

268.

STATE OF MINNESOTA
COUNTY OF RAMSEY

FILED
Court Administrator

MAY - 8 2009

By Deputy

DISTRICT COURT
SECOND JUDICIAL DISTRICT

Court File No. 62-CV-09-56

In the Matter of the contest of General
Election held on November 4, 2008, for the
purpose of electing a United States Senator
from the State of Minnesota,

Cullen Sheehan and Norm Coleman,

Contestants,

v.

Al Franken,

Contestee.

**CONTESTANTS' OBJECTIONS
TO CONTESTEE'S BILL OF
COSTS AND DISBURSEMENTS**

I. INTRODUCTION

Contestants Cullen Sheehan and Norm Coleman (collectively, "Contestants"), by and through the undersigned counsel, hereby object to Contestee Al Franken's ("Contestee") Bill of Costs and Disbursements, notice of which Contestee served May 6, 2009. Contestee has not provided sufficient detail and/or documentation from which to determine the basis of many of the costs he identifies and the purpose for which they were incurred. Nor has he provided a sufficient explanation as to whether the costs claimed were necessary or reasonable, and it is his burden to do so. Accordingly, this Court should disallow the taxation of costs and disbursements to the Contestants to the extent Contestee has inadequately described his costs or it deems them unnecessary or unreasonable.

II. THIS COURT SHOULD STAY RESOLUTION OF COSTS AND DISBURSEMENTS PENDING THE APPEAL

Contestants respectfully request that the Court await resolution of the pending appeal before considering and deciding Contestee's request for taxation of costs and disbursements. Though it retains jurisdiction over costs and disbursements, principles of judicial efficiency and economy dictate that this Court should exercise its discretion and refrain from considering and deciding Contestee's request pending resolution of Contestants' expedited appeal to the Minnesota Supreme Court.

As the Court is aware, Contestants appealed the judgment entered by this Court on April 14, 2009, to the Minnesota Supreme Court, and as directed by statute, the Minnesota Supreme Court is considering Contestants' appeal on an expedited basis. On April 24, 2009, the Supreme Court issued an Order setting forth a briefing schedule and an oral argument date of June 1, 2009. Given this expedited process, it is most efficient for this Court to refrain from considering and deciding Contestee's request for taxation of costs and disbursements until Contestants' expedited appeal to the Minnesota Supreme Court is resolved. If Contestants prevail on appeal, then Contestee's request for taxation of costs and disbursements will become moot. If, on the other hand, Contestee prevails on appeal, this Court can promptly issue an Order on Contestee's request.

III. GENERAL OBJECTIONS

Costs and disbursements are governed by Minn. Stat. § 549.04 and Minn. R. Civ. P. 54.04. Section 549.04 limits a prevailing party's recovery to *reasonable* costs and disbursements paid or incurred. See Minn. Stat. § 549.04 (emphasis added). Rule 54.04

mandates that the disbursements *be stated in detail* and verified by an accompanying affidavit. See Minn. R. Civ. P. 54.04 (emphasis added). The burden is on the prevailing party to show that its claimed costs are necessary and reasonable. See Romain v. Pebble Creek Partners, 310 N.W.2d 118, 124 (Minn. 1981).

The Minnesota Supreme Court has cautioned Courts against expanding the list of costs taxable to the non-prevailing party. Id. at 123 (“[A]s a general matter, courts should be reluctant to expand the list of costs taxable to the losing party.”). Thus, when determining which costs are allowed and in what amount, the Court should take a “hard look” at the costs claimed. Id. at 124; Stinson v. Clark Equipment Co., 473 N.W.2d 333, 338 (Minn. Ct. App. 1991) (remanding case where conclusory statement of costs did not allow the trial court to determine their reasonableness). Before awarding the prevailing party’s requested costs and disbursements, the Court must make sufficient findings of their reasonableness and necessity. See Illinois Farmers Ins. Co. v. Brekke Fireplace Shoppe Inc., 495 N.W.2d 216, 222 (Minn. App. 1993) (reversing award where trial court failed to conduct a hearing and make appropriate findings on reasonableness and necessity of costs and disbursements).

Contestants object to Contestee’s Bill of Costs and Disbursements to the extent, as described more fully bellow, Contestee has inadequately described and documented the costs and disbursements he purportedly incurred. Contestee, for example, refers to photocopy charges but does not identify what in particular was copied and for whom copies were made. Contestants further object to Contestee’s Bill of Costs and Disbursements to the extent he has failed to justify the costs and disbursements he seeks

as necessary and reasonable. Indeed, Contestee makes only one cursory statement regarding the necessity of the taxable costs and disbursements he identifies, without any mention or explanation whatsoever of the reasonableness of those costs and disbursements. Contestee's Bill of Costs and Disbursements at 1 (“[E]ach and every item . . . has actually and necessarily been paid or incurred in this action.”).

II. SPECIFIC OBJECTIONS

1. Deposition Transcripts

The invoices for the deposition transcripts of certain witnesses, including Kevin Boyle, Kevin Corbid, and Joseph Mansky, indicate that the copies the court reporter provided the Contestee's attorneys were expedited. See Tabs B, C, and D. Absent some explanation for why these transcripts were expedited when others were not, however, it would be unreasonable to tax the costs associated with doing so to the Contestants. Similarly, Contestee has provided no explanation of the reasonableness and necessity for the costs identified in the invoices for the deposition transcripts other than those for one original and one copy (for example, costs for messenger services, mini transcripts, and e-transcripts). See id. Expenses, such as these, incurred for the convenience of the prevailing party's attorneys should not be imposed as a cost. See Berman v. CDI Management Corp., Court File No. MP 03-366, 2003 WL 23309325, at **5-6 (Minn. D. Ct. Dec. 11, 2003).

Finally, the invoice for Cynthia Reichert's deposition transcript is insufficiently itemized. There is no way to tell whether the total includes only the cost of the original transcript and one copy or also costs that would be considered unreasonable and

unnecessary. Contestee has the burden of showing that the costs associated with these deposition transcripts were reasonable and necessary, and he has failed to do so. The Court should disallow these claims accordingly.

2. Trial Transcripts

The Minnesota Supreme Court has made clear that transcript costs for “the convenience of the attorney during trial” are not taxable to the other party. Streibel v. Minn. State High Sch. League, 321 N.W.2d 400, 403 (Minn. 1982). Contestee has provided no documentation evidencing that the costs associated with the trial transcripts he obtained, including rough and partial copies, were for anything other than the convenience of his counsel. Accordingly, these claims (\$35,382.55) should be disallowed.

3. Trial Exhibits

The information Contestee offers in support of his request for \$26,576.38 in costs and disbursements is devoid of sufficient detail or, indeed, any explanation of why individual charges were reasonable and necessary. Contestee, for example, requests \$13.00 for a death certificate but fails to identify whose certificate it is or whether it relates to an uncounted absentee ballot he ultimately sought to have counted. See Tab F. There are also numerous charges for color copies, 3-ring binders, custom tabs, and other supplies but no breakdown of how they were used or whether they relate to exhibits fairly taxable to the Contestants. Many may have been for in-house use only and not properly taxable.

In addition, because Contestee is not entitled to costs incurred for convenience in

presenting his case, see Berman, 2003 WL 23309325, at **5-6, the \$1,688.83 Contestee paid Skyline Document Services to enlarge and copy documents is not a reasonable or necessary cost fairly taxable to the Contestants. This case was tried to a panel of three judges and not a jury. It would have sufficed to hand hard copies of exhibits to the judges and counsel for the Contestants. That Contestee preferred to make a show for the media does not mean that Contestants should bear the costs of doing so. These claims should be disallowed.

4. Data Practices Requests/Subpoenas

Contestee seeks \$59,078.89 in costs associated with Data Practices Act (“DPA”) requests and subpoenas, citing Minn. Stat. § 357.31. Section 357.31 provides that:

The legal fees paid for certified copies of . . . any documents or papers filed or recorded in any public office, necessarily used on trial of a cause . . . shall be allowed in the taxation of costs.

The copies of documents Contestee received from the counties do not fall within the category of documents contemplated by this provision. With the exception of certain certifications obtained from the counties in March 2009 (Exs. F3517-3571), the documents Contestee obtained from the counties were not “certified.” Moreover, Contestee has not provided sufficient detail to know whether the requested documents were ever used during the trial. Due to the expedited nature of the proceedings, both parties used DPA requests as a form of discovery, without ever entering the documents into evidence. Without such explanation, these costs are not reasonable and should not be taxed.

Even assuming the costs were taxable under the statute, Contestee provides wholly

inadequate detail with which to determine their reasonableness and necessity. The invoices Contestee attaches in Tab G do not tell Contestants or the Court what documents were copied, how many copies of each were made, or, most importantly, the purpose for which they were to be used. The invoice from Blue Earth County, for example, in the amount of \$12,608 describes the work performed and basis for the costs incurred as “COPIES/STAF.” See Tab G. Worse still, the spreadsheet of “Miscellaneous Data Practice Requests Paid by Check” offers no description or explanation at all for the \$1,631.98 expense. See id.

5. Trial Technology & Equipment

Contestee asks for \$6,031.23 for the rental and purchase of equipment used for the preparation and presentation of evidence at trial. As discussed above, costs incurred for the convenience of the attorneys in presenting their case at trial is not properly imposed as a cost on an adversary, nor are overhead costs which may be paid for through fees collected from the prevailing party. Contestee cites no authority to the contrary. These claims should be disallowed.

6. Photocopying & Service of Trial Motions

Contestee requests \$2,152.51 in costs and disbursements for photocopying and service of trial motions. Tab I attached to Contestee’s Bill of Costs and Disbursements includes a list of “Fredrickson & Byron Copying Charges,” which when added together amount to \$1,474.40. See Tab I. A request for disbursements must be supported with evidence of the disbursement. Contestee, however, provides no documentation with respect to how many copies were made, what was copied, and for what purpose copies

were made. Furthermore, there is no distinction made between copies created for in-house use, which would constitute overhead and could not be imposed as a cost on the Contestants, and copies reasonably and necessarily created for the litigation. The Court should take a “hard look” at these costs and disallow them accordingly.

7. Trial Subpoenas & Witness Fees

Contestee claims \$19,525.51 for the “[s]ervice of 380 trial subpoenas & witness fees.” Some of the invoices Contestee attaches indicate “Priority Rush” service, some indicate “Same Day” service, and others indicate “48 Hr Rate” service. See Tab J. Contestee, however, does not explain the rationale for the different treatment, and whether it was reasonable and necessary that some subpoenas be served within the same day while others could be served within two days. Moreover, it is unclear which costs are associated with which witness, and the vast majority of the 380 witnesses never testified. Thus, some substantial portion of these expenses cannot be taxable. Certainly, the Contestants and the Court cannot know whether all of the claimed costs were necessary and reasonable. These costs, accordingly, should be disallowed.

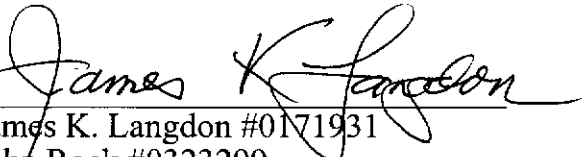
III. CONCLUSION

For the foregoing reasons, Contestants respectfully request that this Court disallow Contestee’s costs and disbursements to the extent he has improperly classified them as “costs,” inadequately described them, or failed to justify them as necessary and reasonable.

Dated: May 8, 2009

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AFFIDAVIT OF SERVICE VIA EMAIL

STATE OF MINNESOTA)
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COUNTY OF HENNEPIN)

Christi Roadfeldt, being first duly sworn on oath, deposes and states that on the 8th day of May, 2009, she served the following:

Contestants' Objections to Contestee's Bill of Costs and Disbursements

by sending true and correct copies via email to:

David L. Lillehaug, Esq.
dlillehaug@fredlaw.com;

and

Kevin J. Hamilton, Esq.
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the last known email addresses of said addressees.

Christi Roadfeldt

Subscribed and sworn to before me this
8th day of May, 2009

Nancy R. Nelson
Notary Public

