01-40474

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

01-40471

Case No. 01-40474

EULOGIO MIRELES, BARTOLO MENDIOLA,
ISRAEL TREVINO and FRANCISCO GONZALES, Plaintiffs – Appellants

and DAVID LYNN HORTON, Appellant;

v.

CELANESE CORPORATION and
CELANESE CHEMICAL CORPORATION, Defendants - Appellees

Case No. 01-40471

OSCAR GUERRA, Plaintiff - Appellant

v.

CELANESE CORPORATION and
CELANESE CHEMICAL CORPORATION, Defendants - Appellees

On Appeal from the United States District Court
For the Southern District of Texas - Corpus Christi Division
The Honorable Ricardo J. Hinojosa - United States District Judge

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CHARLES R. FULBRUGE III
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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that Judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Appellees neither request oral argument in this case pursuant to Local Rule 28.2.4, nor believe that oral argument would be useful or proper. The standard of review in this case is abuse of discretion, which must be determined by reviewing only the record in this Court on the single cost and expense issue.

Appellants suggest that oral argument is necessary in this "appeal from summary judgment." Yet, this is *not* a review of summary judgment. Rather, the only issue raised on appeal is whether the district court abused its discretion when it awarded costs and expenses in this case.[1]

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1 Interestingly, Appellants requested oral argument in the prior challenge of the attorneys' fee award, which was granted. Argument focused on the applicable standard of review and confinned facts in the record. There was no substantive legal argument presented by the parties.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Celanese Chemical Corporation, Celanese Corporation make the following disclosure statement. Celanese Chemical Corporation and Celanese Corporation are wholly owned by the parent company, Celanese A. G., which was formed on October 25, 1999.

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STATEMENT OF JURISDICTION

Celanese Corporation and Celanese Chemical Corporation does not have a substantial disagreement with Appellants' statement regarding the jurisdiction of these cases and the status of the two final orders entered by the district court, made the subject of this consolidated appeal.

STATEMENT OF THE ISSUE

Based on the record before it, and in accordance with the applicable statutory authority, the district court entered awards of costs and expenses in these cases. The district court did not abuse its discretion in entering its orders and they should be affirmed.

This is the *only* issue raised by Appellants. Attempts to recite past history have no relevant bearing on this single appellate point.

STATEMENT OF THE CASE

These consolidated appeals challenge only the award of costs and expenses and the manner in which the district court reached its result, claiming that deposition and photocopy and mediation costs were improperly disallowed.

Appellants' underlying employment discrimination cases against Celanese Corporation, Celanese Chemical Corporation ("Celanese") and Arthur Brothers, Inc. ("ABI") were resolved by settlement. A total of $36,500.00 was paid in the *Mireles v. Arthur Brothers, Inc.* and *Oscar Guerra v. Celanese and Arthur*

Brothers, Inc. cases.[2] The district court awarded attorneys' fees and later awarded costs and expenses. Appellee has paid both awards. The only orders under attack in this appeal are the district court's award of costs and expenses. (Appellants' R.E. Tab B; R. 342)

Appellants' repeated rambling about the twenty-five (25) year histories of these cases (Appellants' Brief, p. 4-14) is inappropriate and should not be part of the Statement of the Case. Additionally, in many respects, it is incorrect. Because of Appellants' characterizations of the history of this case, however, Appellee must respond.

First, one of Appellants' complaints is that the district court refused to consolidate the three cases. Yet, Appellants never before challenged on appeal that refusal; consequently, any complaint has been waived and is also improper in the analysis of the award of costs and expenses.

Next, Appellants' assert that the "joint employer issue" was the critical issue which forced Appellee to settle. Appellee has disputed that throughout this litigation; in fact, Appellee settled the cases as a way of ending such protracted, frivolous litigation for what it considered, a nuisance settlement. Appellants would

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2 In a case filed near the time of the instant cases, *Israel Trevino, et al v. Celanese Corporation, Celanese Chemical Corporation and Arthur Brothers, Inc.*, the parties settled for $40,000.00. The Release and Settlement Agreement in that case was complete and included a release of attorneys' fees, costs and expenses. That case is not the subject of the instant appeal. See. Court's Opinion of August 24, 1997. Therefore, Appellee would argue that reference to the history of that case is improper, unless it bears directly on the issue of costs and expenses.

suggest that Appellees should be ordered to pay more costs because it zealously defended its position; such cannot be allowed.

Further, the inescapable fact is that Appellants never obtained any favorable finding on the "joint employer" issue! While Appellants sought and reviewed voluminous information produced in discovery, they did so on a novel theory in the context of employment discrimination cases and they failed to prove their case before the district court. These efforts resulted in, at most, nominal success.

Appellants claim Appellee used "Stalingrad tactics" (Appellants' Brief, p. 16) by delaying a hearing on the joint employers issue; yet there is no evidence that Appellees caused any delay, other than continuances which both parties requested from time to time. In fact, Appellants allowed these cases to languish on the docket without any request for hearing or trial setting for nearly a decade. Further, even if Appellants' characterization of the handling of this litigation is true, it does not relieve Appellants of the obligation to prosecute its case and certainly does not, in and of itself, lend any support to the issue on appeal: whether the district court abused its discretion in entering its order.

STANDARD OF REVIEW

This Court's standard of review is abuse of discretion. *Polythane Systems, Inc. v. Marine Ventures Intern., Ltd.*, 993 F .2d 1201 (5th Cir. 1993);*Fogleman v. ARAMCO*, 920 F.2d 278 (5th Cir. 1991); *United States v. Kolesar*, 313 F.2d 835

(5th Cir. 1963. Under the authority of 28 U.S.C. Section 1920, the trial court has discretion to tax costs. It has great latitude and discretion to make the award, or to refuse to award costs. Unless there is a clear showing of an abuse of discretion, the district court's order may not be reversed. *Id.* Appellants have merely argued that they were "not awarded enough," but have failed to demonstrate why they should have been awarded more and have failed to show that the district court abused his discretion in any respect. Accordingly, the order awarding costs and expenses must be affirmed.

SUMMARY OF ARGUMENT

Appellants argue that, because they took numerous depositions and offered them into evidence at the "joint employer" hearing, those depositions were automatically "necessarily obtained for use in the case." Appellants offered to the district court *no proof* that the depositions were expected to be used at trial, rather than for the discovery process. The district court specifically mentions that Appellants failed to indicate why the depositions were taken and were necessary. (Appellants' R.E. Tab B; R. 342, AA-8) That the Appellants offered the depositions for purposes of the joint employer hearing is also not persuasive or controlling. There was no active trial on the merits; rather, the parties merely submitted matters it wished the court to consider, on a matter that was not dispositive of the case.

Next, there was no favorable finding on the joint employer issue. It is true that Appellants were found by this Court to be "prevailing parties," in its opinion remanding the case for a review of the original attorneys' fee award. The finding was made because of the nominal settlements that were made, *not* because of the joint employer hearing or any ruling, because there was none. Therefore, because there was no trial on the merits and because the "prevailing party" status was based only on the settlements, the district court was correct to deny all the deposition costs. *Fogleman v. ARAMCO*, 920 F.2d 278, 285 (5th Cir. 1991).

Appellants also complain that the district court should have awarded $6,999.44 in photocopy expenses, based in large part on the failure of the district court to consolidate the cases – a fact of which they never complained on appeal. Accordingly, this Court should not entertain any arguments as to consolidation because such issue was never presented to the court *and* is not dispositive on the abuse of discretion review. On both points, Appellants make no showing of how the district court abused its discretion and makes only a passing comment that the district court did not conduct a review or make findings. The record before this Court tells a different story.

ARGUMENT

The key consideration in reviewing the district court action is whether he clearly abused his discretion when he awarded $2,527.58 in costs and expenses. If there is a discernible, factual basis for the district court's order, then it cannot be reversed on appeal.

I. Applicable Statute.

28 U.S.C. §1920 provides that the judge *may* tax as costs, the following: clerk's fees; deposition costs, as long as such depositions are "necessarily obtained for use in the case;" fees for printing and witnesses; fees for copies if "necessarily obtained for use in the case; docket fees; court-appointed experts and interpreters.

The district court retains discretion to determine which of these costs may be awarded. As to deposition and copying costs, the threshold is if *at the time a deposition was taken*, the deposition would have reasonably been expected to be used *at trial* or for trial preparation, then the cost could be considered, as long as the party requesting had prevailed. The party seeking the costs must offer some proof of necessity, which Appellants did not and the district court specifically found Appellants had not. Such is evident from Plaintiffs' Memorandum in Support of Plaintiffs' Amended Bill of Costs, where only the amounts are included, nothing more. (Appellants' R.E., Tab D; Appellants' R.E. Tab B; R. 342); *Fogleman*, 920 F.2d at 285-286.

II. Necessarily Obtained.

In the appeal before this Court, there is no showing that *any* of the depositions, when taken, were expected to be used at trial. In fact, the Appellants' actual bill of costs is merely a collection of various expenses, with no explanation or evidence as to why the costs were necessarily incurred. The history of the case demonstrates that, at the time they were taken, the depositions were taken as discovery on the joint employer issue only. Therefore, because these numerous depositions were taken as part of discovery there was no expectation that they would ever be used at the employment discrimination trial.

Further, as has been stated before, Appellants did not prevail even on this first joint employer issue. The depositions and other evidence was not sought, nor did it prove, that Celanese and Arthur Brothers, Inc. discriminated against Appellants, which of course, would have been the *only* issue at the trial of this cause. Consequently, because there was no favorable joint employer finding and because there was no trial and verdict, there is no showing that such depositions were "necessarily obtained for use at trial."

Prior to the hearing on March 29, 1999, Appellees filed a formal objection to Appellants' bill of costs, stating that there was no showing of the necessity for the deposition and no delineation of the reason for depositions or the photocopying. (R. 331, A-61) Appellants never responded or provided further explanation. The

district court reviewed this and noted in its orders that "the documentation filed with the Court regarding the deposition costs in this case fails to indicate for what purpose such deposition costs were incurred and why they were necessarily obtained.... The Plaintiffs did not provide the Court the necessary information to determine the necessity of the photocopies." (Appellants' R.E. Tab B; R. 342, AA-8) As this Court is aware, the district court had requested such information on numerous occasions, it was incumbent upon Appellants to meet the burden of proof as required by statute; they failed to do so. The district court did not abuse its discretion in carefully reviewing the bill of costs and awarding costs for clerk's fees in the amount of $203.00.

In *Fogleman*, this Court considered ARAMCO's request for the costs associated with the deposition of Vernon Fogleman. ARAMCO used the deposition in support of its Motion for Summary Judgment as to Fogleman's status as a Jones Act seaman, which motion the Court denied. Fogleman contended that the deposition costs should not be allowed because ARAMCO did not prevail on its motion. This Court disagreed and held that the proper inquiry is whether the charges were "necessarily obtained for use in the case." *Fogleman*, 920 F.2d at 285-286.

In this case, Appellants merely filed a bill of costs which listed total costs, and nothing more. Even after receiving Appellees' objections, Appellants

provided no further information to support its request. On appeal, Appellants challenge the district court's review of the bill of costs, by merely citing the record and the names of deponents. They assert that the record alone justifies the finding of necessity. However, as set forth in controlling case law, such is not the inquiry. The critical determination is whether the deposition*at the time it was taken*, could be expected to be sued at trial. Appellants do not meet this test. In fact, the mere use of the depositions at an evidentiary hearing on one issue of the case, which never resulted in a finding, demonstrates why the court was correct. The district court was correct when it found that Appellants failed to demonstrate "necessity."

As stated in *United States v. Kolesar*, 313 F.2d 835 (5th Cir. 1963), this Court was persuaded that the trial judge who had "nurtured this case from inception to successful end" is in the most unique position to know which depositions were necessary. Just as Judge Hincks' found in*Kolesar* that plaintiff's case depended largely on the depositions taken of Navy hospital personnel, Judge Hinojosa was convinced that Plaintiff's employee discrimination claims did not turn on the voluminous discovery depositions taken by Appellants.

III. Photocopying.

The district court reviewed Appellants' requested bill of costs, to which Appellees objected, and disallowed the charges for photocopies. Appellants generally state here that numerous photocopies were needed because lawyers,

experts and paralegals for Texas Rural Legal Aid ("TRLA") were located in at least three different cities, although none of this evidence was included in the bill of costs. When TRLA required the assistance of David Horton, multiple copies may have been easier for the parties, but making review of documents easier for counsel is not the purpose of the statute and does not support Appellants requests for photocopying costs. Appellants received copies of documents from Appellees throughout the discovery process; that they chose to make additional copies so that counsel and experts could proceed in different locations is not a proper basis for these costs to be awarded under Section 1920. Additionally, Appellees' effort to contain the discovery in these cases was a matter always under review by the court and was always handled in accordance with the rules of procedure.

Appellants offered no evidence as to the reason why the photocopies were made, other than the vague, rambling recitation of the history of the case; therefore, their claim can be considered "essentially undocumented," as was determined in *Perez v. Pasadena Independent School District*, 165 F.3d 368, 374 (5th Cir. 1999)

IV. Mediation.

Appellants complain of one $500 mediation costs. In that there were four (4) mediations in this case, and Appellants' request is not clear, the district court did not abuse its discretion in denying this. Additionally, mediation works, if at

all, because both parties participate and share the expenses in the mediation. Section 1920 does not authorize reimbursement of mediation fees and Appellants present no authority for same.

CONCLUSION

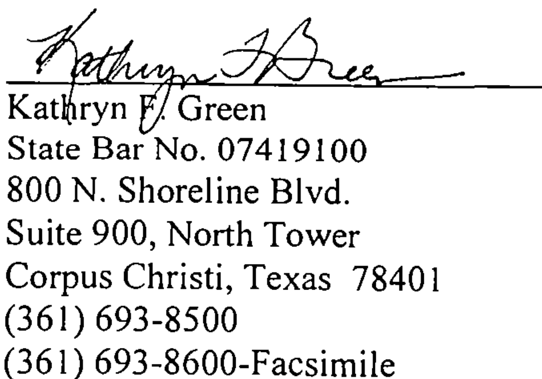
The district court's order with respect to costs and expenses must be affirmed. The costs and expenses Appellants incurred were unreasonable and largely unnecessary, given their handling of the case, the nominal success and the failure to demonstrate to the district court that such costs met the statutory requirement of necessity. Appellants' further argument that Appellees' somehow caused the necessity for these expenses because it "employed Stalingrad tactics" and did not "concede attempts to consolidate the cases" is disingenuous. This smoke and mirrors argument ignores the reality of the litigation: Appellants attempted to assert employment discrimination claims utilizing a novel approach; the initial discovery did not support their contention; they allowed the cases to languish on the docket; Appellees rigorously defended itself from what it considered to be a frivolous case; the district court made rulings when requested to do so and Appellants decided when and how to challenge them. That Appellants may have encountered a more uphill battle than they thought they would does not support a claim for costs and expenses. Nor does the fact that it chose to pursue a statistical approach based on analysis by "experts" reviewing voluminous

documentation provide proof that such costs and expenses were necessary. The district court was in the best position to know the facts, review the request and enter its orders, which should not be disturbed on appeal.

Appellants had every opportunity to review the cases as they were developing them and to make reasonable decisions about further handling. Those facts were reviewed and analyzed when the district court awarded attorneys' fees and should not be part of the consideration of the award of costs and expenses, other than as such analysis bears on the knowledge of the district court with respect to the status of the litigation. Consequently, Appellants' references to*Trevino v. Celanese Corp.*, 701 F.2d 397 (5th Cir. 1983) and*Lipsett v. Blanco*, 975 F.2d 934 (1st. Cir. 1992), suggesting that Appellees' caused the necessity for the costs are misplaced in the context of this appeal and do not represent the proof of necessity that the statute requires the Appellants make. Lastly, Appellants' claim for additional attorneys' fees in the preparation of this appeal should be denied.

WHEREFORE, Appellees Celanese Corporation and Celanese Chemical Corporation pray that this Court affirm in all respects the judgment of the district court below, and to deny the relief requested by Appellants in each of the cases involved in this appeal, *Guerra* and *Mireles*.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Appellees and a computer diskette containing a copy of the Brief of Appellees have been sent by United States certified mail, return receipt requested, to the following attorneys and parties of record this 7th day of December, 2001:

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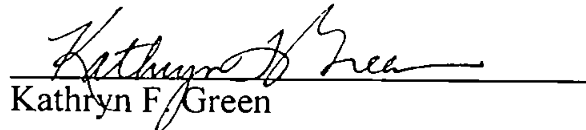


Kathryn F. Green

CERTIFICATE OF COMPLIANCE

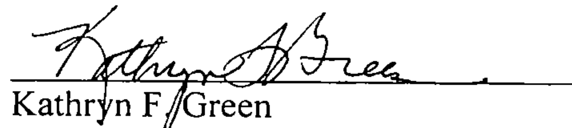
Pursuant to 5th Circuit Rule 32.2.7(c), the undersigned certifies that this brief complies with the type-volume limitations of 5th Circuit Rule 32.2.7(b).

1. Exclusive of the exempted portions of 5th Circuit Rule 32.2.7(b)(3), the brief contains 2,679 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word, in Times New Roman, 14 point font.

3. If the Court so requests, the undersigned will provide an electronic version of the brief and/or a copy of the word printout.

4. The undersigned understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume in 5th Circuit Rule 32.2.7 may result in the Court's striking the brief and imposing sanctions against the person signing the brief.



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