

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

*JLW*

NUMBER 2014 CA 0935

MARGAREE HANEY

VERSUS

DR. JANET E. LEWIS

Judgment Rendered: DEC 23 2014

*KUHN, J CONCURS & ASSIGNS REASONS*

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Appealed from the  
19<sup>th</sup> Judicial District Court  
In and for the Parish of East Baton Rouge, Louisiana  
Trial Court Number 596,837

Honorable Janice Clark, Judge

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Janie Languirand Coles  
Garrett S. Callaway  
Carey M. Nichols  
Baton Rouge, LA

Attorneys for Appellants  
Defendants – Janet E. Lewis, M.D.  
and Louisiana Medical Mutual  
Insurance Company

Leonard Cardenas, III  
Baton Rouge, LA

Attorney for Appellee  
Plaintiff – Margaree Haney

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BEFORE: KUHN, PETTIGREW, AND WELCH, JJ.

*Pettigrew, J. DISSENTS and assigns REASONS*

**WELCH, J.**

Defendants, Dr. Janet Lewis and Louisiana Medical Mutual Insurance Company, appeal a judgment awarding costs of a lawsuit to plaintiff, Margaree Haney. We affirm.

### **BACKGROUND**

Some of the factual background for the present dispute was set forth in a prior opinion by this court, **Haney v. Lewis**, 2013-2053 (La. App. 1<sup>st</sup> Cir. 9/8/14)(unpublished opinion), writs denied, 2014-2087, 2014-2089 (La. 11/26/14), \_\_\_ So.3d \_\_\_. On November 18, 2010, Mrs. Haney filed a medical malpractice lawsuit against Dr. Lewis and later added Dr. Lewis' insurer, Louisiana Medical Mutual Insurance Company, as a defendant. A three-day jury trial was held. At the conclusion of the trial, the jury returned a verdict finding that Dr. Lewis was not negligent in her treatment of Mrs. Haney. The trial court entered judgment in accordance with the jury verdict on May 17, 2013, and dismissed Mrs. Haney's lawsuit, with prejudice, at her costs.

Thereafter, Mrs. Haney filed a motion for a JNOV and a motion for a conditional new trial, asking that the trial court conditionally grant a motion for a new trial in the event it granted her motion for JNOV and that ruling was reversed on appeal. On October 10, 2013, the trial court signed a judgment granting in part Mrs. Haney's motion for JNOV, setting aside and vacating the jury verdict and the judgment for defendants, and entering judgment in favor of Mrs. Haney. The judgment awarded damages to Mrs. Haney and conditionally granted the motion for new trial. On October 18, 2013, the trial court signed an amended judgment incorporating all of the rulings from the October 10, 2013 judgment, and entering judgment against defendants in the amount of \$100,000.00 and against the Louisiana Patient's Compensation Fund in the amount of \$578,574.36. Both judgments are silent as to costs.

On October 24, 2013, Mrs. Haney filed a motion to tax costs.<sup>1</sup> Mrs. Haney attached numerous exhibits to her motion in support of her claim. A hearing on the motion was held on December 2, 2013. At the hearing, defendants did not dispute or challenge the amount of the costs claimed by Mrs. Haney. Instead, defendants argued, in conformity with its opposition to the motion to tax costs, that the trial court had dismissed Mrs. Haney's lawsuit at her costs in the May 17, 2013 judgment rendered in accordance with the jury's verdict. Defendants submitted that Mrs. Haney had never asked that earlier judgment awarding costs against her be modified or revised, and insisted that the later judgments did not reflect that the entire judgment from the trial on the merits had been set aside.

On March 12, 2014, the trial court entered judgment taxing costs against defendants. Defendants filed this suspensive appeal of that judgment. In their brief to this court, defendants contend that the trial court abused its discretion in taxing costs to defendants while the appeal of the trial court's judgments granting the JNOV and conditional motion for a new trial were pending. Defendants argued that if they are required to pay the costs, and this court reversed the JNOV and the trial court's conditional grant of the motion for a new trial, they would have to recoup the costs from Mrs. Haney, which would cause them an undue burden. Defendants insisted that the trial court should have at least deferred assessing costs until the issues presented in their appeal of the trial court's judgment had been resolved.

On September 8, 2014, this court reversed the trial court's grant of the JNOV in favor of Mrs. Haney, but affirmed the judgment to the extent that it conditionally granted the motion for a new trial. Specifically, we found no abuse of the trial court's discretion in granting the motion for a new trial on the basis of

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<sup>1</sup> According to defendants, their appeal of the trial court's judgments granting Mrs. Haney's motion for a JNOV and a conditional motion for a new trial was filed on October 28, 2013.

jury confusion. Accordingly, we remanded the case to the trial court for further proceedings consistent with our opinion. Mrs. Haney and defendants took writs to the Louisiana Supreme Court. On November 26, 2014, the court denied both writ applications. **Haney v. Lewis**, 2014-2087, 2014-2089 (La. 11/26/14), \_\_\_ So.3d \_\_\_.

### COSTS

At the time the trial court cast defendants with costs, the trial court had entered judgment in favor of Mrs. Haney on her negligence claim. Accordingly, costs were assessed by the trial court in accordance with the general rule that a party cast in judgment should be cast with costs. See **Steadman v. Georgia-Pacific Corporation**, 95-1463 (La. App. 1<sup>st</sup> Cir. 4/6/96), 672 So.2d 420, 428, writ denied, 96-1494 (La. 9/20/96), 679 So.2d 440.

Under La. R.S. 13:3666, La. R.S. 13:4533, and La. C.C.P. art. 1920, a trial court has great discretion in awarding costs, including expert witness fees, deposition costs, exhibit costs, and related expenses. Upon review, a trial court's assessment of costs can be reversed by this court only upon a showing of an abuse of discretion. **Suprun v. Louisiana Farm Bureau Mutual Insurance Company**, 2009-1555 (La. App. 1<sup>st</sup> Cir. 4/30/10), 40 So.3d 261, 267.

In this appeal, defendants argue that the trial court abused its discretion by ruling on the motion to tax costs while its appeal was pending in this court. However, pursuant to La. C.C.P. art. 2088(A)(10), a trial court retains jurisdiction to set and tax costs and expert witness fees even after the jurisdiction of the trial court over all matters reviewable under the appeal is divested and the jurisdiction of the appellate court attaches. See **Price v. City of Ponchatoula Police Department**, 2012-0727 (La. App. 1<sup>st</sup> Cir. 12/21/12), 111 So.3d 1053, 1055. The mere act of setting and taxing costs while an appeal is pending does not, in our view, constitute an abuse of the trial court's discretion.

Furthermore, while it is a general rule that the party cast in judgment should be cast with costs, costs may be assessed in any equitable manner. See La. C.C.P. art. 1920; **Steadman**, 672 So.3d at 428. In our prior opinion in this matter, we upheld the trial court's ruling that Mrs. Haney was entitled to a new trial because jury confusion may have led the jury to absolve defendants from liability in the first trial. **Haney**, 2013-2053 at pp. 12-13. Under these circumstances, we do not find the taxing of costs of the first trial to defendants to be inequitable. Accordingly, we decline to reverse the trial court's award of costs to Mrs. Haney.

### **CONCLUSION**

For the foregoing reasons, the judgment appealed from is affirmed. All costs of this appeal are assessed to defendants, Dr. Janet Lewis and Louisiana Medical Mutual Insurance Company.

**AFFIRMED.**

**MARGAREE HANEY**

**FIRST CIRCUIT**

**VERSUS**

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**STATE OF LOUISIANA**

**NO. 2014 CA 0935**



KUHN, J., concurring.

I write separately to point out that the best legal practice in this situation is for restraint by plaintiff in execution of the judgment awarding costs until after final review of the judgment on the merits.

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BEFORE: KUHN, PETTIGREW, AND WELCH, JJ.

PETTIGREW, J., DISSENTS, AND ASSIGNS REASONS.



I respectfully dissent from the majority. I am of the opinion the most appropriate action would be to vacate the trial court's judgment of March 12, 2014, which entered judgment in favor of plaintiff and against defendants, taxing court costs, and to remand the matter to the trial court for reconsideration. I suggest this action in light of this court's prior opinion, which reversed the trial court's grant of a JNOV in favor of plaintiff. **Haney v. Lewis**, 2013-2053 (La. App. 1 Cir. 9/8/14) (unpublished opinion), writ denied, 2014-2087, 2014-2089 (La. 11/26/14), \_\_\_\_ So.3d \_\_\_\_.

The prior JNOV of the trial court in favor of the plaintiff (which this court reversed) formed the basis of the court costs judgment of March 12, 2014.