

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD E. FARLEY : CIVIL ACTION
 :
 v. :
 :
 THE CESSNA AIRCRAFT COMPANY : NO. 93-6948

MEMORANDUM AND ORDER

BECHTLE, J.

AUGUST 1, 1997

Presently before the court is Plaintiff Richard E. Farley's ("Farley") Motion to Disallow and/or Retax Costs, and Defendant The Cessna Aircraft Company's ("Cessna") opposition thereto. For the reasons set forth below, the motion will be granted in part and denied in part, and the court will tax costs against Farley in the amount of \$35,086.06.

I. BACKGROUND

This products liability action involves the crash of a 1946 Cessna Model 140 single-engine, two-seat aircraft piloted by Farley in 1993. Farley alleged that, during the "climb out" phase of a touch-and-go landing, the plane became starved for fuel, lost power, descended uncontrollably and struck the ground. Farley sustained serious injuries as a result of this crash. At trial, he attempted to prove that the design of the plane was unreasonably dangerous.

On May 30, 1995, a jury returned a verdict in favor of Cessna. On January 25, 1996, the court denied Farley's post-

trial motions. On October 25, 1996, the United States Court of Appeals for the Third Circuit affirmed the judgment. Farley v. Cessna Aircraft Co., 101 F.3d 690 (3d Cir. 1996), cert. denied, 117 S. Ct. 1337 (1997).

After the court ruled on the post-trial motions, but before the Third Circuit affirmed the judgment, Cessna filed a Bill of Costs asking the Clerk of Court ("Clerk") seeking \$67,153.13. Farley filed written objections to the Bill of Costs. On February 25, 1997, after a telephone conference with the parties, the Clerk taxed costs against Farley in the amount of \$50,198.48.

On March 4, 1997, Farley filed this motion, asking the court to set aside the taxation of costs in its entirety or to significantly modify the amount taxed. His motion rests on four primary grounds: (1) the taxation of costs should be set aside because it is inequitable; (2) Cessna asked for costs to which it clearly is not entitled and which are not recoverable under the costs and witnesses fee statutes; (3) many of the receipts that were represented to be for duplication of trial exhibits or other papers necessary for the case actually were for non-testimonial services by experts; and (4) Cessna failed to meet its burden of showing that many of the costs claimed were actually incurred. (See Pl.'s Mot. Opp. Taxation at 1.)

On March 14, 1997, Cessna filed a responsive brief in which it asks the court to reject Farley's objections and uphold the Clerk's taxation in its entirety. Farley filed a reply brief two weeks later.

II. DISCUSSION

A. Whether the Bill of Costs Should Be Disallowed on the Ground That it is Abusive and Sanctionable

Farley first argues that the Bill of Costs is abusive and that Cessna should be sanctioned because it sought costs that were clearly not recoverable under the law. He also argues that it is inequitable to tax him for Cessna's costs because he pursued a legitimate claim in good faith, is unable to pay the full amount of the costs, and there is a great disparity in wealth between he and Cessna. Cessna denies that it has engaged in sanctionable conduct and emphasizes that, as the prevailing party, it is presumptively entitled to costs.

Indeed, costs are "allowed as of course to the prevailing party unless the court otherwise directs." Fed. R. Civ. P. 54(d)(1). The "costs" that may be taxed are defined in 28 U.S.C. § 1920, which enumerates six categories of costs.¹ Crawford

¹ The statute provides:

A judge or clerk of any court of the United States may tax as costs the following:

- (1) Fees of the clerk and marshal;
- (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
- (3) Fees and disbursements for printing and witnesses;
- (4) Fees for exemplification and copies of papers 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.

A bill of costs shall be filed in the case, and upon allowance, included in the judgment or decree.
28 U.S.C. § 1920.

Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 441-42 (1987). Regarding costs for witnesses, 28 U.S.C. § 1920(3) is limited by 28 U.S.C. § 1821, West Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 86 (1991), which requires that witnesses be paid an attendance fee of \$40.00 per day, and states that witnesses are entitled to travel and subsistence allowances² and reimbursement for other expenses, such as mileage, tolls, and parking.

A district court, however, has broad discretion to evaluate the particular circumstances of a case and has authority to "refuse to award costs altogether or to apportion them between the parties." Croker v. Boeing Co., 662 F.2d 975, 998 (3d Cir. 1981); see also Crawford Fitting, 482 U.S. at 441-42. The Third Circuit has held that "'denial of costs to the prevailing party . . . is in the nature of a penalty for some defection on his part in the course of the litigation.'" Institutionalized Juveniles v. Secretary of Pub. Welfare, 758 F.2d 897, 926 (3d Cir. 1985) (quoting ADM Corp. v. Speedmaster Packaging Corp., 525 F.2d 662, 665 (3d Cir. 1975)).

Farley correctly notes that Cessna sought nearly \$17,000 in witness fees to which it clearly was not entitled. After the Clerk's telephone conference with the parties, Cessna withdrew the request for the witness fees in question after conceding that it was not supported by law. Despite this, after reviewing the

² Because Philadelphia has been designated a "high-cost area," witnesses requiring an overnight stay are allowed a maximum subsistence allowance of \$125.00 per day. See 28 U.S.C. § 1821(c)(3).

Bill of Costs in its entirety, the court cannot conclude that Cessna acted in bad faith. Cessna's conduct is not so egregious that the penalty of total disallowance of the costs is warranted.

Farley also is not entitled to disallowance of the taxation of costs on the ground that there is a great disparity in resources between he and Cessna. Specifically, Farley declares that since the crash he has been unable to work in a steady, full-time job and can find work only in seasonal part-time jobs such as landscaping and construction. (Farley Aff. ¶ 4.) His tax returns for 1993, 1994, and 1995 reveal that he did not earn more than \$12,762.00 in any one of these years. (Pls.' Mem. Opp. Taxation Ex. D.) He also states that he is financially unable to pay the costs taxed by the Clerk. (Farley Aff. ¶ 6.) On the other hand, there is no dispute that Cessna is a multimillion dollar corporation.

While the disparity in wealth is a factor in determining the equity of the taxation of costs, it may not be the only factor. See Smith v. Southeastern Pa. Transp. Auth., 47 F.3d 97, 99-100 (3d Cir. 1995). Similarly, Farley's inability to pay the costs does not excuse him from the taxation of costs. Id. at 100. Farley does not claim that he is indigent. Farley surely was advised that, given the technical nature of his claims, discovery and trial preparation would require Cessna to spend tens of thousands of dollars for its defense. Further, he and his lawyer knew that among the risks of going to trial was that he might

lose and that the Clerk likely would tax Cessna's litigation costs against him.

Therefore, Farley's motion to set aside the taxation of costs in its entirety, or to significantly reduce it, will be denied. Farley has not met his burden of proving that Cessna engaged in bad faith or that taxing costs against him would be inequitable.³

B. Objections to Particular Costs Taxed by the Clerk

Farley next objects to each of the dozens of individual items taxed by the Clerk. Upon such a motion, the court must carefully scrutinize the Bill of Costs. Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 235 (1964). If the court denies a cost, it must articulate a reason why the prevailing party is not entitled to that cost. Friedman v. Ganassi, 853 F.2d 207, 209 (3d Cir. 1988), cert. denied, 488 U.S. 1042 (1989).

1. Fees for Court Reporter Services

The first item to be reviewed by this court is Cessna's request for \$19,587.00 for the cost of expedited trial transcripts. The cost of trial transcripts may be taxed when they are "necessarily obtained for use in the case." 28 U.S.C. § 1920(2). The costs of expedited transcripts have been taxed in cases involving complex issues or when a trial extends over a

³ The court will deny Farley's request that the court sanction Cessna under Rule 11 because it asked for costs to which it knew it was not entitled.

long period of time. See Charter Med. Corp. v. Cardin, 127 F.R.D. 111, 113 (D. Md. 1989).

Farley argues that Cessna has failed to prove the necessity of expedited trial transcripts and, therefore, may not recover these costs. The court disagrees. This case involved several technical topics concerning engineering and airplane mechanics that required opinion testimony from experts. The trial spanned sixteen days over one month. The court thus concludes that expedited transcripts were necessary to Cessna's defense and not merely for counsel's convenience. Farley will be taxed \$19,587.00 for the cost of these transcripts.

2. Fees for Witnesses

The next category of taxed costs sought by Cessna involve the fees for witnesses called by Cessna at trial under sections 1920(3) and 1821(b).

a. Andrew Hall

Farley objects to the taxation of \$2,335.00 for Andrew Hall's ("Hall") attendance at each and every trial day, and for hotel accommodations for the entire monthlong trial. Hall was listed as a potential witness by Cessna, but was called only by Farley as a hostile witness for one day. Cessna argues that Hall was needed at the entire trial "potentially to authenticate Cessna documents if needed." (Def.'s Mem. Supp. Taxation at 11.) Farley argues that Hall attended the trial as a company representative, not as a potential witness and that such costs are not taxable.

The court agrees with Farley. Costs for attending trial for the purpose of authenticating documents clearly are not taxable under any of the six categories of 28 U.S.C. § 1920. Accordingly, the court will disallow the taxation against Farley of \$2,335.00 for Mr. Hall's attendance at trial.

b. Dr. Timothy Michals

Farley objects to costs associated with the court appearances of Dr. Timothy Michals ("Dr. Michals"). Cessna requests witness fees for three days for Dr. Michals, who testified on two days. Farley argues that Cessna is being abusive in its attempt to collect witness fees for days in which Dr. Michals was required to be available to testify, but was not called. The court disagrees with Farley. In lengthy trials such as the one in this case, the precise day that a witness is to be called to testify often is difficult to predict. Lawyers must have their next few witnesses available in the courthouse in the event that the previous witness' testimony ends sooner than expected. Having a witness available a day in advance is reasonable. Therefore, the court will tax Farley \$120.00 for three court appearances at \$40.00 per day.

c. Dwight Law

The next witness fees in question relate to Dwight Law ("Law"), Cessna's aircraft maintenance expert. Cessna requests \$1,038.91 for Law's two court appearances and related expenses. Although Law testified only on one day, the court understands that witnesses often must be available in court

before the day that they actually testify. As discussed above, the court attendance fee for being in court before testifying is taxable.

The court agrees with Farley that \$81.75 spent by Law for telephone calls is not taxable. All other expenses requested by Cessna are taxable. Thus, the court will disallow \$81.75 and tax Farley for \$957.16 for Law's expenses.

d. Jack Eggspuehler

The court has reviewed all of the proposed costs associated with Jack Eggspuehler ("Eggspuehler"), Cessna's pilot expert, and will tax Farley in the amount of \$494.21. This figure includes \$80.00 for two court appearances, \$250.00 for subsistence allowance, and the other miscellaneous expenses that are allowable under the applicable statutes.

The court will disallow the costs for Eggspuehler's airfare because Cessna has not shown that it was charged at "the most economical rate reasonably available," as required under 28 U.S.C. § 1821(c)(1). Cessna requests \$1594.00 for three one-way airline tickets for Eggspuehler. Only one ticket receipt was submitted by Cessna, a \$534.00 fare from Columbus, Ohio, to Philadelphia. (Def.'s Mem. Supp. Taxation Ex. 8.) The same fare was charged for Eggspuehler's second flight to Philadelphia, and a return flight to Columbus was billed at \$526.00. First class airfare, as opposed to coach class, is not recoverable because it is not the most economical rate reasonably available. See Green Constr. Co. v. Kansas Power & Light Co.,

153 F.R.D. 670, 680-81 (D. Kan. 1994). Further, one-way tickets generally are more expensive than round trip tickets. In its response, Cessna failed to prove the reasonableness of the airfare. Therefore, this court finds that Eggspuehler's airfare costs are unreasonable and will not tax Farley for them.

The court will tax Farley \$494.21 for costs associated with Eggspuehler and will disallow the remaining \$1,988.86.

e. Dr. James Raddin

Farley objects to the \$1,447.00 for Dr. James Raddin's ("Dr. Raddin") one-way flight to Philadelphia on one airline, and one-way flight from Philadelphia on another airline. One-way tickets are generally more costly than round-trip tickets, and therefore do not provide the most economical rate reasonably available. It also appears that Dr. Raddin flew first class. First class travel is not recoverable under 28 U.S.C. § 1821(c)(1). See Green Constr. Co., 153 F.R.D. at 681. In its response, Cessna failed to adequately prove the reasonableness of Dr. Raddin's airfare. Thus, this cost will not be taxed to Farley. Farley, however, will be taxed \$40.00 for Dr. Raddin's court appearance, \$250.00 for his subsistence allowance, and \$94.00 for travel expenses,⁴ for a total of \$384.00.

⁴ Farley had objected to the hotel expenses on the ground that Cessna did not provide receipts in the original motion. In its response, Cessna submitted the necessary invoices. (Def.'s Mem. Supp. Taxation Ex. 9.)

f. Charles Morin

Farley also objects to Cessna's request for travel and subsistence expenses for Charles Morin ("Morin"), Cessna's accident reconstruction expert. As for the lodging expenses, Cessna provided invoices for Morin's hotel accommodations in its reply and has proven that they were reasonable and necessary. The Clerk's taxation of \$125.00 will stand.

As for the travel expenses, Cessna provided receipts showing that Morin flew from Chicago to Philadelphia to testify. He then flew from Philadelphia to Dayton and, a day later, from Dayton to Chicago. (Def.'s Mem. Supp. Taxation Ex. 10.) Farley argues that he should not be taxed for all three flights. The court agrees, and will disallow the \$231.82 cost for airfare from Dayton to Chicago.

Therefore, Farley will be taxed a total of \$952.60, including \$40.00 for Morin's court attendance, \$125.00 for his subsistence allowance, \$615.18 for his Chicago-to-Philadelphia and Philadelphia-to-Dayton airfares, and \$172.44 for other travel expenses.

g. Douglas Marwill

Farley also disputes costs associated with Douglas Marwill ("Marwill"), Cessna's fuel system expert, who testified in court three days. Cessna also requests reimbursement for Marwill's appearance in court for three additional days so that he could "hear first hand the testimony" of Farley's expert witness and to examine Farley's mock-up. This goes beyond the

limits of § 1920. Cessna may not recover for non-testimonial days in court for its witnesses. Cessna was receiving daily transcripts, so there was no need for first hand knowledge of the testimony for Marwill.

Cessna also requests travel expenses for three trips to Philadelphia for Marwill. The court concludes that all three trips were legitimate. Farley has not offered any evidence to prove otherwise or that the cost of the airfare was not reasonable. Therefore, Cessna shall recover \$120.00 for three court appearances of Mr. Marwill and \$4,450.60 for the three flights to and from Philadelphia.

h. Other Witnesses

Witnesses William Rush, Richard Witt, Michael McNamara, and Dr. Brian Sullivan each testified for one day. The court will tax Farley \$40.00 for each of these witnesses, for a total of \$160.00.

3. Fees for Exemplification and Copies of Papers Necessarily Obtained for Use in the Case

Farley disputes Cessna's request for \$8,857.05 for the costs in preparing thirty large posterboard exhibits for the trial, including the costs for printing, enlarging, and mounting photographs (\$3,479.32), and also the fees paid to experts to create the exhibits (\$5,377.73). Farley argues that § 1920 does not cover these costs.

As for the printing, enlarging, and mounting costs, Farley correctly argues that no statutory provision specifically

allows for the taxing of photographs. However, the authority is split in the courts about the taxing of photographs. Some courts have allowed recovery for photographs if they are necessary to the jury's understanding. See Soler v. McHenry, 771 F. Supp. 252, 256 (N.D. Ill. 1991), aff'd, 989 F.3d 251 (7th Cir. 1993) ("The costs of enlarging trial exhibits are recoverable"); Jamison v. Cooper, 111 F.R.D. 350, 352-53 (N.D. Ga. 1986) ("[M]ost courts view such expenses as taxable where they are necessarily obtained for use in the case."). Others have barred recovery for photographs without prior court approval. See, e.g., Green Constr. Co. v. Kansas Power & Light Co., 153 F.R.D. 670, 683 (D. Kan. 1994). As the Third Circuit has no clear rule regarding the taxing of photographs, this court believes that the better rule is to allow for the recovery of photographs and enlargements of photographs if they are reasonably necessary for the factfinder's understanding of the case. Because Cessna used almost all of these exhibits and they assisted the jury's comprehension of the subject matter, the court will tax against Farley \$3,479.32 for the printing, enlarging and mounting of the thirty exhibits.

Regarding the fees paid to experts to create the exhibits, Farley argues that these "preparation costs" are not recoverable under the taxation statute. The Supreme Court has held that 28 U.S.C. § 1920(3), as limited by 28 U.S.C. § 1821, applies only to fees incurred for witnesses in attendance at trial, and not to "fees for services rendered by an expert

employed by a party in a nontestimonial advisory capacity." West Virginia Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 86 (1991).

Because the costs for Cessna's experts to assist in the preparation of exhibits are nontestimonial, the court will not tax Farley for these costs. Thus, the court will disallow Cessna's request for \$5,377.73 in costs.

Farley also disputes the taxation of the costs that Cessna incurred in producing three copies of its trial notebook. Cessna was required by this court to provide a copy of the notebook to both Farley and the court. Therefore, Farley will be taxed \$1,298.86 for the notebooks.

Therefore, the court will tax costs against Farley in the amount of \$4,778.18 for the preparation of trial exhibits. The court will disallow costs to Cessna in the amount of \$5,377.73 for fees paid to expert witnesses for the creation of those exhibits.

4. Costs Incident to the Taking of Depositions

Farley argues that, with no receipts provided, and a disparity in many of the rates, the court cannot determine whether the deposition charges were charged at a regular rate or an expedited rate. As proof, Farley points to the differences in prices charged for each deposition. Cessna responds that, at the time the depositions were taken, the trial was scheduled to begin in about a month and some expedited transcripts were necessary. The court agrees with Farley that Cessna has not proven that they were necessary, rather than merely convenient. Therefore, the

\$2,976.51 incurred in obtaining expedited transcripts of the depositions of David Banton (\$252.00), John Matczak (\$362.46), Manuel Raefsky (\$374.10), R.G. Snyder (\$478.50), David Sommer (\$643.80), Douglas Stimpson (\$395.85), and Jerry Wells (\$469.80) will not be taxed to Farley. Farley will, however, be taxed \$3,019.91 for the costs incident to the depositions of Rod Bourey & Frank Alotta (joint deposition at \$559.70), Robert Campbell (\$221.25), Edwin Detweiler (\$156.60), Farley (\$829.42), Bill McManimen (\$126.50), Michael Michaud (\$226.20), William Rush (\$172.50), Phillip Simon (\$68.75), P.J. Smith (\$557.74), and Richard Witt (\$101.25).⁵

5. Fees for Services of Summons and Subpoena

Farley objects to taxation of \$320.00 for the service of seven subpoenas on April 4, 1995. Because Cessna has provided the applicable receipts, the court finds that it is entitled to recover the \$320.00.

III. CONCLUSION

⁵ Farley also disputes the taxation for deposition expenses for witnesses Rush, Witt, and Simon because these witnesses testified at trial. A prevailing party may recover the cost of a deposition under 28 U.S.C. § 1920 if it is reasonably necessary, regardless of whether the deposition is actually introduced into evidence at trial. Coats v. Penrod Drilling Corp., 5 F.3d 877, 891 (5th Cir. 1993), cert. denied, 510 U.S. 1195 (1994); Raio v. American Airlines, Inc., 102 F.R.D. 608, 611 (E.D. Pa. 1984). Thus, the court will deny Farley's request that the court disallow these costs on this ground.

For the reasons set forth above, the court will grant in part and deny in part Farley's Motion to Disallow and/or Retax Costs.

The court will tax costs against Farley as follows:

Fees for Court Reporter Services	\$19,587.00
Fees for Witnesses	
Timothy Michals	120.00
Dwight Law	957.16
Jack Eggspuehler	494.21
James Raddin	384.00
Charles Morin	695.00
Douglas Marwill	4,570.60
William Rush	40.00
Richard Witt	40.00
Michael McNamara	40.00
Brian Sullivan	40.00
Fees for Exemplification, etc.	
Photographs	3,479.32
Notebooks	1,298.86
Costs Incident to Taking of Depositions	
Richard Farley	829.42
P.J. Smith	557.74
Rod Bourey & Frank Alotta	559.70
William Rush	172.50
Richard Witt	101.25
Bill McManimen	126.50
Robert Campbell	221.25
Phillip Simon	68.75
Edwin Detweiler	156.60
Michael Michaud	226.20
Fees for Services of Summons and Subpoenas	320.00
T O T A L S	\$35,086.06

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
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RICHARD E. FARLEY	:	CIVIL ACTION
	:	
v.	:	
	:	
THE CESSNA AIRCRAFT COMPANY	:	NO. 93-6948

ORDER

AND NOW, TO WIT, this day of August, 1997, upon consideration of Plaintiff Richard E. Farley's Motion to Disallow and/or Retax Costs, and Defendant The Cessna Aircraft Company's opposition thereto, IT IS ORDERED that said motion is GRANTED IN PART and DENIED IN PART.

Costs are taxed against Farley in the amount of \$35,086.06. This sum shall be paid to Cessna within sixty (60) days of the date of this Order.

LOUIS C. BECHTLE, J.