

CARLO CONFORTO

NO. 17-CA-20

VERSUS

FIFTH CIRCUIT

DYLAN TOSCANO, UNITED SERVICES
AUTOMOBILE ASSOCIATION AND
ALLSTATE INSURANCE COMPANY

COURT OF APPEAL
STATE OF LOUISIANA

ON APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA
NO. 711-301, DIVISION "G"
HONORABLE E. ADRIAN ADAMS, JUDGE PRESIDING

December 13, 2017

STEPHEN J. WINDHORST
JUDGE

Panel composed of Judges Robert M. Murphy,
Stephen J. Windhorst, and Hans J. Liljeberg

AFFIRMED

SJW

RMM

HJL

COUNSEL FOR PLAINTIFF/APPELLANT,
CARLO CONFORTO

Laurence D. Cohen

COUNSEL FOR DEFENDANT/APPELLEE,
DYLAN TOSCANO AND USAA CASUALTY INSURANCE COMPANY

T. Gregory Schafer

WINDHORST, J.

Appellant, Carlo Conforto, appeals the trial court's September 22, 2016 judgment,¹ granting his motion to tax costs against appellees, Dylan Toscano and United Services Automobile Association.² For the reasons that follow, we affirm.

Facts and Procedural History

On March 18, 2011, appellant was involved in a motor vehicle accident and as a result sustained injuries. Appellant filed a petition for damages against appellees on February 10, 2012. A jury trial was held March 28 through March 30, 2016, wherein judgment was rendered in favor of appellant in the amount of \$145,708.36 plus legal interest from the date of judicial demand and all court costs.

At the trial on the merits, appellant inquired into how the trial court would like to handle expert witness fees when he had his first expert witness on the stand. After a bench conference with opposing counsel and the trial court, it was agreed that the expert witness fees would be addressed after trial at a motion to tax costs.³

¹ On September 14, 2017, this Court ordered the trial court to amend the September 22, 2016 judgment to include the appropriate and necessary decretal language for a final judgment. The trial court rendered an amended judgment on September 15, 2017, which was filed into this Court's record on September 20, 2017.

² Appellees did not appeal or file an answer to the trial court's September 22, 2016 judgment.

³ The following discussion took place at the trial of this case on March 28, 2016.

Bench conference held on the record:

Mr. Cohen:

Judge, I want to be certain about expert witness fees and how you handle that with these witnesses. Do I add it into the bill? Do you treat that separately? Do they testify here and tell them what their costs is for appearance?

Mr. Schafer:

We can address that after the trial. Depending on what the evidence is usually done for a motion and tax costs after.

Mr. Cohen:

Well, I'm going to make sure that they get their witness fees on the record.

Mr. Schafer:

Well, you can submit that through—

The Court:

Whatever his fees are you submit that after the person testifies.

Mr. Schafer:

For a motion, I mean, I think we do -- if you have a piece of paper, I'm not going to --- I'll say it in front of the judge, I'm not going to object to that down the road, that we have a motion to tax costs after the trial.

Mr. Cohen: Okay. All right, thanks Judge. Thank you Tom.

(Back on the record)

On April 26, 2016, appellees filed a motion for JNOV and/or new trial, which was denied by the trial court on July 11, 2016. Appellant filed a rule to tax costs on August 9, 2016, wherein he requested expert witness fees for Dr. Rand Voorhies, Dr. Donald Dietz, Dr. Peter Zimmerman, Dr. Samuel Greenburg, and Nathaniel Fentress. After a hearing, the trial court issued judgment granting appellant's motion on September 22, 2016. The judgment awarded expert witness fees to appellant for four of the five experts called to testify at trial. The trial court did not award an expert witness fee for one expert, Dr. Samuel Greenburg, appellant's treating physician. This appeal followed.

Discussion

La. C.C.P. art. 1920 authorizes the taxing of costs.⁴ Further, La. R.S. 13:3666 authorizes expert witness fees to be taxed as costs and provides in pertinent part:

A. Witnesses called to testify in court only to an opinion founded on special study or experience in any branch of science, or to make scientific or professional examinations, and to state the results thereof, 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.

B. The court shall determine the amount of the fees of said expert witnesses which are to be taxed as costs to be paid by the party cast in judgment either:

(1) From the testimony of the expert relative to his time rendered and the cost of his services adduced upon the trial of the cause, outside the presence of the jury, the court shall determine the amount thereof and include same.

(2) By rule to show cause brought by the party in whose favor a judgment is rendered against the party cast in judgment for the purpose of determining the amount of the expert fees to be paid by the party cast in judgment, which rule upon being made absolute by the trial court shall form a part of the final judgment in the cause.

⁴ La. C.C.P. art. 1920 provides:

Unless 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.

A trial court has great discretion in awarding costs and its assessment will not be reversed on appeal absent an abuse of discretion. State of Louisiana, Dept. of Transp. & Develop. v. Monteleone, 11-1013 (La. App. 5 Cir. 11/13/12), 106 So.3d 153, 173, writ denied, 13-118 (La. 03/01/13), 108 So.3d 1179; Scramuzza v. River Oaks, Inc., 03-959 (La. App. 5 Cir. 03/30/04), 871 So.2d 522, 531, writ denied, 04-1088 (La. 06/25/04), 876 So.2d 839.

Factors to consider in determining a reasonable expert witness fee award include the 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. Bourgeois v. Heritage Manor of Houma, 96-0135 (La. App. 1 Cir. 02/14/97), 691 So.2d 703, 708. Other considerations by the trial court include helpfulness of the expert's report and testimony to the trial court, the amount in controversy, the complexity of the problem addressed by the expert, and awards to experts in similar cases. Id. However, expert witnesses are entitled only to reasonable compensation. Id. The amount agreed upon between an expert witness and the party calling him is not the criterion to be used by the court in assessing expert fees. Id.

Competent evidence must be produced by a litigant on a contradictory rule to fix and tax expert witness fees pursuant to La. R.S. 13:3666 B(2). Wampold v. Fisher, 01-008 (La. App. 1 Cir. 06/26/02), 837 So.2d 638, 640. The assertions of an attorney and expert through a submitted 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. Dakmak v. Baton Rouge, 12-1850 (La. App. 1 Cir. 09/04/14), 153 So.3d 511, 515. The expert must testify at the trial of the rule and be subject to cross-examination. Wingfield v. State ex rel. Dept. of Transp. And Development, 03-1740 (La. App. 1 Cir. 05/14/04), 879 So.2d 766, 770; Wampold, 837 So.2d at 640.

When a judgment is silent as to a claim or demand that was litigated, it is presumed to be deemed denied by the trial court. Cambre v. St. John the Baptist Parish, 12-590 (La. App. 5 Cir. 05/16/13), 119 So.3d 73, writ denied, 13-1415 (La. 10/11/13), 123 So.3d 1227.

In his first assignment of error, appellant contends that the trial court erred in not awarding appellant the expert costs for the appearance and testimony of Dr. Samuel Greenburg during the trial of this case.

Appellant requested expert witness fees for Dr. Greenburg at the motion to tax costs. Appellee opposed the request. Attached to his motion, appellant included a letter from Dr. Greenburg stating the fees for his court appearance and testimony totaling \$2,250.00 and a check to Dr. Greenburg in the amount of \$750.00 for the “difference for trial fee.” However, no evidence or testimony was admitted regarding the expert witness fees for Dr. Greenburg, only argument. Since the matter was submitted to the trial court and the judgment is silent as to this claim, it is presumed to have been denied by the trial court. We find that the trial court did not abuse its discretion in denying appellant’s request for expert witness fees for Dr. Greenburg based on a lack of admitted supporting evidence. Moreover, we find that the documents which were attached to his motion and memorandum would not have been sufficient on their own to award expert fees to Dr. Greenburg had they been admitted. Dr. Greenburg did not testify and was not subject to cross-examination at the hearing. Dakmak, supra, Wingfield, supra, and Wampold, supra. Accordingly, this assignment of error is without merit.

In his second assignment of error, appellant contends that the trial court committed legal error in failing to award expert costs to Dr. Greenburg and therefore, this Court should review *de novo* all of the expert fees based on the lower court’s abuse of discretion in the low cost awards it made for the other experts. Because we find the trial court did not commit legal error in declining to award expert witness

fees to Dr. Greenburg, there is no basis or ground to justify a *de novo* review by this court. This assignment of error is therefore without merit.

Conclusion

Based on the foregoing, we affirm the trial court's September 22, 2016 judgment.

AFFIRMED

SUSAN M. CHEHARDY
CHIEF JUDGE

FREDERICKA H. WICKER
JUDE G. GRAVOIS
MARC E. JOHNSON
ROBERT A. CHAISSON
ROBERT M. MURPHY
STEPHEN J. WINDHORST
HANS J. LILJEBERG

JUDGES



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NOTICE OF JUDGMENT AND CERTIFICATE OF DELIVERY

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN DELIVERED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 2-16.4 AND 2-16.5** THIS DAY **DECEMBER 13, 2017** TO THE TRIAL JUDGE, CLERK OF COURT, COUNSEL OF RECORD AND ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

CHERYL Q. LANDRIEU
CLERK OF COURT

17-CA-20

E-NOTIFIED

24TH JUDICIAL DISTRICT COURT (CLERK)
HONORABLE E. ADRIAN ADAMS (DISTRICT JUDGE)
T. GREGORY SCHAFFER (APPELLEE)

MAILED

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