

Nos. 18-6102 /18-6165

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UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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RACHEL TUDOR,

*Plaintiff-Appellant/ Cross-Appellee,*

v.

SOUTHEASTERN OKLAHOMA STATE UNIVERSITY  
*and the* REGIONAL UNIVERSITY SYSTEM OF OKLAHOMA,

*Defendants-Appellees/ Cross-Appellants.*

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On appeal from the United States District Court  
for the Western District of Oklahoma

The Hon. Robin Cauthron

No. 5:15-cv-324-C

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**RESPONSE TO FORMER COUNSEL'S ITEMIZED BILL OF COSTS  
FILED ON BEHALF OF DEFENDANTS-APPELLEES/CROSS-APPELLANTS**

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ZACH WEST

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Plaintiff's former counsel has filed an "Itemized Bill of Costs," under the proposed authority of Fed. R. App. P. 39(c), with an "affirmation" in support of that bill. But Rule 39 only addresses appellants, appellees, and parties—not attorneys or counsel. *See* Fed. R. App. P. 39(a)(1)-(3) (costs may be assessed against "appellant" or "appellee" depending on the circumstance); 39(d)(1) ("A party who wants costs taxed must—within 14 days after entry of judgment—file with the circuit clerk ...." (emphasis added)). Plaintiff's former counsel has never been a party, an appellant, or an appellee in this case. Nor does counsel indicate that this bill of costs was filed with approval or even the knowledge of Plaintiff or Plaintiff's current counsel. Thus, in Defendants' view, the bill of costs for movant is not valid and should be rejected. This Court has indicated as much in somewhat similar circumstances. *See Manning v. Astrue*, 510 F.3d 1246, 1249-50 (10th Cir. 2007) (holding that the Equal Access to Justice Act's "statutory language clearly provides that the prevailing party, who incurred the attorney's fees, and not that party's attorney, is eligible for an award of attorney's fees").

In any event, costs are not automatic in a case such as this. The district court was affirmed in part and reversed in part, and Plaintiff did not prevail on every issue brought on appeal. Specifically, Plaintiff's challenge to the application of the Title VII statutory cap was denied at the district court and that denial was affirmed on appeal before this Court, an affirmation that was in line with Defendants' argument. Thus, Rule 39(a)(4) plainly applies, and as such costs can only be taxed pursuant to an order from this Court, acting in its discretion. *See Lincoln v. BNSF Ry. Co.*, 900 F.3d 1166, 1191 (10th Cir. 2018).

Given the circumstances, Defendants request that this Court either deny costs *in toto* because Plaintiff's former counsel is not the proper entity filing the bill, or in the alternative, reasonably reduce the award of costs in light of the mixed judgment. *See, e.g., Quaker Action Grp. v. Andrus*, 559 F.2d 716, 719 (D.C. Cir. 1977) ("As to Quaker Action IV, there were some respects in which the government prevailed. However, we think that plaintiffs were the predominantly prevailing party. We have concluded that plaintiffs shall recover 75% of the costs incurred on the appeal in Quaker Action IV.").

Respectfully Submitted,

*s/ Zach West*

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**CERTIFICATE OF COMPLIANCE**

This document complies with the typeface requirements of Fed. R. App. P. 32 and 10th Cir. R. 32 because it was prepared in a proportionally spaced font (Garamond, 14-point) using Microsoft Word 2016. The document complies with the type-volume limitation of Fed. R. App. P. 27, because it contains 400 words, excluding the parts exempted.

*s/ Zach West*

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ZACH WEST

**CERTIFICATE OF DIGITAL SUBMISSION**

All required privacy redactions have been made as required by 10th Cir. R. 25.5 and the ECF Manual. Paper copies are not required. Additionally, this filing was scanned with Symantec Endpoint Protection antivirus using the latest version (14.2), most recently updated on October 12, 2021.

*s/ Zach West*

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ZACH WEST

**CERTIFICATE OF SERVICE**

I certify that on October 12, 2021, I caused the foregoing to be filed with this Court and served on all parties registered with the Court's CM/ECF filing system.

*s/ Zach West*

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ZACH WEST