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

IN RE: PAOLI RAILROAD YARD PCB LITIGATION	:	MASTER FILE NO. 86-2229
THIS DOCUMENT RELATES TO:	:	
MABEL BROWN	:	NO. 86-2229
GEORGE BURRELL	:	NO. 86-2235
WALLACE D. CUMMINS	:	NO. 86-2669
SYLVAN C. COHEN	:	NO. 86-4037
K. LOUISE JONES	:	NO. 86-5277
JAMES LAMENT	:	NO. 86-5886
CHRISTOPHER S. BROWN	:	NO. 86-7414
CATHLENE BROWN	:	NO. 86-7415
CRAIG BROWN	:	NO. 86-7416
MARGHERITA BARBETTA	:	NO. 86-7417
MARY RETTA JOHNSON	:	NO. 86-7418
CELESTE BROWN	:	NO. 86-7419
CLEMMON BROWN	:	NO. 86-7420
CLOYD BROWN	:	NO. 86-7421
CURTIS BROWN	:	NO. 86-7422
JOHN INGRAM	:	NO. 86-7561
MARY ALICE KNIGHT	:	NO. 87-0712
WILLIAM BUTLER	:	NO. 87-2874
MATTHEW CUNNINGHAM	:	NO. 87-5296

MEMORANDUM

R.F. KELLY, J. AUGUST 2, 1999

The parties in this case have asked this Court to review the Clerk's Taxation Of Costs, entered March 11, 1999, awarding Defendants the amount of 184,675.12. Defendants, Monsanto Company, General Electric Company, Westinghouse Electric Corporation, and the City of Philadelphia, have filed an appeal from the Clerk's decision, seeking review of the Clerk's denial or failure to address five cost items, and, subsequently, filed a Motion for Resolution of Defendants' Appeal from the Clerk's

Taxation of Costs and Judgment entered thereon. Also before this Court is Plaintiffs' Motion to Have This Court Review the Clerk of Court's Award of Costs, seeking an order refusing to tax any costs. For the following reasons, Defendants' Appeal is granted in part and denied in part, and Plaintiffs' Motion is denied.

I. BACKGROUND

Having prevailed at trial from this 13-year old complicated toxic tort case, Defendants, on November 30, 1995, filed their bill of costs. Plaintiffs filed objections to the bill of costs on April 20, 1998. On the following day, April 21, 1998, the Clerk of Court held a telephone conference on the taxing of costs.[1] Subsequently, on March 10, 1999, the Clerk of Court entered judgment on taxation of costs in favor of Defendants in the amount of $184,675.12.

By their appeal, Defendants seek review of the Clerk's denial or failure to address the following:

1. Denial of $2,105.70 for videotape deposition transcript costs;

2. Denial of $18,526.95 and $7,706.90 for photocopying costs of motions, pleadings and briefs;

3. Failure to address claim of $9,780.00 in costs for photocopying medical records and other records;

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[1] "Defendants filed a reply brief on June 9, 1998, to which plaintiffs filed a sur-reply on July 10, 1998." Clerk's Taxation of Costs, entered 3/11/99 (Ex. A to Defs.' Appeal) at 1.

4. Failure to address claim of $15,253.76 in costs for Defendants' trial exhibits; and

5. Failure to address claim of $995.00 for two videotape depositions.

After Defendants filed the instant appeal, the City settled the claims against it and is no longer pursuing a claim for costs. As a result, Defendants Monsanto, General Electric, and Westinghouse do not contest a reduction in the total award to reflect the City's withdraw of its claims for costs.

Plaintiffs have requested de novo review and an order refusing to tax any costs. To support their request, Plaintiffs set forth the following five arguments: (1) it would be inequitable to tax any costs against any of the Plaintiffs in light of their financial status, the magnitude of the costs at issue, the reason the costs were incurred, and the merit of Plaintiffs' claims; (2) it would be inequitable to tax costs against one Plaintiff that were incurred in another Plaintiff's lawsuit; (3) costs should not be taxed which were incurred by one or more settling defendants that have waived any such claim; (4) certain of the costs which Defendants seek are inappropriate; and (5) the Non-Settling Defendants cannot be said to have prevailed against Sylvan Cohen, who voluntarily dismissed his individual action so that he could participate as an absent class member in any class action certified in state court, and, thus, no costs

should be taxed against him.

II. STANDARD OF REVIEW

Rule 54(d) of the Federal Rules of Civil Procedure provides the standard for use in taxing costs in all cases.[2] Smith v. SEPTA, 47 F.3d 97, 99 (3d Cir. 1995). It states the following:

> Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Such costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

FED. R. CIV. P. 54(d).

The language of Rule 54(d)(1) creates a presumption in favor of awarding costs to the prevailing party, which makes such an award automatic in the absence of an express direction to the contrary by the district court. Nat'l Information Serv. v. TRW, 51 F.3d 1470, 1471-72 (9th Cir. 1995); see also Smith, 47 F.3d at

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[2] This Court may only tax costs explicitly mentioned in 28 U.S.C. § 1920, which includes the following: (a) fees of the clerk and marshal; (b) 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 28 U.S.C. § 1923; (6) compensation of court-appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under 28 U.S.C. § 1828.

99 (“Under this rule, a prevailing party generally is entitled to an award of costs unless the award would be `inequitable.’”).

> The unsuccessful litigant can overcome this presumption by pointing to some impropriety on the part of the prevailing party that would justify a denial of costs. The loser bears this burden because the denial of costs is by nature a penalty. A district court therefore generally must award costs unless the prevailing party is guilty of some fault, misconduct, or default worthy of punishment.

Nat’l Information, 51 F.3d at 1472 (citations omitted); see also Smith, 47 F.3d at 99 (describing the limits on a district court’s discretion to deny costs to a prevailing party as a penalty for some defection displayed by said party during the course of the litigation); Greene v. Fraternal Order of Police, 183 F.R.D. 445, 448 (E.D. Pa. 1998) (“[T]he Third Circuit has ruled that for a district court to deny costs to a prevailing party is in the nature of a penalty.”).[3]

Thus, this Court has limited discretion in taxing costs and must explain its conclusions on the record. Farley v. Cessna Aircraft Co., No. CIV. A. 93-6948, 1997 WL 537406, *3 (E.D. Pa. Aug. 1, 1997) (“If the court denies a cost, it must articulate a reason why the prevailing party is not entitled to that cost.”).

III. TIMELINESS

[3] Examples of misconduct that would warrant denying costs to a prevailing party include: calling unnecessary witnesses, bringing in unnecessary issues or otherwise encumbering the record, or delaying in raising objections fatal to the plaintiff’s case. Smith, 47 F.3d at 99 (citation omitted).

At the outset, Defendants have objected to Plaintiffs' Motion To Have this Court Review the Clerk's Taxation of Costs as untimely. The Clerk's decision was entered on March 11, 1999. Under Rule 54(d)(1) of the Federal Rules of Civil Procedure, the parties had five days, excluding intermediate Saturdays and Sundays, from the date that judgment was entered by the Clerk on taxation of costs to file a motion to have the action of the Clerk reviewed by this Court.[4] Thus, an appeal of the Clerk's decision in the instant case was required to be filed on or before Thursday, March 18, 1999. While Defendants did file their appeal by the above due date, Plaintiffs' Motion To Have This Court Review the Clerk of Court's Award of Costs was not filed until March 22, 1999, four days after the due date for taking an appeal. According to Defendants, "Plaintiffs' failure to file a timely appeal renders their appeal defective and this Court has no discretion to exercise its equitable powers and allow an

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[4] The five-day appeal period begins on the day the Clerk's Taxation is entered on the docket and no additional time is allowed under Rule 6(e), even if the clerk mails the taxation of costs to counsel. Hines v. SEPTA, Civ. A. No. 92-4314, 1996 WL 460052, *1-2 (E.D. Pa. Aug. 9, 1996); see also Peasley v. Armstrong World Industries, Inc., 128 F.R.D. 681 (S.D. Fla. 1989) ("[T]he additional three days provided by Rule 6(e) do not apply to judgments which are not the subject of `service,' whether or not the mails were used to transmit the judgment from the Clerk to a party."); but see Wright v. McDonald's Corp., Civ. A. No. 91-2061, 1995 WL 284216, *1 (E.D. Pa. May 8, 1995); Second & Asbourne Assocs. v. Cheltenham Township, Civ. A. No. 88-6400, 1990 WL 165894, *1 (E.D. Pa. Oct. 26, 1990), granting recons. on other grounds, 1991 WL 9356 (E.D. Pa. Jan. 28, 1991); Raio v. American Airlines, Inc., 102 F.R.D. 608, 610 (E.D. Pa. 1984).

untimely filing." Defs.' Brief at 4-5 (citing E.D. PA. CIV. P. 54.1(b)).

In response, Plaintiffs contend that Local Rule 54.1(b) allows a party to file objections to an order taxing costs "within five (5) days after notice of such taxation." Pls.' Reply at 3 (citing E.D. PA. R. CIV. P. 54.1(b)(with emphasis)). Because Plaintiffs' counsel did not receive notice of the Clerk's decision until March 15, 1999, Plaintiffs argue that their Motion for Review of the Clerk's decision was timely filed. However, Defendants are correct in their contention that Local Rule 54.1(b) is not controlling with regard to the procedural aspects of litigation where, as here, it is inconsistent with the Federal Rules of Civil Procedure. See Baylson v. Disciplinary Board, 764 F. Supp. 328, 336 (E.D. Pa. 1991) ("Local Rules that are in conflict with the Federal Rules or Acts of Congress are nullities."), aff'd, 975 F.2d 102 (3d Cir. 1992); see also Laskey v. Continental Products Corp., 804 F.2d 250, 255 (3d Cir. 1986) ("The primacy of the Federal Rules of Civil Procedure with regard to the procedural aspects of litigation in federal courts is well-settled."). Thus, this Court concludes that Plaintiffs' Motion was untimely filed on Monday, March 22, 1999.

Notwithstanding the above, this Court further denies Plaintiffs' motion on its merits, as outlined below.

IV. THE CLERK'S TAXATION OF COSTS

In challenging the Clerk's award of costs to defendants, Plaintiffs initially make much of the fact that there is a great disparity between the parties' wealth.

> However, it is not "`inequitable' to tax costs in favor of a prevailing party with substantially greater wealth than the losing party." Smith v. SEPTA, 47 F.3d 97, 99 (3d Cir. 1995). So long as the losing party can afford to pay, the disparity between the parties' financial resources is not germane to the issue of taxing costs. See id. at 100.

Frey v. Crosman Airgun, No. CIV. A. 96-7290, 1999 WL 126095, *2 (E.D. Pa. March 8, 1999). Here, Plaintiffs submit that because they cannot pay costs in question, the disparity in the parties' wealth should be taken into consideration. In support of their lack of ability to pay, Plaintiffs have submitted materials, including seventeen (17) affidavits that describe Plaintiffs' limited financial means, none of which were before the Clerk of Court.

Defendants object to Plaintiffs' submission of these materials because they were not part of the record below, arguing that it is improper for this Court to consider such evidence now in reviewing the Clerk's award of costs. Defs.' Resp. Opposing Pls.' Motion at 8-9 (citing Fassett v. Delta Kappa Epsilon, 807 F.2d 1150, 1165 (3d Cir. 1986) (proper function of appellate court is to review the decision below on the basis of the record below)). Defendants further object to the submission of this

material on appeal, arguing that Plaintiffs had sufficient time to submit these affidavits and any other materials to contest Defendants' Application for Costs. Defs.' Response to Pls.' Motion at 9 n.6.

"While the court `has the discretion to consider the losing party's inability to pay when reviewing the taxation of costs, the party asserting the lack of funds must demonstrate his indigence." Fitchett v. Stroehmann Bakeries, Inc., No. CIV. A. 95-284, 1996 WL 47977, *2 (E.D. Pa. Feb. 5, 1996). That Plaintiffs failed to present the above affidavits to the Clerk to support their purported financial status leaves this Court with no suitable basis for reducing the costs sought by Defendants.[5] Cf. Samar Fashions, Inc. v. Private Line, Inc., 116 B.R. 417, 420 (E.D. Pa. 1990) (district court's review of bankruptcy appeal is limited to the record before the bankruptcy court).

Plaintiffs also argue that this Court should not tax the costs associated with this case because Plaintiffs merely pursued their rights in good faith, believing that they had been

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[5] Plaintiffs incorrectly state that the Clerk's decision to tax costs "does not have the underpinnings of finality associated with a decision of the court from which an appeal may be taken." Pls.' Reply at 2. Indeed, the plain language of Local Rule 54.1(b) provides: "All bills of costs requiring taxation shall be taxed by the Clerk, subject to an appeal to the Court." E.D. PA. R. CIV. P. 54.1(b) (emphasis added). While this Court's review of the Clerk of Court's taxation of costs is de novo, addressed to the sound discretion of the Court, such a review does not require this Court to consider the sketchy averments in Plaintiffs' belated affidavits.

injured after the EPA determined that the PCB contamination about which Plaintiffs complained of was a health and environmental hazard. However, "[t]he good faith pursuit of rights, alone, does not provide sufficient basis to avoid the taxation of costs." Fitchett, 1996 WL 47977 at *3. Moreover,

> [a]ll parties to a federal action have an obligation to act in good faith and with proper purpose. It follows that noble intentions alone do not relieve an unsuccessful litigant of the obligation under Rule 54(d) to compensate his opponent for reasonable costs. "If the awarding of costs could be thwarted every time the unsuccessful party is a normal, average party and not a knave, Rule 54(d)(1) would have little substance remaining."

Nat'l Information Servs., 51 F.3d at 1472-73 (citations omitted); see also Greene, 183 F.R.D. at 448 ("[T]he mere fact that plaintiffs' claim was not frivolous does not mean that they should be relieved of the burden of paying costs.").

Next, Plaintiffs contend that costs should not be imposed on a joint and several basis. Rather, Plaintiffs argue that apportionment of costs in this case is necessary and proper because Plaintiffs' actions are separate, they raise different claims against different sets of parties, and Defendants have failed to specify which costs were attributable to which Plaintiffs' actions.

Defendants point out, however, that these cases were litigated as consolidated cases from the outset and the costs

incurred by the Defendants were, for the most part, incurred for the joint defense of these cases and were in large part for non-plaintiff-specific costs. Based on the above, this Court sees no justification for departing from the generally accepted rule that losing parties are jointly and severally liable for costs. See, e.g., United States v. Local 1804-1, 1996 WL 22377, at *2 (S.D.N.Y. 1996); Morales v. Smith, No. 94 CIV. 4865(JSR), 1998 WL 352595, *2 (S.D.N.Y. June 26, 1998); Posner v. Lankenau Hospital, CIV. A. No. 82-1387, 1990 WL 18250, *3 (E.D. Pa. Feb. 26, 1990).

In addition, Plaintiffs suggest that Defendants' Cost Application be reduced by two-thirds (2/3) to reflect the fact that Plaintiffs have now settled with six of the nine defendants and if Defendants' Cost Application only seeks payment for those costs incurred by the five defendants who submitted it, then any amount which the Court finds taxable should be reduced by at least forty percent (40%) to reflect Plaintiffs' settlement with two of the Defendants (SEPTA and the City), who have agreed to waive all costs.

Defendants confirm that the costs incurred by the settling defendants, Conrail, Penn Central, Amtrak and the Budd Company, were never included in Defendants' Application to begin with and, thus, did not have to be deducted from the total claim for costs. Because Defendant SEPTA's costs were included in the Application, the Clerk correctly reduced the total award of costs

by 20% based on that defendant's settlement. And, as already explained above, now that the City and Plaintiffs have reached a settlement and the City will not be pursuing a claim for costs at this stage, Defendants do not contest the further reduction of costs by an additional 20% to reflect the withdrawal of the City's portion of Defendants' Cost Application. Accordingly, this Court finds that total award of costs computed by the Clerk should be reduced by an additional 20%.

Plaintiffs also argue that this Court should not award costs associated with defense witnesses who did not testify at trial. Pls.' Supp. Mem. at 20. However, costs associated with deposing witnesses who did not testify at trial are taxable when the depositions appear reasonably necessary to the parties in light of a particular situation existing at the time they were taken. Raio, 102 F.R.D. at 611. This Court is satisfied that defendants necessarily conducted the depositions in this case and, thus, costs are properly awarded for them.

Furthermore, Plaintiffs challenge the costs associated with obtaining or duplicating medical records of the Plaintiffs because they only sought medical monitoring at trial. In response, Defendants state that the majority of Plaintiffs only sought recovery at trial for medical monitoring because their personal injury claims had been dismissed by way of summary judgment in 1992, which was affirmed on appeal. See In Re Paoli

R.R. Yard PCB Litig. ("Paoli II") 35 F.3d 717, 785 (3d Cir. 1994)(aside from minor claims by two Plaintiffs, the Third Circuit affirmed "the district court's grant of summary judgment with respect to the present injury claims of all of the other plaintiffs."), cert. denied sub nom., 513 U.S. 1190 (1995). Defendants explain that up until that point Plaintiffs' experts had taken the position that all of Plaintiffs physical ailments were caused by their alleged exposure to PCBs, leaving it up to Defendants to disprove Plaintiffs' contentions. In addition to the above, Plaintiffs medical records were necessarily obtained by Defendants in order to evaluate their need for medical monitoring. Paoli II, 35 F.3d at 788. Based on the above, this Court finds that the Clerk's award of costs to Defendants for obtaining and duplicating Plaintiffs' medical records was proper.

Next, Plaintiffs focus on one of the two plaintiffs who initially sought property damage recoveries, Sylvan Cohen, contending that the costs associated with Mr. Cohen are not taxable because he voluntarily dismissed his claims in order to participate in the putative class action pending in Pennsylvania state court as an absent class member. Thus, Plaintiffs argue that the Defendants have not prevailed against Mr. Cohen. But even if Mr. Cohen's were voluntarily dismissed without prejudice, subject to the condition that plaintiff not file another individual action asserting the same claims as in his complaint,

Defendants are still regarded as prevailing parties for purposes of Rule 54(d). See, e.g., Aerotech, Inc. v. Estes, 110 F.3d 1523, 1527 (10th Cir. 1997) (defendant is prevailing party under Rule 54 when the plaintiff dismisses its case against the defendant, with or without prejudice); First Commodity Traders, Inc. v. Heinold Commodities Inc., 766 F.2d 1007, 1015 (7th Cir. 1985) ("Under Rule 54(d), `[w]here there is a dismissal of an action, even where such dismissal is voluntary and without prejudice, the defendant is the prevailing party.'"); Schwarz v. Folloder, 767 F.2d 125, 130-31 (5th Cir. 1985) (same). Accordingly, the Clerk properly taxed costs relating to Sylvan Cohen's claims.

Costs associated with obtaining expedited trial transcripts have been deemed necessary and, thus, taxable, in cases involving complex issues or when a trial takes place over a long period of time. Depasquale v. Int'l Business Machines, No. 94-3058, 1998 WL 195662, *2 (E.D. Pa. April 2, 1998). Here, the parties agree that this case was extremely complex. Indeed, the trial and pretrial proceedings were long and involved complicated scientific and medical issues. As a result, this Court finds that expedited transcripts were necessary and, therefore, the costs were properly taxed.

Likewise, the costs associated with the 1992 and 1995 in limine hearings are taxable. Willis v. Bell, No. 86-9589,

1991 WL 147378, *2 (N.D. Ill. July 26, 1991) (court reporter's transcript fee for hearing on motions in limine was reasonably necessary to the preparation for trial). Despite Plaintiffs' contention that Defendants' in limine motions were "in whole unsuccessful," Defendants correctly point out that these hearings led to the dismissal of the majority of Plaintiffs' claims. Accordingly, the Clerk properly taxed these costs against Plaintiffs.

Courts have also taxed costs for demonstrative exhibits pursuant to 28 U.S.C. § 1920(4). In re Kulicke & Soffa Indus. Sec. Litig., 747 F. Supp. 1136, 1147 (E.D. Pa. 1990), aff'd, 944 F.2d 897 (3d Cir. 1991); see also Maxwell v Hapag-Lloyd Aktiengesells-Chaft, 862 F.2d 767, 770 (9th Cir. 1988); Nissho-Iwai Co. v. Occidental Crude Sales, 729 F.2d 1530, 1553 (5th Cir. 1984). At issue here are the displays, charts, enlarged and mounted photographs, and videotapes used by Defendants at trial. The above exhibits aided the jury and this Court during the trial of this case. Because the use of the exhibits was reasonable and necessary for counsel's effective presentation of the case, the Clerk's taxation of these costs was proper.

Plaintiffs also challenge a photocopying rate of $0.15 per page as a means by which Defendants will profit from this litigation. In support of their argument, Plaintiffs assert that a nationwide copy service, Kinko's, charges $0.08 per page which

should be used as a ceiling in this regard.

Defendants argue that the 15 cents per page rate represents the average of the costs that their respective law firms charged for photocopying. See Toland Aff. at ¶¶ 3-5 (Exh. J to Defs.' Resp. to Pls.' Motion). Defendants add that the documents for which they seek recovery of copying costs represent only a small portion of the copying that Defendants have made over the last 13 years of litigation. Defendants further contend that the $0.15 per page rate is reasonable and has been upheld by other federal courts under similar circumstances. See Defs.' Resp. to Pls.' Motion at 31-32 (citing cases).

This Court's cursory review of decisions in the Eastern District of Pennsylvania shows that $0.15 per page is a reasonable rate for photocopying costs. Compare Churchill v. Star Enterprises, No. CIV. A. 97-3527, 1998 WL 254080, *10 (E.D. Pa. April 17, 1998) (finding photocopying costs of .25 per page very reasonable); and 1st Westco Corp. v. School Dist. of Philadelphia, Civ. A. No. 91-2727, 1994 WL 18632, *7 (E.D. Pa. Jan. 13, 1994) (finding copying/printing costs of 20 cents per page to be reasonable), with Becker v. Arco Chemical Co., 15 F. Supp.2d 621, 636 (E.D. Pa. 1998) (court finds that reasonable rate for photocopying is 10 cents per page); Woods v. Adams Run Assocs., No. CIV. A. 96-6111, 1997 WL 256966, *7 (E.D. Pa. May 13, 1997) (same), aff'd, 151 F.3d 1027 (3d Cir. 1998); Poulter v.

Ford Motor Co., No. 96-2024, 1997 WL 22673, *3 (E.D. Pa. Jan. 17, 1997) (same); Scarsellato v. Ford Motor Co., No. 96-3839, 1997 WL 28713 (E.D. Pa. Jan. 24, 1997) (same); McLaughlin v. Ford Motor Co., No. CIV. A. 96-3838, 1997 WL 185942, *4 (E.D. Pa. April 14, 1997) (same). Because a charge of 15 cents per page is not unreasonable, the taxation of copying costs by the Clerk will be upheld.

V. THE PREVAILING PARTY

Finally, Plaintiffs argue that they obtained some of the relief which they sought when they commenced their separate actions -- partial compensation from the settling defendants and contamination remediation ordered by the Federal Government acting under CERCLA jurisdiction -- and, thus, it is questionable who the prevailing parties are in this case for the purposes of Rule 54(d) of the Federal Rules of Civil Procedure.

The prevailing party standard asks whether the plaintiffs obtained some of the benefit the parties sought in bringing suit. Institutionalized Juveniles v. Secretary of Public Welfare, 758 F.2d 897, 910-11, 926 (3d Cir. 1985). "The focus of this analysis is on the relief actually obtained rather than on the success of the legal theories." Id. at 911. Because Plaintiffs in this case brought the instant lawsuit seeking medical monitoring as well as money damages, and achieved neither form of relief, Plaintiffs cannot be considered the prevailing

party. Indeed, when Plaintiffs' surviving claims were submitted to a jury, a verdict in favor of Defendants was rendered, and judgment was entered accordingly. Thus, for the purposes of applying Rule 54, Defendants are the "prevailing party." Hubner v. Schoonmaker, No. CIV. A. 89-3400, 1993 WL 273689, *3 (E.D. Pa. July 20, 1993) (defendants were prevailing party where plaintiffs' claims were submitted to the jury, who returned a verdict in favor of the defendants); Second & Asbourne Assocs., 1990 WL 165894 at *2 (defendants are the prevailing party where defendants brought multi-million dollar suit and received nothing).

VI. DEFENDANTS' APPEAL

Defendants have isolated five cost items for review by this Court. Two of these items involve costs of the videotape depositions of Michael Weitekamp and Fred Lublin. The first amount of $2,105.70 is listed by Defendants as the cost for the videotape deposition transcriptions, which was disallowed by the Clerk.[6] Clerk's Taxation of Costs at 6. Defendants also seek

[6] Federal courts have taken different approaches in determining the taxability videotape deposition transcripts. See, e.g., Meredith v. Schreiner Transport, Inc., 814 F. Supp. 1004, 1006 (D. Kan. 1993) (court must decide if transcript of videotape deposition had "a legitimate use independent from or in addition to the videotape which would justify its inclusion in an award of costs."); Sack v. Carnegie Mellon Univ., 106 F.R.D. 561 (W.D. Pa. 1985) (videotape itself is original transcript and any additional transcription is considered a convenience copy for counsel).

$995.00 for the cost of videotaping the depositions.

In this Circuit, federal courts have interpreted 28 U.S.C. § 1920(2) (allowing the taxing of costs for "[f]ees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case") in conjunction with Fed. R. Civ. P. 30(b)(2) (authorizing videotape depositions as an alternative to traditional stenographic depositions) to implicitly allow fees associated with videotape depositions.[7] See, e.g., Macario v. Pratt & Whitney Canada, Inc., No. CIV. A. 90-3906, 1995 WL 649160 (E.D. Pa. Nov. 1, 1995); Garonzik v. Whitman Diner, 910 F. Supp. 167, 170 (D.N.J. 1995). However, with respect to costs associated with videotape deposition transcripts, federal courts in the Eastern District of Pennsylvania make a choice between taxing either costs associated with the videotaping or costs incurred in preparing a transcript. Fitchett, 1996 WL 47977 at *6; see also Macario, 1995 WL 649160 at *2, n.1 ("Courts generally do not allow recovery of costs for

[7] Rule 30(b)(2) of the Federal Rules of Civil Procedure authorizes depositions to be taken by other than stenographic means. FED. R. CIV. P. 30(b)(2). Before Rule 30(b)(2) came into effect, prior to the 1993 amendments, Rule 30(b)(4) required the recording of deposition testimony by non-stenographic means to first be approved by the court or agreement from other counsel. However, the new language in Rule 30(b)(2) allows parties to videotape depositions at their own discretion. Fitchett, 1996 WL 47977 at *7. "The rule does require a transcript of the videotaped deposition if it is offered . . . in conjunction with a dispositive motion. Nonetheless, the rule only imposes this requirement after the party has chosen, on its own accord and at its own discretion, to videotape the deposition." Id.

both a videotape and written transcript . . . .”). Thus, this Court will grant Defendants’ Appeal with respect to the $995.00 for videotape deposition costs and deny the $2,105.70 transcription costs associated with these same videotape depositions.

Next, Defendant contends that the Clerk disallowed $18,526.95 and $7,706.90 for photocopying costs of motions, pleadings and briefs. To support their appeal in this regard, Defendants cite 28 U.S.C. § 1920(4), which allows as taxable costs “[f]ees for exemplification and copies of papers necessarily obtained for use in the case . . . .” However, the federal case law in Pennsylvania does not appear to support Defendants’ claim for the cost of copying its pleadings. See, e.g., Levin v. Parkhouse, 484 F. Supp. 1091, 1096 (E.D. Pa. 1980) (cost of copies of court papers does not fall within meaning of fees for “copies necessarily obtained for use in the case”); Krouse v. American Sterilizer Co., 928 F. Supp. 543, 546 (W.D. Pa. 1996) (“The Clerk is correct that these copying costs are part of the normal overhead of litigation and are not recoverable.”); Fitchett, 1996 WL 47977 at *8 (“This Court cannot tax Plaintiff for costs Defendant experienced in copying and preparing court papers.”). Therefore, this Court concludes that the Clerk’s decision to disallow such copying costs was correct and Defendants’ appeal regarding these costs will be denied.

Defendants have also appealed the Clerk's decision with respect to photocopying costs in the amount of $9,780.00 for copies of medical records and other records.[8] Because section 1920(4) supports Defendants' entitlement to costs for copying such records, this Court will grant Defendants' Appeal regarding these costs. See Haagen-Dazs Co. v. Double Rainbow Gourmet Ice Creams, Inc., 920 F.2d 587, 588 (9th Cir. 1990); Nugget Distributors v. Mr. Nugget, Inc., 145 F.R.D. 54, 57 (E.D. Pa. 1992).

Finally, Defendants' appeal seeks taxation of costs of Defendants' trial exhibits in the amount of $15,253.76. As already explained above, such costs are taxable under 28 U.S.C. § 1920(4). See, e.g., Day v. Mendenhall Inn, No. CIV. A. 95-830, 1998 WL 599188, *3 (E.D. Pa. Sept. 9, 1998); Farley, 1997 WL 537406 at *5; Rogal v. American Broadcasting Cos., Civ. A. No. 89-5235, 1994 WL 268250, *2 (E.D. Pa. June 15, 1994). Here, "[t]he Clerk taxed $11,798.85 of the total $27,052.61 claim for Defendants' trial exhibits." Motion for Resolution of Defs.' Appeal at 3 n.1 (citing Clerk's Taxation of Costs at 6). In doing so, the Clerk did not give any reason for awarding only part of this claim. Based on the above, this Court finds that the balance of Defendants' claim is taxable.

In summary, costs are taxed as follows:

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[8] The Clerk did not address this matter.

Fees of the Clerk:	$ 1,625.00
Fees of the Marshal:	728.42
Evidence:	93,612.30
Depositions:	113,882.45
Trial Transcript:	25,347.00
Hearing transcript:	2,431.00
Witness attendance:	1,520.00
Subsistence:	5,147.00
Mileage:	909.00
Docket fees:	1,900.00
Copies of Medical records	9,780.00
TOTAL:	$ 256,882.17

The parties acknowledge that the total amount of costs should be reduced by 40% so as not to include SEPTA and the City, leaving an amount of $154,129.30.

For all of the above reasons, Defendants' Appeal of the Clerk's Taxation Of Costs is granted in part and denied in part, and Plaintiffs' Motion for Review of the Clerk's Award of Costs is denied. An appropriate Order will follow.

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

IN RE: PAOLI RAILROAD YARD PCB LITIGATION	:	MASTER FILE NO. 86-2229
THIS DOCUMENT RELATES TO:	:	
MABEL BROWN	:	NO. 86-2229
GEORGE BURRELL	:	NO. 86-2235
WALLACE D. CUMMINS	:	NO. 86-2669
SYLVAN C. COHEN	:	NO. 86-4037
K. LOUISE JONES	:	NO. 86-5277
JAMES LAMENT	:	NO. 86-5886
CHRISTOPHER S. BROWN	:	NO. 86-7414

CATHLENE BROWN	:	NO. 86-7415
CRAIG BROWN	:	NO. 86-7416
MARGHERITA BARBETTA	:	NO. 86-7417
MARY RETTA JOHNSON	:	NO. 86-7418
CELESTE BROWN	:	NO. 86-7419
CLEMMON BROWN	:	NO. 86-7420
CLOYD BROWN	:	NO. 86-7421
CURTIS BROWN	:	NO. 86-7422
JOHN INGRAM	:	NO. 86-7561
MARY ALICE KNIGHT	:	NO. 87-0712
WILLIAM BUTLER	:	NO. 87-2874
MATTHEW CUNNINGHAM	:	NO. 87-5296
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ORDER

AND NOW, this 2nd day of August, 1999, upon consideration of the Appeal filed by Defendants, Monsanto Company, General Electric Company, Westinghouse Electric Corporation, and the City of Philadelphia from the Clerk's Taxation of Costs, Defendants' Motion for Resolution of the Appeal from the Clerk's Taxation of Costs and Judgment entered thereon, and Plaintiffs' Motion to Have This Court Review the Clerk of Court's Award of Costs, and all responses thereto, it is hereby ORDERED that:

1. Plaintiffs' Motion for Review of the Clerk's Award of Costs is DENIED;

2. Defendants' Appeal is GRANTED with respect to the cost of photocopying medical records and other records in the amount of $9,780.00, the cost for trial exhibits in the amount of $15,253.76, and $995.00 for two videotape depositions;

3. Defendants' Appeal is DENIED with respect to

sought-after costs of $2,105.70 for videotape deposition transcripts and $18,526.95 and $7,706.90 for photocopying costs of motions, pleadings and briefs; and

4. Defendants' total award of costs shall be reduced by an additional twenty percent (20%) to reflect the City's withdraw of its claims for costs.

The Clerk of Court is hereby ORDERED to award Defendants taxation of costs in the amount of $154,129.30.

BY THE COURT:

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ROBERT F. KELLY, J.