

DISTRICT COURT, BOULDER COUNTY, STATE OF COLORADO

Case No. 02CV582, Division 3

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**RULING AND ORDER
RE: DEFENDANT'S SECOND REVISED BILL OF COSTS**

**John Ramey,
Plaintiff**

v.

**Mark Boslough, et al.
Defendants**

This matter comes before the Court on Defendant's Second Revised Bill of Costs to which Plaintiff objects. The Court held an evidentiary hearing on Plaintiff's objections to the reasonableness of the expert witness fees on November 1, 2007. After carefully considering the pleadings, the record, and the applicable law, the Court enters this Ruling and Order.

I. LEGAL STANDARD

C.R.C.P. Rule 54(d) provides that costs shall be awarded to the prevailing party. It is undisputed that Defendants are the prevailing party based on the Court's entry of summary judgment in their favor. The types of items the court may award as costs are set forth in C.R.S. § 13-16-122. This list is illustrative rather than exclusive. *Cherry Creek Sch. Dist. v. Voelker*, 859 P.2d 805 (Colo.1993). The award of costs is within the trial court's sound discretion. *Rossmiller v. Romero*, 625 P.2d 1029 (Colo. 1981). In the exercise of its discretion when considering an award of expert witness fees as costs under C.R.C.P. 54(d) and C.R.S. § 13-16-122, the Court must answer two questions:

1. Were the expert's services reasonably necessary to the prevailing party's case?
and
2. Did the party expend a reasonable amount for the expert's services?

Clayton v. Snow 131 P.3d 1202, 1203 (Colo. App. 2006).

II. EXPERT WITNESS FEES

A. Hal K. Rothman, Ph.D.

Defendant seeks an award of \$13,817 for Dr. Rothman's expert witness fees. The fees are supported by two itemized billing invoices: one for \$10,400 for an affidavit and his preservation deposition and the other for \$3417 for his report and consultation. Plaintiff asserts that Dr. Rothman's testimony would have been inadmissible at trial and, therefore, Defendant is not entitled to an award of fees under *Clayton, supra*. The Court does not agree.

Dr. Rothman was retained by Defendant to rebut Plaintiff's expert, Sylvia Pettem. The main thrust of Plaintiff's objection to the admissibility of Dr. Rothman's testimony is that his opinions regarding Ms. Pettem's lack of qualifications as an expert witness go to an ultimate question of law and are inadmissible. C.R.E. 702, however, permits the court, as the trier of fact regarding whether a witness is qualified to testify as an expert witness, to hear testimony about scientific, technical, or other specialized knowledge if it will assist the court in determining a fact in issue. Dr. Rothman, who was the Chair of the History Department at the University of Nevada-Las Vegas and the author of many publications in the field of history, possessed the requisite degree of knowledge, skill, training and education to provide testimony challenging Ms. Pettem's qualifications and her opinions. It would have been helpful to the Court to hear testimony on the necessary training, professional collaboration, peer review and employment that would render one qualified to be considered an "historian" or an expert in the field of "historical research."

Furthermore, the Court agrees with Defendant that the previous trial judge's denial of Defendant Boslough's Motion to Strike did not bar Defendants from challenging her qualifications and the weight to be afforded her expert testimony, if permitted, at trial. Defendants still had the right to challenge her qualifications through cross-examination and the presentation of Dr. Rothman's testimony to demonstrate that she was not qualified to testify as an expert or that her testimony should be given little weight, if any, by the trier of fact.

Dr. Rothman also provided substantive opinions beyond those challenging Ms. Pettem's qualification as an expert witness. His opinions regarding substantive historical matters bore directly on the issues in this case. For example, he provided the historical context for the construction of roads in the area and rendered opinions regarding the establishment of the "Old Ballarat Road" route. These opinions were relevant to the R.S. 2477 issues, among others. Therefore, the Court concludes that Dr. Rothman's services were reasonably necessary to the Defendant in this case.

Turning to the question of the reasonableness of Dr. Rothman's fees, the Court first considers Dr. Rothman's hourly rate of \$200 for research and report writing and \$300 for court-related time. Plaintiff asks the Court to conclude that Dr. Rothman's fees are not reasonable when compared to Ms. Pettem's \$50/hour expert witness fee. The Court rejects Plaintiff's premise that Ms. Pettem's hourly rate is a reasonable basis of comparison for Dr. Rothman's rate. Dr. Rothman's professional qualifications were vastly superior to Ms. Pettem's. Dr. Rothman received a Ph.D. in history from the University of Texas and had been a professor of history for nearly 20 years when he was retained as an expert by the Defendant. By contrast, Ms. Pettem received a B.A. in psychology and had taken "one or two" classes in history in her undergraduate studies 40 years ago. Dr. Rothman's hourly rate of \$200 was reasonable based on the credentials in his curriculum vitae. An hourly rate of \$300 for court-related testimony is also reasonable and many expert witnesses charge a bifurcated rate for testimony.

During the course of litigation, Dr. Rothman was diagnosed with Lou Gehrig's disease and died in late 2006. When it became apparent that he might not be alive at the time of the trial, Defendant correctly undertook a preservation deposition. The costs of taking depositions for the perpetuation of testimony are properly included as costs. C.R.S. § 13-16-122. Plaintiff challenges the reasonableness of the deposition fees and the inclusion of travel costs to Dr.

Rothman's home in Nevada to conduct the preservation deposition. The Court finds no merit to Plaintiff's challenge of the travel fees particularly since Plaintiff's counsel required the attorneys to travel to Nevada for the deposition rather than conduct it through remote technology.

By the time Dr. Rothman was deposed in August 2006, he was having significant speech difficulties which required the use of a voice box or translation of his words by a research assistant. He also fatigued quickly. To accommodate him, the deposition was conducted over two days for a total of 6 hours. Dr. Rothman billed Defendant \$2400 per day ostensibly because of his fragile health. Although Dr. Rothman was obviously in failing health and the deposition may have been very onerous for him, this is not a proper consideration when determining the reasonableness of one's rates. Court testimony can be grueling for people in the best of health. It is not reasonable to charge \$800 per hour for a deposition. Accordingly, the deposition charges are reduced from \$4,800 to \$1,800 (six hours multiplied by \$300). All other charges relating to the deposition are reasonable and necessary and total \$7400.

With regard to the second invoice for \$3,417 for research related fees incurred in 2004, the Court determines that the charge for the research associate is not reasonable and necessary and reduces that invoice by \$1,000. The Court also strikes the "miscellaneous expenses" of \$17.34 due to insufficient evidence on the reasonableness of this fee. The research fees awarded total \$2,000.

B. Robert Orthman, L.P.S.

Defendant seeks an award of costs for \$10,255 of expert witness fees for Robert Orthman, a professional land surveyor. Defendant endorsed Mr. Orthman to testify as a rebuttal expert to Ms. Pettem, and also to testify about 2002 survey drawings obtained by Plaintiff's surveyor, other surveys, maps, and mining documents. Plaintiff argues primarily that Mr. Orthman's expert testimony was inadmissible because he had no expertise in historical research and could not offer opinions regarding the history of the land in question. Plaintiff contends that the bulk of his expert opinions were to rebut Ms. Pettem's opinions.

A review of Defendant's Rule 26 Expert Witness disclosures demonstrates the scope of Mr. Orthman's opinions was much broader than Plaintiff's characterization. The Court agrees that Mr. Orthman's area of expertise is in the area of land surveying but the Court does not agree that his opinions to rebut Ms. Pettem's historical opinions were inadmissible. He was as qualified as Ms. Pettem to offer his opinions as to the existence or non-existence of the road at issue. Indeed, with his expertise in surveying, he was, perhaps, more qualified than Ms. Pettem to render his opinions on the mineral plat surveys conducted in the late 1800s and early 1900s. The Court finds that Mr. Orthman's hourly rate which increased during the years of litigation from \$75/85 to \$100 was reasonable. The Court has considered and rejects all other objections raised by Plaintiff to Mr. Orthman's fees. The Court awards Mr. Orthman's expert fees with the following exception:

Invoice #2265: Defendant voluntarily reduced this to \$540 at the hearing; the Court reduces it further to \$250 finding that Mr. Orthman's attendance at another witness's deposition was not necessary and reasonable.

III. DEPOSITION TRANSCRIPTS

Plaintiff acknowledges that discovery deposition transcript costs may be awarded but only when the discovery depositions are reasonably necessary. Defendant seeks an award of costs of \$6,893 for 12 deposition transcripts. Plaintiff objects to three of the 12 deposition transcripts: Dr. Rothman, Brandt and Raines depositions. Dr. Rothman's deposition transcript is addressed above. The expedite fee was appropriate given the urgency caused by Dr. Rothman's failing health and the fact that his deposition was conducted less than five weeks before trial. The costs were necessary and reasonable.

With regard to Mr. Brandt, the Court agrees that his deposition was reasonably necessary. Mr. Brandt had apparently gone "four-wheeling" on some portion of the property for which Plaintiff claimed there was a public prescriptive easement. In addition, Plaintiff had listed Mr. Brandt in his Rule 26 disclosures. His deposition testimony indicates that he had provided a collection of historical documents reviewed by Ms. Pettem for this case. The Court awards the \$989 as deposition costs.

Mr. Raines is Ms. Pettem's husband. Plaintiff objects to Mr. Raines' deposition costs claiming that he was deposed by Defendant solely to intimidate Ms. Pettem. The Court finds that it was reasonably necessary for Defendant to depose Mr. Raines because Ms. Pettem relied on information he provided as an alleged expert on Colorado mining and mining history to render her expert opinions and conclusions. The Court awards \$225 requested by Defendant.

IV. HEARING TRANSCRIPTS

The Court awards costs associated with the hearing transcript for *Heath v. Parker*. Plaintiff is correct that the transcript involved a different case, but the portion of the transcript requested involved Ms. Pettem's testimony. The transcript was reasonably necessary to impeach Ms. Pettem for her misrepresentation on her resume that she had been previously qualified as an expert in a court of law. Defendant withdrew his request for a second copy of the transcript. The Court reduces the award by \$111.

The Court finds that the transcript of the hearing in this case on Defendant's Motion to Dismiss before Judge Glowinsky was reasonably necessary; however, the expedited rate was not necessary. The transcript costs are further reduced by \$72.

V. FILING FEES

The filing fees objected to by Plaintiff were withdrawn by Defendant and are reduced by \$285.

VI. COMPUTER LEGAL RESEARCH

Defendant seeks \$3,948 as costs for online legal research. Plaintiff contends that these costs are unreasonable. Costs for computerized legal research services are allowed as costs to the prevailing party provided they were necessary for trial preparation and that they are reasonable. *See e.g., Roget v. Grand Pontiac, Inc.*, 5 P.3d 341, 348 (Colo. App. 1999). Defendant has submitted separate invoices to the client in support of the Westlaw charges; however, the invoices contain no specifics as to the nature of the research conducted. The Court agrees with Defendant that this case has been litigated for almost six years with voluminous motions filed throughout the litigation. The Court takes judicial notice of its own file but the Court cannot infer on this basis that the online research conducted was necessary for trial preparation. The request for online legal research is denied.

VII. COPIES

Defendant seeks an award of \$3,014 in copying costs. Plaintiff objects to \$143 for copies made and charged by Boulder County at \$.25 per page, charges for miscellaneous title services, and charges for oversize trial exhibits because this case was set for a court trial. Plaintiff's objections are without merit. C.R.S. § 13-16-122(1) (f) permits the award of copies "necessarily obtained for use in the case." The Court determines that the copies were obtained for use in the case. The copying charges by Boulder County were reasonable as were the charges for oversize trial exhibits which would have materially assisted the Court had the case proceeded to trial.

VIII. AWARD SUMMARY

Pursuant to C.R.C.P. Rules 54(d), 121 (c) §§ 1-15(1) and 1-22 (1), and C.R.S. § 13-16-122 the Court assesses costs against Plaintiff John Ramey as follows:

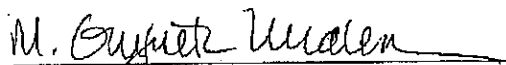
Filing Fees	559
Legal Research	0
Witness Fees	267
Expert Witness Fees	
Orthman	9845
Rothman	9400
Deposition Transcripts	6893
Hearing Transcripts	208
Copies	3014
Delivery Charges	280
Travel Expenses	
(Rothman deposition)	1288
Service of Process	220
Mediation	<u>1123</u>

TOTAL **\$ 33,097**
Plus post-judgment interest at the permitted statutory rate

In rendering this award, the Court has specifically made all inquiries necessary to prevent the squandering of the Plaintiff's resources. These costs were reasonable and necessarily incurred by Defendant Mark Boslough in defending this action.

Done this 5th day of December, 2007.

By the Court:



M. Gwyeth Whalen
District Court Judge