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

Susan Doxtator, Arlie Doxtator, and
Sarah Wunderlich, as Special
Administrators of the Estate of
Jonathon C. Tubby,

Plaintiffs,

Case No. 19-CV-00137

v.

Erik O'Brien, Andrew Smith, Todd J. Delain,
Heidi Michel, City of Green Bay, Brown County,
Joseph P. Mleziva, Nathan K. Winisterfer,
Thomas Zeigle, and John Does 1-5,

Defendants.

TODD J. DELAIN, HEIDI MICHEL, BROWN COUNTY, JOSEPH P. MLEZIVA, NATHAN K. WINISTERFER, AND THOMAS ZEIGLE'S RESPONSE TO PLAINTIFFS' OBJECTIONS TO BILL OF COSTS (ECF NO. 182)

Defendants Todd J. Delain, Heidi Michel, Brown County, Joseph P. Mleziva, Nathan K. Winistorfer (incorrectly spelled as "Winisterfer"), and Thomas Zeigle (collectively "County Defendants"), by their attorneys, Crivello Carlson, S.C., respectfully submit the following Response to Plaintiffs' Objection to the County Defendants' Bill of Costs, (ECF No. 182.)

INTRODUCTION

The allegations that the County Defendants were forced to defend themselves against in this case were serious: Plaintiffs claimed that the County Defendants caused the death of Jonathon Tubby. (3d Am. Compl. ¶¶ 41–42, 48–49, 70–71, ECF No. 83.) Plaintiffs have litigated this case aggressively, as is certainly within their rights, even forcing the County Defendants to defend and prevail against a motion to compel, for which the County Defendants

have not sought any costs or fees. *See* (ECF Nos. 88–89, 92, 95, 99.) And Plaintiffs have been represented by competent and sophisticated counsel, who sought more than $30,000 just to litigate a discovery motion and a motion for attorneys' fees against different Defendants. *See* (ECF No. 175.) In short, this has been a complex, fully litigated case whereby Plaintiffs have availed themselves of all of the rules of discovery and procedure, and the County Defendants have successfully defended themselves against serious allegations.

Significantly, Plaintiffs do not dispute the reasonableness or necessity of any of the costs sought by the County Defendants—the only costs the County Defendants seek are those for deposition transcripts. Instead, Plaintiffs object to their requirement of paying the County Defendants' costs related to this matter based solely on the indigence exception. However, their burden in exercising this exception is high and they have failed to meet it in this case.

Plaintiffs claim that the Estate holds no assets, even though they have already publicly signaled their intent to appeal the Court's summary judgment decision, meaning that the Estate may well have a future asset if it is successful on appeal against other Defendants. *See* WBAY TV-2, *Watch Live: Family members of Jonathon Tubby hold news conference regarding a federal judge's decision to dismiss a lawsuit for police custody death*, FACEBOOK (May 23, 2021, 10:38 AM), https://www.facebook.com/WBAYTV/videos/watch-live-family-members-of-jonathon-tubby-hold-news-conference-regarding-a-fed/689314421828837/. As the County Defendants look to shift their resources and efforts to their continued defense on appeal, the Court should award them the undisputedly reasonable and necessary costs they incurred to defend themselves in the district court, particularly as the Estate expects to treat its interest in this litigation as an asset on appeal.

ARGUMENT

"Under Rule 54, 'the prevailing party is prima facie entitled to costs and it is incumbent on the losing party to overcome the presumption.'" *Balele v. Olmanson*, 13-cv-783-jdp, 2017 WL 455440, at *1 (W.D. Wis. Feb. 2, 2017) (quoting *Popeil Bros. v. Schick Elec., Inc.*, 516 F.2d 772, 775 (7th Cir. 1975)). "Under 28 U.S.C. § 1920, . . . costs may be taxed for 'printed or electronically recorded transcripts necessarily obtained for use in the case.'" *Donohoo v. Hanson*, 2017 WL 1250437, at *1 (W.D. Wis. April 4, 2017). In *Donohoo*, the Western District held that there was "no question" that deposition transcripts of the named defendants were "necessarily obtained for use in the case," where the defendants did not rely on the transcripts in support of their motion for summary judgment, the Plaintiff cited the transcripts in response to the motion, and the defendants cited the transcripts in reply. *Id.*

Here, Plaintiffs do not dispute the reasonableness or necessity of the costs claimed by the County Defendants. Rather, Plaintiffs' sole challenge to the costs is based on the Estate's claimed indigence.

"[I]ndigence does not automatically excuse the losing party from paying the prevailing party's costs." *Rivera v. City of Chicago*, 469 F.3d 631, 635 (7th Cir. 2006); *see Luckey v. Baxter Healthcare Corp.*, 183 F.3d 730, 733–34 (7th Cir. 1999). "There is a presumption that the prevailing party will recover costs, and the losing party bears the burden of an affirmative showing that taxed costs are not appropriate." *Beamon v. Marshall & Ilsley Tr. Co.*, 411 F.3d 854, 864 (7th Cir. 2005). This presumption "is difficult to overcome" and therefore, "the district court's discretion is narrowly confined—the court must award costs unless it states good reasons for denying them." *Weeks v. Samsung Heavy Indus. Co.*, 126 F.3d 926, 945 (7th Cir. 1997).

In *Richardson v. Chicago Transit Authority*, the Seventh Circuit held that the district court did not abuse its discretion when it did not address the losing party's indigence when granting costs to the prevailing party. 926 F.3d 881, 893 (7th Cir. 2019). The Court noted that the indigence exception is narrow and "not a blanket excuse for paying costs." *Id*. (*quoting Rivera*, 469 F.3d at 635-36). The Court concluded that the district court does not "abuse[] its direction when it grants costs, with an explanation, but does not explicitly consider plaintiff's indigence." *Richardson*, 926 F.3d at 893.

If the district court does consider the losing party's indigence, it must first consider whether the losing party is "incapable of paying the court-imposed costs at this time or in the future." *McGill v. Faulkner*, 18 F.3d 456, 459 (7th Cir. 1994). "The burden is on the losing party to provide the district court with sufficient documentation to support such a finding. This documentation should include evidence in the form of an affidavit or other documentary evidence of both income and assets, *as well as* a schedule of expenses." *Rivera*, 469 F.3d at 635 (citation and quotation omitted) (emphasis added).

The plaintiffs offer the Declarations of Plaintiff Susan Doxtator and David Armstrong, the Estate's counsel in probate, in support of their objections to the bill of costs. *See* (Decl. of Susan Doxtator, June 3, 2021, ECF No. 183); (Decl. of David Armstrong, June 3, 2021, ECF No. 184.) Ms. Doxtator states that plaintiffs "are aware of no significant property" belonging to Mr. Tubby. (Doxtator Decl. ¶ 2.) Other than some small personal items and a vehicle believed to still be in the possession of law enforcement, his estate also has $2,000.00 from bereavement assistance. (*Id*. ¶¶ 2–3.) Mr. Armstrong also states that Plaintiffs "conducted a diligent investigation to determine if Mr. tubby had assets or property" but does not explain further. (Armstrong Decl. ¶ 3.)

These declarations alone do not overcome Plaintiffs' burden of providing sufficient information to support the application of the indigence exception. Plaintiffs provide no documentation of the value of the vehicle, or what steps they have attempted to collect the vehicle, other than a publicly available Kelley Blue Book value included by counsel in Plaintiffs' brief. (Pls.' Obj. to County Defs.' Bill of Costs at 3, ECF No. 182.) There is also no testimony or documentation describing how the Plaintiffs or their counsel investigated Mr. Tubby's assets and how they came to their conclusions, other than general statements of due diligence. *See* (ECF Nos. 183–184.) Finally, no schedule of expenses or any other documentation was provided to support their objections.

As noted, the Plaintiffs have signaled their intent to pursue this case on appeal, and they characterize the causes of actions alleged in this litigation as assets of the Estate. (Pls.' Obj. to County Defs.' Bill of Costs at 2, ECF No. 182.) Thus, Plaintiffs' potential success on appeal (and potential success on remand) against Defendants other than the County Defendants could give the Estate a monetary asset sufficient to pay the County Defendants' Bill of Costs. Plaintiffs have thus not met their burden of proving the Estate will not have assets in the future.

Next, district court considers "the amount of costs, the good faith of the losing party, and the closeness and difficulty of the issues raised by the case when using discretion to deny costs." *Rivera*, 469 F.3d at 635. The district court should also "provide an explanation for its decision to award or deny costs." *Id*. at 636. The indigence exception to awarding costs to the prevailing party "is a narrow one. Rule 54(d)(1) provides a presumption that costs are awarded to the prevailing party, and the burden is on the non-prevailing party to overcome this presumption." *Id.*

The issues raised against the County Defendants in this case were not close. Plaintiffs argue by citing evidence they presented and believed to be indicative of a "close" case. *See* (Pls.' Obj. to County Defs.' Bill of Costs at 3–4, ECF No. 182.) However, these arguments are only Plaintiffs' subjective opinions. The excessive force claim against Officer O'Brien was held to be "based on hindsight and conjecture." (Dec. and Order Granting Defs.' Mots. Summ. J. at 20, ECF No. 176.) Plaintiffs' failed to cite any pertinent case law to support their qualified immunity argument. (*Id*. at 23–24.) As it relates to the failure-to-intervene claims against the County Defendants, the Court readily held that "[t]he undisputed evidence in this case establishes that the deputies could not reasonably be expected to have acted to stop Officer O'Brien from shooting because they did not have a reasonable opportunity to prevent the shooting." (*Id*. at 25.)

Further, the state-created-danger issue was not close at all, as the Court rejected it for separate, equally convincing reasons. As the Court recognized, "the state-created danger exception has no application to the facts of this case." (*Id*. at 27.) "[E]ven if the exception did apply, Plaintiffs' claim would fail on the merits because Plaintiffs cannot establish the key element that Defendants' conduct 'shocks the conscience.'" (*Id*. at 28.) A third reason why this claim failed is that Lt. Zeigle enjoys immunity. (*Id*. at 29.) The clear evidence established that this case was not "close," at least as it related to the claims against the County Defendants.

To the extent Plaintiffs are correct that the issues were close, then they necessarily concede that the Estate has a potential asset in this litigation on appeal. To the extent that Plaintiffs are correct that the Estate has no assets at all, then they necessarily concede that the Estate's potential appeal is meritless and the issues in the district court were not close. Plaintiffs cannot have it both ways.

Plaintiffs do not dispute that the amount of costs sought were all necessarily incurred by the County Defendants. All costs are related to acquiring deposition transcripts. *See* (ECF No. 178-2.) Depositions costs are authorized by 28 U.S.C.A. § 1920 if they were "necessarily obtained for use in the case." *Little v. Mitsubishi Motors North America, Inc.*, 514 F.3d 699, 701–02 (7th Cir. 2008). Plaintiffs do not deny the necessity of these costs, only that they are "high compared to the assets of the estate." (Pls.' Obj. to County Defs.' Bill of Costs at 3, ECF No. 182.) Not only were these costs necessarily obtained, most of the depositions were noticed by Plaintiffs' counsel. *See* (ECF No. 178-2.) Out of 27 depositions conducted for which the County Defendants seek costs, 21 were noticed by Plaintiff counsel. (*Id*.) Only one was noticed by the County Defendants, and that was to depose the Plaintiffs' expert. (*Id*., Ex. A-16, A-17.) Plaintiffs were aware of the risks involved in conducting numerous depositions—more than the number contemplated under Fed. R. Civ. P. 30(a)(2)(A)(i)—and the possibility that they would be responsible for reimbursement of the same. Further, the amount of the costs related to the value of the Estate is not the standard the district court considers, only "the amount of costs." *Rivera*, 469 F.3d at 635. The amounts of costs for these depositions were necessarily incurred, known to Plaintiffs as the litigation progressed. Therefore, the costs are not too high given the circumstances.

CONCLUSION

Plaintiffs do not dispute the reasonableness or necessity of the costs sought by the County Defendants. Plaintiffs have not met their burden of establishing that the indigency exception applies, as they simultaneously assert that the Estate holds no assets, while preparing to pursue the Estate's interests in this action on appeal. The County Defendants are entitled to these costs, and they respectfully request that the Court awarded them as such.

Dated this 11th day of June, 2021.

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