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20-7466

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED

MAR 12 2021

Charles L. Burgett - Petitioner

OFFICE OF THE CLERK

vs.

The General Store No. Two Inc., d/b/a/ Marsh's Sunfresh Market, et al. - Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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PRO SE PETITIONER

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTIONS PRESENTED

1. Whether a party waives costs if it does not file a bill of cost on time pursuant to local rules?
2. Whether a district court should consider a party's indigency or inability to pay in awarding costs?
3. Whether the law precludes recovery of both stenographic and videographic deposition costs?
4. Whether the law allows a district court to award duplicate costs to the parties?
5. Whether a party needs to provide adequate detail regarding copy costs to be awarded those costs?

LIST OF PARTIES

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Petitioner, Charles L. Burgett was Appellant/Plaintiff below. Respondents, who were appellees/defendants below, are the General Store No. Two Inc., during business as Marsh's Sunfresh Market; W.S.C. Services Inc., Andrei Florea; and, police officers Thomas Bethel, Terry Grimmett, and Matthew Payne.

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IN THE SUPREME COURT OF THE UNITED STATES

Charles L. Burgett - Petitioner

vs.

The General Store No. Two Inc., d/b/a/ Marsh's Sunfresh Market, et al. - Respondents

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Charles L. Burgett, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in Cause No. 20-1299, entered on October 22, 2020. Rehearing en banc and panel rehearing was denied December 15, 2020.

This case raises fundamental issues concerning whether *Pro Se* parties receive equal justice in the federal court.

OPINION BELOW

On October 22, 2020 a panel of the Court of Appeals entered its affirmance with opinion the judgment of the United States District Court for the Western District of Missouri. The affirmance with opinion of the Court of Appeals is unpublished.

JURISDICTION

The Court of Appeals entered its judgment on October 22, 2020. On December 15, 2020, the Court of Appeals denied the Petitioner's request for panel rehearing and rehearing en banc, and a copy of the order denying rehearing appears at Appendix 6a. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1920; and, Rule 54(d) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

A. Factual Background.

On April 6, 2016, Charles L. Burgett brought suit against the named defendants including the respondents for assault & battery; false arrest & imprisonment; malicious prosecution; excessive force; and, racial discrimination, which were directed against some or all of the defendants.

On December 28, 2016, the district court [as an unwarranted sanction] unjustly dismissed Burgett's entire civil rights lawsuit with prejudice; and, issued judgment [no findings were made on the merits]. The district court clerk entered judgment on the same day from the district court's granting the defendants' motions to dismiss.

On December 4, 2019, the district court clerk ordered assessment of costs in favor of the defendants.

B. District Court Proceedings.

On January 16, 2017, defendants W.S.C. Services Inc. and Andrei Florea filed a Proposed Bill of Costs for \$3,545.01 (Doc. #113). The foregoing defendants claimed, *inter alia*, \$3,336.15 for transcripts—videotaped deposition [\$1,628.00] and stenographic transcripts [\$1,708.15] (Doc. ##113, P. 1; 113-1, PP. 5-8).

On January 18, 2017, defendant the General Store No. Two Inc. filed a Proposed Bill of Costs for \$1,998.24 (Doc. #114). The preceding defendant claimed \$1,704.84 for the stenographic transcripts (Doc. ##114, 114-1, PP. 2-3), which defendant's counsel claimed was defendant's share (Doc. #126, P. 3); and, \$293.40 in copying costs. (Doc. ## 114, 114-1, P. 4).

On January 18, 2017, defendants Thomas Bethel, Matthew Payne and Terry Grimmett filed other documents but not a Proposed Bill of Cost. (Doc. #115).

On January 30, 2017, Burgett filed objections to defendants' W.S.C. Services, Inc. and Andrei Florea (Doc. #117) and, the General Store No. Two Inc. (Doc. #118) Proposed Bills of Costs; and, defendants' Thomas Bethel, Matthew Payne and Terry Grimmett non-filing of Bill of Costs (Doc. #119). Burgett stated, *inter alia*, "The defendants' counsel, Lynnette Lockhart did not timely or otherwise "file a verified bill of costs, upon a form [AO 133] provided by the Clerk" within the required time of "21 days after entry of final judgment pursuant to Fed.R.Civ.P. 58.'" (App. D, P. 7a; Doc. #119, P. 1).

On December 4, 2019, the district court clerk ordered assessment of costs for all the defendants over the objections of Burgett. (Doc. #142).

On December 11, 2019, Burgett filed a Motion to Retax Costs (App. E, PP. 10a-15a; Doc. #143); and, filed a Reply to defendants' opposition on January 7, 2020 (App. F, PP. 16a-19a, Doc. #146). Defendants Thomas Bethel, Matthew Payne and Terry Grimmett did not oppose Burgett's Motion to Retax Costs. (App. F, P. 18a; Doc. #146, P. 3). Burgett reiterated, "[t]he foregoing defendants waived the purported bill of costs because, "a verified bill of costs [was not timely filed], upon a form [AO 133] provided by the [c]lerk", pursuant to Local Rule 54.1(a). See Doc. #119, P. 1. **The [district] court should vacate the award of costs."** (App. E, P. 11a; Doc. #143, P. 2).

Regarding, defendants W.S.C. Services Inc. and Andrei Florea—Burgett requested the district court to vacate the award of costs because incurred costs were unnecessary, duplicate and unreasonably high. Burgett stated that the defendants' counsel noticed Burgett for a video deposition not a video and stenographic deposition. (App. F, P. 16a; Doc. #146, P. 1; Doc. #60). Therefore, costs can only be claimed for the videotaping and not the stenographic deposition. (Id; App. E, P. 11a; Doc. #143, P. 2). Burgett asserted that the costs for invoice (Doc. #113-1, P. 8) [show balance due]; and, the defendants' counsel continues not to provide any proof (e.g., cancelled checks) that the invoices (Doc. #113-1, PP. 5-8) were paid.

In fact, the invoices (Doc. #113-1, PP. 5-8) show that the costs were billed to Nationwide Insurance Company not the defendants. (App. E, P. 11a; Doc. #143, P. 2; App. F, PP. 16a-17a; Doc. #146, PP. 1-2).

Concerning, the General Store No. Two Inc., Burgett also requested the district court to vacate the award of costs for this defendant because incurred costs were unnecessary, duplicate and unreasonably high. Burgett, *inter alia*, averred the costs for the stenographic transcripts were not necessarily incurred; the transcripts established a duplicate cost; and, the costs for (Doc. # 114-1, PP. 2-3) were not paid [invoices show balance due (Id.; Doc. #118, P. 1)]—there is no proof of payment or obligation to pay the costs. (App. E, P. 11a; Doc. #143, P. 2; App. F, PP. 18a; Doc. #146, P. 3). Burgett further averred that defendant's counsel did not identify what was copied and why the copying was necessary for the case (Doc. #114-1, P. 4). (App. E, P. 11a; Doc. #143, P. 2; App. F, PP. 18a; Doc. #146, P. 3).

In regards to all defendants, Burgett asserted,

"[t]he [district] court should vacate the award of costs because Burgett is indigent and is unable to pay any of the assessed costs. *Lampkins v. Thompson*, 337 F.3d 1009, 1017 (8th Cir. 2003). See Affidavit of Assets, Income and Expenses, Exhibit 1 [App E, PP. 14a-15a, Doc. 143-1, PP. 1-2]. The court should vacate the award of costs because the award is inequitable under the circumstances. Imposing an award of \$7,248.09 costs when Burgett is indigent and has an inability to pay would be inequitable. See *id.* Additionally, imposing costs on indigent civil rights plaintiffs [like Burgett] who cases that were dismissed with prejudice [not on the merits] will have a chilling effect on future similar actions. *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1247-48 (9th Cir. 2014). (App. E, P. 12a; Doc. #143, P. 3)."

On January 13, 2020, the district court denied Burgett's Motion to Retax Costs and awarded costs against him. The district court awarded \$3,282.15—videotaped deposition [\$1,610.00] and stenographic transcripts [\$1,672.15] to defendants' W.S.C. Services, Inc. and Andrei Florea; \$1,998.24—stenographic transcripts [\$1,704.84] and copying costs [\$293.40] to defendant the General Store No. Two Inc.; \$1,704.84—stenographic transcripts to defendants Thomas Bethel, Matthew Payne and Terry Grimmett [none of who opposed Burgett's Motion to Retax Costs]. (App. B, P. 5a; Doc. #149).

C. The Court of Appeals' Opinion.

The court of appeals entered its affirmance with opinion the judgment of the district court; and, denied Burgett's Motion to Strike Brief of Appellee The General Store No. Two Inc. (App. G, PP. 20a-21a). (App. A, PP. 1a-2a).

D. The Court of Appeals' Denial of Panel Rehearing and Rehearing En Banc.

The court of appeals denied rehearing and rehearing en banc. App. 6a.

REASONS FOR GRANTING THE WRIT

The Decision Below Violates The Discretionary Authority Found In Rule 54(d), Conflicts With This Court's And The Standard Employed By Other Courts, And Sets A Serious Precedent That Will Undermine The Public's Perception Of The Right For A *Pro Se* Party To Receive Equal Justice In The Federal Court, Which Calls For An Exercise Of This Court's Supervisory Power.

I. This Court Will Intervene When A Lower Court Ignores or Misapprehends Factual Issues.

The Eighth Circuit severely misapplied the facts to the detriment of Petitioner and unjustly affirmed the award of costs against him. This Court has granted review to correct a lower courts mishandling of factual issues. *Tolan v. Cotton*, 572 U.S. —, 134 S. Ct. 1861 (2014).

II. The Eighth Circuit's Decision Conflicts With This Court, Other Courts Of Appeals, And What It Has Applied In Its Own Circuit On Awarding Costs; And, Sanctioned The Departure From Accepted And Usual Course Of Judicial Proceeding Of The District Court.

A. Bethel, Grimmett and Payne failed to timely file bill of costs.

The Eighth Circuit overlooked that the foregoing defendants did not timely file a verified bill of costs, pursuant to the district court's Local Rule 54.1(a).

The deadline to file a bill of costs is governed by local rules. *S.A. Healy Company v. Milwaukee Metropolitan Sewerage District*, 60 F.3d 305 (7th Cir. 1995). The district court's Local Rule 54.1(a)1 states in pertinent part, "A party seeking an award of costs **must file a verified bill of costs, on the form provided by the Clerk [AO 133], no later than 21 days** after entry of final judgment under Fed. R. Civ. P. 58." Final judgment was entered on December 28, 2016 and defendants—Bethel, Grimmett and Payne **did not** "file a verified bill of costs . . . no later than 21 days [January 18, 2017] after entry of final judgment." No Proposed Bill of Cost was filed on January 18, 2017 by defendants—Bethel, Grimmett and Payne. See Doc. #115. The use of the word, "must" in Local Rule 54.1(a) imposed a mandatory legal obligation on defendants—Bethel, Grimmett and Payne to file their verified bill of costs on or before January 18, 2017. The defendants—Bethel, Grimmett and Payne **did not** file their bill of costs on time; therefore, they **waived** the recovery of costs. The First Circuit Court disallowed costs in the case because plaintiffs did not timely file bill of costs. *Phetosomphone v. Allison Reed Group, Inc.*, 984 F.2d 4,9 (1st Cir. 1993).

The district court clerk wrongly ordered assessment of costs. In turn, the district court abused its discretion and improperly ordered award of costs. In turn, the Eighth Circuit overlooked the district court's abusive course and sanctioned the district court's order awarding costs.

B. The district court Did Not consider Petitioner's indigency and inability to pay.

The Eighth Circuit ignored the law requiring the district court to consider Burgett's indigency in awarding costs. The district court's underlying factual findings on alleged willfulness and prejudice were biased and clearly erroneous; and, the district court's order of dismissal was an abuse of discretion. District court judge Bough dismissed Burgett's claims under the pretext that he disregarded court rules. The dismissal was merely a disguise to aid the defendants in violating Burgett's civil rights and to aid the defendants in escaping liability for engaging in, *inter alia*, racist and cowardly conduct against Burgett. The prior panel of the Eighth Circuit condoned the misconduct of the defense counsel, district judge Bough, district court staff; and, displayed an unjust focus on African *Pro Se* Burgett rather than looking at the totality of circumstances. Burgett is entitled to an impartial and disinterested tribunal in all cases. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009).

District Courts have discretion to limit or deny costs—*Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437 (1987); *Reva Inc. v. Spanfelner*, Case No. 19-20664-CIV-MARTINEZ/AOR (S.D. Fla. Jan. 11, 2021); *Atlas Biologicals, Inc. v. Kutrubes*, Civil Action No. 1:15-cv-00355-CMA-KMT (D. Colo. Jul. 10, 2020) ("Rule 54(d) provides that the cost shall be taxed against the losing party unless the

court otherwise directs. . . . It is phrased permissively because Rule 54(d) generally grants a federal court discretion to refuse to tax costs in favor of the prevailing party."). **The district court abused its discretion in not denying costs to the defendants.**

The district court was required to consider Burgett's indigency. See *In re Paoli R.R. Yard PCB Litigation*, 221 F.3d 449, 463 (3d Cir. 2000) (recognizing the most significant factor in determining whether to deny costs is the losing party's indigency or inability to pay). See additionally, *Grewal v. Cuneo Gilbert & LaDuca LLP*, No. 13-cv-6836 (RA) (S.D.N.Y. Oct. 26, 2020) ("Denial of costs is especially appropriate in light of the fact that, whereas Defendants are a well-established law firm and lawyers at that firm, Plaintiff is a *pro se* litigant who asserts that she is unemployed and has limited financial resources. Under these circumstances, it would be significantly more burdensome for Grewal to absorb the costs."); *Borum v. Brentwood Vill., LLC*, Civil Action No.: 16-1723 (RC) (D.D.C. Sep. 4, 2020) (Courts may consider financial hardship when awarding costs). Some courts have denied costs outright based on inability to pay. See, e.g., N.O. by *Orwig v. About Women Ob/Gyn, P.C.*, 440 F. Supp. 3d 565, 567-68 (E.D. Va. 2020) (declining to award costs due to plaintiff's inability to pay and ongoing medical bills); *Cramer v. Equifax Info. Servs.*, No. 4:18-CV-1078-SEP (E.D. Mo. Feb. 24, 2020) ("A losing party's indigency is a factor the court should

consider when determining whether to tax costs, and is a valid reason for not awarding them." Id. (citing *Lampkin v. Thompson*, 337 F.3d 1009, 1017 (8th Cir. 2003), *Poe v. John Deere Co.*, 695 F.2d 1103, 1108 (8th Cir. 1992))").

Burgett is, in fact, indigent as demonstrated by Doc. #143-1 (App. E, PP. 14a-15a); Burgett has an inability to pay; and, the district court order of costs is inequitable. The district court abused its discretion, which was unjustly affirmed by the Eighth Circuit.

C. The district court improperly awarded costs to W.S.C. Services, Inc. and Andrei Florea for both a videotaped deposition and stenographic transcript.

The Eighth Circuit ignored that the above defendants' counsel noticed Burgett for a video deposition not a video and stenographic deposition. The Eighth Circuit misapprehended the law—no costs should be recoverable for both a videotaped deposition and stenographic transcript.

Since the defendants' counsel—W.S.C. Services, Inc. and Andrei Florea noticed Burgett only for a video deposition, costs can only be claimed for the videotaping and not the stenographic deposition. *Blitz Telecom Consulting, LLC v. Peerless Network, Inc.* Case No: 6:14-cv-307-Orl-40GJK (M.D. Fla. Aug. 31, 2016) (costs of conducting the deposition in the manner noticed are recoverable); *Morrison v. Reichhold Chemicals, Inc.*, 97 F.3d 460, 464-65 (11th Cir. 1996). Additionally, no costs should be recoverable for both a videotaped deposition and stenographic

transcript. *Cherry v. Champion Int'l Corp.*, 186 F.3d 442, 448-449 (4th Cir. 1999).

Governing case law makes it clear that 28 U.S.C. § 1920(2) precludes recovery of both stenographic and videographic deposition costs [Fees for printed or electronically recorded transcripts (28 U.S.C. § 1920(2)]. *Travelers Indem. Co. of Conn. v. Attorney's Title Ins. Fund, Inc.*, Case No: 2:13-cv-670-FtM-38CM (M.D. Fla. Jan. 14, 2019) ("[f]ees for printed or electronically recorded transcripts" are recoverable); *Cowden v. BNSF Railway Co.* 991 F.Supp.2d at 1090-91 (2014); *Lift Truck Lease & Service, Inc. v. Nissan Forklift Corporation, North America*, 4:12CV153 CAS, 2013 WL 6331578, at *2 (E.D.Mo. Dec. 5, 2013) (finding “§ 1920(2) precludes the recovery of the cost of both a stenographic transcript and video of the same deposition”); *MEMC Elec. Materials, Inc. v. Sunlight Grp., Inc.*, No. 4:08CV535 FRB, 2012 WL 918743, at *2 (E.D.Mo. Mar. 19, 2012) ("[I]t would be contrary to § 1920's plain language to allow MEMC to recover costs for both stenographic and video costs for [certain] depositions."); *Am. Guar. & Liab. Ins. Co. v. U.S. Fid. & Guar. Co.*, 2010 WL 1935998, at *2 ("The ordinary usage of the word 'or' is disjunctive, indicating an alternative.... [I]t would be contrary to the plain language of § 1920 to allow Defendants to recover costs for both stenographic transcripts and video costs for the same depositions.").

The Eighth Circuit wrongly affirmed the district court's abuse of discretion in ordering costs.

D. The district court unjustly awarded duplicate transcript costs to the defendants.

From the outset, the Eighth Circuit disregarded that attorney Ryan Edward Karaim for General Store No. Two Inc. did not timely enter his appearance as required. No attorney licensed to practice in the Eighth Circuit jurisdiction had entered an appearance on behalf of appellee, The General Store No. Two Inc. and appellee were in default. (App. G, PP. 20a-21a, Doc. # 4915293, PP. 1-2). The foregoing appellee's brief should have been struck from the record; however, the Eight Circuit denied Burgett's Motion and granted Ryan Edward Karaim attorney privilege. Notwithstanding, the Eighth Circuit distorted the facts and misinterpreted the law—the foregoing defendant and the other defendants did not submit evidence that the costs for the stenographic transcripts were not duplicative nor did defendants submit evidence that they paid the costs.

The bill for stenographic transcript - Doc. #113-1, P.6 [defendants W.S.C. Services, Inc. and Andrei Floreal] shows 336 pages at \$4.25 equals \$1,428.00 plus 27 exhibits at .20 equals \$5.40 for a total of [\$1,433.40]; Doc. #114-1, P.2 [defendant the General Store No. Two Inc.] shows [\$1,534.89]; and, Doc. #115-2 [defendants Bethel, Grimmett and Payne] shows [\$1,534.89] all of which are for the same deposition that occurred on October 26, 2016—**Duplicate Costs**. The foregoing Doc. ## show that a total of four transcripts were billed for \$4,963.28.

The defendants' counsels billed for four originals rather than for one plus the cost of copies for the other three. Under 28 U.S.C. § 1920(4), the expense of copying a depositions may be taxed as cost only if the copies were "necessarily obtain for use in the case [and the copies were not necessarily obtained]." *Fogleman v. Aramco*, 920 F.2d 278 (5th Cir. 1991)(costs of original depositions and copies are recoverable under 28 U.S.C. § 1920(2) and § 1920(4) respectively). The three copies [1008 pages] should have been billed at the copy rate not as original. Likewise, the bills for stenographic transcripts - Doc. #113-1, P.8 [\$125.60]; #114-1, P.3 [\$169.95]; and, #115-3 [\$169.95]) are for the same "statement on the record" of November 1, 2016—**Duplicate Costs**. Copy expense for two of the transcripts should have been billed under 28 U.S.C. § 1920(4). Although, Burgett's argues, *inter alia*, that no stenographic deposition was noticed, the appellees excessively billed beyond the copy expense cost for the October 26, 2016 deposition and November 1, 2016 "statement on the record". **The district court egregiously abuse its discretion in awarding duplicate costs, which was unjustly sanctioned by the Eighth Circuit.**

It is a fact that the costs for invoice (Doc. #113-1, P. 8) shows balance due; and, the defendants' counsel—W.S.C. Services, Inc. and Andrei Florea has not provided any proof (e.g., cancelled checks) that the invoices (Doc. #113-1, PP. 5-8) were paid. In fact, the invoices (Doc. #113-1, PP. 5-8) show that the costs were

billed to Nationwide Insurance Company not the defendants. Likewise, it is a fact that the costs for (Doc. #114-1, PP. 2-3) shows balance due. The defendant's counsel—the General Store No. Two Inc. has not provided any proof (e.g., cancelled checks) that the invoices were paid.

The Eighth Circuit wrongly affirmed the district court's abuse of discretion in awarding costs.

E. The district court improperly awarded the General Store No. Two Inc. copying costs.

The Eighth Circuit overlooked that the above-mentioned defendant provided inadequate detail regarding the copying costs. The documentation provided by the defendant's counsel—the General Store No. Two Inc. for copy costs merely indicate that photocopies were made. See Doc. #114-1, P.4 ("110.011 05/19/2016 2A 4 0.500 4.00 Photocopy expense (8 color copies @ 0.50)"). The defendant's counsel did not identify what was copied and why the copied documents were necessary for the case. The providing of inadequate detail regarding the copying costs is inconsistent with case law. See for example *Eolas Techs. Inc. v. Adobe Sys., Inc.* 891 F.Supp.2d at 807 (E.D. Tex. 2012).

This Court should uphold the guarantee of Equal justice for all (Equal justice under law) as engraved on the West Pediment, above the front entrance of the United States Supreme Court building— approved by

**Supreme Court Chief Justice Charles Evans Hughes Sr. (1930-1941), and
Associate Justice Willis Van Devanter (1911-1937).**

This Court is symbolic of our entire judicial system. This case presents the opportunity for the Court to exercise its Supervisory Power to guarantee the fundamental principles of fairness is untarnished; and, to secure the public's perception of the right of a *pro se* party to receive equal justice in the Federal Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: March 12, 2021

Respectfully Submitted,



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