

**IN RE: INTERDICTION OF
THOMAS MILTON BENSON,
JR.**

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NO. 2016-CA-1140

COURT OF APPEAL

FOURTH CIRCUIT

STATE OF LOUISIANA

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2015-00655, DIVISION "L-6"
Honorable Kern A. Reese, Judge

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Judge Roland L. Belsome

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(Court composed of Judge Edwin A. Lombard, Judge Roland L. Belsome, Judge Daniel L. Dysart)

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AFFIRMED

JUNE 21, 2017

Appellants Renee Benson, Rita LeBlanc, and Ryan LeBlanc appeal the trial court's judgment on Appellee's motion to tax costs, which awarded costs in the amount of \$301,164.47 to Mr. Thomas M. Benson. For the reasons that follow, the trial court's cost award is affirmed.

STATEMENT OF THE CASE

This appeal arises out of the trial court's award to Mr. Thomas M. Benson for costs he incurred in defending the interdiction proceedings filed by Appellants.¹ After the eight day bench trial, the trial court dismissed the case with prejudice at Appellants' cost. Subsequently, Mr. Benson filed a motion to fix the quantum of costs, and in December 2015 the trial court entered a judgment awarding Mr. Benson \$301,164.47 in costs.² Petitioners moved for a new trial on the limited issue of costs, which the court denied. This appeal followed.

¹ See *In re Benson*, 2015-0874 (La. App. 4 Cir. 2/24/16), writ denied sub nom. *In re Interdiction of Benson*, 2016-0314 (La. 4/8/16), 188 So.3d 1052 (affirming the trial court's finding that Mr. Benson should not be interdicted).

² The trial court declined to award attorney's fees to Mr. Benson in this matter.

ISSUES ON REVIEW

Appellants first claim that the trial court erred in awarding Mr. Benson attorney's fees and costs because 1) they initiated and pursued the interdiction proceedings in good faith, 2) Mr. Benson failed to prove that he actually paid the costs incurred in defending the interdiction proceeding, and 3) the fees and costs are not authorized by law. Appellants further argue that even if the award of fees and costs were permissible by law, the court abused its discretion and committed manifest error by awarding excessive fees and costs.

LAW AND DISCUSSION

As a general rule, the party cast in judgment is to pay costs, which are taxed by a rule to show cause.³ In an interdiction proceeding, La. C.C.P. art 4550 provides the statutory authority for an award of attorney's fees and costs. The statute states that "[t]he court may render judgment for costs and attorney fees, or any part thereof, against any party, as the court may consider fair."⁴ "A trial court has great discretion in awarding costs ... and can only be reversed on appeal upon a showing of an abuse of that discretion."⁵

La. R.S. 13:4533 provides a list of taxable costs. This list includes "[t]he costs of the clerk, sheriff, witness' fees, costs of taking depositions and copies of

³ La. C.C.P. art. 1920.

⁴ The article goes on to limit the court's discretion in prohibiting an award of attorney fees "to a petitioner when judgment is granted against the petitioner or the petition is dismissed on the merits." La. C.C.P. art. 4550.

⁵ *Certain St. Bernard Par. Gov't Computer Disks v. St. Bernard Par. Gov't ex rel. Ponstein*, 2013-1054, p. 3 (La. App. 4 Cir. 12/18/13), 130 So.3d 56, 58, *writ denied sub nom. Martin v. St. Bernard Par. Gov't*, 2016-1026 (La. 9/16/16), 201 So.3d 252 (internal citations omitted).

acts used on the trial.” The statute then goes on to include “all other costs allowed by the court.”

On appeal, the Plaintiffs first argue that this Court must review the trial court’s judgment *de novo*. They claim that because they initiated the interdiction proceedings in “good faith” the trial court committed legal error in awarding fees and costs to Mr. Benson. They assert that the costs award is in contravention of La. C.C.P. art. 4550 because it is not “fair” to award costs against a party who acted in good faith.

Petitioners cite to *In re Interdiction of Sperandeo* in support of their argument that this court must review the matter under the *de novo* standard of review.⁶ However, the *Sperandeo* case concerned an award of **attorney fees** to a plaintiff who was unsuccessful in her permanent interdiction proceeding against her father. In that case, it was legal error for the court to award fees to the unsuccessful plaintiff per the plain language of La. C.C.P. art. 4550, which explicitly states that “no attorney fees shall be awarded to a petitioner when judgment is granted against the petitioner or the petition is dismissed on the merits.” As the court in *Seprandeo* committed legal error, the reviewing court was required to review the matter *de novo*.

⁶ *In re Interdiction of Sperandeo*, 2011-2380, pp. 4-5 (La. App. 1 Cir. 9/24/12), 104 So.3d 142, 145.

In this case, the trial court did not act in a manner inconsistent with the law, and as such the trial court's factual findings will be reviewed for manifest error and the amount of the award will be reviewed for an abuse of discretion.⁷

Regarding the significance of Petitioners' faith in this matter, the fact that they may have been acting in good faith is not dispositive of the issue of the award. Petitioners cite to *In re Interdiction of Mashburn* regarding this issue, but that case provides that faith is merely a factor that the trial court may consider when determining what is fair or equitable under the circumstances.⁸

The transcripts of the motion hearing and the language of the judgment indicate that the trial court did consider the alleged good faith of the Appellants when making the award. The issue of good faith was brought up by both parties during the motion hearing and the trial court noted that good faith is merely a factor to be considered in setting an award. As the court clearly considered good faith as a factor in this case and because good faith does not preclude the court from charging costs against a party seeking an interdiction, we cannot say that the trial court erred in this regard.

Appellants next argue that the trial court committed legal error by ordering them to pay costs to Mr. Benson without any evidence that he actually paid those costs. They claim that the trial court "erroneously applied the collateral source rule

⁷ See *Saden v. Kirby*, 01-2253, p. 2 (La. App. 4 Cir. 8/7/02), 826 So.2d 558, 560.

⁸ *In re Interdiction of Mashburn*, 2012-1444 (La. App. 1 Cir. 4/30/13), 2013 WL 1845714 at *2 (citation omitted).

by determining that Defendant could recover expenses that Defendant failed to prove he paid.”

It is established that an itemized list of costs and a sworn affidavit satisfies the requirements for a determination of taxable costs.⁹ Regarding Appellants’ argument that Mr. Benson was required to prove that he paid the costs directly to recover them, there is no case law supporting the contention. Rather, in the case *Davis v. Barre*, the Louisiana Supreme Court found that whether or not bills for the costs awarded were paid directly by the defendants or their insurers was immaterial so long as evidence was introduced that the costs were incurred in defending the claim.¹⁰

In this case, the record reflects that Mr. Benson presented an itemized schedule of costs, invoices and receipts for all amounts claimed, and a sworn affidavit from one of Mr. Benson’s attorneys. Appellants argue that Mr. Benson did not submit a personal affidavit, cancelled checks, written agreements regarding payment, receipts, accounting records, or any other evidence that he paid or was obligated to pay any of the costs claimed. They point out that Mr. Benson’s counsel admitted in the opposition memorandum to the motion for new trial that the New Orleans Saints advanced payment for the costs that Mr. Benson prayed for and was awarded, claiming that Mr. Benson had reimbursed the Saints for the advance.

⁹ See *Certain St. Bernard Par. Gov’t Computer Disks*, 130 So.3d at 60; see also *Butler v. Louisiana Mutual Medical Ins. Co.*, 2015-1191 (La. App. 4 Cir. 5/25/16), 195 So.3d 570, 574, writ denied, 2016-1206 (La. 10/10/16), 202 So.3d 169.

¹⁰ *Davis v. Barre*, 15-706, p. 8 (La. App. 5 Cir. 5/12/16), 192 So. 3d 280, 284, writ denied, 2016-1058 (La. 9/16/16), 206 So. 3d 208.

Even if the Saints advanced payments, ultimately Mr. Benson incurred the costs and is personally responsible for their payment. Appellants' argument that the collateral source rule applies here is misplaced. The cases they cite to in support of their contention concern write-offs of medical services where the courts held that plaintiffs could not recover for written-off amounts.¹¹ There is no evidence here that any third parties who charged costs to Mr. Benson, specifically the expert witnesses, wrote off any costs. Rather, the record indicates that all witnesses have been paid in full for all invoices.

As Mr. Benson submitted a number of documents in support of his motion to tax costs, we find that that the trial court did not err in finding that Mr. Benson submitted sufficient proof of the costs he incurred.

Appellants further assert that even if the cost award was permissible by law, the trial court abused its discretion in awarding high expert fees including non-recoverable costs. They ask this Court to reduce the award accordingly.

The trial court's award of \$301,164.47 was comprised of the following costs and fees:

1. Filing Fees and Service Costs: \$948.00
2. Copying of Trial Exhibits: \$22.00
3. Deposition Used at Trial: \$708.10
4. Trial Transcript Fees: \$14,584.00

¹¹ See *Hoffman v. 21st Century N. Am. Ins. Co.*, 2014-2279 (La. 10/2/15), 209 So. 3d 702, 706, *reh'g denied* (Dec. 7, 2015) (“[T]he collateral source rule does not apply to attorney-negotiated write-offs or discounts for medical expenses obtained as a product of the litigation process”).

5. Expert Witness Fees: \$284,927.37

The two categories of costs that Appellants object to and request be reduced are the trial transcript fees and the expert witness fees. They object to the trial transcript fees award of \$14,584 on the grounds the transcripts were ordered for the private use of one party and are therefore not recoverable. They object to the expert witness fees as being excessive, particularly as to Mr. Benson's expert witness.

Examples of litigation expenses that are not recoverable as costs because they are outside the scope of La. R.S. 13:4533 include "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."¹² Appellants claim that the transcripts fall under the category of duplication of documents not used on the trial, and cite to *Beattie v. Dimitry*, where the court found that the amount charged plaintiffs by the stenographers for a copy of the testimony for their private use was not a taxable item of costs.¹³

Here, the record indicates that the transcripts were used for trial and therefore do not fall into the category of non-taxable costs under La. R.S. 13:4533. Mr. Benson stated that the transcripts were specifically used to prepare for closing arguments and for the post-trial memorandum. Therefore, we find that the transcript fees were taxable costs and thus were properly awarded by the trial court.

¹² *Watters v. Dep't of Soc. Servs.*, 2008-0977, p. 51 (La. App. 4 Cir. 6/17/09), 15 So.3d 1128, 1162, writ denied, 2009-1651 (La. 10/30/09), 21 So. 3d 291, and writ denied, 2009-1638 (La. 10/30/09), 21 So.3d 293 (emphasis added) (citation omitted).

¹³ *Beattie v. Dimitry* 168 La. 81, 121 So. 581 (La. 1929).

The vast majority of the costs taxed against the Appellants in this matter were expert witness fees. Expert witness fees for testifying at trial and for time spent preparing for that testimony are recoverable.¹⁴ La. R.S. 13:3666(A) states that expert 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.” The trial court must determine the reasonable amount of expert witness fees to be taxed as court costs based on “the value of time employed and the degree of learning or skill required.”¹⁵ While the amount billed by the expert is not determinative of the taxable costs, the trial court may award the full amount charged by an expert witness if the amount is reasonable under the circumstances.¹⁶ “Factors to be considered by the trial judge in setting an expert witness 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.”¹⁷ “As with other cost awards, the trial court enjoys discretion under La. C.C.P. art. 1920 in the taxing of expert witness fees.”¹⁸

¹⁴ *Yuspeh v. Koch*, 02-1179, p. 3 (La. App. 5 Cir. 5/28/03), 848 So.2d 96, 98 (citing *Smith v. Roussel*, 00-1672 (La. App. 1 Cir. 6/22/01), 808 So.2d 726); *Orea v. Scallan*, 32,622 (La. App. 2 Cir. 1/26/00), 750 So.2d 483, 493-94.

¹⁵ La. R.S. 13:3666(A).

¹⁶ See *Watters*, 2008-0977, p. 50, 15 So.3d at 1162; See also *Reynolds v. Louisiana Dep't of Transp.*, 2015-1304, p. 6 (La. App. 1 Cir. 4/13/16), 194 So. 3d 56, 61.

¹⁷ *Abuan ex rel. Valdez v. Smedvig Tankships, Ltd.*, 2000-1120, p. 8 (La. App. 4 Cir. 4/11/01), 786 So.2d 827, 833 (citations omitted), writ denied sub nom. *Abuan v. Smedvig Tankships, Ltd.*, 2001-1752 (La. 9/28/01), 798 So.2d 117.

¹⁸ *Boseman v. Orleans Par. Sch. Bd.*, 98-1415, p. 9 (La. App. 4 Cir. 1/6/99), 727 So.2d 1194, 1199, writ denied, 99-0390 (La. 4/1/99), 742 So.2d 554.

Appellants complain about the excessiveness of the \$229, 675 expert witness fee award for John W. Thompson, Jr., M.D., a psychiatrist from Tulane University retained by Mr. Benson to testify on his behalf in the interdiction proceeding. They claim that the award is unreasonable and cannot be considered equitable or within the trial court's discretion, especially considering that the award for the third expert witness in the interdiction proceeding, Kenneth Sakauye, M.D., was only \$55,252.37.¹⁹ Appellants ask this Court to either reduce the award for Dr. Thompson's services or eliminate it entirely.

Mr. Benson submitted a detailed breakdown of Dr. Thompson's costs in the Fee Schedule Contract attached to the Rule to Tax Costs. Dr. Thompson charged a \$2,700 retainer up front; \$550 an hour to review depositions, records, reports or other data, to conduct psychiatrist consultations with written reports, or to conference with attorneys or others as required; and \$750 an hour to provide deposition testimony or to testify in court. The trial court was provided with six detailed invoices which establish how much time he spent on individual tasks and how much he charged for each.

Dr. Sakauye's fees are attached to the Rule to Tax Costs. His invoices reflect that he charged a flat fee of \$500 an hour for all pre-trial services, and charged \$5,000 a day to testify at trial. He also submitted travel expenses along with his billed fees for his expert witness services.

¹⁹ Dr. Sakauye was selected by Dr. Thompson and Dr. Bloch, the Appellant's expert witness, at the direction of the trial court. The parties were initially to each bear one-half of Dr. Sakauye's fees; however, Mr. Benson advanced all of his fees with the understanding that his half of the fees would be reimbursed by Appellants.

Appellants argue that Dr. Thompson's fees are excessive considering how much higher they are than Dr. Sakauye's. The record reflects that Dr. Thompson spent 108 hours preparing for his evaluation of Mr. Benson, while Dr. Sakauye spent 13.25 hours. Dr. Thompson began to work on the interdiction proceeding on January 28, 2015, while Dr. Sakauye began working on the case on February 28, 2015. Dr. Thompson also consulted with Appellants' expert to find and retain Dr. Sakauye as the neutral third expert, reviewed and summarized Mr. Benson's medical records, collaborated in drafting an expert report, prepared for and appeared at his deposition, prepared to testify at trial, attended trial, and testified. Additionally, Dr. Thompson remained in the courtroom throughout the entire trial, as he was the last witness called by either party prior to Appellants' rebuttal. Dr. Sakauye was present for about half the trial.

Appellants further claim that at least \$115,236.37 of the \$301,164.47 in fees awarded to Mr. Benson is not taxable under the law, and thus this Court should reduce the award accordingly. They claim the non-taxable fees include approximately \$32,800 that the two doctors billed for time spent in consultation with counsel; \$50,250 awarded to the doctors for time spent in court not testifying; and \$17,602.37 awarded for travel; expenses and deposition-related fees of the doctors.

In support of their request that the award be reduced, Appellants cite to *Watters*, in which this Court reduced a cost award from \$333,577.08 to \$23,302.98. The *Watters* Court stated that “[e]xamples of litigation expenses that

are not recoverable as costs because they are outside the scope of La. R.S. 13:4533 include ‘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.’”²⁰ The *Watters* court stated that the costs of depositions used at trial are recoverable, but only where the deposition was introduced and accepted into evidence.²¹

Regarding the amounts billed by the experts for time spent consulting with counsel, multiple courts have refused to award fees for such time. In *Saden v. Kirby*, this Court stated that it was adopting the reasoning of the First Circuit in that “[t]he defendant can have taxed as costs the reasonable cost of time spent by the expert in gathering facts necessary for his testimony but not for time spent in consultation which only assists the attorney in preparation of litigation.”²²

In this case, the record here does not indicate which consultation fees were incurred in preparation for litigation and which were incurred in gathering facts for testimony. The invoices indicate which fees were for “consultation,” but without more detail it is not possible to determine which fees possibly could have been excluded. Therefore, it appears that the trial court acted within its discretion to award the full consultation amounts billed.

As to the charges incurred for the doctors remaining in the courtroom when not testifying, the record reflects that Dr. Thompson billed 55 hours for time spent

²⁰ 2008-0977, p. 51, 15 So.3d at 1162.

²¹ *Id.*

²² *Saden*, 826 So.2d at 562-63.

in court (totaling \$41,250) and that Dr. Sakauye billed for 4 full days (totaling \$20,000). Appellants argue that the case law is clear that expert fees will not be awarded to an expert after he has testified. They cite to *State, Dept. of Highways v. Whitman*, where the Second Circuit stated that proposition citing First Circuit cases stating the same.²³ However, there is no evidence in the record to show that the time the experts spent in the courtroom were not in preparation for their testimony. As such, we cannot say the trial court abused its discretion in awarding these amounts.

Finally, as to the travel expenses, the trial court had the discretion to award the costs incurred by each expert witness for travel as such expenses can be seen as “additional compensation” per La. R.S. 13:3666.

Considering the detailed invoices submitted by Mr. Benson for the costs incurred in retaining Dr. Thompson and Dr. Sakauye for the interdiction proceeding, and the time put in by both doctors preparing for and testifying in the proceeding, we do not find that the trial court abused its discretion in awarding the full amount invoiced.

²³ *State, Dep't of Highways v. Whitman*, 313 So.2d 918, 925 (La. App. 2d Cir.), writ denied, 319 So.2d 443 (La. 1975) (citing to *State v. LaBauve*, 75 So.2d 862 (La.App.1st Cir. 1954), which held “a court will only award expert witness fees when the witness is in court testifying or in court waiting to be called to testify, and expert witness fees will not be awarded to an expert after he has testified, even though he stays in court only for the purpose of consulting the party who summoned him.”)

CONCLUSION

As the record does not indicate that the trial court abused its discretion or awarded any fees that were not permitted by law, the trial court's award is affirmed.

AFFIRMED