

20-334 SAN ANTONIO, TX V. HOTELS.COM

DECISION BELOW: 959 F.3d 159

LOWER COURT CASE NUMBER: 19-50701

QUESTION PRESENTED:

Under Fed. R. App. P. 39(e), four categories of “costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule.” In a 1991 two-judge, unpublished disposition, the Fifth Circuit construed an outdated version of Rule 39(e) to hold that “district court[s] ha[ve] no discretion whether, when, to what extent, or to which party to award costs” under Rule 39(e), making a full award of costs “mandatory.” *In re Sioux Ltd., Sec. Litig.*, No. 87-6167, 1991 WL 182578, at *1 (5th Cir. Mar. 4, 1991). Every other circuit confronting the question (both before and after Rule 39(e)’s 1998 amendment) has held the opposite: “district court[s] ha[ve] broad discretion to deny costs to a successful appellee under Rule 39(e).” *Republic Tobacco Co. v. N. Atl. Trading Co.*, 481 F.3d 442, 449 (7th Cir. 2007). Despite recognizing that “most other circuits” have adopted the “contrary position,” the panel below held it was bound by its earlier precedent; the full Fifth Circuit subsequently denied re hearing en banc (over the votes of six dissenting judges), entrenching an acknowledged circuit conflict.

In so holding, the Fifth Circuit affirmed a \$2 million cost award against San Antonio, despite the district court’s finding of “persuasive” reasons to deny or reduce that award. This case is thus an ideal vehicle for resolving a clear, intractable, and long-standing split over the proper meaning of Rule 39(e)—as it is routinely applied to the most significant portion of a cost award following a successful appeal.

The question presented is:

Whether, as the Fifth Circuit alone has held, district courts “lack[] discretion to deny or reduce” appellate costs deemed “taxable” in district court under Fed. R. App. P. 39(e).

CERT. GRANTED 1/8/2021