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FILED
Court Administrator
MAY 13 2009
By Deputy

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF RAMSEY | SECOND JUDICIAL DISTRICT

In the Matter of the Contest of General Election held on November 4, 2008, for the purpose of electing a United States Senator for the State of Minnesota	Court File No: 62-CV-09-56 Honorable Elizabeth A. Hayden Honorable Kurt J. Marben Honorable Denise D. Reilly
Cullen Sheehan and Norm Coleman, Contestants, v. Al Franken, Contestee.	**CONTESTEE'S RESPONSE TO CONTESTANTS' OBJECTIONS TO BILL OF COSTS AND DISBURSEMENTS**

Contestee Al Franken ("Contestee") respectfully submits that his costs should be awarded and in the full amount requested pursuant to Minn. R. Civ. P. 54.04. Contestee has submitted a sworn affidavit and numerous invoices documenting costs and disbursements necessarily incurred, as required. Contestants have submitted no affidavit in response. Nor have they suggested that the total amount requested is unreasonable for a complex, seven-week, exhibit-intensive trial. Instead, they raise a series of ill-founded objections, all of which should be rejected. Contestee's costs were reasonably incurred, necessary to the defense of Contestants' lawsuit, and are fully recoverable under Rule 54.

I. THIS COURT SHOULD TAX COSTS NOW.

At the outset, Contestants do not dispute that, as the prevailing party in this litigation, Contestee is fully entitled to an appropriate award of costs.

Instead, Contestants argue that such an award should be delayed, pending resolution of the appeal. The argument finds no support in the law. Rule 54.04 provides

that costs and disbursements may be taxed by the court administrator on two days' notice. Contestants do not appear to contend – nor can they – that their appeal stays the taxation of costs. There is no authority to support such a contention.

Contestee was certified the winner by a unanimous State Canvassing Board and then by a unanimous District Court. Judgment has been entered. There is no good reason to delay determination of costs and Contestants offer this Court no basis upon which to defer an award.

II. CONTESTANTS' OBJECTIONS TO SPECIFIC ITEMS ARE NOT WELL TAKEN.

A. Statutory costs, $250.

Contestants have made no objection and this expense is plainly taxable.

B. Court filing fees, $1,130.

Contestants have made no objection to the taxation of these costs.

C. Deposition transcripts of testifying witnesses, $7,315.

Contestants object to the cost of expediting transcripts of certain testifying witnesses. Both sides ordered expedited transcripts because the election contest itself was an expedited proceeding. Contestants commenced the contest on the first day possible, January 6, 2009. Trial was required to, and did, commence 20 days after the notice of contest. *See* Minn. Stat. Section 209.065. Neither side had the luxury of waiting weeks for deposition transcripts to use at trial.

The deposition of Minneapolis Elections Official Cynthia Reichert was taken by Contestants. The invoice was from the court reporter retained by Contestants and, presumably, Contestants paid for their own expedited copy. The invoice was sufficiently detailed for payment and is sufficient for reimbursement.

D. Written Deposition Transcripts, $812.

Contestants have made no objection.

E. Deposition Transcripts Entered Into Evidence, $3,200.

Contestants have made no objection.

F. Trial transcripts, $35,382.

As Contestants well know, the trial transcripts were not for the "convenience" of the attorneys. In this expedited proceeding, the District Court directed that the parties submit on a weekly basis proposed findings of fact and conclusions of law summarizing the previous week's testimony and exhibits. The interim trial transcripts were necessary for this purpose. At the end of trial, both sides used the trial transcripts to submit their final proposed findings and conclusions.

The case of *Abraham v. County of Hennepin*, 622 N.W.2d 121 (Minn. Ct. App. 2001), is precisely on point. In that case, transcript fees were allowed; "the transcript fees were part of the litigation costs, because the court required the parties to prepare findings of fact and conclusions of law." *Id.* at 129.

It is more than a little ironic that Contestants would challenge this element of the Bill of Costs. Both sides agreed, during the first week of the trial, to split the cost of the transcription of the record since that it was clear from the outset that the trial transcript was likely to be voluminous and would not be available for proposed findings unless prepared during the trial. Contestants have no standing to contend that these costs – incurred by *both parties* – were unreasonable.

G. Trial exhibits, $26,576.

Perhaps most remarkably, Contestants complain about copying charges for the voluminous exhibits utilized at trial. The objection is utterly unsupported and should be summarily rejected.

Contestants first complain about a payment of $13 for a death certificate. But the Bill of Costs clearly shows that the certificate was not only relevant to the litigation, but was admitted into evidence at trial as Exhibit F3007. The death certificate relates to Donald Simmons, one of the voters whose absentee ballots were at issue, and was used to demonstrate that Mr. Simmons' vote should be counted. The District Court ordered that his absentee ballot be counted. *See Findings of Fact, Conclusions of Law and Order for Judgment* ("Final Order") at A-10. The evidence was indisputably relevant and the cost is recoverable.

The Bill of Costs seeks recovery of approximately $24,900 for trial exhibit notebooks and copying. This is a significant amount, but this was a paper-intensive case. As the Court recounted in its Final Order, ¶¶ 24-25, it received 1,717 individual exhibits and reviewed 19,181 of pleadings, motions, and exhibits. The parties generated 21 linear feet of exhibit notebooks, with copies for each judge, each law clerk, the courtroom clerk, and the witnesses. These notebooks were critical to helping the Court and the clerk organize, maintain, and review exhibits, and were required by the Court from the outset of these proceedings.

Indeed, Contestants began their case by preparing and offering similar notebooks for the Court and opposing counsel. Contestee has provided sufficient detail with respect

to the costs of preparing and assembling the notebooks. Undoubtedly Contestant spent at least as much. The objection should be rejected.

The cost of $1,688 to enlarge exhibits was fair and reasonable. Using enlargements rather than forcing each of the judges, the law clerks, and the courtroom clerk to find individual paper exhibits was efficient. The enlargements were particularly beneficial to show beyond doubt that Contestants had redacted portions of copies produced by the cities and counties and were not offering the best evidence.

H. Data Practices Requests/Subpoenas, $59,078.

Contestants next object to the costs incurred obtaining public records used to defend against Contestants' claims and that comprise the bulk of the admitted trial exhibits. This objection, too, is meritless and should be rejected.

Contestants' primary claim was that virtually all counties in Minnesota improperly rejected absentee ballots. In connection with this claim, both sides sought and received from Minnesota counties and cities official copies of absentee ballot envelopes, precinct rosters, and other election-related documents. In all such instances, elections officials represented that the copies were true and correct copies of public records, whether or not eventually the copies were stamped with the jurisdiction's seal. The 21 linear feet of trial exhibits consist mostly of these governmental records. Even those not ultimately marked as exhibits were necessarily obtained in order to evaluate and respond to Contestants' claims, and to review those materials to identify those necessary for presentation to the Court. All of these materials were necessary in connection with the litigation, constitute properly taxable costs, and should be reimbursed by Contestants.

I. Trial Technology & Equipment, $6,031.

Contestants next object to the costs incurred to display admitted evidence in the courtroom, used by Contestee to facilitate the examination of witnesses and to present evidence to the Court for consideration as a less-expensive alternative to document enlargements used by Contestee, and by Contestants to a much more limited extent.

The use of trial technology is commonplace in complex cases and, in this case, was necessary for the effective presentation of evidence in a trial setting, particularly in a matter of intense public interest where transparency is paramount. *Cf.* 28 U.S.C. § 1920(4) (federal costs include costs for "exemplification" of papers necessarily used in the case). This trial took place in the Minnesota Supreme Court's courtroom which, unlike many district courtrooms, did not have presentation technology.

The equipment was not for the mere "convenience" of the attorneys, but for the benefit of the Court and the witness for whom a monitor was furnished. The equipment helped the Court and the witness focus quickly on highlighted exhibits. This was particularly helpful when viewing individual entries in complicated election result spreadsheets. Further, in the middle of testimony of Contestants' star witness Pamela Howell, when Contestants' attorneys only produced single copies of documents that should have been provided during discovery, the Court was able to view the documents on the projector.

This technology was more efficient and less expensive than using enlargements, more practical for the use of the Court and the witnesses, and – perhaps most importantly – made the proceedings more accessible and transparent to the citizens of the State of

Minnesota. These costs were properly incurred and reasonable in amount, and should be taxed to Contestants.

J. Photocopying & Service of Trial Motions, $2,152.

Contestants have made no objection to approximately $620 for courier services. The remainder (to which Contestants *do* object) is for photocopying for 21 submissions, including lengthy motions, proposed findings, and pleadings. Contestee has provided a breakdown of copying expenses by each motion, by total and amount per page. The amount per page, 20 cents, is reasonable and customary for law firms.

K. Trial Subpoenas & Witness Fees, $19,625.

Next, Contestants object to the expedited service of trial subpoenas as unreasonable. This objection is without merit.

First, expedited service was necessitated as a result of Contestants' failure to provide sufficiently advanced notice of when they intended to complete the presentation of evidence in their case in chief. Leisurely service of subpoenas was not possible. Further, until Contestants rested their case, Contestee could not finally determine which witnesses would be necessary.

Ultimately, Contestee subpoenaed some 380 voters and presented testimony from more than 60 of them. In order to present 60 such voter-witnesses at trial, it was necessary to subpoena a much larger number to accommodate employer demands, travel in winter conditions, health concerns, disabilities, academic schedules, and a myriad of other issues, all of which consumed an enormous amount of time and money. Even though many of these voters did not testify, the costs associated with serving those subpoenas are most assuredly recoverable. *See Spanish Action Comm. of Chicago v. City*

of Chicago, 811 F.2d 1129, 1138 (7th Cir. 1987) (costs awarded for witness fees paid to witnesses who did not testify). This evidence was relevant, admissible, and compelling as the Court itself noted in Final Order. The costs of serving legal process to obtain and present such testimony is fully taxable and should be awarded.

For all of these reasons, Contestee submits that the full amount itemized in the Bill of Costs and Disbursements should be taxed to Contestants. The costs were reasonably incurred, necessary for the presentation of relevant and admissible evidence at trial, and should be awarded to Contestee as the prevailing party in this action pursuant to Rule 54.04.

Dated: May 13, 2009

Respectfully submitted,

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November 4, 2008 for the purpose of electing a
United States Senator from the State of Minnesota
Cullen Sheehan and Norm Coleman v. Al Franken
Court File No.: 62-CV-09-56

AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
) SS.
COUNTY OF HENNEPIN)

David L. Lillehaug, being duly sworn on oath, deposes and states that on the 13th day of May, 2009, copies of the following:

1. Contestee's Response to Contestants' Objections to Bill of Costs and Disbursements; and
2. Affidavit of Service.

were forwarded via e-mail to the following:

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David L. Lillehaug

Subscribed and sworn to before me
this 13th day of May, 2009

Notary Public

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DEBORAH L. SYNOWCZYNSKI
NOTARY PUBLIC-MINNESOTA
My Commission Expires Jan. 31, 2010