



IN THE ALABAMA COURT OF THE JUDICIARY

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|-----------------------|---|--------------|
| IN THE MATTER OF: |) | |
| ANITA KELLY, |) | Court of the |
| Circuit Judge, |) | Judiciary |
| 15th Judicial Circuit |) | Case No. 50 |
| |) | |

**MEMORANDUM OF LAW IN SUPPORT OF
THE JUDICIAL INQUIRY COMMISSION'S
MOTION TO ALTER FINAL JUDGMENT AS TO COSTS**

Comes now the Judicial Inquiry Commission ("Commission") and submits this memorandum of law for consideration by the Court in support of the Commission's Motion to Alter the Final Judgment as to 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. Hanford v. Hanford, 608 So.2d 1370, 1372 (Ala. Civ. App. 1992). The Commission recognizes that the taxing of costs falls within the discretion of the trial court. 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 governing 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 award costs to the Commission 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 court reporter's fees and expenses for depositions introduced into evidence. State Dept. of Human Resources 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, copying costs, and filing fees 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)). The Supreme Court of

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 since denial of costs is in the nature of a penalty for some defection on his part in the course of the litigation.” City of Birmingham, 396 So.2d at 696. In the absence of a specific objection to a specific item of cost, “the court ordinarily should approve the item.” Lewis, Wilson, Lewis, & Jones, 435 So.2d at 23. 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). Unless the trial court’s rationale for awarding costs other than to the prevailing party is otherwise manifest, it should be expressed in the order. City of Birmingham, 396 So.2d at 696.

Application to the Facts of this Case

The Judicial Inquiry Commission's Motion to Alter the Final Judgment as to Costs includes four items, all of which may be properly taxed against Defendant, the losing party in the instant case: transcription fees, court reporter fees, process server fees, and printing costs. See Motion to Alter at ¶ 10. Each of these items falls within one of the categories of "costs" recognized by Alabama courts as taxable 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 losing party).

In Strickland, the 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 and other documents printed for use in the trial. 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 Commission seeks to recover were incidental specifically for the proceedings of this case, were necessary for the presentation of the Commission's case, and were entirely reasonable.

Each category of expenses listed in the Judicial Inquiry Commission's Motion to Alter also specifically falls within the parameters of case law interpreting the federal version of Rule 54(d), which courts have treated as relevant to a court's application of Alabama Rule of Civil Procedure 54(d). 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 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 depositions that were necessary to the Commission's preparation of its case. Moreover, transcription of those appearances before the Commission by various witnesses as shown in Attachment A were 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. 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 costs are necessarily obtained for use in the case. 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 Commission's court reporter fees were
necessary so that both parties could have written
transcripts of the Commission's witness hearings and the
Court's hearings on March 13, 2018 and May 1, 2018. The
Commission also requested and received rough drafts of
trial testimony while the trial was in progress to aid in
its presentation. None of the transcripts overlapped or
were used by the Commission in other cases.

Third, the expenses of Mr. Mike James, the process
server for many of the Commission's trial subpoenas, 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.

Fourth, copying expenses are generally allowable; a prevailing party seeking to recover expenses for copies need not "justify each copy," but rather must only show 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 were related to all discovery materials served on the Defendant pursuant to Rule 6, to trial preparation, and to the necessity of providing the Court with hard copies of exhibits the Commission intended to introduce at trial.

Ultimately, the decisions regarding particular costs that may be taxed against Defendant will fall under the discretionary power of the Court. However, both Alabama and federal cases suggest that the prevailing party typically may recover its costs, unless the losing party disputes those costs specifically, rather than generally. For the reasons stated in this memorandum, supported by Rosa Davis' affidavit, all costs listed in the Commission's Motion to Alter are properly taxable, and the Commission requests that the Court alter its judgment to order the recovery of these costs from the 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."

Respectfully submitted, this 6th day of June, 2018.

/s/ William A Gunter V
William A. Gunter V
Attorney for the Commission

CERTIFICATE OF SERVICE

I certify that, on this 6th day of June, 2018, a copy of the foregoing has been filed electronically with the Court of the Judiciary and a copy of the same has been served on attorneys for Respondent, through electronic mail:

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 /s/ William A Gunter V
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Attorney for the Commission

COJ 50 Judge Anita Kelly Taxed Costs

**Court Reporter Costs includes: Appearance Fee, exhibits (if applicable), deposition disc & transcription costs*

| <u>NAME</u> | <u>JOB DATE</u> | <u>Amount</u> |
|---|---------------------|--------------------|
| COJ Deposition/Transcript Costs | | |
| Marilyn Floyd | 10/23/2017 | \$ 917.40 |
| Tara Seay Hunter | 10/20/2017 | \$ 756.03 |
| Tiffany McCord | 10/25/2017 | \$ 732.17 |
| Bruce Howell | 11/8/2017 | \$ 549.70 |
| Beverly Wise | 9/15/2017 | \$ 361.20 |
| Charles Price | 11/13/2017 | \$ 394.65 |
| Sharon Ficquette | 12/12/2017 | \$ 280.90 |
| Sharon Ficquette | 2/28/2017 | \$ 370.20 |
| David Smith | 2/28/2018 | \$ 241.25 |
| Eugene Reese | 2/22/2018 | \$ 460.05 |
| Beverly Wise | 3/7/2018 | \$ 320.65 |
| Anita Kelly (Pre-Trial conference) | 3/13/2018 | \$ 562.95 |
| Pre-Trial Conference Hearing and rough draft transcripts of Burl A. Edwards, Sean Michael Cox, Judge Eugene Reese & Calvin Williams | 5/1/2018 & 5/7-9/18 | \$ 851.85 |
| | | \$ 6,799.00 |
| JIC Transcript Costs | | |
| Sharon Ficquette (fee) | 12/8/2016 | \$ 150.00 |
| Sharon Ficquette | 12/8/2016 | \$ 241.50 |
| Anita Kelly, Beverly Wise, and Angela Staar | 5/18/2017 | \$ 1,379.85 |
| Bruce Howell | 5/18/2017 | \$ 173.35 |
| | | \$ 1,944.70 |
| Copy Costs | | |
| 9,065 pages/\$.15 per page | | \$1,359.75 |
| Process Server | | |
| Service of COJ subpoenas | 3/14/2018 | \$ 90.00 |
| | 5/2/2018 | \$ 120.00 |
| | | \$ 210.00 |

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| COJ Deposition Costs | \$ | 6,799.00 |
| JIC Transcript Costs | \$ | 1,944.70 |
| Copy Costs | \$ | 1,359.75 |
| Process Server costs | \$ | 210.00 |

Total \$ 10,313.45

STATE OF ALABAMA
COUNTY OF MONTGOMERY

A F F I D A V I T

Comes now Rosa Hamlett Davis who being personally known to me hereby deposes and says as follows:

I served as co-counsel in the Matter of Anita Kelly, COJ No. 50. I have reviewed the itemized costs list attached as Exhibit "A" to the Commission's Motion filed herewith and know it to be an accurate statement of costs incurred by the Judicial Inquiry Commission in this matter, including:

1. Court Reporter Costs: \$6,799.00
2. JIC Investigation Court Reporter Costs: \$1,944.70
3. Copy Costs: \$1,359.75
4. Process Server Fees: \$210

If the Commission does not recoup the \$10,313.45 expended in this matter, it will be less able to effectively and efficiently pursue time-consuming and costly matters which may now exist or which may arise in the future and to conduct other business of the Commission.

All costs listed, including pre-Complaint court reporter costs, were incurred in the reasonable anticipation that they would garner evidence that could be used at trial in this matter.


ROSA HAMLETT DAVIS

Subscribed and Sworn to or affirmed before me

this 30th day of May, 2018.



Notary Public

My Commission expires: 2/8/2020

