

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 1794

RON WALKER AND IRIS WALKER, INDIVIDUALLY AND ON BEHALF OF
THEIR MINOR SON, SKYY WALKER

VERSUS

DR. RODGER ELOFSON, II

Judgment Rendered: JUN - 8 2012



APPEALED FROM THE NINETEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF EAST BATON ROUGE
STATE OF LOUISIANA
DOCKET NUMBER 525,392, DIVISION "M"

THE HONORABLE KAY BATES, JUDGE

Andre' LaPlace
Baton Rouge, Louisiana

Attorney for Plaintiffs/Appellants
Ron Walker and Iris Walker,
Individually and on Behalf of Their
Minor Son, Skyy Walker

Janie Languirand Coles
Baton Rouge, Louisiana

Attorney for Defendant/Appellee
Rodger Elofson, II, M.D.

BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

Hughes, J., dissents in part and concurs in part, with reasons.

McDONALD, J.

This is an appeal from a trial court judgment granting the defendant's, Dr. Elofson's, request to tax expert witness fees as costs of the trial. The plaintiffs, Ron Walker and Iris Walker, individually and on behalf of their minor son, Skyy Walker, assert that the trial court erred in taxing them with the costs of the expert witnesses, Dr. George H. Sterne and Dr. Stephen Heinrich, after their case was dismissed with prejudice.

The trial court may assess costs of a suit in any equitable manner and the assessment of costs can only be reversed by the appellate court upon a showing of an abuse of discretion. **Yuspeh v. Koch**, 2002-1179 (La. App. 5 Cir 5/28/03), 848 So.2d 96, 100, writs denied, 2003-1134, 2003-1144 (La. 6/27/03), 847 So.2d 1277 and 1279.

Dr. Stephen Heinrich, a pediatric orthopedist and Chairman of the Department of Orthopaedic Surgery at Children's Hospital in New Orleans, billed for review of depositions, phone conferences, his court appearance, and the cost of his trip to Baton Rouge at a total of \$7,808.89. Dr. George H. Sterne, a pediatrician in New Orleans, charged a total of \$5,075.00 for his services.

The trial court stated in its oral reasons for judgment:

The court has carefully reviewed the memoranda, exhibits and the law that applies to this motion to tax costs and accordingly hereby finds that in accordance with Exhibits 1, 2 and [5] of the supplemental memorandum in support of the motion to fix expert witness costs and to tax costs, the court hereby assesses the costs to be paid to the defendant by the plaintiff[s] for Dr. Stephen Heinrich in the amount of \$6,000.00, and in the amount [of] \$4,000 for Dr. George Sterne.

After a thorough review, we find no abuse of discretion in the award of \$4,000.00 taxed as costs for the expert witness fee of Dr. Sterne, and we affirm that award.

However, as to the trial court's taxing of \$6,000.00 as costs for an expert witness fee for Dr. Heinrich, the bill submitted by Dr. Heinrich, dated March 23 or

25, 2009, lists the work done by Dr. Heinrich on the case, but lists future dates for the work, namely dates in November of 2009.¹ Clearly these dates are incorrect, but we have no way of knowing what work was done when, due to these incorrect dates. Thus, we find the award of \$6,000.00 taxed as costs for the expert witness fee for Dr. Heinrich to be an abuse of discretion, and we vacate that award.

For the foregoing reasons, we affirm the \$4,000.00 expert witness fee for Dr. Sterne taxed as costs, and we vacate the \$6,000.00 expert witness fee for Dr. Heinrich taxed as costs. The costs of this appeal are assessed one-half to the plaintiffs and one-half to the defendant.

AFFIRMED IN PART AND VACATED IN PART.

¹ The jury trial was held in this case on March 17-20, 2009.

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VERSUS

DR. RODGER ELOFSON, II

HUGHES, J., dissenting in part and concurring in part.

The judgment rendered following the March 17, 2009 jury trial, signed on March 26, 2009, did not award costs to the defendant, stating only, in pertinent part: “IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED, that there be judgment herein in favor of Defendant, Dr. Rodger Elofson, II, against Plaintiffs, . . . rejecting Plaintiffs’ demand, and dismissing Plaintiffs’ suit, with prejudice.” The March 26, 2009 judgment was not appealed.

Louisiana Code of Civil Procedure Article 1920 states: “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.” This court has interpreted this article to mean that “[w]here a judgment on the merits casts one party with the payment of costs, but does not specifically set forth the amount of those costs, the party in whose favor costs are awarded may file a rule to show cause to have the precise amount of costs set and

taxed if not agreed upon by the parties.” **Cormier v. Roberson**, 96-1107 (La. App. 1 Cir. 3/27/97), 691 So.2d 807, 810 (emphasis added). Since the judgment on the merits in this case did not “cast” the plaintiffs with costs, the defendant’s rule to have the precise amount of costs set, filed more than one year following the signing of the final judgment in this case, was insupportable. Therefore, I believe the judgment of the trial court fixing specific costs to be paid by the plaintiffs should be vacated.

I concur with that part of the majority decision that vacates the award of the expert witness fee for Dr. Heinrich taxed as costs.