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EXPERT WITNESS FEES AS A RECOVERABLE ITEM OF COSTS: RECENT LITIGATION TRENDS

PAUL M. KOLKER*

I. Introduction

Prevailing parties in civil lawsuits are entitled to reimbursement for certain expressly enumerated items of costs.¹ Specifically, costs are awarded to a successful party upon a judgment in that party's favor.² Although the trial court typically awards costs, an appellate court may also award costs to parties on appeal.³

Because the right to recover costs did not exist at common law, courts must predicate a proper award of costs upon a statutory enactment.⁴ In Oklahoma, title 12, section 942 expressly delineates the costs that a prevailing party may recover.⁵ It provides, in pertinent part:

A judge of any court of this state may award the following as costs:

1. Any fees assessed by the court clerk or the clerk of the appellate court;
2. Reasonable expenses for the giving of notice, including expenses for service of summons and other judicial process and expenses for publication;
3. *Statutory witness fees . . .*⁶

Section 942 does not define what constitutes a "statutory witness fee," as that term is used within section 942(3). Thus, the courts have traditionally looked to title 28, section 81, Oklahoma's "witness fees" statute, to determine

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1. *Peters v. Am. Income Life Ins. Co.*, 2003 OK CIV APP 62, ¶ 58, 77 P.3d 1090, 1101.

2. 12 OKLA. STAT. §§ 928-929 (2001); *see also* *Nat'l Educators Life Ins. Co. v. Apache Lanes, Inc.*, 1976 OK 121, ¶ 10, 555 P.2d 600, 602.

3. *Nat'l Educators Life Ins. Co.* ¶ 10, 555 P.2d at 602.

4. *Sloan v. Owen*, 1977 OK 239, ¶ 9, 579 P.2d 812, 814 (citing *Sarkeys v. Haas*, 1965 OK 83, ¶ 34, 402 P.2d 894, 900); *Okla. City Urban Renewal Auth. v. Lindauer*, 1975 OK 58, ¶ 12, 534 P.2d 682, 685; *Owens v. Clark*, 1936 OK 558, ¶ 20, 61 P.2d 201, 203. In accordance with the "American Rule," Oklahoma courts must strictly construe any authority for fees and expenses. *Hi-Pro Animal Health v. Halverson*, 2002 OK CIV APP 61, ¶ 7, 48 P.3d 120, 121 (citing *Borst v. Bright Mortgage Co.*, 1991 OK 121, ¶ 11 n.5, 824 P.2d 1102, 1104 n.5).

5. 12 OKLA. STAT. § 942 (entitled "Costs Which Judges May Award").

6. *Id.* (emphasis added).

the proper amount of a “statutory witness fee.”⁷ Section 81 mandates a nominal, \$10 per day witness fee, plus reimbursement of travel expenses.⁸ Unlike fact witnesses, experts have traditionally demanded a much higher hourly rate commensurate with their education, experience, and field of expertise, often resulting in substantial fees.⁹ Therefore, prevailing parties have ample incentive to seek reimbursement of these fees as a “cost” of litigation. Until recently, however, litigants desiring reimbursement of expert fees lacked any legitimate argument because of an absence of statutory authority permitting a court to tax expert fees as a “cost” of litigation.¹⁰ Thus, for many years, prevailing parties were unable to recover costs spent on expert witness fees.

This Article addresses the propriety of an award, as “costs,” of the statutorily prescribed expert witness fees mandated by the Oklahoma Discovery Code (Code).¹¹ Since the enactment of the Code, prevailing litigants have frequently sought reimbursement of these statutorily prescribed witness fees, and many have done so successfully. The question remains, however, whether such an award of expert witness fees is proper.

II. Pre-Oklahoma Discovery Code Cases

The issue of whether expert fees were recoverable prior to the Code’s enactment was first addressed by the Oklahoma Supreme Court in *Sarkeys v. Haas*.¹² In *Sarkeys*, the court squarely rejected the plaintiff’s attempt to tax, as costs, a \$100 fee paid to the defendant’s expert engineer.¹³ The court relied upon longstanding precedent that there was no common law rule permitting recovery of litigation expenses.¹⁴ Instead, the court relegated the plaintiff to the \$10 fee codified at title 28, section 81.¹⁵

7. 28 OKLA. STAT. § 81 (2001); *see, e.g.*, *Dulan v. Johnston*, 1984 OK 44, ¶ 25, 687 P.2d 1045, 1048-49; *In re Estate of Buckner*, 1980 OK 54, ¶ 7, 609 P.2d 1285, 1287; *Lindauer* ¶ 13, 534 P.2d at 685.

8. 28 OKLA. STAT. § 81(A)(3).

9. The agreement to pay the much higher expert witness fee began as a “gentleman’s agreement” between legal practitioners, wherein the parties generally agreed, strictly as a professional courtesy, to pay the expert fee(s) of their adversary. However, these fees were never *mandated* by statute.

10. 12 OKLA. STAT. § 3226(B)(3)(c)(1) (Supp. 2003) (formerly 12 OKLA. STAT. § 3203(B)(3)(c)(1) (1982)).

11. 12 OKLA. STAT. §§ 3224-3237 (2001).

12. 1965 OK 83, 402 P.2d 894.

13. *Id.* ¶¶ 34-35, 402 P.2d at 900.

14. *Id.*

15. *Id.* ¶ 35, 402 P.2d at 900.

Ten years after *Sarkeys*, the court revisited this precise issue. In *Oklahoma City Urban Renewal Authority v. Lindauer*,¹⁶ the Oklahoma Supreme Court again refused to allow the prevailing party to recover an expert witness fee — at least, not an amount exceeding the “usual” statutory witness fee in section 81. The *Lindauer* court stated: “We know of no statutory authority allowing recovery as cost, the litigation expense incurred in presenting an expert witness at trial other than the *usual* statutory witness fees”¹⁷

Over the next two years, the Oklahoma Supreme Court affirmed *Sarkeys* and *Lindauer* on two different occasions.¹⁸ Clearly, these cases hold that witness fees exceeding the “usual” expert witness fees¹⁹ may *not* properly be taxed as costs under section 942. Importantly, however, these decisions predate the enactment of the Code. Thus, these decisions necessarily fail to analyze the unique interplay of recently enacted legislation within the Code that specifically and expressly mandates payment of expert fees above and beyond the nominal amount contemplated by title 28, section 81.

III. Enactment of the Oklahoma Discovery Code and Early Cases Construing Its Provisions

The Oklahoma legislature enacted the Code in 1982, and subsequently amended it in 1989.²⁰ Since the Code’s enactment, expert witness fees are no longer a gentleman’s agreement.²¹ Today, the Code expressly requires the party seeking discovery to pay an adversary’s expert witness fee for time expended responding to discovery.²² The statute provides in pertinent part:

16. 1975 OK 58, 534 P.2d 682.

17. *Id.* ¶ 13, 534 P.2d at 685 (emphasis added).

18. Nat’l Educators Life Ins. Co. v. Apache Lanes, Inc., 1976 OK 121, ¶ 11, 555 P.2d 600, 602 (holding expert witness fees “are not statutorily sanctioned, and must be deleted from the award”); Sloan v. Owen, 1977 OK 239, ¶ 9, 579 P.2d 812, 814 (“We know of no statute, and none is called to our attention, which authorizes the assessment of expert witness fees as costs.”).

19. *E.g.*, as defined in 28 OKLA. STAT. § 81(A)(3) (1971).

20. See 1982 Okla. Sess. Laws, ch. 198, originally codified at 12 OKLA. STAT. §§ 3201-3215 (Supp. 1982), and presently codified at 12 OKLA. STAT. §§ 3224-3237 (2001).

21. See *Peters v. Am. Income Life Ins. Co.*, 2003 OK CIV APP 62, ¶ 58, 77 P.3d 1090, 1101 (stating that “the scope of what may be recovered as costs is limited by statute”); see also *supra* note 9.

22. 12 OKLA. STAT. § 3226(B)(3)(c)(1). For a detailed analysis of the differences between *expert* testimony and *fact* testimony presented by an expert witness, see *Heffron v. District Court of Oklahoma County*, 2003 OK 75, ¶¶ 16-32, 77 P.3d 1069, 1076-83.

Unless manifest injustice would result:

1. The court *shall* require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery²³

The term “shall” generally signifies a mandatory command or directive.²⁴ Thus, absent “manifest injustice,” section 3226(B)(3)(c)(1) *commands* payment of an expert fee.²⁵ As such, it plainly and necessarily constitutes a statutory witness fee.²⁶ Of course, the more pressing question is whether the required fee of section 3226(B)(3)(c)(1) constitutes a “statutory witness fee” within the meaning of section 942(3). The answer to this question is, admittedly, much more problematic.

Two years after the Oklahoma legislature enacted the Code, the Oklahoma Supreme Court touched upon this issue in *Dulan v. Johnston*.²⁷ In *Dulan*, the defendant filed an offer to confess judgment under title 12, section 1101.²⁸ The plaintiff accepted, and judgment was entered.²⁹ After the court entered judgment,³⁰ the plaintiff moved for an award of prejudgment interest and costs, including expert witness fees paid to *his own experts*.³¹ The trial court denied the plaintiff’s motion to tax the expert fees as costs,³² and the plaintiff appealed.³³

On appeal, the defendant argued that there was no statutory basis for an award of expert fees inasmuch as the plaintiff sought reimbursement for fees paid to his own expert, as opposed to those of his adversary. Thus, the defendant claimed that the fees could not be charged under the Code, let alone

23. 12 OKLA. STAT. § 3226(B)(3)(c)(1) (emphasis added).

24. *Apache Corp. v. State ex rel. Okla. Tax Comm’n*, 2004 OK 48, ¶ 11, 98 P.3d 1061, 1064 (citing *Tulsa County Budget Bd. v. Tulsa County Excise Bd.*, 2003 OK 103, ¶ 13 n.25, 81 P.3d 662, 671 n.25); *United States ex rel. Farmers Home Admin. v. Hobbs*, 1996 OK 77, ¶ 7 n.16, 921 P.2d 338, 343 n.16 (“The use of ‘shall’ by the Legislature is normally considered as a legislative mandate equivalent to the term ‘must,’ requiring interpretation as a command.”); *State ex rel. Macy v. Freeman*, 1991 OK 59, ¶ 8, 814 P.2d 147, 153; *Forest Oil Corp. v. Corp. Comm’n*, 1990 OK 58, ¶ 26, 807 P.2d 774, 787.

25. *Dulan v. Johnston*, 1984 OK 44, ¶ 22, 687 P.2d 1045, 1048 (citing 12 OKLA. STAT. § 3226(B)(3)(c)(1) (1982)).

26. Notably, as is the case with title 28, section 81 of the Oklahoma Statutes, section 3226 is not referenced within section 942, or vice versa.

27. 1984 OK 44, 687 P.2d 1045.

28. *Id.* ¶ 3, 687 P.2d at 1046.

29. *Id.*

30. *Id.* ¶ 4, 687 P.2d at 1046.

31. *Id.* ¶ 24, 687 P.2d at 1048.

32. *Id.* ¶ 4, 687 P.2d at 1046.

33. *Id.* ¶ 1, 687 P.2d at 1046.

taxed as costs.³⁴ The plaintiff, on the other hand, correctly pointed out that case law supporting the defendant's arguments predated the enactment of the Code's expert fee provision.³⁵ Consequently, the plaintiff claimed the decisions failed to consider the interplay between the Code's expert witness fee clause and the statutory witness fee provision of section 942(3).³⁶

Citing *National Educators, Sloan*, and a probate case, *In re Estate of Buckner*,³⁷ the *Dulan* court began its analysis by acknowledging the general rule that witness fees must be statutory to become recoverable as costs.³⁸ Yet, rather tellingly, the court did not summarily reject the plaintiff's argument that the Code's fees could be recovered as costs. Instead, the court first analyzed the *applicability* of section 3226, thereby suggesting that expert fees could, in fact, be taxed as costs.³⁹

Ultimately, as a threshold matter, the court rejected the plaintiff's claim that section 3226 was applicable because the plaintiff sought reimbursement for expert witness fees paid to his own experts as opposed to fees paid to his adversary's experts.⁴⁰ Consequently, the court did not answer the more pressing issue of whether expert fees imposed by the Code are taxable as costs. In sum, the *Dulan* court lacked the requisite facts necessary to embark upon the next analytical step. Importantly, however, *Dulan* suggests that, in cases where the Code's expert witness fee provision is applicable, those fees may be taxable as costs under the statutory witness fee provision of section 942(3).⁴¹

34. *Id.* ¶¶ 18-25, 687 P.2d at 1048-49.

35. *Id.* ¶ 21, 687 P.2d at 1048; 12 OKLA. STAT. § 3226(B)(3)(c)(1) (2001) (which was 12 OKLA. STAT. § 3203(B)(3)(c)(1) (1982) at that time).

36. *Dulan*, ¶ 21, 687 P.2d at 1048.

37. 1980 OK 54, 609 P.2d 1285.

38. *Dulan*, ¶¶ 18-20, 687 P.2d at 1048.

39. *Id.* ¶¶ 21-23, 687 P.2d at 1048.

40. *Id.* ¶ 23, 687 P.2d at 1048.

41. Note that the court ultimately awarded the defendant's expert fees using title 12, section 1101.1 of the 1981 Oklahoma Statutes. In 1989, the Oklahoma Supreme Court revisited this issue within the context of a condemnation action. In *Andress v. Bowlby*, 1989 OK 78, 773 P.2d 1265, the court held that the term "costs" does *not* include expert witness fees. *Id.* ¶ 3, 773 P.2d at 1267; *see also* 52 OKLA. STAT. § 318.5 (2001). The "costs" statute examined in *Andress*, however, was an oil and gas statute. Thus, the opinion fails to mention the interplay between section 3226 of the Code and section 942(3) of title 12. Consequently, although the Oklahoma Supreme Court decided the *Andress* case well after the enactment of the Code, it contemplates an entirely different statutory scheme.

IV. Recent Developments and Litigation Trends

Two recently published Oklahoma Court of Civil Appeals decisions squarely address the question that *Dulan* left unanswered.⁴² Both of these cases upheld imposing expert fees as costs;⁴³ however, these decisions are only persuasive and not binding.⁴⁴ Nevertheless, they arguably have legitimized the claim that expert witness fees imposed by the Code are taxable as costs. Indeed, until the Oklahoma Supreme Court answers this question, these cases may even impose an ethical obligation on legal practitioners to seek reimbursement of these fees.

The first case in this line of court of civil appeals decisions is *Atchley v. Hewes*.⁴⁵ In *Atchley*, the prevailing party sought to recover expert witness fees paid to doctors during the discovery phase of litigation.⁴⁶ The trial court denied the plaintiff's application for costs,⁴⁷ and on appeal, the court of civil appeals reversed and upheld the award of expert fees.⁴⁸

Relying on *Dulan*, the court of civil appeals held that the Code's statutorily mandated witness "fee" is tantamount to a "statutory witness fee" within the meaning of section 942(3).⁴⁹ Thus, the court opined that an expert fee constitutes a properly recoverable item of costs.⁵⁰ The *Atchley* court carefully explained that *Dulan* merely suggests this result; it does not expressly mandate it.⁵¹

Two years later, in *Paulson v. Sternlof*,⁵² the court of civil appeals again arrived at the same conclusion. In affirming *Atchley*, the *Paulson* court held that "the award of costs to the prevailing party is authorized" by title 12, section 929, and it "may include those items set forth" within the witness fee

42. *Paulson v. Sternlof*, 2000 OK CIV APP 128, 15 P.3d 981, *cert. denied*, Case No. SD-9432 (Okla. Ct. App. Oct. 17, 2000); *Atchley v. Hewes*, 1998 OK CIV APP 143, 965 P.2d 1012.

43. *Paulson* ¶¶ 16-17, 15 P.3d at 984, *Atchley* ¶ 10, 965 P.2d at 1015. *But see* Okla. Orthopedic & Arthritis Found., Inc. v. Millstead, 1983 OK CIV APP 15, ¶ 8, 666 P.2d 242, 244 (a post-Code decision holding that "there is no statutory authority for assessing expert witness fees as costs. . . . We are not aware of any basis for requiring a party or his attorney to pay expert witness fees absent an agreement express or implied.").

44. *See infra* Part V.

45. 1998 OK CIV APP 143, 965 P.2d 1012.

46. *Id.* ¶ 10, 965 P.2d at 1014-15.

47. *Id.* ¶ 1, 965 P.2d at 1013.

48. *Id.* ¶¶ 10, 14, 965 P.2d at 1015-16.

49. *Id.* ¶ 10, 965 P.2d at 1015.

50. *Id.*

51. *Id.*

52. 2000 OK CIV APP 128, 15 P.3d 981.

statute in section 942(3) as well as the expert witness fees of section 3226(B)(3)(c)(1) of the Code.⁵³

Later, in *Fuller v. Pacheco*,⁵⁴ the court of civil appeals again confronted this issue. In *Fuller*, the defendant filed an offer to confess under title 12, section 1101.1.⁵⁵ After the close of evidence, the jury returned a verdict for the defendant.⁵⁶ Subsequently, the trial court awarded the defendant costs and attorney fees, including fees paid to eight different experts.⁵⁷ Notably, seven of these experts were paid *before* the offer to confess was filed.⁵⁸ Thus, out of the total expert fees awarded, the trial court necessarily awarded fees for seven expert witnesses under section 942, as opposed to section 1101.1.

Importantly, the court did not summarily reject the defendant's claim that the prevailing party could recover expert fees as costs under section 942. Instead, with seeming approval, the court quoted the following from *Atchley*: "In *Atchley*, the court explained that section 942(3) mandates the allowance of 'statutory witness fees.' The [*Atchley*] court further explained that, inasmuch as fees paid to expert witnesses under section 3226(B)(3)(c)(1) are required by statute to be paid, those fees are recoverable as costs."⁵⁹

Ultimately, the *Fuller* court affirmed only the one expert fee that accrued during the time frame of section 1101.1.⁶⁰ Consequently, the court did not expressly hold that the remaining expert fees were recoverable as costs under section 942. The court likewise never stated that the remaining fees could not be recovered under section 942. Instead, the court held that nothing in the record established that the remaining expert witnesses fell within the purview of section 3226(B)(3)(c)(1), and hence, whether the fees paid to those witnesses fell within the purview of section 942.⁶¹ Thus, as in *Dulan*, the court never reached the next analytical step. Notwithstanding, the *Fuller* case is significant because it quotes from *Atchley* without expressly disapproving it.

V. Precedential Effect of Published Appellate Decisions

Since the Oklahoma Court of Civil Appeals released *Atchley*, *Paulson*, and *Fuller* for publication, prevailing litigants have routinely sought

53. *Id.* ¶ 16, 15 P.3d at 984.

54. 2001 OK CIV APP 39, 21 P.3d 74.

55. *Id.* ¶ 25, 21 P.3d at 80.

56. *Id.*

57. *Id.* ¶¶ 31, 34, 21 P.3d at 81.

58. *Id.* ¶ 35, 21 P.3d at 81-82.

59. *Id.* ¶ 32, 21 P.3d at 81 (internal citations omitted).

60. *Id.* ¶ 36, 21 P.3d at 82.

61. *Id.* ¶¶ 34-35, 21 P.3d at 81-82.

reimbursement for expert witness fees as “costs.” Many legal practitioners mistakenly believe that courts should accord these decisions precedential value. These cases are, however, merely persuasive.

The precedential value of an opinion designated for official publication depends on which appellate court “approved” the official publication.⁶² Oklahoma Supreme Court opinions designated for publication always have binding, precedential effect.⁶³ In contrast, an opinion released for publication by the court of civil appeals merely has “persuasive” effect unless the Oklahoma Supreme Court approves the opinion for publication.⁶⁴ The Supreme Court of Oklahoma is also authorized to order, and many times does order, an opinion of the court of civil appeals withdrawn from publication altogether.⁶⁵ In such instances, the court of civil appeals decision is deprived of any persuasive value.⁶⁶

In light of section 30.5, Oklahoma Court of Civil Appeals decisions can never have precedential value absent express approval by the state’s highest court.⁶⁷ Objective evidence is available to determine whether court of civil appeals decisions meet this standard.⁶⁸ For instance, such opinions are always published in the Pacific Reporter, and Oklahoma Supreme Court rules provide for a specific notation on any opinion that the supreme court approves for publication.⁶⁹ The published opinion within the official reporter should always indicate that it has been “Released for publication by order of the Court of Civil Appeals” or “Approved for publication by the Supreme Court.”⁷⁰

Unfortunately, the Oklahoma Supreme Court has not approved *Atchley*, *Paulson*, or *Fuller* for publication. Therefore, these decisions merely have persuasive, not binding, authority. Because none of these decisions have been withdrawn from publication by the Supreme Court, however, they should be carefully considered by the *nisi prius* court.

62. 5 HARVEY D. ELLIS, JR. & CLYDE A. MUCHMORE, OKLAHOMA APPELLATE PRACTICE § 14.117 (2004 ed.).

63. OKLA. SUP. CT. R. 1.200(c).

64. *Id.*; see also 20 OKLA. STAT. § 30.5 (2001); *Hollaway v. UNUM Life Ins. Co. of Am.*, 2003 OK 90, ¶ 3 n.6, 89 P.3d 1022, 1025 n.6 (“Opinions released for publication by order of the Court of Civil Appeals, are persuasive only, and lack precedential effect.”).

65. OKLA. SUP. CT. R. 1.200(c); see also 20 OKLA. STAT. § 30.5.

66. 20 OKLA. STAT. § 30.5; see also ELLIS & MUCHMORE, *supra* note 62, § 14.117.

67. 20 OKLA. STAT. § 30.5; see also OKLA. SUP. CT. R. 1.200(c)(2).

68. ELLIS & MUCHMORE, *supra* note 62, § 14.117.

69. *Id.*; see also OKLA. SUP. CT. R. 1.200(c)(2).

70. OKLA. SUP. CT. R. 1.200(c)(2).

VI. Conclusion

Under current Oklahoma law, it is unclear whether expert witness fees paid to an adversary's expert may properly be taxed as costs. Certainly, section 3226(B)(3)(c)(1) compels payment of these fees under certain circumstances.⁷¹ Because the Code imposes a witness fee, it is logical to conclude that the fee constitutes a "statutory witness fee" within the meaning of section 942(3). Courts, however, strictly construe statutes regarding costs and attorney fees. Because of this practice, Oklahoma courts have traditionally relegated prevailing parties to the "usual" \$10 fee set forth within title 28, section 81.

Nevertheless, one cannot ignore the clear import of *Atchley*, *Paulson*, and *Fuller*. Without question, these decisions indicate that the Code's expert witness fees are a recoverable item of costs under section 942(3). One must recognize, however, that the gravamen of this proposition presupposes that section 3226(B)(3)(c)(1) constitutes a "statutory witness fee" within the meaning of section 942(3). The Oklahoma Supreme Court has not yet expressly recognized this concept. Thus, this question remains unanswered.

71. 12 OKLA. STAT. §§ 3226(B)(3)(c)(1) (2001); see Oklahoma Discovery Code, 12 OKLA. STAT. §§ 3224-3237; see also *Heffron v. Dist. Ct. of Okla. County*, 2003 OK 75, ¶¶ 16-32, 77 P.3d 1069, 1076-83.

