

IN THE COURT OF CLAIMS OF OHIO

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

ENTRY

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COURT OF CLAIMS
OF OHIO
2016 OCT -5 PM 1:07

On July 8, 2016, defendant, Cleveland State University (CSU) filed a motion to tax transcript expenses as costs pursuant to Civ.R. 54(D). CSU seeks costs totaling \$12,970.84. On July 19, 2016, plaintiffs filed an opposition to defendant's motion to tax transcript expenses as costs. On July 25, 2016, defendant filed a motion for leave to file a reply in support of its motion tax transcript expenses as costs, along with its reply. Upon review, defendant's motion for leave is GRANTED, and the court accepts defendant's reply.

Civ.R. 54(D) provides: "Except when express provision therefor is made either in a statute or in these rules, costs shall be allowed to the prevailing party unless the court otherwise directs." "The Supreme Court of Ohio has stated that its 'interpretation of Civ.R. 54(D) is that the phrase "unless the court otherwise directs" grants the court discretion to order that the prevailing party bear all or part of his or her own costs.'" *Kelly v. Northeastern Ohio Univ. College*, 10th Dist. Franklin No. 07AP-945, 2008-Ohio-

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2016 OCT -5 PM 1:07

-2-

4893, ¶ 37, quoting *Vance v. Roedersheimer*, 64 Ohio St.3d 552, 555, 597 N.E. 2d 153 (1992). "Costs are generally defined as statutory fees to which officers, witnesses, jurors and others are entitled for their services in an action and which the statutes authorize to be taxed and included in the judgment." *Williamson v. Ameritech Corp.*, 81 Ohio St.3d 342, 343, 691 N.E.2d 288 (1998), quoting *Benda v. Fana*, 10 Ohio St.2d 259, 227 N.E.2d 197 (1967), paragraph one of the syllabus.

CSU moves to recover the cost of transcripts that were used in both the motion for summary judgment and trial phases of this case and provided the affidavit of Kelly M. King, Associate General Counsel for CSU, including invoices, in support of its motion. CSU requests costs for transcripts used in the following four situations: (1) the trial transcript; (2) deposition transcripts marked and admitted at trial; (3) deposition transcripts CSU cited in its motion for summary judgment; and (4) deposition transcripts plaintiffs cited in support of their memorandum opposing CSU's motion for summary judgment. The court discusses each situation below.

1) Trial Transcript

R.C. 2303.21 provides: "[w]hen it is necessary in an appeal, or other civil action to procure a transcript of a judgment or proceeding, or exemplification of a record, as evidence in such action or for any other purpose, the expense of procuring such transcript or exemplification shall be taxed in the bill of costs and recovered as in other cases." Civ.R. 53(D)(3)(b)(iii) requires that objections to a magistrate's decision "be supported by a transcript of all the evidence submitted to the magistrate." CSU argues that trials are plainly "proceedings" and depositions are also "proceedings." *Brodess v. Bagent*, 10th Dist. No. 04AP-623, 2005-Ohio-20, ¶¶ 12-13.

Further, CSU argues that a transcript is "necessary" for purposes of R.C. 2303.21 if "the trial court used it." *Id.* at ¶ 13. CSU argues that plaintiffs' objections required them to order the transcript, and the trial court used the transcript in

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ruling on the objections. Thus, CSU's \$6,002.44 cost of ordering the transcript was "necessary" and recoverable under Civ.R. 54(D).

Plaintiffs argue that CSU did not file its request within a reasonable period of time, as nearly ten months passed since the magistrate's decision in September 2015. Plaintiffs also state that CSU did not make any request to plaintiffs to reduce or share the costs of transcripts during the preparation of objections, which could have substantially have reduced defendant's expense. Lastly, plaintiffs urge the court to deny transcript costs because it will have a chilling effect on future public employees of the State of Ohio who seek legal redress against their public employers.

While Civ.R. 53 requires objections to a magistrate's decision to be supported by a transcript, here CSU did not file objections. Rather, CSU filed a memorandum in response to plaintiffs' objections. Civ.R. 53 does not provide for a memorandum in response to objections, and while this court routinely accepts them, a transcript is not "necessary" for purposes of R.C. 2303.21 to support a memorandum in response to objections. As such, defendant is not entitled to the cost of the trial transcript.

2) Deposition Transcripts Marked and Admitted at Trial

CSU also argues it should recover for the deposition transcripts of Dr. Drnek and Dr. Cauthen, as they were marked and admitted into evidence at trial, which means that the trial court "used" them and, as such, their \$1,165.00 cost is recoverable under Civ.R. 54(D).

Plaintiffs argue that CSU failed to meet its burden to show that these transcripts were "necessary" for trial as required by Civ.R. 54(D) and R.C. 2303.21. First, plaintiffs argue that they offered these transcripts as exhibits for admission, and defendant did not include these transcripts on its exhibit list, call either person to testify at trial, or attempt to move the transcripts into evidence. Second, plaintiffs claim that ordering these transcripts was not necessary for purposes of preparing any post-trial briefing because plaintiffs provided CSU copies of all exhibits at trial, including these transcripts.

2016 OCT -5 PM 1:07

-4-

A review of the docket reveals that plaintiffs introduced these exhibits at trial and they were admitted. As such, CSU should have received or asked for a copy of these deposition transcripts, as they were plaintiffs' exhibits. As such, these transcripts were not "necessary" for purposes of R.C. 2303.21 and CSU is not entitled to the costs of these transcripts.

3) Deposition Transcripts CSU Cited in its Motion for Summary Judgment

Similarly, CSU argues that in its motion for summary judgment it cited the depositions of Mr. Vartorella, Mr. Russell, Ms. Courson, Dr. Banks, and Mr. Liss, and it should recover \$4,521.40 for the cost of ordering those transcripts. CSU also points to the fact that "the citation of a deposition transcript in a summary judgment motion also demonstrates that a trial court 'used' it." *Boomershine v. Lifetime Capital, Inc.*, 2009-Ohio-2736, ¶13 (2d Dist).

Plaintiffs argue that "the trend in Ohio is not to tax the cost of a deposition not used at trial." *Gnepper v. Beegle*, 84 Ohio App.3d 259, 264, 616 N.E.2d 960 (3d Dist.1992). Additionally, plaintiffs claim that the rule in Ohio is not to permit a party to tax the expense of depositions taken in anticipation of future need, but not actually used at trial, as cost of litigation. *Barrett v. Singer Co.*, 60 Ohio St.2d 7, 616 N.E.2d 128 (1979). Plaintiffs argue that *Boomershine* held that deposition transcript costs may be taxed as costs in cases decided on summary judgment with no trial, which was not the case here.

In response, CSU argues that *Boomershine* rejected the argument that "expenses may be recovered only when a deposition is used at trial," and that both *Boomershine* and *Haller* held that deposition transcripts used on summary judgment can be taxed as costs. CSU claims that the costs of depositions used for summary judgment can be taxed whether or not a trial took place. *First Nat'l Bank of Dillionvale*, 94 Ohio App.3d 368 (7th Dist.1993).

JOURNALIZED

2016 OCT -5 PM 1:07

-5-

The court agrees with plaintiff, and the costs of the depositions used in CSU's motion for summary judgment will not be taxed as costs. The court agrees that taxing deposition transcripts as costs would discourage the reasonable exercise of discovery and pre-trial motion practice. As such, CSU is not entitled to the costs of deposition transcripts used in support of its motion for summary judgment.

4) Deposition Transcripts Plaintiffs Cited in Support of their Memorandum Opposing CSU's MSJ

Finally, in support of their memorandum opposing CSU's motion for summary judgment, plaintiffs filed the deposition transcripts of Mr. Bergmann, Dr. Walker, Ms. Johnston, and Ms. McCafferty, and CSU should recover \$1,282.00 in costs for ordering those transcripts. In support of this final argument for costs, CSU cites to *Haller v. Borrer*, 107 Ohio App.3d 432, 441 (10th Dist.1995), "[i]f 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."

Plaintiffs argue that CSU filed its summary judgment motion before plaintiffs filed any transcripts, and that CSU does not allege that it used these transcripts for any purpose whatsoever, whether at summary judgment or at trial.

Similarly to the court's discussion of deposition transcripts used in support of CSU's motion for summary judgment, the court will not tax as costs deposition transcripts plaintiffs cited in support of their memorandum opposing CSU's motion for summary judgment. Upon review, defendant's motion to tax transcript expenses as costs pursuant to Civ.R. 54(D) is DENIED. Court costs associated with the processing of this entry are absorbed by the court.



PATRICK M. MCGRATH
Judge

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2016 OCT -5 PM 1:07

-6-

cc:

Christopher Paul Thorman
Daniel Parker Petrov
3100 Terminal Tower
50 Public Square
Cleveland, Ohio 44113

Amy S. Brown
Emily Simmons Tapocsi
Randall W. Knutti
Assistant Attorneys General
150 East Gay Street, 18th Floor
Columbus, Ohio 43215-3130

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