

[Cite as *Starner v. Starner*, 2010-Ohio-4620.]

COURT OF APPEALS  
HOLMES COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

RANDY STARNER	:	JUDGES:
	:	Julie A. Edwards, P.J.
Plaintiff-Appellant	:	Sheila G. Farmer, J.
	:	John W. Wise, J.
-vs-	:	
	:	Case No. 10 CA 001
	:	
VERONICA STARNER, et al.,	:	<u>OPINION</u>
Defendants-Appellees	:	

CHARACTER OF PROCEEDING: Civil Appeal from Holmes County Court of Common Pleas, Probate Division, Case No. 08 MS 023

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: September 27, 2010

APPEARANCES:

For Plaintiff-Appellant

For Defendant-Appellee Veronica Starner

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*Edwards, P.J.*

{¶1} Plaintiff-appellant, Randy Starner, appeals from the January 5, 2010, Judgment Entry of the Holmes County Court of Common Pleas, Probate Division, granting defendant-appellee John E. Starner, Jr.'s motion to tax interpreters' fees as court costs and ordering that \$3,362.50 be assessed as additional court costs.

#### STATEMENT OF THE FACTS AND CASE

{¶2} On November 10, 2008, appellant Randy Starner filed a complaint and will contest against, among others, appellee Veronica Starner and her son, appellee John E. Starner, Jr., who is deaf. Appellant specifically sought to have the Last Will and Testament of John E. Starner declared invalid and set aside. Following a jury trial commencing on November 2, 2009, the jury, on November 6, 2009, found that the will signed by John E. Starner was valid.<sup>1</sup>

{¶3} The trial court, as memorialized in a Judgment Entry filed on November 9, 2009, stated that “[t]he issue of interpreter fees was discussed with Counsel by the Court. Counsel requested an opportunity to brief the question if interpreter fees, whether incurred before or during trial, may properly be treated as Court costs.” The trial court set a briefing schedule to address such issue.

{¶4} On November 18, 2009, appellee John E. Starner, Jr. filed a motion asking that interpreters' fees be taxed as costs pursuant to R.C. 2311.14(C) and that, upon payment of such costs, the fees be reimbursed to appellee Veronica Starner “who was required to advance those fees on behalf of [appellee] John E. Starner, Jr., to secure the appearance of the interpreters.” Appellant filed a memorandum in opposition

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<sup>1</sup> Appellant also had filed a declaratory judgment action regarding the validity of a trust created by John E. Starner. The two cases were consolidated for jury trial. The jury also found that the trust was valid.

to the same on November 25, 2009. Appellant, in his memorandum, argued, in relevant part, that the interpreters were not appointed by the trial court and that appellees' personal expenses could not be taxed against him and also that the trial court lacked authority to tax interpreters' fees as costs.

{¶5} Pursuant to a Judgment Entry filed on January 5, 2010, the trial court granted appellee John E. Starner, Jr.'s motion to tax interpreters' fees as court costs and ordered that the amount of \$3,362.50 be assessed as additional court costs. The trial court further ordered that, upon payment to the Court of such amount, the amount would be reimbursed to appellee Veronica Starner.

{¶6} Appellant now raises the following assignments of error on appeal:

{¶7} "I. THE TRIAL COURT ERRED AS A MATTER OF LAW BY TAXING AS COSTS THE FEES OF INTERPRETERS BECAUSE THERE IS NO STATUTORY AUTHORITY TO DO SO.

{¶8} "II. THE TRIAL COURT ERRED AS A MATTER OF LAW BY TAXING INTERPRETERS' FEES AGAINST A PARTY WHEN IT DID NOT APPOINT THE INTERPRETERS AS REQUIRED BY R.C. 2311.14(A).

{¶9} "III. THE TRIAL COURT ERRED AS A MATTER OF LAW BY TAXING AS COURT COSTS THE INTERPRETERS' FEES OF JOHN E. STARNER, JR., AND ORDERING THEM TO BE PAID TO VERONICA STARNER SINCE SHE PAID THE FEES AS A VOLUNTEER."

I

{¶10} Appellant, in his first assignment of error, argues that the trial court erred by taxing interpreters' fees as court costs because there is no statutory authority to do so. We disagree.

{¶11} The Ohio Supreme Court, in *Williamson v. Ameritech Corp.* stated as follows with respect to the allowance of costs in a civil case: "Civ.R. 54(D) provides the general rule allowing costs to the prevailing party in a civil case unless the court otherwise directs. The categories of litigation expenses comprising "costs" are, however, limited. *Centennial Ins. Co. v. Liberty Mut. Ins. Co.* (1982), 69 Ohio St.2d 50, 23 O.O.3d 88, 430 N.E.2d 925. "Costs are generally defined as 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.: (Emphasis added). *Benda v. Fana* (1967), 10 Ohio St.2d 259, 39 O.O.2d 410, 227 N.E.2d 197, paragraph one of the syllabus. "The subject of costs is one entirely of statutory allowance and control." *State ex rel. Michaels v. Morse* (1956), 165 Ohio St. 599, 607, 60 O.O. 531, 535, 138 N.E.2d 660, 666, reaffirmed in *Vance v. Roedersheimer* (1992), 64 Ohio St.3d 552, 555, 597 N.E.2d 153, 156." *Williamson v. Ameritech Corp.*, 81 Ohio St.3d 342, 343-344, 1998-Ohio-347, 691 N.E.2d 288.

{¶12} The assessment of costs which are authorized by law is within the discretion of the trial court and will not be reversed absent an abuse of discretion. *Taylor v. McCullough Hyde Memorial Hosp.* (1996), 116 Ohio App.3d 595, 600, 688 N.E.2d 1078. In order to find an abuse of discretion, we must determine that the trial court's

decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶13} In the case sub judice, appellee John E. Starner, Jr., who is deaf, requested interpreter fees pursuant to R.C. 2311.14(C). R.C. 2311.14 states, in relevant part, as follows: “(A)(1) Whenever because of a hearing, speech, or other impairment a party to or witness in a legal proceeding cannot readily understand or communicate, the court shall appoint a qualified interpreter to assist such person. Before appointing any interpreter under this division for a party or witness who is a mentally retarded person or developmentally disabled person, the court shall evaluate the qualifications of the interpreter and shall make a determination as to the ability of the interpreter to effectively interpret on behalf of the party or witness that the interpreter will assist, and the court may appoint the interpreter only if the court is satisfied that the interpreter is able to effectively interpret on behalf of that party or witness....“(C) The court shall determine a reasonable fee for all such interpreter service which shall be paid out of the same funds as witness fees.” (Emphasis added).

{¶14} R.C. 2335.06 provides for witness fees in civil cases to be taxed in the bill of costs. Such section states, in relevant part, as follows:” Each witness in civil cases shall receive the following fees: (A) Twelve dollars for each full day's attendance and six dollars for each half day's attendance at a court of record, mayor's court, or before a person authorized to take depositions, to be taxed in the bill of costs. Each witness shall also receive reimbursement for each mile necessarily traveled to and from the witness's place of residence to the place of giving testimony, to be taxed in the bill of costs...” (Emphasis added).

{¶15} As noted by the Court in *Huebner v. Cervi* (1984), 19 Ohio App.3d 259, 260, 483 N.E.2d 1204, “[t]hus, interpreter fees are to be taxed as part of the costs which shall be allowed to the prevailing party unless the court otherwise directs.” Reading R.C. 2311.14 in conjunction with R.C. 2335.06, it is clear that there is statutory authority to tax interpreters’ fees as costs. We note that appellant does not argue that the trial court abused its discretion in ordering the fees to be taxed as costs.

{¶16} Appellant’s first assignment of error is, therefore, overruled.

## II

{¶17} Appellant, in his second assignment of error, contends that the trial court erred by taxing interpreters’ fees as costs when the trial court did not appoint the interpreters as required by R.C. 2311.14(A).

{¶18} As is stated above, such section states, in relevant part, as follows: “(A)(1) Whenever because of a hearing, speech, or other impairment a party to or witness in a legal proceeding cannot readily understand or communicate, the court shall appoint a qualified interpreter to assist such person...”

{¶19} In its January 5, 2010 Judgment Entry, the trial court indicated that, on the third day of trial, the question of interpreters’ fees was raised and that, by agreement of the parties, the court did not rule on such issue at the time. The trial court, in its Judgment Entry, further stated, in relevant part, as follows: “There was no mention by Counsel about appointment of the interpreters and there was no objection lodged by either party about the lack of any formal or journalized appointment of the interpreters. The interpreters were sworn in when John E. Starner, Jr. testified on ...the fourth day of trial. It is true there was no formal or journalized ‘appointment’ of the interpreters in this

case. The Plaintiff was or should have been aware of ORC Section 2311.14 and the risk against him as part of the Court costs. However, Plaintiff failed to object at any time during the trial to the lack of any formal or journalized 'appointment' of the interpreters. The Court finds that it would be inequitable to allow the Plaintiff to rely upon the statutory language regarding appointment of an interpreter to avoid payment of the interpreter fees when he was or should have been aware of the risk of those fees and failed to object to the Court's procedure during the trial."

{¶20} Although not on point, we find the case of *State v. Rosa* (1988), 47 Ohio App.3d 172, 547 N.E.2d 1232 to be persuasive. In such case, a defendant who was convicted of aggravated murder argued on appeal that the trial court had erred in failing to administer an oath to an interpreter as required by R.C. 2311.14(B). The court held that because the defense failed to object to the court's failure, the oath requirement was waived and did not constitute a condition precedent to the utilization of the interpreter's services in court.

{¶21} We note that a waiver is defined as an intentional relinquishment of a known right. See *State ex rel. Wallace v. State Med. Bd. Of Ohio*, 89 Ohio St.3d 431, 435, 2000-Ohio-213, 732 N.E.2d 960. Moreover, under the invited error doctrine, a party will not be allowed to take advantage of an error that he or she has invited or induced the trial court to make. *State ex rel. Beaver v. Kontech*, 83 Ohio St.3d 519, 521, 1998-Ohio-295, 700 N.E.2d 1256.

{¶22} In the case sub judice, appellant does not dispute that he did not object at any time during the trial to the trial court's failure to appoint the interpreters pursuant to R.C. 2311.14(A) and agreed to defer the matter until later. We find that, by doing so,

appellant has invited such error and/or has waived such argument. Moreover, we note, as an aside, that appellant does not challenge the need for interpreters or the reasonableness of their fees.

{¶23} Appellant's second assignment of error is, therefore overruled.

### III

{¶24} Appellant, in his third assignment of error, argues that the trial court erred by taxing the interpreters' fees as court costs and then ordering them to be reimbursed to appellee Veronica Starner because, according to appellant, she paid such fees as a volunteer.

{¶25} Appellant did not raise the "volunteer" issue below. As is stated above, appellant, in his memorandum, argued, in relevant part, that the interpreters were not appointed by the trial court and that appellees' personal expenses could not be taxed against him and also that the court lacked authority to tax interpreter fees as costs. It is axiomatic that the failure to raise an issue in the trial court waives the right to raise the issue on appeal. *State v. Williams* (1977), 51 Ohio St.2d 112, 364 N.E.2d 1364, paragraph one of the syllabus, *overruled on other grounds* (1988), 49 Ohio St.3d 226. We find, therefore, that appellant has waived such issue by failing to raise it in the trial court.

{¶26} Further, it appears that the trial court treated the interpreter issue as if there had been a formal judgment entry appointing an interpreter. In other words, a de facto appointment occurred. Had Veronica Starner not paid for the interpreter, the costs collected would have been paid directly to the interpreter. We find the trial court had the equitable authority to order the costs to Veronica Starner.

{¶27} Appellant's third assignment of error is, therefore, overruled.

{¶28} Accordingly, the judgment of the Holmes County Court of Common Pleas, Probate Division, is affirmed.

By: Edwards, P.J.

Farmer, J. and

Wise, J. concur

s/Julie A. Edwards

s/Sheila G. Farmer

s/John W. Wise

JUDGES

JAE/d0801

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IN THE COURT OF APPEALS FOR HOLMES COUNTY, OHIO  
FIFTH APPELLATE DISTRICT

RANDY STARNER	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
VERONICA STARNER, et al.,	:	
	:	
Defendants-Appellees	:	CASE NO. 10 CA 001

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Holmes County Court of Common Pleas, Probate Division, is affirmed. Costs assessed to appellant.

s/Julie A. Edwards

s/Sheila G. Farmer

s/John W. Wise

JUDGES