

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO, BY AND THROUGH
JERRY WRAY, DIRECTOR,
OHIO DEPARTMENT OF
TRANSPORTATION, ET AL.

Plaintiff-Appellants

-VS-

KARL R. ROHRER ASSOCIATES, INC.

Defendant-Appellee

JUDGES:

Hon. W. Scott Gwin, P.J.
Hon. William B. Hoffman, J.
Hon. Earle E. Wise, Jr., J.

Case No. 2017AP050012

OPINION

CHARACTER OF PROCEEDING:

Appeal from the Tuscarawas County
Common Pleas Court, Case No.
2015CV030118

JUDGMENT:

Affirmed in part, Reversed in part,
Final Judgment Entered

DATE OF JUDGMENT ENTRY:

January 11, 2018

APPEARANCES:

For Plaintiff-Appellants

For Defendant-Appellee

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Hoffman, J.

{¶1} Appellants State of Ohio, by and through Jerry Wray, Director, Ohio Department of Transportation and Ohio Department of Administrative Services n/k/a Ohio Facilities Construction Commission appeal a judgment entered by the Tuscarawas County Common Pleas Court awarding Appellee Karl R. Rohrer Associates Inc. costs in the amount of \$10,135.60.

STATEMENT OF THE CASE¹

{¶2} On March 3, 2015, Appellants filed the instant action against Appellee for breach of contract, negligence and declaratory judgment. The claims arose from engineering services provided by Appellee on the construction of an Ohio Department of Transportation facility in New Philadelphia, Ohio.

{¶3} Prior to trial, Appellants dismissed their claims for negligence and declaratory judgment. The breach of contract claim proceeded to jury trial in the Tuscarawas County Common Pleas Court. Following the presentation of Appellants' case, the trial court directed a verdict in Appellee's favor, finding the cause of action sounded in tort rather than contract, and Appellants' had not presented any evidence Appellee breached the contract. Judgment entry, February 28, 2017.

{¶4} On March 8, 2017, Appellee moved for an award of costs pursuant to Civ. R. 54(D). The trial court found as the prevailing party, Appellee was entitled to an award of costs of \$2,474.07 for deposition transcripts, \$7,393.53 for trial exhibits and oversized drawings, \$268.00 for court costs, for a total award of \$10,135.60. From this April 19, 2017 judgment of the court Appellants prosecute their appeal, assigning as error:

¹ A rendition of the facts is unnecessary for our disposition of this appeal.

“THE TRIAL COURT ERRED BY AWARDING APPELLEE COURT COSTS CONSISTING OF TRIAL EXHIBIT EXPENSES AND DISCOVERY DEPOSITION EXPENSES NOT PERMITTED BY STATUTE, RULE OR ESTABLISHED CASE LAW.”

{¶15} 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 phrase “unless the court otherwise directs” grants the trial court discretion to order the prevailing party bear all or part of his or her own costs. *Vance v. Roedersheimer*, 64 Ohio St.3d 552, 555, 1992-Ohio-24, 597 N.E.2d 153, 156. The Ohio Supreme Court has defined “costs”:

This court has consistently limited the categories of expenses which qualify as “costs.” “Costs, in the sense the word is generally used in this state, may be defined as being the 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 * * *. * * * Costs did not necessarily cover all of the expenses and they were distinguishable from fees and disbursements. They are allowed only by authority of statute * * *.” *State, ex rel. Commrs. of Franklin County, v. Guilbert* (1907), 77 Ohio St. 333, 338-339, 83 N.E. 80, quoted, in part, with

approval in *Benda v. Fana* (1967), 10 Ohio St.2d 259, 262-263, 227 N.E.2d 197.

Today, we reaffirm the principle that “(t)he subject of costs is one entirely of statutory allowance and control.” *State, ex rel. Michaels, v. Morse* (1956), 165 Ohio St. 599, 607, 138 N.E.2d 660, quoted with approval in *Sorin v. Bd. of Edn.* (1976), 46 Ohio St.2d 177, 179, 347 N.E.2d 527.

{¶6} *Centennial Ins. Co. v. Liberty Mut. Ins. Co.*, 69 Ohio St.2d 50, 50–51, 430 N.E.2d 925, 926 (1982).

{¶7} Appellants first argue the trial court erred in taxing exhibit copy expenses as court costs. We agree.

{¶8} The bills attached to Appellee’s motion show Appellee paid to Legal Images document production company \$4,554.89 for scanning documents, blowbacks, index tabs, 3-ring binders, and numbering scanned documents, and an additional \$2,838.64 for oversized copies.

{¶9} There is no statutory authority for the allowance of copying expenses, and as such photocopying expenses are not properly taxed as costs. *State ex rel. Toth v. Indus. Com'n of Ohio*, 80 Ohio St.3d 360, 363, 1997-Ohio-108, 686 N.E.2d 514,516. Photocopying expenses and trial exhibit fees are not recoverable as a matter of law. *Kava v. Boesch*, 8th Dist. Cuyahoga No. 95018, 2011-Ohio-617, ¶ 23. Accordingly we find the court erred in awarding Appellee costs in the amount of \$7,393.53 for copying and preparation of trial exhibits.

{¶10} Appellants also argue the trial court erred in taxing the preparation of transcripts of discovery deposition expenses as court costs. We disagree.

{¶11} R.C. 2319.27 provides:

Except as section 147.08 of the Revised Code governs the fees chargeable by a notary public for services rendered in connection with depositions, the fees and expenses chargeable for the taking and certifying of a deposition by a person who is authorized to do so in this state, including, but not limited to, a reporter, stenographer, or person described in Civil Rule 28, may be established by that person subject to the qualification specified in this section, and may be different than the fees and expenses charged for the taking and certifying of depositions by similar persons in other areas of this state. Unless, prior to the taking and certifying of a deposition, the parties who request it agree that the fees or expenses to be charged may exceed the usual and customary fees or expenses charged in the particular community for similar services, such a person shall not charge fees or expenses in connection with the taking and certifying of the deposition that exceed those usual and customary fees and expenses.

The person taking and certifying a deposition may retain the deposition until the fees and expenses that the person charged are paid. The person also shall tax the costs, if any, of a sheriff or other officer who serves any process in connection with the taking of a deposition and the

fees of the witnesses, and, if directed by a person entitled to those costs or fees, may retain the deposition until those costs or fees are paid.

{¶12} This statute does not provide a statutory basis for taxing the services of a court reporter at a deposition as costs under Civ.R. 54(D). *Williamson v. Ameritech Corp.*, 81 Ohio St.3d 342, 1998-Ohio-347, 691 N.E.2d 28 (1998), syllabus. However, the *Williamson* court did not consider whether costs of a transcript of a deposition could be taxed pursuant to R.C. 2303.21:

When 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.

{¶13} Other courts of appeals have found the cost of deposition transcripts properly taxed as costs pursuant to the authorization found in R.C. 2303.21. *Vossman v. AirNet Systems, Inc.*, 10th Dist. Franklin No. 16AP-739, 2017 -Ohio- 2872; *Brondes Ford, Inc. v. Habitec Sec.*, 38 N.E.3d 1056, 2015-Ohio-2441 (6th Dist. Lucas); *2115-2121 Ontario Bldg., L.L.C. v. Anter*, 8th Dist. Cuyahoga Nos. 98255, 98296, 2013-Ohio-2993; *Boomershine v. Lifetime Capital, Inc.*, 182 Ohio App.3d 495, 2009-Ohio-2736 (2nd Dist. Montgomery); *Raab v. Wenrich*, 2nd Dist. Montgomery No. 19066, 2002-Ohio-936. Even

if no trial is held, transcripts of depositions filed and used for any purpose necessary can be awarded as costs. *Vossman, supra*, ¶12.

{¶14} In the instant case, the deposition of John Sweany was filed as evidence in support of Appellee's motion for summary judgment, which Appellee requested leave to file *instanter*. Although the trial court denied leave to file the summary judgment motion *instanter*, we find no abuse of discretion in taxing the costs to produce the transcript pursuant to Civ. R. 54(D) and R.C. 2303.21.

{¶15} The complete transcript of the deposition of Tony Schorr was filed on February 13, 2017. A portion of the transcript of the deposition was filed as an exhibit attached to Appellee's brief in opposition to Appellants' motion in limine as to construction defects, and used by Appellee in support of its position in opposition to that motion. The transcript of the deposition of James Dixon was filed on February 13, 2017, and used by Appellee in cross-examining Dixon at trial. Tr. 364-365. We find the trial court did not abuse its discretion in awarding these deposition transcript costs to Appellee pursuant to Civ. R. 54(D) and R.C. 2303.21.

{¶16} The assignment of error is sustained in part and reversed in part.

{¶17} The judgment of the Tuscarawas County Common Pleas Court is affirmed in part and reversed in part. Pursuant to App. R. 12(B) we hereby enter final judgment awarding Appellee costs in the amount of \$2,742.07, and post-judgment interest to accrue pursuant to R.C. 1343.03.

By: Hoffman, J.

Gwin, P.J. and

Wise, Earle, J. concur