

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

2015 CA 1287

FLORIDA PARISHES JUVENILE JUSTICE COMMISSION BY AND ON
BEHALF OF THE FLORIDA PARISHES JUVENILE JUSTICE DISTRICT

VERSUS

HANNIS T. BOURGEOIS, L.L.P., CHARLES PHILLIP HEBERT, CPA, AND
PHIL HEBERT, CPA, A PROFESSIONAL ACCOUNTING CORPORATION

Judgment Rendered: SEP 27 2016

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On Appeal from the
Twenty-First Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
No. 2012-0000110

The Honorable Frederick S. Ellis, Ad Hoc Judge Presiding

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BEFORE: GUIDRY, HIGGINBOTHAM, AND HOLDRIDGE JJ.

Guidry, J. Dissents in part on legal reasons.

HOLDRIDGE, J.

The Florida Parishes Juvenile Justice Commission (Commission) filed suit against an accounting firm, Hannis T. Bourgeois, L.L.P. (HTB), alleging HTB had improperly performed a number of annual audits for the Florida Parishes Juvenile Justice District and, as a result, failed to detect the defalcation of nearly \$2,000,000.00 from one of the Commission's accounts. Following a trial, the district court rendered judgment finding HTB to be 75% at fault and the Commission to be 25% at fault. Both parties have appealed. For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY

The Florida Parishes Juvenile Justice District (District) is a political subdivision of the state of Louisiana.¹ The Commission was created to control, administer, and manage the affairs of the District. La. R.S. 15:1094.1. The Commission is composed of a board of commissioners, who are appointed to four-year terms, which they serve without salary. La. R.S. 15:1094.1. The purpose of the Commission is to assist children who have entered the juvenile justice system; toward that end, the Commission was granted the authority to acquire, construct, and administer a juvenile detention facility ("Detention Center"). See La. R.S. 15:1094.2 and 1094.4.

The Commission generally receives its funding from two sources: (1) ad valorem taxes levied on property within the District, and (2) special fees added to criminal fines imposed by the courts in the District. At all times relevant to this case, the funds from these sources were sent to a post office box in Hammond, Louisiana where they were retrieved by the Commission's recording secretary and bookkeeper, Brenda Bickford. Bickford would deposit the tax revenues into the

¹ See La. R.S. 15:1094.

Commission's "tax revenue account" and the court fees into the Commission's "court costs account" (collectively, "Commission accounts"). The Commission used the tax revenue account to fund operations at the Detention Center. The court costs account was used to pay the expenses of the Commission, which generally consisted of Bickford's salary, travel reimbursements, and the District's legal fees. Bickford, who performed her bookkeeping duties for the Commission at her home, was the only individual authorized to manage these accounts. In addition to making all of the deposits, Bickford maintained and initiated (but did not sign) all checks, received the bank statements, and performed the monthly reconciliations on both accounts.

As a political subdivision, the District was required by law to undergo an annual audit of its financial statements.² The "lion's share" of the District's financial information pertained to the Detention Center and its accounts. Thomas Jarlock, the Executive Director of the Detention Center, hired an outside accountant, Phil Hebert, CPA, to perform bookkeeping services for the Detention Center accounts. Hebert was also engaged to assist in preparing the necessary documents for the District's annual audit. Although the Commission and the Detention Center were part of a single entity -- the District -- there was a clear distinction between the Detention Center and the Commission, and they maintained separate bank accounts that were managed by separate bookkeepers (Bickford and Hebert). Therefore, Jarlock and Hebert, who both worked at the Detention Center, had no authority over, or access to, the Commission accounts maintained by Bickford. Thus, at the end of each fiscal year, Bickford would deliver a thumb drive containing her "Quickbook" figures for the Commission accounts so that they could be "plugged into" the financial statements being

² See La. R.S. 24:513 et seq.; La. R.S. 15:1093.2.

prepared at the Detention Center for the District's audit. No one at the Detention Center generated the figures for the Commission accounts; they simply used the figures calculated and supplied by Bickford.

HTB performed the annual audit of District's financial statement for the years 2002 through 2010. During this period of time, HTB repeatedly found no material weaknesses in the District's internal controls and indicated its reasonable assurance that the District's financial statements were free from material misstatement.

In early 2011, by sheer happenstance, John Feduccia, the attorney who routinely performed legal work for the District, happened to see a copy of HTB's 2010 audit report for the District. He noticed that the figure listed for the District's legal expenses was inordinately high and did not correspond with the amount of work he had performed for the District. A subsequent investigation revealed that Bickford had been fabricating invoices for a fictitious company, "B & B Court Reporting, Inc.," which purported to bill the District for court reporting services. Using the checks she maintained for the court costs account, Bickford would then "pay" these invoices ("legal expenses"), often forging the Commissioners' signatures on the checks. Thereafter, Bickford would then negotiate the checks for her benefit and file the phony invoices in her bookkeeping records. Investigators ultimately discovered that, over the course of nine years (roughly the entire period HTB had been conducting the District's audits), Bickford had embezzled nearly \$2,000,000.00 from the Commission's court costs account. Following the discovery of her defalcations, Bickford was charged with several offenses, including felony theft. After pleading guilty, she was sentenced and is currently incarcerated.

In January 2012,³ the Commission filed a “Petition for Damages for Breach of Contract and Accounting Malpractice” against HTB⁴ alleging HTB had negligently performed audits for the District for the years 2002 through 2010. Specifically, the Commission alleged that there were inadequate internal controls on the court costs account managed by Bickford, which facilitated her illegal acts. However, year after year, HTB reported that it found no material weaknesses in its internal controls. The Commission alleged that due to HTB’s negligent auditing, Bickford’s embezzlement was allowed to continue from 2002 until 2011.

Thereafter, HTB filed an exception raising the objection of preemption. Under Louisiana law, actions for professional accounting liability that do not involve fraud are subject to certain preemptive periods. Specifically, La. R.S. 9:5604 provides, in part:

A. No action for damages against any accountant duly licensed under the laws of this state, or any firm as defined in R.S. 37:71, whether based upon tort, or breach of contract, or otherwise, arising out of an engagement to provide professional accounting service shall be brought unless filed in a court of competent jurisdiction and proper venue within one year from the date of the alleged act, omission, or neglect, or within one year from the date that the alleged act, omission, or neglect is discovered or should have been discovered; **however, even as to actions filed within one year from the date of such discovery, in all events such actions shall be filed at the latest within three years from the date of the alleged act, omission, or neglect.**

E. **The preemptive period provided in Subsection A of this Section shall not apply in cases of fraud, as defined in Civil Code Article 1953.** (Emphasis added.)

³ While the petition was filed on January 9, 2012, the record reflects that the Commission had actually filed a request for an accountant review panel on January 5, 2012. See La. R.S. 37:101 et seq. Ultimately, HTB chose to waive its right to a review panel and this litigation proceeded.

⁴ Initially, the Commission also named Hebert as a defendant; however, it later voluntarily dismissed its claims against him during the accountant review panel process.

Considering the lack of allegations of fraud, HTB sought a determination that all claims arising out of services it rendered more than three years before the Commission filed its malpractice action were preempted. A hearing on HTB's exception was set for October 18, 2013.

Approximately two weeks before the hearing, the Commission was granted leave of court to file a supplemental and amending petition to assert claims of fraud against HTB. The Commission alleged that HTB's standard statement in its annual audit report averring that it had conducted its audit in compliance with Generally Accepted Auditing Standards (GAAS) and Generally Accepted Government Auditing Standards (GAGAS), constituted a fraudulent misrepresentation because HTB had actually failed to meet those standards. The trial court subsequently deferred ruling on HTB's exception in light of the Commission's newly added claims of fraud.

HTB subsequently filed a motion for partial summary judgment seeking the dismissal of Commission's fraud allegations, arguing that the Commission lacked any evidence to show that HTB had acted fraudulently in connection with its auditing services, i.e., that it *intentionally* made misrepresentations for the purpose of gaining an unfair advantage over the Commission. According to HTB, at most, the Commission would "only be able to establish at trial that HTB negligently performed its audit work in connection with the [pertinent] audits." In support of its motion, HTB submitted the report prepared by the Commission's expert; HTB pointed out that the report was devoid of any opinion or suggestion that HTB acted with the intent to deceive the Commission. HTB also submitted deposition testimony of its expert opining that there was a lack of evidence of fraud on the part of HTB.

The Commission opposed HTB's motion. Attached to its opposition were several unverified and unauthenticated documents and limited excerpts of deposition testimony. However, none of these exhibits suggested an intent to deceive on the part of HTB. Consequently, the Commission argued in its opposition that fraud, as defined by La. C.C. 1953, does not require an intent to deceive, but instead can be satisfied by a lesser showing of reckless or gross negligence.

HTB filed a reply memorandum disputing the Commission's assertion that La. C.C. art. 1953 does not require a showing of fraudulent intent. Additionally, HTB objected to the unauthenticated documents submitted by the Commission and requested that they be stricken by the trial court.

Following a hearing on the motion, the trial court ultimately granted partial summary judgment in favor of HTB and dismissed the Commission's allegations of fraud. In light of this ruling, the trial court also granted HTB's previously deferred exception of peremption and dismissed any claims by the Commission arising out of audit services HTB performed prior to January 5, 2009.

A four-day trial on the Commission's remaining claims commenced later that month. As a result of the trial court's determination that some of the Commission's claims were preempted, the only two audits performed within the actionable period were those for the fiscal years ending on June 30, 2009 and June 30, 2010. However, because an auditor such as HTB is charged with all knowledge it accumulated from prior audits, information and evidence regarding other earlier audits were also deemed relevant.

Two auditors testified about their "understanding" and assumptions regarding internal controls they believed were in place for the Commission accounts. Specifically, they stated that it was their "understanding" that Hebert,

who worked at the Detention Center, was performing the monthly reconciliations on the separate Commission accounts managed by Bickford. However, the testimony of the Commission's former president, Peggy Hoover, and others, including Jarlock and Hebert, clearly relayed that the Detention Center and the Commission, as well their accounts, were separate, and that Hebert, who worked at the Detention Center, had no authority or responsibilities with respect to the Commission's accounts. Moreover, Hebert testified that he specifically told HTB auditors that he had nothing to do with the Commission accounts and that he was only aware of internal controls in place for the Detention Center accounts.

Additionally, both parties called experts to testify. The Commission's expert, Andrew Mintzer, testified that HTB failed to properly plan for the audits in failing to ascertain the internal controls for the Commission accounts. Furthermore, he testified that the evidence HTB did have indicated a problem regarding the amount of legal expenses paid out of the Commission's court costs account that should have alerted HTB to Bickford's defalcation. HTB's expert, Wilson LaGraize, testified that the Commission had the responsibility to place appropriate internal controls on the Commission accounts, but failed to do so.

At the end of the trial, the trial court took the matter under advisement and requested that the parties submit post-trial memoranda. On July 22, 2014, the trial court issued written reasons for judgment. Therein, the trial court expressly credited the testimony of the Commission's expert and concluded that HTB had clearly committed accounting malpractice. The trial court further concluded that HTB knew or should have known that there were no controls over the accounts handled by Bickford, but it failed to advise the Commission of the problem. It further concluded that the Commission had failed to fulfill its responsibility to place proper controls on its accounts. Based on the totality of the circumstances,

the trial court allocated 75% fault to HTB and 25% to the Commission. After reducing the total amount of damages by 25%, the trial court determined that the Commission was entitled to an award of \$342,637.50 in damages.

The Commission subsequently filed a motion to tax costs. Following a hearing, the trial court determined that HTB should be cast with court costs in the amount of \$58,901.19. A judgment memorializing the trial court's decisions on both the trial of the merits and the motion to tax costs was signed on January 2, 2015. Both parties have appealed.

DISCUSSION

Commission's Fraud Claims

In its first assignment of error, the Commission argues that the trial court erred in granting HTB's motion for partial summary judgment and dismissing its claims of fraud, and, as a result, determining that some of the Commission's claims were preempted.

We review the granting or denial of a motion for summary judgment *de novo* under the same criteria governing the trial court's consideration of whether summary judgment is appropriate. Schultz v. Guoth, 10-0343 (La. 1/19/11), 57 So.3d 1002, 1005. A motion for summary judgment should be granted only if the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, admitted for purposes of the motion for summary judgment, show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B)(2).⁵

On a motion for summary judgment, the burden of proof is on the mover. La. C.C.P. art. 966(C)(2). However, if the mover will not bear the burden of proof

⁵ All citations to La. C.C.P. art. 966 specifically refer to that article as it existed prior to its amendment by 2014 La. Acts, No. 187, effective August 1, 2014, and by 2015 La. Acts, No. 422, effective January 1, 2016.

at trial, the mover's burden does not require that all essential elements of the adverse party's claim be negated. Instead, the mover must point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim. Thereafter, the adverse party must produce factual evidence sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If the adverse party fails to meet this burden, there is no genuine issue of material fact, and the mover is entitled to summary judgment as a matter of law. La. C.C.P. art. 966(C)(2); Schultz, 57 So.3d at 1006.

Although summary judgment is seldom appropriate for determinations based on subjective facts of motive, intent, good faith, knowledge, or malice, summary judgment may be granted on subjective intent issues when no issue of material fact exists concerning the pertinent intent. Jones v. Estate of Santiago, 03-1424 (La. 4/14/04), 870 So.2d 1002, 1006. See also Duplechien v. Ackal, 15-825 (La.App. 3 Cir. 2/3/16), 185 So.3d 282, 288-89, writ denied, 16-0420 (La. 4/22/16), 191 So.3d 1048.

In its motion for partial summary judgment, HTB alleged that the Commission lacked factual support to establish the essential elements of its allegations of fraud. Because it would bear the burden of establishing its claims at trial, it was incumbent on the Commission to produce factual support sufficient to show that it would be able to satisfy its evidentiary burden of proof at trial. As noted above, the Commission attached several exhibits to its opposition, including a number of unverified and unauthenticated documents. HTB objected to these documents in its reply memorandum and moved to have them stricken. See La. C.C.P. art 966(F)(2), (3). We are unable to tell what, if any, ruling the trial court made on HTB's motion, because the record lacks a transcript of the hearing.⁶

⁶ The minute entry makes no reference to HTB's motion or a ruling.

However, even assuming these documents were entitled to consideration, we find that they, along with the other evidence submitted by the Commission, fail to demonstrate that it would have been able to satisfy its evidentiary burden of proof.⁷

Louisiana Civil Code article 1953, defines “fraud” as:

[A] misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction.

At the outset, we reject the Commission’s assertion that the requisites of La. C.C. art. 1953 may be satisfied by proof of gross negligence as opposed to a deliberate intent to deceive. Louisiana courts have repeatedly held that fraudulent intent, or the specific intent to deceive, is a necessary and inherent element of fraud, and that fraud cannot be predicated upon mistake or negligence, no matter how gross. Lomont v. Bennett, 14-2483 (La. 6/30/15), 172 So.3d 620, 634, cert. denied, ___ U.S. ___, 136 S.Ct. 1167, 194 L.Ed.2d 178 (2016); Charming Charlie, Inc. v. Perkins Rowe Associates, LLC, 11-2254 (La.App. 1 Cir. 7/10/12), 97 So.3d 595, 599; Terrebonne Concrete, LLC v. CEC Enterprises, LLC, 11-0072 (La.App. 1 Cir. 8/17/11), 76 So.3d 502, 509, writ denied, 11-2021 (La. 11/18/11), 75 So.3d 464.

Therefore, we must examine what evidence the Commission put forth regarding any deliberate and knowing misrepresentations made by HTB with the intent to obtain an unjust advantage or cause loss to the Commission. While fraud may be established by circumstantial evidence, including highly suspicious facts

⁷ In its appellate brief, we note that the Commission does not offer any arguments with respect to the evidence it submitted in opposing HTB’s motion for partial summary judgment in the trial court. Instead, the Commission refers almost exclusively to *testimony that was offered at the trial on the merits*. However, only evidence admitted for purposes of the motion for summary judgment may be considered by the court in ruling on the motion. La. C.C.P. art. 966(F)(2); see also La. C.C.P. 966(B)(2). See also Hopkins v. American Cyanamid Co., 95-1088 (La.1/16/96), 666 So.2d 615, 624. Therefore, we consider only the evidence submitted by the parties in connection with the May 2014 trial court hearing on HTB’s motion for partial summary judgment.

and circumstances, La. C.C. art. 1957; Terrebonne Concrete, 76 So.3d at 510, we note that the summary judgment evidence submitted by the Commission is devoid of any suspicious circumstances or facts from which fraud could reasonably be inferred. Indeed, the Commission admitted in its brief that it has no way of knowing whether HTB wanted to cause it the loss it incurred, (Br. 15) and it failed to produce factual evidence connoting HTB's deceptive intent to gain an unjust advantage. Given the lack of any evidence of HTB's fraudulent intent, it is apparent that the Commission's claims sound in accounting malpractice, not fraud. See Royer v. Our Lady of Lake Hosp., Inc., 15-0009 (La.App. 1 Cir. 12/11/15) 2015 WL 8910533, *8 (unpublished), writ denied, 16-0298 (La. 4/8/16), 191 So.3d 587 (finding plaintiff's claims were for medical malpractice, not fraud, since fraudulent intent cannot be predicated on mistake or negligence). Therefore, we find the Commission's first assignment of error to be without merit.

Allocation of Fault

Both the Commission and HTB have assigned error to the trial court's allocation of fault, 75% fault to HTB and 25% to the Commission, each arguing that their percentage of fault is too high. Because the finding of percentages of fault is a factual determination, the trier of fact is owed some deference in its allocation of fault. Duncan v. Kansas City S. Ry. Co., 00-0066 (La. 10/30/00), 773 So.2d 670, 680, cert. dismissed, 532 U.S. 992, 121 S.Ct. 1651, 149 L.Ed.2d 508 (2001). Thus, a trier of fact's allocation of fault is subject to the manifest error or clearly wrong standard of review. See Stobart v. State, through Department of Transportation and Development, 617 So.2d 880, 882 (La. 1993).

Allocation of fault is not an exact science or the search for one precise ratio, but rather an acceptable range, and any allocation by the fact finder within that range cannot be clearly wrong. Foley v. Entergy Louisiana, Inc., 06-0983 (La.

11/29/06), 946 So.2d 144, 166. Only after making a determination that the trier of fact's apportionment of fault is clearly wrong can an appellate court disturb the apportionment, and then only to the extent of lowering it or raising it to the highest or lowest point respectively that is reasonably within the trier of fact's discretion. Clement v. Frey, 95-1119 (La. 1/16/96), 666 So.2d 607, 611.

Louisiana Revised Statute 37:93 of the Louisiana Accountancy Act provides, in part:

(2) If the licensee, employee, or principal is not proven to have acted with the deliberate intent to deceive, manipulate, or defraud for his or its own direct pecuniary benefit, the amount of the liability in damages shall be determined as follows:

(a) The trier of fact shall determine the percentage of responsibility of the plaintiff, of each of the defendants, and of each of the other persons or entities alleged by the parties to have caused or contributed to the harm alleged by the plaintiff. **In determining the percentages of responsibility, the trier of fact shall consider both the nature of the conduct of each person and the nature and extent of the causal relationship between that conduct and the damage claimed by the plaintiff.** (Emphasis added.)

In Watson v. State Farm Fire & Cas. Ins. Co., 469 So.2d 967, 973-74 (La. 1985), the Louisiana Supreme Court referred to the same language (from the Uniform Comparative Fault Act), and concluded that in assigning percentages of fault the court should consider: (1) whether the conduct resulted from inadvertence or involved an awareness of the danger, (2) how great a risk was created by the conduct, (3) the significance of what was sought by the conduct, (4) the capacities of the actor, whether superior or inferior, and (5) any extenuating circumstances which might require the actor to proceed in haste, without proper thought.

First, HTB argues that the trial court violated La. R.S. 37:93 because it failed to determine and allocate a percentage of fault to Hebert.⁸ However, we find no merit to this argument. The issue of Hebert's fault, if any, was placed squarely

⁸ Both parties had alleged fault on the part of Hebert, although the Commission later voluntarily dismissed its claims against Hebert.

before the court both during the trial and in the parties' post-trial memoranda. The trial court ultimately allocated 75% fault to HTB and 25% to the Commission. It did not allocate any percentage of fault to Hebert. Generally, silence in a judgment of the trial court as to any issue, claim, or demand placed before the court is deemed a rejection of the claim and the relief sought is presumed to be denied. Schoolhouse, Inc. v. Fanguy, 10-2238 (La.App. 1 Cir. 6/10/11), 69 So.3d 658, 664. Thus, arguably, the trial court rejected HTB's contention that Hebert breached a duty to the Commission that resulted in the damages sustained by the Commission during the relevant period. The trial court's written reasons do not reflect a finding that Hebert breached a duty that resulted in the pertinent damages.⁹ The trial court noted Hebert and Jarlock worked for the Detention Center and had nothing to do with the Commission accounts handled by Bickford, and there was no procedure in place whereby they could have discovered Bickford's activities. In contrast, the trial court found that the Commission had failed to implement proper internal controls over its accounts and further found that HTB was aware that the accounts handled by Bickford, including the court cost account, lacked any controls. The trial court expressly credited the testimony of the Commission's expert witness, Mintzer, who opined that HTB had failed to properly perform its auditing duties

⁹ In its written reasons for judgment, the trial court repeatedly referred to Hebert as an "employee" of the Detention Center; however, it is undisputed that Hebert was not an employee, but rather was an outside contractor. Even so, the trial court's reasons indicate that it found no fault on the part of Hebert, irrespective of his status (be it an employee or a contractor). Even if a plausible argument could be made that the trial court had determined that Hebert was negligent but failed to allocate a percentage of fault to him based on its erroneous conclusion that Hebert was an employee, such an error would not have been prejudicial to HTB, and the manifest error rule would still apply to the allocation of 75% fault to HTB. See Rideau v. State Farm Mut. Auto. Ins. Co., 06-0894 (La.App. 1 Cir. 8/29/07), 970 So.2d 564, 574-77 n.7, writ denied, 07-2228 (La. 1/11/08), 972 So.2d 1168. Put differently, to the extent that the trial court determined that Hebert was an employee and negligent, his negligence would have been imputed to the Commission and thus included within the 25% fault attributed to the Commission. However, it would have no effect on the 75% fault allocated to HTB which would remain subject to the manifest error standard of review. See Rideau, 970 So.2d 577 n.7.

and committed malpractice in failing to uncover Bickford's defalcations with respect to the court costs account.

We find no manifest error in the trial court's conclusion that Hebert was **not** proven to be at fault in this case. The record amply supports the trial court's factual determination.¹⁰

It is undisputed that Bickford was hired to perform bookkeeping for the Commission accounts and that Hebert was engaged to perform payroll and bookkeeping services solely for the Detention Center. Hebert performed his services at the Detention Center under the supervision of Jarlock, and, later, also under Steven Happel. The record makes it abundantly clear that Hebert did not have control over the Commission accounts. The evidence further shows that HTB was aware that the Commission accounts were decentralized and maintained by Bickford at her home.

Hebert was also engaged to assist in the preparation of District's financial documents for HTB's audits of the District. According to Hoover, Jarlock, Happel, and Hebert, in performing these services, Hebert's duty with respect to the Commission accounts controlled by Bickford was simply to get "the numbers" provided by Bickford (which were supplied without any supporting documentation) and incorporate them into the pertinent documents along with those of the Detention Center.

Hebert testified that he was not aware of the internal controls in place for the Commission accounts. Furthermore, he testified that he specifically told one of HTB's auditors that he could only provide HTB information about the internal

¹⁰ Even if we were to find legal error in this case, resulting in a de novo review, it would not change the result. The evidence produced at trial does not preponderate in favor of finding Hebert to be liable.

controls in place for the Detention Center's accounts and that he was unaware of the controls in place for the separate Commission accounts.

Based on our review, we find that HTB failed to satisfy its burden of proving Hebert was at fault in this case. Indeed, neither HTB's argument in brief nor the testimony of its expert at trial cogently sets forth a specific duty that Hebert owed to the Commission, a breach of that duty, and how that breach caused the damages complained of in this case.

Rather, HTB generally asserts that Hebert had "access" to information and that if he had paid attention to that information he would have had an "opportunity" to discover Bickford's illegal activities. However, HTB never specifies what that information was, or why such information should have alerted him, or how it would have led to his uncovering the defalcation. At best, it appears that HTB argues that Hebert was negligent for either (1) not telling the Commission something they already knew (that the legal expenses, paid out of the court costs account, were exceeding the annual budget) and/or (2) not telling the Commission something that he did not know (that there were inadequate internal controls over the Commission's accounts). Accordingly, we find no merit in HTB's argument that the trial court erred in not allocating fault to Hebert in this case. See Gantt v. Boone, Wellford, Clark, Langschmidt & Pemberton, 559 F.Supp. 1219, 1229-30 (M.D. La.1983), aff'd, 742 F.2d 1451 (5th Cir.1984).

Additionally, we find no error in the trial court's finding that both HTB and the Commission were at fault. The Commission has a legal duty "to control, administer, and manage the affairs" of the District. La. R.S. 15:1094.1(A). The evidence adduced at trial established that the Commission was responsible for placing appropriate internal controls on its accounts; however, it failed to do so. Instead, Bickford was allowed to exercise almost unfettered control over these

accounts. Therefore, the trial court's conclusion that the Commission was partly at fault in this case was not clearly wrong.

Similarly, the evidence, particularly the testimony given by the Commission's expert, Mintzer, established that HTB violated several mandated auditing standards in conducting the District's audits and was partially at fault. According to Mintzer, HTB failed to prepare for the audits by failing to collect competent evidence and assess the internal controls in place for the Commission accounts. Further, although HTB had identified a risk of fictitious vendors for the District in its audits, it failed to reasonably respond to that risk. Finally, Mintzer opined that HTB failed to skeptically assess the audit evidence it obtained, which, according to Mintzer, should have alerted HTB to a problem regarding the excessive "court reporting expenses" and exposed Bickford's embezzlement. Specifically, HTB's audit evidence showed that although the District was engaged in minimal litigation each year, its legal expenses nonetheless kept exceeding its yearly budgeted amount. A breakdown of those legal expenses additionally showed court reporting fees that were up to ten times the amount of attorney fees, thus indicating an obvious "mismatch." Moreover, the dubious B & B invoices (which had never been found and contained fictitious information) charged excessive court reporting fees, including fees for court reporting services supposedly performed in a case that HTB knew had already been settled.

Finally, considering the parties' respective positions and the Watson factors to be assessed in allocating fault, we find no error in the trial court's determination that HTB was 75% at fault and the Commission was 25% at fault. While this Court recognizes that the fault allocated to HTB was higher and the fault allocated to the Commission was lower than the percentage this Court might have awarded, we do not feel that the allocations were so wrong as to show manifest error. The

Commissioners (who come from various walks of life) are appointed to a term of 4 years. They are unsalaried and only spend about 24 hours a year at the Detention Center for their meetings. Accordingly, they depended on HTB's audit reports to inform them if there were any problems or if any changes needed to be made. While the Commission failed to ensure the placement of adequate internal controls over its accounts, the totality of the evidence indicates that this was primarily due to inadvertence.

In contrast, HTB possessed not only significantly greater professional expertise, it also possessed all the facts and evidence accumulated in its prior audits of the District. Moreover, HTB was bound by **mandatory** auditing standards to carry out its audit in a certain fashion **regardless** of anything the Commission did or did not do or say. The evidence demonstrates that HTB failed to meet those mandatory standards. Accordingly, we find no merit in the parties' respective assignments of error challenging the trial court's allocation of fault.

Expert Witness Fees

In this last assignment of error, HTB challenges the trial court's judgment on the Commission's motion to tax costs. According to HTB, it does not appeal that judgment's award of "costs for travel expenses, clerk and sheriff's fees[,] and copy costs." It only disputes the setting of fees for the Commission's expert witness, Mintzer. Specifically, HTB argues that the trial court erred in "awarding costs which included the recovery of expert fees not related to time spent preparing for and testifying at trial and at an excessive rate."

The parties stipulated to Mintzer's billing summary, which detailed his fees (\$625.00 per hour) and the fees for his assistant (\$250.00-\$280.00 per hour). The bill showed that they worked a total of 284.90 in connection with this case and billed a total of \$119,993.00. HTB contested the amount of Mintzer's fee, arguing

that it was not in line with the fees of in-state experts. It also argued that the billing summary indicated that not all of the charges were in preparation for trial, and that those amounts should not be taxed as costs.

The trial court ultimately found that Mintzer had spent 50.75 hours preparing for trial and that his assistant spent 101 hours, for a total of 151.75 hours (133.25 hours less than charged.). The trial court also awarded reimbursement of Mintzer at a rate of \$500.00 per hour instead of the \$625.00 per hour he charged. Therefore, the trial court awarded expert fees in the total amount of \$50,625.00 (less than half the amount the Commission requested.)

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, and 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, 09-1555 (La.App. 1 Cir. 4/30/10), 40 So.3d 261, 267. Factors to be considered by the trial judge in setting an expert witness's fee 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, and the knowledge, attainments and skill of the expert. Mack v. Transport Insurance Company, 577 So.2d 112, 119 (La.App. 1 Cir. 1991); Succession of Moody, 306 So.2d 869, 877 (La.App. 1 Cir. 1974), writ denied, 310 So.2d 639 (La. 1975).

In Wampold v. Fisher, 01-0808 (La.App. 1 Cir. 6/26/02), 837 So.2d 638, this court explained what evidence must be produced by a litigant on a contradictory rule to fix and tax expert witness fees under La. R.S. 13:3666(B)(2):

A trial court judge may fix an expert witness fee solely on the basis of what the court has observed or experienced concerning the expert's time and testimony in the courtroom or in deposition under LSA-R.S.

13:3666 B(1)... If a rule under LSA-R.S. 13:3666 B(2) seeks to set the value on the time the expert witness was before the court, that value may be determined by the court on the basis of its observation of and experience with the expert witness at trial, without further proof. However, if the rule seeks to value the total time employed by the expert, for example, time gathering facts necessary for his testimony, time spent away from regular duties while waiting to testify, or if the party seeks a fee outside of that normally charged by similar experts in that field, then the plaintiff in rule must prove by competent evidence, what service and expertise the expert rendered in addition to that observed by the trial court. Neither B(1) nor B(2) allows the trial court to value the expert's services performed away from its hearing and observation without competent and admissible evidence.

Wampold, 01-0808 at pp. 2-3; 837 So.2d at 640. (Internal citations omitted).

Where a party seeks to base an expert's fee in part on out-of-court work, the law requires a contradictory and full hearing, with the burden of proving the reasonable value of the expert's out-of-court work being on the plaintiff-in-rule. Northwest Ins. Co. v. Borg-Warner Corp., 501 So.2d 1063, 1066 (La.App. 2 Cir. 1987). The assertions of an attorney and the expert's bill, even in conjunction with an expert's affidavit attesting to the correctness and truth of the bill, do not support an award for the total time of an expert. The expert must testify at the trial of the rule and be subject to cross-examination, **unless the parties stipulate to the specifics and costs of the out-of-court work.** Wingfield v. State ex rel. Dept. of Transp. and Development, 03-1740 (La.App. 1 Cir. 5/14/04), 879 So.2d 766, 770.

With respect to Mintzer's billing summary, the following stipulation was made by HTB:

The Court: Your [sic] stipulating he did everything he said he did [listed in the bill summary] you just don't stipulate he's worth \$650[.00] [sic] an hour is that correct?

[Defense counsel]: Correct.

* * * * *

[Defense counsel]: And that everything he did was in preparation for the trial....

Consequently, the parties did **not** effectively stipulate to the specific out-of-court work Mintzer performed or to the costs of that work. Accordingly, while the trial court was certainly able to make an award for Mintzer's in-court work for testifying at trial, it lacked competent evidence on which it could make an award for his out-of-court work. See Dakmak v. Baton Rouge City Police Dep't, 12-1850 (La.App. 1 Cir. 9/4/14), 153 So.3d 511, 516. See also Reynolds v. Louisiana Dep't of Transp., 15-1304 (La.App. 1 Cir. 4/13/16), 194 So.3d 56, 61-62; M. Matt Durand, L.L.C. v. Denton-James, L.L.C., 11-0784 (La.App. 1 Cir. 3/8/12) 2012 WL 762303, *4 (unpublished). Consequently, we must vacate that portion of the judgment awarding expenses for Mintzer's out-of-court work, and we remand this matter so that the trial court can determine the value of his out-of-court services in accordance with the law.

CONCLUSION

For all of the foregoing reasons, we vacate that part of the trial court's judgment awarding the Commission fees for the out-of-court work performed by its expert, and we remand this matter for a hearing to determine those expert witness fees in accordance with the law. In all other respects, the judgment of the trial court is affirmed. Costs of this appeal in the amount of \$10,436.50 are to be split equally between the parties.

AFFIRMED IN PART; VACATED IN PART; AND REMANDED WITH INSTRUCTIONS.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2015 CA 1287

FLORIDA PARISH JUVENILE JUSTICE COMMISSION BY AND ON
BEHALF OF THE FLORIDA PARISHES JUVENILE JUSTICE DISTRICT

VERSUS

HANNIS T. BOURGEOIS, L.L.P., CHARLES PHILLIP HEBERT, CPA, AND
PHIL HEBERT, CPA, A PROFESSIONAL ACCOUNTING CORPORATION

GUIDRY, J., dissents in part and assigns reasons.

 **GUIDRY, J., dissenting in part.**

I disagree with the majority's determination that the district court did not manifestly err in its allocation of fault in this matter. I believe the record and the law supports a finding that the Florida Parish Juvenile Justice Commission ("Commission") was equally at fault for the loss suffered by the Florida Parishes Juvenile Justice District ("District"). The record is clear that the Commission negligently performed its duties "to control, administer, and manage the affairs of the District."¹

According to La. R.S. 15:1093.2(A)(2), the Commission is required to provide "sworn annual financial statements," wherein the Commission must include "a recital that the financial statements present fairly, in all material respects, the financial condition and results of operations of the entity; *that the entity has maintained a system of internal control structure sufficient to safeguard assets and comply with laws and regulations*; and that the entity has complied with all laws and regulations, or shall acknowledge exceptions thereto." (Emphasis added.) Moreover, "a sworn notarized affidavit from the president of the board of

¹ See La. R.S. 15:1094.1.

commissioners stating that he has viewed the financial statements and declares that the information provided therein is true and correct to the best of his knowledge,” has to accompany the financial statement. La. R.S. 15:1093.2(C)(1).

In deciding this matter, the trier of fact was required to consider both the nature of the conduct of each person and the nature and extent of the causal relationship between that conduct and the damage claimed by the plaintiff. La. R.S. 37:93. Considering the aforementioned duties imposed on the Commission by law, these duties are equal, if not greater (considering the purpose of the Commission, see La. R.S. 15:1094.2) to the duties imposed on the accounting firm. Compare La. R.S. 37:73(14) and (16).

Thus, considering the nature of the Commission’s responsibilities and the ultimate effects of the harm suffered, fault imposed on the Commission should be at least equal to that imposed on HTB under the circumstances. I therefore respectfully dissent from the majority opinion finding the Commission’s actions to have caused harm to any lesser degree.