CITY OF FALLS CITY, NEBRASKA, APPELLEE AND CROSS-APPELLEE, V. NEBRASKA MUNICIPAL POWER POOL, A NEBRASKA NONPROFIT CORPORATION, APPELLANT, J. GARY STAUFFER ET AL., APPELLEES AND CROSS-APPELLANTS, CENTRAL PLAINS ENERGY PROJECT, APPELLEE, AND AMERICAN PUBLIC ENERGY AGENCY, INTERVENOR-APPELLEE.

795 N.W.2d 256

Filed March 18, 2011. No. S-10-458.

1. **Costs: Appeal and Error.** The decision of a trial court regarding taxing of costs is reviewed for an abuse of discretion.
2. **Costs.** Litigation costs are not recoverable by a party unless authorized by statute or a uniform course of procedure.
3. **Statutes: Legislature: Public Policy.** It is the Legislature's function through the enactment of statutes to declare what is the law and public policy.

Appeal from the District Court for Lancaster County: STEVEN D. BURNS, Judge. Affirmed.

Daniel E. Klaus and David J.A. Bargen, of Rembolt Ludtke, L.L.P., for appellant.

James P. Fitzgerald and James G. Powers, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellees J. Gary Stauffer et al.

Robert W. Mullin and David S. Houghton, of Lieben, Whitted, Houghton, Slowiaczek & Cavanagh, P.C., L.L.O., and Douglas E. Merz, of Weaver & Merz, for appellee City of Falls City.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, and MCCORMACK, JJ.

STEPHAN, J.

This case is before us for the second time.[1] In this appeal, we are asked to examine what costs a district court may tax and how they should be apportioned in a case involving multiple claims with differing resolutions.

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[1] See *City of Falls City v. Nebraska Mun. Power Pool*, 279 Neb. 238, 777 N.W.2d 327 (2010).

FACTS AND PROCEDURAL BACKGROUND

In October 2006, the City of Falls City (Falls City) filed a complaint against the Nebraska Municipal Power Pool (NMPP), five individuals who were officers or employees of NMPP or its related entities, and Central Plains Energy Project (CPEP).[2] A detailed summary of the factual basis for the suit is included in our previous opinion. Falls City alleged, summarized, that NMPP breached a contract with an interlocal agency created in order to secure natural gas for participating municipalities, including Falls City, and that the individual defendants violated fiduciary duties to individual members of the agency, including Falls City, by their involvement in the formation of CPEP. Prior to trial, CPEP's motion for summary judgment was sustained, but it thereafter remained a party to the action because of Falls City's request for equitable relief against the other parties, which might have entailed CPEP's participation. CPEP is not a party to this appeal.

In February 2007, the American Public Energy Agency (APEA) was granted leave to intervene as a plaintiff in order to file a complaint against J. Gary Stauffer and Evan Ward, two of the individual defendants. An 11-day trial occurred in May 2008. At the conclusion of the trial, the district court dismissed all claims against two of the individual defendants, Ron Haase and Chris Dibbern, but awarded a money judgment of approximately $477,000 in favor of Falls City against NMPP, Stauffer, Ward, and John Harms. The court awarded another judgment of approximately $150,000 in favor of Falls City against NMPP. APEA was awarded a judgment of approximately $3.2 million against Stauffer and Ward. And, although APEA had not asserted a claim against NMPP, the judgment ordered NMPP to disgorge approximately $220,000 received from CPEP by paying this amount to APEA. The court also awarded other equitable relief.

During the pendency of an appeal, NMPP, Stauffer, and Ward entered into a settlement with APEA. Pursuant to the settlement, APEA received $2.25 million and in return released

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[2] *Id.*

all claims against NMPP, Stauffer, Ward, Harms, and others. Each party agreed to pay its own costs and attorney fees.

After the settlement with APEA, the appeal proceeded to this court with NMPP and the individual defendants challenging the judgment in favor of Falls City.[3] We determined that Falls City lacked standing to assert its claims against NMPP and the individual defendants and therefore reversed, and remanded to the district court with directions to dismiss.[4] Upon receipt of our mandate, the district court entered an order stating that the matter was "dismissed with costs assessed to [Falls City]."

NMPP and the five originally named individual defendants then filed motions for taxation of costs. Included in NMPP's motion was a request for taxation of the cost of obtaining deposition copies, of videotaping depositions, and of electronically displaying trial testimony and exhibits. Included in the individual defendants' motion was a request for taxation of the costs of obtaining deposition copies and of videotaping depositions. Falls City filed objections to the motions. The district court conducted an evidentiary hearing at which it received affidavits in support of the motions.

On April 5, 2010, the district court entered a written order awarding costs. The court first determined that only those costs which were authorized by statute or historical procedure could be taxed. These included filing fees, sheriff service fees, witness fees, mileage paid to a witness to secure the witness' appearance on a subpoena, original deposition costs, and the cost of the bill of exceptions on appeal. The court concluded that the requested costs associated with obtaining deposition copies, videotaping depositions, and electronically displaying trial testimony and exhibits were not taxable.

The district court then addressed the apportionment of taxable costs among the parties in light of the APEA settlement during the pendency of the first appeal. The court generally reasoned that considering the APEA settlement and the judgment in favor of Falls City together, APEA had received about 78 percent of the total amount awarded and Falls City had

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[3] *Id.*

[4] *Id.*

received about 22 percent (prior to our reversal of the judgment in favor of Falls City). Because the court found that there was "no evidence that any of the taxable costs requested . . . were incurred solely due to the Falls City litigation," the court concluded that Falls City should be responsible for 22 percent of the taxable costs claimed by NMPP and the individual defendants.

NMPP filed this timely appeal, contesting both the items considered to be properly recoverable as costs and the apportionment of costs. The five individuals originally named as defendants cross-appealed and raised the same issues.

ASSIGNMENTS OF ERROR

Appellant NMPP assigns, restated and consolidated, that the district court erred in (1) determining that only those costs prescribed by statute or a uniform course of procedure are recoverable and (2) reducing the costs it could recover based on the claims asserted by APEA. The individual defendants (hereinafter cross-appellants) assign the same errors.

STANDARD OF REVIEW

[1] The decision of a trial court regarding taxing of costs is reviewed for an abuse of discretion.[5]

ANALYSIS

Determination of Taxable Costs

Neb. Rev. Stat. §§ 25-1708 (Cum. Supp. 2010) and 25-1710 (Reissue 2008) govern the taxation of court costs in specified types of actions, but taxation of costs in equitable actions such as this is governed by Neb. Rev. Stat. § 25-1711 (Reissue 2008).[6] Section 25-1711 provides in part: "In other actions the court may award and tax costs, and apportion the same between the parties on the same or adverse sides, as in its discretion it may think right and equitable." Like §§ 25-1708 and 25-1710, § 25-1711 generally states when a court may tax

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[5] *Teadtke v. Havranek*, 279 Neb. 284, 777 N.W.2d 810 (2010).

[6] See, generally, *id.*; *R & S Investments v. Auto Auctions*, 15 Neb. App. 267, 725 N.W.2d 871 (2006).

costs but does not specify what costs are taxable. We have long held that costs of litigation and expenses incident to litigation may not be recovered unless provided for by statute or a uniform course of procedure.[7] Applying this principle, we have held that expert witness fees[8] and expenses of making copies of depositions and enlargements of exhibits[9] are not taxable court costs. The Court of Appeals has applied this principle in holding that photocopy, fax, and postage expenses are not taxable costs.[10]

NMPP and the cross-appellants argue that our jurisprudence on the issue of what litigation expenses may be taxed as court costs does not reflect the realities of modern litigation and should be expanded. They ask that we establish guidelines for the lower courts to use in taxing costs based upon a standard of reasonability and note that other courts have specifically approved taxation of the types of costs which were disallowed by the district court in this case.

[2] We begin our discussion of taxable costs with an 1872 case, where this court stated:

> Costs are unknown to the common law. They are given only by statute, which may be changed at the will of the legislature. The recovery of costs must depend upon the statute law in force at the time the judgment was rendered. . . . The right to costs is a statutory right, and cannot be enlarged by judicial authority.[11]

At times, our jurisprudence has strayed somewhat from this categorical statement. For example, in *Kasparek v. May*,[12] a

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[7] *Bartunek v. Gentrup*, 246 Neb. 18, 516 N.W.2d 253 (1994); *Kliment v. National Farms, Inc.*, 245 Neb. 596, 514 N.W.2d 315 (1994); *Nat. Bank of Commerce Trust & Savings Assn. v. Rhodes*, 207 Neb. 44, 295 N.W.2d 711 (1980).

[8] *Bartunek v. Gentrup, supra* note 7; *Kliment v. National Farms, Inc., supra* note 7.

[9] *Kliment v. National Farms, Inc., supra* note 7.

[10] *In re Estate of Snover*, 4 Neb. App. 533, 546 N.W.2d 341 (1996).

[11] *Geere v. Sweet*, 2 Neb. 76, 76-77 (1872).

[12] *Kasparek v. May*, 178 Neb. 425, 133 N.W.2d 614 (1965).

civil contempt action, this court concluded that under the facts and circumstances of that case, the trial court did not err in refusing to tax postage, mileage expenses, and other miscellaneous expenses as costs. Admittedly, the language used in *Kasparek* suggests that the trial court would have had discretionary authority to tax such expenses as costs under different facts and circumstances. But since 1980, we have adhered to the principle that litigation costs are not recoverable by a party unless authorized by statute or a uniform course of procedure.[13] We acknowledge that a "uniform course of procedure" which did not exist in 1980 could never develop under the principle we have applied since then. Thus, we are essentially back to where we started, recognizing that it is within the province of the Legislature to designate specific items of litigation expense which may be taxed as costs. We are not persuaded that we should abandon this principle.

[3] As the cross-appellants acknowledge in their reply brief, "[t]his appeal presents a policy issue for this Court, i.e., whether to allow district courts to consider additional elements as taxable costs."[14] Shifting of litigation expenses from one party to another could have "a chilling effect on a plaintiff's right to seek relief for injury or wrong" or subject an unsuccessful defendant to costs "greatly in excess of the monetary relief sought by the plaintiff."[15] It is the Legislature's function through the enactment of statutes to declare what is the law and public policy.[16] And in fact, the Legislature has done so with respect to certain court costs. For example, statutes authorize the taxation of costs associated with executed orders of attachment,[17] answers filed to garnishment interrogatories,[18] replevin

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[13] See *Nat. Bank of Commerce Trust & Savings Assn. v. Rhodes, supra* note 7.

[14] Reply brief for appellees on cross-appeal at 9.

[15] *Bartunek v. Gentrup, supra* note 7, 246 Neb. at 21, 516 N.W.2d at 255.

[16] See, *Stewart v. Bennett*, 273 Neb. 17, 727 N.W.2d 424 (2007); *In re Claims Against Atlanta Elev., Inc.*, 268 Neb. 598, 685 N.W.2d 477 (2004).

[17] Neb. Rev. Stat. § 25-1005 (Reissue 2008).

[18] Neb. Rev. Stat. § 25-1026 (Reissue 2008).

orders,[19] service of process,[20] and the completion of records in concluded district court cases.[21]

Although federal courts have held that the costs at issue in this case are taxable, they have done so not on their own authority but pursuant to 28 U.S.C. § 1920 (2006 & Supp. III 2009), which lists general categories of litigation expense which may be taxable as costs. These include "[f]ees for printed or electronically recorded transcripts necessarily obtained for use in the case" and "[f]ees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case."[22] Federal courts have construed the former provision as authorizing taxation of the cost of deposition copies[23] and, when read in conjunction with Fed. R. Civ. P. 30(b), the cost of videotaping depositions.[24] Similarly, federal courts have held that the cost of electronic display of trial exhibits is a form of "'exemplification,'" the costs of which may be taxed pursuant to § 1920(4).[25]

The parties direct us to no Nebraska statute or any "uniform course of procedure" authorizing the taxation of such costs, and we are aware of none. We therefore conclude that the district court correctly determined that its discretion to tax costs under § 25-1711 did not include authority to tax the costs of obtaining deposition copies, videotaping depositions, or presenting evidence electronically. As to NMPP's argument that litigation practice has changed dramatically over the years and thus the rules for taxation of costs should change accordingly, we conclude that it presents a policy question which is properly left to the Legislature.

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[19] Neb. Rev. Stat. § 25-10,107 (Reissue 2008).

[20] Neb. Rev. Stat. § 25-507(4) (Reissue 2008).

[21] Neb. Rev. Stat. § 33-106(3) (Reissue 2008).

[22] 28 U.S.C. § 1920(2) and (4).

[23] See, *Independent Iron Works, Inc. v. United States Steel Corp.*, 322 F.2d 656 (9th Cir. 1963); *United States v. Kolesar*, 313 F.2d 835 (5th Cir. 1963).

[24] See, *Craftsmen Limousine, Inc. v. Ford Motor Co.*, 579 F.3d 894 (8th Cir. 2009); *Tilton v. Capital Cities/ABC, Inc.*, 115 F.3d 1471 (10th Cir. 1997).

[25] See *Cefalu v. Village of Elk Grove*, 211 F.3d 416, 427 (7th Cir. 2000).

Apportionment of Taxable Costs

Section 25-1711 authorized the district court to apportion taxable costs "between the parties on the same or adverse sides, as in its discretion it may think right and equitable." NMPP and the cross-appellants contend that the district court abused its discretion in apportioning only 22 percent of the taxable court costs to Falls City.

This complex litigation involved two claimants, Falls City and APEA. At the conclusion of trial, the district court awarded APEA a judgment of approximately $3.2 million against Stauffer and Ward and a judgment of approximately $220,000 against NMPP. Falls City was awarded a judgment of approximately $477,000 against NMPP, Stauffer, Ward, and Harms, and another judgment of approximately $150,000 against NMPP. Thus, APEA was awarded a total of about $3.5 million and Falls City was awarded a total of about $628,000. As a result of the settlement, APEA received $2.25 million, and as a result of the first appeal, the judgment in favor of Falls City was vacated. Three of the five originally named individual defendants emerged from the litigation unscathed; Dibbern and Haase were dismissed at the close of trial, and Harms' liability to Falls City was extinguished as a result of the first appeal. APEA made no claim against these individuals.

The district court concluded that "all the costs incurred were the result of both claims." NMPP does not dispute this, but argues that its costs should not have been apportioned between the two claims, because APEA never asserted a claim against it. While that is true, it is also the case that APEA obtained a judgment against NMPP which was eventually resolved by a settlement in which NMPP participated. On these facts, it was entirely reasonable for the district court to conclude that NMPP did not prevail with respect to the APEA claim, which was settled with each party agreeing to bear its own costs. We conclude that the district court did not abuse its discretion by taking the APEA judgment and settlement into account and in arriving at the percentage of such costs which should be borne by Falls City.

The cross-appellants contend that the cost apportionment was flawed because it was "premised upon a valid damage

award"[26] in favor of Falls City which was in fact vacated by the first appeal. We find no merit in this argument. The district court properly considered the judgment in favor of Falls City in determining its percentage relationship to the entire amount of the judgments initially awarded, and then taxed that percentage of the costs against Falls City because it "failed to carry its claim and it should bear the costs associated with it." Dibbern and Haase also argue that their costs should not have been apportioned because they were never sued by APEA. But they do not challenge the finding of the district court that they did not incur any costs which were unique to them and separate from those incurred by Stauffer and Ward.

In sum, the district court provided a reasoned and logical explanation for the manner in which it apportioned the costs taxed against Falls City. It did not abuse its discretion.

CONCLUSION

For the reasons discussed, we affirm the judgment of the district court.

AFFIRMED.

WRIGHT and MILLER-LERMAN, JJ., not participating.

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[26] Brief for appellees on cross-appeal at 16.