

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

TRINA ZIMMERMAN,)	
)	
Plaintiff,)	
vs.)	NO. 4:05-cv-00031-DFH-WGH
)	
R & S TRUCKING,)	
HAROLD GULLION,)	
PINNACLE ENTERTAINMENT, INC.,)	
BELTERRA RESORT INDIANA, LLC,)	
Belterra Casino Resort & Spa,)	
)	
Defendants.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

TRINA ZIMMERMAN as Executrix of the)
Estate of Thomas J. Zimmerman,)
Deceased,)

Plaintiff,)

v.)

CASE NO. 4:05-cv-0031-DFH-WGH

SUE DICKERSON, d/b/a R&S)
TRUCKING, HAROLD GULLION,)
PINNACLE ENTERTAINMENT, INC., and)
BELTERRA RESORT INDIANA, LLC,)
d/b/a Belterra Casino Resort & Spa,)

Defendants.)

ENTRY ON DEFENDANTS' BILL OF COSTS

Defendants Belterra Resort Indiana, LLC and Pinnacle Entertainment, Inc. prevailed on summary judgment, see *Zimmerman v. R&S Trucking*, 2006 WL 2346392 (S.D. Ind. Aug. 11, 2006), and have submitted a bill of costs. Plaintiff Zimmerman has filed her notice of appeal from the court's grant of summary judgment in favor of these defendants. She has objected to some substantial portions of the bill of costs, and she argues that the notice of appeal transferred jurisdiction over the entire case to the Court of Appeals, so that this court lacks jurisdiction to address the bill of costs until the Court of Appeals issues its mandate.

In support of this position, plaintiff cites *Mother and Father v. Cassidy*, 338 F.3d 704, 707-08 (7th Cir. 2003). In that case, the plaintiffs had voluntarily dismissed their federal claims. The district court had dismissed those claims initially without prejudice, so that the plaintiffs could pursue state law claims in state court, and then converted the federal dismissal into dismissal with prejudice so that the judgment would be final. The defendant then sought costs in the district court. The district court denied the costs, holding that the defendant's request for costs should be determined in the state court. The defendant appealed that denial of its requests for costs. The Seventh Circuit reversed and remanded for the district court to determine whether the defendant should be awarded costs.

On appeal, the plaintiffs argued that the Seventh Circuit lacked jurisdiction over the cost question because the defendant had not filed its bill of costs in the district court until after it had filed its notice of appeal. The Seventh Circuit rejected the argument, finding that the question whether to award costs at all was properly before it. The Seventh Circuit commented: "The notice of appeal transferred jurisdiction over the costs question to this court." 338 F.3d at 708, citing *Kusay v. United States*, 62 F.3d 192, 193 (7th Cir. 1995). The notice of appeal in *Cassidy* was a notice of appeal from the district court's order denying costs, not from the district court's order on the merits. Thus, the issue of costs was squarely before the Court of Appeals, and the district court had lost jurisdiction over that issue. That reasoning does not apply when the notice of appeal addresses the merits of the case, leaving costs as an ancillary matter to be

decided in the district court. This much is clear from the *Kusay* case cited by the *Cassidy* court.

In *Kusay* the Seventh Circuit held that the district court had acted without jurisdiction when, before the issuance of the appellate mandate, it held an evidentiary hearing on the factual issue that the appellate court's opinion (issued before the mandate) had said was required. In the course of the *Kusay* opinion on this jurisdictional question, the Seventh Circuit quoted the governing standard from the Supreme Court: "The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." 62 F.3d at 194, quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). The important qualifier is "those aspects of the case involved in the appeal." The *Kusay* court went on to point out that a district court may award attorney fees while the merits are on appeal and may address "ancillary questions such as costs" 62 F.3d at 194, citing *Terket v. Lund*, 623 F.2d 29, 33-34 (7th Cir. 1980) (attorney fees may be awarded while merits are on appeal, and a separate notice of appeal is required to appeal a fee awarded after judgment on merits), *Chicago Truck Drivers Pension Fund v. Central Transport, Inc.*, 935 F.2d 114, 119-20 (7th Cir. 1991) (dicta regarding costs), and *Wilson v. O'Leary*, 895 F.2d 378, 382 (7th Cir. 1990) (dicta regarding costs).

Thus, this court has jurisdiction to decide the defendants' bill of costs while the parties pursue the appeal of the merits. Nevertheless, the court may stay consideration of the issue pending appeal. See *Cooper v. Eagle River Memorial Hospital, Inc.*, 270 F.3d 456, 464 (7th Cir. 2001). That step seems prudent here, especially since the bill of costs seeks more than \$39,000 and includes costs that clearly are not recoverable under 28 U.S.C. § 1920, such as expert witness fees and attorney travel expenses. See *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 439 (1987) (expert witness fees); *Wahl v. Carrier Mfg. Co.*, 511 F.2d 209, 217 (7th Cir. 1975) (attorney travel expenses). Also, the substantial court reporter fee requests are not supported by invoices. The court ordinarily does not award certain extra court reporter charges incurred for the convenience of counsel, such as for expedited transcripts, video recordings, and extra copies. (Contrary to plaintiff's suggestion, however, a deposition transcript need not be used in a summary judgment motion to be a recoverable cost when the case is decided on summary judgment.) Accordingly, the court grants plaintiff's motion to stay the taxation of costs pending the resolution of the appeal. In the event this court's decision is affirmed, the court contemplates scheduling a conference with counsel for both sides to address the amount of costs properly taxable.

So ordered.

Date: November 16, 2006

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

Copies to:

Robert Ballard Clemens
BOSE MCKINNEY & EVANS, LLP
rclemens@boselaw.com

Wilmer E. Goering II
ECKERT ALCORN GOERING & SAGE
goering@eaglaw.com

Steven D. Groth
BOSE MCKINNEY & EVANS
sgroth@boselaw.com

Heidi Kendall-Sage
ECKERT ALCORN GOERING & SAGE
sage@eaglaw.com

Christopher G. Stevenson
WILSON KEHOE & WININGHAM
cstevenson@wkw.com

William E. Winingham
WILSON KEHOE & WININGHAM
winingham@wkw.com