[Cite as *Alcoroso v. Correll*, 2020-Ohio-4752.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STACY ALCOROSO, :

Plaintiff-Appellant, :

No. 109166

v. :

JASON B. CORRELL, :

Defendant-Appellee. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED IN PART; REVERSED IN PART; AND REMANDED
RELEASED AND JOURNALIZED: October 1, 2020

Civil Appeal from the Rocky River Municipal Court
Case No. 17CVF2706

Appearances:

Ali Mustafa, *for appellant*.

Law Offices of Brent L. English, and Brent L. English, *for appellee*.

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Plaintiff-appellant Stacy Alcorso[1] ("Alcorso") brings the instant appeal challenging the trial court's denial of her motion for attorney fees and motion to tax

[1] Appellant was listed as "Stacy Alcoroso" in the record of the lower court and in her notice of appeal and brief in this matter; however, her name is spelled "Stacy Alcorso."

costs, arguing that the verdict in this matter was against the manifest weight of the evidence. After a thorough review of the record and law, this court affirms in part and reverses in part the decision of the trial court.

I. Factual and Procedural History

{¶ 2} Alcorso entered into a written lease agreement to rent a home located at 4117 W. 217th Street, Fairview Park, Ohio ("premises") from defendant-appellee Jason Correll ("Correll"). Pursuant to the terms of the lease, Alcorso paid Correll a security deposit in the amount of $1,200. At the end of the lease agreement, Alcorso vacated the premises; Correll subsequently sent her a letter with an itemization of the alleged damage and repairs made to the premises. Alcorso objected to the claimed damage and repairs and demanded the return of her full security deposit, which Correll refused.

{¶ 3} On December 26, 2017, Alcorso filed a complaint in the Rocky River Municipal Court seeking the return of her security deposit, double damages, and attorney fees pursuant to R.C. 5321.16. Correll answered the complaint on February 16, 2018, and later amended his answer to assert a counterclaim for damage to the premises. A jury trial commenced on July 15, 2019. The jury ultimately found in favor of Alcorso on her complaint and awarded her $446.19. The jury also found in Alcorso's favor on Correll's counterclaim.

{¶ 4} On August 6, 2019, Alcorso filed (1) a motion to tax costs seeking $1,143.06 for the costs of Correll's deposition and Alcorso's expert witness; and (2) a motion for attorney fees seeking $11,150. Correll did not file a brief in opposition to

either motion. The court held a hearing on the motions, at the conclusion of which, it denied both motions. In its judgment entry, the court stated that the motion for attorney fees was denied because the matter had been submitted to the jury. The court further denied the motion to tax costs but noted that Alcorso had previously been awarded court costs in the sum of $525 in the court's July 23, 2019 judgment entry journalizing the jury verdict.

{¶ 5} On October 14, 2019, Alcorso filed the instant appeal and raises the following assignments of error for our review:

> I. The trial court erred when it determined that attorney fees pursuant to R.C. 5321.16(C) was a question for the jury and refused to tax attorney fees as costs.
>
> II. The trial court abused its discretion when it failed to order any attorney fees to be taxed as costs and denied the tenant's litigation expenses to be awarded as costs when a portion of the security deposit was improperly withheld by the landlord in violation of R.C. 5321.16.
>
> III. The trial court erred when it failed to make an award of statutory damages in accordance with R.C. 5321.16(C).
>
> IV. The judgment was against the manifest weight of the evidence.

II. Law and Analysis

{¶ 6} For ease of analysis, we will address the assignments of error out of order.

A. Manifest Weight of the Evidence

{¶ 7} In her fourth assignment of error, Alcorso argues that the judgment was against the manifest weight of the evidence.

{¶ 8} To set aside a damage award as inadequate and against the manifest weight of the evidence, a reviewing court must determine that the verdict is so gross as to shock the sense of justice and fairness, cannot be reconciled with the undisputed evidence in the case, or is the result of an apparent failure by the jury to include all the items of damage making up the plaintiff's claim. *Morelli v. Walker*, 8th Dist. Cuyahoga No. 88706, 2007-Ohio-4832, ¶ 40, citing *Whiteside v. Bennett*, 1st Dist. Hamilton No. C-050605, 2006-Ohio-3600.

{¶ 9} "A verdict supported by some competent, credible evidence going to all the essential elements of the case must not be reversed as being against the manifest weight of the evidence." *Swoope v. Osagie*, 2016-Ohio-8046, 76 N.E.3d 686, ¶ 25-26 (8th Dist.), citing *Domaradzki v. Sliwinski*, 8th Dist. Cuyahoga No. 94975, 2011-Ohio-2259, ¶ 6; *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus. "Weight of the evidence concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other.'" *Swoope* at ¶ 26, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *Black's Law Dictionary* 1594 (6th Ed.1990).

{¶ 10} R.C. 5321.16 provides security deposit procedures for landlords and tenants. Relevant to this matter, R.C. 5321.16(B) sets forth procedures with respect to deductions made from the security deposit by the landlord upon the termination of the rental agreement and requires that "[a]ny deduction from the security deposit shall be itemized and identified by the landlord in a written notice delivered to the tenant together with the amount due, within thirty days after termination of the

rental agreement and delivery of possession." Also, pursuant to R.C. 5321.16(B), the tenant is required to "provide the landlord in writing with a forwarding address or new address to which the written notice and amount due from the landlord may be sent"; otherwise, "the tenant shall not be entitled to damages or attorney fees provided under division (C) of this section." R.C. 5321.16(C) provides that "[i]f the landlord fails to comply with division (B) of this section, the tenant may recover the property and money due him, together with damages in an amount equal to the amount wrongfully withheld, and reasonable attorney fees."

{¶ 11} The Supreme Court of Ohio has recognized that in enacting R.C. 5321.16(B) and (C), part of the General Assembly's intent was "to provide a penalty by way of damages and reasonable attorney fees against a noncomplying landlord for the wrongful withholding of any or all of the security deposit." *Vardeman v. Llewellyn*, 17 Ohio St.3d 24, 28, 476 N.E.2d 1038 (1985). The Supreme Court has stated that the "amount wrongfully withheld" means "the amount found owing from the landlord to the tenant over and above any deduction that the landlord may lawfully make." *Id*. at 29.

{¶ 12} Additionally, R.C. 5321.16(B) and (C) do not require bad faith on the part of the landlord. *Lloyd v. Roosevelt Properties*, 8th Dist. Cuyahoga No. 105721, 2018-Ohio-3163, ¶ 43, citing *Smith v. Padgett*, 32 Ohio St.3d 344, 349, 513 N.E.2d 737 (1987). As held by the Supreme Court, "under R.C. 5321.16(B) and (C), a landlord who wrongfully withholds a portion of a tenant's security deposit is liable for damages equal to twice the amount wrongfully withheld and for reasonable

attorney fees. Such liability is mandatory * * *." *Smith*, paragraph two of the syllabus.

{¶ 13} With respect to the recovery of double damages under R.C. 5321.16(C), the Supreme Court of Ohio has stated as follows:

> There is no requirement that a conscious, deliberate, or intentional attempt to cause harm be proved in order to recover statutory double damages pursuant to R.C. 5321.16(C). * * * Thus, to recover double damages under R.C. 5321.16(C) the tenant need prove only that the security deposit, or some portion thereof, has been wrongfully withheld. * * *
>
> The double damages recoverable under R.C. 5321.16(C) are simply a measure of the damages allowable and are akin to liquidated damages rather than punitive damages. These additional damages serve to compensate injured tenants for the temporary loss of the use of that money given to the landlord as a security deposit and for the time and inconvenience of having to sue for the recovery of money wrongfully withheld. In addition, the possibility of double damages creates an incentive for landlords to comply with the law.

Klemas v. Flynn, 66 Ohio St.3d 249, 251-252, 611 N.E.2d 810 (1993).

{¶ 14} This matter proceeded as a jury trial. The jury instructions utilized in this case were submitted by Correll and drawn from OJI. They stated in pertinent part:

> If you find by the greater weight of the evidence that the defendant wrongfully withheld all or any part of the security deposit, then your verdict must be for the plaintiff and you will proceed to determine what amount of money should be awarded to the plaintiff. The amount wrongfully withheld is the amount of the security deposit plus any offset or deduction for excessive wear and tear.
>
> On the other hand, if you find by the greater weight of the evidence that the defendant did not wrongfully withhold any part of the security deposit, then your verdict must be for the defendant.

> If you find that the defendant wrongfully withheld all or any part of the security deposit, and if you find that the plaintiff provided to the defendant in writing her new or forwarding address, then you shall award to the plaintiff the money due to the plaintiff together with additional damages in the amount equal to the amount wrongfully withheld and reasonable attorney fees.
>
> You shall not, however, permit this award of additional damages to affect your determination of the amount wrongfully withheld.
>
> If you find that the defendant wrongfully withheld all or any part of the security deposit, but you find that the plaintiff did not provide in writing a new or forwarding address, then you should award to the plaintiff only the money wrongfully withheld.

{¶ 15} We note that the transcripts that have been filed in this case reflect only the hearing on Alcorso's post-judgment motions for attorney fees and costs and excerpts of the second day of trial, which included closing arguments, the jury charge, and the verdict. The transcript from all other parts of the trial was not filed in this case.

{¶ 16} However, the record in this matter contains all of the exhibits submitted at trial. Defendant's Exhibit K was an email from Correll to Alcorso requesting her forwarding mailing address. Defendant's Exhibit L was Alcorso's email response to Correll wherein she provided her forwarding address. Thus, the jury had before it undisputed evidence that Alcorso had complied with the requirements of R.C. 5321.16(B). As noted above, the jury was instructed that if it found that the defendant wrongfully withheld all or any part of the security deposit *and* that the plaintiff provided to the defendant in writing her new or forwarding address, then it "*shall*" award to the plaintiff the money due to her together with

additional damages in the amount equal to the amount wrongfully withheld and reasonable attorney fees. The use of the word "shall" rather than "may" in the instructions indicates that the jury was required to award the additional damages. *See, e.g., State v. Evans*, 10th Dist. Franklin No. 01AP-594, 2001 Ohio App. LEXIS 5918, 20-21 (Dec. 27, 2001), citing *State v. Getsy*, 84 Ohio St.3d 180, 196, 702 N.E.2d 866 (1998).

{¶ 17} Consequently, once the jury found that Correll had wrongfully withheld part of the security deposit, it should have also determined that the undisputed evidence demonstrated that Alcorso provided her forwarding address, thus requiring the jury to award double damages[2] and reasonable attorney fees.

{¶ 18} Because the jury failed to award the proper damages to Alcorso, we find that the verdict cannot be reconciled with the undisputed evidence in this matter and consequently, the verdict was against the manifest weight of the evidence. Alcorso's fourth assignment of error is sustained. The case is remanded for the trial court to impose double damages and award reasonable attorney fees, which will be discussed below.

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[2] We find no merit to Correll's contention that the jury did award double damages in this case. The jury was tasked with determining the amount wrongfully withheld and calculated the amount to be $446.19. Because this amount is an odd number that is not wholly divisible by 2, the amount determined by the jury does not represent a doubled amount.

B. Attorney Fees

{¶ 19} In her first assignment of error, Alcorso argues that the trial court erred when it determined that attorney fees pursuant to R.C. 5321.16(C) was a question for the jury and refused to tax attorney fees as costs.

{¶ 20} During the hearing on Alcorso's motions, counsel for Alcorso and the trial court engaged in an extensive discussion regarding whether an award of attorney fees was appropriate. The trial court did not believe it had jurisdiction to rule upon the motion for attorney fees because the issue had been presented to the jury, which had not awarded any attorney fees. The trial court noted that the instructions provided to the jury stated that the jury had the option to award attorney fees and maintained that the decision of whether to award attorney fees and the amount thereof was solely in the province of the jury. The trial court further noted that Alcorso had not presented evidence of attorney fees for the jury to award.

{¶ 21} Alcorso argued that, pursuant to Ohio case law, the amount of attorney fees to award may be determined solely by the court and not by a jury. We agree. *See Christe v. GMS Mgt. Co.*, 88 Ohio St.3d 376, 726 N.E.2d 497 (2000); *Oldendick v. Crocker*, 2016-Ohio-5621, 70 N.E.3d 1033, ¶ 29 (8th Dist.).

{¶ 22} With respect to the recovery of attorney fees under R.C. 5321.16(C), the Supreme Court of Ohio has concluded that "the legislature's intent was to allow R.C. 5321.16(C) attorney fees as costs, not damages." *Christe* at 377-378. In *Christe*, the court recognized that it has "repeatedly held that when a statute authorizes the awarding of attorney fees, it does so by allowing the fees to be taxed as costs rather

than awarded as damages." *Id.* at 378, citing *State ex rel. Beacon Journal Publishing Co. v. Ohio Dept. of Health*, 51 Ohio St.3d 1, 3, 553 N.E.3d 1345 (1990); *Sorin v. Warrensville Hts. School Dist. Bd. of Edn.*, 46 Ohio St.2d 177, 179, 347 N.E.2d 527 (1976); *State ex rel. Michaels v. Morse*, 165 Ohio St. 599, 607, 138 N.E.2d 660 (1956).

{¶ 23} The *Christe* court observed that the legislature did not include express language in R.C. 5321.16(C) stating that attorney fees are recoverable as damages and noted the impracticality of having a jury make an award of attorney fees as damages since that would require "the availability and amount of such fees * * * to be determined by the jury" and "could result in a cumbersome and awkward process." *Id.*, citing *Zoppo v. Homestead Ins. Co.*, 71 Ohio St.3d 552, 557, 644 N.E.2d 397 (1994). The court also observed that its holding was consistent with at least one of the legislative objectives underlying R.C. 5321.16(C) "that attorney fees are provided for in order to ensure the return of wrongfully withheld security deposit at no costs to tenants." *Id.* at 378, citing *Lacare v. Dearing*, 73 Ohio App.3d 238, 241, 596 N.E.2d 1097 (11th Dist.1991); *Sherwin v. Cabana Club Apts.*, 70 Ohio App.2d 11, 17, 433 N.E.2d 932 (8th Dist.1980).

{¶ 24} Pursuant to our analysis of Alcorso's fourth assignment of error, the jury was presented with undisputed evidence that Alcorso provided Correll with her forwarding address in writing, thus requiring an award of additional damages and reasonable attorney fees under R.C. 5321.16(C). The trial court therefore should

have allowed attorney fees as costs in this matter. Alcorso's first assignment of error is sustained.

C. Costs under Civ.R. 54(D)

{¶ 25} In her second assignment of error, Alcorso argues that the trial court abused its discretion in failing to award attorney fees and litigation expenses as costs. We have addressed the attorney fees award in the previous assignment of error and thus will only analyze the litigation expenses.

{¶ 26} In her motion to tax costs pursuant to Civ.R. 54(D), Alcorso sought an award of her litigation costs, including the attendance fee of the court reporter for the deposition of Correll, the cost of the transcript of Correll's deposition, the cost of her expert witness, and other court costs. The trial court denied the motion and noted that it had already awarded Alcorso court costs in the amount of $525 in its judgment entry of July 23, 2019.

{¶ 27} Civ.R. 54(D) governs the award of costs and provides, "[e]xcept when express provision therefore is made either in a statute or in these rules, costs shall be allowed to the prevailing party unless the court otherwise directs." The decision to award or decline to award costs is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *Vanadia v. Hansen Restoration, Inc.*, 8th Dist. Cuyahoga No. 101033, 2014-Ohio-4092, ¶ 32, citing *Holmes Cty. Bd. of Commrs. v. McDowell*, 169 Ohio App.3d 120, 2006-Ohio-5017, 862 N.E.2d 136, ¶ 43 (5th Dist.).

{¶ 28} "'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.'" *Stallworth v. Woods*, 8th Dist. Cuyahoga No. 108543, 2020-Ohio-111, ¶ 18, quoting *Benda v. Fana*, 10 Ohio St.2d 259, 227 N.E.2d 197 (1967), paragraph one of the syllabus.

{¶ 29} Alcorso argues that the trial court abused its discretion by refusing to award the costs for her expert witness and expenses related to Correll's deposition. First, Alcorso's argument regarding the costs related to her expert witness is without merit. The Supreme Court of Ohio has held that, absent statutory directive, a trial court should not tax an expert witness's fees as costs. *Naples v. Kinczel*, 8th Dist. Cuyahoga No. 89138, 2007-Ohio-4851, ¶ 11, citing *Moore v. Gen. Motors Corp., Terex Div.*, 18 Ohio St.3d 259, 260, 480 N.E.2d 1101 (1985); *Bates v. Ricco*, 8th Dist. Cuyahoga No. 74982, 1999 Ohio App. LEXIS 5452 (Nov. 18, 1999).

{¶ 30} With regard to the deposition expenses, Alcorso contends that R.C. 2303.21 allows for such an award. This statute provides: "When it is necessary in * * * [a] civil action to procure a transcript of a * * * proceeding, * * * the expense of procuring such transcript * * * shall be taxed in the bill of costs and recovered as in other cases." The Supreme Court of Ohio recently considered the meaning of the word "proceeding" within the statute and concluded that a "transcript of a proceeding" is "a transcript of matters presented to a court or other adjudicative body" and "documents what happened in the court." *Vossman v. Airnet Sys., Inc.*, Slip Opinion No. 2020-Ohio-872, ¶ 19-20. The *Vossman* court determined that "the

word 'proceeding' in R.C. 2303.21 refers to matters before a court or other adjudicative body" and concluded that "a deposition conducted outside the presence of a judge is not a proceeding within the meaning of R.C. 2303.21." *Id*. at ¶ 23-24. Thus, Alcorso is not entitled to an award of costs related to the deposition of Correll.

{¶ 31} We therefore find no abuse of discretion in the court's denial of Alcorso's motion to tax costs. Alcorso's second assignment of error is overruled.

{¶ 32} Finally, our resolution of Alcorso's fourth assignment of error renders her third assignment of error moot.

III. Conclusion

{¶ 33} The jury's verdict was against the manifest weight of the evidence insofar as the jury failed to award statutory double damages and reasonable attorney fees in this matter. In addition, the trial court erred in denying Alcorso's motion for attorney fees. Finally, the trial court did not err in denying Alcorso's motion to tax costs.

{¶ 34} Judgment affirmed in part and reversed in part. This matter is hereby remanded to the trial court to impose an award of double damages and reasonable attorney fees.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

_____
FRANK D. CELEBREZZE, JR., JUDGE

SEAN C. GALLAGHER, P.J., CONCURS WITH SEPARATE CONCURRING OPINION;
RAYMOND C. HEADEN, J., CONCURS WITH LEAD OPINION AND CONCURS WITH SEPARATE CONCURRING OPINION

SEAN C. GALLAGHER, P.J., CONCURRING:

{¶ 35} I concur with the lead opinion in this matter. I write to further address a few points.

{¶ 36} The jury found in favor of Alcorso on her complaint against Correll for the wrongful withholding of her security deposit, awarded her $446.19 as the amount wrongfully withheld, and found against Correll on the counterclaim. Alcorso claims that the trial court erroneously believed it could not award double damages and attorney fees pursuant to R.C. 5321.16(C) because the dispute over the security deposit had been tried to a jury. Alcorso also challenges the trial court's failure to tax as costs certain litigation expenses.

{¶ 37} I concur with the majority's determination that Alcorso's damages award should have been doubled and that Alcorso should have been awarded attorney fees. R.C. 5321.16 and controlling case law mandates this outcome. In this case, the jury determined the amount wrongfully withheld by the landlord was $446.19, which was not a doubled amount. The amount found owing from the

landlord is the "amount wrongfully withheld." *See Vardeman v. Llewellyn*, 17 Ohio St.3d 24, 28, 476 N.E.2d 1038 (1985). While I understand that the jury was instructed on awarding additional damages in this matter, there is no merit to Correll's contention that the jury awarded double damages in this case. Upon the record before us, Alcorso was entitled to an award of double damages and reasonable attorney fees under R.C. 5321.16(C). "Such liability is mandatory * * *." *Smith v. Padgett*, 32 Ohio St.3d 344, 349, 513 N.E.2d 737 (1987).

{¶ 38} As found by the majority, the undisputed evidence demonstrated that Alcorso provided her forwarding evidence, and therefore she was entitled to the additional damages. I further recognize that insofar as R.C. 5321.16 requires a tenant to provide the landlord with a forwarding address, "courts have avoided a hypertechnical application of the statute" and "where a landlord has a reasonable avenue to contact the former tenant, the landlord's statutory duty under R.C. 5321.16 is triggered." *Jensen v. Blvd. Invs. Ltd.*, 8th Dist. Cuyahoga No. 103658, 2016-Ohio-5325, ¶ 19-20, citing *Wehrley v. Sunchase Am., Ltd.*, 12th Dist. Butler No. CA99-11-191, 2001 Ohio App. LEXIS 256, 13 (Jan. 29, 2001).

{¶ 39} Furthermore, attorney fees under R.C. 5321.16(C) are to be taxed as costs by the court, rather than awarded as damages determined by the jury. *Christe v. GMS Mgt. Co.*, 88 Ohio St.3d 376, 377-378, 726 N.E.2d 497 (2000). Thus, the trial court was required to award double damages and to tax as costs reasonable

attorney fees. *See Klemas v. Flynn*, 66 Ohio St.3d 249, 251-252, 611 N.E.2d 810 (1993); *Padgett*, 32 Ohio St.3d at 349; *Christe*, 88 Ohio St.3d at 378.[3]

{¶ 40} I also concur with the majority's determination that the trial court did not err by denying Alcorso's motion to tax litigation expenses as costs. Alcorso claims that the trial court abused its discretion in refusing to award litigation costs for the court reporter deposition fee, the cost of the deposition transcript of Correll, which was never filed, and the cost of the expert report/witness fee in this matter. I agree with the majority's determination that the trial court did not abuse its discretion in denying the motion to tax these litigation costs because they are not expressly, statutorily permitted. *See Vossman v. Airnet Sys., Inc.*, Slip Opinion No. 2020-Ohio-872, ¶ 6; *Benda v. Fana*, 10 Ohio St.2d 259, 227 N.E.2d 197 (1967), paragraph one of the syllabus; *Centennial Ins. Co. v. Liberty Mut. Ins. Co.*, 69 Ohio St.2d 50, 50-51, 430 N.E.2d 925 (1982).

{¶ 41} As this court has previously recognized "in the absence of statutory authorization, deposition costs and other litigation expenses may not be properly taxed as costs." *Beal v. State Farm Ins. Co.*, 132 Ohio App.3d 203, 210, 724 N.E.2d

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[3] "[A] tenant may recover reasonable attorney fees under R.C. 5321.16(C) attributable to both the security deposit claim and to defending against the landlord's claim for alleged damages when the two claims are virtually indivisible." *Whitestone Co. v. Stittsworth*, 10th Dist. Franklin No. 06AP-371, 2007-Ohio-233, ¶ 56.

It should be noted that a trial court has the authority under R.C. 5321.16(C) to tax as costs the attorney fees incurred at the appellate level. *Klein v. Moutz*, 118 Ohio St.3d 256, 2008-Ohio-2329, 888 N.E.2d 404, ¶ 13. On remand, the trial court "'can easily determine, either in a hearing or by reviewing affidavits, the reasonableness of fees to be awarded. The trial court, having final authority to assess costs, is in the best position to make such an award.'" *Id.* at ¶ 14, quoting *Breault v. Williamsburg Estates*, 6th Dist. Lucas No. L-86-116, 1986 Ohio App. LEXIS 9152, 12 (Nov. 21, 1986).

860 (8th Dist.1999), citing *Carr v. Lunney*, 104 Ohio App.3d 139, 142, 661 N.E.2d 246 (8th Dist.1995).[4] The Supreme Court of Ohio has held that "R.C. 2319.27 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, 1998-Ohio-625, 691 N.E.2d 288, paragraph one of the syllabus. Further, the court "has repeatedly held that expert witness fees are generally not taxable as costs." *Victor v. Big Sky Energy, Inc.*, 2018-Ohio-4666, 124 N.E.3d 283, ¶ 94 (11th Dist.), citing *State ex rel. Williams v. Colasurd*, 71 Ohio St.3d 642, 644, 646 N.E.2d 830 (1995); *In re Election of Nov. 6, 1990 for the Office of Atty. Gen. of Ohio*, 62 Ohio St.3d 1, 4-5, 577 N.E.2d 343 (1991). "Expert witness fees are considered litigation expenses, for which the opposing party is not responsible in the absence of statutory authority to the contrary." *Id.* at ¶ 95, citing *Williams* at 645; *Ohio Edison Co. v. Franklin Paper Co.*, 18 Ohio St.3d 15, 16, 479 N.E.2d 843 (1985). As reiterated by the First District Court of Appeals, "a court must not tax litigation expenses as costs unless expressly permitted to do so by statute." *Alexander* at ¶ 14, citing *Centennial Ins. Co.*, 69 Ohio St.2d at 51, 430, N.E.2d 925. Therefore, the trial court did not abuse its discretion in denying the motion to tax these litigation costs.

{¶ 42} Accordingly, I concur with the lead opinion.

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[4] Additionally, in awarding attorney fees pursuant to R.C. 5321.16, it has been determined that a trial court does not err in excluding litigation expenses in its attorney fee award. *Alexander v. LJF Mgt.*, 1st Dist. Hamilton No. C-100618, 2011-Ohio-2532, ¶ 14.