

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2015 CA 0085

AMT

IN RE: MEDICAL REVIEW PANEL FOR THE CLAIM
OF TARA LORRAINE

*WJC
by AMT*

Grey

Judgment Rendered: SEP 01 2016

On Appeal from the Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
No. C607582

Honorable Robert D. Downing, Judge, *pro tempore*, Presiding

Robert T. Talley
Baton Rouge, Louisiana

Counsel for Plaintiff/Appellant
Tara Lorraine

Guice A. Giambrone, III
Kelly M. Brian
Metairie, Louisiana

Counsel for Defendants/Appellees
Dr. Ross Quartano, Dr. Louis
Lamendola, Dr. Andre Bruni,
and Bluebonnet Dental Care, LLC

BEFORE: GUIDRY, McDONALD, McCLENDON, CRAIN AND THERIOT,
JJ.

AMC McCleendon J. dissents in part and assigns reasons.
amm McDonald, J. dissents in part for reasons assigned by
Judge McCleendon and assigns additional reasons.

THERIOT, J.

This is a companion case to **In re Medical Review Panel ex rel. Lorraine**, 14-1428 (La. App. 1 Cir. 1/19/16), 2016 WL 228166 (unpublished), wherein we affirmed the trial court’s judgment on the merits. In this appeal, the plaintiff-appellant, Tara Lorraine, seeks review of the trial court’s judgment taxing her with costs in the amount of \$9,555.14 following a trial by jury. For the following reasons, we reverse.

FACTS AND PROCEDURAL HISTORY

Ms. Lorraine filed the underlying suit against the defendants-appellees, Dr. Ross Quartano, Dr. Andre Bruni, and Dr. Louis Lamendola, for alleged malpractice related to dental treatment Ms. Lorraine received at Bluebonnet Dental Care, L.L.C. Following a jury trial, the jury returned a verdict finding that Ms. Lorraine failed to prove the appropriate standard of care, and the trial court rendered a judgment dismissing Ms. Lorraine’s claims with prejudice. Thereafter, the defendants filed a motion to tax costs, outlining various costs associated with the trial on the merits. Specifically, the defendants sought the following:

Court Costs:	\$ 1,870.29
Panel Fees (Drs. Quartano and Bruni):	\$ 2,269.92
Panel Fees (Dr. Lamendola):	\$ 766.64
Panel Fees (for Pauper Plaintiff):	\$ 756.64
Expert Fees (Dr. Kenneth Wilkinson):	\$ 3,000.00
Costs of Jury Lunches:	<u>\$ 891.65</u>
	\$ 9,555.14

The defendants attached the following documents to their memorandum in support of their motion to tax costs: correspondence from the clerk of court reflecting that Ms. Lorraine’s costs to date totaled \$1,870.29; a letter from the medical review panel chairman detailing the charges for the medical review panel; a letter from Dr. Wilkinson, the defendants’ expert witness at trial, indicating that his fee for professional witness services was \$3,000.00; and three invoices from Christina’s Restaurant pertaining to the costs of jury lunches during the trial.

Following a hearing on the motion to tax costs, the trial court signed a judgment on October 1, 2014, taxing costs in the amount of \$9,555.14 against Ms. Lorraine. Ms. Lorraine now appeals, asserting that the trial court erred in granting the defendants' motion to tax costs as a matter of law.

DISCUSSION

Louisiana Code of Civil Procedure art. 1920 states, in pertinent part: "Unless the judgment provides otherwise, costs shall be paid by the party cast, and may be taxed by a rule to show cause." In determining the amount of the award, the trial court has discretion to render a judgment for costs, or any part thereof, against any party, as it may consider equitable. La. C.C.P. art. 1920. The assessed costs may include "costs 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. The assessed costs may also include compensation for expert witnesses. See La. R.S. 13:3666.¹

On appeal, Ms. Lorraine notes that the defendants attached copies of purported invoices to their memorandum in support of their motion, but failed to introduce any of these documents into evidence at the hearing. Ms. Lorraine also

¹ Louisiana Revised Statute 13:3666, 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.

asserts that none of these documents were certified or authenticated in any way, nor were any of them itemized so as to permit cross-examination. Moreover, Ms. Lorraine notes that at the hearing on the motion to tax costs, the defendants offered no witnesses. Ms. Lorraine contends that because no witnesses authenticated or explained the charges, the defendants' motion to tax costs should have been denied as a matter of law.

In opposition, the defendants contend that Ms. Lorraine's argument that they "offered no evidence whatsoever" is incorrect, insofar as Ms. Lorraine acknowledged the list of exhibits they introduced. The defendants assert that their motion was grounded in law and well supported by the exhibits attached to their motion. The defendants aver that, under Louisiana law, the trial court needed no further evidence to determine whether the amounts sought were reasonable, and conclude that the trial court did not abuse its discretion in awarding the total amount prayed for in the defendants' motion to tax costs.

The record on appeal reflects that the defendants attached the supporting documents to their memorandum in support of their motion to tax costs, but failed to formally admit these documents into evidence at the hearing. Ms. Lorraine objected at the hearing regarding the defendants' failure to admit the documents into evidence, noting that "there has not been a shred of evidence offered other than argument of counsel." However, the defendants did not thereafter offer the documents into evidence. Thus, the defendants failed to support their motion to tax costs with competent and properly admitted evidence. See Denoux v. Vessel Management Services, Inc., 07-2143 (La. 5/21/08) 983 So.2d 84, 88. ("Evidence not properly and officially offered and introduced cannot be considered, even if it is physically placed in the record[;] [d]ocuments attached to memoranda do not constitute evidence and cannot be considered as such on appeal."). See also Jefferson Parish Hosp. Dist. No. 1 v. K & B Louisiana Corp., 13-508 (La. App.

5 Cir. 3/12/14), 138 So.3d 51, 56 n.5, writ denied, 14-0759 (La. 5/23/14), 140 So.3d 731 (citing **Denoux** in the specific context of a motion to tax costs). Therefore, the trial court erred, as a matter of law, in taxing Ms. Lorraine with costs for the amounts allegedly due for court costs, the medical review panel fees, and the jury lunches.

Though the defendants failed to support their motion to tax costs with properly admitted evidence, we recognize that the trial court was entitled to award expert witness fees based on its own in-court observations and experiences, without further proof. See **Wingfield v. State ex rel. Dept. of Transp. and Dev.**, 03-1740 (La. App. 1 Cir. 5/14/04), 879 So.2d 766, 770. Furthermore, we note that the trial court has great discretion in awarding costs, including expert witness fees, deposition costs, exhibit cost, and related expenses. **Id.** Nevertheless, we find that, under the facts of this case, the trial court abused its discretion by awarding expert witness fees for services performed away from its hearing and observation without competent and properly admitted evidence.

In **Wingfield**, this court discussed the assessment of expert witness fees and explained what evidence a litigant must introduce to be successful on a motion to tax costs:

Experts are only entitled to reasonable fees and related costs. Neither the agreement between the hiring party and the expert, nor the bill submitted to the court, binds the court's decision. Factors to be considered by the trial court in setting expert fees and related costs include: the time spent testifying at trial, time spent in preparatory work for trial, time spent away from regular duties while waiting to testify, the extent and nature of work performed, and the knowledge, attainments, and skill of the expert. Additional considerations include the helpfulness of the expert's testimony to the court, the amount in controversy, the complexity of the problem addressed by the expert, and awards to experts in similar cases. While an expert may receive fees for preparatory work, this is limited to the work done in preparation for trial, not consultations that only assist the attorney in his preparation for trial. Experts who testify by deposition may also have their fees taxed as costs, provided that their depositions have been introduced as evidence.

In setting expert fees and related costs for in-court time, such as testimony and depositions submitted at trial, the trial court may rely upon its own in-court observations and experiences, without further proof. However, for work done or expenses incurred outside the courtroom, such as time spent gathering facts in preparation for trial testimony and time spent away from regular duties, the plaintiff in rule must submit competent and admissible evidence. Unless the parties stipulate to the specifics and costs of the out-of-court work, the expert must testify at the trial, or a subsequent hearing on the rule to tax costs, and be subject to cross-examination. Thus ... the mere assertions of an attorney and the expert via the submitted bill, even in conjunction with an expert's affidavit attesting to the correctness and truth of the billing statement, are not sufficient. This is especially true for complex, protracted litigation that has produced high expert fees and related costs.

Wingfield, 879 So.2d at 770 (internal citations omitted) (emphasis added).

In this case, it is uncontested that the trial judge who considered the motion to tax costs and signed the judgment awarding costs was not the judge that presided over the trial on the merits. We regard this fact as controlling of our decision. As articulated by this court in **Wingfield**, *supra*, a trial court may rely upon "its own" in-court observations and experiences in rendering an award for expert witness fees and related costs, whereas an award for work done or expenses incurred outside of the courtroom must be supported by competent and admissible evidence. Similarly, as we recently had occasion to explain in **Dakmak v. Baton Rouge City Police Dept.**, "[n]either [La. R.S. 13:366] B(1) nor B(2) allows the trial court to value the expert's services performed away from its hearing and observation without competent and admissible evidence." 12-1850 (La. App. 1 Cir. 9/4/14), 153 So.3d 511, 515 (quoting **Wampold v. Fisher**, 01-0808 (La. App. 1 Cir. 6/26/02), 837 So.2d 638, 640). Absent the trial judge relying on its own in-court observations and experiences in rendering the expert witness fees and absent competent and properly admitted evidence pertaining to the expert witness fees, we are constrained to conclude that the trial court's award of expert witness fees must also be reversed. Ms. Lorraine's sole assignment of error has merit.

DECREE

For the foregoing reasons, we reverse the trial court's judgment taxing the plaintiff-appellant, Tara Lorraine, with costs in the amount of \$9,555.14 following a trial by jury. Costs of this appeal are assessed to the defendants-appellees, Dr. Ross Quartano, Dr. Andre Bruni, and Dr. Louis Lamendola.

REVERSED.

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McClendon, J., dissenting in part.

The costs incurred with the clerk of court are easily verifiable from the court's own records. Given the discretion afforded the trial court by virtue of LSA-C.C.P. art. 1920, I respectfully disagree with my colleagues and would affirm the trial court's award of these readily established costs.

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McDonald, J., dissenting in part:

I dissent in part for the reasons assigned by Judge McClendon concerning the court costs. These are readily ascertainable. Additionally, I disagree with the majority in denying the expert fees. A trial judge with the experience of the one who made these determinations easily has the understanding and familiarity with expert testimony to appropriately set the amount of expert fees even if he did not preside over the trial. I would affirm the trial court's award of costs and expert witness fees.