[Cite as *Chambers v. Chambers*, 2003-Ohio-7341.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

LARRY W. CHAMBERS, ET AL,	:	
	:	
Plaintiffs-Appellants,	:	Case No. 02CA38
	:	
v.	:	
	:	
RHONDA S. CHAMBERS,	:	DECISION AND JUDGMENT ENTRY
	:	
Defendant-Appellee.	:	**RELEASED 12/30/03**

APPEARANCES:

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EVANS, P.J.

{¶1} Plaintiffs-Appellants Larry W. Chambers and Brenda Chambers appeal the judgment of the Lawrence County Court of Common Pleas, which denied their request for reimbursement of costs associated with the taking of two depositions. Appellants assert that the expense of the depositions of two medical experts should have been included as costs and reimbursed to them. Accordingly, appellants conclude that

the trial court erred by not awarding them the cost of the two depositions.

{¶2} For the following reasons, we disagree and affirm the judgment of the trial court.

Lower Court Proceedings

{¶3} On May 13, 2000, Plaintiffs-Appellants Larry W. and Brenda Chambers were passengers in a vehicle driven by their daughter Defendant-Appellee Rhonda S. Chambers. Due to Rhonda's failure to control the vehicle, the vehicle left the roadway and rolled over. Appellants were both injured as a result of the accident.

{¶4} In October 2001, Larry and Brenda filed a complaint against Rhonda and her insurance company asserting that Rhonda was negligent in her operation of the vehicle. Rhonda admitted liability for Larry and Brenda's injuries, but denied the extent of the injuries claimed by her parents.

{¶5} A jury trial was held on the issue of damages in September 2002. At trial, appellants presented the testimony of two medical experts, Dr. D.J. Carey and Dr. Panos Ignatiadis. Dr. Carey's testimony was presented at trial by way of his deposition being read into the record. Dr. Ignatiadis testified by way of a videotape deposition. The jury returned a verdict in favor of appellants, entering judgment in favor of Larry and Brenda, awarding them $15,000 and $10,000 respectively.

{¶6} Subsequently, appellants filed a motion for costs, seeking reimbursement for the following expenses and amounts: (1) $200 - filing fee; (2) $362.40 - transcript of Dr. Carey's deposition testimony; (3) $154 - videotape of Dr. Ignatiadis' deposition testimony; and (4) $292.05 - transcript of Dr. Ignatiadis' deposition testimony. The trial court ruled on appellants' motion and ordered that appellee reimburse appellants $354 for the filing fee and videotape of Dr. Ignatiadis' testimony. However, the trial court found that the $362.40 for Dr. Carey's transcript, which was read into the record at trial, and the $292.05 for the transcript of Dr. Ignatiadis' deposition testimony were not reimbursable as costs.

The Appeal

{¶7} Appellants appeal the decision of the trial court denying them reimbursement for the remaining expenses and present the following assignment of error for our review: "The trial court erred in failing to reimburse plaintiffs for the costs of transcripts used in plaintiffs' case-in-chief at trial."

{¶8} At the outset, we note that appellants are not seeking reimbursement for expert witness fees. Generally, expert witness fees are not taxable as costs. See *Beal v. State Farm Ins. Co.* (1999) 132 Ohio App.3d 203, 724 N.E.2d 860; *Coleman v. Jagniszcak* (1995) 104 Ohio App.3d 413, 662 N.E.2d 91. Rather, appellants are

seeking reimbursement for payments made to the court reporters for the production of transcripts of the doctors' depositions.

{¶9} 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." This rule grants the trial court broad discretion to assess costs, and the court's ruling will not be reversed absent an abuse of that discretion. See *Vance v. Roedersheimer,* 64 Ohio St.3d 552, 555, 1992-0hio-24, 597 N.E.2d 153; *Gnepper v. Beegle* (1992), 84 Ohio App.3d 259, 263, 616 N.E.2d 960. Therefore, to successfully appeal the taxing of costs, an appellant must demonstrate that a trial court's determination that an expense is or is not a "cost" within the meaning of Civ.R. 54(D) was arbitrary, unreasonable, or unconscionable. See *Howard v. Wills* (1991), 77 Ohio App.3d 133, 137, 601 N.E.2d 515.

{¶10} The categories of litigation expenses comprising "costs" are limited. See *Centennial Ins. Co. v. Liberty Mut. Ins. Co.* (1982), 69 Ohio St.2d 50, 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, 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, 138 N.E.2d 660, reaffirmed in *Vance*, supra.

{¶11} In *Keaton v. Pike Community Hosp.* (1997), 124 Ohio App.3d 153, 705 N.E.2d 734, this Court noted that "Ohio courts [have] disagree[d] as to whether a statutory basis for taxing deposition costs exists." Id. at 156. We further noted that "In applying *Vance* to deposition cost disputes, the Eighth Appellate District simply [held] that 'since there is no statutory authorization for taxing deposition costs, a court may not properly make such an award under Civ.R. 54(D).'" Id. (citing *Carr v. Lunney* (1995), 104 Ohio App.3d 139, 142, 661 N.E.2d 246; *Wiltsie v. Teamor* (1993), 89 Ohio App.3d 380, 624 N.E.2d 772).

{¶12} In contrast, we also noted that "the First and Tenth Appellate Districts cite R.C. 2319.27[1] as the statutory basis for taxing court reporter and transcript fees from a deposition as costs under Civ.R. 54(D)." *Keaton* at 156, citing *Haller v. Borror* (1995), 107 Ohio App.3d 432, 438-439, 669 N.E.2d 17 (citing *In re Election of November 6, 1990 for the Office of Attorney General of Ohio* (1991), 62 Ohio St.3d 1, 4, 577 N.E.2d 343 and *Miller v. Gustus* (1993), 90

[1] R.C. 2319.27 states, "The person taking and certifying a deposition may retain the deposition until the fees and expenses that he charged are paid. He 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."

Ohio App.3d 622, 625, 630 N.E.2d 68; *Cincinnati ex rel. Simons v. Cincinnati* (1993), 86 Ohio App.3d 258, 267, 620 N.E.2d 940).

{¶13} In Keaton, we further noted that "[c]ourts adopting the position that deposition expenses are costs pursuant to R.C. 2319.27 nonetheless limit the right to recover deposition expenses under Civ.R. 54(D) by requiring some 'use' of the deposition. Depositions used only for discovery or impeachment, but not admitted into evidence, generally are not taxable." *Keaton* at 157 (citing *Barrett v. Singer* (1979), 60 Ohio St.2d 7, 8-9, 396 N.E.2d 218; *Miller v. Gustus*, 90 Ohio App.3d 622, 624-625, 630 N.E.2d 68). This Court proceeded to adopt the position that a trial court may, in its discretion, tax deposition expenses as court costs. See id.

{¶14} However, the Supreme Court of Ohio subsequently held in *Williamson v. Ameritech Corp.,* 81 Ohio St.3d 342, 343-344, 1998-Ohio-347, 1998-0hio-625, 691 N.E.2d 288, 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)." Id. at syllabus. In so holding, the Supreme Court of Ohio reasoned that while R.C. 2319.27 satisfies the court's first requirement in *Benda* (i.e., that costs be "statutory fees to which officers, witnesses, jurors and others are entitled for their services in an action"), nothing in the statute satisfies the second requirement of *Benda* that requires statutory authorization to tax and include deposition costs in a judgment. Id. at 344.

{¶15} The Supreme Court of Ohio further explained that its decision in *In re Election of November 6, 1990 for the Office of Attorney General of Ohio,* 62 Ohio St.3d 1, had been misapplied to other cases not involving an election challenge or R.C. 3515.09, which the court construed as statutory authorization to award court reporter deposition fees to the prevailing party as costs in election contests. The court concluded that in *Williamson,* unlike *In re Election*, there is no statute authorizing the deposition expenses to be taxed and included in the judgment.

{¶16} This Court's decision in *Keaton* relied on the analysis specifically rejected by the Supreme Court of Ohio in *Williamson.* Appellants, however, assert that *Williamson is* distinguishable from the case sub judice. Appellants have directed this Court's attention to the Second District's decision in *Raab v. Wenrich,* 2nd Dist. No. 19066, 2002-0hio-936.

{¶17} In *Raab,* the trial court denied the prevailing party's motion for costs, which included the expenses she incurred in videotaping the deposition of her expert witness and in preparing a written transcript of the witness' testimony. On appeal, the Second District noted that Sup.R. 13(D)(2) provides for the inclusion as a part of costs under Civ.R. 54 the expenses associated with recording

testimony on videotape and displaying that videotape at trial.[2] In regard to the transcript of the expert's testimony, the *Raab* Court relied on a local rule requiring the presentation of such a transcript to find that it was a reimbursable cost.

{¶18} In the case sub judice, there is no local rule requiring the filing of a transcript of the videotape testimony. Furthermore, we are not convinced by appellants' attempts to distinguish the present case from *Williams* based on the fact that the depositions in *Williams* were taken only for discovery purposes and not used at trial. Based on our reading of the Supreme Court of Ohio's decision in *Williams* we find irrelevant, for purposes of determining "costs" under Civ.R. 54, whether a deposition has been "used" at trial.

{¶19} Accordingly, absent some form of statutory authorization for the taxation of deposition fees as costs, expenses associated with the taking of depositions and creating transcripts of those depositions are not reimbursable pursuant to Civ.R. 54. See *Williams,* supra, citing *Benda v. Fana,* 10 Ohio St.2d 259, 227 N.E.2d 197, paragraph one of the syllabus. Furthermore, to the extent that this Court's decision in *Keaton* conflicts with the Supreme Court of Ohio's holding in *Williams,* it is overruled.

{¶20} Therefore, the trial court did not abuse its discretion in denying appellants' motion for costs as it pertained to the two

[2] We note that the trial court relied on Sup.R. 13(D)(2) for including the expense

depositions. Appellants' assignment of error is overruled and the judgment of the trial court is affirmed.

Judgment affirmed.

Abele, J.: Concurs in Judgment and Opinion.
Kline, J.: Concurs in Judgment Only.

FOR THE COURT

BY:_____
David T. Evans
Presiding Judge

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of Dr. Ignatiadis' videotape testimony as a part of costs.