STATE OF MICHIGAN

COURT OF APPEALS

WOLVERINE COMMERCE, LLC, Plaintiff-Appellee,	UNPUBLISHED February 23, 2010
v	No. 282532 Washtenaw Circuit Court
PITTSFIELD CHARTER TOWNSHIP, Defendant-Appellant.	LC No. 05-000321-CH ON REMAND

Before: Beckering, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Defendant appeals as of right an order awarding expert witness fees to plaintiff. We affirm in part, vacate in part, and remand.

This case arises out of plaintiff's purchase of a parcel of land in defendant township. Plaintiff initially planned to develop the property as a business park, and because the property was master planned for industrial use and was selling for an attractive price, it was a "suitable risk." Plaintiff pursued and successfully obtained industrial PUD zoning for the property. Plaintiff then concluded that it had made an "expensive mistake" and decided that it would pursue residential development instead. Defendant denied rezoning for residential use. The trial court found that industrial zoning was arbitrary, capricious, and confiscatory. Defendant appealed that decision previously, in Docket No. 278417, and this Court concluded that the "self-imposed hardship rule" applied to preclude relief because plaintiff's zoning problems were self-inflicted. Our Supreme Court reversed, holding that the self-imposed hardship rule did not apply because plaintiff had not physically altered its property so as to render it unfit for the property's zoning. Our Supreme Court remanded the matter for this Court to consider defendant's challenge to the trial court's award of expert witness fees in Docket No. 282532, which this Court previously deemed unnecessary to address.

A trial court's ruling on a motion for costs pursuant to MCR 2.625 is reviewed for an abuse of discretion, but the trial court's determination of whether a given expense is a taxable cost is reviewed de novo as a question of law. *Guerrero v Smith*, 280 Mich App 647, 670; 761 NW2d 723 (2008). Costs are only recoverable where they are permitted by some statutory authority. *Id*. at 670-671. Here, the statutory authority appears in MCL 600.2164 and MCR 2.625. Under the Court Rule, costs may be taxed in two ways: "by the court on signing the judgment" or "by the clerk as provided in this subrule." MCR 2.625(F)(1). The trial court's final judgment did not include any costs, so the costs at issue must have been taxed pursuant to

the latter method, which requires the party entitled to costs to submit a bill of costs conforming to MCR 2.625(G).

Plaintiff did submit a bill of costs to the court clerk, but the clerk denied those costs for possible violation of MCL 600.2164. Defendant argues that, pursuant to MCR 2.625(F)(4), the trial court was only permitted to review the correctness of the clerk's denial. Defendant further argues that because the clerk acted correctly, the trial court was not permitted thereafter to award costs.

In relevant part, MCL 600.2164(1) states: "No expert witness shall be paid, or receive as compensation in any given case for his services as such, a sum in excess of the ordinary witness fees provided by law, unless the court before whom such witness is to appear, or has appeared, awards a larger sum, which sum may be taxed as a part of the taxable costs in the case." It is well settled that this provision allows expert witnesses to be compensated for their trial preparations even if they did not ultimately testify. See *Peterson v Fertel*, 283 Mich App 232, 240-242; 770 NW2d 47 (2009). Furthermore, under MCL 600.2614(3), only expert *opinion* witnesses are entitled to compensation; the statute does not compensate purely factual witnesses. *Guerrero*, *supra* at 672.

Defendant argues that our Supreme Court has previously interpreted identical statutory language[1] as prohibiting the clerk from taxing costs unless the trial court first authorizes those costs. *Wuerth v Frohlich*, 251 Mich 701, 702-703; 232 NW 373 (1930). We agree that *Wuerth* at least arguably stands for the proposition that MCL 600.2164(1) prohibits the clerk from taxing costs that were not previously authorized by the trial court. And MCR 2.625(F)(4) provides that the "action of the clerk is reviewable . . . but on review only those affidavits or objections that were presented to the clerk may be considered by the court."

However, we need not consider this argument because it is based on the erroneous foundational assertion that, because an appeal to this Court had already been filed in Docket No. 278417, the trial court lacked jurisdiction to consider awarding costs on any *other* basis. MCR 7.208(I) expressly permits the trial court to "rule on requests for costs or attorney fees under MCR 2.403, 2.405, 2.625, or other law or court rule, unless the Court of Appeals orders otherwise." The trial court's order unambiguously indicates that this is precisely what it did. The trial court's order further references MCL 600.2164 and explains that it found the expert witnesses helpful and appropriate and entitled to their fees. Therefore, even if the clerk might arguably not have been permitted to tax costs, the trial court properly did.

Defendant finally argues that the trial court erred in adopting plaintiff's revised bill of particulars in its entirety because that revised bill of particulars included impermissible fees for

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[1] The *Wuerth* Court interpreted 1919 PA 404, which became 1929 CL §14223 and subsequently 1948 CL §617.69, and was replaced by MCL 600.2164(1) by the Revised Judicature Act of 1961 with no modification to the language. As a practical matter, *Wuerth* interpreted the same statute.

experts' assistants or strategy sessions, or at least did not clearly explain that such charges had been excluded. We agree in part.

Nowhere in MCR 2.625 or MCL 600.2164 is there any explicit indication whether the work of an expert's assistant may be taxed as a cost. In direct contrast, MCR 2.626 explicitly permits an award of *attorney* fees to include the "time and labor" of certain legal assistants. Again, no similar provision exists in MCR 2.625 or MCL 600.2164. This suggests that the time and labor of assistants is *not* compensable under MCR 2.625 or MCL 600.2164. However, an expert is entitled to compensation for his or her preparations for testifying. *Mackie v Rowe*, 372 Mich 341, 342-343; 126 NW2d 702 (1964). If an expert witness's preparations for testimony requires the work of assistants, those assistants' labors necessarily constitute taxable "preparation." Nevertheless, only the preparation of *opinion* testimony is taxable. MCL 600.2164(3). Therefore, we agree with the principle impliedly laid out in *Verma v Giancarlo*, unpublished opinion per curiam of the Court of Appeals, Docket No. 208534 (2000), where a panel of this Court suggested that costs could be taxed for expert's assistants hours spent preparing to express an opinion, but not hours spent assembling data.

Additionally, the trial court correctly held that any "conferences with counsel for purposes such as educating counsel about expert appraisals, strategy sessions, and critical assessment of the opposing party's position" are not "properly compensable as expert witness fees." *City of Detroit v Lufran Co*, 159 Mich App 62, 67; 406 NW2d 235 (1987).[2] Furthermore, expert witnesses may not be compensated for any "services" that exceed the scope of what such an expert would normally render. *Id*. Therefore, any time expended by plaintiff's expert witnesses or their assistants not directly necessary to the preparation of opinion testimony intended to be presented in court was not compensable.

Although we agree with the trial court's legal conclusions as to what costs are compensable, our review of the lower court record reveals a lack of factual foundation for the award of costs actually awarded. The trial court properly ordered plaintiff to submit a revised bill of particulars deducting any costs for "time allocated for conferences with counsel for purposes such as educating counsel about expert appraisals, strategy sessions, and critical assessment of the opposing party's position;" along with "an affidavit from each expert that such charges have been deducted in accordance with this ruling." Plaintiff submitted a revised bill of particulars with some experts' charges reduced, but with no explanation as to what specific items were deducted or why. Furthermore, the only invoices or affidavits we have found in the record are attached to the *original* bill of costs. The affidavits contain some variation on "the total fee, including expenses, for the services my staff and I actually performed at trial and in preparation for trial is [some amount]. See attached invoices." The invoices contain numerous entries that are either dubious or vague, such as transportation expenses or "labor."

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[2] The *Lufran* Court interpreted MCL 213.66, but it simultaneously held that the only difference between that statute and MCL 600.2164 is that compensation is mandatory under MCL 213.66 but discretionary under MCL 600.2164. *Id*. at 66.

The trial court correctly held that the party claiming fees has the burden of proving those fees. *Campbell v Sullins*, 257 Mich App 179, 201; 667 NW2d 887 (2003). The trial court also correctly held that plaintiff was entitled to fees in the abstract, and it correctly identified what could be compensated. However, plaintiff has not satisfied its burden of proving the specific fees actually awarded here. The revised bill of particulars, even when read along with the original bill of costs, simply does not contain enough information to permit this Court to evaluate whether those costs include non-compensable charges. The trial court erred in apparently accepting the revised bill of particulars on its face.

The trial court's ruling that plaintiff was entitled to an award of costs to the extent of expenses directly necessary for the preparation of expert witnesses' opinion testimony is affirmed. The trial court's ruling that plaintiff satisfied its burden of proving its entitlement to the costs awarded is reversed. The award of costs is vacated, and the matter is remanded for a determination of what charges were necessary for preparation of opinion testimony and a revised award of costs in conformity with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Stephen L. Borrello
/s/ Alton T. Davis