

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
CIVIL ACTION NO. 5:08-CV-240-BO**

SPARC ACADEMY, a North Carolina Non-Profit Corporation, R. L. a student enrolled in January of 2008, by his mother, CHANTE ELLIOT and D. D., a student enrolled in January of 2008, by his next friend, CAROLYN DAVIS,

Plaintiffs,

v.

NORTH CAROLINA STATE BOARD OF EDUCATION,

Defendant.

**DEFENDANT'S MOTION FOR
COSTS
RULE 54(d)
Fed. R. Civ. Pro.**

PURSUANT to Rule 54(d) of the Federal Rules of Civil Procedure, Defendant hereby moves to recover costs associated with preparing for and attending the court-ordered hearing on 30 July 2008, which counsel for Plaintiffs failed to attend. In support of this motion, Defendant shows the following:

1. On 16 June 2008, Plaintiffs filed their Complaint, including a prayer for Preliminary Injunction, with this Court. Plaintiff SPARC had learned, in late January 2008, that its charter from the State Board of Education to operate a public school in North Carolina was going to be allowed to expire, on its own terms, on 30 June 2008.
2. On 14 July 2008, Judge Boyle set a hearing on Plaintiffs' Motion for Preliminary Injunction and Defendant's Motion to Dismiss for 16 July 2008 in Wilmington, NC.
3. On 14 July 2008, the undersigned counsel received a call from Plaintiff's counsel, Mr. Adkins. Mr. Adkins stated he was in Utah on vacation and would not return to North Carolina until 25 July 2008. He furthermore asked the undersigned to assist him in getting the hearing continued to a mutually agreeable date.
4. The undersigned called the Court and spoke with the case manager for Judge Boyle. In

this conversation, the undersigned relayed the information received from Plaintiffs' counsel.

5. On 17 July 2008, Judge Boyle orally re-set the hearing for 30 July 2008 at 10:30 a.m. in Elizabeth City. The Court also issued proper notice of the new date and time to the parties.
6. On 29 July 2008, just a day before the recalendared motions hearing, the undersigned had a telephone conversation with opposing counsel.
7. In this conversation, opposing counsel gave no indication that he was not planning to attend the motions hearing on the following day, nor did Mr. Adkins say that he was scheduled to be in a deposition in another case on 30 July 2008.
8. On 29 July 2008, in mid-afternoon, the undersigned counsel left for Elizabeth City to avoid an early morning drive and any traffic issues impeding their being in court the following morning.
9. On 30 July 2008, the undersigned appeared in court, along with four witnesses from Raleigh. Defendant's witnesses were present to offer live testimony to rebut the showings in Plaintiffs' affidavits in support of injunctive relief. Plaintiffs' counsel did not appear, however, nor did he alert the Court or the undersigned of his intention not to attend. The Court observed during the hearing that Plaintiffs had the burden of proof on their request for injunctive relief.
10. Notably, the hearing on 30 July had been rescheduled from 16 July 2008, specifically at Plaintiffs' counsel's request and only for his personal convenience. At no time, either during conversations on 14 July, or during the subsequent telephone conversation on 29 July 2008, did Plaintiffs' counsel ever inform undersigned counsel that he did not intend to appear at the hearing. To the contrary, by his actions in requesting assistance with a continuance of the earlier hearing, and his actions in submitting a Response to the Motion to Dismiss, it appeared he fully planned to pursue his Motion for Preliminary Injunction. It is reasonable to assume that Plaintiffs' counsel knew full

well he did not intend to appear in court and deliberately misled opposing counsel and the Court. It is also reasonable to assume that, had Plaintiffs' counsel indicated he did not intend to pursue the preliminary injunction, a hearing would not have been necessary, since Defendant's defense was based simply and emphatically on the 11th Amendment, a defense often ruled on without the necessity of a hearing. Certainly, without a hearing on the preliminary injunction, defense counsel would not have arranged for the attendance of four witnesses on behalf of the State Board of Education. Counsel for Plaintiffs failed in the most elementary sense of extending to the parties and the Court the courtesy of advising us that he did not intend to pursue injunctive relief.

11. On 7 August 2008, Judge Boyle issued a written Order dismissing the case on grounds of Eleventh Amendment immunity and denying the motion for preliminary injunction as moot. Judgment was entered by the clerk on 8 August 2008.
12. As a result, Defendant is the prevailing party, allowed to seek costs associated with this matter under 28 U.S.C. §§ 1919 and 1920, and Fed. R. Civ. P. 54(d), as a matter of due course.
13. 28 U.S.C. § 1919 states "[w]hensoever any action or suit is dismissed in any district court . . . for want of jurisdiction, such court may order the payment of just costs."
14. Likewise Fed. R. Civ. P. 54(d) (2008) states:
 - (1) Costs Other Than Attorney's Fees. 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. . . . The clerk may tax costs on 1 day's notice.

...
In addition, and perhaps even more applicable under these facts, 28 U.S.C. § 1927 provides:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

15. The undersigned have compiled a list of all costs made necessary by the hearing on Plaintiffs' Motion for Injunctive Relief in Elizabeth City on 30 July 2008, and have attached hereto an affidavit verifying Defendant's bill of costs as required by 28 U.S.C. § 1924. See Affidavit attached as Exhibit 1, for counsel's and witnesses' costs incurred for travel, lodging, and meals for the time period of the night prior to and the day of the motions hearing. Section 1924 states:

Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed.

16. The Department of Public Instruction (DPI) witnesses were needed to provide further live testimony/clarification and to provide answers to any questions arising from the Court and from counsel's presentation of the arguments. Judge Boyle, in fact, did ask questions during the hearing, which were answered by Defendant's available witnesses.
17. All the costs for which Defendant seeks reimbursement were directly incurred as a result of the hearing which Plaintiffs' counsel did not attend. These expenses were incurred to provide the Court with the necessary argument and response.
18. Mileage reimbursement is computed by multiplying the Internal Revenue Service standard mileage rate (IRS rate - see <http://www.irs.gov/taxpros/article/0,,id=156624,00.html>), which for business expense is 58.5 cents per mile, by the number of miles traveled, on average 370 miles round trip in this case. The undersigned counsel rode together to minimize cost, but this was not possible for all the witnesses to do so as there were schedule conflicts.
19. Meal reimbursement was calculated by using the State of North Carolina *per diem* rates for meals, whether or not those rates actually covered all meal expenses in full.
20. Hotel rooms were all reserved under a government rate.

21. This request is being made within fourteen days of the Judgment in this case.
22. The Fourth Circuit has held in that "in the ordinary course, a prevailing party is entitled to an award of costs." *Teague v. Bakker*, 35 F.3d 978, 996 (4th Cir. 1994).
23. In *Cherry v. Champion Int'l Corp.*, 186 F.3d 442, 447 (4th Cir. 1999), the Fourth Circuit held that a prevailing party can only be denied costs when there is an element of injustice in a presumptive cost award. The court concluded that a plaintiff's good faith in bringing the lawsuit did **not** entitle her to relief from the presumptive taxation of costs. "Were this to be a proper independent basis for denial of costs, it would 'frustrate' the operation of Rule 54(d)(1) because the losing party in most cases has acted in good faith." *Id.*
24. Defendant could have been spared these costs, had Plaintiff's counsel informed both the Court and the undersigned that his clients wished to withdraw their prayer for an injunction and had the Court then decided that oral arguments were not needed, in that the Motion to Dismiss rested on sound precedent involving the 11th Amendment. Plaintiffs' counsel's conduct in not informing the Court and opponent's counsel of his intention not to appear, and presumably not to pursue his client's request for injunctive relief, was discourteous and unprofessional. It also resulted in the incurrence of unnecessary costs by Defendant which Defendant should now be entitled to recoup.

WHEREFORE, Defendant North Carolina State Board of Education requests that the Court award costs as detailed in the Affidavit attached as Exhibit 1, incorporated by reference herein. Such costs should be taxed either against Plaintiffs, or against counsel, in the sound discretion of this Court.

Respectfully submitted this 13th day of August 2008.

ROY COOPER
Attorney General

/s/ Laura E. Crumpler
Co-Counsel for Defendant
Assistant Attorney General
PO Box 629
Raleigh, NC 27602
Tel: (919) 716-6920
Fax: (919) 716-6764
E-mail: lcrumpler@ncdoj.gov
State Bar No. 8712

/s/ Joyce S. Rutledge
Co-Counsel for Defendant
Special Deputy Attorney General
PO Box 629
Raleigh, NC 27602
Tel: (919) 716-6920
Fax: (919) 716-6764
E-mail: jrutledg@ncdoj.gov
State Bar No. 16816

CERTIFICATE OF SERVICE

I hereby certify that on August 13, 2008, I electronically filed the foregoing: MOTION FOR COSTS with the Clerk of the Court using the CM/ECF system and the Court will provide a copy to the following CM/ECF participant:

Philip S. Adkins
PO Box 52393
Durham, NC 27717
Attorney for Plaintiffs

This 13th day of August 2008.

/s/ Laura E. Crumpler
Laura E. Crumpler
Assistant Attorney General

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
CIVIL ACTION NO. 5:08-CV-240-BO**

**SPARC ACADEMY, a North Carolina
Non-Profit Corporation, R. L., a student
enrolled in January of 2008, by his mother,
CHANTE ELLIOT and D. D. , a student
enrolled in January of 2008, by his next
friend, CAROLYN DAVIS,**

Plaintiffs,

v.

**NORTH CAROLINA STATE BOARD OF
EDUCATION,**

Defendant.

**AFFIDAVIT OF JOYCE RUTLEDGE
IN SUPPORT OF DEFENDANT'S
MOTION FOR COSTS, WITH
ATTACHED BILL OF COSTS**

I, Joyce Rutledge, being first duly sworn, hereby depose and say:

1. I am over eighteen years of age, and make this statement of my own volition.
2. I served as one of the counsel for the North Carolina State Board of Education in the above captioned case, which the Court dismissed by Judgment entered on 8 August 2008.
3. I have knowledge of the expenditures in connection with the defense of this case by the State Board of Education and the reasons for those costs in this matter. All the amounts shown on the attached bill of costs are correct and all these items were necessarily and directly incurred in this case in conjunction with travel, by counsel and defense witnesses, to the hearing set on Plaintiffs' Motion for Preliminary Injunction for 30 July 2008 in Elizabeth City. Defendant is the prevailing party in this action, entitled to fees under applicable law cited in Defendant's accompanying Motion for Costs.

4. Attached to this affidavit as Defendant's Bill of Costs is a fully itemized spreadsheet.

The total costs per person are as follows:

- A. Counsel - Laura Crumpler
Costs for travel, meals, and lodging: \$ 367.97
- B. Counsel - Joyce Rutledge
Costs for meals and lodging: \$ 168.17
- C. Jack Moyer - DPI official
Costs for travel, meals, and lodging: \$ 198.90
- D. Dottie Heath - DPI official
Costs for travel, meals, and lodging: \$ 195.98
- E. Jean Krufft - DPI official
Costs for travel, meals, and lodging: \$ 194.22
- F. Karen Frazier - DPI official
Costs for travel, meals, and lodging: \$ 312.01


Total Costs \$ 1,437.25

5. These costs were directly incurred in connection with the hearing in Elizabeth City scheduled by the Court for 30 July 2008, which Plaintiff's counsel did not attend. These expenses were necessary to provide the Court with oral legal arguments and responses from the DPI witnesses to the Court's questions during the proceedings.

6. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Further this Affiant sayeth not.

This the 13th day of August, 2008



Joyce Rutledge

Costs Incurred

Person / Cost Item	Mileage Exp.	Hotel	Meals	Total by person
Laura Crumpler	\$ 216.45	\$ 117.52	\$ 34.00	\$ 367.97
Joyce Rutledge	n/a	\$ 134.17	\$ 34.00	\$ 168.17
Jack Moyer, DPI	\$ 198.90	n/a	n/a	\$ 198.90
Dottie Heath, DPI	\$ 195.98	n/a	n/a	\$ 195.98
Jean Krufft, DPI	\$ 194.22	n/a	n/a	\$ 194.22
Karen Frasier, DPI	\$ 198.90	\$ 79.11	\$ 34.00	\$ 312.01

Total Costs	\$ 1,437.25
--------------------	-------------

* Ms. Rutledge traveled with Ms. Crumpler to save the travel expense.

Mileage computed on miles driven multiplied by 58.5 cents per mile

Mileage rate per IRS website; See <http://www.irs.gov/taxpros/article/0,,id=156624,00.html>