ORIGINAL

IN THE OHIO COURT OF CLAIMS

WILLIAM RUSSELL, Plaintiff, vs. CLEVELAND STATE UNIVERSITY, Defendant.	)	CASE NO.: 2013-00138 JUDGE PATRICK M. McGRATH MAGISTRATE HOLLY T. SHAVER
STEVEN LISS, Plaintiff, vs. CLEVELAND STATE UNIVERSITY, Defendant.	)	CASE NO.: 2013-00139 JUDGE PATRICK M. McGRATH MAGISTRATE HOLLY T. SHAVER

FILED
COURT OF CLAIMS
OF OHIO
2016 JUL 19 AM 11:12

PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO TAX TRANSCRIPT EXPENSES AS COSTS

CHRISTOPHER P. THORMAN (0056013)
cthorman@tpgfirm.com
DANIEL P. PETROV (0074151)
dpetrov@tpgfirm.com

THORMAN PETROV GROUP CO., LPA
3100 Terminal Tower
50 Public Square
Cleveland, Ohio 44113
Tel. (216) 621-3500
Fax (216) 621-3422

Attorneys for Plaintiffs Steven Liss and William Russell

DISCUSSION

The Staff Notes to Civ. R. 54(D) indicate that the trial court has the ultimate responsibility for the assessment of costs, and it is incumbent upon the court to exercise discretion in determining whether to assess costs in a particular case. The Court's discretion is not unbridled.[1] Civ.R. 54(D) is not a grant of an absolute right for costs to be allowed to the prevailing party.[2] As explained herein, Plaintiffs Steven Liss and William Russell ask the Court to deny Defendant's Motion to Tax Transcript Expenses as Costs.

A. Defendant Is Not Entitled to Transcript Expenses of Depositions Not Used at Trial.

Defendant improperly seeks an award of transcript expenses for several depositions not used at trial, but instead used for summary judgment purposes. The trend in Ohio is not to tax the cost of a deposition not used at trial.[3] In addition, the rule in Ohio is not to permit a party to tax the expense of depositions taken in anticipation of a future need, but not actually used at trial, as cost of the litigation.[4] To tax as costs the expense of a deposition not used at trial might discourage the "reasonable exercise" of taking depositions because counsel might injudiciously take numerous depositions with little regard for the expense, comfortable in the knowledge that the expense would be taxed as costs.[5]

Defendant seeks reimbursement of costs for depositions not used at trial, which are not reimbursable under Ohio law. Specifically, Defendant seeks an award of $4,521.40 for the depositions of Vartorella, Courson, Banks, Liss, and Russell. Defendant does not claim that these depositions were used at trial or even necessary for trial in its Motion. Instead, Defendant argues that it used these transcripts for purposes of summary judgment. This is not a proper basis for an

---

1 *Gnepper v. Beegle*, 84 Ohio App.3d 259, 263, 616 N.E.2d 960 (3d Dist.1992).

2 *State ex rel. Gravill v. Fuerst* (1986), 24 Ohio St.3d 12, 24 OBR 10, 492 N.E.2d 809. *See, also, Gold v. Orr Felt Co.* (1985), 21 Ohio App.3d 214, 21 OBR 228, 487 N.E.2d 347.

3 *Gnepper v. Beegle*, 84 Ohio App.3d 259, 264, 616 N.E.2d 960 (3d Dist.1992)

4 *Barrett v. Singer Co.* (1979), 60 Ohio St.2d 7, 14 O.O.3d 122, 396 N.E.2d 218.

5 *Id.* at 11, 14 O.O.3d at 124, 396 N.E.2d at 220. *See, also, Rice v. Dudick Corrosion-Proof, Inc.* (1989), 57 Ohio App.3d 156, 567 N.E.2d 315; *Dorko v. Woodruff* (1988), 42 Ohio App.3d 13, 536 N.E.2d 56.

award of costs when, as here, the case is not disposed of on summary judgment. Defendant cites *Boomershine v. Lifetime Capital, Inc.*[6] *Boomershine* holds that deposition transcript costs may be taxed as costs in cases decided on summary judgment with no trial. Obviously, that is not the case here. Defendant identifies no authority holding that deposition costs for pre-trial motion practice are recoverable as costs after a trial. The Court should decline to award Defendant $4,521.40 for the depositions of Vartorella, Courson, Banks, Liss, and Russell, as these depositions were not admitted as evidence or used at trial, and not necessary for trial.

Similarly, the Court should reject Defendant's request for $1,282.00 for the deposition transcripts of Bergmann, Walker, Johnston, and McCafferty. Defendant's sole support for this request is that Liss and Russell filed these transcripts with the Court at the time of summary judgment briefing. Defendant overlooks, however, that it filed its summary judgment *before* Liss and Russell filed any transcripts. Defendant does not allege that it used these transcripts for any purpose whatsoever, whether at summary judgment or at trial. Even if it had used these transcripts for summary judgment purposes, the costs are not recoverable *after trial* under *Boomershine* and *Haller v. Borror.*[7]

As Defendant identifies no authority allowing for the recovery of these costs, and as it has failed to make a showing that these transcripts were necessary for purposes of trial or post-trial briefing, the Court should reject Defendant's request for the reimbursement of costs for the depositions of Vartorella, Courson, Banks, Liss, Russell, Bergmann, Walker, Johnston, and McCafferty.

B. <u>Defendant Is Not Entitled for Reimbursement of Expenses of Cauthen's or Drnek's Depositions When They Were Not Necessary for Defendant's Case.</u>

Defendant improperly seeks reimbursement for the deposition transcripts of Drnek and Cauthen in the amount of $1,165.00. Defendant's sole argument for the reimbursement of these

---

6 182 Ohio App.3d 495, 2009-Ohio-2736, 913 N.E.2d 520 (2d Dist.)

7 107 Ohio App.3d 432, 669 N.E.2d 17 (10th Dist.1995).

costs is that Liss and Russell offered these transcripts into evidence and that the Court admitted them as exhibits. Defendant fails to meet its burden to show that these transcripts were "necessary" for trial as required by Rule 54 and Section 2303.21. First, it was Plaintiffs who offered these transcripts as exhibits for admission by the Court and not Defendant. Defendant did not include these transcripts on its exhibit list, call Drnek or Cauthen to testify at trial, or otherwise attempt to move these transcripts into evidence. Had these transcripts been necessary for Defendant at trial, Defendant would have presented these transcripts as part of its case. Second, ordering these transcripts was not necessary for purposes of preparing any post-trial briefing, as Plaintiffs provided to Defendant copies of all exhibits, including these transcripts, at trial.

C. <u>The Court Should Decline to Tax Trial Transcript Expenses to Liss & Russell</u>.

Defendant finally seeks $6,002.44 for its order of the trial transcript. In *Vance v. Roedersheimer*,[8] the Ohio Supreme Court determined that the language of Civ.R. 54(D) grants the trial court discretion to order the prevailing party to bear all or part of his or her own costs. First, Defendant has not filed its request within a reasonable period of time, waiting nearly ten months since the Magistrate's ruling in September 2015. Delay in requesting reimbursement of costs warrants denial of a request to tax costs.[9] Second, at no time following the Magistrate's ruling did Defendant make any request to Plaintiffs to reduce or share costs of transcripts during the preparation of objections, which could substantially have reduced Defendant's financial expense.

Finally, the Court should deny Defendant's request for reimbursement of trial transcript costs based on the chilling effect that such an award will have on future public employees of the State of Ohio who seek legal redress against their public employers. Federal courts in the Sixth Circuit have recognized that the Court should consider Liss and Russell's good faith and the

---

[8] *Vance v. Roedersheimer*, (1992), 64 Ohio St.3d 552, 1992 Ohio 89, 597 N.E.2d 153; *see also Holmes Cnty. Bd. of Comm'rs v. McDowell,* 169 Ohio App.3d 120, 2006-Ohio-5017, 862 N.E.2d 136, ¶ 44 (5th Dist.).

[9] *Martin v. Lake Mohawk Props. Owner's Ass'n*, 7th Dist. Carroll No. 10 CA 869, 2011-Ohio-5132.

difficulty of the case in evaluating their request to deny Defendant costs.[10] Federal courts in the same Circuit have concluded that the chilling effect of awarding costs is a relevant consideration in determining whether it is proper to award costs to the prevailing party.[11] "Indeed, numerous district courts in this circuit have considered the potential chilling effect on future, similarly situated litigants to be a valid reason, among others, to decline to award costs."[12]

Liss and Russell are perfect examples of individuals against whom transcript costs should not be taxed considering their service to CSU and the State of Ohio, the complexity and difficulty of their cases, and the good faith nature of their claims. Liss served Defendant's Department of Student Life for more than 19 years until he was abruptly terminated.[13] Russell, a member of CSU first entering class, is a dedicated alumnus who "bleeds green"—the colors of CSU. Russell earned his bachelor's and law degrees from CSU, and beginning in 1979, served as an Adjunct Law Professor at CSU.[14] In 2000, out of his loyalty to CSU, Russell left his law practice to take on the role of Defendant's Greek Life Coordinator.[15] Given the financial disparities between Defendant and Plaintiffs, Plaintiffs' good faith conduct, and decades of devoted service to Defendant and its students at personal sacrifice to themselves, the Court should avoid chilling future civil rights litigants from pursuing legal review of their claims by imposing transcript costs upon Liss and Russell.

---

[10] *Knology v. Insight Communications Co. LP*, 460 F.3d 722, 726 (6th Cir. 2006); *see also Anderson v. Jo-Ann Stores, Inc.*, M.D. Tenn. No. 3:09-1042, 2011 U.S. Dist. LEXIS 91493, at *4 (Aug. 15, 2011).

[11] *Id.* at 731.

[12] *Anderson v. Jo-Ann Stores, Inc.*, M.D.Tenn. No. 3:09-1042, 2011 U.S. Dist. LEXIS 91493, at *4-5 (Aug. 15, 2011), *citing Barber v. Overton*, 2005 WL 2018134, *1 (W.D. Mich. Aug. 20, 2005); *Pickens v. GLR Constructors, Inc.*, 196 F.R.D. 69, 77 (S.D. Ohio 2000).

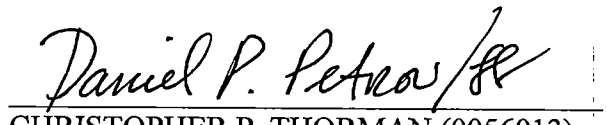
[13] Liss, Tr. at 77.

[14] Russell, Tr. at 385-86; Tr. at 388 (hired as Adjunct Law Professor in 1978).

[15] Russell, Tr. at 391-92.

For the reasons set out herein, Plaintiffs Steven Liss and William Russell respectfully ask the Court to deny Defendant's Motion to Tax Transcript Expenses as Costs for the reasons described above.

Respectfully submitted,



CHRISTOPHER P. THORMAN (0056013)
cthorman@tpgfirm.com
DANIEL P. PETROV (0074151)
dpetrov@tpgfirm.com

THORMAN PETROV GRIFFIN CO., LPA
3100 Terminal Tower
50 Public Square
Cleveland, Ohio 44113
Tel. (216) 621-3500
Fax (216) 621-3422

Attorneys for Plaintiffs Steven Liss and William Russell

CERTIFICATE OF SERVICE

A true and accurate copy of the foregoing was served via electronic mail, on this 18th day of July 2015 to:

Randall W. Knutti, Esq.
Amy S. Brown, Esq.
Emily M. Simmons, Esq.
Ohio Attorney General's Office
Court of Claims Defense Section
150 East Gay Street, Floor 18
Columbus, OH 43215
Randall.Knutti@OhioAttorneyGeneral.gov
Amy.Brown@OhioAttorneyGeneral.gov
Emily.Simmons@OhioAttorneyGeneral.gov

Attorneys for Defendant

Daniel P. Petrov/SS

Attorney for Plaintiffs Steven Liss and William Russell

TPG THORMAN PETROV GROUP

FILED
COURT OF CLAIMS
OF OHIO

2016 JUL 19 AM 11: 12

July 18, 2016

Via Overnight Fedex Mail
The Ohio Judicial Center
Court of Claims of Ohio
65 South Front Street
Third Floor
Columbus, OH 43215

Re: *Liss v. Cleveland State University-Case No.: 2013-00139*
Russell v. Cleveland State University-Case No.: 2013-00138

Dear Sir/Madam:

I have enclosed an original and one copy of *Plaintiffs' Opposition to Defendant's Motion to Tax Transcript Expenses as Costs* for the cases referenced above. The original is for filing with the Clerk and the copy we would like to have time-stamped. Please return the time-stamped copy to me in the enclosed self-addressed postage-prepaid envelope. /KU

Thank you for your attention to this matter. Please do not hesitate to call me should you have any questions.

Sincerely,

Lesa Liston

Lesa Liston
Paralegal
lliston@tpgfirm.com

Enclosures

Cc: Randall W. Knutti, Esq.
Amy S. Brown, Esq.
Emily M. Simmons, Esq.