

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Tammy Kinn, etc.

Court of Appeals No. L-13-1016

Appellant

Trial Court No. CI0200908520

v.

HCR ManorCare, et al.

DECISION AND JUDGMENT

Appellees

Decided: September 20, 2013

* * * * *

Dennis E. Murray, Sr. and Donna J. Evans, for appellant.

Robert M. Anspach, Cori D. Catignani, Mark D. Meeks, Elizabeth D. Wilfong, Thomas D. Warren and Gretchen L. Lange, for appellees.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, Tammy Kinn, as executrix and surviving spouse of the estate of her late husband, Gregory Kinn, and in her individual capacity, appeals the judgment of the Lucas County Court of Common Pleas, awarding costs to appellees, HCR ManorCare

and Heartland Hospice Services, LLC, for expenses incurred in procuring deposition transcripts and daily trial transcripts. Because we conclude that the trial court erred in awarding costs for the trial transcripts, we reverse, in part, and affirm, in part.

A. Facts and Procedural Background

{¶ 2} On December 1, 2009, Kinn filed a complaint against Heartland and its parent company, HCR ManorCare, alleging multiple claims including breach of contract, negligent hiring, training, and retaining, infliction of emotional distress, breach of duty and trust, wrongful death, and negligence. Kinn's claims stem from allegedly substandard hospice care that Heartland provided to Gregory during the last several days of his life.

{¶ 3} Following extensive discovery by both parties, appellees moved for summary judgment as to all of Kinn's claims. Ultimately, the trial court granted appellees' motion on all claims except Kinn's negligence claim. A six-day jury trial began on the negligence claim on June 25, 2012. The jury returned a verdict in appellees' favor, concluding that Heartland was not negligent in its provision of palliative care to Gregory. On July 10, 2012, the trial court entered its judgment entry dismissing all claims against appellees and ordering Kinn to pay costs. Appellees filed a proposed bill of costs, and the trial court determined that they were entitled to reimbursement for their deposition and trial transcript expenses. This timely appeal followed.

B. Assignments of Error

{¶ 4} Kinn assigns the following errors for our review:

FIRST ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED IN TAXING AS COSTS THE EXPENSE OF PROCURING TRANSCRIPTS OF VARIOUS DISCOVERY DEPOSITIONS.

SECOND ASSIGNMENT OF ERROR: THE TRIAL COURT ERRED IN TAXING AS COSTS THE EXPENSE OF EXPEDITING TRANSCRIPTS OF THE TRIAL PROCEEDINGS DAILY.

II. Standard of Review

{¶ 5} Generally, whether or not the trial court makes an award of allowable expenses is a discretionary matter, which we review for an abuse of discretion. *Atkinson v. Toledo Area Reg'l Transit Auth.*, 6th Dist. Lucas No. L-05-1106, 2006-Ohio-1638, ¶ 9. However, the determination of whether or not the expense can be awarded as a “cost” under Civ.R. 54(D) is a question of law that is reviewed under a de novo standard of review. *Jackson v. Sunforest OB-GYN Assoc. Inc.*, 6th Dist. Lucas No. L-08-1133, 2008-Ohio-6170, ¶ 7.

III. Analysis

{¶ 6} In each of her assignments of error, Kinn argues that the trial court erred in its award of costs. Specifically, Kinn challenges the trial court’s determination that various deposition and trial transcripts were taxable as costs.

{¶ 7} Civ.R. 54(D) governs the allowance of costs to the prevailing party in a civil action. It 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.” We have previously held that only those litigation expenses that are authorized by statute can qualify as costs under Civ.R. 54(D). *Jackson* at ¶ 8, citing *Williamson v. Ameritech Corp.*, 81 Ohio St.3d 342, 691 N.E.2d 288 (1998), syllabus. As relevant here, R.C. 2303.21 authorizes the inclusion of transcript expenses as costs, and provides:

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.

{¶ 8} Kinn argues that the costs of the deposition transcripts should not have been taxed to her because the transcripts were not actually used at trial. While she acknowledges that certain depositions were used at trial, she asserts that the use of those transcripts was not “necessary” under R.C. 2303.21 because they were merely used for impeachment purposes.

{¶ 9} Appellees argue that the deposition transcripts were necessary in light of Lucas County Court of Common Pleas Gen.R. 5.07(C), which requires a party to file a transcript of a deposition if it will be used as evidence at trial. We agree.

{¶ 10} In *Jackson*, we examined Rule 5.07(C) and held that deposition transcripts are “necessary” and can be awarded as costs under Civ.R. 54(D). *Jackson*, 6th Dist. Lucas No. L-08-1133, 2008-Ohio-6170 at ¶ 8. Similar to the argument advanced in this case, the appellant in *Jackson* argued that the depositions were not necessary because they were not actually used at trial. In responding to that argument, we stated:

The issue of whether the deposition was used to question a witness about a material issue in the case is irrelevant. Appellees were required to file the depositions if they intended to use them at trial. Appellees anticipated using the depositions if necessary to attack the credibility of the witnesses. * * * The depositions of appellant’s experts were necessary to be able to defend against their medical conclusions. Since appellees filed the depositions for a proper purpose, they were entitled to seek reimbursement of the expense as a cost of the litigation when it was resolved in their favor.

Id. at ¶ 9.

{¶ 11} As was the case in *Jackson*, appellees in this case were required by local court rule to file the depositions prior to using them in trial. Rule 5.07(C) applies to any deposition a party intends to use at trial, regardless of whether the deposition is actually used. Based on our prior holding in *Jackson*, we conclude that the deposition transcripts were properly taxable as costs. Thus, the trial court did not err in awarding costs to appellees for the deposition transcripts.

{¶ 12} Accordingly, Kinn’s first assignment of error is not well-taken.

{¶ 13} Next, Kinn argues that the trial court erroneously awarded appellees costs for expedited trial transcripts that were used during trial. Specifically, Kinn argues that the trial transcripts were not necessary under R.C. 2303.21 and, further, that awarding costs for the trial transcripts is inequitable in this case.

{¶ 14} In its judgment entry awarding costs, the trial court stated that appellees “sufficiently demonstrated the ‘necessity’ of the daily transcripts as required by R.C. 2303.21.” The court based its determination on an affidavit filed by appellees’ attorney, who testified that the trial transcripts were used during trial in order to prepare, examine, and impeach witnesses. In addition, the court noted that the transcripts were used in preparing and presenting appellees’ closing arguments. The court held that appellees had demonstrated that the procurement of the transcripts was necessary for “any other purpose” under R.C. 2303.21.

{¶ 15} Regarding the necessity of certain expenses, the Eighth District has previously stated:

Ohio has long recognized that there exists a difference, for the purpose of awarding costs, between personal expenditures outlaid during litigation and litigating expenses. Personal expenses, which are not taxable as costs, are those expenses expended by a party in preparing a case for trial. *Pope v. Pollock*, 46 Ohio St. 367, 21 N.E. 356 (1889). On the other hand, necessary litigating expenses are taxable costs pursuant to Civ.R.

54(D); that is, as much of the funds expended by a party as are necessary and vital to the litigation must be characterized as taxable costs which will normally be awarded to the prevailing party. *Jones v. Pierson*, 2 Ohio App.3d 447, 449, 442 N.E.2d 791 (8th Dist.1981).

{¶ 16} While subsequent Ohio Supreme Court precedent has clarified *Jones* by requiring statutory authorization for costs, we find the distinction between personal expenses and litigating expenses helpful. Here, counsel's affidavit clearly supports a determination that the daily transcripts were *useful* to appellees in preparing their defense. However, the statute requires more than mere usefulness—the expense must be *necessary*. We conclude that appellees' expenses for the daily trial transcripts fit into the category of personal expenses. The evidence submitted by appellees in support of their claim for costs merely demonstrates that the trial transcripts assisted counsel in its preparation of the defense. There is nothing in the record showing that the trial transcripts were essential to the litigation. Indeed, counsel's notes could have served the same purpose as the trial transcripts in assisting in the preparation of closing arguments and the examination of witnesses. Because the costs for the trial transcripts were personal in nature, we conclude that they were not necessary under R.C. 2303.21 or taxable under Civ.R. 54(D). Thus, the trial court erred in awarding costs to appellees for the trial transcripts.

{¶ 17} Accordingly, Kinn's second assignment of error is well-taken.

IV. Conclusion

{¶ 18} Based on the foregoing, the judgment of the Lucas County Court of Common Pleas is reversed, in part, and affirmed, in part. The trial court’s award of costs for the trial transcripts is vacated. Costs of this appeal are to be split evenly between the parties pursuant to App.R. 24.

Judgment reversed, in part,
and affirmed, in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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