2011 IL App (1st) 093287-U
No. 1-09-3287

FIFTH DIVISION
July 22, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

SCOTT ZEEDYK,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	
	)	
FEDERAL EXPRESS CORP.,	)	No. 03 L 14227
	)	
Defendant,	)	
	)	
BRIAN J. COLE, M.D.,	)	Honorable
	)	Lee Preston,
Appellee.	)	Judge Presiding.

JUSTICE HOWSE delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Epstein concurred in the judgment.

O R D E R

HELD: Order awarding expert witness fees, payable by plaintiff, to doctor who was subpoenaed by plaintiff to testify at his trial affirmed.

¶ 1 Plaintiff Scott Zeedyk appeals from an order of the circuit court of Cook County awarding Dr. Brian Cole $3,500 in witness fees pursuant to section 2-1101 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1101 (West 2008)). On appeal, plaintiff challenges the propriety of that order.

¶ 2 The instant appeal stems from a jury trial in the circuit court of Cook County in the case of *Zeedyk v. Federal Express Corp.*, No. 03-L-14227 (2003) where judgment was entered on the jury verdict for plaintiff in the amount of $106,000. Thereafter, a fee dispute arose between plaintiff and Dr. Cole, a witness he had subpoenaed to testify at his trial, which is the subject of this appeal. Briefs have been filed by Dr. Cole and defendant Federal Express Corp.

¶ 3 The record shows, in relevant part, that Dr. Cole was subpoenaed by plaintiff and testified at his jury trial on April 30, 2009. He was not plaintiff's primary physician, but rather, testified regarding an independent medical evaluation of plaintiff that he had conducted for Sedgwick Insurance. Prior to eliciting that testimony, plaintiff had requested that Dr. Cole "be recognized as an expert in orthopedic surgery," and with no objection by defendant, the court stated, "he certainly can give his opinions in the areas of his specialty."

¶ 4 However, on cross-examination, plaintiff objected to a question asked by counsel for defendant, stating that Dr. Cole

"has not been called here as an expert witness or to give medical opinions in expert forms. He has been called as a fact witness." The following exchange was subsequently had before the court:

> "MR. XYDAKIS [counsel for plaintiff]: Your Honor, we subpoenaed him as a fact witness. We paid him his $35 just to testify as to the validity of records and to facts. If he is going to call him as an expert witness, he is asking to give a medical opinion and then he would have to say to a reasonable degree of medical certainty yes, he could have done something like that. That's not why we called him, and I am not paying his $800 or whatever he wants an hour to call him as an expert and physician.
>
> THE COURT: Counsel?
>
> MR. GRYTDAHL [counsel for defendant]: Well, your Honor, we qualified him as a medical expert, and he is on our list as an expert. He should be able -- he testified certainly more than as a records custodian on direct. I should be able to present him with a question based on Mr. Xydakis' questions, which asked him ad nauseam about the functional capacity exam and the limitations of the functional capacity exam, how he sees that applying to certain functions, you know,

> using specific reference points to the 15 pounds and the 35 pounds."

The court ultimately overruled plaintiff's objection, and on May 19, 2009, judgment was entered for plaintiff in the amount of $106,000.

¶ 5 On June 12, 2009, Dr. Cole filed a "Motion to Determine Reasonable Fee to be Paid to Plaintiff's Expert Witness pursuant to 735 ILCS 5/2-1101" (hereafter, Motion for Fees). Dr. Cole asserted that plaintiff had subpoenaed him to testify at trial and elicited his expert medical testimony, and that plaintiff had not paid him the reasonable fee that he requested. As relief, he sought an order declaring $4,000, *i.e.*, the four hours he spent on the case at $1,000/hour, to be a reasonable fee for his time. He also attached to the motion, *inter alia*, plaintiff's Illinois Supreme Court Rule 213(f)(1) and (f)(2) disclosures in which plaintiff had identified Dr. Cole as a "Lay Witness and Independent Expert Witness."

¶ 6 On June 17, 2009, the trial court entered a briefing schedule order in which it expressly retained jurisdiction through August 19, 2009, to award plaintiff costs after it had ruled on Dr. Cole's Motion for Fees. Thereafter, plaintiff filed a verified response to the motion, asserting that Dr. Cole should not be awarded fees where he repeatedly refused to appear to

testify, that he was only entitled to the normal witness fee, and that his fee petition was insufficient.

¶ 7 At a hearing on August 19, 2009, counsel for plaintiff further argued, *inter alia*, that any witness fees awarded to Dr. Cole should be shifted as costs to the losing party at trial, *i.e.*, defendant, and also demanded an evidentiary hearing. Although counsel for Dr. Cole responded that the court could make its determination solely on the briefs, the court stated that plaintiff was entitled to an evidentiary hearing if he so desired. The court also found Dr. Cole's fee petition insufficient for lack of necessary detail and granted him until September 2, 2009, to remedy the defect and file an additional fee petition. The case was then continued to September 9, 2009.

¶ 8 Meanwhile, Dr. Cole filed an itemized invoice of the time that he had spent on plaintiff's case, which totaled 4 hours and 50 minutes and listed the amount due as $4,750. On September 3, 2009, plaintiff filed a motion to strike that amended fee petition, and a supplemental brief in opposition to Dr. Cole's Motion for Fees. He asserted that Dr. Cole's amended fee petition was deficient, that Dr. Cole was not an expert witness entitled to fees as such, and that any witness fees due to Dr. Cole should be shifted to defendant. He also continued to demand an evidentiary hearing. A hearing on that motion was set for November 3, 2009.

¶ 9 On September 29, 2009, however, plaintiff filed a motion to strike Dr. Cole's Motion for Fees, or in the alternative, for an evidentiary hearing on the motion. In that motion, plaintiff asserted that Dr. Cole's fee petition was untimely, that Dr. Cole was not an expert witness entitled to fees as such, that any witness fees due to Dr. Cole should be shifted to defendant, and that his fee petition was not an affidavit and was not specific. In his response, Dr. Cole disputed each of these assertions, but did not address the issue of whether his fees should be shifted to defendant.

¶ 10 At the hearing on November 3, 2009, plaintiff reiterated his demand for an evidentiary hearing, and counsel for Dr. Cole again urged the court to consider the matter solely on the briefs, stating that the court could take judicial notice of Dr. Cole's trial testimony. Plaintiff responded that even if it was proper for the court to take judicial notice of that testimony, Dr. Cole was also seeking fees for things he had done outside of court, and he had a right to cross-examine him as a result. The court, however, denied plaintiff an evidentiary hearing and awarded Dr. Cole $3,500 in witness fees to be assessed against plaintiff. The court also noted that its decision was based on, *inter alia*, its observation of the trial proceedings on April 29 and 30, 2009. This appeal followed.

¶ 11 Plaintiff contends that the trial court erred in awarding Dr. Cole expert witness fees of $3,500 pursuant to section 2-1101, and raises numerous objections in that regard. Section 2-1101 provides that where a fee dispute arises between an expert witness and the party who has subpoenaed him, the trial court must conduct a hearing after the expert witness has testified and determine the reasonable fee due to him. 735 ILCS 5/2-1101 (West 2008). Since the issues raised involve questions of law and statutory interpretation, our review is *de novo*. *Inland Bank and Trust v. Knight*, 399 Ill. App. 3d 378, 380 (2010), citing *People v. Hall*, 195 Ill. 2d 1, 21 (2000).

¶ 12 Plaintiff first claims that the Motion for Fees filed by Dr. Cole was untimely. He maintains that the only motions generally allowed after judgment has been entered are post-judgment motions, and, citing *Marsh v. Evangelical Covenant Church of Hinsdale*, 138 Ill. 2d 458, 464 (1990), he asserts that Dr. Cole's fee petition does not qualify as such. He also maintains that Dr. Cole's fee petition does not fall within any exception to the general rule because section 2-1101 does not expressly provide for a fee petition to be filed post-judgment.

¶ 13 In *Marsh*, 138 Ill. 2d at 459, plaintiffs filed a notice of appeal 29 days after judgment had been entered, on the same day that defendant filed a motion for attorney fees as sanctions. The issue before the supreme court was whether

plaintiffs' appeal was timely because, at the time, Illinois Supreme Court Rule 303(a)(2) stated that a notice of appeal filed before the last post-trial motion had been disposed of had no effect and had to be withdrawn by the filing party. *Marsh*, 138 Ill. 2d at 460. Although the supreme court found that defendant's motion did not qualify as a "post-trial" motion, it nonetheless held that a final judgment could not be appealed from where a motion for attorney fees as sanctions remained unresolved unless there is a finding that no just reason to delay enforcement or appeal exists. *Marsh*, 138 Ill. 2d at 464, 468. In so holding, the court noted that this would not result in any unnecessary delay because such a motion is part of the underlying action and must be brought within 30 days of judgment or while the court still has jurisdiction over the matter. *Marsh*, 138 Ill. 2d at 468.

¶ 14 Contrary to defendant's claim, *Marsh* makes clear that a motion for fees is part of the underlying action and can be brought at any time the court still has jurisdiction over the matter. Here, the trial court clearly had jurisdiction to rule on Dr. Cole's motion where it was filed on June 12, 2009, less than 30 days after judgment became final on May 19, 2009 (*Brewer v. National R.R. Passenger Corp.*, 165 Ill. 2d 100, 105 (1995)), and the court expressly retained jurisdiction thereafter to rule on it (See *Northern Trust Co. v. Upjohn Co.*, 213 Ill. App. 3d

390, 397 (1991)). We thus find defendant's reliance on *Marsh* misplaced, and that Dr. Cole's Motion for Fees was timely.

¶ 15 Plaintiff next claims that Dr. Cole was a treating physician and only entitled to a normal witness fee. In support, he cites *Tzystuck v. Chicago Transit Authority*, 124 Ill. 2d 226, 235 (1988) for the proposition that a treating physician is not to be regarded as an expert. However, defendant fails to initially establish that Dr. Cole was a treating physician. In fact, the record shows that Dr. Cole was not plaintiff's primary physician and was hired by Sedgwick Insurance for the purpose of conducting an independent medical evaluation of him, which was the subject of his testimony. See *Bernardoni v. Industrial Comm'n*, 362 Ill. App. 3d 582, 597 (2005) (physician who conducted independent medical evaluation referred to as one of "employer's experts").

¶ 16 Furthermore, the record shows that plaintiff identified Dr. Cole as a "Lay Witness and Independent Expert Witness" in his Rule 213(f)(1) and (f)(2) disclosures, and, at trial, expressly qualified him as an expert in orthopedic surgery. Plaintiff also admits in his brief "that he [Dr. Cole] was also called as an expert witness, as well as a lay witness." Under the totality of the circumstances, we find that the trial court properly considered Dr. Cole to be an expert witness.

¶ 17 Plaintiff also claims that an evidentiary hearing and more specificity were required before the trial court could award Dr. Cole expert witness fees. With respect to his claim for an evidentiary hearing, he relies on *Brandel Realty Co. v. Olson*, 159 Ill. App. 3d 230 (1987) in maintaining that an evidentiary hearing should be required for determining the reasonableness of expert witness fees, since such a hearing is required in the context of attorneys' fees. In that case, plaintiff filed a petition for attorney fees accompanied by affidavits, but presented no evidence that the fees were reasonable. *Brandel*, 159 Ill. App. 3d at 237. This court noted that it was improper to establish attorney fees by affidavit in lieu of presenting evidence at a hearing, and found that the trial court erred in failing to require that plaintiff present evidence that the fees were reasonable. *Brandel*, 159 Ill. App. 3d at 236-37.

¶ 18 We find defendant's reliance on *Brandel* unavailing. Here, the trial court's duties in ruling on a fee dispute involving an expert witness are governed by section 2-1101 which only requires that the court hold a "hearing," not an evidentiary hearing (735 ILCS 5/2-1101 (West 2008)); and, in this case, the court did hold hearings on Dr. Cole's Motion for Fees and thereby complied with its statutory obligation. We thus find no basis

for concluding that the court erred in denying defendant an evidentiary hearing on the issue of expert fees.

¶ 19 In turning to plaintiff's additional claim regarding specificity, we find his argument unclear. Although he takes issue with the invoice provided by Dr. Cole and claims that it "contained nothing but two to six word generalized and vague descriptions of the purported time he spent on the case," he then states that he disputes that time and that those descriptions "indicate that most of his time is not compensable." In light of that argument, plaintiff has found the invoice sufficiently specific for a response, thereby nullifying his argument to the contrary.

¶ 20 Plaintiff also requests that we strike the invoice and an affidavit attached to Dr. Cole's Motion for Fees. However, we find that doing so would actually reduce the level of specificity in Dr. Cole's motion, and, in that respect, plaintiff's argument is contradictory. It appears that plaintiff is disputing Dr. Cole's fees under the guise of demanding more specificity, but he has not made a coherent argument on that issue. It is not our task to piece together an inarticulate argument (*First Illinois Bank & Trust v. Galuska*, 255 Ill. App. 3d 86, 94 (1993), and such arguments do not warrant further review (*Bank of Ravenswood v. Maiorella*, 104 Ill. App. 3d 1072, 1074-75 (1982)).

¶ 21 Plaintiff finally claims that any expert witness fees that Dr. Cole is entitled to should be taxed to defendant as court costs, citing *Vicencio v. Lincoln-Way Builders, Inc.*, 204 Ill. 2d 295 (2003). Defendant responds that Dr. Cole's expert witness fees do not qualify as court costs which can be taxed against it.

¶ 22 In *Vicencio*, 204 Ill. 2d at 302, the supreme court noted that costs commonly understood to be "court costs," *i.e.*, filing fees, subpoena fees, and statutory witness fees, are taxable to the losing party under section 5-108 of the Code (735 ILCS 5/5-108 (West 2008)). However, it also noted that those costs were distinguishable from "litigation costs," which are defined as " 'expenses of litigation, prosecution, or other legal transaction, esp[ecially] those allowed in favor of one party against the other.' " *Vicencio*, 204 Ill. 2d at 302, quoting Black's Law Dictionary 350 (7th ed. 1999). The supreme court then found that the fee charged by a treating physician for attending an evidence deposition qualified as a "litigation cost," that it was thus not taxable under section 5-108, and that it could only be taxed as a cost if a different statute or supreme court rule authorized it. *Vicencio*, 204 Ill. 2d at 302.

¶ 23 Under that reasoning, we similarly find that Dr. Cole's expert witness fee qualifies as a litigation cost which is not taxable under section 5-108. It is clear from *Vicencio* that

the fee charged by Dr. Cole for giving expert witness testimony at trial is more aptly characterized as an expense of litigating the underlying dispute, than the type of administrative charge which would qualify as a court cost. Since plaintiff has not identified any other statute or supreme court rule authorizing Dr. Cole's expert witness fee to be taxed to the losing party at trial, we find that it is not taxable to defendant.

¶ 24 In so finding, we note that *Woolverton v. McCracken*, 321 Ill. App. 3d 440, 446-47 (2001), cited by plaintiff, is distinguishable from the case at bar because, as defendant notes, that case involved fees charged by physicians who gave evidence depositions used at trial, whereas, here, the issue is whether the fee of an expert witness subpoenaed to testify live at trial pursuant to section 2-1101 should be taxed as costs to the losing party. We thus conclude that the trial court did not err in declining to tax defendant with the expert witness fee due to Dr. Cole.

¶ 25 In sum, we find no basis for concluding that the trial court erred in awarding Dr. Cole expert witness fees of $3,500 pursuant to section 2-1101, payable by plaintiff, and, accordingly, affirm that order of the circuit court of Cook County to that effect.

¶ 26 Affirmed.