

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION**

Case No.: 9:18-cv-80771-RLR

ROBERT W. OTTO, PH.D., LMFT,
individually, and on behalf of his patients,
JULIE H. HAMILTON, PH.D., LMFT,
individually and on behalf of her patients,

Plaintiffs,

v.

CITY OF BOCA RATON, FLORIDA, and
COUNTY OF PALM BEACH, FLORIDA,

Defendants.

PALM BEACH COUNTY'S RESPONSE TO PLAINTIFF'S MOTION FOR COSTS

Defendant, Palm Beach County (County), responds to the Bill of Costs, and Motion filed by the Plaintiffs, Robert Otto and Julie Hamilton (DE 213, 213-1) and The City of Boca Raton Florida's (City or Boca) response to same, (DE 218) and states the following:

I. Background.

1. On January 27, 2023, the City served its Rule 68 Offers of Judgment on the Plaintiffs. ("Offers"). The Plaintiffs accepted the City's Offers on February 9, 2023. (DE 196).
2. On February 22, 2023, the County served its own Rule 68 Offers of Judgment on the Plaintiffs. The Plaintiffs accepted the County's Offers on March 3, 2023. (DE 203).
3. On May 8, 2023, Plaintiffs moved for taxable costs to be awarded in this case. (DE 213, 213-1). Prior to filing their Motion for Costs, the Plaintiffs conferred with the two Defendants in this case relative to their objections. At that time, the County indicated that it did not oppose the

Plaintiffs' Bill of Costs, and that it was the County's position that costs should be split equally between the two Defendants.

4. On May 26, 2023, the City responded to the Plaintiffs' Motion, indicating that it objected to the costs being taxed against the City and the County jointly and severally, and that costs should be apportioned, with the City being responsible for a smaller portion of the costs than the County. (DE 218).

5. On June 2, 2023, this Court issued a paperless order directing the County to respond to the Plaintiffs' Motion for costs by June 8, 2023.

II. Argument.

As indicated in the Plaintiffs' Motion for Costs, (DE 213-1), the County does not object to the amount of costs sought by the Plaintiffs: \$6,101.44. However, the County opposes the City's position that this Court should apportion the costs as 3/7th against the City and 4/7th against the County. (DE 218). Rather, the Defendants are jointly and severally liable for the taxable costs up to the date of the City's Offer of Judgment. To the extent that the costs are to be apportioned at this juncture, they should split equally, with the City and the County each responsible for \$3050.72 (or 50% of the total costs) as no grounds exist for anything other than an equal division.

a) Litigation against the City and County was so inextricably intertwined that taxable costs cannot be apportioned between the two Defendants as anything other than 50/50 split.

The Plaintiffs brought their action against the County and the City based on the Defendants' passage of their respective, nearly identical ordinances prohibiting conversion therapy on minors. (DE 1). The causes of action raised in the Complaint were identical as to the two Defendants. In fact, each of the eight counts of the Complaint pertained to the alleged illegalities

of the “The City and the County Ordinances....”¹ The requested relief was identical as to the two Defendants. The Plaintiffs made the same claims, made the same arguments, took the same discovery, and litigated the case the exact same way against the two Co-Defendants. In turn, the County and the City entered into a joint defense agreement, raised the same defenses, made the same arguments, and litigated the case the same way against the Plaintiffs. In short, since the inception of the case, through its conclusion, the litigation against the County and City was inextricably intertwined.² In light of the foregoing, it is impossible to apportion the costs as anything other than being equally split between the two Defendants.

The County agrees with the Plaintiffs that “the default rule is that costs are to be imposed jointly and severally, and the burden is on the party seeking to avoid that to introduce evidence justifying apportionment and persuade the court to do that.” *State Farm Fire & Cas.Co. v. Silver Star Health & Rehab*, 739 F.3d 579, 585–86 (11th Cir. 2013), citing *In re Paoli R.R. Yard PCB Litigation*, 221 F.3d 449, 469 (3d Cir.2000). As demonstrated *infra*, the City does not meet this burden.

b) City’s suggested apportionment of costs is unsupported by facts or law.

Language of the Offers of Judgment does not support an unequal division of costs.

¹ For example, Count I provides that “The City and County ordinances violate Plaintiffs’ right to freedom of speech under the First Amendment” Count II provides that the City and County ordinances violate Plaintiffs’ clients’ First Amendment right to receive information, and so forth. (DE 1).

² “Claims are ‘inextricably intertwined’ when a ‘determination of the issues in one action would necessarily be dispositive of the issues raised in the other.’ ” *Anglia Jacobs & Co. v. Dubin*, 830 So.2d 169, 172, Fla. 4th DCA 2002) (quoting *Cuervo v. W. Lake Village II Condo. Ass’n*, 709 So.2d 598, 599–600 (Fla. 3d DCA 1998)). Conversely, “claims are separate and distinct when they could support an independent action and are not simply alternative theories of liability for the same wrong.” *Avatar Dev. Corp. v. DePani Constr., Inc.*, 883 So.2d 344, 346 (Fla. 4th DCA 2004).

The County does not dispute that the Defendants' respective Offers include language relative to the City and the County's "pro-rata share" of the Plaintiffs' costs. However, contrary to the City's assertions, there is no language in either of the Defendants' Offers to indicate that the County and City's pro-rata shares of the Plaintiffs' costs are anything other than equal, or (as the City argues) that the Defendants' pro-rata shares are proportional to the amounts of the Defendants' respective settlement offers to the Plaintiffs. (DE 196, 203).

Notwithstanding the foregoing, the City argues that "costs should be taxed proportionally, based upon each Defendants' proportionate share of the total \$175,000 judgment" and concludes that because the County settlement offer was greater than the City's, that the County should pay a bigger share of the taxable costs. (DE 218, p. 2). The City's argument is misleading, in that it implies (repeatedly) that here there pre-existed a final, monetary "total judgment" for damages against the Defendants in the amount of \$175,000.00 that was then apportioned between the City and the County in such a way that the County was responsible for a larger portion of the Plaintiffs' damages. Nothing could be further from the truth.

Here, the Defendants' respective Offers to each Plaintiff were based on an amount that the Defendants thought that the Plaintiffs would either reasonably accept, (or in the alternative, an amount that would likely exceed any future award of actual damages that would ultimately be awarded to the Plaintiffs, thereby cutting off Plaintiffs' ability to recover costs (including attorneys' fees) from the dates of the Defendants' respective Offers.) In other words, they were independent Offers of Judgment by each Co-Defendant to each Co-Plaintiff, each presumably the culmination of respective negotiations between the Co-Plaintiffs and each Co-Defendant, rather than a lone final judgment with each Defendant being apportioned liability by a trier of fact.

Further, the County's offering an additional \$25,000 to the Plaintiffs had nothing to do with the Plaintiffs' actual damages, the County's percentage of liability for any damages, or the jurisdictional scope of its ordinance.

The City served its Offers on January 27, 2023, offering to pay for its share of Plaintiffs' costs (including attorneys' fees) accrued up to the date of the Offer. Once the Plaintiffs accepted, the City was no longer jointly and severally liable for any costs or fees accrued by the Plaintiffs after the date of the Offer. This left the County on the hook for the entire amount of any reasonable costs and fees accrued going forward. A point that was not lost on the Plaintiffs, who now insisted on a bigger payout to settle the case.³ The County had no choice but to offer the Plaintiffs more money than Boca in an effort to cut off the Plaintiffs' overbilling.

Based on the foregoing, it is entirely possible that at the City and the County's pro rata shares of the Plaintiffs' total taxable costs could have been different. For example, the County would be solely responsible for costs accrued between January 27, 2023 and February 22, 2023 (the date of its own Offers). However, that is not the case here. As evidenced in the Plaintiffs' Bill of Costs, all of the specific taxable costs are from 2018 and 2019. Accordingly, both Defendants are equally responsible for an equal share of these costs.

Jurisdictional scope of the ordinances is irrelevant, and in light of the procedural posture of this case, is speculative.

The City also asserts that an equal split of the costs would not address the jurisdictional scope of the challenged ordinances. The City claims that the effect of the County's ordinance was

³ For example, the Plaintiffs filed their Notice of Acceptance of the City's Offers the morning of February 9, 2023. (DE 196). Later that same day, the Plaintiffs filed six documents with this Court (DE 197, 197-1-197-5) The County would be solely responsible for attorneys' fees and costs associated not only with these six pleadings, but with any litigation going forward.

broader than the City's ordinance, and therefore the County should pay more of the costs. (DE 218, p. 3) This argument is equally unpersuasive.

First, the Plaintiffs' taxable costs are entirely unrelated to the jurisdictional scope of the ordinances. If there is such a purported relationship, the City certainly does not explain what it is. Rather, the costs were incurred in the process of the Plaintiffs litigating a single action against two Co-Defendants.

Further, to the extent that in making this argument, the City seeks to tie apportionment of costs to the impacts of the Defendants' respective ordinances on the individual Plaintiffs, this argument is entirely without any basis in fact. When the Offers of Judgment were made, the case was still in the early pleading stages of litigation.⁴ While the parties disagreed on whether the Plaintiffs' claims for injunctive and declaratory relief were moot, **all parties** agreed that issue of the Plaintiffs' actual damages remained outstanding.⁵ The parties agreed to hold off on discovery related to Plaintiffs' damages until the Court ruled on the issue of mootness. At the time of settlement, Defendants' Motions to Dismiss were still pending, the issue of mootness remained unresolved, and no discovery relative to the Plaintiffs' damages had yet occurred. Accordingly, there are no findings in the record as to the amounts of the Plaintiffs' actual damages, the jurisdictional scope of the challenged ordinances, or the impact of the City's ordinance versus the County's ordinance on either Plaintiff.

The City's equity argument fails because applying the City's enumerated equity factors makes clear that an unequal apportionment of costs would be inequitable.

⁴ Plaintiffs were given leave to file an Amended Complaint, and did so on October 28, 2022, to which the Defendants responded with Motions to Dismiss. (DE 183, DE 184).

⁵ The County would draw the Court's attention to the fact that the City and the County filed a joint procedural posture statement indicating just that: i.e., that to the extent that there was to be any discovery, that it should only be limited to the issue of compensatory damages, as those were the sole issues in dispute in this case.

Finally, the City asserts that if Court is unconvinced by its preceding arguments, that it should nonetheless allocate a bigger portion of the costs to the County based on equity principles. (DE 218, p. 4).

To that end the City provides a list of factors supporting joint and several liability, which include “joint representation of the non-prevailing parties, common theories of liability or defense among the non-prevailing parties, equal cost attributions, and the unfairness of requiring the prevailing party to collect costs from several sources and bear the risk of non-payment from one or more of them.” (DE 218, p. 4). The City then lists factors supporting cost apportionment, which include “whether the court had consolidated cases on its own initiative, whether costs can be easily disregarded, and unequal cost attribution.” (DE 218, p. 4).

However, the application of these factors only reinforces the County’s position that both Defendants are responsible for an equal amount of the taxable costs. For example, while there was no joint representation, the Defendants did enter into a joint defense agreement early in the litigation. As evidenced by the docket, the Defendants had the same theories of defense.⁶ Finally, as discussed below, here, costs are equally attributable to both Defendants.

As for factors supporting cost apportionment, these too do not support the City’s request. For example, the first factor asks whether consolidation of cases was voluntary or involuntary. However, here there was no consolidation, the Complaint named the County and City as Co-

⁶ Here it is clear that the claims against the Defendants involve a common core of facts based on related legal theories. For example, a dispositive ruling on the merits of the initial petition for preliminary injunction against either Co-Defendant would necessitate a dispositive ruling against the other. All parties recognized this, as the Plaintiffs’ Complaint brought the same fundamental claims of civil rights violations against both the City and the County. Further, the Court may note, the City never sought to sever the Plaintiffs’ proceedings against it from those against the County, pursuant to Federal Rule of Civil Procedure 21, which grants the District Court the authority to sever any claim against a party.

Defendants. Further, costs cannot be easily segregated, nor would apportionment result in unequal cost attribution. The City vaguely refers to “County hearings and witnesses” versus “City witnesses.” (DE 218, p. 5). However, Plaintiffs’ Bill of Costs includes costs that are equally attributable to both Defendants. These include various filing costs, as well as costs for transcripts of several hearings and depositions that involved both Defendants. One is a transcript of a September 12, 2018 hearing on discovery, another is a transcript of an October 18, 2019 hearing on Plaintiffs’ Petition for a Preliminary Injunction. As for deposition transcripts, regardless of the deponent, both Defendants attended and participated in all of these depositions.

In conclusion, the County would note that while the Plaintiffs’ Bill of Costs is relatively short, the Plaintiffs’ billing records are voluminous. Following the City’s approach to costs in relation to attorney’s fees would involve dissecting each of the hundreds of billing entries to determine whether it relates to the County or the City. This exercise would result in an undue burden on all parties, this Court, and, ultimately, would prove to be useless. A cursory look at the docket makes clear that the litigation against the two Defendants was so inextricably intertwined, that such apportionment simply cannot be made.

Joint and Several Liability is Predominant in Section 1988 Attorney’s Fee Claims Involving Two or More Defendants.

Finally, an analysis of Section 1988 fee claims involving inextricably intertwined litigation further supports the County’s position.

“It is frequently appropriate to hold all defendants jointly and severally liable for § 1988 attorney fees in cases in which two or more defendants actively participated in constitutional violation; when this approach is adopted, [the] court must be careful to do so consistently with preexisting background of substantive liability rules.” See *Herbst v. Ryan*, 90 F.3d 1300, 1303 (7th

Cir. 1996), (citing *Koster v. Perales*, 903 F.2d 131, 138 (2d Cir.1990)); see also *Jones v. Southpeak Interactive Corp. of Delaware*, 777 F.3d 658 (4th Cir. 2015); see also *Molnar v. Booth*, 229 F.3d 593, 605 (7th Cir.2000). In *Koster*, the State of New York was a co-defendant with Nassau County (a subdivision of the State of New York) wherein the State sought departure from joint and several liability of a fee award. However, the Second Circuit Court of Appeals affirmed the district court's imposition of joint and several liability for attorney's fees, based on the indivisible nature of the injury to the prevailing party by both the State and the Nassau County, as well as in the interests of avoiding changing the "consideration of a fee petition [into a] "second major litigation." See *Id.* (quoting *Webb v. Dyer County Bd. of Ed.*, 471 U.S. 234, 244 n. 20, 105 S.Ct. 1923, 1929 n. 20, 85 L.Ed.2d 233 (1985))

The only limitation on a district court's discretion to award fees jointly and severally is that it must do so consistently with the pre-existing background of substantive liability rules. See *Kentucky v. Graham*, 473 U.S. at 159,171; 105 S.Ct. 3099, 3108; *Dean v. Gladney*, 621 F.2d 1331, 1339–40 (5th Cir.1980), *cert. denied*, 450 U.S. 983;101 S.Ct. 1521, 67 L.Ed.2d 819 (1981) (defendants must be joint tortfeasors⁷). Of course, the district court should "make every effort to achieve the most fair and sensible solution that is possible." *Grendel's Den, Inc. v. Larkin*, 749 F.2d 945, 960 (1st Cir. 1984).

WHEREFORE, Defendant, Palm Beach County, respectfully requests that this Court hold the County and the City as jointly and severally liable for the \$6,101.44 cost award sought, and to the extent that the costs are to be apportioned, find that the City and the County are each responsible for \$3050.72.

⁷ Here, while the City and the County are not joint tortfeasors, they are in an analogous position by virtue of passing near identical ordinances which impacted both Plaintiffs.

Respectfully submitted this 8th day of June, 2023.

/s/ Marianna Sarkisyan

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 8, 2023, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system, which will send an electronic notice to the authorized CM/ECF filers.

/s/ Marianna Sarkisyan

Marianna Sarkisyan, Esquire
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