

**ENTERED**

May 12, 2016

David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

MARIE A. HICKS-FIELD, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	CIVIL ACTION NO. H-12-3650
	§	
HARRIS COUNTY, TEXAS,	§	
	§	
Defendant.	§	

**ORDER ON COSTS**

Pending before the court are Defendant’s Bill of Costs (Doc. 179), Plaintiffs’ Objections to Defendant’s Bill of Costs (Doc. 182), Defendant’s Supplemental Bill of Costs (Doc. 192), Defendant’s Motion for Leave to File Consolidated Reply (Doc. 194), and Plaintiffs’ Objections to Defendant’s Supplemental Bill of Costs (Doc. 195). Defendant’s Bill of Costs and Supplemental Bill of Costs are **AWARDED WITH MODIFICATIONS**; Plaintiffs’ objections to the Bill of Costs and the Supplemental Bill of Costs are **OVERRULED**; and Defendant’s motion for leave is **GRANTED**.

**A. Procedural Background**

On December 30, 2015, the court entered judgment in favor of Defendant and awarded Defendant its taxable costs.<sup>1</sup> On January 13, 2016, Defendant timely filed its Bill of Costs, seeking reimbursement of \$23,940.39.<sup>2</sup> The Bill of Costs was supported by

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<sup>1</sup> See Doc. 176, Final J.

<sup>2</sup> See Doc. 179, Bill of Costs.

the affidavit of Defendant's counsel and accompanying invoices.<sup>3</sup> Defendant contemporaneously filed a motion for extension of time to file a motion for attorneys' fees and nontaxable expenses and to supplement its request for taxable costs.<sup>4</sup> The court granted the motion with regard only to the request to supplement Defendant's Bill of Costs with additional taxable expenses.<sup>5</sup> On March 10, 2016, Defendant filed its Supplemental Bill of Costs, seeking an additional \$5,584.55.<sup>6</sup> Plaintiffs filed objections to the Bill of Costs and the Supplemental Bill of Costs.<sup>7</sup>

**B. Applicable Law**

Federal Rule of Civil Procedure ("Rule") 54(d)(1), which governs the award of costs, contains a strong presumption that a prevailing party will be awarded its costs. See Marx v. Gen. Revenue Corp., \_\_\_ U.S. \_\_\_, 133 S. Ct. 1166, 1172 (2013); Pacheco v. Mineta, 448 F.3d 783, 793 (5<sup>th</sup> Cir. 2006). Rule 54(d)(1) provides that "[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party."

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<sup>3</sup> See id.

<sup>4</sup> See Doc. 180, Def.'s Mot. for an Extension of Time Within Which to File its Mot. for Attys.' Fees & Related Nontaxable Expenses & to Supplement its Req. for Taxable Costs.

<sup>5</sup> See Doc. 185, Order Dated Feb. 9, 2016.

<sup>6</sup> See Doc. 192, Supplemental Bill of Costs.

<sup>7</sup> See Doc. 190, Objs. to Def.'s Bill of Costs; Doc. 195, Objs. to Supplemental Bill of Costs.

Costs that may be taxed are:

- (1) Fees of the clerk and marshal;
- (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
- (5) Docket fees under section 1923 of this title;
- (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

28 U.S.C. § 1920. The court may only tax costs that fit within 28 U.S.C. § 1920 ("Section 1920"). See Coats v. Penrod Drilling Corp., 5 F.3d 877, 891 (5<sup>th</sup> Cir. 1993)(citing Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 442 (1987)).

When objections are raised, "the party seeking costs bears the burden of verifying that the costs were necessarily incurred in the case rather than just spent in preparation and litigation of the case." Baisden v. I'm Ready Prods., 793 F. Supp.2d 970, 973 (S.D. Tex. 2011)(citing Fogleman v. ARAMCO (Arabian Am. Oil Co.), 920 F.2d 278, 286 (5<sup>th</sup> Cir. 1991)). Costs that are merely for the convenience of the parties are not taxable. See Studiengesellschaft Kohle mbH v. Eastman Kodak Co., 713 F.2d 128, 133 (5<sup>th</sup> Cir. 1983). The court has discretion to determine the appropriateness of awarding costs to the prevailing party. Marx, 133 S. Ct. at 1172-73.

### **C. Discussion**

In the objections to the Bill of Costs, Plaintiffs argued

three grounds: (1) that the court should decline to award costs to avoid "the potential 'chilling effect' on future civil rights litigants;"<sup>8</sup> (2) that Defendant failed to satisfy its "burden to prove the necessity of the exorbitant costs,"<sup>9</sup> including numerous costs that are not allowed by statute; and (3) that the award would impose a substantial hardship on Plaintiffs. In addition to those same three grounds, Plaintiffs objected to the Supplemental Bill of Costs on the grounds that the supplemental reproduction costs did not fall within the statutory list of taxable costs. The court addresses each of Plaintiffs' objections in turn.

#### **1. Chilling Effect**

Plaintiffs argue that awarding fees against them would "discourage prospective civil rights litigants, and their counsel, from bringing these important cases."<sup>10</sup> The court agrees with Plaintiffs on the importance of civil-rights litigation; however, to deny costs on that basis takes a rather large bite out of the strong presumption favoring the award of costs to the prevailing party. The court finds that the public-policy considerations are insufficient to deny Defendant its costs.

Plaintiffs also ask the court to defer assessment of costs pending the appeal of the case. The court denies that request.

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<sup>8</sup> Doc. 190, Pls.' Objs. to Def.'s Bill of Costs p. 4.

<sup>9</sup> Id. p. 1.

<sup>10</sup> Id. p. 4.

## 2. Necessity

Plaintiffs object to the following categories of costs as nontaxable: (1) delivery and postage; (2) certain costs associated with the depositions on written questions; (3) cost of a Civil Service Commissioner's hearing transcript; (4) non-itemized costs associated with the depositions of Roy T. (Tim) Gravette and John Douglas Hicks; (5) costs for both transcripts and videos of depositions; (6) costs of videotaping interviews with Marcellus Hicks and Tawny Hicks; and (7) overnight rush fees for deposition transcripts. In its reply, Defendant withdrew its request for costs associated with delivery and postage fees, e-cds, e-transcripts, ASCII disks, administrative fees, and expedited transcripts and its request for reimbursement of a duplicative invoice.<sup>11</sup>

Plaintiffs do not assert that the costs of the depositions on written questions are not taxable under Section 1920; nor do they challenge, in their brief, the necessity of the ones propounded by Defendant. Rather, Plaintiffs complain that Defendant seeks reimbursement for expenses associated with the depositions on written questions that, they contend, are solely for the convenience of the attorneys. Plaintiffs target a few categories of costs, most of which Defendant concedes are not taxable.

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<sup>11</sup> See Doc. 196, Def.'s Consolidated Reply to Pls.' Objs. to Def.'s Bill of Costs & Supplemental Bill of Costs ("Def.'s Reply") pp. 1, 20.

The only category that remains in contention is the cost of sealed court copies. Defendant is entitled to the reimbursement of fees for the original plus one copy. See Favata v. Nat'l Oilwell Varco, LP, Civ. Action No. 2:12-cv-82, 2014 WL 5822781, at \*3 (S.D. Tex. Nov. 10, 2014)(slip copy)("It is generally recognized that the basic costs of an original deposition transcript and one copy are taxable against the non-prevailing party."). Therefore, the court allows the cost of sealed court copies.

Although Plaintiffs provide no legal basis, they deduct the entire invoice amount for eight of the depositions on written questions. Defendant's counsel affirmed the necessity of obtaining the negative depositions on written questions.<sup>12</sup> The court finds that these costs should be reimbursed to the extent they are taxable. Additionally, the full amount of one invoice should be deducted from the award because it is duplicative.

The total amount of taxable costs associated with the depositions on written questions is \$2899.85.

In addition to the depositions on written questions, Defendant withdrew its requests for reimbursement of nontaxable costs incurred for depositions. The total amount of taxable costs associated with depositions is \$9829.69.<sup>13</sup>

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<sup>12</sup> See Doc. 196, Def.'s Reply pp. 15-17; Doc. 196-3, Ex. 3 to Def.'s Reply, Lisa Hulsey's Aff. p. 2.

<sup>13</sup> This total does not match Defendant's calculation due to several errors on Defendant's part. Defendant included the cost of e-transcripts for four depositions despite having withdrawn the request for reimbursement of e-

Transcripts of the court hearings may be taxable if they were necessary to the case as opposed to for the convenience of the party acquiring them. See Studiengesellschaft Kohle mbH, 713 F.2d at 133. In this case, Defendant seeks reimbursement for the cost of the Civil Service Commissioner's hearing transcript. The hearing addressed the acts of a Harris County Deputy Sheriff who admitted to disseminating confidential information about the Hicks' incident to an unauthorized person outside of the department.

Plaintiffs object to the assessment of this cost for failure to establish necessity in light of their claim that at least two of Defendant's attorneys were present at this hearing. Defendant responds that Defendant's counsel was neither involved in nor present during the hearing and that the deputy's statement and other information relating to the investigation were included in the Hicks-related Internal Affairs Division file produced to Plaintiffs.<sup>14</sup> Defendant represents that it obtained the transcript in anticipation of using it in trial and disclosed the deputy as a person with knowledge of the facts of the case in their initial disclosures.

The court finds that the hearing testimony is relevant to this

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transcripts. Defendant excluded taxable costs for exhibits in connection with three depositions. Defendant improperly included a charge for video pages copy as taxable (labeled as a copy of the transcript) for one deposition. Defendant listed one charge as \$0.35 less than the invoiced amount.

<sup>14</sup> See Doc. 196, Def.'s Reply pp. 18-19; Doc. 196-3, Ex. 3 to Def.'s Reply, Lisa Hulsey's Aff. p. 2.

case and may have been utilized at trial and/or in trial preparation. Therefore, Defendant met its burden of establishing that the transcript was necessarily obtained for use in the case. The total charged amount of \$384.00 is taxable.

Plaintiffs objected to the non-itemized invoices for the depositions of Plaintiffs' expert Roy T. (Tim) Gravette ("Gravette") and the deceased's brother John Douglas Hicks ("John Hicks"). Defendant responded by submitting an itemized invoice for Gravette's deposition and the sworn itemization for John Hicks' deposition.<sup>15</sup> Of the charges on the itemized invoice for Gravette's deposition, Defendant concedes that the amount of \$115.00 is not taxable as costs. Defendant also concedes that the amount of \$126.87 of the charges for John Hicks' deposition is not taxable as costs.

The court finds that the remaining total amount for the two depositions, \$2250.46, should be taxed.

Plaintiffs challenge the taxing of both typed and video transcripts of depositions, arguing that Section 1920(2) allows *either* a printed or an electronically recorded transcript to be taxed. Defendant counters with legal authority indicating that both may be taxed if both meet Section 1920(2)'s requirement that they be "necessarily obtained for use in the case."<sup>16</sup> Defendant

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<sup>15</sup> See Doc. 196-5, Ex. 5 to Def.'s Reply, Malissa Phillips' Aff. p. 2; Doc. 196-6, Ex. 6 to Def.'s Reply, Itemized Invoice.

<sup>16</sup> See Doc. 196, Def.'s Reply p. 7 & n.29, p. 9 n.34 (citing cases).

argues that the typed and video transcripts for the depositions of the four named plaintiffs and the two experts designated by Plaintiffs were necessarily obtained because "the credibility of each of these individuals was at issue" and Defendant's counsel "anticipated the need at trial to impeach each of these witnesses using both the transcripts and videotapes of these witnesses' depositions to show the witnesses' verbal and non-verbal communication when answering pertinent questions."<sup>17</sup> Defendant also contends that, as to three of the six deponents, both versions were necessarily obtained because the witnesses' availability for trial was in question. One plaintiff was in jail at the time of the deposition, and one was undergoing cancer treatment. Also, one of the experts lived in Louisiana at the time of his deposition.

This court is in agreement with other district courts sitting in the Fifth Circuit that tax the costs of both versions of any deposition shown to be necessary for trial preparation. See Favata, 2014 WL 5822781, at \*2 (collecting cases). The appropriate point in time to make the determination whether both were necessarily obtained is at the time of the deposition. Cf. Cypress-Fairbanks Indep. Sch. Dist. v. Michael F. by Barry F., 118 F.3d 245, 257 n.37 (5<sup>th</sup> Cir. 1997)(citing Copper Liquor, Inc. v. Adolph Coors Co., 684 F.2d 1087, 1099 (5<sup>th</sup> Cir. 1982), overruled on other grounds, as stating that a deposition is taxable as a cost

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<sup>17</sup> Id. pp. 9-10.

when "the taking of the deposition is shown to have been reasonably necessary in light of the facts known to counsel at the time it was taken." ).

In this case, Defendant reasonably anticipated the need for both typed and video transcripts of these six depositions for trial preparation. See Baisden, 793 F. Supp.2d at 977-78 (finding that disputed credibility and uncertain attendance at trial to justify taxing both versions). Thus, the court finds that \$3980.00 should be taxed for the video transcripts of Evangeline Campbell, Marie Hicks-Fields, Norman F. Hicks, Jr., Arthur Copeland, and Jason Hicks, in addition to the costs of the typed deposition transcripts.

Plaintiffs further object to the cost of videotaping the interviews of Marcellus Hicks and Tawny Hicks, contending that "[t]here was no reason that these interviews needed to be videotaped."<sup>18</sup> To the contrary, argues Defendant, these interviews were necessary to counter Plaintiffs' sworn testimony that they were the deceased's only children. Defendant contends that capacity was a major point of disagreement, and the interviews of Marcellus Hicks and Tawny Hicks, which contradicted Plaintiffs' asseverations, forced Plaintiffs to admit that Marcellus Hicks and Tawny Hicks were also the deceased's children. Defendant videotaped the interviews to preserve that testimony.

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<sup>18</sup> Doc. 190, Pls.' Objs. to Def.'s Bill of Costs p. 12.

Although the Marcellus Hicks and Tawny Hicks' testimony possibly could have been preserved by a less expensive method, the video transcript falls within Section 1920(2) because the testimony was necessarily obtained and is therefore taxable. The court finds that the total sum of \$825.00 for the videotaping of the interviews of Marcellus Hicks and Tawny Hicks is taxable.

### **3. Substantial Hardship**

Plaintiffs represent that the imposition of costs requested by Defendant would "work an enormous hardship on Plaintiffs."<sup>19</sup> The court is sympathetic but finds no reason that Defendant should be denied its awarded costs based solely on Plaintiffs' inability to pay. The court has reduced the total bill of costs as explained above but will not deviate from its regular practice of awarding costs to the prevailing party based on Plaintiffs' financial status.

### **4. Reproduction Costs**

Plaintiffs pose challenges to the taxing of Defendant's in-house reproduction costs. Plaintiffs object to the recovery of these costs because, Plaintiffs argue, the copies were not "necessarily obtained for use in the case" as required by Section 1920(4) but were produced to Plaintiffs in response to discovery requests. Plaintiffs also object to Defendant's method of calculation and failure to provide itemization of the costs.

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<sup>19</sup> Id. p. 5.

Defendant argues that the reproduction costs associated with the 40,177 pages and 63 audiotapes for production in discovery are recoverable under Section 1920(4). Defendant applied a rate that is standardized for local governments reproducing documents and audiotapes in response to requests pursuant to the Public Information Act: \$15.00 per hour plus \$0.10 per page for standard size copies and \$1.00 per diskette or audio cassette. Defendant provided an itemized account of the material produced.<sup>20</sup>

If necessary to the litigation of the case, reproduction costs associated with production in discovery are covered by Section 1920(4). See Wal-Mart Stores, Inc. v. OORE, Inc., Civ. Action No. 1:06CV326-MPM, 2010 WL 2757369, at \*3 (N.D. Miss. July 9, 2010)(finding document reproductions produced in discovery were necessary to the litigation of the case and taxable). The Fifth Circuit has acknowledged that costs incurred during discovery may be taxed when reasonable and necessary. Rundus v. City of Dallas, 634 F.3d 309, 316 (5<sup>th</sup> Cir. 2011)(quoting Harrington v. Texaco, Inc., 339 F.2d 814, 822 (5<sup>th</sup> Cir. 1964)). “[D]ocument scanning is essentially copying paper documents to electronic form” and falls within Section 1920(4). Structural Metals, Inc. v. S&C Elec. Co., Civ. Action No. SA-09-CV-984-XR, 2013 WL 3790450, at \*8 (W.D. Tex. July 19, 2013)(quoting Eolas Techs. Inc. v. Adobe Sys., Inc., 891 F. Supp.2d 803, 806 (E.D. Tex. 2012)); see also Kellogg Brown &

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<sup>20</sup> See Doc. 192, Supplemental Bill of Costs pp. 8-9.

Root Int'l, Inc. v. Altanmia Commercial & Mktg. Co. W.L.L., Civ. Action No. H-07-2684, 2009 WL 1457632, at \*6 (S.D. Tex. May 26, 2009)(stating that scanning documents for use in electronic format is not recoverable if solely for the convenience of counsel).

The court finds the reproduction of documents and audiotapes in this case was necessary to litigation and that the costs for that reproduction are taxable at the rate employed by Defendant. The court finds that \$5,584.55 is taxable for reproduction costs.

The court **OVERRULES** Plaintiffs' objections and taxes Defendant's costs in the total amount of \$25,753.55. Post-judgment interest will attach to the awarded costs and will run from the date of this order at a rate of .52 percent.

**SIGNED** in Houston, Texas, this 12<sup>th</sup> day of May, 2016.



U.S. MAGISTRATE JUDGE