

BILLS OF COSTS: A CONTINUOUSLY MOVING TARGET

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Trial Talk, August/September 2001

There was a time when bills of costs were relatively simple. Allowable costs included the filing fees, service costs, jury fee, costs of copies of documents used as exhibits,¹ costs of deposition transcripts if the depositions were used at trial for testimony or impeachment,² witness fees, and expert witness fees for time spent preparing for and testifying at trial.³

Cost awards were fairly predictable and you could in good conscience tell your clients that the risk of paying costs if they lost their cases (which, of course, was only the remotest of possibilities) did not entail a lot of money in most cases. Over the past 10 or 15 years, in conjunction with rising costs of all things litigation-related, increased use of more expensive technologies, and higher rates charged by experts, the courts have expanded the range of allowable costs. Costs awards are far less predictable, making it much more difficult to advise clients of the dollar amounts they may have to pay in the unthinkable, unlikely event of an unfavorable result.

Colorado Revised Statute §§ 13-16-104 and 13-16-105, in conjunction with C.R.C.P. 54(d) and 121, § 1-22, provide for the prevailing party to collect certain costs of litigation. An award of costs under these statutes and rules is guided by the items listed in C.R.S. § 13-16-122(1), "Items includable as costs." Section 13-16-122(1), states,

Whenever any court of this state assesses costs pursuant to any provision of this article, such costs may include:

- (a) Any docket fee required by article 32 of this title or any other fee or tax required by statute to be paid to the clerk of the court;
- (b) The jury fees and expenses provided for in article 70 of this title;
- (c) Any fees required to be paid to sheriffs pursuant to section 30-1-104, C.R.S.;
- (d) Any fees of the court reporter for all or any part of a transcript necessarily obtained for use in this case;
- (e) The witness fees, including subsistence payments, mileage at the rate authorized by section 13-33-103, and charges for expert witnesses approved pursuant to section 13-33-102(4);

- (f) Any fees for exemplification and copies of papers necessarily obtained for use in the case;
- (g) Any costs of taking depositions for the perpetuation of testimony, including reporters' fees, witness fees, expert witness fees, mileage for witnesses, and sheriff fees for service of subpoenas;
- (h) Any attorney fees, when authorized by statute or court rule;
- (i) Any fees for service of process or fees for any required publications;
- (j) Any item specifically authorized by statute to be included as part of the costs.

Generally, “unless there is a statute or rule specifically prohibiting the award of costs, trial courts may exercise their discretion to award costs to a prevailing party.”⁴ That being said, the trial court is not obliged to award all of the requested costs.⁵ In the past 10 years, there have been numerous cases redefining and clarifying awardable costs. This article is intended to provide an overview of the current status of the “grey areas” of costs awards in Colorado civil cases which do not involve a state entity.⁶ It is not intended to be comprehensive, particularly because the broad discretion allowed trial court judges makes it difficult to discern hard and fast rules. This article does not deal with the question of what costs are allowed under C.R.S. § 13-17-202, *et seq.*, the offer of settlement statute, which mandates an award of “actual costs” where a party does not obtain a result more favorable than the offer.⁷

The prevailing party does not have to win on all claims. The Colorado Supreme Court, *In the Matter of Board of County Comm’rs v. Crystal Creek Homeowners Ass’n*, 891 P.2d 981, 984 (Colo. 1995), stated that

In order to be the prevailing party, one must prevail on a significant issue in the litigation and achieve some of the benefits sought by the litigation. *Odenbaugh v. County of Weld*, 809 P.2d 1059, 1063 (Colo. App. 1990). “The issue on which

the party prevails need not be the central issue in the litigation, only a significant one.”

In September 1993 and mid-1994, the Colorado Supreme Court issued its opinions in *Cherry Creek v. Voelker*⁸ and *American Water Dev. v. City of Alamosa*,⁹ announcing a more expansive view of a trial court’s ability to award costs. The Court held that while C.R.S. § 13-16-122(1) is a detailed listing, the legislature intended the list of recoverable items to be illustrative, rather than exclusive.¹⁰ The *Cherry Creek* and *AWDI* decisions seem to have had their biggest impact on the recovery of deposition costs, as discussed below, but have also allowed trial courts to award miscellaneous expenses, including, in *AWDI*, setting up an office near the courthouse with leased furniture and equipment.

Filing Fees. Simply, this section of the statute provides for recovery of your initial filing fee and jury fee. Prevailing parties have attempted to stretch the interpretation of “docket fees,” under C.R.S. § 13-16-122(1)(a), to include costs incurred in fax filing pleadings with the trial court. Generally, trial courts have viewed this method of filing as a convenience, and, thus, not a compensable cost under any provision of the statute. The prevailing party would not necessarily be allowed to recover the costs of transmitting the pleading to the court clerk for filing had it chosen to mail, hand deliver or Federal Express the document. Similarly, the prevailing party should not be allowed to recover the cost of fax filing. With the introduction of JusticeLink and its current mandatory use in some civil actions (soon to be all civil actions), it is reasonable to expect the trial courts to award as costs the fees incurred in its use.¹¹

Witness Fees. Generally, a prevailing party is entitled to costs associated with witness and service of process fees, including witnesses subpoenaed but not called at trial, unless it is determined that a witness was “not subpoenaed in good faith, but rather for purposes of

oppression.”¹² In considering an award of costs under C.R.S. § 13-16-122(1)(e), the trial court needs to consider C.R.S. § 13-16-112, which limits the taxation of fees to no more than four witnesses, “unless the court certifies on its minutes that more than four witnesses were really necessary.” Certification of the number of witnesses “really necessary” is an issue for the trial court,¹³ which can be determined before, during or after the court proceedings.¹⁴

Witnesses’ mileage expenses remain limited to the statutory mileage and attendance rates authorized by C.R.S. § 13-33-103. Unsubpoenaed, out-of-state witnesses may not recover mileage.¹⁵ However, the Supreme Court, in a recent case footnote, said that C.R.S. § 13-33-103 “does not, however, similarly restrict the award of any other expenses associated with a witness attending trial.”¹⁶ Does that mean reimbursement of lodging, meals and other expenses, even though transportation costs are not recoverable?

Expert Witness Fees. Colorado Revised Statute § 13-16-122(1)(e) also provides for the payment of expert witness fees,¹⁷ referring to C.R.S. § 13-33-102(4), which provides for extra compensation to witnesses who testify as experts.¹⁸ An award of expert witness fees and the amount awarded are in the sound discretion of the trial court,¹⁹ though the award must be reasonable.²⁰ If you challenge the reasonableness of the expert’s fees, you may request a hearing, in which case the trial court is required to hold an evidentiary hearing for the purpose of determining the reasonableness of the amount sought by the prevailing party.²¹ Generally, the prevailing party is entitled to recover reasonable costs related to the expert’s trial preparation time and trial testimony.²² In addition to fees, the prevailing party may also be awarded costs incurred in connection with the expert’s travel expenses (travel, food and lodging).²³

A pre-*Cherry Creek* Court of Appeals case held that pretrial expert preparation fees relating to opinions not admitted into evidence were not recoverable.²⁴

Exemplification and Copies. Pursuant to C.R.S. § 13-16-122(1)(f), the prevailing party is entitled to reimbursement of copy costs for “papers necessarily obtained for use in this case.”²⁵ The burden of establishing that the costs qualify under the statutory provision falls to the prevailing party.²⁶ However, as a general rule, “prevailing parties are not entitled to recover costs incurred in responding to discovery.”²⁷ Copies made for the mere convenience of counsel are also not reimbursable.²⁸ Whether an item is necessarily obtained for use in a case calls for a factual evaluation which is left to the discretion of the trial court.²⁹ While a demonstrative exhibit may help the jury to understand the issues in a case, costs for exemplification³⁰ generally have not been awarded if the demonstrative exhibit merely illustrates expert testimony or other evidence in support of the prevailing party’s case.³¹ Whether that remains the case under the expanding allowances of costs in Colorado is questionable.

Deposition Costs. In *Cherry Creek*, the Court, recognizing the realities of current complex litigation, expanded the scope of C.R.S. § 13-16-122(1)(g), which previously had been interpreted to include just preservation depositions, to include discovery depositions, which had been regarded as a “luxury.”³²

Given the complexities of contemporary litigation, however, the federal courts have recognized that discovery depositions can be an important component of effective trial preparation. Accordingly, they have allowed the expenses incurred in taking discovery depositions to be awarded as costs where the taking of the deposition and its general content were *reasonably necessary for the development of the case in light of facts known to counsel at the time it was taken.*³³

Videotaped depositions, unless taken for preservation purposes, may still be considered a luxury,³⁴ but the law is not entirely clear.³⁵ In a 1989 case, the Court of Appeals upheld the trial

court's exercise of discretion in denying costs of videotaping.³⁶ In *Cherry Creek*, the Supreme Court said that "no party has an absolute right to a video deposition" and that "[s]uch a deposition . . . is a luxury not a necessity."³⁷ Prior to 1995, trial court approval or the parties' agreement was required for videotaped depositions. Since January 1, 1995, such approval or agreement is no longer required. Does that mean videotaped depositions are no longer luxuries?

In connection with out-of-town depositions, should an attorney's travel expenses, such as airfare, lodging, and meals, be awardable as costs? The Colorado Court of Appeals has held that such expenses are more properly included in attorneys' fees, where they are charged to the client as reasonable out-of-pocket expenses in addition to the normal hourly charges.³⁸

Computerized Legal Research. A recent development in the recovery of on-line legal research costs (Lexis-Nexis, Westlaw, etc.) is the Colorado Court of Appeals' decision in *Roget v. Grand Pontiac*, 5 P.3d 341 (Colo. App. 1999). The Court of Appeals concluded that computerized legal research expenses may be recoverable as costs³⁹ if the prevailing party meets a three-pronged test. The *Roget* court stated that "recovery of computerized legal research as costs is conditioned upon meeting three requirements:"

- a. a showing that the client was billed for computerized legal research expenses separate from attorneys' fees;
- b. the computerized legal research was necessary for trial preparation; and
- c. the costs requested for computerized legal research must be reasonable.⁴⁰

Previous to *Roget*, computerized legal research fell under the category of attorneys' fees and, therefore, was not recoverable under the statute.⁴¹

Expenses for Technical Support. Advancing technology and imaginative new trial techniques raise new issues with regard to compensable costs. Federal courts in this circuit have held that expenses incurred for “technical support,” such as PowerPoint® presentations, demonstrative video graphics, are not awardable.⁴² Again, unless the trial court determines that the expense was necessarily incurred and that the presentation was not merely illustrative, the cost will not be awarded. In a recent case in federal court in Kansas, a prevailing third party defendant sought an award of costs for “technical support for operation of video deposition system” used at trial. The party used a consulting firm to edit and present video depositions and argued that such use was “necessary for an efficient presentation of the evidence and for the jury’s understanding of the issues.”⁴³ The U.S. District Court applied a necessity standard and disallowed the costs.

The authors of this article have not found any cases in which the Colorado appellate courts have addressed the issue of costs of technical support, jury consultants, focus groups, or other litigation support now used by many lawyers in preparing and trying cases. With the expansion of the universe of awardable costs over the last few years, such costs will surely be sought and the trial courts’ decisions appealed. Things that were once considered “luxuries” may one day be viewed as reasonably necessary. With expensive experts, whose fees sometimes eclipse those of the attorneys, and other high costs, our system may be becoming a “loser pays” one even without attorneys’ fee awards to the winner.

With the broad discretion allowed trial judges to award reasonable costs, there will probably continue to be a large variance from judge to judge as to what costs are recovered until

and unless the appellate courts draw more lines. May you only be faced with those issues as the prevailing party!

ENDNOTES

1. *Shultz v. Linden-Alimak, Inc.*, 734 P.2d 146, 150 (Colo. App. 1986) (no statutory authorization for photocopies, blueprints, long distance phone calls and postage under C.R.S § 13-16-122).

2. *Songer v. Bowman*, 804 P.2d 261, 265 (Colo. App. 1990) (reversing cost award because depositions were not used at trial; expert witness travel expenses not recoverable because experts were not out-of-state witnesses under subpoena).

3. *Yeager Garden Acres v. Summit Constr. Co.*, 32 Colo. App. 242, 245-246, 513 P.2d 458, 460 (1973) (upholding the trial court's award of a whopping \$1,000 of \$1,660 claimed for one day's testimony (\$440), plus preparation time).

4. *Rossmiller v. Romero*, 625 P.2d 1029, 1030 (Colo. 1981); *Board of County Comm'rs, supra*, 891 P.2d at 983; *Ballow v. PHICO Ins. Co.*, 878 P.2d 672, 684 (Colo. 1994).

5. *Bowers v. Loveland Pub. Co.*, 773 P.2d 595, 596 (Colo. App. 1988) (a trial court retains discretion to decide which costs are to be included in an assessment, even when the assessment is required by statute); *cf. Denver Urban Renewal Authority v. Hayutin*, 40 Colo. App. 559, 565, 583 P.2d 296, 301 (1978) (“‘Costs’ includes only those items usually taxed as costs and does not include any and all expenses which an owner may see fit to incur in preparing for and in presenting his side of the case”).

6. “[C]osts against the state of Colorado, its officers or agencies, shall be imposed only to the extent permitted by law.” C.R.C.P. 54(d). *See Central Colo. Water Conservancy Dist. v. Simpson*, 877 P.2d 335, 349 (Colo. 1994); *cf. Nguyen v. Regional Transp. Dist.*, 987 P.2d 933, 935 (Colo. App. 1999) (C.R.C.P. 54(d) or the Governmental Immunity Act do not prohibit an assessment of costs and interest on a judgment entered against a public entity merely because the legislature has not seen fit to expressly provide for such assessments . . . [C]osts are awardable in the context of a tort claim under the Governmental Immunity Act); *Lee v. Colorado Dep't of Health*, 718 P.2d 221, 229 (Colo. 1986).

7. *See, e.g., Cedar Lane Invs. v. St. Paul Fire & Marine Ins. Co.*, 883 P.2d 600 (Colo. App. 1994).

8. *Cherry Creek Sch. Dist. #5 v. Voelker*, 859 P.2d 805 (Colo. 1993).

9. *American Water Dev. v. City of Alamosa*, 874 P.2d 352 (Colo. 1994).

10. *See also Harvey v. Farmers Ins. Exch.*, 983 P.2d 34, 41 (Colo. App. 1998) (list of allowable costs under C.R.S. § 13-16-122(1) is not exhaustive but merely illustrative); *Church v. American Standard Ins. Co.*, 764 P.2d 405, 406 (Colo. App. 1988) (“list of expenses that may be awarded . . . is not exclusive”).

11. Presently, JusticeLink charges JusticeLink subscribers \$.10 per page, per attorney served, with a \$2.00 minimum per document filed. Service on non-subscribers costs \$.10 per page for delivery of documents via U.S. Mail, first class, and \$.20 per page for fax delivery.

12. *Gutierrez v. Bussey*, 837 P.2d 272, 276 (Colo. App. 1992), *citing Kinderman v. Hersch*, 53 Colo. 561, 129 P. 228 (1912).

13. *Weber v. Wallace*, 789 P.2d 427, 430 (Colo. App. 1989); *Gutierrez, supra*, 837 P.2d at 276.

14. Colorado Revised Statute § 13-16-112 states,

In no case in the district court shall the fees of more than four witnesses be taxed against the party against whom judgment is given for costs, unless the court certifies on its minutes that more than four witnesses were really necessary, in which case the clerk shall tax the costs of as many witnesses as the court so certifies.

15. *Welch v. George*, 19 P.3d 675, 680 (Colo. 2000) (the recovery of witness mileage fees as costs . . . may only be awarded to subpoenaed witnesses).

16. *Id.*

17. “[A]nd charges for expert witnesses approved pursuant to section 13-33-102(4).”

18. Colorado Revised Statute § 13-33-102(4) states,

Witnesses in courts of record called to testify only to an opinion founded on special study or experience in any branch of science or to make scientific or professional examinations and state the result thereof shall receive additional compensation, to be fixed by the court, with reference to the value of the time employed and the degree of learning or skill required.

19. *Trinity Universal Ins. Co. v. Streza*, 8 P.3d 613, 619 (Colo. App. 2000).

20. *American Water Dev., supra*, 874 P.2d at 387 (an award of costs for expert witness fees must be reasonable).

21. *Trinity, supra*, 8 P.3d at 619.

22. *Songer, supra*, 804 P.2d at 265.

23. *Leadville Water Co. v. Parkville Water Dist.*, 164 Colo. 362, 366, 436 P.2d 659, 661 (Colo. 1967); *American Water*, *supra*, 874 P.2d at 389; *cf. Songer*, *supra*, 804 P.2d at 265 (the experts' travel expenses are not recoverable because they were not out-of-state witnesses under subpoena); *Crawford v. French*, 633 P.2d 524, 526-527 (Colo. App. 1981) (“[m]ileage fees for witnesses testifying at trial are purely statutory . . . Where the trial witness is from out of the state and is not under subpoena, he is not entitled to any mileage fee”); *Welch*, *supra*, 19 P.3d at 680 (the recovery of witness mileage fees as costs . . . may only be awarded to subpoenaed witnesses).

24. *Perkins v. Flatiron Structures Co.*, 849 P.2d 832, 836 (Colo. App. 1992).

25. *Battenfeld of Am. Holding Co. v. Baird, Kurtz & Dobson*, 196 F.R.D. 613, 617 (D. Kan. 2000) (a copy is “necessarily obtained” . . . only where the court believes that its acquisition was reasonably necessary to the prevailing party’s preparation of its case).

26. *Battenfeld*, *supra*, 196 F.R.D. at 617; *Green Constr. Co. v. Kansas Power & Light Co.*, 153 F.R.D. 670, 683 (D. Kan. 1994) (disallowing copy expenses where prevailing party merely submitted statements from copy services without identifying use made of the photocopied materials).

27. *Pehr v. Rubbermaid, Inc.*, 196 F.R.D. 404, 408 (D. Kan. 2000).

28. *Manildra Milling Corp. v. Ogilvie Mills*, 878 F. Supp. 1417, 1428 (D. Kan. 1995).

29. *Mikel v. Kerr*, 499 F.2d 1178, 1183 (10th Cir. 1974); *Cleverock Energy Corp. v. Trepel*, 609 F.2d 1358, 1363 (10th Cir. 1979) (“The awarding of costs for preparation of exhibits is committed to the discretion of the trial court”); *Tilton v. Capital Cities/ABC*, 115 F.3d 1471 (10th Cir. 1997).

30. *Frigiquip Corp. v. Parker-Hannifin Corp.*, 75 F.R.D. 605, 614 (W.D. Okla. 1976), *citing Mikel*, *supra*, defines exemplification as

a showing or illustrating by example [quoting *Webster’s New Collegiate Dictionary* (2nd ed.)]. Exemplification therefore means more than obtaining or making a copy of something. It includes showing or demonstrating something by way of illustration or example and all that is reasonably necessary in this connection.

31. *Battenfeld*, *supra*, 196 F.R.D. at 616-617; *Green*, *supra*, 153 F.R.D. at 683; *Manildra*, *supra*, 878 F. Supp. at 1428.

32. *Cherry Creek*, *supra*, 859 P.2d at 810 (while videotaped deposition may be desirable under certain circumstances, it is a luxury not a necessity).

33. *Id.* at 813 (emphasis added).

34. *Id.* at 810.

35. *See Simon v. Coppola*, 876 P.2d 10, 20 (Colo. App. 1993) (remanding for award of costs associated with the taking of a video deposition of out-of-state witness).

36. *Dorrence v. Family Athletic Club*, 777 P.2d 667, 668 (Colo. App. 1989).

37. *Cherry Creek*, *supra*, 859 P.2d at 810.

38. *Heating & Plumbing Engineers, Inc. v. H.J. Wilson Co.*, 698 P.2d 1364, 1368-1369 (Colo. App. 1984).

39. *Roget v. Grand Pontiac*, 5 P.3d 341, 348 (Colo. App. 1999) (based on the broad definition of costs in *Cherry Creek*, computerized legal research expenses may be recoverable as costs).

40. *Id.* at 349.

41. *Heating & Plumbing*, *supra*, 698 P.2d at 1368 (Colo. App. 1984) (certain out-of-pocket costs incurred by attorneys are considered “office overhead . . . included in how the attorneys set their hourly rates for their attorney’s fees. . . . These expenses include . . . computer research fees . . .” The Federal courts have ruled similarly, holding that the cost of research is not enumerated as a taxable cost under U.S.C. § 1920, whether manual or by computer. *See Nugget Distrib. Coop. v. Mr. Nugget*, 145 F.R.D. 54, 59 (E.D. Pa. 1922) (the cost of legal research is a facet of an attorney’s fee); *Ortega v. Kansas City*, 659 F. Supp. 1201, 1219 (refusing to tax computerized legal research as costs).

42. *Battenfeld*, *supra*, 196 F.R.D. at 616 (while the use of such technology at trial was both efficient and helpful and such use by counsel may have increased his or her client’s chance of prevailing before a jury, it does not necessarily follow that such costs should be shifted to the losing party); *Vornado Air Circulation Sys. v. Duracraft Corp.*, 1995 U.S. Dist. LEXIS 20104, *9 (D. Kan. 1995) (while the computer simulation exhibits could be considered helpful, they were by no means necessary to the case).

43. *Battenfeld*, *supra*, 196 F.R.D. at 616.