UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES ALLEN FRYE, on behalf of himself and all others similarly situated,

Plaintiff – Appellant,

v.

BAPTIST MEMORIAL HOSPITAL, INC., dba Baptist Memorial Hospital-Memphis, dba Baptist Memorial Hospital-Collierville, dba Baptist Memorial Hospital for Women

Defendant – Appellee.

Case No. 12-5371

On Appeal From the United States District Court For the Western District of Tennessee. Western Division, Judge Samuel H. Mays, Jr., Presiding

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APPELLANT'S PRINCIPAL BRIEF

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 12-5371 Case Name: Frye v. Baptist Memorial Hospital, Inc.

Name of counsel: Alan G. Crone

Pursuant to 6th Cir. R. 26.1, James Allen Frye
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

CERTIFICATE OF SERVICE

I certify that on June 4, 2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Alan G. Crone

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiff requests oral argument in this appeal. Oral argument will enable counsel to address any questions of fact or law which are unclear or not fully answered in the parties' briefs.

JURISDICTIONAL STATEMENT

Plaintiff's allegations were for violations of 29 U.S.C. §§ 201 *et seq.* (R. No. 1, Representative Action Complaint for Violation of the Fair Labor Standards Act.) The district court had subject-matter jurisdiction over the claims of Plaintiff pursuant to 28 U.S.C. § 1331 as a matter of general federal question jurisdiction. The award of costs was made pursuant to Fed. R. Civ. Proc. 54(d) and 28 U.S.C. § 1920.

The Court of Appeals has jurisdiction of this appeal pursuant to 28 U.S.C. § 1291.

The Clerk of Court entered its Order Taxing Costs on December 22, 2011. (R. No. 419.) The District Court issued its Order Denying Plaintiff's Motion for Taxation of Costs and Awarding Costs on March 26, 2012. (R. No. 423). Plaintiff timely filed his Notice of Appeal on April 4, 2012. (R. No. 424).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Issue 1: Did the District Court err in ruling that the FLSA allows defendants to recover costs?

Issue 2: Did the District Court err in ruling that Baptist Memorial Hospital was a prevailing party as to the opt-in plaintiffs whose claims were part of the decertified collective action but were not dismissed with prejudice?

Issue 3: Did the District Court err in ruling that all the costs awarded to Baptist Memorial Hospital associated with the decertification were necessary to resolve Mr. Frye's substantive rights?

Issue 4: Did the District Court err in ruling that all the costs awarded Baptist Memorial Hospital were covered by 28 U.S.C. § 1920?

Issue 5: Did the District Court err in ruling that Mr. Frye had not provided sufficient proof that he would be impoverished if required to pay all the costs awarded to Baptist Memorial Hospital?

STATEMENT OF THE CASE

Plaintiff James Frye, along with Plaintiff Clarence Moore, filed a Representative Action Complaint for Violation of the Fair Labor Standards Act on November 2, 2001, alleging the Defendant violated the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq*. (R. No. 1.) Plaintiff Moore later took a voluntary dismissal without prejudice from the case. (R. No. 132, Order Dismissing Clarence Moore and Certain Opt-ins and Order Staying Discovery.) Defendant Baptist Memorial Hospital, Inc., filed its Answer on December 11, 2007. (R. No. 7.)

On February 15, 2008, Plaintiff filed his Motion for Conditional Certification and Notice to Putative Plaintiffs. (R. No. 48.) Defendant filed its response on April 7, 2008 (R. No. 106), and Plaintiff filed his Reply to

Defendant's Response in Opposition to Plaintiff's Motion for Conditional Certification and Notice to Putative Plaintiffs on April 21, 2008. (R. No. 131.) Defendant filed a Sur-reply on May 30, 2008. (R. No. 140.) On September 16, 2008, the District Court issued its Order Granting in Part and Denying in Part Motion to Certify Collective Action. (R. No. 144.)

Defendant filed its Motion to Decertify Collective Action on January 15, 2010. (R. No. 339.) Defendant also filed Defendant Baptist Memorial Hospital Inc.'s Motion for Summary Judgment as to Named Plaintiff James Allen Frye on that same date. (R. No. 343.) Plaintiff's Response to Defendants' Motion to Decertify Collective Action was filed on April 9, 2010. (R. No. 373.) Defendant filed its Reply in Support of Defendants' Motion to Decertify Collective Action on June 3, 2010. (R. No. 387.)

On September 27, 2010, the Court entered its Order Granting Motion to Decertify Collective Action. (R. No. 395.) Plaintiff filed his Response to Defendants' Motion for Summary Judgment on December 10, 2010 (R. No. 400), and Defendant filed Defendant's Reply in Support of Its Motion for Summary Judgment as to Named Plaintiff James Frye on December 20, 2010. (R. No. 403.) On April 27, 2011, the Court entered its Order Granting Defendant's Motion for Summary Judgment. (R. No. 409.) Judgment was also entered on April 27, 2011

(R. No. 410), and Plaintiff filed a Notice of Appeal on May 27, 2011. (R. No. 413.)

Defendant filed its Motion for Bill of Costs on May 20, 2011. (R. No. 411.) On July 1, 2011, Plaintiff filed his Memorandum in Opposition to Bill of Costs. (R. No. 417.) Defendant's Reply in Support of Its Bill of Costs was filed on July 5, 2011. (R. No. 418.) The Clerk of Court issued its Order Taxing Costs on December 22, 2011 (R. No. 419), and Plaintiff filed his Motion to Review the Order of the Clerk Taxing Costs on December 29, 2011. (R. No. 420.) Defendant's Response in Opposition to Motion to Review the Order of the Clerk Taxing Costs was filed on January 17, 2012. (R. No. 422.) The District Court issued its Order Denying Plaintiff's Motion for Taxation of Costs and Awarding Costs on March 26, 2012 (R. No. 423), and Plaintiff timely filed his Notice of Appeal on April 4, 2012, which appeal is currently before this Court. (R. No. 424).

STATEMENT OF FACTS

The underlying case before the District Court was an FLSA action. (R. No. 1, Representative Action Complaint for Violation of the Fair Labor Standards Act.) A collective action was conditionally certified by the District Court on September 16, 2008. (R. No. 144, Order Granting in Part and Denying in Part Motion to Certify Collective Action.) Four hundred and two employees filed consents to join the collective action. (R. No. 419, Order Taxing Costs at 1.)

Following certification, there was a period of class discovery, during which time the Defendant, Baptist Memorial Hospital, Inc., (hereinafter referred to as "Baptist"), deposed thirty-nine opt-in plaintiffs, as well as Plaintiff James Allen Frye (hereinafter referred to as "Mr. Frye"). (R. No. 419, Order Taxing Costs at 1.) In addition, some of the plaintiffs opted out during this phase of the case. (R. No. 419, Order Taxing Costs at 1.) After two years and extensive discovery by both sides, the District Court granted Baptist's motion to decertify the collective action. (R. No. 395, Order Granting Motion to Decertify Collective Action; R. No. 419, Order Taxing Costs at 1.) This resulted in the dismissal without prejudice of the claims of the individual opt-in plaintiffs. (R. No. 419, Order Taxing Costs at 1.)

Approximately seven months later, the District Court also granted summary judgment to Baptist on Mr. Frye's individual FLSA claim. (R. No. 409, Order Granting Defendant's Motion for Summary Judgment ; R. No. 419, Order Taxing Costs at 1.) The basis for the Court's granting summary judgment was that Mr. Frye had not timely filed a written consent to join the collective action and therefore was outside the statute of limitations. (R. No. 409, Order Granting Defendant's Motion for Summary Judgment at 7-20.)

On May 20, 2011, Baptist filed its Bill of Costs. (R. No. 411, Motion for Bill of Costs.) Baptist sought $1,008.00 in subpoena costs for subpoenaed opt-in

plaintiffs (R. No. 411-2, Exhibit A to Motion for Bill of Costs); $23,240.60 in court reporter costs (R. No. 411-3, Exhibit B to Motion for Bill of Costs); $29,197.18 in printing charges (R. No. 411-4, Exhibit C to Motion for Bill of Costs); and $1,955.85 for exemplification and copy charges (R. No. 411-5, Exhibit C to Motion for Bill of Costs). The overwhelming majority of these costs were related to the collective action, not the summary judgment on Mr. Frye's individual claim. The Clerk of Court awarded Baptist all of its requested costs, for a total of $55,401.63. (R. No. 419, Order Taxing Costs at 6.) Although Mr. Frye filed a Motion to Review the Order of the Clerk Taxing Costs (R. No. 420), the District Court denied the motion and ordered Mr. Frye to pay the full $55,401.63. (R. No. 423, Order Denying Plaintiff's Motion for Taxation of Costs and Awarding Costs at 22.)

SUMMARY OF ARGUMENT

The District Court abused its discretion and committed reversible error in upholding the award of costs to Baptist. The Court erred in four respects: (1) it erroneously held that the FLSA allows for defendants to recover costs as prevailing parties, (2) it erred because Baptist was not a prevailing party to the opt-in plaintiffs, whose claims were dismissed without prejudice when the collective action was decertified, (3) it erred because not all of the costs taxed against Mr. Frye were necessary to resolve his substantive rights, (4) it erroneously allowed

Baptist to recover costs not contemplated by 28 U.S.C. § 1920, and (5) it erred because the taxation of costs against Mr. Frye will render him insolvent.

First, Federal Rule of Civil Procedure 54(d) provides that a prevailing party should recover its costs unless a federal statute, a court, or the rules themselves provide otherwise. The FLSA, by its plain language, only allows for the recovery of attorney's fees by prevailing *plaintiffs*, not defendants, and applying the principle of *expression unius est exclusion alterius* to the statute, it also provides that only prevailing plaintiffs may recover costs. This reading of the statute is supported by the fact that the FLSA is a remedial and humanitarian statute and that the policy underlying it is to promote lawsuits by workers who are either not being paid the minimum wage or who are not being paid a premium for overtime hours. Allowing defendants to recover costs when they prevail in an FLSA action would have a chilling effect on potential plaintiffs, both potential representative plaintiffs and potential opt-ins.

Second, Mr. Frye should not have been taxed for Baptist's litigation costs because Baptist is not a prevailing party as to the opt-in plaintiffs, whose claims were dismissed *without* prejudice when the case was decertified. For one thing, decertification is a procedural ruling. It does not go to the merits of a claim; rather, it is collateral to those merits. In addition, a party is a prevailing party under Rule 54(d) when there is an enduring and irrevocable change in the legal relationship

between the parties. No such change has occurred in the instant case because the decertification did not extinguish the opt-in plaintiffs' FLSA claims against Baptist. Instead, those claims survived and could be brought again in another action.

Third, the majority of the costs awarded to Baptist were not necessary to resolve his substantive rights. Mr. Frye's claim was resolved on summary judgment because the Court found that, because he had not filed a consent form to join the lawsuit, his claim fell outside the applicable statute of limitations. Most of the costs awarded to Baptist were incurred, not in relation to this issue, but instead in relation to the decertification of the collective action. If the FLSA *does* allow for the recovery of costs by a defendant, the only equitable way to assess the costs related to the decertification of a collective action is to apportion those costs on a *pro rata* basis to all the plaintiffs, representative plaintiffs and opt-ins alike. Allowing Mr. Frye to pay the costs related to all the opt-ins would be completely inequitable.

Fourth, certain costs which were taxed against Mr. Frye are not provided for by 28 U.S.C. § 1920, specifically the costs of OCR imaging. Yet Mr. Frye was taxed for $5,148.23 in OCR imaging costs. At the very least, the cost bill must be reduced to remove those charges.

Finally, when awarding costs, courts are to consider whether or not the award will impoverish the party against whom the costs are taxed. Mr. Frye submitted an affidavit which set forth his income and expenses and which showed that he cannot afford to pay the costs assessed against him. For that reason, Baptist's costs should not be assessed against him. If they are, the amount should be reduced.

ARGUMENT

I. Standard of Review.

The Court of Appeals reviews a district court's award of costs under an abuse of discretion standard. *Singleton v. Smith*, 241 F. 3d 534, 538 (6th Cir. 2001); *Jones v. Continental Corp.*, 789 F.2d 1225, 1233 (6th Cir. 1986). "Abuse of discretion is defined as a definite and firm conviction that the trial court committed a clear error of judgment." *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 780 (6th Cir. 1996).

II. The FLSA Does Not Provide for the Recovery of Costs by Defendants.

First, the District Court erred in finding that the FLSA, 29 U.S.C. § 201, *et seq.*, allows prevailing defendants to recover costs in a collective action. The Sixth Circuit has not yet determined whether defendants can recover costs under the FLSA, but the language of the statute does not provide for costs to defendants, and the broad remedial purpose of the statute argues against the award of costs to

defendants. Neither the letter nor the spirit of the FLSA allows for defendants to recover costs.

The Federal Rules of Civil Procedure provide for an award of certain costs to prevailing parties in actions in federal court: "*Unless a federal statute*, these rules, or a court order *provides otherwise*, costs—other than attorney's fees—should be allowed to the prevailing party." Fed. R. Civ. Proc. 54(d) (emphasis added). The question then, in the case at bar, is whether or not the FLSA is one of those statutes that "provides otherwise" when it comes to an award of costs to a defendant. The plain language of the statute would suggest that it is. Pursuant to the FLSA, "the court in such [an] action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action." 29 U.S.C. § 216(b).

The Sixth Circuit has previously interpreted this language to mean that the award of attorney's fees by the statute applies *only* to plaintiffs, not to defendants:

> Defendants further claim they are entitled to attorney fees. Under § 216(b), however, "[t]he court in such action shall, in addition to any judgment awarded *to the plaintiff* or plaintiffs, allow a reasonable attorney's fee *to be paid by the defendant,* and costs of the action." (emphasis added). This section does not provide for plaintiffs to pay attorney fees to defendants; under the plain language of the statute, defendants' argument is meritless.

Fegley v. Higgins, 19 F.3d 1126, 1135 (6th Cir. 1994). Even though the statute does not state that defendants may not be awarded costs if they prevail in the

lawsuit, the *Fegley* court interpreted the statute's language that successful plaintiffs would be awarded attorney's fees as exclusive of attorney's awards to defendants, precisely because it does not state that attorney's fees can be paid to them. Similarly, the fact that the statute also provides for an award of costs to plaintiffs, in the *same* sentence as its provision for attorney's fees, and does not state that an award of costs should be given to prevailing defendants, leads to the same conclusion—that costs are not available to prevailing defendants in FLSA collective actions. The principle of *expression unius est exclusion alterius*, that the express mention of one thing excludes all others, argues that the authors of the statute intended for attorney's fees *and* costs to be available *only* to prevailing plaintiffs.

The reason for this implicit prohibition becomes clear upon examination of the policy behind the statute. The Sixth Circuit has noted that the FLSA is a remedial statute which is to be liberally interpreted to effectuate Congress' intention to help employees. This Court discussed the history of the statute and the policies underlying it in *Dunlop v. Carriage Carpet Co.*, 548 F.2d 139, 143 (6th Cir. 1977):

> The Fair Labor Standards Act of 1938 was enacted by Congress to be a broadly remedial and humanitarian statute. The Act was designed to correct "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers . . ." 29 U.S.C. s 202(a). In *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 706-07, 65 S.Ct. 895,

902, 89 L.Ed. 1296 (1945), the Supreme Court reviewed the Congressional history of the Act and emphasized the broad scope of Congressional intent:

> The legislative history of the Fair Labor Standards Act shows an intent on the part of Congress to protect certain groups of the population from sub-standard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce. The statute was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce. (Footnotes omitted.)

The FLSA's primary purpose was to protect the ordinary worker, who is generally otherwise unprotected and lacking in the power to effectively bargain with her employer. *See Dunlop*, 548 F.2d at 143. As a result, "[i]n interpreting provisions of the Fair Labor Standards Act the courts have construed the Act's definitions liberally to effectuate the broad policies and intentions of Congress." *Id.* at 144. The provisions of the FLSA "are remedial and humanitarian in purpose." *Id.* Because the FLSA is to be interpreted in a remedial, humanitarian manner, with its prime purpose being the protection of individual workers, the only proper interpretation of the statute is that it provides for an award of costs to plaintiffs only, not to defendants, who are in a far better position to bear those costs. Indeed, "[o]bviously Congress intended that the wronged employee should receive his full

wages plus the penalty without incurring any expense for legal fees or costs." *Maddrix v. Dize*, 153 F.2d 274, 275-76 (4th Cir. 1946).

Even if the FLSA is interpreted to provide for an award of costs to a prevailing defendant, such an award should be made sparingly. Among the factors a court in this Circuit is to consider when making a decision on whether or not to award costs, and how much to award, is whether the effect of such an award would be to chill the prospect of any future litigation against the more affluent employer. *See White & White, Inc. v. American Hosp. Supply Corp.*, 786 F.2d 728, 730 (6th Cir. 1986); *Beck v. Buckeye Pipe Line Servs. Co.*, No. 3:10 CV 319, 2011 WL 3040910 at *1 (N.D. Ohio July 25, 2011). Indeed several courts have concluded that awarding costs to defendants can have just such a chilling effect. *See Austin v. Cuna Mutual Ins. Society*, 232 F.R.D. 601, 608 (W.D. Wis. 2006); *King v. ITT Continental Baking Co.*, No. 84 C 3410, 1986 WL 2628 at *3 (N.D. Ill. Feb. 18, 1986). In the instant action, there can be no doubt that an award to Baptist of costs will chill the possibility of any future action against it by its employees and, further, will chill the possibility of an FLSA action against any employer in the Sixth Circuit.

The District Court, however, gives short shrift to this probability, finding that "Frye's argument that awarding costs to Baptist would have a chilling effect on future FLSA claims is without merit." (R. No. 423, Order Denying Plaintiff's

Motion for Taxation of Costs and Awarding Costs at 9.) While recognizing the broad remedial purpose behind the statute, the Court concludes that an award of costs to Baptist would not undermine that purpose. (R. No. 423, Order Denying Plaintiff's Motion for Taxation of Costs and Awarding Costs at 9.) The Court's reasoning behind that finding represents a basic misapprehension of the realities of the workplace and the purpose behind the statute. According to the Court,

> Frye chose to bring his FLSA claim as a collective action. He was not required to do so. He chose to put himself at risk as the named party, and he assumed the attendant risks, including the risk of paying costs. That the FLSA is remedial should not permit Frye to evade the responsibilities of advancing a failed claim.

(R. No. 423, Order Denying Plaintiff's Motion for Taxation of Costs and Awarding Costs at 9-10.) The Court concluded that denying a prevailing FLSA defendant an award of its costs would allow plaintiffs to pursue collective actions without any risk, in supposed derogation of the purpose behind the FLSA. (R. No. 423, Order Denying Plaintiff's Motion for Taxation of Costs and Awarding Costs at 10.)

The District Court, though, was wrong in reaching this conclusion. "The purposes of a collective action is to 'allow[ ] . . . plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources.' " *Nerland v. Caribou Coffee Co.*, 564 F. Supp. 2d 1010, 1025 (D. Minn. 2007) (quoting *Hoffman-LaRoche Inc. v. Sperling*, 493 U.S. 165, 170, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989)). In fact, many putative plaintiffs would not be able to afford to

litigate their rights if they were not part of a collective action:

> Finally, although Caribou contends it has the right to defend against individualized claims on an individual basis, rather than collectively, (*see* Doc. No. 402, Defendant's Memorandum in Support at 38), this right must be balanced with the rights of the plaintiffs-many of whom would likely be unable to bear the costs of an individual trial-to have their day in court. *See Glass v. IDS Fin. Servs., Inc.*, 778 F.Supp. 1029, 1081-82 (D.Minn.1991) (ADEA claim) (finding that although the defendant complained that collective treatment would infringe upon its due process rights, such treatment was necessary in order to protect the rights of the plaintiffs, who were "less able to bear the cost of separate trials because they ha[d] fewer resources than [the defendant]"). Here, the Court finds the individual plaintiffs are less able to bear the cost of separate trials because they have fewer resources than Caribou; a collective action will give plaintiffs a fair and full opportunity to adjudicate their claims. *See id.* at 1081.

Nerland, 564 F. Supp. 2d at 1026.

To hold the individual plaintiffs in a collective action responsible for costs incurred by a large defendant corporation would discourage their joining the lawsuit, for fear of incurring costs they are in no position to bear—for even if they can do so without going bankrupt, the common FLSA opt-in can ill afford *any* extra expenses of any sort. Even worse, however, the threat of holding a representative plaintiff responsible for the total sum of a defendant's Rule 54(d) costs will, in most cases, discourage that plaintiff from bringing a collective action. Furthermore, in many FLSA cases the damages likely to be recovered by any one plaintiff are not large and, in most cases, would be dwarfed by the costs incurred by the defendant in litigating even that one single claim. So not only would most

plaintiffs balk at bringing a collective action, they would also balk at bringing their own individual actions. Thus, holding plaintiffs like Mr. Frye liable for the costs of a large, affluent defendant, like Baptist, would not just chill the prospect of FLSA litigation—it would put it in a deep freeze.

Therefore, the proper interpretation which should be given to the FLSA is that defendants cannot be awarded costs when they prevail in the lawsuit. And even if this Court finds that the statute does not forbid awarding costs to defendants, it should certainly find that such costs, especially full costs, should be awarded sparingly indeed. In the instant case, the Clerk and the District Court have saddled Mr. Frye with an overwhelming cost bill of $55,401.63. (R. No. 419, Order Taxing Costs at 6.) While this might not be a large amount for Baptist, it is a tremendous amount for Mr. Frye to bear. If this cost bill stands, it will be far more unlikely in the future that any potential plaintiffs will ever bring an FLSA collective action against Baptist—or any other employer for that matter.

III. Baptist Was Not a Prevailing Party as to the Opt-ins of the Decertified Collective Action.

Even if this Court concludes that the FLSA does provide for the recovery of costs by defendants, the Court must still reverse the overall award against Mr. Frye. While Baptist may well have been a prevailing party against Mr. Frye himself, it was not a prevailing party against the opt-ins of the decertified class. Since the vast majority of the costs assessed against Mr. Frye actually were

incurred in defending against the claims of the opt-ins, against whom Baptist did not prevail, the cost award must be cut drastically. Mr. Frye should only be assessed those costs which were incurred in defending against his claim since Baptist was only a prevailing party as to him.

"[D]enial or decertification of a[n FLSA collective action] class is 'a procedural ruling, collateral to the merits of the litigation.' " *See Johnson v. Big Lots Stores, Inc.*, 639 F. Supp. 2d 696, 708 (E.D. La. 2009) (citing *J.R. Clearwater, Inc. v. Ashland Chemical Co.*, 93 F.3d 176 (5th Cir. 1996) (quoting *Deposit Guaranty Bank v. Roper*, 445 U.S. 326, 336, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980))); *but see Gidden v. Chromalloy Am. Corp.*, 808 F.2d 621, 623 (7th Cir. 1986) (holding that a decertification decision is not collateral to a determination of the merits). The Sixth Circuit has stated that a denial of class certification status in an arbitral setting is collateral to the substantive merits of a claim:

> Here, in contrast, the interim class arbitration determination, albeit a significant procedural step in the arbitration proceedings, has no impact on the parties' substantive rights or the merits of any claim. The denial of class arbitration proceedings arguably disposes of a discrete, independent, severable issue, but it is a procedural issue . . . .

Dealer Computer Servs., Inc. v. Dub Herring Ford, 623 F.3d 348, 352 (6th Cir. 2010). The U.S. Supreme Court has stated, in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978), that an order dealing with class certification does not fall into the category of an order conclusively

determining a disputed question and resolving an issue completely separate from the merits of the case. Two years later, however, in *Deposit Guaranty Nat'l Bank*, 445 U.S. at 336, the Court stated as follows: "We view the denial of class certification as an example of a procedural ruling, collateral to the merits of a litigation . . . ."

Furthermore, in order to be a prevailing party in a federal lawsuit, there must be a change in the legal relationship between the parties, such as occurs in a judgment on the merits or in a consent decree. *See Buckhannon Board & Care Home v. West Virginia Dept. of Health & Human Resources*, 532 U.S. 598, 604, 121 S. Ct. 1835, 149 L. Ed. 2d 855 (2001). In *McQueary v. Conway*, 614 F.3d 591 (6th Cir. 2010), this Court noted that, in order for there to be a prevailing party, there has to be an enduring and irrevocable change in the legal relationship between the parties. *Id.* at 597 (quoting *Sole v. Wyner*, 551 U.S. 74, 86, 127 S. Ct. 2188, 167 L. Ed. 2d 1069 (2007)). The change must also be material. *McQueary*, 614 F.3d at 598 (citing *Sole*, 551 U.S. at 83).

It is indisputable that a decertification decision does not involve an enduring and irrevocable change in the relationship between a defendant and the plaintiffs who had opted into the collective action. The effect of a decertification decision was explained in *Nerland*:

> Moreover, the effect of a court order directing the decertification of the conditional class in this case would be a

> dismissal all of the opt-in plaintiffs *without prejudice*, placing each opt-in plaintiff back at square one, without the benefit of pooled resources, and presenting the Court with almost three hundred separate lawsuits to resolve the same question of whether Caribou's exemption classification of all of its store managers was proper.

564 F. Supp. 2d at 1025-26 (emphasis added). Just like in *Nerland*, the legal relationship between Baptist and the opt-in plaintiffs did not *irrevocably* change when the collective action was decertified. Neither was that relationship changed when summary judgment was granted against Mr. Frye. The opt-in plaintiffs had the right to file their own FLSA actions against Baptist, and indeed some have done just that.

Therefore, those costs generated by Baptist in decertifying the collective action were incurred in winning a procedural issue, collateral to the substantive merits of the case, and did not secure an enduring change in the relationship between Baptist and the opt-ins. Those particular costs should not have been assessed against Mr. Frye. Taxing Mr. Frye for costs incurred solely in the pursuit of decertification is not warranted and is, in fact, inequitable.

IV. Not All the Costs Awarded to Baptist Were Necessary to Resolve Mr. Frye's Substantive Rights.

A question closely related to the issue of prevailing party status in this case is whether or not all the costs awarded to Baptist were necessary to resolve Mr. Frye's substantive rights. Mr. Frye's substantive claims were dismissed by summary judgment because Mr. Frye had not timely filed a written consent to join

the collective action.[1] (R. No. 409, Order Granting Defendant's Motion for Summary Judgment at 7-20.) The decertification of the case, however, had *no* bearing on whether or not Mr. Frye had timely filed a written consent. The costs incurred in defending against the original certification and in prosecuting the decertification were, therefore, collateral to the decision which actually resolved Mr. Frye's substantive rights. If Baptist's costs were to be assessed at all, the only equitable solution would have been to assess them *pro rata* against all of the opt-ins, not solely against Mr. Frye.

Rule 54(d) provides that the specific costs set forth in 28 U.S.C. § 1920, such as fees for printed or electronically recorded transcripts, must be those which were necessarily obtained for use in the case. The vast majority of the costs awarded to Baptist, however, were related solely to the decertification action, not to litigating the summary judgment against Mr. Frye. The costs awarded to Baptist were the following:

1. Baptist was awarded $1,008.00 in subpoena costs for subpoenaed opt-in plaintiffs. (R. No. 411-2, Exhibit A to Motion for Bill of Costs—Subpoena Costs at 1; R. No. 419, Order Taxing Costs at 3, 6.) None of these

[1] The Court also determined that Mr. Frye had failed to carry his burden to show that Baptist had acted willfully, thereby making the three-year statute of limitation inapplicable to him. (R. No. 409, Order Granting Defendant's Motion for Summary Judgment at 20-26.)

costs were attributable to the decision on the merits because Mr. Frye was not subpoenaed and the depositions taken pursuant to the subpoenas had nothing to do with whether or not Mr. Frye had timely filed a written consent.

2. Baptist was awarded $23,240.60 in court reporter costs. (R. No. 411-3, Exhibit B to Motion for Bill of Costs—Court Reporter Costs at 2; R. No. 419, Order Taxing Costs at 3, 6.) Only $290.20 of this amount is attributed to Mr. Frye's deposition. (R. No. 411-3, Exhibit B to Motion for Bill of Costs—Court Reporter Costs at 1.) The rest of the costs were incurred in fighting the collective action.

3. Baptist was awarded $29,197.18 in printing charges. (R. No. 411-4, Exhibit C to Motion for Bill of Costs—Printing Costs at 1; R. No. 419, Order Taxing Costs at 3, 6.) Of this amount, $25,240.75 was charged for scanning personnel files. (R. No. 411-4, Exhibit C to Motion for Bill of Costs—Printing Costs at 7-8.) The vast majority of these was used as exhibits in taking depositions of the opt-in plaintiffs and had no bearing on the summary judgment issue.

4. Baptist was awarded $1,955.85 for exemplification and copy charges. (R. No. 411-5, Exhibit D to Motion for Bill of Costs—Docs Used in This Matter at 44; R. No. 419, Order Taxing Costs at 3, 6.) Of this total, $778.35

was the cost for production of documents. (R. No. 411-5, Exhibit D to Motion for Bill of Costs—Docs Used in This Matter at 44.) A large number of these documents were used only in deposing opt-ins and supporting Baptist's attempts to defeat certification. An additional $327.00 was incurred in producing defensive declarations from Baptist's employees, which once again were used solely for the collective action. (R. No. 411-5, Exhibit D to Motion for Bill of Costs—Docs Used in This Matter at 8-20.)

Those costs which were appropriately attributable to Mr. Frye were only the costs necessary for the summary judgment pleadings, including the copies of pleadings actually filed with the Court, deposition transcripts which were cited in the summary judgment pleadings, and those subpoenas for witnesses whose testimony was actually cited in the summary judgment pleadings. Most of the costs which were awarded, though, were incurred in defending against the collective action, not in winning summary judgment against Mr. Frye. Since they were not directly related to resolving Mr. Frye's substantive rights, these costs should not have been assessed against him.

If the FLSA *does* allow a defendant to recover costs, the only equitable way to do that is to apportion the costs among the representative plaintiff and all of the opt-in plaintiffs. Several courts have recognized this and have insisted that notices of FLSA collective actions include language to the effect that anyone opting into

the case might have to pay some of the defense costs.[2] *See Harris v. Pathways Community Behavioral Healthcare, Inc.*, No. 10-0789-CV-W-SOW, 2012 WL 1906444 at *4 (W.D. Mo. May 25, 2012) ("Therefore, the Court finds that the Notice should inform prospective class members about the possibility that they may be responsible for some costs."); *Perrin v. Papa John's International, Inc.*, No. 4:09CV01335 AGF, 2011 WL 4815246 at *4 (E.D. Mo. Oct. 11, 2011) ("In order to provide accurate notice courts have held that this fact [that opt-ins might have to pay some defense costs] should be included in the notice."); *Cretin-Miller v. Westlake Hardware, Inc.*, No. 08-2351-KHV, 2009 WL 2058734 at *4 (D. Kan. July 15, 2009) ("The Court therefore agrees with Westlake that the notice should inform recipients about the possibility that they may be responsible for court costs.")

At the cost bill hearing, Baptist suggested that the cost bill could be apportioned on a *pro rata* basis among all the opt-in plaintiffs. (R. No. 419, Order Taxing Costs at 5.) The Clerk of Court was sympathetic to this solution, noting

[2] Some courts have refused to require a notice that opt-ins could be liable for costs. *See Austin v. Cuna Mutual Ins. Society*, 232 F.R.D. 601, 608 (W.D. Wis. 2006) ("These courts have declined to require the inclusion of this warning because the statute is silent with respect to fee shifting for prevailing defendants and because the warning would chill participation in collective actions."); *King v. ITT Continental Baking Co.*, No. 84 C 3410, 1986 WL 2628 at *3 (N.D. Ill. Feb. 18, 1986) ("The Court notes that Section 216(b) specifically directs that prevailing plaintiffs should be awarded attorneys' fees and costs; it is silent as to prevailing defendants. . . .The Court finds that inclusion of such a statement would unreasonably chill participation in this action by potential class members.").

that such an apportionment would result in each opt-in paying less than $200.00. (R. No. 419, Order Taxing Costs at 5.) But the Clerk was concerned about certain perceived problems with this solution:

> The problem, in the opinion of the Clerk of Court, is that there is no legal basis for allocating the costs across the entire decertified class. There is no credible evidence that opt-in plaintiffs had agreed to bear a proportionate share of the costs in this case. Moreover, the decertification of the class itself runs counter to requiring each opt-in plaintiff to bear a portion of these expenses. Further, the principal cited case by Defendant in support of apportionment clearly states that the apportionment awarded was split between the plaintiffs who remained in the case; dismissed opt-in plaintiffs were not taxed any costs. *See Anderson v. Cagle Foods JV, LLC*, No. 1:00-cv-166 (WLS) (M.D. Ga). [R. No. 418-1, Exhibit A to Defendant's Reply in Support of Its Bill of Costs.] Finally, if Defendant desires to apportion costs among the named plaintiff and all of the opt-in plaintiffs, the opt-in plaintiffs should have been joined in the Bill of Costs proceeding.

(R. No. 419, Order Taxing Costs at 5.) Regardless of the Clerk's reservations, the *only* equitable solution would have been to apportion the costs among all the plaintiffs. The bulk of the costs, after all, related to the certification and decertification proceedings—they related to the opt-in plaintiffs, not to Mr. Frye. The fact that Baptist did not join them in the Bill of Costs proceeding should not result in the inequity of Mr. Frye bearing all these costs.

V. Not All of the Costs Awarded to Baptist Were Covered by 28 U.S.C. § 1920.

Assuming *arguendo* that it was not an abuse of discretion for the District Court to award fees to Baptist and to also assess fees against Mr. Frye which

clearly had no relation to the determination of his substantive claim, some of the fees awarded to Baptist were still inappropriate. Specifically, the District Court erred in approving the assessment against Mr. Frye for those charges identified as "Image OCR Capture."

Baptist's motion for costs included several invoices for OCR imaging. These were the following:

1. Invoice dated 3/28/08 for $138.24. (R. No. 411-4, Exhibit C to Motion for Bill of Costs—Docs Used in This Matter at 5.)

2. Invoice dated 1/30/09 for $1,116.33. (R. No. 411-4, Exhibit C to Motion for Bill of Costs—Docs Used in This Matter at 7.)

3. Invoice dated 2/17/09 for $3,382.55. (R. No. 411-4, Exhibit C to Motion for Bill of Costs—Docs Used in This Matter at 8.)

4. Invoice dated 4/13/09 for $382.15. (R. No. 411-4, Exhibit C to Motion for Bill of Costs—Docs Used in This Matter at 10.)

5. Invoice dated 6/10/09 for $9.93. (R. No. 411-4, Exhibit C to Motion for Bill of Costs—Docs Used in This Matter at 12.)

6. Invoice dated 6/26/09 for $57.08. (R. No. 411-4, Exhibit C to Motion for Bill of Costs—Docs Used in This Matter at 13.)

7. Invoice dated 1/8/10 for $61.95. (R. No. 411-4, Exhibit C to Motion for Bill of Costs—Docs Used in This Matter at 15.)

These costs totaled $5,148.23. (R. No. 419, Order Taxing Costs at 5.)

Several courts, however, have found that charges for OCR imaging are not recoverable. *See City of Alameda v. Nuveen Municipal High Income Opportunity Fund*, Nos. C 08-4575 SI, C 09-1437 SI, 2012 WL 177566 at *5 (N.D. Cal. Jan. 23, 2012) ("The Court agrees with plaintiffs that OCR and metadata extraction are not recoverable."); *Computer Cache Coherency Corp. v. Intel Corp.*, No. C-05-01766 RMW, 2009 WL 5114002 at *4 (N.D. Cal. Dec. 18, 2009) ("The court finds that a portion of the disputed costs, such as the expense of Bates-numbering and electronic scanning, are recoverable as reproduction costs, while some of the costs, such as the expense incurred for OCR and metadata extraction, are not recoverable, as they are merely for the convenience of counsel."); *Roehrs v. Conesys, Inc.*, 2008 WL 755187 at *3 (N.D. Tex. Mar.21, 2008) (rejecting argument that scanned digital versions of paper documents were necessary to the case because they were "merely only more convenient for counsel to search and examine"); *Conoco, Inc. v. Energy & Envtl. Intern., L.C.*, 2006 WL 734396 at *2 (S.D. Tex. Mar.22, 2006) (prohibiting recovery for scanned images).

VI. The District Court Erred in Ruling that Mr. Frye Had Not Provided Sufficient Proof that He Would Be Impoverished if Required to Pay All the Costs Awarded to Baptist.

Finally, another factor to consider regarding the appropriateness of a cost award is the losing party's inability to pay. *See White & White*, 786 F.2d at 730;

Beck, 2011 WL 3040910 at *1. Mr. Frye executed an affidavit which set forth his income and monthly expenses. (R. No. 416-1, Affidavit of Financial Status for James Allen Frye.) His affidavit explains that he is currently working as a registered nurse in Sacramento, California. (R. No. 416-1, Affidavit of Financial Status for James Allen Frye at ¶ 2.) His current salary is approximately $75,000 per year. (R. No. 416-1, Affidavit of Financial Status for James Allen Frye at ¶ 2.) His regular monthly expenses total approximately $3, 190.00. (R. No. 416-1, Affidavit of Financial Status for James Allen Frye at ¶ 3.) According to Mr. Frye, he will not be able to pay the cost award to Baptist of $55,401.63. (R. No. 416-1, Affidavit of Financial Status for James Allen Frye at ¶ 4.)

Affirming the award of costs would be a gross inequity. Mr. Frye cannot pay, but Baptist is exceedingly capable of absorbing these costs. Because Mr. Frye is in danger of becoming impoverished, the District Court should be reversed. At the very least, it should the amount of costs assessed against him should be reduced.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court and disallow all costs against Mr. Frye. In the alternative, if the Court is of the opinion that some of the costs are allowable, they should be reduced in amount so that Mr.

Frye is only taxed with what would have been his *pro rata* share among all of the opt-in plaintiffs.

Date: June 4, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 6,963 words in proportionately spaced font in 14 type.

/s/ Alan G. Crone

CERTIFICATE OF SERVICE

I hereby certify that the foregoing pleading was filed electronically and notice of such filing was made electronically to counsel for Defendants – Appellees pursuant to the Electronic Case Filing Rules of the United States Court of Appeals – Sixth Circuit on June 4, 2012 to:

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ADDENDUM:
DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

R. No. 1, Representative Action Complaint for Violation of the Fair Labor Standards Act

R. No. 7, Answer of Baptist Memorial Hospital

R. No. 48, Plaintiff's Motion for Conditional Certification and Notice to Putative Plaintiffs

R. No. 106, Defendant's Response in Opposition to Plaintiffs' Motion for Conditional Certification and Notice to Putative Plaintiffs

R. No. 131, Plaintiff's Reply to Defendant's Response in Opposition to Plaintiffs' Motion for Conditional Certification and Notice to Putative Plaintiffs

R. No. 132, Order Dismissing Clarence Moore and Certain Opt-ins and Order Staying Discovery

R. No. 140, Defendant's Sur-Reply to Plaintiff's Reply to Defendant's Response in Opposition to Plaintiff's Motion for Conditional Certification and Notice to Putative Plaintiffs

R. No. 144, Order Granting in Part and Denying in Part Motion to Certify Collective Action

R. No. 339, Defendant's Motion to Decertify Collective Action

R. No. 343, Defendant Baptist Memorial Hospital Inc.'s Motion for Summary Judgment as to Named Plaintiff James Allen Frye

R. No. 373, Plaintiff's Response to Defendants' Motion to Decertify Collective Action

R. No. 387, Reply in Support of Defendants' Motion to Decertify Collective Action

R. No. 395, Order Granting Motion to Decertify Collective Action

R. No. 400, Plaintiff's Response to Defendants' Motion for Summary Judgment

R. No. 403, Defendant's Reply in Support of Its Motion for Summary Judgment as to Named Plaintiff James Frye

R. No. 409, Order Granting Defendant's Motion for Summary Judgment

R. No. 410, Judgment

R. No. 411, Motion for Bill of Costs

R. No. 411-1, Affidavit in Support of Bill of Costs

R. No. 411-2, Exhibit A to Motion for Bill of Costs—Subpoena Costs

R. No. 411-3, Exhibit B to Motion for Bill of Costs—Court Reporter Costs

R. No. 411-4, Exhibit C to Motion for Bill of Costs—Printing Costs

R. No. 411-5, Exhibit D to Motion for Bill of Costs—Docs Used in This Matter

R. No. 413, Notice of Appeal

R. No. 416, Memorandum in Opposition to Bill of Costs

R. No. 416-1, Affidavit of Financial Status for James Allen Frye

R. No. 417, Memorandum in Opposition to Bill of Costs

R. No. 418, Defendant's Reply in Support of Its Bill of Costs

R. No. 418-1, Exhibit A to Defendant's Reply in Support of Its Bill of Costs

R. No. 419, Order Taxing Costs

R. No. 420, Motion to Review the Order of the Clerk Taxing Costs

R. No. 420-1, Memorandum in Support of Motion to Review the Order of the Clerk Taxing Costs

R. No. 422, Order of the Clerk Taxing Costs

R. No. 423, Order Denying Plaintiff's Motion for Taxation of Costs and Awarding Costs

R. No. 424, Notice of Appeal