

IN THE IOWA DISTRICT COURT FOR DUBUQUE COUNTY

**IN THE MATTER OF
THE RESIDUAL TRUST B UNDER
THE LAST WILL AND TESTAMENT OF
MARTHA WILLENBORG,
Deceased.**

No. TRPR 027914

**IN THE MATTER OF THE ESTATE OF
ELMER V. WILLENBORG,
Deceased.**

No. ESPR 044243

ORDER ON POST-RULING MOTIONS

On May 31, 2016 the court considered post-ruling motions filed upon the court's April 13th Declaratory Ruling. The motions were deemed submitted on the pleading record, informed by judicial notice of the trial record, and presented without request for oral argument. Upon review of the issues presented, the court finds no good cause to amend or enlarge the April 13th Ruling as the Beneficiaries seek. O'Connor & Thomas' May 12th Bill of Costs has drawn resistance; and, upon analysis, there is good cause to allow certain itemized relief, but to deny part of the claim. The Intervenor's Motion for Sanctions should be granted. An order now enters to confirm the court's rulings.

THE COURT DIRECTS THE FOLLOWING.

1. Motion to Amend and Enlarge

The Beneficiaries' Motion to Amend and Enlarge the April 13, 2016 Declaratory Ruling, is denied.

2. Bill of Costs

O'Connor & Thomas' Bill of Costs is approved in part, and denied in part.

A. Deposition Transcripts

Deposition testimony utilized in presentation of admitted evidence at trial fulfils a purpose that qualifies deposition expense as "necessarily incurred" and implicates

an assessment of that expense in some amount against losing parties. IOWA R. CIV. P. 1.716; *see EnviroGas v. Cedar Rapids/Linn Co. Solid Waste Agency*, 641 N.W.2d 776, 786 (Iowa 2002) (citing and quoting *Woody v. Machin*, 380 N.W.2d 727, 730 (Iowa 1986)). “[A] cost award may include only the costs of depositions which are introduced into evidence in whole or in part at trial.” *Woody*, 380 N.W.2d at 730.

Here, O’Connor & Thomas’ use of a portion of various deposition transcripts for purposes, respectively, of developing expert testimony, impeaching the witness, and refreshing the witness’ recollection, was measured. Such targeted usage reflects exercise of trial counsel’s professional judgment, and is driven by the unpredictable dynamic of trial. The trial record reveals that O’Connor & Thomas’ use of depositions now cited for cost recovery under Rule 1.716, was for substantive evidentiary presentation, for the respective purpose at hand. Moreover, there is no indication that the usage at issue was born of a mere design to qualify the expense of the depositions for taxation as costs. *See EnviroGas*, 641 N.W.2d at 786 (court bears responsibility to determine if “offer of deposition testimony was not made for a useful purpose”) (citing and quoting *Woody*, 380 N.W.2d at 730).

A trial attorney’s reference to deposition content in a non-evidentiary opening statement does not disqualify that deposition from cost consideration under Rule 1.716—if the deposition was otherwise used legitimately during presentation of evidence. *See id.*

It is appropriate to grant O’Connor & Thomas’ request for assessment of certain deposition costs, as itemized in the Bill of Costs, Section 1. a. – h. The clerk of court shall post the itemized deposition expenses as court costs, and shall assess them along with all other court costs jointly and severally against the Beneficiaries, Mary Zirul, Joyce Willenborg, Ann Holst, Thomas Willenborg, Sr., and Carl Florian.

B. Trial Transcript

- 1) O’Connor & Thomas’ claim for recovery of the sum it paid toward an expedited, certified transcript of Mark McCormick’s testimony, is granted under Iowa Code Section 625.9. The clerk of court shall post as a recoverable court cost, the \$266.25 charge incurred by O’Connor & Thomas (representing 5/12 of the total transcript cost of \$639.00, as per defendants’ informal agreement for transcript-cost sharing). Like all other court costs, this charge shall be assessed jointly and severally against the Beneficiaries, Mary Zirul, Joyce Willenborg, Ann Holst, Thomas Willenborg, Sr., and Carl Florian.
- 2) The \$1,157.81 balance of the O’Connor & Thomas claim for transcript charges, is denied. The sum of \$1,157.81 reflects the claimant’s 5/12 portion of a total bill of \$2,278.75 which was paid for an “unedited draft transcript” of the trial

record, supplementing the certified transcript of McCormick testimony. This purchase by O'Connor & Thomas and other defendants was made at a discounted \$2.25-per-page rate given the limited purpose of the product—just to assist these parties in post-trial brief writing. A limited-use transcript is not one for which costs are lawfully recoverable under Section 625.9.

C. Witness Fees

All witness fees claimed by O'Connor & Thomas for appearance of expert witness Darrell Morf and for witness Kerrie Liedtke, are recoverable under applicable Iowa law, shall be posted by the clerk of court, and shall be assessed jointly and severally against the Beneficiaries, Mary Zirul, Joyce Willenborg, Ann Holst, Thomas Willenborg, Sr., and Carl Florian.

3. Motion for Sanctions

Intervenor Joan L. Recker demonstrates entitlement to a recovery of her reasonable expenses, including attorney fees, as a result of the Beneficiaries' filing and pursuit of their litigation claims in violation of Iowa Rule of Civil Procedure 1.413 and/or Iowa Code Section 619.19.

A. Failure of Reasonable Inquiry

Each Beneficiary, and the group collectively, failed to make reasonable inquiry to ascertain the falsity of the factual allegations they sponsored in affirmative defenses and in counterclaims lodged against Recker as she posed in good faith, variously, her Petition for Intervention, her Motion for Joinder of the Elmer Willenborg Estate litigation with that of the Martha Willenborg Trust litigation, and her Petition[s] for Specific Performance. Specifically, the record confirms the following.

- 1) There was ample time to investigate the facts before the Beneficiaries brought their claims.
- 2) The operative facts were not complex, and were well documented.
- 3) Before permitting their counsel to sign false allegations, it was feasible for the Beneficiaries to investigate the facts surrounding Elmer Willenborg's repudiation of the 2002 Option Agreement Extension and the development of the 2003 Agreement Concerning Real Estate (ACRE); indeed, some Beneficiaries had personally participated in acts that defied the very allegations they made in their suit papers.
- 4) A majority of Beneficiaries had been privy to documents that refuted their very claims.

- 5) The Beneficiaries' lawyers relied upon the Beneficiaries' individual and collective allegations and proceeded on claims made by the Beneficiaries—claims that were lodged recklessly, were collusively agreed upon, and were motivated by opportunism and greed.
- 6) The Beneficiaries individually and collectively had resources reasonably available to them to conduct inquiry, knowing as they did, the people involved, the subject matter at issue, the timing of developments, and the documentation pertaining to the circumstances.
- 7) The Beneficiaries individually and collectively were on public notice that further inquiry was appropriate.

See Mathias v. Glandon, 448 N.W.2d 443, 445 – 46 (Iowa 1989) (internal citation omitted.)

As a result of the Beneficiaries' failure to make reasonable inquiry to investigate their pleading claims, Recker is entitled to relief under Rule 1.413 and/or Section 619.19. *See Barnhill v. Iowa District Court for Polk County*, 765 N.W.2d 267, 272 (Iowa 2009).

B. Beneficiaries' Improper Purpose

Certain Beneficiaries possessed personal knowledge of the falsity of their claims, and all Beneficiaries had a duty to investigate the extent and substance of that knowledge and to abstain from recklessly going forward, in collusion, in quest of a windfall that was unsupported by truth and the law. Certain Beneficiaries individually, and all of them collectively, sponsored an improper purpose to harass Recker financially, and/or to perpetrate a fraud upon her to deny her the lawful benefits of the bargained ACRE. The Beneficiaries' tactic was to make false allegations in affirmative defenses and in counterclaims filed in court against Recker as she posed in good faith, variously, her Petition for Intervention, her Motion for Joinder of the Elmer Willenborg Estate litigation with that of the Martha Willenborg Trust litigation, and her Petition[s] for Specific Performance

As a result of the Beneficiaries' sponsorship of an improper purpose in their pleadings, Recker is entitled to relief under Rule 1.413 and/or Section 619.19. *See Barnhill*, 765 N.W.2d at 272.

C. Interplay of Bad Faith

Beneficiary Carl Florian, recruited to round-out the Beneficiary class of protagonists, arguably deferred to the litigation posturing of his uncle Tom Willenborg, Sr. and his aunts Mary Zirul, Joyce Willenborg, and Ann Holst, whose bad faith is demonstrated in the trial record. Yet, as a member of the Beneficiaries

class, and as an adult responsible for his own conduct and compliance with the law, Carl should not be excused from sanction. *See Barnhill*, 765 N.W.2d at 273 (“[A] party . . . need not act in subjective bad faith or with malice to trigger a violation.”)

D. Sanctions Imposed

Sanctions are rightfully imposed upon the Beneficiaries, jointly and severally, for violation of Rule 1.413 and/or Section 619.19, in an amount to be determined by the court. *See Rowedder v. Anderson*, 814 N.W.2d 585, 590 (Iowa 2012).

To permit the court to determine the appropriate amount of financial sanction, certified claims for reasonable expenses incurred by Recker, including but not limited to attorney fees, shall be filed by June 14, 2016.

JUDGMENT IS ENTERED ACCORDINGLY JUNE 1, 2016.

Directions for Service

Service of an electronic copy of this Order shall be made upon:

David J. Dutton, Cheryl L. Weber, Steven K. Daniels, attorneys for Willenborg
Trust/Estate beneficiaries/interested persons/executor
Gregory M. Lederer, attorney for American Trust and Savings Bank
Megan R. Dimitt, attorney for American Trust and Savings Bank
Robert V.P. Waterman and Andrea D. Mason, attorneys for O'Connor & Thomas, P.C.
Douglas M. Henry, attorney for Joan L. Recker
Carrie Nauman, court reporter
Dana Havertape, 1st District case coordinator



State of Iowa Courts

Type: OTHER ORDER

Case Number **Case Title**
TRPR027914 TRUST MARTHA WILLENBORG TRUST B

So Ordered

A handwritten signature in blue ink, consisting of several loops and a long horizontal stroke, positioned above a horizontal line.

Annette J. Scieszinski, District Court Judge,
Eighth Judicial District of Iowa