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IN THE OHIO COURT OF CLAIMS

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COURT OF CLAIMS  
OF OHIO

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WILLIAM RUSSELL  
Plaintiff

v.

CLEVELAND STATE UNIVERSITY  
Defendant

And

STEVEN LISS  
Plaintiff

v.

CLEVELAND STATE UNIVERSITY  
Defendant

Case Nos. 2013-00138 and  
2013-00139

Judge Patrick M. McGrath  
Magistrate Holly T. Shaver

CLEVELAND STATE UNIVERSITY'S  
REPLY IN SUPPORT OF ITS MOTION  
TO TAX TRANSCRIPT EXPENSES AS  
COSTS PURSUANT TO RULE 54(D) OF  
THE OHIO RULES OF CIVIL PROCEDURE

I. Overview

Steven Liss and William Russell say they are not responsible for the costs of even a single transcript CSU had to use to defend these cases. As support, they raise six arguments. First, citing *Haller v Borrer*, 107 Ohio App.3d 432, 441 (10<sup>th</sup> Dist. 1995) and *Boomershine v Lifetime Capital, Inc.*, 2009-Ohio-2736, ¶13 (2d Dist.), they say the deposition transcripts on which Magistrate Shaver relied in awarding CSU partial summary judgment cannot be taxed as costs because that judgment did “not [fully] dispose[ ] of” the cases. (Memo at 2.) Second, citing *Haller*, they say CSU cannot recover the costs of deposition transcripts they filed. *Id.* Third, citing no case law, they say CSU cannot recover the costs of the transcripts of Dr. Cauthen and Dr. Drnek because they, not CSU, moved to have those transcripts admitted. *Id.* at 3. Fourth, citing *Martin v Lake Moharok Property Owner's Association*, 2011-Ohio-5132 (7<sup>th</sup> Dist.), they say CSU cannot recover the cost of the trial transcript because CSU's motion was not filed “within a reasonable period of time.” *Id.* Fifth, citing

no case law, they say CSU cannot recover the cost of the trial transcript because it did not collude with them to keep the court reporter from earning a full fee. *Id.* And sixth, citing federal case law that does not apply here, they say that taxing costs can have a “chilling effect,” that the cases were complex, that they acted in “good faith,” and that CSU has more money than they do. *Id.* at 3-4.

II. *Haller* and *Boomershine* do not hold that CSU cannot recover the cost of deposition transcripts on summary judgment because the case was tried. Mr. Russell’s and Mr. Liss’s first argument is wrong.

*Boomershine* rejected the argument that “expenses may be recovered only when a deposition is used at trial.” And it noted, obviously enough, that decisions distinguishing between “a deposition used at trial and one not used at trial” were “inapposite” in an appeal involving a case that was not tried. 2009-Ohio-2736, ¶13. In the same paragraph, the court cited *Haller*, which held that deposition transcripts used on summary judgment can be taxed as costs. Neither *Boomershine* nor *Haller* has a thing to say about depositions used in partial summary judgments followed by a trial. But one of the cases *Haller* cites approvingly, *First Nat’l Bank of Dillonaule*, 94 Ohio App.3d 368 (7<sup>th</sup> Dist. 1993) (abrogated on other grounds), holds that the cost of depositions used on summary judgment can be taxed whether or not a trial took place. As *Haller* noted, *Dillonaule* upheld a trial court’s award of costs for deposition transcripts the plaintiff “used to defend a motion for summary judgment,” which was not granted. “The plaintiff went on to win at trial, and on appeal the defendant challenged the awarding of deposition expenses and costs on the ground that the depositions were not admitted into evidence.” *Haller*, 107 Ohio App.3d 432, 440. “These depositions were filed and used by First National in opposition to Progressive’s motion for summary judgment. We find the trial court did not abuse its discretion in taxing the costs of deposing those two witnesses.” *Dillonaule*, 94 Ohio App.3d 368, 376.

In other words, Mr. Russell and Mr. Liss have cited *Boomershine* and *Haller* for a proposition those decisions never even addressed, and they managed not to notice that the key paragraph in *Haller* cited a decision that stands for precisely the opposite of their point.

III. *Haller* makes clear that deposition transcripts can be taxed as costs regardless of which party took them, filed them or moved them into admission. Mr. Russell's and Mr. Liss's second and third arguments are wrong.

The issue is whether the transcripts were used or necessary. And this is what *Haller* said about that: As *Haller v Borror*, 107 Ohio App.3d 432, 441 (10<sup>th</sup> Dist. 1995) put it, "If appellant believed that the deponents' testimony was relevant to winning his case, it is reasonable to assume that appellee needed a transcript of that testimony to defend the case."

IV. *Martin* does not hold that CSU's motion, which it filed within thirty days after Mr. Russell's and Mr. Liss's time to appeal expired, was untimely. Their fourth argument is wrong.

The plaintiffs in *Martin* won a final judgment on December 30, 2008 and filed their motion for costs over thirteen months later on February 11, 2010. 2011-Ohio-5132, ¶¶3, 4. CSU won a final judgment when this Court overruled Mr. Russell's and Mr. Liss's objections on May 10, 2016; Mr. Russell's and Mr. Liss's time to appeal ran on June 9, 2016; and it filed its motion on July 9, 2016, less than one month later. It is "reasonable" to file a motion for costs within one month after the losing party's "time for appeal had run." *Bookatz v Kupps*, 39 Ohio App.3d 36, 38 (8<sup>th</sup> Dist. 1987).

V. No case appears ever to have held that a prevailing party cannot recover the full cost of transcripts it needed merely because it did not attempt to avoid a court reporter's fee by making a deal with its opponent to "share" a transcript. And *Haller*, which Mr. Russell and Mr. Liss cite and must have read, specifically rejects their fifth argument.

"Appellant first claims that appellee refused his suggestion that they share the expense of transcripts and reproduction. Regardless of whether one party put up all of the money or half of the money, the trial court could have awarded the prevailing party the amount expended." *Haller*, 107 Ohio App.3d 432, 440-441 (Emphasis added.)

VI. Mr. Russell's and Mr. Liss's citations to decisions construing federal Rule 54(D) are inapplicable. Their sixth argument is wrong.

Ohio courts have analyzed every issue needed to resolve CSU's motion, and Mr. Russell and Mr. Liss have yet to locate even one that parrots the holdings of the federal cases it cites.

VII. Conclusion

Mr. Russell and Mr. Liss's most recent memorandum mischaracterizes the law. CSU is entitled to the costs it seeks, and it urges the Court to grant its motion in full.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On July 25, 2016, I sent a copy of this document via electronic mail to Plaintiff's Counsel  
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