NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 0784

M. MATT DURAND, L.L.C.

VERSUS

DENTON-JAMES, L.L.C., THE LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, PATRICK J. LANDRY AND ROBERT H. HENNIGAN

Judgment Rendered: MAR - 8 2012

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Appealed from the
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket Number 547,608

Honorable Wilson E. Fields, Judge

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BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

Guidry, J. dissents in part and assigns reasons

WHIPPLE, J.

The Louisiana Department of Transportation of Development (DOTD) appeals an amended judgment awarding expert witness costs and attorney fees to a subcontractor following the subcontractor's successful litigation of a breach of contract action against the DOTD. For the following reasons, we vacate in part and remand, and affirm all remaining portions of the judgment.

PROCEDURAL HISTORY

This matter comes before us again pursuant to an appeal filed by the DOTD seeking review of a judgment taxing costs. In the prior appeal, M. Matt Durand, LLC (Durand) sought review of the amount of damages awarded by the trial court, in a judgment rendered in its favor, for its breach of contract action against the DOTD. In that appeal, this court affirmed the trial court's determination that the DOTD had materially breached the contract with Durand, but found that the amount of damages awarded by the trial court was insufficient, and therefore amended the judgment to increase the award of damages. See M. Matt Durand, L.L.C. v. Denton-James, L.L.C., 10-0625 (La. App. 1st Cir. 12/22/10)(unpublished opinion).

In the meantime, Durand filed a motion to fix costs in the trial court, seeking to recover expert witness and attorney fees incurred in connection with the litigation, pursuant to the parties' stipulation that attorney's fees would be addressed by post-trial motion and hearing. Specifically, in the trial court's December 14, 2010 "Order" certifying as final the judgment on the merits at issue in the prior appeal, the trial court ordered therein that "Plaintiff's claim for attorneys' fees shall be determined by the Court on post trial hearing." On initial hearing, the trial court rendered judgment in favor of Durand for the total amount

requested.[1] However, following a hearing on a motion for new trial filed by the DOTD, the trial court amended the judgment to reduce the amount previously awarded to Durand for Courville's fees by $1,831.51 to account for the portion of these fees that had already been paid by the DOTD. The DOTD then filed the instant suspensive appeal from the trial court's March 11, 2011 judgment, assigning as error the trial court's decision to award expert witness fees to Durand, and alternatively, the amount awarded for the experts' fees, and the award of attorney fees.

DISCUSSION

Assignment of Error Number One

The DOTD first complains on appeal that expert witness fees should not have been awarded as costs in this matter due to certain procedural defects.

Louisiana Revised Statute 13:3666 clearly provides for an award of expert witness fees, providing, in pertinent part, as follows:

> 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. [Emphasis added.]

[1]Specifically, the judgment awarded $15,150.00 and $33,319.12 as expert fees for Dr. Jerry Householder and Craig Courville, respectively.

Moreover, it is not required that there be a substantive judgment in favor of the party on each particular issue that each particular expert witness testifies for the party to be awarded the costs of expert witness fees. Rather, all that is required to impose expert witness fees is a substantive judgment in favor of the party requesting the award and that the expert witness fees were reasonably necessary to the presentation of that party's case.[2] State, Department of Transportation and Development v. Restructure Partners, L.L.C., 07-1745 (La. App. 1st Cir. 3/26/08), 985 So. 2d 212, 233, writ denied, 08-1269 (La. 9/19/08), 992 So. 2d 937. See also LSA-C.C.P. art. 1920. Thus, based on the plain wording of La. R.S. 13:3666, we reject the DOTD's assertion that the trial court erred in finding that Durand is entitled to an award of expert witness fees. See Allen v. Roadway Express, Inc., 31,628 (La. App. 2nd Cir. 2/24/99), 728 So. 2d 1015, 1019.

Accordingly, we find no merit to this assignment of error.

Assignment of Error Number Two

In its second assignment of error, the DOTD contends that the expert fees awarded by the trial court herein are excessive.

A trial court has great discretion in fixing expert witness fees. Samuel v. Baton Rouge General Medical Center, 99–1148 (La. App. 1st Cir. 10/2/00), 798 So. 2d 126, 131–132. Factors to be considered by the trial court 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. Albin v. Illinois Central Gulf Railroad Company, 607 So. 2d 844, 845 (La. App. 1st

[2]In the underlying action, Durand filed suit not only against the DOTD, but also sued individually the two DOTD engineers who had calculated the quantities of limestone listed in the project bid. The claims against those engineers were rejected by the trial court, which determination was affirmed on appeal. Consequently, the DOTD asserts that because one of Durand's experts, Dr. Jerry Householder, primarily testified regarding the negligence of those engineers, Durand is not entitled to an award of that expert's fees. We reject this assertion.

Cir. 1992). Additional considerations 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. However, and most importantly, expert witnesses are entitled only to reasonable compensation. Albin v. Illinois Central Gulf Railroad Company, 607 So.2d at 846. The amount agreed upon between an expert witness and the party calling him is not the criterion by which the court is bound in assessing expert fees. Albin v. Illinois Central Gulf Railroad Company, 607 So.2d at 846. On appeal, the amount and fixing of expert fees will not be disturbed in the absence of an abuse of discretion. Samuel v. Baton Rouge General Medical Center, 798 So.2d at 132.

The DOTD raises several arguments in support of its assertion that the trial court erred in awarding expert witness fees in this matter. Its primary assertion is that no expert fees could be properly awarded because the DOTD was not given an opportunity to cross-examine the expert witnesses regarding the fees charged by them.

In construing LSA-R.S. 13:3666, this court held in Wampold v. Fisher, 01-0808 (La. App. 1st Cir. 6/26/02), 837 So. 2d 638, 640 (citation omitted):

> If a rule under [La. R.S.] 13:3666(B)(2) seeks to set the value on the time the expert witness was before the court, that value may be determined by the court on the basis of its observation of and experience with the expert witness at trial, without further proof. However, if the rule seeks to value the total time employed by the expert, for example, time gathering facts necessary for his testimony, time spent away from regular duties while waiting to testify, or if the party seeks a fee outside of that normally charged by similar experts in that field, then the plaintiff in rule must prove by competent evidence, what service and expertise the expert rendered in addition to that observed by the trial court. Neither 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.
>
> **It has been the law for almost a century that the assertion of an attorney and the bill of an expert do not support an award for the total time of an expert. The expert must testify at the trial of the rule and be subject to cross-examination, unless there is some stipulation between the parties.** [Emphasis added.]

Here, both of the experts for which the trial court awarded Durand fees as costs taxed against the DOTD testified at trial on October 23, 2009.[3] At that time, both witnesses were subject to cross-examination and were, in fact, cross-examined by counsel for the DOTD. However, only one of the experts, Dr. Jerry Householder, testified regarding the amount of fees he had charged. Moreover, he only stated a figure without specifying how that amount was calculated or what it was based on. Further, the figure he quoted was only a partial total that did not include the entire time he spent at trial, for which he indicated he intended to charge additional fees to account for the time spent at trial.[4]

As noted above, after the trial on the merits concluded, the trial court held a hearing on Durand's motion to fix costs on May 17, 2010, and subsequently, a hearing on the DOTD's partial motion for new trial on February 7, 2011. According to the minute entries of the hearings, the court heard argument from counsel; however, neither party called either expert to testify as to their fees at either of the hearings on the rule to fix costs. Although a detailed accounting of the time rendered and costs incurred therefore for the experts' services through the date of trial is set forth in the experts' invoices, which were filed into the evidence at the initial hearing on May 17, 2010, the DOTD challenges the figures set forth in the invoices. Unfortunately, the record before us on appeal does not contain a transcript of the initial or subsequent hearing. Further, although Durand contends that the DOTD had the opportunity to cross-examine these experts regarding their

[3]The two experts are Dr. Householder, who was qualified as an expert in construction and engineering, and Craig Courville, who was qualified as an expert "construction claims analyst."

[4]At trial, Mareen Matthew Durand, the owner of Durand, testified regarding the total sums the company had paid the experts for their services. Also, in conjunction with the experts' invoices, Durand submitted the affidavit of Raymond Smith, the office manager for Durand, who likewise attested to the total amounts Durand paid the experts for their services.

fees at the trial of this matter and failed to do so, we note that the experts' invoices, which the DOTD challenges on appeal, were not available at that time.

Moreover, in reviewing the trial transcript in this matter, it is evident from the experts' testimony that each spent time outside of trial gathering information and preparing for trial. It is well settled that in order to tax a party with the fees of an expert for out-of-court work, either the parties must stipulate to the specifics and costs of the expert's out-of-court work or the expert must testify regarding the same at trial or at a subsequent hearing and be subject to cross-examination. See Wingfield v. State ex rel. Department of Transportation and Development, 03-1740 (La. App. 1st Cir. 5/14/04), 879 So. 2d 766, 770; Wampold v. Fisher, 837 So. 2d at 640; and Allen v. Roadway Express, Inc., 728 So. 2d at 1019. Furthermore, the jurisprudence has recognized that 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 to support a court's award of out-of-court work costs. Wingfield v. State ex rel. Department of Transportation and Development, 879 So. 2d at 770.

Here, the trial court awarded Durand the total sums reflected in the experts' invoices, less the amount deducted from the Courville invoices following the hearing on the motion for new trial. The itemized invoices show that much of the documented costs are associated with out-of-court work performed by the experts. Thus, on the record before us, we are compelled to find the trial court erred in awarding Durand the total sums listed in the invoices without an evidentiary basis for doing so.

According to the applicable law, Durand is entitled to an award of its expert witness fees. However, the DOTD disputes both the hourly rate billed by the experts and the time spent by the experts at trial, and contends that it could not have questioned the experts at trial regarding these invoices, as they were not

submitted then. Under these circumstances, and in fairness to all parties, we find it appropriate to vacate the trial court's award of expert witness fees and to remand this matter to the trial court for a new hearing to determine such fees, based on the court's personal observations at trial, the parties' evidentiary support, and the criteria discussed herein. See Wampold v. Fisher, 837 So. 2d at 641; Allen v. Roadway Express, Inc., 728 So. 2d at 1018; compare with Wingfield v. State ex rel. Department of Transportation and Development, 879 So. 2d at 771.

Assignment of Error Number Three

In its final assignment of error, the DOTD contends that the trial court erred in awarding attorney fees.

Attorney fees are not allowed except where authorized by contract or statute. State, Department of Transportation and Development v. Wagner, 10-0050 (La. 5/28/10), 38 So. 3d 240, 241. Based on the DOTD's failure to timely pay, the trial court awarded attorney's fees in the amount of $317,943.48, pursuant to LSA-R.S. 48:251.5, which provides, in pertinent part:

> A. The department shall promptly pay all obligations arising under public contracts within thirty days of the date the obligations become due and payable under the contract. All progressive stage payments and final payments shall be paid when they, respectively, become due and payable under the contract.
>
> B. (1) If the department fails to make any final payments after recordation of formal final acceptance and within forty-five days following receipt of a clear lien certificate by the department, the department shall be liable for legal interest on the balance due on the contract.
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> ...
>
> (3) If the department fails to make final payment as provided or neglects to promptly ascertain the final estimated quantities under the contract in bad faith, then the contractor shall be entitled to attorney fees if a mandamus to perform such acts is necessary for the contractor to receive all monies due and owed the contractor under the contract.
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> C. The provisions of this Section shall not be subject to waiver by contract.

In challenging this portion of the judgment, the DOTD presents several strained and hypertechnical arguments. Specifically, the DOTD contends that because Durand's request for attorney's fees was not in the form of a mandamus, the trial court improperly awarded same. We disagree.

Louisiana courts will pierce through the caption, style, and form of the pleadings to determine from the substance of the pleadings the nature of the proceeding. Fusilier v. Liberty Rice Mill, Inc., 569 So. 2d 1050, 1053 (La. App. 3rd Cir. 1990). Every pleading shall be so construed as to do substantial justice. LSA-C.C.P. art. 865. Our jurisprudence establishes that pleadings are to be construed in light of their allegations as a whole. Mid-City Investment Company, Inc. v. Young, 238 So. 2d 780, 784 (La. App. 1st Cir. 1970). The nomenclature given a pleading is not controlling; the courts will look behind mere headings on pleadings to determine the substance and true nature thereof. Mid-City Investment Company, Inc. v. Young, 238 So. 2d at 784.

Herein, Durand's request for attorney's fees was set forth in a post-trial motion to fix costs, pursuant to the parties' stipulation, and the reservation of the right to so proceed by the trial court in its December 14, 2010 order. Although the instant case was not styled as a "mandamus" proceeding, we find the trial court properly recognized that the underlying purpose of the petition and these proceedings was for Durand to obtain a judgment forcing the DOTD "to perform such acts [as] necessary for the contractor to receive all monies due and owed . . . under the contract." Thus, we find no error in the trial court's consideration of Durand's request for attorney's fees pursuant to LSA-R.S. 48:251.5 or in its award. Moreover, although "bad faith" is not defined within the statute, considering the trial court's determination that the DOTD "unjustly refused" to issue a "unilateral

change order" and failed to pay funds clearly owed to Durand, we find the trial court's award of attorney's fees appropriate herein.[5]

Accordingly, we find no merit to this assignment of error.

CONCLUSION

For the foregoing reasons, the portion of the March 11, 2011 judgment of the trial court fixing expert witness costs is vacated and remanded to the trial court for further proceedings consistent with the views expressed herein. In all other respects, the judgment is affirmed.

Costs of this appeal in the amount of $8,238.50 are assessed to the defendant/appellant, the State of Louisiana, Through the Department of Transportation and Development.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

[5]In so finding, we note that we express no opinion on the issue of Durand's entitlement to additional attorney's fees as a result of our disposition remanding the issue of quantum of the costs of expert fees to which Durand is entitled.

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VERSUS

DENTON-JAMES, L.L.C., THE LOUISIANA DEPARTMENT OF TRANSPORTATION AND DEVELOPMENT, PATRICK J. LANDRY AND ROBERT H. HENNIGAN

GUIDRY, J., dissents in part and assigns reasons.

GUIDRY, J., dissenting in part.

Although Durand alleges and the majority agrees that the suit filed against the DOTD can properly be construed to be an action for mandamus, I disagree. Mandamus is statutorily defined as "writ directing a public officer or a corporation or an officer thereof to perform any of the duties set forth in Articles 3863 and 3864." La. C.C.P. art. 3861. Jurisprudentially, it has been held:

> Mandamus is an extraordinary remedy, which must be used by the courts sparingly to compel something that is clearly provided by law, and only where it is the only available remedy or where the delay occasioned by the use of any other remedy would cause an injustice. Moreover, mandamus will not lie in matters in which discretion and evaluation of evidence must be exercised. The remedy of mandamus is not available to command performance of an act that contains any element of discretion, however slight. Further, mandamus is to be used only when there is a clear and specific legal right to be enforced or a duty which ought to be performed. It never issues in doubtful cases.

Charter School of Pine Grove, Inc. v. St. Helena Parish School Board, 07-2238, p. 13 (La. App. 1st Cir. 2/19/09), 9 So. 3d 209, 221(citations omitted). Moreover, mandamus is a summary proceeding. Weaver v. LeBlanc, 09-0244, p. 5 (La. App. 1st Cir. 9/14/09), 22 So. 3d 1014, 1017, writ denied, 09-2290 (La. 10/1/10), 45 So. 3d 1090.

The action filed by Durand does not meet the above-referenced standards.

Relying on La. C.C.P. art. 865 and jurisprudence establishing that courts should look beyond the caption, style, and form of pleadings to determine from the substance of the pleadings the nature of the proceedings, the majority holds that the petition for damages filed by Durand can be construed as an action for mandamus. However, that rule of law applies generally where a particular pleading has been improperly designated and not where the pleading specifically addresses the relief sought. Savoie v. Page, 09-0415, p. 6 (La. App. 3d Cir. 11/4/09), 23 So. 3d 1013, 1017, writ denied, 10-0096 (La. 4/5/10), 31 So. 3d 365.

The substance of Durand's petition, on the other hand, does not indicate that it sought to initiate a summary proceeding. Summary proceedings are conducted with rapidity, within the delays allowed by the court, and without citation and the observance of all the formalities required in ordinary proceedings. La. C.C.P. art. 2591; Chaney v. Department of Public Safety & Corrections (Office of Motor Vehicles), 09-1543, p. 4 (La. App. 1st Cir. 3/26/10), 36 So. 3d 328, 331. The petition filed by Durand provided for citation and complied with the formalities of an ordinary proceeding. See La. C.C.P. art. 851. Moreover, in the petition, Durand alleged that the named defendants were liable "for sums equivalent to all damages that are reasonable in the premises," and concluded with a prayer for judgment in its favor "after due proceedings." Thus, the substance of Durand's petition, seeking damages premised on an evaluation of the evidence and after due proceedings, cannot be construed as an action for mandamus. Furthermore, summary proceedings are not authorized for the trial of an action for damages. See La. C.C.P. art. 2592. Compare Revere v. Reed, 95-1913, p. 2 n.1 (La. App. 1st Cir. 5/10/96), 675 So. 2d 292, 294 n.1 (wherein the court observed that "[d]espite its caption, the pleading is in substance an application for a writ of mandamus, since it includes an order requesting the District Attorney be ordered to show cause 'why

he should not be ordered to comply with the Public Record Law under LSA R.S. 44:1 et seq....'").

Therefore, as there is no provision for attorney fees by contract, nor is the asserted statutory authority applicable, I believe that the trial court erred in granting Durand an award of attorney fees and accordingly would reverse that award. I, therefore, respectfully dissent from that portion of the majority opinion awarding Durand attorney fees pursuant to La. R.S. 48:251.5, but in all other respects, I agree with the majority opinion.