

NOT DESIGNATED FOR PUBLICATION

**DEBORRAH MUNCH** \* **NO. 2011-CA-0100**  
**VERSUS** \*  
**NICHOLAS BACKER, ET AL.** \* **COURT OF APPEAL**  
\* **FOURTH CIRCUIT**  
\* **STATE OF LOUISIANA**  
\* \* \* \* \*

APPEAL FROM  
CIVIL DISTRICT COURT, ORLEANS PARISH  
NO. 2000-9442, DIVISION "C"  
Honorable Sidney H. Cates, Judge

\* \* \* \* \*

**Judge Max N. Tobias, Jr.**

\* \* \* \* \*

(Court composed of Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr.,  
Judge Max N. Tobias, Jr.)

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**AFFIRMED.**

United Services Automobile Association (USAA) appeals the judgment of the trial court awarding costs in favor of the plaintiff, Deborah Munch. For the following reasons, we affirm.

Ms. Munch filed a petition for damages, alleging that she was injured after USAA's insured, Mr. Backer, struck her vehicle in the rear. The case proceeded to trial, and the jury rendered a verdict that was affirmed by this court. *Munch v. Backer*, 04-1136 (La. App. 4 Cir. 5/31/06), 932 So.2d 759. The Louisiana Supreme Court remanded the matter back to this Court for re-consideration of the claim of improper jury selection. *Munch v. Backer*, 06-1634 (La. 5/18/07), 957 So.2d 141. After re-consideration, this court vacated its prior decision and remanded the matter to the district court for a new trial. *Munch v. Backer*, 04-1136 (La. App. 4 Cir. 12/5/07), 972 So.2d 1249, *writ denied*, 07-2477 (La. 3/7/08), 977 So.2d 909.

The second jury trial occurred in May 2010. At the conclusion of trial, the jury returned a verdict awarding damages to Ms. Munch as follows:

General damages:	\$12,000.00
Loss of Enjoyment of Life:	\$ 3,000.00

Medical Expenses:	\$ 6,343.00
Past Lost Wages:	\$ 8,960.00
Future Loss of Earning Capacity:	\$ 0
<b>TOTAL DAMAGES:</b>	<b>\$30,303.00</b>

The trial court rendered a judgment in accordance with the jury’s verdict. This court affirmed. *Munch v. Backer*, 10-1544 (La. App. 4 Cir. 3/23/11), \_\_So.3d \_\_, 2011 WL 1085671.

Ms. Munch filed a motion to tax costs on 9 July 2010. Ms. Munch requested the trial court award her a total of \$28,110.18 for court costs, deposition costs, medical records costs, exhibits, and expert fees. USAA opposed the motion to tax costs. After a hearing, the court rendered a judgment awarded Ms. Munch a total of \$14,404.73. From that judgment, USAA timely filed a petition for appeal.

The assessment of costs, including expert witness fees, lies within the trial court’s discretion. *Tipton v. Campbell*, 08-0139, 08-0140, p.26 (La. App. 4 Cir. 9/24/08), 996 So.2d 27, 45. On appeal, the assessment of costs may only be reversed upon a showing of an abuse of that discretion. *Id.*

The Code of Civil Procedure provides that “[u]nless 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.” La. C.C.P. art. 1920. “Costs” are defined as “the cost 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.” La. R.S. 13:4533.

In their first assignment of error, USAA argues the trial court erred and abused its discretion in taxing the costs of obtaining the records concerning Ms.

Munch's medical treatment maintained by Memorial Hospital (\$286.92), Dr. Joseph Guarineri (\$15.00), and Dr. Ahmad Shanableh (\$35.31). USAA argues that Ms. Munch offered evidence that she incurred \$97,694.00 in charges for medical treatment received at Memorial Hospital. USAA avers that the jury awarded only \$6,343.00 in medical expenses. USAA concludes that the jury rejected the claim of Ms. Munch relative to the treatment received at Memorial Hospital. USAA cites *Simmons v. State*, 502 So.2d 187 (La. App. 3 Cir. 1987) in support of its argument. In *Simmons*, the court disallowed the costs of certain medical reports, finding that those reports were not relevant on the issue upon which Ms. Simmons prevailed. *Id.*, 502 So.2d at 191. However, this court has concluded that:

[w]hether a party should be awarded fees when the expert's opinion is not accepted by the court and the party presenting the evidence does not prevail on the issue is a matter in which the trial court has some discretion. Compare *Glass v. Aetna Casualty & Surety Co.*, 166 So.2d 552 (La. App. 4 Cir. 1964) (court awarded expert fees to physician-witnesses where plaintiff failed to sustain the burden of proving a causal connection between the condition and the accident) and *Adamson v. Westinghouse Electric Corp.*, 236 So.2d 556 (La. App. 4 Cir. 1970) (court denied expert fees when the claim was totally rejected by the trial court).

*Baker v. Marcello*, 533 So.2d 1057, 1059 (La. App. 4 Cir. 1988).

Further, in *Trinh ex rel. Tran v. Dufrene Boats, Inc.*, 08-0824, p.9 (La. App. 1 Cir. 1/22/09), 6 So.3d 830, 838-838, the court affirmed an award of all costs taxed against the defendant, although the defendant was only found to be sixty percent at fault. The court noted that trial court may assess costs in any equitable manner pursuant to La. C.C.P. art. 1920 and that the plaintiffs' claim resulted in a judgment in their favor. *Id.*

In the case at bar, the trial court's reasoning in assessing costs is unknown. The trial court is granted the authority to assess costs in any equitable manner, even against a defendant who is not 100% at fault or for costs associated with a claim upon which a plaintiff failed to carry the burden of proof. USAA has not shown that the trial court abused its discretion in awarding the costs that it did, and our review of the record reveals no abuse of the trial court's discretion. We find no merit in this assignment of error.

In its second assignment of error, USAA argues the trial court erred and abused its discretion in taxing the costs of the expert fees of Thomas Dalton, Shael Wolfson, Nathaniel Fentress, Dr. Vogel, and Dr. Dyess.

With respect to Thomas Dalton, Shael Wolfson, and Nathaniel Fentress, USAA argues the jury rejected Ms. Munch's claim of future loss of earning capacity. Therefore, USAA concludes that no costs should be awarded for the testimony of the three expert witnesses. On the other hand, Ms. Munch argues that all three experts were utilized to establish lost wages, and she did receive an award for past lost wages.

Ms. Munch requested an award of costs in the amount of \$750.00 for the testimony of Thomas Dalton (who testified at the 2004 trial), \$1,800.00 for the testimony of Shael Wolfson (who testified at the 2010 trial), and \$3,600.00 for the testimony of Nathaniel Fentress (who testified at both the 2004 and 2010 trials).

A trial court is not required to award as costs the amount charged by an expert witness. *Tipton v. Campbell*, 08-0139, 08-0140, p.28, 996 So.2d at 46, citing *City of Shreveport v. Noel Estate, Inc.*, 41,148, pp. 30-31 (La. App. 2 Cir. 9/27/06), 941 So.2d 66, 85-86. The factors to be considered by the trial court in setting an expert witness fee include: (a) the time spent testifying, (b) the time

spent in preparing for trial, (c) the time spent away from regular duties while waiting to testify, (d) the extent and nature of the work performed, (e) the expert's knowledge and attainments, and (f) the helpfulness of the expert's report and testimony. *Id.* Additional considerations include the amount in controversy, the complexity of the problem addressed by the expert and awards to experts in similar cases. *Albin v. Illinois Cen. Gulf Railroad Co.*, 607 So.2d 844, 845-846 (La. App. 1st Cir. 1992).

After a hearing, the trial court rendered judgment setting the expert fee of Thomas Dalton at \$750.00, the expert fee of Shael Wolfson at \$1,000.00, and the expert fee of Nathaniel Fentress at \$2,000.00. Based on the difference in the amount requested and the amount awarded, we find that the trial court applied the factors noted above. USAA has not shown that the trial court abused its discretion in awarding these fees, and our review of the record reveals none.

USAA argues that Dr. Vogel's testimony was completely discredited at trial and that the jury disregarded his testimony as reflected by the award. USAA concludes that the trial court abused its discretion in awarding him \$2,500.00. Ms. Munch averred that Dr. Vogel was paid \$1,200.00 for his testimony in the 2004 trial and \$1,500.00 for his testimony at the trial held in 2010. In *Albin*, 607 So.2d at 847, expert witness fees were disallowed where the report and testimony of the expert were found to be of no value to the trial court in rendering its decision. In this case, we are unable to determine what was of value to each individual juror in rendering his/her decision.<sup>1</sup> Considering the amount requested by Ms. Munch was higher than the amount awarded for Dr. Vogel's testimony, we find that the trial

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<sup>1</sup> Moreover, one might argue that Dr. Vogel's testimony was so unpersuasive that it proved USAA's position on their liability for damages.

court applied the factors mentioned above. Once again USAA has not shown that the trial court abused its discretion in awarding the fee to Dr. Vogel's testimony, and our review of the record reveals none.

Lastly, USAA notes that Dr. Dyess failed his board certification in internal medicine and only saw Ms. Munch on three occasions. Ms. Munch avers that Dr. Dyess was paid \$1,250.00 for his testimony in the 2004 trial and \$3,700.00 for his testimony at the trial held in 2010. Additionally, Dr. Dyess submitted a bill for an additional \$3,050.00 for his time and testimony in the 2010 trial. Ms. Munch notes that Dr. Dyess was in court for two days waiting to testify and testifying. The trial court awarded Dr. Dyess \$4,000.00. Considering the amount requested by Ms. Munch was higher than the amount awarded for Dr. Dyess' testimony, we find the trial court applied the factors mentioned above.<sup>2</sup> USAA has not shown that the trial court abused its discretion in awarding a fee for Dr. Dyess' testimony. We find no merit in this assignment of error.

Accordingly, we affirm the judgment of the trial court taxing costs against USAA.

**AFFIRMED.**

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<sup>2</sup> One might argue that Dr. Dyess' testimony was significantly unpersuasive that it proved USAA's position on their liability for damages.