2015 IL App (5th) 140046-U

NO. 5-14-0046

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE BOARD OF TRUSTEES OF SOUTHERN ILLINOIS UNIVERSITY, a Body Politic Incorporate, *ex rel.* JERRY BECKER and KEVIN WISE,	)	Appeal from the Circuit Court of St. Clair County.
Plaintiffs-Appellants,	)	
v.	)	No. 11-CH-256
DAN JONES,	)	Honorable Richard A. Aguirre, Judge, presiding.
Defendant-Appellee.	)	

JUSTICE WELCH delivered the judgment of the court.
Justice Goldenhersh concurred in the judgment.
Presiding Justice Cates specially concurred.

ORDER

¶ 1 *Held*: The trial court did not err in granting summary judgment in favor of the defendant where there was no genuine issue of material fact as to whether the defendant knowingly submitted false or fraudulent travel reimbursement claims; the court did not abuse its discretion by denying the plaintiffs' motion to disqualify the defendant's attorney based on a conflict of interest; the court did not abuse its discretion by denying the plaintiffs' motion to compel the defendant to disclose who was paying his attorney fees; the court did not abuse its discretion by denying the plaintiffs' motion to compel the defendant to reappear for a second deposition for the purpose of disclosing the content of a conversation with his attorney during a break in his deposition; and the court did not abuse its discretion in assessing costs against the plaintiffs. The court did err in assessing costs associated

with the taking of discovery depositions that were not used at trial. Therefore, the court's decision is affirmed as modified.

¶ 2 The plaintiffs, Jerry Becker and Kevin Wise, appeal an order of the circuit court of St. Clair County entering summary judgment in favor of the defendant, Dan Jones. On appeal, the plaintiffs raised the following issues for our consideration: (1) whether the trial court erred in granting summary judgment in favor of the defendant, (2) whether the court abused its discretion in denying their motion to disqualify the defendant's attorney based on a concurrent conflict of interest, (3) whether the court abused its discretion by denying their motion to compel the defendant to disclose who was paying his attorney fees, (4) whether the court abused its discretion by denying their motion to compel the defendant to reappear for a second deposition for the purpose of disclosing the content of a conversation with his attorney during a break in his deposition, and (5) whether the court had authority to order them to pay costs associated with the taking of the discovery depositions and whether the court abused its discretion in assessing costs. For the reasons which follow, we affirm the decision of the circuit court as modified.

¶ 3 The plaintiffs and the defendant are faculty members in the Department of Curriculum and Instruction at Southern Illinois University Carbondale (University). The defendant was hired by the University in 1978 as a professor. As part of his employment, he was required to teach, provide supervision and support to, and observe University students who were student teaching at school districts in various locations around Illinois, which included Belleville, Bluford, Texico, Dix, Woodlawn, and Mt. Vernon. He was expected to travel to these various locations and observe the student teachers in the

classroom and meet with their cooperating teachers, the schools' principals, and other administrators. In addition, he was required to attend various meetings at the University's campus in Carbondale. The frequency of his travel to campus depended on when the meetings were scheduled, which varied considerably. Although the University provided him with an office on campus, the defendant maintained an office in his home in Belleville. Throughout his employment, he sought and, with the University's approval, obtained reimbursement for his work-related travel from his home office to the schools in other cities and to the University campus. He did not seek reimbursement for travel from his Belleville home office to Belleville schools.

¶ 4 March 3, 2011, the plaintiffs filed a complaint on behalf of the University[1] pursuant to section 3 of the Illinois False Claims Act (False Claims Act) (740 ILCS 175/3 (West 2010)), alleging that the defendant had knowingly submitted false claims for travel reimbursement for work-related travel between his Belleville home office and the Carbondale campus. The complaint alleged that the reimbursement violated section 3000.220 of Title 80 of the Illinois Administrative Code (Administrative Code) (80 Ill.

[1]Pursuant to section 4(b) of the Illinois False Claims Act (False Claims Act) (740 ILCS 175/4(b) (West 2010)), an individual may bring a civil action under the False Claims Act in the State's name where the State has notified the circuit court that it has elected not to intervene and proceed with the action. The University declined to intervene in the action and the plaintiffs pursued this action on its behalf.

Adm. Code 3000.220 (2010)), which prohibits travel reimbursement for commuting expenses between an employee's residence and headquarters.

¶ 5 On September 10, 2013, the defendant filed a motion for summary judgment, arguing that there was no genuine issue of material fact as to whether he had knowingly submitted false or fraudulent claims for travel reimbursement. The motion argued that his home office in Belleville was his headquarters. The motion argued that any reimbursement that he had received from the University was to cover expenses incurred for work-related travel between his headquarters and other locations, including the campus, and was not reimbursement for commuting expenses.

¶ 6 Attached to the motion was the defendant's affidavit in which he stated that when he was hired by the University, he was told to establish an office at his residence and he had maintained this office throughout his employment. He noted that his business cards listed his home address as his office address, that he received work-related mail at that address, that he maintained a separate phone line in that office for University business, and that he kept student records in that office. He maintained that he worked from this office when he was not traveling to the various schools or to campus. He acknowledged that the University had provided him with a shared workspace at the campus to use when he was there for other purposes, and they had also provided him with an on-campus mailbox, which he checked when he was there for other business. He stated that he was not required to report to the campus unless a meeting required his attendance.

¶ 7 In the alternative, the defendant argued that even if he was prohibited from seeking reimbursement for his travel between Belleville and Carbondale under section

3000.220 of the Administrative Code, the reimbursement sought and received did not violate section 3 of the False Claims Act (740 ILCS 175/3 (West 2010)) because he did not knowingly present a false or fraudulent claim for payment to the University. His affidavit indicated that he had received reimbursement, which was reviewed and approved by the University, for this type of travel throughout his employment, that he had been informed by various University administrators that seeking reimbursement for work-related travel between Belleville and Carbondale was acceptable, and that he was never told that he could not seek reimbursement for travel between those locations.

¶ 8 The affidavit of Rita Cheng, the chancellor of the University, was attached to the motion. Cheng indicated that the plaintiffs had filed this action on behalf of the University without the University's consent. She explained that the University was aware that Jones was filing claims for reimbursement for travel between Belleville, where his office and headquarters were located, and the University's campus in Carbondale. She stated that the University had approved those requests. She further indicated that other University employees employed in similar positions have also sought travel reimbursement between their headquarters and the University's campus and that the University had approved those claims. She stated that the University did not contend that it had been defrauded by the defendant and it had no interest in pursuing the litigation. Also attached to the motion was a letter from the University chair of the Department of Curriculum, Instruction, and Media to the Internal Revenue Service dated December 1983, which explained the University's policy concerning the defendant's office. The letter explained that because the defendant's job responsibilities required him

to travel to various schools in Belleville and surrounding areas, he was expected to maintain an office within that area for work-related purposes.

¶ 9 In response, the plaintiffs argued that there was a genuine issue of material fact as to whether the defendant's headquarters for travel reimbursement purposes was in Carbondale and whether he had knowingly submitted false or fraudulent claims for reimbursement. The plaintiffs argue that from 2007 until 2010, the defendant signed notices of reappointment for the position of visiting associate professor at the University and that the notices indicated that a condition of his employment was that he was assigned an office on campus. The plaintiffs noted that the reappointment notices did not mention any office or headquarters at the defendant's place of residence and that the defendant did not fill out any form designating his office as the Belleville office. The plaintiffs further noted that the defendant had acknowledged that he maintained an office on the University campus, that he had a mailbox at the University, and that the campus directory and website listed his office on campus as his office address.

¶ 10 In further support of their position, the plaintiffs cited section 3000.210(a) of Title 80 of the Administrative Code (80 Ill. Adm. Code 3000.210(a) (2010)), which requires that form TA-2 be completed and filed with the Legislative Audit Commission for "any individual whose headquarters has been designated as a location other than that at which official duties require the largest part of working time," and argued that the evidence indicated that this form was not filed for the defendant. They argued that the defendant had made no contention that he spent the largest portion of his working time at his home office. Further, they noted that the defendant's Belleville office did not have a fax

machine, it was not wheelchair accessible, there was no lock on the door, and the defendant had never used the home office to meet with anyone connected with the University.

¶ 11 Following a hearing on the motion, the trial court entered summary judgment in favor of the defendant. The court found that contrary to the plaintiffs' arguments, the various reappointment documents did not make a condition of the defendant's employment that he designate as his headquarters the assigned on-campus office. The court therefore concluded that the notices did not create a genuine issue of material fact as to where the defendant maintained his headquarters for travel reimbursement purposes. The court further concluded that there was no evidence presented that the defendant ever designated his shared on-campus office as his headquarters and that the evidence revealed that he only used this office when on campus for other purposes. The court found that contrary to the plaintiffs' arguments, the defendant was not required to file form TA-2 as the University was responsible for filing the form and the form specifically instructed that it was to be submitted for all employees for whom official headquarters have been designated at any location other than that at which their official duties require them to spend the largest amount of their working time. The trial court concluded that the plaintiffs had failed to provide any evidence raising a genuine issue of material fact that the defendant spent the largest part of his working time in his University office. Instead, the court determined that the summary judgment record established that the defendant's primary office and headquarters for purposes of travel reimbursement was in Belleville.

¶ 12 Further, the trial court noted that it was undisputed that the defendant had established his home office at the direction of the University administrators. The court further noted that it was undisputed that the University recognized the defendant's Belleville office as his headquarters and consistently approved travel reimbursement claims for work-related travel between his home office and Carbondale. The court concluded that the University knew and approved of the defendant using his Belleville office as his headquarters before he submitted his reimbursement claims and that the defendant had a right to rely on his superiors' instructions and approvals. Therefore, the court concluded that the plaintiffs could not claim that the defendant knowingly defrauded the State when seeking travel reimbursement where the University, an arm of the State, repeatedly, and knowingly, approved his requests for reimbursement. The plaintiffs appeal.

¶ 13 The plaintiffs' first argument is that the trial court erred in granting summary judgment in favor of the defendant in that there was a genuine issue of material fact as to whether the defendant knowingly submitted false or fraudulent claims for travel reimbursement. In response, the defendant argues that he is entitled to summary judgment because there is no genuine issue of material fact with respect to (1) the existence of a false or fraudulent claim and (2) whether he knowingly submitted any false claim.

¶ 14 Summary judgment is appropriate only where the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of

law. *Wright v. St. John's Hospital of the Hospital Sisters of the Third Order of St. Francis*, 229 Ill. App. 3d 680, 682 (1992). "In making this decision, the trial court may draw inferences from undisputed facts; if reasonable persons could draw divergent inferences from the undisputed facts, the issue should be decided by the trier of fact and the motion should be denied." *Id.* at 683. Summary judgment is appropriate where the nonmoving party has failed to establish an element of the cause of action. *Pyne v. Witmer*, 129 Ill. 2d 351, 358 (1989). In ruling on a summary judgment motion, the trial court must construe the pleadings, depositions, admissions, and affidavits on file in the light most favorable to the nonmoving party. *In re Estate of Hoover*, 155 Ill. 2d 402, 410-11 (1993). We review a summary judgment ruling *de novo*. *Wright*, 229 Ill. App. 3d at 683.

¶ 15 The issue concerning the existence of a false or fraudulent claim depends on where the defendant's headquarters for purposes of travel reimbursement has been established. Section 3000.120 of Title 80 of the Administrative Code (80 Ill. Adm. Code 3000.120 (2010)) instructs the University to reimburse its employees for "reasonable authorized [travel] expenses incurred by them in the performance of their duties." However, section 3000.220 of Title 80 of the Administrative Code (80 Ill. Adm. Code 3000.220 (2010)) prohibits the University employees from being reimbursed for commuting expenses, which is defined as travel between the employee's residence and headquarters. "Headquarters" is defined as follows: "The post of duty or station at which official duties require the employee to spend the largest part of working time." 80 Ill. Adm. Code 3000.140 (2010).

¶ 16 In the present case, the plaintiffs have not argued that the defendant has submitted claims for work-related travel that did not occur. Instead, they challenge the travel reimbursement claims submitted by the defendant for his work-related travel between Carbondale and Belleville, claiming that these expenditures were commuting expenses. The plaintiffs argue that the defendant's headquarters for purposes of travel reimbursement is his office at the University's campus, pointing to the following facts in support of their position: the notice of reappointment forms, which they argued indicated that the defendant was given an office on campus as a condition of employment; the fact that the University had not filed a TA-2 form indicating that the defendant's headquarters was located in Belleville; that the defendant maintained an on-campus office with his name on the door and the campus directory and website listed this office as his office; the defendant never conducted any University-related appointments at his home office; the fact that his home office was not wheel-chair accessible and did not have a lock on the door; and the fact that defendant spent the majority of his time observing student teachers in various schools and therefore his official duties did not require him to spend the largest part of his working time at his home office.

¶ 17 After carefully reviewing the record, we conclude that there is no genuine issue of material fact as to the existence of a false or fraudulent claim because the evidence indicated that the defendant's headquarters was located in Belleville. It was undisputed that the defendant's employment required him to spend a significant amount of time traveling to various school districts and that it was not traditional faculty employment where he was required to report to campus to teach. It was also undisputed that the

defendant maintained an office in his home. The evidence indicated that he worked from this home office when not traveling. Although he also had a shared office on campus, the evidence indicated that he only used that office when on campus for other purposes, such as faculty meetings. The meetings varied considerably and the frequency of his travel to campus depended on when the meetings were held. Further, like the trial court, we find that the notices of reappointment did not make the designation of the on-campus office as his headquarters a condition of his employment. Nothing in the forms precluded the defendant from establishing his home office as his headquarters, nor did the forms require that the on-campus office be established as his headquarters for travel reimbursement purposes.

¶ 18 Also, like the trial court, we conclude that the University was not required to file a TA-2 form for the defendant, as the defendant's official headquarters, *i.e.*, his home office, was not a location other than that at which his official duties required him to spend the largest amount of his working time. The plaintiffs have failed to present any evidence raising a genuine issue of material fact that he spent the largest part of his working time at the on-campus office. The evidence revealed that the defendant's headquarters for travel reimbursement purposes was his home office in Belleville. Accordingly, we conclude that there is no genuine issue of material fact as to whether the defendant submitted false or fraudulent travel reimbursement claims for his travel between Belleville and Carbondale.

¶ 19 However, even assuming that there was a genuine issue of material fact as to the location of the defendant's headquarters, we would still find that summary judgment was

appropriate as the plaintiffs have not established that there was a genuine issue of material fact as to whether the defendant knowingly presented false or fraudulent claims. To establish a violation of section 3(a)(1)(A) of the False Claims Act, the plaintiffs must show that the defendant "knowingly present[ed], or cause[d] to be presented, a false or fraudulent claim for payment or approval." 740 ILCS 175/3(a)(1)(A) (West 2010). The False Claims Act defines "knowing" and "knowingly" as follows: a person, with respect to information, who has actual knowledge of the information; acts in deliberate ignorance of the truth or falsity of the information; or acts in reckless disregard of the truth or falsity of the information. 740 ILCS 175/3(b)(1)(A) (West 2010). The definition does not require proof of specific intent to defraud in order to prove knowledge. 740 ILCS 175/3(b)(1)(B) (West 2010).

¶ 20 The trial court found *United States ex rel. Durcholz v. FKW, Inc.*, 189 F.3d 542 (7th Cir. 1999), instructive on this issue. In *Durcholz*, 189 F.3d at 544, federal officials had instructed general contractors who were bidding on a government project to use a particular line-item for their bids, which was incorrect. An unsuccessful bidder for a subcontract on the government project filed suit against the private general contractor and the contracting specialist under section 3729 of the federal False Claims Act (31 U.S.C. § 3729), arguing that the use of the inaccurate line-item constituted a fraudulent claim. *Durcholz*, 189 F.3d at 544. The appellate court affirmed the district court's decision to grant summary judgment in favor of the defendant, the private general contractor, declining to hold the defendant liable for "following the government's explicit directions." *Id.* at 545. The court explained that a claim for payment cannot be

fraudulent or false where the "government knows and approves of the particulars of a claim for payment before that claim is presented." *Id.*

¶ 21 Here, it was undisputed that the University recognized the defendant's home office as his headquarters and had approved numerous travel reimbursement claims throughout his employment for his trips between Belleville and Carbondale. Like the trial court, we cannot conclude that the defendant knowingly defrauded the State in this instance where an arm of the State, the University, repeatedly and knowingly approved his requests for reimbursement. Accordingly, we conclude that summary judgment was proper.

¶ 22 The plaintiffs' next argument on appeal is whether the trial court abused its discretion when it denied the plaintiffs' motion to disqualify the defendant's counsel based on a conflict of interest. The defendant's trial counsel was Reona Daly, a staff attorney for the University. As previously explained, Becker and Wise filed their complaint on behalf of the University even though the University elected not to intervene and pursue the action. The plaintiffs filed a motion to disqualify Daly as the defendant's counsel, arguing a conflict of interest under Rule 1.7 of the Illinois Rules of Professional Conduct. According to the plaintiffs, there was a concurrent conflict of interest between the interests of the University and the defendant because the University would receive a substantial percentage of the award if the plaintiffs' lawsuit was successful. The plaintiffs argued that this conflict was not subject to waiver and requested the court enter an order disqualifying Daly from any further representation of the defendant.

¶ 23 In response, the defendant argued that the University and the defendant were adverse in name only, and that there was no conflict because they were in agreement

concerning the central issue in the case, *i.e.*, whether the defendant knowingly submitted false or fraudulent claims for travel reimbursement. Alternatively, he argued that even if a conflict existed, the conflict can be and has been waived by him and the University's chancellor. The trial court denied the motion to disqualify counsel because Daly had not appeared of record in the case yet nor appeared in a deposition cited by the court.

¶ 24 The decision as to whether counsel should be disqualified is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Schwartz v. Cortelloni*, 177 Ill. 2d 166, 176 (1997). Rule 1.7 of the Illinois Rules of Professional Conduct prohibits an attorney from representing a client if a concurrent conflict of interest exists. A concurrent conflict of interest exists where "the representation of one client will be directly adverse to another client." Ill. Rs. Prof'l Conduct 1.7(a)(1) (eff. Jan. 1, 2010). However, even if a conflict of interest existed between the University and the defendant, the plaintiffs have no standing to challenge the conflict without some showing that the representation adversely affected their interests. *Evink v. Pekin Insurance Co.*, 122 Ill. App. 3d 246, 250 (1984).

¶ 25 In the present case, we note that the position of the University and the defendant on the central issue in the case is the same, *i.e.*, that the defendant did *not* submit false or fraudulent travel reimbursements. However, the plaintiffs argue that there is still a concurrent conflict of interest because the University will gain a percentage of any award granted to the plaintiffs. Even assuming for the sake of argument that a concurrent conflict of interest exists between the interests of the defendant and the University, the plaintiffs have failed to show that this representation was prejudicial to them. We note

that the plaintiffs were represented by separate counsel who had no affiliation with the University. Because the plaintiffs have failed to present any evidence that the alleged conflict had any bearing on the outcome of the case, we conclude that the trial court correctly denied the plaintiffs' motion to disqualify the defendant's counsel. See *Evink*, 122 Ill. App. 3d at 250 (affirming the trial court's denial of the plaintiffs' motion to disqualify counsel because the plaintiffs failed to establish how they were prejudiced or adversely affected by the alleged conflict).

¶ 26 The third issue raised by the plaintiffs is whether the trial court abused its discretion when it denied the plaintiffs' motion to compel the defendant to disclose who was paying his attorney fees. During the defendant's deposition, the plaintiffs' counsel asked him who was paying his attorney fees. His attorney instructed him not to answer, claiming attorney-client privilege and relevance. Thereafter, the plaintiffs filed a motion to compel answer to the deposition question, arguing that information concerning a client's attorney fees was generally not a confidential communication between an attorney and client and therefore not protected by privilege. In response, the defendant argued that the information sought by the plaintiffs was not relevant to the central issue in the case. The trial court agreed with the defendant and denied the plaintiffs' motion.

¶ 27 Illinois Supreme Court Rule 201(b)(1) (eff. Jan. 1, 2013) provides that "a party may obtain by discovery full disclosure regarding any matter relevant to the subject matter involved in the pending action." Although great latitude is allowed in the scope of discovery to enhance the "truth-seeking process," the right to discovery is limited to disclosure of information that is relevant to the case or will lead to relevant information.

Leeson v. State Farm Mutual Automobile Insurance Co., 190 Ill. App. 3d 359, 365-66 (1989). The discovery rulings made by the trial court are within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Regency Commercial Associates, LLC v. Lopax, Inc.*, 373 Ill. App. 3d 270, 284 (2007).

¶ 28 Here, the trial court concluded that the information concerning who paid the defendant's attorney fees was not relevant to the central issue in the case. The plaintiffs do not argue that this information is relevant to the issue of whether the defendant knowingly submitted false or fraudulent travel reimbursements. Instead, they argue that the information is relevant to their motion to disqualify the defendant's attorney based on a concurrent conflict of interest. We conclude that because the information sought was not relevant to the ultimate issue in the case and will not lead to relevant information on this issue, the court's decision was not an abuse of discretion. Furthermore, assuming *arguendo* that the court did abuse its discretion in denying the plaintiffs' motion, we would not grant the plaintiffs a reversal because they have failed to establish that the error was substantially prejudicial and affected the outcome of the case. See *Burns v. Michelotti*, 237 Ill. App. 3d 923, 938 (1992) (a party is not entitled to reversal based on evidence rulings unless the error was substantially prejudicial and affected the outcome of the trial). Accordingly, we conclude that the court did not abuse its discretion.

¶ 29 The fourth issue raised by the plaintiffs on appeal is whether the trial court abused its discretion when it denied the plaintiffs' motion to compel the defendant to reappear for a second deposition for the purpose of disclosing the contents of a conversation with his attorney during a break in his deposition. During the defendant's deposition, the

plaintiffs' counsel questioned him on a particular claim for travel reimbursement from April 2007. Initially, the defendant did not recall the particular claim and indicated that he would have to review his calendar to determine the reason for the travel. Later in the deposition, after a brief recess, the defendant offered to answer the prior question regarding the travel claim. The plaintiffs' counsel then asked whether the defendant had spoken to his counsel during the break, and the defendant responded in the affirmative. The plaintiffs' counsel then asked about the details of the conversation. The defendant's attorney objected to the question based on attorney-client privilege, and the plaintiffs' counsel maintained that the privilege had been waived because the defendant was improperly coached by his attorney during the break. Thereafter, the plaintiffs filed a motion seeking to compel the defendant to appear at a second deposition where the plaintiffs' counsel could question him concerning his conversation with his attorney. This motion was denied by the trial court.

¶ 30 Again assuming for the sake of argument that the trial court abused its discretion in not ordering the defendant to answer the question concerning his conversation with his attorney, the plaintiffs have failed to present any evidence that this error impacted the outcome of the case. The relevant issues in this case are whether the defendant's headquarters for travel reimbursement purposes was in Belleville or Carbondale and whether he knowingly submitted false or fraudulent travel reimbursement claims when he submitted claims for his travel between these locations. The plaintiffs do not claim that the defendant fraudulently submitted claims for travel reimbursement that did not occur. The content of any conversation that occurred between the defendant's counsel and the

defendant during the deposition break concerning a particular travel reimbursement claim that occurred in April 2007 and was not for travel between Belleville and Carbondale would have no affect on the outcome of the case. Therefore, we cannot say that the court abused its discretion in denying the plaintiffs' motion. See *Burns*, 237 Ill. App. 3d at 938 ("We will not grant reversal upon rulings on evidence unless the error was substantially prejudicial and affected the outcome of the trial.").

¶ 31 The last issue presented by the plaintiffs on appeal is whether the trial court abused its discretion in ordering them to pay the defendant's costs. In its January 7, 2014, order, the trial court assessed costs against the plaintiffs. Thereafter, the defendant submitted an affidavit of bill of costs, which identified the following costs as those incurred by him: $839.55 for the costs associated with taking the plaintiffs' depositions and obtaining copies of the transcripts as well as obtaining copies of the transcript of the defendant's deposition and $146 for the cost associated with answering the plaintiffs' complaint. The total amount of costs sought by him was $985.55. The plaintiffs filed an objection. On appeal, the plaintiffs argue that the court erred in assessing costs because (1) expenses associated with discovery depositions are not taxable as costs when not used for trial and (2) there is no showing that the defendant has actually paid any costs.

¶ 32 Before costs can be allocated to the losing party in litigation, there must be statutory authority, and any assessed costs must be limited to those specifically allowed by statute. *Premier Electrical Construction Co. v. Morse/Diesel, Inc.*, 257 Ill. App. 3d 445, 461 (1993). While the power to impose costs must ultimately be found in a statute, the legislature may grant the power in general terms to the courts, which may make rules

or orders under which costs may be assessed. *Id.* The decision to award costs and fees is within the sound discretion of the trial court and should not be disturbed on appeal absent an abuse of discretion. *Id.* However, the determination as to whether the trial court has the authority to award a particular cost is subject to *de novo* review. *Vicencio v. Lincoln-Way Builders, Inc.*, 204 Ill. 2d 295, 299 (2003).

¶ 33 The defendant sought deposition transcription fees as taxable costs under section 5-110 of the Code of Civil Procedure (735 ILCS 5/5-110 (West 2010)), which provides for the recovery of costs when a judgment is entered as the result of a motion. The defendant also relies on Illinois Supreme Court Rule 208(d) (eff. Nov. 1, 2011), which provides that deposition fees may, in the discretion of the trial court, be taxed as costs. The Illinois Supreme Court has interpreted Rule 208(d) as authorizing the trial court to tax as costs the expenses only of those depositions necessarily used at trial. *Galowich v. Beech Aircraft Corp.*, 92 Ill. 2d 157, 166 (1982). Although *Galowich* involved a voluntary dismissal by the plaintiffs and not a summary judgment, this holding has been found applicable to summary-judgment cases. See *Newton Tractor Sales, Inc. v. Kubota Tractor Corp.*, 382 Ill. App. 3d 1176, 1183 (2008), *rev'd on other grounds*, 233 Ill. 2d 46, (2009); *Premier Electrical Construction Co.*, 257 Ill. App. 3d at 462. Accordingly, although we conclude that the trial court's overall assessment of costs was not an abuse of discretion, we do find that the costs associated with the discovery deposition fees cannot be assessed against the plaintiffs as the depositions were not necessary for use at trial because there was no trial. Therefore, pursuant to our authority under Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994), we modify the trial court's award of costs to

subtract the assessment of any costs associated with the discovery depositions. We affirm the remaining assessment of costs as taxable under section 5-110 of the Code of Civil Procedure.

¶ 34 For the foregoing reasons, we affirm the judgment of the circuit court of St. Clair County as modified.

¶ 35 Affirmed as modified.

¶ 36 PRESIDING JUSTICE CATES, specially concurring.

¶ 37 I concur in the decision, but write separately to address an issue of frequent concern amongst members of the trial bar. Specifically, the concern pertains to the circumstance where counsel speaks with a witness, especially his client or an expert, over the course of a short recess during a deposition. When the deposition resumes, the opposing lawyer is quite sure that there has been "coaching" of the witness during the break. When the witness is asked whether he spoke with his counsel, he responds in the affirmative. When asked, however, about the details of that conversation, an objection is interposed, claiming that any question about the details of the conversation is protected by the attorney-client privilege.

¶ 38 A primary purpose for pretrial discovery, including the taking of depositions, is to elicit the facts in a case and to commit witnesses, under oath, to their memory of the evidence prior to trial. Ill. S. Ct. R. 201 (eff. Jan. 1, 2013); R. 206(c) (eff. Feb. 16, 2011). Once a witness, especially a client, has been prepared for a deposition by his

attorney, the witness should be on his own, and the coaching of that witness via private conferences is not proper during the course of the witness's testimony. This is especially true during the course of an evidence deposition, taken pursuant to Illinois Supreme Court Rule 206(c)(2), which requires that "[i]n an evidence deposition the examination and cross-examination shall be the same as though the deponent were testifying at the trial." Ill. S. Ct. R. 206(c)(2) (eff. Feb. 16, 2011). Depositions, whether taken for discovery or evidence, are part of the truth-seeking process, and should not be altered through the coaching process.

¶ 39 This principle has been aptly explained by the federal courts in interpreting their rules of procedure. See, *e.g.*, *Hunt v. DaVita, Inc.*, 680 F.3d 775, 780 (2012); *Hall v. Clifton Precision*, 150 F.R.D. 525, 528-29 (E.D. Pa. 1993) (private conferences are barred during the deposition and the fortuitous break, and a clever lawyer or witness who finds that the deposition is going in an undesired or unanticipated direction may not insist on a recess to discuss the unanticipated questions). Although every deposition taken pursuant to the federal rules of procedure is the equivalent of an Illinois evidence deposition, the philosophy behind the rule should be the same–no coaching of the witness to modify the presentation of the truth.

¶ 40 One can only imagine the scenario where the trial judge announces to the jury that the attorney needs a break in order to clarify the witness's testimony. Such a circumstance breaches the integrity of the judicial system. More prudent is the admonition made at trial that the attorneys "not speak to the witness" during the break. Because deposition testimony is tantamount to testimony given during a trial, it is equally

important that the witness and his lawyer not engage in improper conferences during a deposition. Should that occur, the content of those conversations should not automatically and unconditionally be covered by the attorney-client privilege, and the content should be subject to some inquiry by the judge *in camera* or the deposing attorney to determine whether there has been inappropriate coaching.

¶ 41 In this case, it is not possible to know whether the conversation between the defendant and his counsel impacted the outcome of the case, and the majority places the burden on the plaintiff to show how the conversation prejudiced the case. This burden is an impossible load to carry when the plaintiff is not allowed some inquiry into the substance of the conversation between the defendant and his counsel. Nevertheless, considering the circumstances of this particular case, it appears that the trial court did not abuse its discretion in denying the plaintiff's motion to compel the defendant to answer questions about the content of the conversation. The evidence was overwhelming that the plaintiff could not prevail, no matter what extent of coaching occurred. It is for this reason that I concur. My concurrence, however, does not connote acceptance of or approval of what occurred during the deposition in this instance.