

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN W. PEROTTI,

Plaintiff,

v.

MS. MARLBERRY, *et al.*,

Defendants.

Case No. 05-60172

Hon. John Corbett O'Meara

**ORDER OVERRULING OBJECTIONS TO
MAGISTRATE JUDGE'S OPINION AND ORDER GRANTING COSTS**

Before the court are the Federal Defendants' objections to Magistrate Judge Whalen's March 29, 2010 order granting costs. Plaintiff filed a civil rights complaint against the Warden of the Federal Correctional Institution at Milan, Michigan, and others. The court dismissed the complaint on June 1, 2006, because Plaintiff failed to exhaust his administrative remedies as to all of his claims, under the "total exhaustion" rule of Jones-Bey v. Johnson, 407 F.3d 801 (6th Cir. 2005). Plaintiff appealed; while the appeal was pending the Supreme Court decided Jones v. Bock, 549 U.S. 199 (2007), which overruled Jones-Bey. Accordingly, the Sixth Circuit vacated this court's order of dismissal and remanded for further proceedings.

Plaintiff filed a motion for costs to recover the filing fee he paid on appeal.¹ Magistrate Judge Whalen granted the motion on March 29, 2010. The Federal Defendants filed objections on April 6, 2010.

Pursuant to 28 U.S.C. § 636(b)(1)(A), this court may modify or set aside any portion of

¹ Plaintiff first filed his motion in the court of appeals; the Sixth Circuit remanded the motion for this court's consideration.

Magistrate Judge Whalen's non-dispositive order that is "clearly erroneous or contrary to law."

See also Fed. R. Civ. P. 72(a). A prevailing party on appeal is generally entitled to costs.

See Fed. R. App. P. 39(a). Although Defendants argue that Plaintiff has not prevailed upon his claims on the merits and that costs are premature, they provide no case law for the proposition that costs (as opposed to attorney fees) should not be awarded under these circumstances.

Plaintiff did prevail on appeal and it is within the court's discretion to award him the \$455 he paid to file his notice of appeal. See Fed. R. App. P. 39(e)(4). The court finds that Magistrate Judge Whalen's order awarding costs is not clearly erroneous or contrary to law.

Accordingly, IT IS HEREBY ORDERED that Defendants' objections to Magistrate Judge Whalen's March 29, 2010 order granting costs are OVERRULED.

s/John Corbett O'Meara
United States District Judge

Date: July 21, 2010

I hereby certify that a copy of the foregoing document was served upon the parties of record on this date, July 21, 2010, using the ECF system and/or ordinary mail.

s/William Barkholz
Case Manager