STATE OF MICHIGAN

COURT OF APPEALS

WESLEY PFEIFFER and GAIL PFEIFFER,

Plaintiffs-Appellees,

v

MICHAEL YUCHUCK and DENISE YUCHUCK,

Defendants-Appellants.

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No. 375144
Wayne Circuit Court
LC No. 21-007625-CZ

Before: LETICA, P.J., and RICK and GARRETT, JJ.

PER CURIAM.

In this property dispute action, defendants appeal as of right the trial court's order taxing costs in their favor in the amount of $340 for filing fees and mediator fees but denying other costs. On appeal, defendants argue the trial court erred by failing to follow the procedure outlined in MCR 2.625(F)(3) for taxing costs at the time of judgment because (1) the clerk did not properly examine defendants' bill of costs, (2) the trial court considered plaintiffs' untimely objection, and (3) the trial court failed to award defendants' sundry costs and costs incurred for two land surveys. We affirm in part and remand to the trial court for an amended entry of costs.

I. FACTS AND PROCEDURAL HISTORY

The parties are neighbors. This case centers on a 2- to 3-foot piece of property that borders plaintiffs' driveway and defendants' property. Defendants and plaintiffs both acquired surveys of their respective properties in 2019 to support their claims of ownership to the disputed property; however, it was not until May 2021 that plaintiffs brought the property dispute to court. In September 2024, the trial court entered an order reflecting that the parties had agreed to retain AB-SB Land Survey, PC, an independent survey company, to survey both properties. The order stated that the independent surveys would be adopted by the court as the legal boundaries of the parties' properties and further ordered that "the parties will be equally responsible for the cost of the surveys."

A joint survey reflecting both properties was eventually completed. The joint survey supported that defendants owned the disputed property, and the trial court granted summary disposition in their favor.

Plaintiffs filed a motion for reconsideration on January 3, 2025. While the motion was pending, defendants filed their bill of costs on January 6, 2025. The bill of costs included sundry costs under MCL 600.2441 ($20 for proceedings before trial and $20 for a motion resulting in a dismissal or judgment); disbursements under MCL 600.2529 ($40 for motion fees); and "other costs" consisting of $3,200 for the survey defendants obtained from True North Surveying, Inc (True North) in 2019,[1] $2,399 for defendants' half of the court-ordered survey prepared by AB-SB Land Survey and $300 for defendants' share of mediation.

Plaintiffs motion for reconsideration was denied January 21, 2025. On February 11, 2025, 21 days after the denial of the motion for reconsideration and 36 days after defendants filed their bill of costs, plaintiffs filed their objection with the court clerk.

The trial court granted defendants' bill of costs in part, awarding them $340. The trial court determined that defendants' June 2019 survey did not constitute an expert witness fee because it was not for litigation, and, therefore, reimbursement was not permissible under a statute or court rule. The trial court further decided that the court-ordered survey did not qualify for reimbursement because it was ordered by the court and the parties had agreed they would be equally responsible for that cost. The trial court then ruled that the filing costs and facilitation were permissible costs before granting "the amount of $340 for filing fees and mediation."

This appeal followed.

II. DISCUSSION

On appeal, defendants argue that the trial court erred by failing to follow the procedure outlined in MCR 2.625(F)(3) for taxing costs at the time of judgment because (1) the clerk did not properly examine defendants' bill of costs, (2) the trial court considered the plaintiffs' untimely objection, and (3) the trial court failed to award defendants' sundry costs and costs incurred for the land surveys, which defendants characterize as expert witness fees. We agree in part and disagree in part.

A. STANDARDS OF REVIEW

"This Court reviews a trial court's ruling on a motion for costs under MCR 2.625 for an abuse of discretion." *Fansler v Richardson*, 266 Mich App 123, 126; 698 NW2d 916 (2005). A court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). "[W]hether a particular expense is taxable is a question of law," which we review de novo. *Guerrero v Smith*, 280 Mich App 647, 670; 761 NW2d 723 (2008). Likewise, "[t]he construction

[1] True North provided: (1) a boundary survey invoiced for $2,500.00 on June 8, 2019, (2) an updated boundary survey due to additional irons on the south property line invoiced for $500.00 on February 3, 2020, and (3) an updated boundary survey with the notation to prepare a letter regarding a conversation with Tod Stanley of Stanley Associates invoiced on May 12, 2020 for $200.00.

and interpretation of court rules present a question of law that this Court reviews de novo." *ISB Sales Co v Dave's Cakes*, 258 Mich App 520, 526; 672 NW2d 181 (2003).

B. ANALYSIS

1. PLAINTIFF'S OBJECTION TO THE BILL OF COSTS

Defendants filed their bill of costs on January 6, 2025, and plaintiffs filed their objection on February 11, 2025. Therein, plaintiff asserted that they were not served with the bill of costs until February 11, 2025; however, the court file contains a January 6, 2025 proof of service. Defendants contend that the time for filing an objection ended 14 days after service, and that the trial court erred by considering plaintiffs' late-filed objection.

MCR 2.625(F) provides for the procedure for taxing costs. It reads:

> (1) Costs may be taxed by the court on signing the judgment, or may be taxed by the clerk as provided in this subrule.
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> (2) When costs are to be taxed by the clerk, the party entitled to costs must present to the clerk, within 28 days after the judgment is signed, or within 28 days after entry of an order denying a motion for new trial, a motion to set aside the judgment, a motion for rehearing or reconsideration, or a motion for other postjudgment relief except a motion under MCR 2.612(C),
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> > (a) a bill of costs conforming to subrule (G),
> >
> > (b) a copy of the bill of costs for each other party, and
> >
> > (c) a list of the names and addresses of the attorneys for each party or of parties not represented by attorneys.
>
> In addition, the party presenting the bill of costs shall immediately serve a copy of the bill and any accompanying affidavits on the other parties. Failure to present a bill of costs within the time prescribed constitutes a waiver of the right to costs.
>
> (3) **Within 14 days after service of the bill of costs, another party may file objections to it, accompanied by affidavits if appropriate. After the time for filing objections, the clerk must promptly examine the bill and any objections or affidavits submitted and allow only those items that appear to be correct, striking all charges for services that in the clerk's judgment were not necessary. The clerk shall notify the parties in the manner provided in MCR 2.107.**
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> (4) The action of the clerk is reviewable by the court on motion of any affected party filed within 7 days from the date that notice of the taxing of costs was sent, but on review only those affidavits or objections that were presented to the clerk may be considered by the court. [Emphasis added.]

The trial court opined that plaintiffs' objection was timely because defendants' bill of costs would have been stayed until the court ruled on plaintiffs' motion for reconsideration, which occurred on January 21, 2025. Assuming without deciding that defendants' bill of costs could be stayed in the manner suggested by the trial court and should have been treated as being served on January 21, 2025, MCR 2.625(F)(3) still required plaintiffs' objection to be filed within 14 days, or by February 4, 2025. Consequently, when plaintiffs filed their objection on February 11, 2025, it was a week late.

Below and in their reply brief on appeal, defendants cite to *Theophelis v Lansing Gen Hosp*, 141 Mich App 199, 207-208; 366 NW2d 249 (1985), for the proposition that late-filed objections to a bill of costs cannot be considered. This Court, however, vacated this decision in *Theophelis v Lansing Gen Hosp (On Rehearing)*, 148 Mich App 564, 566; 384 NW2d 823 (1986), aff'd and remanded 430 Mich 473; 424 NW2d 478 (1988). While a vacated opinion lacks precedential value, we believe that the panel's reasoning, which was rooted in the court rule's plain language, was sound. See e.g., *Jesse Estate v Lakeland Specialty Hosp at Berrien Ctr*, 328 Mich App 142, 146-149; 936 NW2d 705 (2019) (adopting a vacated opinion's legal analysis of statutory language). Indeed, the staff comments to MCR 2.625(F)(3) states:

> The [March 1, 1985] amendment of MCR 2.625(F)(3) clarifies the time within which objections to a proposed bill of costs may be filed. The opposing party has 14 days within which to serve objections, and the clerk is to examine the bill promptly thereafter. [MCR 2.625, 421 Mich lxxxix (staff comment).][2]

Yet, plaintiffs argue that MCR 2.625(F)(4) "provides that the court, not the clerk, may consider objections to a bill of costs when ruling on a motion or conducting a review." And plaintiffs contend that "MCR 2.625(F)(4) contains no time bar on the courts ability to conduct such a review." Because plaintiffs' objection was filed "before the clerk responded," they assert that the trial court had the ability to consider it.

Plaintiffs, however, ignore the language in MCR 2.625(F)(4), which provides that "*only* those affidavits or objections that were *presented to the clerk* may be considered by the court." (Emphasis added.) This reflects that the court may only review the objections presented to the clerk under subrule (F)(3). Simply put, MCR 2.625(F)(4) does not exist in a vacuum; instead, it is subject to subrule (F)(3), which contains a 14-day deadline to file objections. Thus, the trial court erred by considering plaintiffs' untimely objection.

Nevertheless, "an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for . . . vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice." MCR 2.613(A). When considering whether an error is harmless under MCR 2.613(A), this Court evaluates whether the error prejudiced the party challenging it. *Law Offices of Jeffrey Sherbow, PC v Fieger & Fieger, PC*, 507 Mich 272, 308; 968 NW2d 367 (2021).

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[2] We further recognize that MCR 2.625(G) requires the court or clerk to stay the enforcement of taxed costs while an appeal is pending or until time for filing an appeal has passed; however, it does not indicate that the review of the costs must also be stayed.

The procedural errors in this case did not prejudice defendants because, ultimately, they were not entitled to recover costs absent statutory authorization, see *Carlsen Estate v Southwestern Mich Emergency Servs PC*, 338 Mich App 678, 701-702; 980 NW2d 785 (2021) (describing costs recoverable by a prevailing party), and the procedures employed in this case were designed to limit their recovery in accordance with the law. Consequently, the trial court's procedural error does not independently warrant appellate relief.

2. SPECIFIC TAXABLE COSTS

Defendants maintain on appeal that the trial court should have awarded the costs incurred to obtain the surveys and sundry costs. We disagree as to the survey costs but agree as to the sundry costs.

Defendants argue that under MCL 600.2164(1), the prevailing party is permitted to recover costs for an expert witness's trial preparation, even when there is no trial. But this Court has explained:

> Costs will be allowed to the prevailing party in an action, unless prohibited by statute or by [court] rules or unless the court directs otherwise, for reasons stated in writing and filed in the action. The power to tax costs is purely statutory, and the prevailing party cannot recover such expenses absent statutory authority. "Costs" or "taxable costs" are not the equivalent of "expenses." While "expenses" is used by the Michigan Court Rules in its generic sense, i.e., the reasonable charges, costs, and expenses incurred by the party directly relating to the litigation, "costs" or "taxable costs" are strictly defined by statute, and the term is not as broad . . . . Accordingly, the presumption that costs shall be allowed as a matter of course to the prevailing party "does not mean . . . that every expense incurred by the prevailing party in connection with the proceeding may be recovered against the opposing party." Rather, "[t]he term 'costs' as used [in] MCR 2.625(A) takes its content from the statutory provisions defining what items are taxable as costs." [*Carlsen Estate*, 338 Mich App at 701-702 (some quotation marks and citations omitted; alterations in original).]

Concerning expert witnesses, MCL 600.2164(1) provides:

> No expert witness shall be paid, or receive as compensation in any given case for his services as such, a sum in excess of the ordinary witness fees provided by law, unless the court before whom such witness is to appear, or has appeared, awards a larger sum, which sum may be taxed as a part of the taxable costs in the case. Any such witness who shall directly or indirectly receive a larger amount than such award, and any person who shall pay such witness a larger sum than such award, shall be guilty of contempt of court, and on conviction thereof be punished accordingly.

"This Court has repeatedly interpreted MCL 600.2164(1) to allow the prevailing party to tax costs for an expert's trial preparation even if the case did not proceed to trial, provided that the witness would have testified if there had been a trial." *Carlsen Estate*, 338 Mich App at 705. See also *Peterson*, 283 Mich App at 241 ("Indeed, it is well settled that regardless of whether the expert testifies, the prevailing party may recover fees for trial preparation.”). Nevertheless, this Court has also explained:

> An expert is not automatically entitled to compensation for all services rendered. Conferences with counsel for purposes such as educating counsel about expert appraisals, strategy sessions, and critical assessment of the opposing party’s position are not regarded as properly compensable as expert witness fees. Experts are properly compensated for court time and the time required to prepare for their testimony. [*Van Elslander*, 297 Mich App at 218 (cleaned up).]

In *Home-Owners Ins Co v Andriacchi*, 320 Mich App 52, 71; 903 NW2d 197 (2017), the prevailing party sought to tax costs after summary disposition was granted, including for those for expert witnesses who did not testify. The taxed party argued against paying costs for the expert witness because the witness was retained and completed his report 21 days before the lawsuit was filed, and therefore, his work should be considered “analogous to a ‘critical assessment of the opposing party’s position . . . .’ ” *Id*. at 73. This Court disagreed, holding, “[T]the costs sought by Home-Owners in connection with the expert’s time were necessary for the expert to develop his opinion regarding the cause of the damages.” *Id*. at 74. And this Court pointed out that the taxed party had relied on the prevailing party’s expert witness report in its own motion for summary disposition. *Id*.

In this case, however, defendants’ initial True North survey was completed two years before plaintiffs filed suit with the last follow up being more than a year before plaintiffs filed suit. Defendants provided no evidence that the True North’s boundary surveys were in anticipation of litigation, or that testimony preparation occurred, only that the surveys were performed. Moreover, the parties thereafter agreed that they would rely on the independent joint survey. Thus, even had the case proceeded to trial, the True North surveyor would not have earned an expert witness fee. *Carlsen Estate*, 338 Mich at 707 (explaining that costs are available “for those [expert] witnesses who actually appeared through deposition, trial testimony, or both, or who would have appeared had the case not been dismissed before trial”). Simply put, no statutory authority supported taxing costs for the True North surveys. Because the clerk would not have been able to award these costs without statutory authority, the trial court did not err in failing to tax costs for the defendants’ True North surveys.

Likewise, defendants’ portion of the independent joint survey was not a taxable cost because it was incurred pursuant to a court order that reflected that the parties agreed to be equally responsible for that cost. See e.g., MCR 2.507(G) (“An agreement or consent between the parties or their attorneys respecting the proceedings in an action is not binding unless it was made in open court, or unless evidence of the agreement is in writing, subscribed by the party against whom the agreement is offered or by that party’s attorney.”). Again, the prevailing party cannot recover costs when no statutory authority exists for awarding them. *Id*. at 701. And because the clerk would not have been able to grant these costs, the trial court did not err in failing to tax costs for the joint survey.

Lastly, defendants’ bill of costs included $40 in sundry costs under MCL 600.2441, comprised of $20 for proceedings before trial and $20 for a motion resulting in dismissal or judgment, along with $40 in motion fees under MCL 600.2529. The trial court awarded the motion fees, but not the sundry costs. In relevant part, MCL 600.2441(2) directs:

> In all civil actions or special proceedings in the circuit court, whether heard as an original proceeding or on appeal, the following amounts *shall* be allowed as costs in addition to other costs unless the court otherwise directs:
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> (a) For the proceedings before trial, $20.00.
>
> (b) For motions that result in dismissal or judgment, $20.00. [Emphasis added.]

Defendants litigated this matter for several years and eventually obtained summary disposition of plaintiffs' claims in their favor. These costs were statutorily supported.

Ultimately, the trial court granted defendants' request for $300 for mediation fees and $40 for the filing fees. It is not clear on the record why the trial court granted the $40 in filing fees under MCL 600.2529, but not defendants' sundry costs under MCL 600.2441.

A court may deny costs "for reasons stated in writing and filed in the action." MCR 2.625(A)(1). But the trial court provided no reason for denying defendants' sundry costs. " '[F]ailure to exercise discretion when called on to do so constitutes an abdication and hence an abuse of discretion.' " *Rieth v Keeler*, 230 Mich App 346, 348; 583 NW2d 552 (1998), quoting *People v Stafford*, 434 Mich 125, 134 n 4; 450 NW2d 559 (1990). Further, given that plaintiffs indicated on the record at the hearing that they would be willing to pay the $80 in miscellaneous fees, the trial court abused its discretion in failing to tax costs for the additional $40 in sundry fees.

Affirmed in part and remanded to the trial court for entry of an amended order regarding costs consistent with this opinion. Because neither party prevailed in full, appellate costs are not awarded. See MCR 7.219(A). We do not retain jurisdiction.

/s/ Anica Letica
/s/ Michelle M. Rick
/s/ Kristina Robinson Garrett