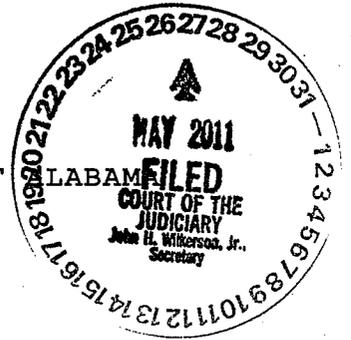


BEFORE THE COURT OF THE JUDICIARY OF THE STATE OF



In the matter of:

M. JOHN STEENSLAND, JR.,	*	Court of the
Retired District Judge	*	Judiciary
Of the Twentieth Judicial	*	Case Number 39
Circuit of Alabama	*	

MEMORANDUM OF LAW IN SUPPORT OF
JUDICIAL INQUIRY COMMISSION'S
MOTION TO TAX COSTS

COMES now the Judicial Inquiry Commission, by and through counsel, and submits this memorandum of law for consideration by the Court, in support of the Commission's Motion to Tax Costs.

Discussion of the Law

In Alabama, the general rule with respect to recovery of costs is that costs are properly taxable to the losing party in civil litigation, unless the trial court decides to allocate them differently. Hanford v. Hanford, 608 So. 2d 1370, 1372 (Ala. Civ. App. 1992). The taxing of costs falls within the discretion of the trial court and will only be overturned on appeal if the trial court clearly abuses that discretion. Vulcan Oil Co. v. Gorman, 434 So. 2d 760, 762 (Ala. 1983).

Because the Rules of Procedure for the Alabama Court of the Judiciary do not address the taxing of costs, appropriate provisions of the Alabama Rules of Civil Procedure will apply to any motion filed in that court. See Alabama Court of the Judiciary Rule 10 ("Except where inappropriate, or otherwise provided for by these rules, the provisions of the Alabama Rules of Civil Procedure and the rules of evidence used in civil cases in Alabama shall govern proceedings before the Court."). The relevant rule that governs taxation of costs states: "Except when express provision therefor is made in a statute, costs shall be allowed as of course to the prevailing party unless the court otherwise directs, and this provision is applicable in all cases in which the state is a party plaintiff in civil actions as in cases of individual suitors." Ala. R. Civ. P. 54(d). The Supreme Court of Alabama has previously upheld the Alabama Court of the Judiciary's decision to tax costs to the defendant under Rule 54(d) in an action brought by the Alabama Judicial Inquiry Commission. See Ex parte Strickland, 401 So. 2d 33 (Ala. 1981).

Alabama's version of Rule 54(d) is modeled on the corresponding federal rule, and, consequently, Alabama courts may look to federal case law to determine whether particular items may properly be taxed as "costs." City of Birmingham v. City of Fairfield, 396 So. 2d 692, 696 (Ala. 1981). Although no Alabama statute or rule lists the specific items that may be covered under a motion to tax costs, Alabama courts have held that the term "costs" includes witness fees and expenses for depositions introduced into evidence. State Dept. of Human Res. v. Estate of Harris, 857 So. 2d 818 (Ala. Civ. App. 2002). Courts may also tax depositions not used at trial, if those depositions are reasonably necessary for use in the case. Strickland, 401 So. 2d at 34-35. Travel expenses and copying costs are also properly taxable costs. Lewis, Wilson, Lewis, & Jones, Ltd. v. First Nat'l Bank of Tuscumbia, 435 So. 2d 20, 23 (Ala. 1983). Similarly, federal courts have found that, under the federal version of Rule 54(d), courts may appropriately tax the costs of "fees of the clerk and marshal, court reporter's fees, printing costs and witness fees, costs for copies of papers, docketing fees, and

compensation of court-appointed experts and interpreters." Ennis v. Kittle, 770 So. 2d 1090, 1092 (Ala. Civ. App. 1999) (citing Parkes v. Hall, 906 F.2d 658, 659 & n.3 (11th Cir. 1990)).

Adopting federal case law to interpret Alabama Rule 54(d), the Alabama Supreme Court has stated: "[T]he language of the rule reasonably bears the intendment that the prevailing party is prima facie entitled to costs and it is incumbent on the losing party to overcome that presumption." City of Birmingham, 396 So. 2d at 696. To deny costs to the prevailing party would be a "severe penalty," and "there must be some apparent reason to penalize the prevailing party if costs are to be denied." Klein v. Grynberg, 44 F.3d 1497, 1507 (10th Cir. 1995).

Application to the Facts of this Case

The Judicial Inquiry Commission's Motion to Tax Costs includes five items, all of which may be properly taxed against Defendant, the losing party in the instant case: transcription fees, court reporter fees, witness travel and related expenses, trial subpoenas, and printing and copying costs. See Motion to Tax Costs at ¶ 2. Each of these items

falls within one of the categories of taxable "costs" recognized by Alabama courts under Rule 54(d). See Lewis, Wilson, Lewis, & Jones, 435 So.2d at 23; Ennis, 770 So. 2d at 1092. All of these expenses are "routinely incidental to litigation" and are not so substantial that they would significantly increase the total expense of the litigation. See Vintero Sales Corp. v. Marsh & McLennan, Inc., 367 So. 2d 461, 462-63 (Ala. 1979) (holding that large insurance premiums for an attached vessel should not be taxed against the losing party).

In Strickland, the Alabama Supreme Court's holding clearly establishes that expenses may still be recovered even if the documents produced are not actually used at trial, provided those documents are "reasonably necessary for use in the case." Strickland, 401 So. 2d at 34-35. Although Strickland dealt specifically with depositions, the Court's reasoning applies equally to transcripts, other documents printed for use in the trial, and expenses for witnesses reasonably necessary for a party's case. Likewise, federal courts have held that expenses for copying may be recovered if those expenses are necessary for trial, even if

the materials are not introduced at trial. E.E.O.C. v. Sears Roebuck & Co., 138 F.R.D. 523, 528 (N.D. Ill. 1991). All litigation expenses that the Judicial Inquiry Commission seeks to recover were incurred specifically for the proceedings of this case, were necessary for the presentation of the Commission's case, and were entirely reasonable. See Harrison Aff., ¶ 3-9.

Each category of expenses listed in the Judicial Inquiry Commission's Motion to Tax Costs also specifically falls within the parameters of case law interpreting the federal version of Rule 54(d), which Alabama courts have treated as relevant to the application of Alabama Rule of Civil Procedure 54(d). See City of Birmingham, 396 So. 2d at 696. First, transcription costs are typically taxable so long as they are "necessarily obtained for use in a case," rather than "purely investigative." Marmo v. Tyson Fresh Meats, Inc., 457 F.3d 748 (8th Cir. 2006) (quoting Smith v. Tenet Healthsystem SL, Inc., 436 F.3d 879, 889 (8th Cir. 2006)); see also In re Williams Securities Litigation-WCG Subclass, 558 F.3d 1144, 1147 (10th Cir. 2009) (affirming the district court's decision to tax or exclude

transcription costs based on whether the particular deposition was "'necessarily obtained' for use in the case"). In the instant case, the transcription costs were associated with witness interviews that were necessary to the Judicial Inquiry Commission's preparation of its case. Moreover, transcription of those interviews by Net Transcripts, Inc. was necessary, both for the Commission's trial preparation and also to fulfill Defendant's discovery request and the discovery requirements of the Rules of Procedure of the Judicial Inquiry Commission. See Harrison Aff., ¶ 5. Expenses that a party incurs in responding to discovery requests are also recoverable, subject to the standard "necessary for use in the case" test. Rundus v. City of Dallas, 634 F.3d 309, 315-16 (5th Cir. 2011); SCA Services, Inc. v. Lucky Stores, 599 F.2d 178, 180 (7th Cir. 1979).

Second, fees for court reporters are usually taxed under Rule 54(d) if those transcripts are necessarily obtained for use in the case. See Extra Equipamentos E Exportacao Ltda. v. Case Corp., 541 F.3d 719, 727 (7th Cir. 2008); see, e.g., Ortho-McNeil Pharmaceutical, Inc. v. Mylan

Laboratories Inc., 569 F.3d 1355, 1358 (Fed. Cir. 2009) (affirming district court's award of court reporter fees for all depositions except those that overlapped with other cases). Here, the Judicial Inquiry Commission's court reporter fees were necessary so that both parties could have transcripts of the Judicial Inquiry Commission's witness hearings and the Court's hearing on March 3, 2011. See Harrison Aff., ¶ 6. None of the transcripts overlapped or was used by the Commission in other cases. Id. at ¶ 3.

Third, the travel expenses of witnesses are available to be taxed as costs under Rule 54(d) and are usually not limited to the area of subpoena power. Moylan v. AMF Overseas Corp., S.A., 354 F.2d 825, 829-30 (9th Cir. 1965). In the present case, the travel expenses include two round trips made by many of the witnesses, including Mr. and Mrs. Rae who flew round trip twice from their residence in Spanaway, Washington, to be present to testify at the trial: first, when the trial was scheduled to begin on March 2, 2011, but the Court granted Defendant's motion for a continuance made in open court that date on the allegation that Defendant's counsel was ill, and second, on April 20

and 21, 2011, when the trial was finally held. The duplicative, but unavoidable witness expenses should be charged to Defendant; the Commission was ready for trial, with its witnesses present, on March 2, 2011. Although some of those witnesses ultimately did not testify, they were necessary witnesses whose testimonies materially contributed to the Judicial Inquiry Commission's case. See Harrison Aff., ¶ 7. The Commission intended to have these witnesses testify, but their testimonies became unnecessary as the trial progressed. Id. When counsel made a good faith and reasonable judgment about the need for a witness to be available at trial to testify, but during trial, made a good faith determination to minimize delay, inconvenience to the Court and parties, and unnecessary trial expenses because that witness's testimony would only have been repetitious and cumulative of a case already sufficiently proven, counsel's failure to call that witness does not defeat a claim for costs for that attending witness. Quy v. Air America, Inc., 667 F.2d 1059, 1064-65 (D.C. Cir. 1981) (relying on United States v. Lynd, 334 F.2d 13 (5th Cir. 1964)). In addition to allowing counsel the discretion

to avoid unnecessary delay, inconvenience, and trial expenses, such policy grants counsel, as an officer of the Court, a desirable degree of latitude and discretion in deciding which and how many witnesses must necessarily be subpoenaed in the event they are needed to prove the essential facts in the case. Id.

Fourth, the expenses related to the subpoenas include the witness fees required by Rule 45(b)(1), Ala. R. Civ. P. (if the person is commanded to appear at a place more than 100 miles from his or her residence, the server of the subpoena must tender to the summoned person the fees for one day's attendance and an amount to reimburse the mileage allowed by law, i.e., \$1.50 per day and \$0.05 per mile to and from his or her residence, § 12-19-131, Code of Alabama (1975)). In addition, the expenses of Mr. Dale Leddick, authorized by the Court to serve subpoenas for trial, are included. Independent process servers who deliver a subpoena or summons are properly taxable. Alflex Corp. v. Underwriters Laboratories, Inc., 914 F.2d 175, 178 (9th Cir. 1990). Again, the subpoenas were absolutely necessary to the

Commission's case and the presentation of that case to the Court of the Judiciary. See Harrison Aff., ¶ 8.

Fifth, copying expenses are generally allowable; a prevailing party seeking to recover expenses for copies need not "justify each copy," but rather must show only that the copies were "reasonably necessary for use in the case." In re Williams Securities Litigation, 558 F.3d at 1149. In this particular case, the copying expenses covered in the fifth item in the Motion to Tax Costs are limited to production of trial notebooks and discovery. See Harrison Aff., ¶ 9. The notebooks were presented to each judge on the Court of the Judiciary, to the court reporter, and to Defendant. Id. The notebooks were actually used during the trial to follow the transcripts and other evidence and were not created merely for the convenience of the Commission; thus, they were necessary for use in the case, as required by the cases cited above. As noted supra, expenses that a party incurs in responding to discovery requests are also recoverable, subject to the standard "necessary for use in the case" test. Rundus, 634 F.3d at 315-16; SCA Services, Inc., 599

F.2d at 180. The discovery produced for Defendant meets that standard. See Harrison Aff., ¶ 9.

Ultimately, the decisions regarding particular costs that may be taxed against Defendant will fall under the discretionary power of this Court. For the reasons stated in this memorandum, supported by Mr. Harrison's affidavit, all costs listed in the Judicial Inquiry Commission's Motion to Tax Costs are properly taxable, and the Commission requests that the Court permit its recovery of these costs from Defendant.

Finally, the Commission requests that the Court seek and tax costs for its recovery of the expense of a verbatim transcript of all proceedings before the Court. Alabama Court of the Judiciary Rule 21 states, in part, "A verbatim transcript of the proceedings before the Court shall be kept, and the original thereof transcribed and filed in the Office of the Secretary in Montgomery as a part of the record of the proceedings." The Commission further requests that the Court seek and tax costs for its recovery of the expense of the publication of the Court's Final Judgment and Censure (May 2, 2011). That Final Judgment orders, in

pertinent part, "[t]hat Judge Steensland be publicly censured by the publication of this order of final judgment and public censure in a newspaper of general circulation in Houston County."

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. E. Harrison', with a long horizontal flourish extending to the right.

THOMAS E. HARRISON
Attorney, Judicial Inquiry Commission
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251-433-1819

CERTIFICATE OF SERVICE

I hereby certify that on this the 27th day of May, 2011, I electronically filed a copy of the foregoing motion and attachments with the Clerk of the Court of the Judiciary and I served a copy of the same through the United States mail, first class postage prepaid, on:

Hon. William J. Baxley
Baxley, Dillard, Dauphin, McKnight & James
Attorneys at Law
2008 Third Avenue South
Birmingham, AL 35233-2102

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. E. Harrison', written in a cursive style.

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