IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN EAKIN,	)	
	)	
Plaintiff,	)	
	)	
V.	)	**CIVIL ACTION SA-12-CA-1002-FB(HJB)**
	)	
AMERICAN BATTLE MONUMENTS	)	
COMMISSION, ET AL.,	)	
	)	
Defendants.	)	

ORDER CONCERNING PLAINTIFF'S MOTION FOR RECOVERY OF COSTS

Before the Court are Plaintiff's Motion for Recovery of Costs (docket no. 122) and defendants' opposition (docket no. 123) thereto. After careful consideration, the Court is of the opinion the motion should be denied.

BACKGROUND

Plaintiff brought this suit in 2012 against defendants asserting claims related to the remains of Army Private Arthur H. "Bud" Kelder, plaintiff's cousin once removed. Private Kelder died in 1942 as a prisoner of the Japanese while serving in the Pacific Theater during World War II. Private Kelder's remains were among those of fourteen servicemen originally interred in Grave 717 in a prisoner of war cemetery at Cabanatuan, Nueva Ecija Province, Philippine Islands. Although the U.S. Army Grave Registration Service identified four sets of remains recovered from Grave 717, Private Kelder's remains were not individually identified. Instead, they were determined to be non-recoverable in 1950 and were interred with others as "unknown" in Fort McKinley Military Cemetery near Manila. Ultimately, the suit was dismissed as moot in 2015 after the Secretary of the Army exhumed for identification the ten sets of remains associated with Cabanatuan common grave 717 and matched Private Kelder's remains

with DNA from his family. No appeal was taken. Plaintiff now moves for an award of costs pursuant to the Equal access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d). Defendants filed a response in opposition to the motion, to which plaintiff did not file a discretionary reply. The issue is whether plaintiff can be considered a "prevailing party" for purposes of recovering his costs under the EAJA.

DISCUSSION

The EAJA provides that "a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded . . . incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States . . . ." 28 U.S.C. § 2412(d)(1)(A). Therefore, a threshold requirement for a party seeking fees is to establish that he is a "prevailing party" within the Act's definition. *Astrue v. Ratliff,* 560 U.S. 586, 591 (2010). Plaintiff contends he is a prevailing party "because he received the relief he sought, namely the recovery and identification of the remains of his family member, Arthur H. "Bud" Kelder" and "[t]his Court subsequently determined that, 'with the positive identification of Private Kelder's remains, plaintiff's claims concerning the identification and release of those remains are now moot.'"

Plaintiff is advancing the "catalyst theory," under which a plaintiff is considered a "prevailing party" if he achieves the desired result because the lawsuit brought about a voluntary change in the defendants' conduct. This widely accepted theory was rejected by the Supreme Court in *Buckhannon Bd. & Care Home, Inc. v. West Va. Dept. of Health & Human Res.,* 532 U.S. 598, 601 (2001). Plaintiffs in *Buckhannon* sued to enjoin the application of a West Virginia law as violative of the federal Fair Housing Amendments Act ("FHAA") and Americans With Disabilities Act ("ADA"), although the case became moot when the state legislature eliminated the law. *Id.* at 600-01. The Court rejected plaintiffs'

argument that the lawsuit caused a voluntary change in defendant's conduct which entitled them to attorney's fees as prevailing parties under the federal statutes. *Id.* The Court held that in order to recover under the fee-shifting provisions of those statutes, plaintiffs not only had to receive the "sought-after destination" but had achieve this result by obtaining judicial relief, such as a judgment on the merits or a settlement agreement enforced through a consent decree. *Id.* at 603-05. While *Buckhannon* arose in the context of the FHAA and ADA, the Supreme Court has recognized that its definition of "prevailing party" extends to requests for attorney's fees under the EAJA. *Astrue v. Ratliff,* 560 U.S. 586, 591-92 (2010).

It appears the Fifth Circuit has not spoken directly to whether *Buckhannon*'s "prevailing party" analysis applies to requests for costs under the EAJA. However, the Seventh Circuit inquired whether *Buckhannon* suggests that "prevailing party" has a different meaning in the context of costs as opposed to attorney's fees, and remanded the case to the district court to consider that question. *Petersen v. Gibson,* 372 F.3d 862, 867-68 (7th Cir. 2004) (citing *Buckhannon,* 532 U.S. at 606 n.8).[1] Conversely, the Second Circuit, citing to the same footnote in *Buckhannon*[2] which gave rise to the Seventh Circuit's

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[1]The District Court had awarded costs without any discussion and the parties had not distinguished between costs and attorneys' fees in their briefing of whether the plaintiff was a prevailing party. *Petersen,* 372 F.3d at 867. On remand, the District Court found "the cases on which the Seventh Circuit relied to imply that Peterson might be entitled to fees do not suggest creating . . . a 'prevailing' standard for fees that differs from the standard for costs . . . ." *Petersen v. Gibson,* No. 97 C 4123, 2005 WL 6705656, at *4 (N.D. Ill. Sept. 27, 2005).

[2]The footnote reads in its entirety:

> Although the dissenters seek support from *Mansfield, C. & L.M.R. Co. v. Swan,* 111 U.S. 379, 4 S.Ct. 510, 28 L.Ed. 462 (1884), that case involved costs, not attorney's fees. "[B]y the long established practice and universally recognized rule of the common law . . . the prevailing party is entitled to recover a judgment for costs," *id.,* at 387, 4 S.Ct. 510, but "the rule 'has long been that attorney's fees are not ordinarily recoverable, " *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 257, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975) (quoting *Fleischmann Distilling Corp. v. Maier Brewing Co.,* 386 U.S. 714, 717, 87 S.Ct. 1404, 18 L.Ed.2d 475 (1967)). Courts generally, and this Court in particular, then and now, have a presumptive rule for costs which the Court in its discretion may vary. See, *e.g.,* this Court's Rule 43.2 ("If the Court reverses or vacates a judgment, the respondent or appellee shall pay costs unless the Court otherwise orders"). In *Mansfield,* the defendants had

concern, stated that "although *Buckhannon* acknowledged the historical distinction between 'costs' and 'attorney's fees,' . . . the Court did not suggest–and there is no reason to conclude–that the distinction affects the meaning of the separate term 'prevailing party.'" *Dattner v. Conagra Foods, Inc.,* 458 F.3d 98, 101 (2d Cir. 2006) (citing *Buckhannon,* 532 U.S. at 606 n.8). This Court finds persuasive the Second Circuit's reading of the *Buckhannon* in light of two Fifth Circuit opinions which indicate there is no distinction between costs and attorney's fees which affects the meaning of "prevailing party." *See Dearmore v. City of Garland,* 519 F.3d 517, 521 (5th Cir. 2008) (applying *Buckhannon* "prevailing party" definition to requests for both attorney's fees and costs under 42 U.S.C. § 1988); *Hirczy De Mino v. Achenbaum,* 81 F. App'x 819, 821 (5th Cir. 2003) (applying *Buckhannon* "prevailing party" definition to request for costs under civil rights statute); *see also Farrar v. Hobby,* 506 U.S. 103, 118-20 (1992) (O'Connor, J., concurring) (suggesting that "prevailing party" standards for attorney's fees under 42 U.S.C. § 1988 and costs are synonymous).

In sum, under *Buckhannon,* to be considered a prevailing party, a plaintiff must not only achieve some material alteration of the legal relationship of the parties–the change must be also judicially

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> successfully removed the case to federal court, successfully opposed the plaintiffs' motion to remand the case to state court, lost on the merits of the case, and then reversed course and successfully argued in this Court that the lower federal court had no jurisdiction. The Court awarded costs to the plaintiffs, even though they had lost and the defendants won on the jurisdictional issue, which was the only question this Court decided. In no ordinary sense of the word can the plaintiffs have been said to be the prevailing party here—they lost and their opponents won on the only litigated issue—so the Court's use of the term must be regarded as a figurative rather than a literal one, justifying the departure from the presumptive rule allowing costs to the prevailing party because of the obvious equities favoring the plaintiffs. The Court employed its discretion to recognize that the plaintiffs had been the victims of the defendants' legally successful whipsawing tactics.

Buckhannon, 532 U.S. at 606 n.8. In his concurrence, Justice Scalia characterized the plaintiffs in *Mansfield* has having prevailed in the sense that "defendants' original position as to jurisdiction was defeated." *Id.* at 614 n.2 (Scalia, J., concurring). According to the *Buckhannon* dissent, *Mansfield* undercut the majority holding in that the *Mansfield* decision had awarded costs to a party it clearly regarded as not having prevailed. *Id.* at 630 (Ginsburg, J., dissenting). *See also Brewer v. Wisconsin Bd. of Bar Examiners,* No. 04-C-0694, 2007 WL 1140249, at *5 & n.4 (E.D. Wis. Apr. 17, 2007) (concluding *Buckhannon* makes no distinction between attorney's fees and costs for purposes of "prevailing party" analysis).

sanctioned. 532 U.S. at 604. In this case, the Secretary of the Army, not a named party, exhumed all ten graves associated with Common Grave 717, from which Private Kelder's remains were identified, thereby giving plaintiff the relief he sought. After Private Kelder's remains were identified, the Court dismissed plaintiff's complaint as moot and entered no order on his behalf. Plaintiff does not therefore fit the definition of a "prevailing party" as set forth in *Buckhannon*. *See id.* (determining that plaintiff was not prevailing party when case was dismissed as moot after third party provided relief plaintiff sought). He is thus ineligible for an award of costs under the EAJA. *See Ma v. Chertoff,* 547 F.3d 342, 344 (2d Cir. 2008) (finding that plaintiff did not fit definition of "prevailing party" under *Buckhannon* and thus was not eligible for award of attorney's fees or costs under EAJA because plaintiff's claims were dismissed as moot after defendants voluntarily gave plaintiff relief he sought).

IT IS THEREFORE ORDERED that Plaintiff's Motion for Recovery of Costs (docket no. 122) is DENIED.

It is so ORDERED.

SIGNED this 11th day of September, 2015.

FRED BIERY
CHIEF UNITED STATES DISTRICT JUDGE