

ROY ANDERMANN

NO. 21-CA-17

VERSUS

FIFTH CIRCUIT

JOHNNY PATRICK ROUILLIER, ET AL

COURT OF APPEAL

STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT
PARISH OF ST. JAMES, STATE OF LOUISIANA
NO. 33,694, DIVISION "D"
HONORABLE EMILE R. ST. PIERRE, JUDGE PRESIDING

May 26, 2021

HANS J. LILJEBERG
JUDGE

Panel composed of Judges Susan M. Chehardy,
Stephen J. Windhorst, and Hans J. Liljeberg

AFFIRMED IN PART;
REVERSED IN PART; REMANDED.

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LILJEBERG, J.

Plaintiff, Roy Andermann, seeks review of the trial court’s August 20, 2020 judgment, which granted a Motion to Tax Costs filed by defendant/intervenor, UCAR Pipeline, Inc. (“UCAR”). For the following reasons, we affirm in part, reverse in part, and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

In this case arising from a boundary dispute, the trial court rendered a judgment on September 20, 2017, setting a boundary between property owned by plaintiff, Roy Andermann, and defendants, Johnny Rouillier and Lisa Calhoun. The judgment also dismissed the claims of Mr. Andermann and intervenor, St. James Properties, Inc. (“St. James”), to ownership of disputed property located along the boundary between the properties, and assessed all costs against Mr. Andermann and St. James. Mr. Andermann and St. James appealed the trial court’s judgment. This Court affirmed the trial court’s judgment, but also remanded for the trial court to amend its judgment to provide further specifications as to the boundary, in accordance with a particular survey. The Louisiana Supreme Court denied writs. *See Andermann v. Rouillier, et al.*, 18-88 (La. App. 5 Cir. 4/25/19), 271 So.3d 384, *writs denied*, 19-971 (La. 9/24/19), 278 So.3d 978, and 19-981 (La. 9/24/19), 279 So.3d 935.

On June 22, 2020, UCAR filed a Motion to Tax Costs, pursuant to La. C.C.P. art. 1920, La. R.S. 13:4533, and La. R.S. 13:3666, seeking to recover \$49,812.15 in costs and expert witness fees, as follows:

Clerk of Court for the Parish of St. James	\$2,987.65
Clerk of Court for the Fifth Circuit Court of Appeal	\$448.00
Clerk of Court for the Louisiana Supreme Court	\$400.00
Transcript Expenses	\$3,225.00
Expert Fees for Stephen LeBlanc, UCAR’s land man	\$6,746.09

Expert Fees for David Patterson, UCAR’s surveyor	\$31,644.99
Copying and Trial Exhibit Costs	\$4,360.42

In support of its motion, UCAR attached invoices for the costs incurred, an affidavit from the CPA/Chief Financial Officer of the law firm representing UCAR attesting to the accuracy of the invoices, as well as copies of the rulings of the trial court, this Court, and the Louisiana Supreme Court.

Mr. Andermann and St. James filed memoranda in opposition to the Motion to Tax Costs, arguing that the expert fees should not be awarded, because the relevance of an expert’s report and testimony is to be considered when setting expert witness fees and the trial court’s ruling was not based on the testimony of these experts.

The Motion to Tax Costs came for hearing before the trial court on August 10, 2020. The motion was heard by Judge Emile St. Pierre, *pro tempore*, who did not hear the trial on the merits.¹ At the hearing, Judge St. Pierre indicated that he had read the record in this case. There was no testimony at the hearing, only the arguments of counsel. After argument, the court granted UCAR’s Motion to Tax Costs and awarded it the total amount of costs sought in its motion, \$49,812.15.

Immediately after the trial court’s oral ruling, counsel for UCAR stated that it would like to offer, file, and introduce into evidence the exhibits attached to its Motion to Tax Costs. Counsel for Mr. Andermann replied, “they can’t do that after because I would have objected to it, and that’s going to be part of my appeal.” The trial court did not indicate whether he found the exhibits to be admissible and he

¹ Several judges have presided over this case at various points in the litigation. Notably, Judge Alvin Turner, Jr. presided over the six-day trial in this matter, but he recused himself shortly after the trial concluded and did not render a decision on the merits. The case was then transferred to Judge Jessie LeBlanc. After the parties agreed to submit the case on the record and briefs, Judge LeBlanc rendered a judgment on the merits on September 20, 2017. At the time of the hearing on the Motion to Tax Costs, Judge LeBlanc was no longer a district court judge.

did not admit them into evidence; rather, he stated, “[t]hat’s fine, but I took notice of them.”

On August 20, 2020, the trial court signed a written judgment granting the Motion to Tax Costs and ordering that \$49,812.15 in costs be taxed jointly, severally, and *in solido* against Mr. Andermann and St. James. Mr. Andermann appeals this judgment.

LAW AND DISCUSSION

On appeal, Mr. Andermann asserts that the trial court erred by granting UCAR’s Motion to Tax Costs, where there was no evidence introduced to support the costs awarded. He argues that the invoices for the expert fees were not admitted into evidence, but even if they had been, they are insufficient to establish the value of the experts’ services. He further argues that UCAR failed to present any testimony at the contradictory hearing, thereby denying his right to cross-examine the expert witnesses as to the reasonableness of their fees. Mr. Andermann also contends that because Judge St. Pierre was not the judge at the trial on the merits and did not observe the expert witnesses or weigh their testimony, he could not award any expert fees without testimony from the experts regarding their fees.

UCAR responds that the trial court has great discretion in the taxation of costs and that the trial court did not abuse its discretion by awarding the total amount of the costs requested. UCAR argues that Mr. Andermann has not suggested that the Clerk of Court fees, transcript fees, or copying and trial exhibit fees were unreasonable. Rather, his argument pertains solely to the expert fees awarded. UCAR asserts that the record is more than adequate to support the expert fees awarded. It notes that the trial court stated that bringing in the experts to cross-examine them would involve more costs and would be “throwing good money after bad.”

La. C.C.P. art. 1920 states:

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.

The trial court has great discretion in awarding costs, and its assessment of costs will not be disturbed on appeal absent an abuse of discretion. *Rauch-Milliken Intern., Inc. v. Halprin*, 09-723 (La. App. 5 Cir. 12/29/09), 30 So.3d 879, 882.

La. R.S. 13:4533 sets forth the costs to be taxed as follows:

The costs of the clerk, sheriff, witness' fees, costs of taking depositions and copies of acts used on the trial, and all other costs allowed by the court, shall be taxed as costs.

In the present case, the trial court's September 20, 2017 judgment ordered that "[a]ll costs shall be assessed against Roy Andermann and St. James Properties, Inc." With regard to the award of costs for Clerk of Court fees, transcripts, copies, and trial exhibits, Mr. Andermann has made no allegation that UCAR is not entitled to these costs on the grounds that the amounts were inaccurate or excessive. Rather, he challenges them on the grounds that the exhibits supporting these costs were not admitted into evidence.

Evidence not properly and officially offered and introduced cannot be considered, even if it is physically placed in the record. *Denoux v. Vessel Mgmt. Services, Inc.*, 07-2143 (La. 5/21/08), 983 So.2d 84, 88. However, we note that counsel for UCAR attempted to introduce the exhibits supporting its motion into evidence, including the invoices for its costs. After counsel for Mr. Andermann complained that it was too late for the exhibits to be admitted, the trial court did not admit them. However, based on our review of the proceeding, we find that UCAR's request for admission of these exhibits should have been considered.

In *Kim v. Kim*, 07-318 (La. App. 5 Cir. 10/30/07), 970 So.2d 1158, 1164, after the plaintiff rested his case, defendant's counsel moved for a directed verdict on the grounds that no evidence had been submitted into the record. Counsel for the plaintiff immediately apologized and asked to admit his exhibits into evidence, but the trial court denied the request and granted an involuntary dismissal of the plaintiff's case. On appeal, this Court found that the trial court abused its discretion in refusing to allow the plaintiff to introduce evidence into the record after he rested his case. This Court noted that although the normal order of trial under La. C.C.P. art. 1632 indicates that the plaintiff should have moved to introduce his exhibits into evidence prior to resting his case, the record showed that he moved to introduce them shortly after. This Court, in the interest of justice, remanded the case for the trial judge to allow the plaintiff to introduce his exhibits. *Kim*, 970 So.2d at 1164.

In the present case, UCAR moved to introduce its exhibits in support of its Motion to Tax Costs immediately after the trial court's verbal ruling and prior to the signing of a written judgment. The trial court should have considered whether the documents were admissible and, if so, admitted them into evidence. Because the trial court did not admit into evidence any exhibits supporting UCAR's request for the costs of the Clerk of Court fees, transcripts, copies, and trial exhibits, there was an insufficient basis upon which to award the amount of these costs.

Accordingly, we reverse the trial court's ruling awarding costs for the Clerk of Court fees, transcripts, copies, and trial exhibits. However, in the interest of justice, we remand for the trial court to allow UCAR to introduce its exhibits, to decide whether these exhibits are admissible, and to render a decision on these costs based on the evidence.

We now turn to the award of expert fees. The procedure for taxing expert fees is set forth in La. R.S. 13:3666, in pertinent part, as follows:

- A. Witnesses called to testify in court only to an opinion founded on special study or experience in any branch of science, or to make scientific or professional examinations, and to state the results thereof, shall receive additional compensation, to be fixed by the court, with reference to the value of time employed and the degree of learning or skill required.
- B. The court shall determine the amount of the fees of said expert witnesses which are to be taxed as costs to be paid by the party cast in judgment either:
 - (1) From the testimony of the expert relative to his time rendered and the cost of his services adduced upon the trial of the cause, outside the presence of the jury, the court shall determine the amount thereof and include same.
 - (2) By rule to show cause brought by the party in whose favor a judgment is rendered against the party cast in judgment for the purpose of determining the amount of the expert fees to be paid by the party cast in judgment, which rule upon being made absolute by the trial court shall form a part of the final judgment in the cause.

Experts are entitled to reasonable compensation for their time in court and for work done in preparation for trial. *Reynolds v. Louisiana Department of Transportation*, 15-1304 (La. App. 1 Cir. 4/13/16), 194 So.3d 56, 60. However, the amount actually charged by the expert does not determine the amount to be taxed as costs. *Yuspeh v. Koch*, 02-1179 (La. App. 5 Cir. 5/28/03), 848 So.2d 96, 98, *writs denied*, 03-1134 (La. 6/27/03), 847 So.2d 1277, and 03-1144 (La. 6/27/03), 847 So.2d 1279; *Wampold v. Fisher*, 01-808 (La. App. 1 Cir. 6/26/02), 837 So.2d 638, 640. Factors to be considered by the trial judge in setting expert witness to be taxed as costs include time spent testifying, time spent in preparatory work for trial, time spent away from regular duties while waiting to testify, the extent and nature of the work performed, the knowledge, attainments and skill of the expert, the helpfulness of the expert's report and testimony to the trial court, the amount in controversy, the complexity of the problem addressed by the expert, and the awards in similar cases. *Yuspeh*, 848 So.2d at 98-99.

When setting expert fees and related costs for in-court time, such as testimony and depositions submitted at trial, the trial court may rely upon its own in-court observations and experiences, without further proof. *Wingfield v. State, ex rel. Dept. of Transp. and Development*, 03-1740 (La. App. 1 Cir. 5/14/04), 879 So.2d 766, 770; *Wampold*, 837 So.2d at 640. However, for work done or expenses incurred outside the courtroom, the mover must provide competent and admissible evidence. Unless the parties stipulate to the costs of the out-of-court work, the expert must testify at the trial, or at a subsequent rule to tax costs, and be subject to cross-examination. *Wingfield*, 879 So.2d at 770; *Wampold*, 837 So.2d at 640.

In this case, the trial court taxed the full amount of the expert fees requested by UCAR against Mr. Andermann and St. James, which included fees for in-court and out-of-court work. With regard to the in-court expert fees, the trial judge who heard the Motion to Tax Costs is not the judge who presided over the trial and personally observed the testimony of the experts. However, the trial judge stated at the hearing that he had read the record and that the record “amply supports” UCAR’s request for costs.

Although the trial judge who observed the experts testifying at trial would have been in a better position to set the in-court fees based on his first-hand observations, this was not possible since he recused himself at the conclusion of trial. We find no error in the trial court’s decision to award expert fees for in-trial time based on its review of the record. However, the trial court did not indicate what portion of the costs awarded was for in-court expert fees. Accordingly, we must remand for the trial court to determine the amount of the expert fees awarded for in-court time.²

² See also, *Wingfield*, 879 So.2d at 771, in which the First Circuit reviewed the record and determined the reasonableness of the experts’ in-court fees, where the trial judge who observed the experts testifying at trial and also heard the rule to tax costs was no longer a district court judge.

With regard to the out-of-court expert fees, the party seeking to recover such fees bears the burden of proving the reasonable value of the expert witness' out-of-court work. *Ryan v. Case New Holland, Inc.*, 51,062 (La. App. 2 Cir. 12/22/16), 211 So.3d 611, 628; *Wingfield*, 879 So.2d at 770. The law is clear that if the parties do not stipulate to the specifics and costs of an expert's out-of-court work, the expert must testify at a contradictory hearing on the rule to set costs, subject to cross-examination, in order to award such expert fees. *McDougald v. St. Francis North Hosp., Inc.*, 50,079 (La. App. 2 Cir. 10/14/15), 179 So.3d 715, 718; *Wingfield*, 879 So.2d at 770; *Wampold*, 837 So.2d at 640.

At the hearing in this matter, UCAR's experts were not called to testify and thus, were not subject to cross-examination. Because there were no stipulations and the experts did not testify as to their out-of-court fees, there was an insufficient basis for the trial court to award the expert fees requested for out-of-court work.

UCAR asserts that if this Court finds the evidence insufficient to support the award of costs for out-of-court expert fees, this Court should remand to give it an opportunity to present additional evidence, not reverse the award. In *Conforto v. Toscano*, 17-20 (La. App. 5 Cir. 12/13/17), 234 So.3d 252, this Court affirmed the trial court's denial of a request for expert fees for out-of-court work, where the expert did not testify at a contradictory hearing and was not subject to cross-examination. This Court did not remand the matter for further evidence or give the mover a second opportunity to meet his burden of proof.

In the present case, UCAR had the opportunity to call its experts to testify at the contradictory hearing on costs, but it failed to do so. Accordingly, because UCAR did not present testimony from the experts regarding their out-of-court fees at the contradictory hearing, we find that it did not meet its burden of proof. Therefore, we reverse the award of costs for UCAR's expert fees for out-of-court work.

DECREE

For the foregoing reasons, we reverse the trial court's August 20, 2020 judgment insofar as it taxed costs for Clerk of Court fees, transcripts, copies, and trial exhibits against Mr. Andermann, but we remand for the trial court to allow UCAR to introduce its exhibits, to decide whether these exhibits are admissible, and to render a decision on these costs based on the evidence. We affirm the trial court's decision to award in-court expert fees, but we remand for the trial court to determine the amount of these fees. Finally, we reverse the trial court's judgment insofar as it awarded costs for out-of-court expert fees.

AFFIRMED IN PART;
REVERSED IN PART; REMANDED

SUSAN M. CHEHARDY
CHIEF JUDGE

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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **MAY 26, 2021** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CURTIS B. PURSELL
CLERK OF COURT

21-CA-17

E-NOTIFIED

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