STATE OF MAINE
YORK, ss.

SUPERIOR COURT
CIVIL ACTION
DOCKET NO. RE-09-111

ROBERT F. ALMEDER et al.,	)	
	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**PLAINTIFFS' PARTIAL OBJECTION**
	)	**TO TOWN OF KENNEBUNKPORT'S**
TOWN OF KENNEBUNKPORT and	)	**BILL OF COSTS**
ALL PERSONS WHO ARE	)	
UNASCERTAINED,	)	
	)	
Defendants.	)	

Plaintiffs object to the recoverability and amount of costs stated in the Town of Kennebunkport's (the "Town") December 10, 2012 Bill of Costs, which was served electronically.[1] For the following reasons, the Town is not permitted to recover all of the costs included in its Bill of Costs.

Costs of trial are only recoverable pursuant to Rule 54(d)–(g) of the Maine Rules of Civil Procedure and by statute. M.R. Civ. P. 54(d) (costs allowed "as provided by statute and by these rules"). Generally there are two categories of recoverable costs: (1) costs recoverable that "shall be allowed" pursuant to 14 M.R.S. § 1502-B and (2) discretionary costs that are shown to be "just and reasonable" for trial under 14 M.R.S. § 1502-C. When it comes to recovery for costs associated with expert witnesses, both 14 M.R.S. § 1502-B and § 1502-C reference 16 M.R.S. § 251. Section 251 states that certain costs for expert travel fees and attendance at trial are allowed and costs associated with immediate trial preparation are discretionary. Furthermore, section 251

[1] Plaintiffs note that by simply e-mailing its Bill of Costs to counsel for the Plaintiffs, the Town has never properly served their Bill of Costs as prescribed by statute and Maine Rules of Civil Procedure.

caps costs for experts at $10 per day unless the prevailing party files an "affidavit" explaining those reasonable costs. 16 M.R.S. § 251("no more than $10 per day may be allowed or taxed . . . unless the affidavit is filed").

Itemized Objections to Town Costs

Plaintiffs specifically object to certain costs, as itemized by the Town as follows:

1. **Service of Process**: The Town did not complete its services as prescribed under this Court's August 30, 2010 and September 9, 2010 orders for service upon beach front owners at Goose Rocks Beach. Plaintiffs object to any and all costs associated with service of process to parties that were not represented by Curtis Thaxter and/or did not participate at trial and were not bound by the court's decision.
2. **Expert Witnesses**: Plaintiffs object to expert witness costs as outlined in the Town's Bill of Costs. First, costs for expert witnesses requested pursuant to either 14 M.R.S. § 1502-B or § 1502-C are available only to the extent allowed by 16 M.R.S. § 251. Since the Town failed to file an affidavit explaining all costs pursuant to section 251, "no more than $10 per day may be allowed." *Id.*

As a general matter, "Expert fees and expenses beyond those associated with trial attendance" are "not recoverable." *See* 16 M.R.S.A § 251 n.9 (citing *McCarthy v. U.S.I. Corp.*, 678 A.2d 48 (Me. 1996)). "The court allows reasonable expenses for expert testimony at trial; however, time spent in reviewing the case for deposition testimony and preparing for trial is not recoverable." *See Camp Takajo, Inc. v. Simplexgrinnell LP,* 2007 Me. Super. LEXIS 173, *3–4 (citing *Poland v. Webb*, 1998 ME 104, ¶¶ 14, 15, 711 A.2d 1278, 1281-82 (stating that statutes authorize only fees directly related to attendance at trial and not for attendance at a deposition or for records review and travel time)).

Furthermore, even if the Town was eligible for discretionary costs, the Town cannot collect any costs for their expert Robert Yarumian because this Court deemed Mr. Yarumian's potential testimony inadmissible. By law, costs associated with an expert's inadmissible testimony is barred. *See* 14 M.R.S. § 1502-B n.2 ("If a party summons witnesses to prove certain facts, under the direction of his counsel, and their testimony is rejected as inadmissible without being offered, he will not be allowed to tax their travel and attendance, if he prevails against the other party, in his bill of costs.") (citing *Grover v. Drummond*, 25 Me. 185 (Me. 1845)).

Additionally, the Town seeks costs for Mr. Yarumian that are in no way related to the issues at trial. Mr. Yarumian's own bill at Exhibit B to the Town's Bill of Costs indicates that part of his bill is for work performed for the purposes of settlement, not trial, and still others are for services performed in preparation for the title claims not the prescriptive claims. Neither Mr. Yarumian nor the Town even attempts to show what amount of the bill relates to work on its prescriptive claims. For these reasons, the court should deny the Town's request for Mr. Yarumians' costs.

Assuming *arguendo* that the Town can recover any costs for Mr. Churchill's preparation even though it failed to file an affidavit as required by Section 251, those costs, other than travel fees for trial, are discretionary by statute. Mr. Churchill's bill simply reflects work performed sometime before trial. This court should deny some or all of Churchill's costs for preparation due to the fact that his preparation time was unreasonable. The Town has not even attempted, as it must under the rules, to explain how 34 hours of preparation research is reasonable for Mr. Churchill's limited trial testimony. Time spent in preparing for trial is not recoverable. *See Poland v. Webb,*

1998 ME 104, ¶¶ 14, 15, 711 A.2d 1278, 1281-82 (statutes authorizing only fees directly related to attendance at trial and not for attendance at a deposition or for records review and travel time).

3. **Referee**. Costs for referees are not recoverable under the rules or statute. In fact, the Law Court has specifically stated that referee costs cannot be recovered because referee hearings are not considered a "trial of cause" in the Superior Court. *Newell v. Stanley*, 15 A.2d 30 (Me. 1940).

4. **Visual Aids**. These costs are discretionary under 14 M.R.S. § 1502-C(3) and are limited by statute to not exceed $500.

5. **Depositions**. Plaintiffs object to the Town's requested costs for depositions. The allowance of deposition expenses (i.e. cost of stenographer, service of process, and video/DVD or transcripts) is subject to the discretion of the court. *See Camp Takajo, Inc. v. Simplexgrinnell LP,* 2007 Me. Super. LEXIS 173, *5 (citing *Boudreau v. Manufacturers & Merchants Mut. Ins. Co.*, 588 A.2d 286, 289 n.12); 14 M.R.S. § 1502-C; and M.R. Civ. P. 54(g). First, the Town has failed to show how such costs were "reasonable" for its preparation of trial and therefore its costs must be denied. None of deposition transcripts were offered or used as evidence at trial. Second, the Town has included costs for depositions of title witnesses that it never intended to use at trial. If the Town later wins its title claims, it may recover these costs but recovery is inappropriate at this time.

6. **Trial Exhibits**. Trial exhibit costs are not recoverable by statute or rule.

For the above referenced reasons, Plaintiffs respectfully object to the Town's Bill of Costs because not all included costs are recoverable and to the extent some costs are recoverable, Plaintiffs request this Court reduce the recoverable amount to reflect Plaintiffs' objection.

Dated: December 19, 2012

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