

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 CA 2015

NEWTON M. HARRIS

VERSUS

ST. TAMMANY PARISH HOSPITAL AND E. J. FIELDING
FUNERAL HOME, INC.

CONSOLIDATED WITH

NO. 2012 CA 2016

NEWTON M. HARRIS, Individually and on behalf of the
ESTATE OF SUZANNE HALKETT HARRIS

VERSUS

ST. TAMMANY PARISH HOSPITAL SERVICE DISTRICT NO. 1,
MICHAEL IVERSON, M.D. AND JAMES WATTLER, C.R.N.A.

Judgment Rendered: NOV 20 2013

* * * * *

On Appeal from the
22nd Judicial District Court,
in and for the Parish of St. Tammany,
State of Louisiana

Docket Number 2007-13187 C/W 2010-12773

Honorable Raymond S. Childress, Judge Presiding

* * * * *

Mary Grace Knapp
Laura Caviness Cocus
Lauren Kaufmann Navarre
Mandeville, LA

Attorneys for Plaintiff-Appellee,
Newton M. Harris

Whipple, C.J. dissents for the reasons assigned by TMH

C. Wm. Bradley, Jr.
Bradley R. Belsome
Crystal E. Domreis
New Orleans, LA

Attorneys for Defendant-Appellant,
St. Tammany Parish Hospital
District No. 1

David J. Bourgeois
Jaime M. Cambre
Philip P. Watson
Nicole M. Boyer
Christina M. Roselle
Metairie, LA

Attorneys for Defendant-Appellee,
E. J. Fielding Funeral Home, Inc.

* * * * *

BEFORE: WHIPPLE, C.J., GUIDRY, PETTIGREW,
HIGGINBOTHAM, AND DRAKE, JJ.

HIGGINBOTHAM, J.

This matter is before us on appeal by defendant, St. Tammany Parish Hospital Service District No. 1 (“STPH”), from a judgment of the trial court granting a motion to tax costs in favor of plaintiff, Newton M. Harris, and assessing STPH with trial court costs. For the following reasons, we vacate the October 4, 2012 costs judgment and reinstate the original trial court judgments dated September 3, 2010, as to trial court costs only.

BACKGROUND

The underlying consolidated suits on the merits involved plaintiff’s general negligence and medical malpractice claims against STPH and certain healthcare providers surrounding the death of plaintiff’s wife. A complete recitation of the extensive facts and procedural history in this matter is outlined in our previous opinion: **Harris v. St. Tammany Parish Hosp. Service Dist. No. 1**, 2011-0941 (La. App. 1st Cir. 12/29/11) (unpublished), writs denied, 2012-0585, 2012-0678 (La. 4/20/12), 85 So.3d 1275, 1277 (hereafter referred to as “the first appeal”). Although the underlying medical malpractice suit and general negligence suit were consolidated for trial, the trial court signed separate judgments on September 3, 2010, dismissing plaintiff’s medical malpractice claims in one judgment, and dismissing plaintiff’s entire civil action in the other judgment, all in accordance with a jury’s verdict.

In the first appeal, this court reviewed the September 3, 2010 judgments, and affirmed the trial court insofar as it dismissed plaintiff’s medical malpractice claims. However, in reference to the trial court judgment that dismissed plaintiff’s claims in negligence, this court vacated in part the dismissal of plaintiff’s negligence claims against STPH, amended the judgment in part by finding STPH negligent after a *de novo* review, and awarded plaintiff general damages. This court further assessed all costs of the first appeal to STPH, but was silent as to trial

court costs that were originally assessed in the trial court judgments as each party to “bear their own costs.”¹ *Id.* The trial court’s assessment of costs was not assigned as error in the first appeal. After this court rendered the opinion in the first appeal, the Louisiana Supreme Court denied writs on April 20, 2012.

Shortly thereafter, considering this court’s appellate ruling in favor of plaintiff on the negligence claims, plaintiff filed a “Motion to Tax Costs” on May 8, 2012, seeking to have “expert fees, medical and legal costs of litigation” assessed against STPH. The matter was set and heard before the trial court on June 29, 2012. After hearing arguments by the parties and accepting evidence,² the trial court granted plaintiff’s motion and awarded plaintiff costs, explaining:

[A]s I appreciate what the First Circuit did, they reviewed the trial, and based upon the evidence that was presented during the course of the trial, they reversed and rendered and came up with their own judgment. But that was based upon the evidence that was submitted during the course of the trial itself. So it would seem kind of pointless for this Court to not tax those costs for the trial itself to the party who was cast in judgment [on appeal,] which was [STPH].

Accordingly, on October 4, 2012, the trial court signed another judgment granting plaintiff’s motion and assessing trial court costs totaling \$13,735.62 against STPH.³ This second appeal, filed by STPH, followed the trial court’s cost judgment.

DISCUSSION

In its sole assignment of error, STPH asserts that the trial court erred in granting plaintiff’s motion and awarding plaintiff trial court costs. STPH contends

¹ The trial court actually handwrote the language concerning costs in each judgment issued on September 3, 2010.

² On July 3, 2012, plaintiff filed a motion to supplement the record with exhibits to “corroborate litigation costs expended and awarded by [trial] [c]ourt.” The trial court granted the motion on July 9, 2012.

³ The judgment was rendered in open court on June 29, 2012, and it further ordered STPH to tender to plaintiff, by July 2, 2012, the amount of \$70,767.96, representing damages, appellate costs, and legal interest awarded by this court in the first appeal. *See Harris*, 2011-0941 at pp. 18-19.

that the September 3, 2010 judgments rendered by the trial court following the underlying trial on the merits ordered that each party was to bear their own costs, and that once the supreme court denied the applications for writs of certiorari after this court's opinion in the first appeal, the trial court's cost assessment, ordering each party to bear their own trial court costs, became final. As such, STPH maintains that any modification to those original cost awards is a substantive amendment to a final judgment, which is prohibited by La. Code Civ. P. art. 1951.⁴

Conversely, plaintiff contends that the trial court did not substantively modify or reverse the trial court's original judgments on the merits in awarding costs to plaintiff on its motion to tax costs. Instead, plaintiff asserts that the judgment on the motion to tax costs was entered "subsequent to and pursuant to" this court's opinion in the first appeal, which rendered judgment in favor of plaintiff and against STPH for negligent infliction of emotional distress and awarded damages accordingly. Plaintiff further argues that the award of trial court costs pursuant to a motion to tax costs against the party cast in judgment on appeal, *i.e.*, STPH, was proper and did not amend a prior judgment of the trial court. Thus, plaintiff counters La. Code Civ. P. art. 1951 does not apply.

As a general rule, the party cast in judgment is taxed with the costs of the proceeding, unless the judgment provides otherwise, pursuant to La. Code Civ. P. art. 1920.⁵ In this case, the trial court judgments signed on September 3, 2010,

⁴ Louisiana Code of Civil Procedure article 1951 provides as follows:

A final judgment may be amended by the trial court at any time, with or without notice, on its own motion or on motion of any party:

- (1) To alter the phraseology of the judgment, **but not the substance**; or
- (2) To correct errors of calculation.

(Emphasis added.)

⁵ Louisiana Code of Civil Procedure article 1920 provides as follows:

Unless the judgment provides otherwise, costs shall be paid by the party cast, and may be taxed by a rule to show cause.

Except as otherwise provided by law, the court may render judgment for costs, or any part thereof, against any party, as it may consider equitable.

provided otherwise with regards to costs, and those cost assessments were not vacated or modified by this court in the first appeal.

Plaintiff points to the trial court's discretionary authority to award specific costs under La. Code Civ. P. art. 1920, but discretion is not at issue in this appeal. Rather, the issue is: when a judgment regarding costs is issued by the trial court and is not overturned by the appellate court, does the trial court have the authority to amend its previous judgment and reassess trial court costs? This is a jurisdictional issue, which is a question of law, not of discretion. Appellate review regarding questions of law is subject to *de novo* review and involves a determination of whether the trial court was legally correct, with no special weight given to the findings of the trial court. See **Dixon v. First Premium Ins. Group**, 2005-0988 (La. App. 1st Cir. 3/29/06), 934 So.2d 134, 139, writ denied, 2006-0978 (La. 6/16/06), 929 So.2d 1291. See also **Winston v. Millaud**, 2005-0338 (La. App. 4th Cir. 4/12/06), 930 So.2d 144, 149-150.

In order for La. Code Civ. P. art. 1951 to apply, the judgments signed on September 3, 2010, must have been *final* judgments. After this court's ruling on the first appeal, both parties submitted rehearing applications, which were denied by this court, and then subsequently filed applications for writs of certiorari with the Louisiana Supreme Court, which were also denied. None of the rehearing applications or writ applications raised the issue of costs; therefore, this court's December 29, 2011 judgment that was silent as to trial court costs became final and no further modifications could be made by the trial court. See La. Code Civ. P. art. 2166(E).⁶ Moreover, the trial court's original September 3, 2010 judgments

⁶ Louisiana Code of Civil Procedure article 2166(E) provides in part as follows:

When an application for certiorari to the supreme court is timely filed, a judgment of the court of appeal becomes final and definitive after a delay of five days, exclusive of legal holidays, commencing to run on the day after the clerk has mailed the denial by the supreme court of the application for certiorari.

as to the assessment of costs became final when the Louisiana Supreme Court denied writs on the merits without altering the original assessment of trial court costs. See Tolis v. Board of Supervisors of Louisiana State University, 95-1529 (La. 10/16/95), 660 So.2d 1206, 1207. See also Rills v. Southern Bell Tel. Co., 305 So.2d 596, 597 (La. App. 1st Cir. 1974), where this court stated, “[o]ur law is well settled that where a decree is silent on an issue, such silence is to be construed as a rejection of the demands of a litigant.” Thus, when the first appeal was brought and this court declined to speak on the issue of trial court costs in the decree, in effect, this court was affirming the costs portion of the trial court judgments. See Rills, 305 So.2d at 597.

Once a judgment becomes final, *res judicata* bars the re-litigation of any subject matter that arises from the same transaction or occurrence of the previous suit. See La. R.S. 13:4231; La. Code Civ. P. art. 425. See also Avenue Plaza, L.L.C. v. Falgoust, 96-0173 (La. 7/2/96), 676 So.2d 1077, 1079; Leon v. Moore, 98-1792 (La. App. 1st Cir. 4/1/99), 731 So.2d 502, 504, writ denied, 99-1294 (La. 7/2/99), 747 So.2d 20. Once a final judgment acquires the authority of a thing adjudged, no court has jurisdiction to change the judgment, regardless of the magnitude of the final judgment’s error. Avenue Plaza, 676 So.2d at 1079.

Louisiana Code of Civil Procedure article 1951 permits the amendment of a final judgment of the trial court only to alter the phraseology, but *not the substance*, or to correct errors of calculation. Here, the trial court originally determined that each party was to bear their own costs. Thus, the subsequent judgment on the motion to tax costs against STPH amounts to a substantive amendment to the original final judgments as to trial court costs. While it may have thought it was doing this court’s bidding, the trial court clearly did not have the jurisdictional authority to make a substantive change to the final judgments regarding the original assessment of trial court costs. Further, although La. Code

Civ. P. art. 2088(A)(10) provides that the trial court retains jurisdiction to “[s]et and tax costs and expert witness fees,” the trial court’s jurisdiction is limited to fixing the amount of costs consistent with the final judgment. See Rose v. Travelers Ins. Co., 2003-606 (La. App. 5th Cir. 11/12/03), 861 So.2d 692, 695, writ denied, 2003-3420 (La. 3/19/04), 869 So.2d 850. The trial court may not alter an award of costs once made in a final judgment. **Constans v. Choctaw Transport, Inc.**, 97-0863 (La. App. 4th Cir. 12/23/97), 712 So.2d 885, 903, writs denied, 98-0408, 98-0412 (La. 3/27/98), 716 So.2d 892.

Essentially, what plaintiff sought to do by his motion to tax costs was to have the trial court costs reassessed in light of this court’s ruling after the first appeal. While we understand plaintiff’s desire to have all trial court costs reassessed against STPH as the losing party on the first appeal, we also recognize that the judgments awarding trial court costs are final and could not be substantively amended. And while it may be argued that this court could have addressed the issue of trial court costs in the first appeal, we point out that the issue was never raised by any party in the first appeal or on rehearing, and our silence regarding trial court costs effectively affirmed the trial court’s original assessment of those costs. See Rills, 305 So.2d at 597. Thus, it is wholly without foundation for the plaintiff to request that the trial court rectify this court’s silence as to trial court costs, as no court has jurisdiction to change the final judgment as to those costs.

We have previously stated in **Mack v. Wiley**, 2007-2344 (La. App. 1st Cir. 5/2/08), 991 So.2d 479, 486, writ denied, 2008-1181 (La. 9/19/08), 992 So.2d 932, that “[w]hen a trial court substantively amends a judgment without recourse to the proper procedure, the amended judgment is an absolute nullity. Louisiana jurisprudence further provides that when a trial court signs a judgment and then signs another, the second judgment is an absolute nullity and without legal effect.”

(Citations omitted.) See also **McGee v. Wilkinson**, 2003-1178 (La. App. 1st Cir. 4/2/04), 878 So.2d 552, 554-555; **Hebert v. Blue's Auto and Truck Parts**, 2000-2154 (La. App. 1st Cir. 12/28/01), 804 So.2d 953, 955, writ denied, 2002-0272 (La. 3/28/02), 812 So.2d 635 (“Substantive amendments to judgments can be made only after a party has successfully litigated a timely application for *new trial*, an *action for nullity*, or a *timely appeal*.”). Therefore, the subsequent judgment rendered on October 4, 2012, as it amounts to a partial amendment of the original September 3, 2010 judgments as to trial court costs, is absolutely null for lack of jurisdiction and is without legal effect. See **Rose**, 861 So.2d at 695.

CONCLUSION

For the above and foregoing reasons, the October 4, 2012 judgment of the trial court, taxing and fixing costs, is hereby vacated. The original trial court judgments dated September 3, 2010, ordering each party to bear their own costs, are hereby reinstated, as to trial court costs only. Costs of this appeal are assessed to the plaintiff, Newton M. Harris.

OCTOBER 4, 2012 JUDGMENT VACATED; AND ORIGINAL SEPTEMBER 3, 2010 JUDGMENTS REINSTATED AS TO TRIAL COURT COSTS ONLY.

NEWTON M. HARRIS

STATE OF LOUISIANA

COURT OF APPEAL


VERSUS

FIRST CIRCUIT

ST. TAMMANY PARISH HOSPITAL
AND E. J. FIELDING FUNERAL
HOME, INC.

NUMBER 2012 CA 2015

CONSOLIDATED WITH


NEWTON M. HARRIS,
INDIVIDUALLY AND ON BEHALF
OF THE ESTATE OF SUZANNE
HALKETT HARRIS

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

VERSUS

ST. TAMMANY PARISH HOSPITAL
SERVICE DISTRICT NO. 1, MICHAEL
IVERSON, M.D. AND JAMES
WATTLER, C.R.N.A.

NUMBER 2012 CA 2016

WHIPPLE, C.J., dissenting.

I respectfully disagree with the opinion of the majority herein.

As noted in the majority's opinion, generally, the party cast in judgment is taxed with the costs of the proceeding. LSA-C.C.P. art. 1920. Except as otherwise provided by law, the court may render judgment for costs, or any part thereof, against any party, as it may consider equitable. LSA-C.C.P. art. 1920. Under LSA-C.C.P. art. 1920, the trial court has great discretion in awarding costs. MCI Telecommunications Corporation v. Kennedy, 2004-0458 (La. App. 1st Cir. 3/24/05), 899 So. 2d 674, 681, writ not considered, 2005-1578 (La. 1/9/06), 918 So. 2d 1021. An appellate court will not disturb the trial court's fixing of costs absent an abuse of the sound discretion afforded the trial court. MCI Telecommunications Corporation v. Kennedy, 899 So. 2d at 681. The trial court can assess costs in any equitable manner. LSA-C.C.P. art. 1920; Allen v. Baton Rouge General Medical Center/General Health System, 2009-1110 (La. App. 1st Cir. 12/23/09), 30 So. 3d 127, 131, writ denied, 2010-0195 (La. 4/5/10), 31 So. 3d

368. Moreover, once it is determined on appeal that a trial court's ruling was in error, a court of appeal can award costs under the general rule to reflect that the party cast in judgment is taxed with the costs of the proceeding. See Allen v. Baton Rouge General Medical Center/General Health System, 30 So. 3d 131 (where appellate court found error in trial court's ruling, judgment of trial court was amended to assess costs to party that prevailed on appeal); see also Vernon Company v. Carter, 254 So. 2d 297 (La. App. 4th Cir. 1971)(per curiam on rehearing) (where judgment in favor of plaintiff in trial court was reversed by appellate court, plaintiff was obligated to pay all costs).

At the request of St. Tammany Parish Hospital, the trial court issued written reasons for judgment wherein it noted:

This Rule to Tax Costs arises out of a Judgment on the merits rendered by the First Circuit Court of Appeals in favor of Newton Harris against St. Tammany Parish Hospital, awarding to Mr. Harris \$35[,]000.00 in General Damages, plus interest and appellate costs. Writs were denied by the Louisiana Supreme Court on April 20, 2012, and thereafter, this Rule to Tax trial court costs was filed. The matter is opposed by the defendants on the basis that the First Circuit awarded appellate costs, but did not award trial court costs. The Court does not agree. It is within the authority of the trial court to assess trial court costs.

(Emphasis added.)

When a trial court taxes costs against a party and the court of appeal reverses the trial court's judgment, where a motion to tax costs is subsequently filed in connection with the appellate court's findings, the appellate court's failure to address the issue of costs is manifest error, which must be corrected. See LSA-C.C.P. art. 2164;¹ Thompson v. Rapides Parish School Board, 94-651 (La. App.

¹Louisiana Code of Civil Procedure article 2164 provides as follows:

The appellate court shall render any judgment which is just, legal, and proper upon the record on appeal. The court may award damages, including attorney fees, for frivolous appeal or application for writs, and may tax the costs of the lower or appellate court, or any part thereof, against any party to the suit, as in its judgment may be considered equitable.

3rd Cir. 5/31/94), 637 So. 2d 683.

On review, I find that plaintiff's Motion to Tax Costs was filed in connection with and pursuant to a judgment rendered in plaintiff's favor on appeal, after this Court's findings in this matter. As the trial court noted in its oral and written reasons, its ruling on the Motion to Tax Costs was based on the fact that this Court determined that the trial court had erred, that plaintiff was the prevailing party on appeal, and that St. Tammany Parish Hospital had been cast in judgment.

Louisiana Code of Civil Procedure article 1920 gives the trial court discretion to tax costs "against any party as it may consider equitable." Given this Court's finding, on *de novo* review, that St. Tammany Parish Hospital was negligent and breached its duty owed plaintiff, there is no special indication that the trial court abused its discretion in taxing certain costs to the party this Court earlier cast in judgment. See Cole v. State, Department of Public Safety and Corrections, 2003-2269 (La. App. 1st Cir. 6/25/04), 886 So. 2d 463, 466, writ denied, 2004-1836 (La. 10/29/04), 885 So. 2d 589. As the trial court noted in its reasons, "it would seem kind of pointless for [the trial court] to not take those costs for the trial itself to the party who was cast in judgment which was St. Tammany parish Hospital."

For these reasons, I respectfully dissent and would affirm the October 4, 2012 judgment of the trial court.