

Not Reported in F.Supp., 1993 WL 256755 (D.Kan.)
(Cite as: 1993 WL 256755 (D.Kan.))

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United States District Court, D. Kansas.
Sam J. **WALTERS**, D.C., Plaintiff,

v.

MONARCH LIFE INSURANCE CO., Defendant.
Civ. A. No. 91-2396-GTV.

June 29, 1993.

Thomas L. Thurston, Perry & Hamil, [Anthony F. Rupp](#), Shughart, Thomson & Kilroy, Overland Park, KS, [W James Foland](#), [Bradley J Baumgart](#), [David H Luce](#), Shughart, Thomson & Kilroy, P.C., Kansas City, MO, for plaintiff.

[Lee M. Smithyman](#), **Smithyman & Zakoura, Chtd.**, Overland Park, KS, for defendant.

MEMORANDUM AND ORDER

VAN BEBBER, District Judge.

*1 This case is before the court on Defendant's Motion to Retax Costs (Doc. 294). On December 4, 1992, the clerk of this court entered judgment for the plaintiff in the amount of \$44,066.43, together with his costs of action (Doc. 272). Plaintiff filed a bill of costs on December 18, 1992, seeking a total of \$29,887.82 (Doc. 282). On January 14, 1993, the Clerk of the Court taxed costs against defendant for the full amount sought (Doc. 293). On January 21, 1993, defendant filed its motion to retax costs. Plaintiff has since responded to the motion. The court, having reviewed the matter, finds that the costs taxed shall be reduced to the amount of \$12,773.78. Defendant's motion is granted in part.

Taxation of costs is authorized by [Fed.R.Civ.P. 54\(d\)](#) and governed by [28 U.S.C. § 1920](#), which 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.

In this case, defendant objects to any award of costs, claiming plaintiff is not actually a "prevailing party" entitled to recover costs under the statute. The court disagrees. Plaintiff recovered \$44,066.43 on his breach of contract claim, and also prevailed on defendant's counterclaim of fraud. That plaintiff recovered less than the full amount of damages he was seeking does not preclude him from being a prevailing party for purposes of recovering his costs. Similarly, the fact that plaintiff voluntarily dismissed one of his claims against defendant before trial is irrelevant to his status as a prevailing party.

That aside, the court has reviewed plaintiff's bill of costs and finds that certain items claimed as costs are not properly recoverable under [28 U.S.C. § 1920](#). The costs that are to be disallowed are:

(1) expert witness fees in the amount of \$15,027.50. It is well-established in this district that the court cannot tax a prevailing party's expert witness fees as costs, but is limited by statute to the per diem rate of reimbursement for all witnesses. [Meredith v. Schreiner Transport, Inc.](#), 814 F.Supp. 1004, 1005 (D.Kan.1993); see also [Ramos v. Lamm](#), 713 F.2d 546, 559 (10th Cir.1983) (Tenth Circuit has recognized that expert fees in excess of the statutory per diem rate are not recoverable). Plaintiff has argued that the "vexatious" nature of defendant's refusal to pay plaintiff's insurance claim warrants the award of expert witness fees in this case. The court disagrees with the "vexatious" characterization.

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Plaintiff will be awarded the statutory per diem fee of \$40, pursuant to [28 U.S.C. § 1821\(b\)](#), for each of the eleven experts who testified at trial or were deposed by plaintiff, for a total of \$440.00.

*2 (2) trial exhibits produced by RSI in the amount of \$155.99 because plaintiff's counsel has not substantiated that these costs were necessarily obtained for use in the case. [28 U.S.C. § 1920\(4\)](#). Further, visual aids such as graphs which are merely illustrative of other evidence adduced at trial are not properly taxable. See [Miller v. City of Mission](#), 516 F.Supp. 1333, 1340 (D.Kan.1981). The court notes that plaintiff has substantiated that the other copying charges requested in his bill of costs were for trial exhibits and copies necessarily obtained for use at trial. The court will also allow the requested costs of videotape editing and equipment rental for trial as a surveillance videotape taken of plaintiff was important to the trial. See [Meredith](#), 814 F.Supp. at 1005-06 (video deposition costs and equipment rental for trial allowed).

(3) witness fees and expenses for Dennis Schwercinsky, James Holtwick, Tom Paden, and Chris White because plaintiff did not call these witnesses to testify at trial. A total amount of \$163.20 is deducted for these witnesses.

(4) fees for a "process server" in the amount of \$150.00 because plaintiff's counsel has not indicated who was served. Further, the court will not allow the \$132.00 charge for service of subpoenas on Robert and Doug Allen, the \$96.00 charge for service of a subpoena on Dennis Gibson, or the \$56.00 ^{FN1} charge for service of Alan Hicks. Fees of private process servers do not fall within the taxable items enumerated in [28 U.S.C. § 1920](#). See [In re Air Crash Disaster at Stapleton Int'l Airport](#), 1989 WL 259995 (D.Colo. July 24, 1989).

(5) court reporter charges for depositions not necessarily obtained for use at trial. "With respect to deposition costs, including the costs of the stenographer's sitting fee and one copy, the court has great discretion to tax these costs if it finds the deposition transcript and the copy were " 'necessarily obtained for use in the case.' " [Washington v. Board of Public Utilities](#), No. 88-2312-0, 1990 WL 182347 (D.Kan. Oct. 29, 1990) (quoting [Ortega v. Kansas](#)

[City, Kansas](#), 659 F.Supp. 1201, 1219 (1987), *rev'd on other grounds*, 875 F.2d 1497 (1989)). Depositions taken solely for discovery purposes are not taxable as costs; only depositions actually admitted, read, or used at trial are taxable. [Furr v. AT & T Technologies](#), 824 F.2d 1537, 1550 (10th Cir.1987).

Here, plaintiff has requested costs for twenty-four depositions at a total cost of over \$11,000. Several of the witnesses for which plaintiff has requested deposition costs did not testify in the case. Thus, deposition costs in the amount of \$796.00 for witnesses William Martin, Chris White, Charles Snow, Mel Hudson, Roger Hood, and James Holtwick will not be allowed. The court will also not allow the \$257.45 cost of obtaining a copy of plaintiff's own deposition, nor will it allow the \$63.40 cost of obtaining a copy of the deposition of Dennison Hamilton, one of plaintiff's witnesses. These copies were merely for the convenience of plaintiff's counsel and not necessarily obtained for use in the case.

*3 As to the remaining witnesses, the court will allow the costs for the depositions of Diana Bardwell and Otto Hartig, which were read at trial. The court will also allow the deposition costs for: Thomas Hardin, John Wertzberger, Ed Gallet, Robert Allen, Brent Douglas Allen, Thomas Rhudy, Dana Faris, Jay Rozen, Dennis Gibson, John Renner, and Alan Hicks. These were witnesses called by the defendant which plaintiff cross-examined.^{FN2}

(6) transcription fees in the amount of \$149.50 for the opening statement of **Lee Smithyman**, defendant's counsel. The court finds that this transcript was obtained solely for the convenience of plaintiff's counsel.

IT IS, THEREFORE, BY THE COURT ORDERED that defendant's Motion to Retax Costs (Doc. 294) is granted in part. The Clerk of the Court is directed to retax plaintiff's costs to the defendant in the amount of \$12,773.78, which reflects the reductions detailed in this Memorandum and Order.

Copies of this order shall be mailed to counsel of record for the parties.

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IT IS SO ORDERED.

[FN1](#). Plaintiff claimed \$96.00 total for service on Alan Hicks and for Hicks's witness fee. The statutory fees of \$40.00 is allowed.

[FN2](#). The court has also reduced the amount of costs by \$507.00 because deposition costs regarding Robert Allen and Thomas Rhudy were listed twice on the itemized bill of costs.

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