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Op. No. 52-129

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David H. Palmer, Jr., Esquire  
County Attorney  
Yavapai County  
Prescott, Arizona

Dear Mr. Palmer:

This acknowledges receipt of your letter of April 26 in which you submit a hypothetical fact situation as follows:

"A sues B. Half way through the trial B obtains a directed verdict in his favor and against A. The Court enters judgment against A for jury fees. A appeals the case. The Supreme Court reverses the lower court but does not mention jury fees in its mandate. The case is tried again and A finally loses the case.

Who must pay the jury fees in the first case? If B loses the second trial, who pays the jury fees in the first trial?"

Section 34-118 ACA 1939 provides that "the successful party to a civil action shall recover of his adversary all the costs expended or incurred therein except as otherwise provided by law."

Section 34-125 ACA 1939 defines jury fees as part of taxable costs in the superior court and provides:

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"Costs in the superior court shall include the fees of officers, witnesses, \* \* \*. There shall also be included in the judgment, and taxed as costs, a jury fee, which jury fee shall be fixed by the court at the time of the rendition of the judgment, and the same shall be paid to the clerk of the court and such clerk shall pay the same to the county treasurer who shall dispose of the same as other similar money is disposed of; provided, that the court may at any time for good cause shown relieve any person from the payment of such jury fee when the court believes such relief proper."

The termination and disposition of costs are largely in the discretion of the trial court, according to Billups v. Utah Canal, etc., 7 Ariz. 211; 63 P. (2) 13.

Section 34-120 ACA 1939 provides that in new trials and on arrest of judgment,

"The costs of new trials may either abide the result of the action or may be taxed against the party to whom the new trial is granted, or may be adjudged by the court at the time of granting such new trial. When the judgment is arrested or the verdict set aside because of the insufficiency of the pleadings of the party in whose favor the verdict or judgment is rendered, the costs thereof shall be taxed against the party whose pleadings were adjudged insufficient."

This section has been construed by the Arizona Supreme Court in the case of Durkee-Thomas Corp. v. Doherty, 40 Ariz. 399; 12 P. (2) 617, which states at page 402:

"The only other objection is that the trial court allowed as part of the costs in favor of plaintiff, not only a jury fee for the second trial, but also one for the trial in which the judgment reversed by this court as above was rendered, and it is urged that, when a case is appealed to this court and by us reversed and remanded for a new trial, the appellant, even though the case go against him on the second trial and that judgment be affirmed by this court, cannot be taxed with the costs incurred in the first trial.

Costs are generally fixed by statute, but it appears that the precise point in question is not specifically determined by our Code, and we must reason from analogy and general principles.

The same question has been before the courts of different jurisdictions on a similar state of facts and the majority rule is that the party ultimately prevailing at the new trial should recover the costs of both trials in the lower court. Stoddard v. Treadwell, 29 Cal. 231; Durant v. Abendroth, 48 Hun 16, 1 N.Y. Supp. 533; Berthold v. Burton, (C.C.A.) 169 Fed. 495; National Masonic Acc. Assn. v. Burr, 57 Neb. 437, 77 N.W. 1098; Palmer v. Palmer, 97 Iowa 454, 66 N.W. 734.

\* \* \* \* \*

When this court reverses a case and remands it for a new trial without specific directions as to the costs of the lower court, the party ultimately losing must pay all the properly taxable costs \* \* \* "

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The fact that no costs (including jury fees) are mentioned in the Supreme Court's mandate or even in the event of failure of the prevailing party to pray for costs is not a waiver thereof and does not bar recovery therefor on final disposition of the suit.

Sincerely yours,

FRED O. WILSON  
Attorney General

PHIL J. MUNCH  
Assistant Attorney General

PJM:mv

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