STATE OF MICHIGAN

COURT OF APPEALS

ROBERT A. DOYLE and SUSAN DOYLE,

Plaintiffs-Appellees,

v

ARCHBOLD LADDER COMPANY, d/b/a BLUE RIBBON LADDER COMPANY, and A.L. DAMMAN COMPANY, d/b/a DAMMAN HARDWARE,

Defendants-Appellants.

UNPUBLISHED
June 25 2002

No. 227092
Macomb Circuit Court
LC No. 96-003204-NP

Before: Neff, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

This product liability case arises out of an injury in which plaintiffs sought to recover damages from defendants, the manufacturer and the retail seller of an aluminum stepladder. Following a jury trial, a verdict was rendered in favor of defendants. On January 19, 2000, judgment was entered on the verdict, allowing taxable costs. Thereafter, defendants submitted their bill of costs with attached invoices to the trial court, requesting $17,823.77 for various expenses and fees. As a result of plaintiffs' objections to the bill of costs, defendants filed a motion for taxation of costs that was denied without prejudice. Defendants appealed, and retaining jurisdiction, this Court remanded the matter to the trial court for its reconsideration. The sole issue on this appeal relates to defendants' challenges to the trial court's denial of certain taxable costs. We affirm in part, reverse in part, and remand.

I

Defendants raise several challenges to the trial court's awards of costs and argue that the trial court abused its discretion when it denied or limited the award of costs pursuant to MCL 600.2401 *et seq.*, and MCL 600.2501 *et seq*. The order of judgment in this case permitted defendants to tax costs. Taxation of costs under MCR 2.625(A) is within the discretion of the trial court. *Blue Cross & Blue Shield of Michigan v Eaton Rapids Community Hosp*, 221 Mich App 301, 308; 561 NW2d 488 (1997). This Court reviews a trial court's ruling on a motion for costs under MCR 2.625 for an abuse of discretion. *Klinke v Mitsubishi Motors Corp*, 219 Mich App 500, 518; 556 NW2d 528 (1996), aff'd 458 Mich 582 (1998). The interpretation and application of court rules and statutes present a question of law that is reviewed de novo. *Szymanski v Brown*, 221 Mich App 423, 433; 562 NW2d 212 (1997).

The four items of costs that defendants challenge on appeal are: (A) the motion filing fees, (B) the subpoena service fees served on four custodians of records, (C) the costs and expenses related to the depositions of plaintiffs' expert witnesses, David Sikarskie and Robert Little, and (D) the costs and expenses related to defendants' expert witness Jon Ver Halen.

Generally, a prevailing party may be entitled to costs. MCR 2.625(A)(1). Taxation of costs and allowable fees is governed by MCL 600.2401 *et seq*., and MCL 600.2501 *et seq*. Although the decision whether to tax costs is discretionary, any costs that the court awards must be authorized by statute, and only costs statutorily authorized may be recovered. *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 465; 633 NW2d 418 (2001); *Beach v State Farm Mutual Auto Ins Co*, 216 Mich App 612, 621; 550 NW2d 580 (1996). A trial court abuses its discretion by taxing litigation expenses without statutory authority. *Beach, supra* at 623. An award of costs does not include all expenses. *Id*. at 621-622.

A. Motion Filing Fees

Defendants argue that the trial court improperly disallowed certain motion fees to be taxed as costs. We agree. Here, the trial court disallowed the fees for the filing of motions on the basis that no statutory authority allowed for the taxation of motions. However, MCL 600.2529(1)(e) and (2) allow motion fees to be taxed as costs. Defendants claim that there are six motions involved, but they provide documentation pertaining to only five motions. In regard to the five documented motions, we conclude that the lower court erred in refusing to allow the taxation of costs for the motions at a rate of $20 per motion.

B. The Fees for Service of Subpoenas

Defendants rely on MCL 600.2552(1) and MCL 600.2559(1)(n), and argue that the trial court erred in failing to allow defendants to tax their service of subpoena fees to the custodian of records of four of plaintiffs' medical providers. We disagree.

Defendants failed to prove that these witnesses attended any action or proceeding in the instant case for purposes of MCL 600.2552(1). The provision that was in effect on the date of the trial reads as follows:

> A witness *who attends any action or proceeding* pending in a court of record shall be paid a witness fee of $12.00 for each day and $6.00 for each half day, or may be paid for his or her loss of working time but not more than $15.00 for each day shall be taxable as costs as his or her witness fee. A witness shall be reimbursed for his or her traveling expenses at the rate of 10 cents per mile in coming to the place of attendance and returning from the place of attendance, to be estimated from the residence of the witness, if his or her residence is within this state, or from the boundary line of this state that the witness passed in coming into this state, if his or her residence is out of this state. [MCL 600.2552(1) (text effective until October 1, 2000) (emphasis added).]

In the instant case, the subpoenas were issued to the records' custodians for Dr. John Cieszkowski, St. Joseph Mercy Hospital Outpatient Physical Therapy, St. Joseph Mercy Hospital (different address), and Mt. Clemens General Hospital. Defendants did not provide the trial

court with a copy of the actual subpoenas served for a determination whether they were, in fact, issued as subpoenas for the personal appearance of the custodians of the records. We note that the trial court, itself, stated at the June 26, 2000, hearing that the custodians of the records were served with subpoenas for discovery-related matters only. Moreover, at oral arguments before the trial court, and in their brief on appeal, defendants argue extensively the fact that the witness fee is taxable for the witness' appearance – a subpoenaed witness need not testify. But not once have defendants, either at the trial court or in their brief on appeal, stated that these four witnesses actually appeared at the court as potential witnesses, and defendants provided no evidence to support their burden of proof that the witnesses actually appeared for purposes of MCL 600.2552(1). Accordingly, the trial court did not abuse its discretion in denying these costs to defendants.

Defendants are vague in their brief on appeal regarding whether the subpoenas in question were issued pursuant to the trial court's order under MCR 2.506.[1] In *Glover v Ralph Meyers Trucking, Inc*, 224 Mich App 665, 674-675; 569 NW2d 898 (1997), this Court held that where an individual is forced to appear by direction of a subpoena, the individual is entitled to be paid a fee for "attendance and mileage." MCR 2.506(G); *Glover, supra* at 674. Accordingly, this Court ruled that the witness fee for the appearance of the custodian of records pursuant to the subpoena over and above the cost of copying the medical documents was to be awarded. *Id*. at 675. In the instant case, if, in fact, the subpoenas were ordered pursuant to MCR 2.506, defendants again fail their burden of proof in showing that any of these witnesses actually "appeared." Accordingly, the trial court did not err in denying these costs to defendants.

Defendants also fail to meet the requirements of MCL 600.2559(1)(n) that requires a subpoena to be directed to a witness. As earlier noted, defendants have not shown that the four custodians of records were served in their individual capacity with a subpoena to testify. Accordingly, they were not entitled to these fees pursuant to MCL 600.2559(1)(n).

C. Deposition and Expert Witness Costs and Fees

Defendants argue that the trial court abused its discretion when it declined to allow as taxable costs the expert witness fees and travel expenses covering the discovery-only videotaped depositions of plaintiffs' first engineering expert, David Sikarskie, and plaintiffs' second engineering expert, Robert Little, who was retained following Sikarskie's death. We disagree.

Here, defendants rely on MCL 600.2164 to support the taxation of expert witness fees in this case. MCL 600.2164 authorizes a trial court to award expert witness fees as an element of taxable costs, in excess of the ordinary witness fees. *Rickwalt, supra* at 466. MCL 600.2164(1) provides:

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[1] MCR 2.506(A) (1) provides:

> The court in which a matter is pending may by order or subpoena command a party or witness to appear for the purpose of testifying in open court on a date and time certain and from time to time and day to day thereafter until excused by the court, and to produce notes, records, documents, photographs, or other portable tangible things as specified.

> No expert witness shall be paid, or receive as compensation in any given case for his services as such, a sum in excess of the ordinary witness fees provided by law, unless the court before whom *such witness is to appear, or has appeared*, awards a larger sum, which sum may be taxed as a part of the taxable costs in the case. Any such witness who shall directly or indirectly receive a larger amount than such award, and any person who shall pay such witness a larger sum than such award, shall be guilty of contempt of court, and on conviction thereof be punished accordingly. [Emphasis added.]

In the instant case, defendants intended the video depositions of both expert witnesses to be discovery-only depositions, and the depositions were taken as such. Moreover, during the proceedings in the case, the parties effectively barred, through motions in limine, either deposition from being presented at trial. The deposition testimony of these two expert witnesses, as such, were never intended to be presented before the trial court and neither expert was intended to appear before the trial court to testify regarding the matters that they testified to in those depositions. Therefore, the expert witness fees fail to meet the requirements of MCL 600.2164(1) for purposes of taxable costs, and the trial court did not abuse its discretion in denying these costs.

D. Taxable Fees and Travel Expenses for Defendants' Expert Witnesses

Defendants also rely on MCL 600.2164(1) to support the taxation of defendants' expert witness fees in this case, and argue that the trial court abused its discretion when it allowed only $1,160 of Ver Halen's total invoice of $13,458.81. Specifically, defendants argue that the trial court (1) disallowed any compensation for Ver Halen's time spent examining the ladder and developing his opinions, (2) disallowed any travel expenses, (3) disallowed any time spent on preparation for two discovery depositions by plaintiffs, and (4) disallowed most of the 28.5 hours Ver Halen spent traveling to trial and being available to testify. Defendants do not dispute the four hours of Ver Halen's actual trial testimony that the trial court allowed as taxable costs.

We first address the issue of Ver Halen's trial preparation fees and trial travel expenses. A trial court has discretion under MCL 600.2164 to authorize expert witness fees for court time and for the time required to prepare for testifying. *Herrera v Levine*, 176 Mich App 350, 357-358; 439 NW2d 378 (1989). However, this Court has drawn a distinction between preparing for testimony and providing consultant services for a litigant. *Hartland Twp v Kucykowicz*, 189 Mich App 591, 599; 474 NW2d 306 (1991).

In the instant case, defendants sought reimbursement of $13,458.81 for Ver Halen's expert witness fees and travel expenses. The record of the June 26, 2000, hearing regarding costs indicates that the trial court recognized its authority to grant Ver Halen reasonable costs for trial preparation, but expressed its concern over the unclear itemized expenses that were attached to defendants' bill of costs. The record shows that the parties argued the propriety of specific items within the itemized bill that was presented to the trial court. The parties discussed the amount of time that Ver Halen spent preparing for his trial testimony, the amount of time he was available awaiting his turn to testify, the amount of time he spent on travel, and the reasonableness of his hourly rates for trial preparation and testimony. The trial court indicated that Ver Halen's testimony that he had been paid $4,000 in fees prior to trial was considerably less than the amount that defendants were charging in their bill of costs and that the trial court

believed that the time Ver Halen spent waiting to testify was utilized by defendants as trial consulting time and, accordingly, was not taxable. The trial court then reviewed the itemized charges in Ver Halen's invoices and noted that Ver Halen only charged a total of 3.25 hours of trial preparation and travel time. The trial court extensively inquired into other various travel expense charges in Ver Halen's invoices. It appears from the record that the trial court disallowed any travel expenses because they were "nontestimonial hours."

Because the record indicates that the trial court considered and weighed the reasonableness of defendants' requested trial preparation expert witness fees, we conclude that the trial court's reduced award of $360 for trial preparation and testimony was not an abuse of discretion. However, Ver Halen's travel expenses were taxable pursuant to MCL 600.2164(1). Because the trial court disallowed Ver Halen's trial travel expenses merely because they involved "nontestimonial" expenses, the issue of Ver Halen's travel expenses to and from the trial is remanded for reconsideration by the trial court in light of MCL 600.2164(1).

The remaining issues defendants challenge are Ver Halen's fees and travel expenses for examining the ladder at issue and developing his opinions regarding the case, and preparation for two discovery depositions by plaintiffs. Regarding the expenses that defendants claim are related to Ver Halen's examination of the ladder, the invoices attached to defendants' bill of costs do not reflect any such charges, and defendants fail to support their claim with any authority that allows as taxable costs an expert witness' examination of a trial exhibit. Therefore, the trial court did not abuse its discretion in failing to award any costs related to the examination of the ladder.

Regarding defendants' claim that Ver Halen's fees and expenses related to the two depositions are taxable, we reject this claim for the second deposition, dated August 9, 1999, for the same reasons that fees and expenses are not taxable for the video depositions of plaintiffs' two expert witnesses. Similar to the depositions of Sikarskie and Little, Ver Halen's second deposition was given for discovery-only purposes. Regarding the first deposition, dated June 3, 1998, it appears from Ver Halen's invoices that he charged a total of $1,950 for deposition preparation and $281.04 for travel expenses. However, we do not make a determination of this matter. Both at the June 26, 2000, hearing and in their brief on appeal, defendants failed to support their claim with any reference to the nature of the first deposition. Defendants have not convinced this Court to disturb the trial court's decision to deny Ver Halen's witness expenses for the first deposition.

Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion. No taxable costs on appeal pursuant to MCR 7.219, neither party having prevailed in full. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Richard Allen Griffin
/s/ Michael J. Talbot