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COURT OF COMMON PLEAS  
CLERMONT COUNTY, OHIO

BARBARA A. FREDERICK  
CLERK OF COMMON PLEAS COURT  
CLERMONT COUNTY, OHIO

**AMANDA TINCHER** :  
Plaintiff : **CASE NO. 2013 CVC 00601**  
vs. : **Judge McBride**  
**KATHERYN COSTA, ET AL.** : **DECISION/ENTRY**  
Defendant :

James A. Hunt, counsel for the plaintiff Amanda Tinchler, Two East Main Street, Amelia, Ohio 45102

John Mark Williams, counsel for the defendants Katheryn Costa and Leonard Costa, 8280 Montgomery Road, Suite 110, Cincinnati, Ohio 43236

This cause is before the court for consideration of (1) the defendants' motion to correct the plaintiff's dismissal and assess costs to the plaintiff and (2) the plaintiff's motion to remit costs.

Upon consideration of the motions, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

## FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The plaintiff Amanda Tincher voluntarily dismissed her suit against the defendants Kathryn Costa and Leonard Costa on April 10, 2015. The plaintiff's notice of dismissal included the language "cost to Defendant." The defendants aver they did not become aware of the language until they received a notice from the Clerk of Courts to pay \$169.00 in court costs. The defendants attempted to contact the plaintiff regarding the fact that they did not agree to pay court costs, but they were unsuccessful.

Accordingly, on May 22, 2015, the defendants filed a motion to correct the plaintiff's dismissal, requesting that the court impose the costs upon the plaintiff. In response, on June 19, 2015 the plaintiff filed her memorandum submitting that she should not be required to pay court costs because she is indigent, and she requested that the court remit the costs.

## LEGAL ANALYSIS

The payment of court costs are "entirely of statutory allowance and control."<sup>1</sup> Costs are "defined as being 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."<sup>2</sup>

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<sup>1</sup> *Vance v. Roedersheimer*, 64 Ohio St.3d 552, 555, 1992-Ohio-24, 597 N.E.2d 153, quoting *State ex rel. Michaels, v. Mores*, 165 Ohio St 599, 138 N.E.2d 660, 60 O.O. 531 (1956).

<sup>2</sup> *Vance*, 64 Ohio St.3d at 555, quoting *State ex rel. Commrs. of Franklin Co. v. Guilbert*, 77 Ohio St. 333, 338-39, 83 N.E. 80 (1907).

Pursuant to Civ.R. 41(A)(1)(a), the plaintiff may dismiss the case without prejudice at any time before the trial, absent the existence of a counterclaim.<sup>3</sup> While the trial court is typically divested of its jurisdiction following a voluntary dismissal, "a trial court may consider certain collateral issues not related to the merits of the action."<sup>4</sup>

Such is not the case for assessing costs after a voluntary dismissal without prejudice.<sup>5</sup> Once the plaintiff files the voluntary dismissal, the trial court is "deprived of all jurisdiction," and since it "cannot be reclaimed" the trial court is "divested of jurisdiction to award attorney fees and costs" as well.<sup>6</sup> Two civil rules govern the assessment of costs in the instant case, Civ.R. 41(D) and Civ.R. 54(D).

Although the plaintiff is entitled to one voluntary dismissal pursuant to Civ.R. 41(A), "upon refile, the plaintiff may nevertheless be subject to the payment of costs of the previously dismissed action."<sup>7</sup> The provisions in Civ.R. 41(D) pertain to awarding costs from a previously dismissed action:

"If a plaintiff who has once dismissed a claim in any court commences an action based upon or including the same claim against the same defendant, the court may make such

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<sup>3</sup> *Strum v. Strum*, 63 Ohio St.3d 671, 674, 590 N.E.2d 1214 (1992).

<sup>4</sup> *State ex rel. Hummel v. Sadler*, 96 Ohio St.3d 84, 2002-Ohio-3605, 771 N.E.2d 853, ¶ 23. Examples of such collateral matters include Rule 11 sanctions, criminal contempt, and an R.C. 2323.51 motion for a frivolous action. *Id.* See *Williams v. Thamann*, 173 Ohio App.3d 426, 2007-Ohio-4320, 878 N.E.2d 1070, ¶ 5 ("[A] voluntary dismissal of a complaint under Civ.R. 41(A) does not deprive the court of jurisdiction to consider collateral matters unrelated to the merits of the case," such as pending motions for sanctions at the time of dismissal).

<sup>5</sup> *Strum*, 63 Ohio St.3d at 676.

<sup>6</sup> *Hennis v. Ashland Chemical, Inc.*, 5th Dist. Stark No. CA-8867, 1992 WL 147505, \*1 (June 8, 1992), citing *Zimmie v. Zimmie*, 11 Ohio St.3d 94, 95, 464 N.E.2d 142 (1984). See *Ewing v. Summit Pathology Assoc., Inc.*, 81 Ohio App.3d 284, 285, 610 N.E.2d 1074 (9th Dist. 1992) (holding the trial court erred by awarding the appellee's motion to tax costs to the appellant after the case was dismissed because the trial court lost its jurisdiction upon dismissal); *Putham Recovery Corp. v. American Solid Waste Corp.* 8th Dist. Cuyahoga No. 60326, 1991 WL 64314, \*1 (Apr. 25, 1991), citing *Goldstein v. Goldstein*, 50 Ohio App.3d 4, 552 N.E.2d 228 (8th Dist. 1988) (finding that the "the trial court was without authority to award costs to defense following the plaintiff's Civ.R. 41(A)(1)(a) dismissal.").

<sup>7</sup> *Strum*, 63 Ohio St.3d at 674.

order for the payment of costs of the claim previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.”<sup>8</sup>

Hence, once an action is dismissed pursuant to Civ.R. 41(A)(1)(a), the original trial court has “lost jurisdiction over the matter and cannot award costs under Civ.R. 41(D).”<sup>9</sup> Under Civ.R. 41(D), a trial court is only vested “with the authority to collect court costs against one who has previously voluntarily dismissed the same matter, [but] this authority is not triggered until the case is refiled.”<sup>10</sup> Thus, the original trial court does not retain “the jurisdiction to assign costs under Civ.R. 41(D) after a plaintiff voluntarily dismissed [his or] her action pursuant to Civ.R. 41(A)(1)(a).”<sup>11</sup> Moreover, there is “no source of legal authority enabling the trial court to require payment of the costs as a mandatory condition of refiling.”<sup>12</sup>

The Ohio Supreme Court has explained the rationale for prohibiting the original trial court from assessing costs: “[I]f the right to one dismissal without prejudice is absolute, with only the court in which the action is refiled having the power to award the costs of the previous litigation, as is suggested by the language in Civ.R. 41(D), the original trial court cannot retain jurisdiction over the matter for the purposes of assessing costs.”<sup>13</sup> Additionally, if the rule is interpreted otherwise, “this interpretation

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<sup>8</sup> Civ.R. 41(D).

<sup>9</sup> *Strum*, 63 Ohio St.3d at 676.

<sup>10</sup> (Emphasis added.) *Hanson v. Riccardi*, 6th Dist. Erie No. E-06-047, 2007-Ohio-449, ¶ 12.

<sup>11</sup> *Stririz v. Nissen*, 6th Dist. Lucas No. L-05-1390, 2006-Ohio-3986, ¶¶ 7, 12. See *Goldstein*, 50 Ohio App.3d at \*6 (Emphasis original.) (“Civ.R. 41(D) clearly contemplates a particular sequence of events: (1) the filing of an original action in any court, i.e., any jurisdiction; (2) the subsequent dismissal of that action by the plaintiff who filed it; and (3) the refiling of a second action by the same plaintiff based on the same claim against the same defendant in an Ohio court.”)

<sup>12</sup> *Hanson*, 2007-Ohio-449 at ¶ 12.

<sup>13</sup> *Strum*, 63 Ohio St.3d at 676.

would have the anomalous result of allowing two courts to award costs: both the original court through an 'inherent power' theory and the court in which the action is refiled, under authority of Civ.R. 41(D)."<sup>14</sup>

In the instant case, the court cannot award costs to the defendant under Civ.R. 41(D). As the original trial court, this court lost jurisdiction under Civ.R. 41(A) the instant the plaintiff filed the dismissal. If, however, the plaintiff refiles her claim against the defendants in another Ohio court, that trial court may require her to pay the court fees associated with the case at bar.

Turning next to Civ.R. 54, unless provided by statute or rule, in civil cases the court can assess costs to the "prevailing party" pursuant to Civ.R. 54(D).<sup>15</sup> Civil Rule 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."<sup>16</sup> A "prevailing party" is the party "in whose favor the decision or verdict is rendered and judgment entered."<sup>17</sup> A court may deny costs to both parties "when neither party entirely prevails."<sup>18</sup>

In the case of a voluntary dismissal without prejudice, the dismissal "is not an 'adjudication upon the merits'" and therefore "there is no prevailing party."<sup>19</sup> As such,

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<sup>14</sup> *Strum*, 63 Ohio St.3d at 676.

<sup>15</sup> Civ.R. 54(D).

<sup>16</sup> *Id.*

<sup>17</sup> *Bies v. State*, 7th Dist. Mahoning No. 12 MA 3, 2012-Ohio-5572, ¶ 30 quoting *Hagemeyer v. Sadowski*, 86 Ohio App.3d 563, 566, 621 N.E.2d 707 (6th Dist. 1993).

<sup>18</sup> (Citation omitted.) See *State ex rel. Reyna v. Natalucci-Persichetti*, 83 Ohio St.3d 194, 198, 1998-Ohio-129, 699 N.E.2d 76.

<sup>19</sup> *Strum*, 63 Ohio St.3d at 675. See *Geauga Cty. Bd. of Health v. Pauer*, 11th Dist. Geauga No. 2002-G-2462, 2003-Ohio-6740, ¶ 20 quoting *Hensley v. Henry*, 61 Ohio St.2d 277, 279, 400 N.E.2d 1352 (1980) and citing *Strum*, 63 Ohio St.3d at 675 (holding that it is "well established under Ohio law" that a Civ.R. 41(A) dismissal is not an "adjudication upon the merits" and thus "there is no prevailing party when a claim is voluntarily dismissed."); *Hamilton Die Cast, Inc. v.*

the Ohio Supreme Court has held that Civ.R. 54(D) does not empower the court to award costs to a "non-prevailing party."<sup>20</sup> Once the plaintiff files the voluntary dismissal, the trial court is "deprived of all jurisdiction," and since it "cannot be reclaimed" the trial court is "divested of jurisdiction to award attorney fees and costs."<sup>21</sup> Thus, "the common pleas court [has] no authority to award costs to either party after the matter [is] voluntarily dismissed."<sup>22</sup> Likewise, the trial court may not award costs based upon which party "has the deeper pockets."<sup>23</sup>

As in the case costs under Civ.R. 41(D), the court in the instant case is likewise deprived of jurisdiction to assess costs under Civ.R. 54(D). Because the plaintiff voluntarily dismissed the case without prejudice, neither party prevailed. As such, the court cannot assign costs to either party.

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*Brunswick Administrative Services Inc. et al.*, 2nd Dist. Montgomery No. 10287, 1987 WL 15244, \*5 (Aug. 4, 1987).

<sup>20</sup> *Vance*, 64 Ohio St.3d at 555. See *Jackson v. Greater Cleveland Regional Transit Auth.*, 8th Dist. Cuyahoga No. 80788, 2002-Ohio-3799, ¶¶ 4-5 (holding that Civ.R. 54(D) does not empower the trial court to award any type of cost to the non-prevailing party, and reversing the trial court's decision to impose the cost of the jury trial on the prevailing party).

<sup>21</sup> (Citation omitted.) *Hennis v. Ashland Chemical, Inc.*, 5th Dist. Stark No. CA-8867, 1992 WL 147505, \*1 (June 8, 1992).

<sup>22</sup> *Pauer*, 2003-Ohio-6740 at ¶ 21.

<sup>23</sup> *Nelson v. Ford Motor Co.*, 145 Ohio App.3d 58, 69, 761 N.E.2d 1099 (11th Dist. 2001).

## CONCLUSION

For the foregoing reasons the court grants the defendants' motion in part and denies it in part. The court strikes the language in the plaintiff's Civ.R. 41(A)(1)(a) dismissal assessing costs to the defendants. The court may not assess costs in the case to the plaintiff, but reserves the right to order the payment of the costs by the plaintiff if her action is re-filed.

**IT IS SO ORDERED.**

DATED: 1-12-2016

  
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Judge Jerry R. McBride