

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EVERY PACK,

Plaintiff,

vs.

Case No. 03-CV-73601
HON. GEORGE CARAM STEEH

DAMON CORPORATION,
an Indiana corporation,

Defendants.

_____/

ORDER TAXING \$439.00 IN COSTS AGAINST DEFENDANT
PURSUANT TO RULE 39(E) AND PLAINTIFF'S BILL OF COSTS (#57)
AND OVERRULING DEFENDANT'S OBJECTION (#58)

Plaintiff Avery Pack filed a verified bill of costs pursuant to Federal Rule of Appellate Procedure 39(e) on January 19, 2006 in the amounts of \$255.00, representing the fee for filing a notice of appeal in this action, and \$184.00 for a reporter's transcript needed to determine the appeal. Pack appealed this court's order granting defendant Damon Corporation's motion for summary judgment as to Pack's state and federal claims of breach of express and implied warranties, and violation of Michigan's Consumer Protection Act ("MCPA"), relative to a motor home manufactured by Damon. On January 5, 2006, a panel of the Sixth Circuit reversed in part the dismissal of Damon's state law express warranty claims, reversed the dismissal of Damon's state law implied warranty claim, and reversed the dismissal of Damon's federal warranty and MCPA claims. See Pack v. Damon Corp., --- F.3d --- , 2006 WL 27278 (6th Cir. Jan. 5, 2006). The Sixth Circuit mandate was filed here on February 10, 2006. In the interim, Pack filed his verified bill of costs on January 19, 2006, with Damon filing objections on January 24, 2006.

Federal Rule of Appellate Procedure 39 provides in relevant part:

(a) Against Whom Assessed. The following rules apply unless the law provides or the court orders otherwise:

- (1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;
- (2) if a judgment is affirmed, costs are taxed against the appellant;
- (3) if a judgment is reversed, costs are taxed against the appellee;
- (4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

* * *

(e) Costs on Appeal Taxable in the District Court. The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

- (1) the preparation and transmission of the record;
- (2) the reporter's transcript, if needed to determine the appeal;
- (3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and
- (4) the fee for filing the notice of appeal.

Fed. R. App. P. 39(a), (e). Pack seeks taxable costs under Rule 39(e)(2) and (4).

Damon's sole objection is that, because the Sixth Circuit reversed in part, Rule 39(a)(4) requires that costs may only be taxed as the *Sixth Circuit* court orders, and because the Sixth Circuit did not tax costs, Pack's bill of costs must be stricken. Damon's objection is unsupported by any authority or the plain meaning of Rule 39. Rule 39(a) simply outlines against whom taxable costs are assessed following an appeal. In the case of an affirmance or reversal in part, costs are taxed only as "the court orders" because there is no clear prevailing party, unlike the situation where a judgment is completely affirmed or completely reversed. Compare Rule 39(a)(2-4). Rule 39(e) expressly provides for the taxation of specific appellate costs by this court "for the benefit of the party entitled to costs under [Rule 39]." Clearly, Pack is the party entitled to taxable costs following

appeal notwithstanding that the Sixth Circuit "reversed in part" the dismissal of Pack's state law express warranty claims, while reversing this court's ruling on the remainder of Pack's claims. This court is expressly authorized by Rule 39 (e)(2) and (4) to tax the reporter's transcript costs and notice of appeal filing fee against Damon, costs the court finds both warranted and reasonable. Damon's objection is hereby OVERRULED. Accordingly,

Taxable costs are hereby assessed against defendant Damon Corporation under Federal Rule of Appellate Procedure 39(a) and 39(e)(2) and (4) in the total amount of \$439.00, as requested by plaintiff Pack in his verified bill of taxable costs.

SO ORDERED.

s/George Caram Steeh
GEORGE CARAM STEEH
UNITED STATES DISTRICT JUDGE

Dated: February 23, 2006

CERTIFICATE OF SERVICE

Copies of this Order were served on the attorneys of record on February 23, 2006, by electronic and/or ordinary mail.

s/Josephine Chaffee
Secretary/Deputy Clerk