STATE OF MICHIGAN

COURT OF APPEALS

ROBERTA LENSKI,

Plaintiff-Appellee,

v

CHELSEA COMMUNITY HOSPITAL and MANCHESTER FAMILY PRACTICE,

Defendants,

and

DORI TAMAGNE, M.D.,

Defendant-Appellant.

UNPUBLISHED
August 14, 2008

No. 275995
Washtenaw Circuit Court
LC No. 04-000457-NM

Before: Saad, C.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Defendant Dori Tamagne, M.D., appeals as of right from a combined judgment of no cause of action in her favor and order and judgment awarding her $1,170 in taxed costs against plaintiff. On appeal, defendant challenges the trial court's lesser award of costs instead of the full amount ($22,525.90) she had requested. We vacate the award of taxed costs and remand the case to a different trial judge to determine an appropriate award of taxed costs in favor of defendant. This case has been decided without oral argument under MCR 7.214(E).

This Court reviews a trial court's ruling on a motion for taxable costs under MCR 2.625 for an abuse of discretion. *Ivezaj v Auto Club Ins Ass'n*, 275 Mich App 349, 367; 737 NW2d 807 (2007). Generally, a decision is not an abuse of discretion if it constitutes a reasonable and principled outcome. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Defendant argues that the trial court abused its discretion in failing to award the full amount of taxable costs she requested. While we do not agree that defendant was entitled to the full amount of taxable costs, we do agree that the trial court abused its discretion by failing to award defendant's motion fee costs and in its treatment of her expert witness fees.

Initially, we reject defendant's argument that the trial court erred by failing to place in writing its reasons for failing to award the full amount of taxable costs sought by defendant.

MCR 2.625(A)(1) provides that such costs will be allowed to the prevailing party "unless prohibited by statute or by these rules or unless the court directs otherwise, for reasons stated in writing and filed in the action." However, the trial court did not refuse to award costs to defendant as the prevailing party. Rather, it awarded defendant a lesser amount of such costs than she requested. By the plain language of MCR 2.625(A)(1) a trial court is only required to state in writing its reasons for denying taxable costs to a prevailing party, i.e., for refusing to award any such costs to the party, not for awarding a lesser amount of such costs than the party requested.

Turning to the substance of the trial court's decisions regarding taxable costs, the trial court failed to award defendant the $80 in motion fees she requested. Under MCL 600.2529(1)(e) and (2) motion fees are taxable as costs. The trial court did not specifically address the requested motion fees at the motion hearing, but it did express that defendant was entitled to the "statutory fees." It appears undisputed that defendant actually paid $80 in motion fees. Because (1) the trial court expressed that it would allow defendant to recover the "statutory fees," (2), the taxation of motion fees as costs is authorized by MCL 600.2529, and (3) the trial court's award reflects that it allowed defendant to tax the larger amount of $170 in trial costs, the failure to include $80 in motion fees in the award of taxable costs appears to be an oversight. Thus, we conclude that the trial court abused its discretion by failing to award defendant the $80 in motion fees as part of the award of taxable costs because there was no reasonable and principled basis for failing to award this amount.

However, defendant has not established that the trial court abused its discretion in refusing to award her $3,714.90 in costs for the deposition testimony of Billy Joe Page, D.O., Debra Spicehandler, M.D., and David Cox, M.D. MCL 600.2549 provides:

> Reasonable and actual fees paid for depositions of witnesses filed in any clerk's office and for the certified copies of documents or papers recorded or filed in any public office shall be allowed in the taxation of costs only if, at the trial or when damages were assessed, the depositions were read in evidence, except for impeachment purposes, or the documents or papers were necessarily used.

Thus, by the plain statutory language, a requirement for the taxation of such costs is that the relevant depositions must have been filed in a clerk's office. *Portelli v I.R. Constr Products Co, Inc*, 218 Mich App 591, 606-607; 554 NW2d 591 (1996). The depositions of Dr. Page and Dr. Spicehandler are not included in the record and, accordingly, there is no indication that those depositions were filed with the clerk's office. Therefore, the trial court properly refused to award defendant costs for the depositions of Dr. Page and Dr. Spicehandler.[1] The deposition of Dr. Cox was filed with the clerk's office below because it is attached to defendant's motion to strike portions of the trial testimony of Dr. Cox, who is described in the motion as plaintiff's standard of care expert. However, in addition to the deposition transcript having been filed with

[1] Notably, defendant asserts that Dr. Spicehandler's deposition was filed as an exhibit to her motion to strike Dr. Spicehandler's standard of care testimony, but that deposition is not actually attached to this motion in the record.

the clerk's office, by the plain language of MCL 600.2549, costs may be taxed under that statutory provision for the costs of the deposition only if the deposition was "read in evidence, except for impeachment purposes." Plaintiff indicates that any information from the deposition transcripts at issue was only used for impeachment purposes. Defendant does not dispute this, but rather seems to incorrectly assert that the cost of Dr. Cox's deposition transcript was taxable merely because it was filed in the lower court record. Defendant has not provided transcripts of the trial, but it seems unlikely that defendant would have had the deposition testimony of Dr. Cox, one of plaintiff's experts, read into evidence for anything other than impeachment purposes. Accordingly, there is no basis to conclude that the trial court abused its discretion in refusing to award costs for Dr. Cox's deposition testimony.

However, we hold that the trial court abused its discretion with regard to the amount of expert witness fees it awarded as taxable costs. The trial court awarded only $1,000 rather than the $18,561 requested by defendant. The trial court's essential rationale for awarding only $1,000 was that each of defendant's two experts should have been "able to say what you have to say in two hours." That conclusion was unreasonable because it allowed recovery of a fee only for the time that the trial court subjectively determined each expert's trial testimony should have taken. It included no allowance for the preparation time an expert would plainly need in advance of trial, which is properly included in an award of expert witness fees. See *Rickwalt v Richfield Lakes Corp*, 246 Mich App 450, 466-467; 633 NW2d 418 (2001) (upholding a trial court's award of expert witness fees that included recovery for time the expert spent in preparation for testimony). Thus, the trial court abused its discretion in determining the amount of expert witness fees defendant was entitled to include in her taxed costs. Defendant requests that this Court hold she is simply entitled to recover the entire $18,561 in expert witness fees. However, it does not follow from the trial court's abuse of discretion in determining the amount of expert witness fees that defendant was necessarily entitled to recover the full amount of such fees. Rather, because this is a discretionary decision for the trial court, we must remand the case for the trial court to determine an appropriate amount of expert witness fees to award.

We further hold that this case shall be remanded to a different judge because, here, the judge made clear that he would "have difficulty in putting aside previously expressed views" about his aversion to awarding costs to a prevailing defendant in a medical malpractice action. *Bayati v Bayati*, 264 Mich App 595, 602-603; 691 NW2d 812 (2004). At the hearing on defendant's motion to tax costs, when defense counsel asked the trial court to use its discretion to award the full amount requested, the trial court responded, "I have a fairly standard response on that," and shortly thereafter stated, "Fairly standard discretion." Thereafter, the trial judge questioned defense counsel about his client's motivation to seek costs, suggesting that it was a maneuver to avoid an appeal. The judge further insinuated that defendant sought recovery of the statutorily-permitted costs to extract "a pound of flesh" from plaintiff, opining to defense counsel that "[y]ou have all the law on your side and then you still come in and try to run their nose in it. I can't believe it . . . ." In an even more blatant expression of his predisposition against defendant, the trial judge commented to defense counsel that "your clients have done this marvelous job of getting the Legislature to put all the law on their side and then you want to come in and rub their nose in it." The judge then characterized defendant's motion for costs as "a terrible thing." Moreover, when ruling on defendant's request for expert witness fees, the trial judge refused to award any more than $500 per witness, observing that, "I have yet to meet anybody in any of these case[s] where a physician can't state their view in two—in—it shouldn't

take more than two hours." The judge then advised defense counsel that, with regard to plaintiff, he "ought to let this poor woman go home and lick her wounds."

We view the trial judge's remarks in this case as egregiously biased and simply injudicious.[2] The Code of Judicial Conduct, Canon 2(B), requires that a judge "respect and observe the law" and act at all times to "promote public confidence in the integrity and impartiality of the judiciary." Indeed, it is fundamental that **"**due process in civil cases requires an impartial decisionmaker." *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995). It is the essence of impartiality that a judge interpret and apply the law without bias. A judge is not a policy-maker and must not limit a party's rights under the law based on his disagreement with the policy underlying the Legislature's promulgation of that law. Rather, a judge must, in conduct and discourse, give all assurances of objectivity to satisfy the public of the integrity of the judicial process.

Here, the opposite occurred. Not only did the trial judge's comments express a clear prejudice against defendant and, indeed, any prevailing defendant in a medical malpractice action, they evidence a disturbing inclination to flout a prevailing party's entitlement to costs under Michigan law. This judge's paternalistic bias in favor of plaintiff also calls into question his ability to engage in a proper analysis of defendant's legal entitlement to recover costs as the prevailing party. Clearly, "reassignment [to a different judge] is advisable to preserve the appearance of justice" which, under these egregious circumstances, would outweigh any "waste or duplication." *Bayati, supra* at 602-603. It is clear that under Michigan law a prevailing defendant in a medical malpractice action is allowed to tax certain costs. A hearing on a motion to tax such costs must be directed at evaluating the request under the law, not at the trial judge's subjectively negative view of the underlying law allowing taxation of costs. Further, the trial judge's treatment of the expert witness fees claimed by defendant—a matter clearly involving considerable discretion—by limiting the time for which he would allow fees to be recovered to an arbitrary amount of two hours per expert, strongly suggests that the judge inappropriately attempted to use his discretion to severely limit the award of taxable costs rather than attempting to fairly determine an amount of expert witness fees. Accordingly, while our decision to remand to a different judge may involve some duplication because the new judge will not be as familiar with the case, we firmly believe that the reasons to question the original judge's ability to fairly handle this matter and the appearance of justice outweigh any such concern.

We vacate the judgment being appealed in part, specifically with regard to the amount of taxable costs awarded to defendant, and remand the case to a different trial judge for an appropriate determination of an award of taxable costs in defendant's favor. This award should include the $170 in trial costs previously awarded as well as the $80 in motion fees requested by

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[2] "Bias or prejudice has been defined as 'an attitude or state of mind that belies an aversion or hostility of a kind or degree that a fair-minded person could not entirely set aside when judging certain persons or causes.' " *Cain v Michigan Dept of Corrections*, 451 Mich 470, 495 n 29; 548 NW2d 210 (1996), quoting *United States v Conforte*, 624 F2d 869, 881 (CA 9, 1980).

defendant. The trial court should also determine an appropriate amount of expert witness fees to include in the award. However, the award should not include any amount for the costs of the depositions at issue in this appeal. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello