

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

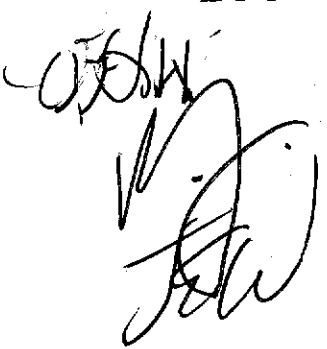
FIRST CIRCUIT

NO. 2013 CA 0186

BYARD EDWARDS, ET AL.

VERSUS

LOUISIANA FARM BUREAU MUTUAL INSURANCE
COMPANY, ET AL.



Judgment Rendered: DEC 27 2013

On Appeal from
21st Judicial District Court,
In and for the Parish of Tangipahoa,
State of Louisiana
Trial Court No. 2007-0000750

The Honorable M. Douglas Hughes, Judge Presiding

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BEFORE: WHIPPLE, C.J., WELCH, AND CRAIN, JJ.

CRAIN, J.

The defendant appeals a judgment awarding costs to the plaintiff. We amend and affirm the judgment as amended.

FACTS AND PROCEDURAL HISTORY

Byard Edwards, Jr. instituted this proceeding against his uninsured motorist insurer, Louisiana Farm Bureau Mutual Insurance Company, seeking to recover damages arising out of an automobile accident. Edwards sought recovery for personal injuries, exemplary damages, and penalties and attorney's fees pursuant to Louisiana Revised Statutes 22:1892 and 22:1973. The claims for personal injuries and exemplary damages were tried before a jury and resulted in a verdict in favor of Edwards in the total amount of \$820,000.00, which included awards for general, special, and exemplary damages. The trial court considered the bad faith claim for penalties and attorney's fees in a separate trial and ruled that Farm Bureau did not violate Section 1892 or 1973. A single judgment was signed that set forth the trial court's judgment on the jury verdict and its denial of the bad faith claim. After deduction of the amount of a pre-suit tender by Farm Bureau, the net amount of the judgment in favor of Edwards and against Farm Bureau was \$410,000.00, plus legal interest. The judgment further provided that court costs would be determined at a separate hearing by the court.

On an appeal of that judgment, this court vacated the award for exemplary damages based upon a finding that Farm Bureau's insurance policy did not provide coverage for those damages. In all other respects, the judgment was affirmed. *See Edwards v. Louisiana Farm Bureau Mutual Insurance Company*, 12-1495 (La. App. 1 Cir. 4/26/13), 2013 WL 1790996 (unpublished opinion), *writ denied*, 13-1175 (La. 8/30/13), ____ So. 3d ____.

While that appeal was pending, Edwards filed a Rule to Fix Costs in the trial court seeking to recover costs in the total amount of \$29,551.50. Edwards' motion was later supported by an itemized summary of the costs together with invoices

and cancelled checks confirming the figures identified in the summary. Farm Bureau opposed numerous items sought through the motion, including charges for depositions that were not used at trial, expert fees incurred for attorney conferences, attorney travel expenses for a deposition, a private investigator fee for locating and serving subpoenas on witnesses, and a charge associated with a medical test conducted on the plaintiff. Farm Bureau also asserted that the fees for two of Edwards' experts were unreasonable, and that no fee should be awarded for an expert who testified at the trial of the bad faith claim because Edwards did not prevail on that claim.

At the hearing of the motion, Edwards withdrew the charge associated with the medical test in the amount of \$302.46. The trial court did not individually address each of the remaining cost items but stated that it would "adjust the recovery a little bit" by reducing the total amount requested by \$1,500.00. The resulting amount taxed by the trial court as costs to be paid by Farm Bureau was \$27,748.54.¹ Farm Bureau appealed the judgment and contends on appeal that the trial court abused its discretion in granting the award.²

LAW AND ANALYSIS

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. La. Code Civ. Proc. art. 1920. Pursuant to Article 1920, the trial court may cast costs among the parties in any equitable manner, and this article has been liberally interpreted as

¹ We note that \$29,551.50 (total costs submitted) less \$302.46 (withdrawn) and \$1,500.00 (reduction) equals \$27,749.04, which is slightly less than the judgment amount. Given the result reached in this case, we do not address this difference between the court's oral reasons and the signed judgment.

² The judgment refers to the costs awarded as "expert costs," which suggests a partial judgment for expert fees only and prompted a rule to show cause from this court on why the appeal should not be dismissed pursuant to Louisiana Code of Civil Procedure articles 1911, 1915 and 1918. However, based upon the evidentiary record, the parties presented evidence of costs beyond expert fees, and it is evident that the judgment addresses all disputed aspects of the plaintiff's claim for costs. We therefore recall the rule to show cause and maintain the appeal. By separate order, the trial court denied a motion by Farm Bureau seeking an award of costs incurred in defense of the bad faith claim. That order is the subject of a separate appeal, *Edwards v. Louisiana Farm Bureau Mutual Insurance Company*, 2013 CA 0187.

granting broad discretion to the trial court. *Gauthier v. Wilson*, 04-2527 (La. App. 1 Cir. 11/4/05), 927 So. 2d 383, 390, *writ denied*, 05-2402 (La. 3/31/06), 925 So. 2d 1258. Upon review, an appellate court will not disturb the trial court's fixing of costs absent an abuse of the sound discretion afforded the trial court. *Gauthier*, 927 So. 2d at 390.

However, the only costs which can be taxed against a litigant are those specifically provided for by statute. *State Through Department of Highways v. Salemi*, 249 La. 1078, 1082, 193 So. 2d 252, 253 (1966); *Town of Walker v. Stafford*, 01-2188 (La. App. 1 Cir. 10/18/02), 833 So. 2d 349, 356, *writs denied*, 03-0441, 03-0524 (La. 4/25/03), 842 So. 2d 400, 405. Louisiana Revised Statute 13:4533 provides, "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." Fees for expert witnesses are addressed in Louisiana Revised Statute 13:3666A, which mandates that such witnesses "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." Under Louisiana Revised Statutes 13:3666 and 13:4533, as well as Article 1920, the trial court has great discretion in awarding costs, including expert witness fees, deposition costs, exhibit costs, and related expenses. *Suprun v. Louisiana Farm Bureau Mutual Insurance Company*, 09-1555 (La. App. 1 Cir. 4/30/10), 40 So. 3d 261, 267.

Although the trial court did not identify the cost items that were the subject of the general reduction of \$1,500.00, we will conduct an item-by-item review of the contested costs to determine which are properly taxable as costs at the discretion of the trial court. Based upon that determination, we will then review the net award by the trial court under the abuse of discretion standard. *See Suprun*, 40 So. 3d at 267.

A. Depositions

Farm Bureau first opposes the award of charges associated with certain depositions that were not used at trial, including the depositions of Dr. Cary Rostow, Dr. Marc Hines with Ottumwa Neurological Associates, Jeremy Hoffpauir, Dr. Gary Wimbish, Dr. Devin Bianchini, Dr. Michael Becker, and Dr. Donald Dietze. Edwards does not dispute that many of these depositions were not introduced at trial, but he contends that the costs were still taxable for the following reasons: (1) Dr. Rostow was mentioned by other experts and his records were a defense exhibit, (2) Dr. Hines possessed knowledge of the plaintiff's condition and was referenced by several experts, (3) Hoffpauir and Dr. Bianchini were called to testify by the defendant, and (4) live testimony was "intended from" Dr. Wimbish and he was listed on the defendants' witness list.

In order for the costs of depositions to be taxable, they must fall within the purview of Section 4533, which requires that the depositions be "used on the trial." *See also Gauthier*, 927 So. 2d at 387. The introduction and acceptance in evidence of the depositions constitutes "used on the trial." *Succession of Franz*, 242 La. 875, 884, 139 So.2d 216, 219 (1962). If a deposition is not so used at trial, the cost of that deposition, including the deponent's fee for giving the deposition, may not be taxed as costs. *Gauthier*, 927 So. 2d at 387; *Moran v. Harris*, 93-2227 (La. App. 1 Cir. 11/10/94), 645 So. 2d 1248, 1250.

The depositions of Dr. Rostow, Dr. Hines, Hoffpauir, Dr. Wimbish, and Dr. Bianchini were not introduced at trial and, therefore, were not "used on the trial" as required by Section 4533. The reference to those witnesses by other experts at trial or the admission into evidence of medical records reflecting their treatment of Edwards is not sufficient to bring their depositions within the purview of Section 4533. *See Gauthier*, 927 So. 2d at 389 (reference to deposition by other witnesses during trial does not satisfy the requirement that the deposition be "used on the

trial”). Accordingly, the charges associated with those depositions in the total amount of \$3,315.20 are not taxable as costs.

The depositions of Dr. Becker and Dr. Dietze were introduced into evidence but not during the trial. Edwards introduced these depositions in opposition to several pretrial motions, including a “Daubert Motion” whereby Farm Bureau sought to exclude the trial testimony of Dr. Dietze. Edwards prevailed on the Daubert Motion, and Dr. Dietze was permitted to testify at trial.³

Pretrial motions to determine whether a witness qualifies as an expert or whether his methodologies are reliable are authorized by Louisiana Code of Civil Procedure article 1425F. Subsection F(8) provides that “all or a portion of the court costs, including reasonable expert witness fees and costs, incurred when a motion is filed in accordance with this Paragraph may, in the discretion of the court, be assessed to the non-prevailing party as taxable costs at the conclusion of the hearing on the motion.” The language of this subsection is sufficiently broad to permit the trial court to tax the cost of the depositions of Dr. Becker and Dr. Dietze, as the depositions were used to present the experts’ testimony at the hearing in lieu of their personal attendance. The costs incurred to present the experts’ testimony in this manner may be assessed pursuant to Article 1425F(8).

We further find that the statute’s requirement that such costs be taxed “at the conclusion of the hearing” does not require assessment of the costs immediately upon conclusion of the pretrial hearing. A trial court may defer any such assessment until the conclusion of the trial when rendering a judgment as to all court costs. See *Wingfield v. State ex rel. Department of Transportation and Development*, 03-1740 (La. App. 1 Cir. 5/14/04), 879 So. 2d 766, 769-770 (affirming an award for “Daubert hearing costs” assessed after the trial on the

³ The “Daubert” reference is to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).

merits). The trial court could properly include these costs in the assessment of court costs against Farm Bureau.

B. Expert Fees for Attorney Conferences

Farm Bureau also contests the award of fees paid to Dr. Susan Andrews and Dr. Dietze for attorney conferences in the total amount of \$375.00. While an expert may receive fees for preparatory work, this is limited to the work done in preparation for trial, not consultations that only assist the attorney in his preparation for trial. *Wingfield v. State ex rel. Department of Transportation and Development*, 03-1740 (La. App. 1 Cir. 5/14/04), 879 So. 2d 766, 770; *Smith v. Roussel*, 00-1672 (La. App. 1 Cir. 6/22/01), 808 So. 2d 726, 731. For work done or expenses incurred outside the courtroom, such as time spent gathering facts in preparation for trial testimony and time spent away from regular duties, the plaintiff in rule must submit competent and admissible evidence. *Wingfield*, 879 So. 2d at 770; *Wampold v. Fisher*, 01-0808 (La. App. 1 Cir. 6/26/02), 837 So. 2d 638, 640. Unless the parties stipulate to the specifics and costs of the out-of-court work, the expert must testify at the trial, or a subsequent hearing on the rule to tax costs, and be subject to cross-examination. The mere assertions of an attorney and the expert via a submitted bill, even in conjunction with an expert's affidavit attesting to the correctness and truth of the billing statement, are not sufficient to prove the out-of-court work. *Wingfield*, 879 So. 2d at 770; *Wampold*, 837 So.2d at 640.

Edwards' evidence in support of the fees paid for these conferences was limited to the summary of the payment, indicating only "attorney conference" for Dr. Andrews and "conference" for Dr. Dietze, and the cancelled checks issued in payment of the fees. Without more evidence of the purpose of those conferences, the trial court had no basis to determine that the charges were for time expended by the experts in preparation for trial, which would be recoverable as costs, or for time in consultations that only assist the attorney in his preparation for trial, which

would not be recoverable costs. Therefore, these fees in the amount of \$375.00 were not properly taxable as costs based upon the evidence presented at the hearing. See *Wingfield*, 879 So. 2d at 771-772; *Wampold*, 837 So.2d at 641.

C. Travel Expenses for Deposition

Travel related expenses totaling \$411.06 are included among the costs Edwards submitted to the trial court. While not disputing that these charges were incurred by Edwards' counsel to attend the perpetuation deposition of a defense expert, Farm Bureau contends that such travel expenses may not be assessed as costs. For support, Farm Bureau cites *Succession of Franz*, 242 La. 875, 880, 139 So. 2d 216 (1962), wherein the supreme court held that an attorney's travel expenses incurred to attend an out-of-state deposition subsequently used at trial were not properly taxable as costs under Louisiana Revised Statute 13:4533. *Succession of Franz*, 139 So. 2d at 219.

Edwards relies upon *Madison v. Travelers Ins. Co.*, 308 So. 2d 784 (La. 1975), which involved a motion for protective order filed by a plaintiff after a defendant noticed the deposition of a defense witness in California shortly before trial. Under the particular circumstances of that case and in the context of a motion for protective order, the trial court granted the motion and ordered the defendant to prepay the reasonable and necessary expenses for travel, lodging, and meals for opposing counsel to attend the deposition of this and another witness if the depositions were outside of Orleans Parish. *Madison*, 308 So. 2d at 785. The supreme court held that the trial court's order was authorized by former Louisiana Code of Civil Procedure article 1452 which governed discovery and permitted the trial court, upon a showing of good cause, to enter any order required "to protect a party from annoyance, embarrassment, oppression or undue expense."⁴ *Madison*, 308 So. 2d at 785-786. Emphasizing that such orders are discretionary and depend upon the circumstances of each case, the supreme court held that the trial court's

⁴ See now La. Code of Civ. Pro. art. 1426.

finding of good cause to enter the order was not an abuse of discretion. *Madison*, 308 So. 2d at 787-788. The court also noted that any such costs paid by the defendant would be taxed as costs pursuant to Louisiana Code of Civil Procedure articles 1920 and 5188. *Madison*, 308 So. 2d at 788.

We do not interpret *Madison* as authorizing the assessment of travel expenses incurred to attend a distant deposition as recoverable costs under Article 1920 in the absence of a protective order requiring that such expenses be prepaid by the party noticing the deposition. The travel expenses in the present case were not the subject of a protective order and were incurred in the ordinary course of attending a deposition without any formal objection. Under these circumstances, the travel expenses of \$411.06 were not properly taxable as court costs. *See Succession of Franz*, 139 So. 2d at 219.

D. Private Investigator Fee Appointed to Serve Subpoenas

Farm Bureau next contends that the fee paid by Edwards to hire a private investigator to locate and serve witnesses with subpoenas for trial was not taxable as court costs. Pursuant to a motion filed by Edwards, the trial court appointed a private process server to serve trial subpoenas on witnesses that Edwards had been unable to serve through the sheriff's office. Edwards submitted as taxable costs the fee of \$645.00 paid to the private investigator for locating and serving the witnesses. Farm Bureau argues that this expense does not fit within the specific items enumerated in Louisiana Revised Statute 13:4533 and that no other positive law authorizes this sum to be taxed as costs.

Although Section 4533 provides that the "costs of the . . . sheriff" shall be taxed as costs, the statute does not authorize taxing the fee of a private investigator appointed by the court to serve witness subpoenas. Edwards counters that the fee was taxable pursuant to general language in Section 4533 permitting "all other costs allowed by the court." However, in adhering to the rule that the only costs that can be taxed against a litigant are those specifically provided for by statute,

courts have not cited or construed the language of Section 4533 as permitting an award of cost for an expense not specifically identified and authorized by statute. *See Salemi*, 249 La. at 1082, 193 So. 2d at 254 (holding that “no statute . . . provides that the fee of an expert who is employed and paid by a litigant for work preparatory to trial, but who is not called to testify in the case, may be considered costs and taxed as such”); *Degruipe v. Houma Courier Newspaper Corp.*, 00-0229 (La. App. 1 Cir. 3/28/02), 815 So. 2d 1074, 1081, *writ denied*, 02-1202, 02-1179 (La. 6/21/02), 819 So. 2d 342, 345 (recognizing that the “following are litigation costs that would not be allowable as court costs because they are outside the scope of [La. R.S.] 13:4533: duplication costs of various documents and medical reports not used on the trial, postage, and telephone charges, as well as plaintiff’s food and lodging during the trial”).

Although a private process server appointed to render service is performing the same service obligation usually performed by the sheriff, the expense of the private process server is not identified as a recoverable cost by Section 4533 or any other statute. The court’s ability to tax an expense as court cost is limited to those expenses specifically provided for by statute. *Salemi*, 249 La. at 1082, 193 So. 2d at 253; *Town of Walker*, 833 So. 2d at 356. We recognize the inequity of a party’s inability to recover the cost of a private process server whose services were rendered necessary only after the sheriff, whose fee is a recoverable cost, was unable to accomplish the service; however, that inequity is a matter for legislative correction. The fee of \$645.00 paid by Edwards to a private investigator to locate and serve witnesses with subpoenas for trial is not taxable as court costs.

E. Expert Fees

Farm Bureau argues that Dr. Dietze’s expert fee of \$3,500.00 and Dr. William George’s fee of \$2,500.00 are excessive and should be reduced to \$1,500.00 each, and that Tim Pujol’s fee of \$1,500.00 should be completely denied

because he testified for Edwards at the trial of his bad faith claim that was denied by the trial court.

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. La. R.S. 13:3666A. Experts are only entitled to reasonable fees and related costs. Neither the agreement between the hiring party and the expert, nor the bill submitted to the court, binds the court's decision. *Wingfield*, 879 So. 2d at 770. Factors to be considered by the trial court in setting expert fees and related costs include the time spent testifying at trial, time spent in preparatory work for trial, time spent away from regular duties while waiting to testify, the extent and nature of work performed, and the knowledge, attainments, and skill of the expert. Additional considerations include the helpfulness of the expert's testimony to the court, the amount in controversy, the complexity of the problem addressed by the expert, and awards to experts in similar cases. *Wingfield*, 879 So. 2d at 770. In 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*, 879 So. 2d at 770.

A trial court has great discretion in fixing expert witness fees. *State, Department of Transportation and Development v. Restructure Partners, L.L.C.*, 07-1745 (La. App. 1 Cir. 3/26/08), 985 So. 2d 212, 233, *writ denied*, 08-1269 (La. 9/19/08), 992 So. 2d 937. On appeal, the amount and fixing of expert fees will not be disturbed in the absence of an abuse of discretion. *Samuel v. Baton Rouge General Medical Center*, 99-1148 (La. App. 1 Cir. 10/2/00), 798 So. 2d 126, 132.

Dr. Dietze was accepted as an expert in the fields of neurosurgery and neurology. He testified about the diagnosis, treatment and nature of Edwards'

traumatic brain injury, which Dr. Dietze attributed to the subject accident, and the impact of that injury and related complications on Edwards' cognitive function and his ability to practice as a trial attorney. A significant amount was in controversy in the case, and the etiology and extent of Edwards' neurological condition were complex issues at the core of the dispute between the parties. Dr. Dietze was qualified in two highly specialized fields, and his testimony bore directly on those critical issues. Under these circumstances, we find that a fee of \$3,500.00 for Dr. Dietze's in-court time was within the discretion of the trial court.

Dr. George was accepted as an expert in the field of toxicology and provided testimony relevant to Edwards' claim for exemplary damages based upon the other driver's use of cocaine prior to the accident. Defense counsel stated on the record that he and Dr. George had "known each other a long time" and that he had "no question about [Dr. George's] expertise as a toxicologist." Dr. George explained the effects of cocaine on a person's central nervous system, the half-life of the drug, and the information that could be gathered from a drug screen undergone by the other driver after the accident. Given the complexity of his testimony, we find that a fee of \$2,500.00 for Dr. George's in-court time was within the discretion of the trial court.

Farm Bureau also asserts that no fee should have been awarded to Pujol, an attorney who testified as an expert on behalf of Edwards at the trial of the bad faith claim. Farm Bureau does not challenge the fee as excessive but contends that the trial court should not have taxed Farm Bureau with any fee for Pujol because Edwards did not prevail on his bad faith claim. However, a substantive judgment in favor of the party requesting the award on each particular issue addressed by each particular expert witness is not required to tax the fees as costs. Rather, all that is required is a substantive judgment in favor of the party requesting the award and that the expert witness fees were reasonably necessary to the presentation of that party's case. *Restructure Partners, L.L.C.*, 985 So.2d at 233 (expert witness

fees could be taxed against the defendant although the plaintiff did not prevail on the particular claims that were the subject of the experts' testimony). Therefore, the trial court had the discretion to tax Pujol's expert witness fee to Farm Bureau.⁵

CONCLUSION

Based upon the evidence presented to the trial court, we find the following costs submitted by Edwards are not taxable against Farm Bureau: (1) \$3,315.20 in costs and fees for depositions that were not used at trial; (2) \$375.00 in fees for pre-trial conferences between experts and counsel; (3) \$411.06 for counsel's travel expenses to a deposition; and (4) \$645.00 paid to a private investigator to locate and serve witnesses with subpoenas. These sums total \$4,746.26, so the trial court erred by reducing the total amount requested by Edwards by only \$1,500.00. We amend the judgment to tax costs against Farm Bureau in the total amount of \$24,502.78. Costs of this appeal are assessed seventy-five percent to Farm Bureau and twenty-five percent to Edwards.

AMENDED AND AFFIRMED AS AMENDED.

⁵ Farm Bureau does not specifically contest the fee taxed for any other expert witness but does generally submit that this court should exercise its discretion and assess the other expert fees listed by the plaintiff to ensure they are reasonable as well. We find the other fees submitted by Edwards for the plaintiff's expert witnesses to be reasonable and within the discretion of the trial court.