United States District Court
Northern District of Mississippi
Office of the Clerk

BILLS OF COST REFERENCE NOTES

(FEBRUARY 2003)

These notes are offered by the Clerk of Court merely as an aid in preparing bills of costs in civil actions in this court. These notes are not an authoritative statement of the law or practice in the United States District Court for the Northern District of Mississippi. This compilation has not been reviewed or approved by any judge of this court. It does not necessarily represent the views of any judge of this court. It is not legal authority and should not be cited in motions or other papers supporting or opposing costs-related issues. It is neither legal advice nor an explanation of the law governing bills of costs.

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Prevailing Party. Generally, the prevailing party in a civil action is entitled to recover its costs for a limited range of expenses *allowed by statute*. The decision whether to award costs is vested in the trial judge. *See Card v. State Farm Fire & Cas. Co.*, 126 F.R.D. 658, 660 (N.D. Miss. 1989) ("The trial court has discretion to award costs to a prevailing party."), *citing Nissho-Iwai Co., Ltd. v. Occidental Crude Sales*, 729 F.2d 1530, 1551 (5th Cir. 1984).

Standards of Review. The district court's standard of review of the clerk's taxation of costs is *de novo*. *See American Steel Works v. Hurley Const. Co.*, 46 F.R.D. 465 (D. Minn. 1969).

The appellate standard of review of a district court's costs determination is "abuse of discretion." *Pierce v. Underwood*, 487 U.S. 552, 557 (1988); *see also Stearns Airport Equipment Co. v. FMC Corp.*, 170 F.3d 518, 536 (5th Cir. 1999), *and Fogelman v. ARAMCO*, 920 F.2d 278, 285 (5th Cir. 1991).

Generally, —

The plaintiff is the prevailing party when it recovers on the entire complaint.

The defendant is the prevailing party when the case is terminated by judgment in favor of the defendant or on court-ordered dismissal.

The court may determine the prevailing party when the case is voluntarily dismissed or when there is a partial recovery or recovery by more than one party.

But note—

"[W]here the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum of $75,000, computed without regard to any setoff or counterclaim to which the defendant may be . . . entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff." 28 U.S.C. § 1332(b).

What to file. A party claiming costs must file a *verified* bill of costs containing an affidavit attesting that each claimed item is correct, that each claimed item was *necessarily incurred* in the case, and that the services for which fees were charged were actually and necessarily performed. 28 U.S.C. § 1924.

The standard federal form for the bill of costs is *Bill of Costs Form AO 133* and is available at the clerk's offices in Oxford, Aberdeen, and Greenville and on the Northern District's website:

www.msnd.uscourts.gov Go to the **Forms** option

The court's form contains a listing of items recoverable as costs, a worksheet for capturing expenses and fees for witnesses, and the necessary affidavit. If costs are presented on a properly completed AO 133 or the form available at the court's website, a separate affidavit or verification is not necessary.

Although the conclusory statement in application to tax costs that "each item of cost or disbursement claimed is correct and has been necessarily incurred in the above action" may be sufficient in support of an *unopposed* motion to tax costs, such evidence clearly falls short of meeting prevailing party's burden of proof after necessity and reasonableness of costs have been challenged by opposing party. *See Copper Liquor, Inc. v. Adolph Coors Co.*, 684 F.2d 1087, 1098-99 ("Courts are not accountants and defendants should not be tagged with either cost or expense bills that are horseback estimates. Those who are entitled to recover costs and expenses bear the burden of furnishing a reasonable accounting.").

When to File. A prevailing party "shall serve the bill of costs **not later than thirty days after entry of judgment**. . . . [A]n appeal . . . shall not affect the taxation of costs." (Emphasis added). Rule 54.2(A), UNIFORM LOCAL RULES OF THE UNITED STATES DISTRICT COURTS FOR THE NORTHERN DISTRICT AND THE SOUTHERN DISTRICT OF MISSISSIPPI (Dec. 1, 2000, ed.) [hereinafter LOCAL RULES].

LOCAL RULE 54.2(A) notwithstanding, the time for filing a bill of costs or objections thereto is not jurisdictional; accordingly, an untimely bill or objections to a bill *may* be considered even if tardy. *See United States v. Kolesar*, 313 F.2d 835, 837 n.1 (5th Cir. 1963). The period for serving the bill may be enlarged under FED. R. CIV. P. 6(b). *Id.*

A judgment is "entered" on the date it is recorded in the court's docket. *See* FED. R. CIV. P. 58 (a judgment is effective only when entered as provided in Rule 79(a)). A copy of this entry is served contemporaneously on all parties. Entry of a judgment may be further verified by examining the public copy of the court's docket through the PACER electronic process or by calling the Clerk's Office.

Neither a bill of costs nor an objection to a bill of costs involves reconsideration of the decision on the merits of a civil action. Consequently, such a motion or application is not one to alter or amend the judgment under FED. R. CIV. P. 60(b) and it does not render ineffective a notice of appeal filed prior to disposition of costs issues. *Buchanan v. Stanships, Inc.*, 485 U.S. 265, 268-69 (1988); *see also Samaad v. City of Dallas*, 922 F.2d 216, 217 (5th Cir. 1991).

Application for Attorneys' Fees Distinguished. Unlike bills of costs, motions or applications for attorneys' fees are not reviewed by the Clerk. Accordingly, prevailing parties should not combine an application for attorneys' fees in a bill of costs—they should be submitted as two separate and distinct applications. *See* FED. R. CIV. P. 54(d)(1) and (d)(2).

Items Recoverable as Costs. "Costs" is not synonymous with "litigation expenses." Items allowable as recoverable costs are listed in 28 U.S.C. §§ 1821, 1920, 1921, and 1923. If a litigation-related expense is not specifically listed in these statutes, it probably is not recoverable as an item of compensable costs.

The following categories of expenses are recoverable under 28 U.S.C. § 1821:

- A witness's attendance fee ($40 per day) when subpoenaed or summoned for appearance at discovery or at trial.

- A witness's mileage allowance (36½¢ per mile), plus charges for parking, tolls, taxicabs, and "all normal travel expenses."

- A witness's "actual expenses of travel . . . at the most economical rate reasonably available" when traveling by common carrier.

- Airport terminal parking fees. *Ezelle v. Bauer Corporation*, 154 F.R.D. 149, 154 (S.D. Miss. 1994).

- A witness's daily subsistence allowance (per diem) ($85 per day, Oxford, Aberdeen, and Greenville; call Clerk's Office for rates for other localities) when overnight stay away from home "is required at the place of attendance because such place is so far removed from the residence of such witness as to prohibit return thereto from day to day."

Note: The rule in the Northern District of Mississippi is that, absent a reasonable explanation, there is a presumption that a witness subpoenaed to trial but not called to the stand is not a necessary witness and attendance fees and related expenses are not recoverable costs. *See Morris v. Carnathan*, 63 F.R.D. 374, 377 (N.D. Miss. 1974).

- Same statutory fees apply to expert witnesses. Unless specifically ordered by the court, the expert's fees for his or her expertise *are not* recoverable as an item of costs. *See Copper Liquor, Inc. v. Adolph Coors* Co., 684 F.2d 1087, 1100 (5th Cir. 1982) ("Expert witnesses generally may be allowed only the fees allowed 'fact' witnesses, ... If counsel plan to seek allowance of the entire expert's fee, the better practice is to seek court approval before calling the expert witness."); *Card v. State Farm Fire & Cas. Co.*, 126 F.R.D. 658, 661 (N.D. Miss. 1989) ("Costs for expert witnesses are limited to the costs which would be allowed other witnesses under [U.S.C.] Sections 1920 and 1821.").

- As to whether a corporation, as the prevailing party, may recover the witness fee, witness mileage allowance, and per diem of its corporate representative, who is not personally involved in the civil action and who testifies for the corporation, *compare Morrison v. Alleluia Cushion Co., Inc.*, 73 F.R.D. 70, 71 (N.D. Miss. 1976) (not allowed), *with Ezelle v. Bauer*, 154 F.R.D. 149, 154-55 (S.D. Miss. 1994) (allowed).

The following categories of expenses are recoverable under 28 U.S.C. § 1920:

- Fees of the clerk, including filing fees and statutorily-defined docketing fees. *Card*, 126 F.R.D. at 660 (N.D. Miss. 1989) ("Court fees are allowed as costs whether they are fees which are paid when the action was initially filed or when the action was removed.").

- U.S. Marshal's fees. *See* 28 U.S.C. § 1921 for an itemization of marshal's fees recoverable as costs. The U.S. Marshal does not serve civil process except (i) on behalf of the United States as a party, (ii) in proceedings classified as *in forma pauperis*, and (iii) on writs of seizure and execution. *See* Rule 4.1(B), LOCAL RULES. For bill of cost determinations, state and local law officers and private process servers are not the equivalent of U.S. Marshals—their service of process fees are not recoverable in a bill of costs. *See Collins v. Gorman*, 96 F.3d 1057, 1059 (7th Cir. 1996) ("Changes in the rules of procedure [allowing service of process by any person who is not a party and is at least eighteen years of age] mean that § 1920(1) covers a smaller portion of the costs of litigation than it used to; but that development does not alter the meaning of the word 'marshal.' A private process server may be faster or cheaper . . . , but the private process server does not become a 'marshal.'").

- Reporters' fees for transcripts that *are necessarily obtained for use in the case*.

  For a discussion of deposition-related expenses that are recoverable in a bill of costs, *see* 10 Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE, Civil 3d § 2676 (1998).

  The phrase *necessarily obtained for use in the case* is a term of art. A prevailing party seeking an award for stenographers' fees and expenses might want to ensure that his or her claim meets the standards enunciated in the following authorities, among others:

  Fogelman v. ARAMCO, 920 F.2d 278, 286 (5th Cir. 1991)("Prevailing parties are entitled to recover the costs of original depositions and copies under 28 U.S.C § 1920(2) and § 1920(4) . . . provided they were 'necessarily obtained for use in the case.'").

  "Use in the case" means that a transcript must have a direct relationship to the determination and result of the trial. *Loewen v. Turnipseed*, 505 F.Supp. 512, 517 (N.D. Miss. 1980).

  The cost of a deposition may be taxed even if it is used just to structure questioning at trial, but only if the court in its discretion believes the taxation of costs to be justified. *Ezelle v. Bauer Corporation*, 154 F.R.D. 149, 155 (S.D. Miss. 1994).

  Stearns Airport Equipment Co., Inc. v. FMC Corporation, 170 F.3d 518, 536 (5th Cir. 1999) ("it is not required that a deposition actually be introduced in

evidence for it to be necessary for a case—as long as there is a reasonable expectation that the deposition may be used for trial preparation, it may be included in costs."). *But see Felts v. National Accounts Ass'n Corp., Inc.*, 83 F.R.D. 112, 114 (N.D. Miss. 1979) (When copies of depositions taken by plaintiffs were not necessarily obtained by defendants for use in presenting their successful motion for summary judgment, costs for such deposition copies would be disallowed.).

Copper Liquor, Inc. v. Adolph Coors Co., 684 F.2d 1087, 1099 (5th Cir. 1982) ("While some cases hold that the costs of depositions are taxable only if they were either introduced in evidence or used at trial in examining or impeaching witnesses, the more equitable as well as more practical view is to allow the recovery of such expense if the taking of the deposition is shown to have been reasonably necessary in the light of facts known to counsel at the time it was taken." *See also Nissho-Iwai*, 729 F.2d 1530, 1553 (5th Cir. 1984) (use of a deposition to structure questioning met the "reasonably necessary" standard).

- Fees for printing, photocopying, and for witnesses.

  Fees for witnesses are governed by 28 U.S.C. § 1821, as is stated above.

  Printing and photocopying expenses are recoverable if the materials were necessarily obtained for use in the case and the prevailing party demonstrates that necessity. *See Stearns Airport Equipment Co., Inc. v. FMC Corporation*, 170 F.3d 518, 536 (5th Cir. 1999), *and Fogelman v. ARAMCO*, 920 F.2d 278, 286 (5th Cir. 1991). If a document that is otherwise allowable as an item of costs requires notarization, the notary's fee may also be recovered.

  A claim for photocopy expenses should show at least the following information:
  - Date copies were made
  - Identification or description of document copied
  - Purpose of the copies, or the reason they were made
  - Number of pages in original
  - Number of copies made
  - Total number of pages copied
  - Price per copy (25¢ per page approved in *Herdahl v. Pontotoc County School Dist.*, 64 F. Supp. 1113, 1120 (N.D. Miss. 1997)
  - Total photocopy charges.

  A grid similar to the one below may prove useful (but is not mandatory) in organizing, presenting, and justifying claims for photocopying expenses:

Date	Document Copied	Purpose (or Recipient) of Copy	Pages in Original	No. Copies Made	Total No. Pages Copied	Per Page Copy Price	Total Copy Charge
						$	$

Generally, a prevailing party is allowed as a matter of course, without further documentation, to recover costs for up to five sets of copies of pleadings, motions, proposed orders, notices, and other documents docketed in the clerk's office and served on the party-opposite. This allows one copy for counsel's office files, one copy for opposing counsel, one copy for counsel's client, one copy for the trial judge, and a copy for the clerk's office. Additional copies are routinely allowed in actions involving more than one party-opposite.

Items Generally NOT Recoverable as Costs. *See generally,* 10 Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE, Civil 3d § 2677 (1998).

- Incompletely or inadequately documented expenses. Documentation supporting the bill of costs should include, when appropriate, copies of canceled checks, receipts for payments, invoices or bills for expenses, or other documentation reasonably showing that an allowable expense was in fact paid by the prevailing party.

- Attorneys' fees and travel expenses incurred in connection with deposition taking. *See J.T. Gibbons v. Crawford Fitting Co.*, 760 F.2d 613, 616 (5th Cir. 1985).

- Fees charged by state or local law officers, or by private process servers, for service of subpoenas and summons.

- Witness attendance fees, mileage allowances, and subsistence for parties.

- Messengers.

- Telephone expenses or tolls, including long-distance charges and conference call charges, unless agreed to by the parties and/or specifically allowed by the court. *See Ezelle v. Bauer Corporation*, 154 F.R.D. 149, 155 (S.D. Miss. 1994). Issues related to telephone and other communications expenses are usually best resolved in the pretrial order. *See* Rule 16.2, LOCAL RULES.

- Charter airfares for witnesses, including expert witnesses, unless agreed to by the parties and/or specifically allowed by the court. Issues related to charter airfares are usually best resolved in the pretrial order. *See* Rule 16.2, LOCAL RULES.

- Experts' professional fees for their testimony, unless agreed to by the parties and/or specifically allowed by the court. Issues related to experts' fees are usually best resolved in the pretrial order. *See* Rule 16.2, LOCAL RULES. *See, e.g., Coats v. Penrod Drilling Corp.*, 5 F.3d 877, 891(5th Cir. 1993) (experts' fees not recoverable under 28 U.S.C. § 1920), *and J.T. Gibbons v. Crawford Fitting Co.*, 760 F.2d 613, 616-17 (5th Cir. 1985) ("The Supreme Court long ago established as a general rule that expert witness fees are not taxable as costs beyond the statutory per diem fee, mileage, and subsistence allowance provided in 28 U.S.C. § 1821."). For exceptions in a narrow range of cases, most notably civil rights cases, *see Jones v. Diamond*, 636 F.2d 1364, 1381 (5th Cir.), *cert. dismissed sub nom Ledbetter v. Jones,* 453 U.S. 950 (1981).

- Expenses for photographs, graphic enlargements, charts, models, demonstrative evidence, and other exhibits, unless agreed to by the parties and/or specifically allowed by the court. Issues related to expenses of exhibits are usually best resolved in the pretrial order. Rule 16.2, LOCAL RULES. *See Louisiana Power & Light Co. v. Kellstrom*, 50 F.3d 319, 335 (5th Cir.) (district court may authorize production of trial exhibits if such would "facilitate the just, speedy, and inexpensive disposition of the action," but absent pretrial approval a prevailing party may not seek taxation of costs for exhibits), *cert. denied*, 516 U.S. 862 (1995); *Card v. State Farm Fire & Cas. Co.*, 126 F.R.D. 658, 662 (N.D. Miss. 1989) ("The cost of videotape and duplicates of slides will not be allowed because these costs were not approved and were not necessarily obtained for trial. Costs for demonstrative aids are not usually allowed."), *aff'd without opinion*, 902 F.2d 957 (5th Cir. 1990).

  But note: In *Ezelle v. Bauer Corp*., 154 F.R.D. 149, 155 (S.D. Miss. 1994), the court ruled that "Costs pertaining to videotapes are not taxable without prior authorization by the court and are not included under 28 U.S.C. § 1920." The clerk for the Northern District of Mississippi has not applied *Ezelle* to claims for videotaped depositions. The use of videotaped depositions is expressly allowed and, with respect to experts, expressly encouraged. *See* LOC. R. 30.1 and 30.2.