

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

JOCELYN REINKE, :
 : C.A. NO. 08C-09-033 WLW
Plaintiff, :
 :
v. :
 :
MARTIN R. FURBUSH, :
 :
Defendant. :

Submitted: September 22, 2011
Decided: December 1, 2011

ORDER

Upon Plaintiff's Motion for Costs.
Granted in part; Denied in part.

David A. Boswell, Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware;
attorney for the Plaintiff.

Mary E. Sherlock, Esquire of Weber Gallagher Simpson Stapleton Fires & Newby,
LLP, Dover, Delaware attorney for the Defendant.

WITHAM, R.J.

FACTS

After her automobile was rear-ended by Martin Furbush (hereinafter “Defendant”), Jocelyn Reinke (hereinafter “Plaintiff”) succeeded in her negligence suit through a jury verdict in her favor in the amount of \$95,000 on September 2, 2011. Previously, Defendant made an offer of judgment under Superior Court Civil Rule 68 for \$40,001. Plaintiff now brings her motion for costs pursuant to Superior Court Civil Rules 54(d) and 68,¹ and 10 *Del. C.* § 5101.

Standard of Review

Superior Court Civil Rule 54(d):

Costs. Except when express provision therefor is made either in a statute or in these Rules or in the Rules of the Supreme Court, costs shall be allowed as of course to the prevailing party upon application to the Court within ten (10) days of the entry of final judgment unless the Court otherwise directs.

10 *Del. C.* § 5101 states:

In a court of law, whether of original jurisdiction or of error, upon a voluntary or involuntary discontinuance or dismissal of the action, there shall be judgment for costs for the defendant. Generally a party for whom final judgment in any civil action, or on a writ of error upon a judgment is given in such action, shall recover, against the adverse

¹In addition to Superior Court Civil Rule 54(d) and 10 *Del. C.* § 5101, Superior Court Civil Rule 68 allows for Plaintiff’s motion for costs by implication. In pertinent part, the rule states, “If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer.” Super. Ct. Civ. R. 68. By implication, when the judgment obtained is more favorable than the offer, the offeree may move for costs as per Superior Court Civil Rule 54(d) and 10 *Del. C.* § 5101.

party, costs of suit, to be awarded by the court.

In a civil suit, determining whether costs should be awarded is a matter of judicial discretion.² The word “generally,” as used in 10 Del. C. § 5101, means “for the most part,” or “usually.”³

Title 10, Section 8906 of the Delaware Code provides, “The fees for witnesses testifying as experts . . . in the Superior Court . . . shall be fixed by the court in its discretion, and such fees so fixed shall be taxed as part of the costs in each case and shall be collected and paid as other witness fees are now collected and paid.”⁴ In Delaware, it is well settled “that the expert’s fee that is recoverable as a cost of litigation is limited to the time necessarily spent in actual attendance upon the Court for the purpose of testifying.”⁵ This includes testifying, waiting to testify, or traveling to testify.⁶

Generally, court filing fees are recoverable.⁷

DISCUSSION

In a civil suit, determining whether costs should be awarded is a matter of

²*Donovan v. Delaware Water and Air Res. Comm’n*, 358 A.2d 717, 722-23 (Del. 1976).

³*Id.* at 722.

⁴*Midcap v. Sears Roebuck and Co.*, 2004 WL 1588343, at *2 (Del. Super. May 26, 2004).

⁵*Id.* (quoting *State v. 0.0673 Acres of Land*, 224 A.2d 598, 602 (Del. 1966)).

⁶*Id.* at *3.

⁷*See id.* at *7.

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judicial discretion.⁸ The word “generally,” as used in 10 Del. C. § 5101, means “for the most part,” or “usually.”⁹ Pursuant to Superior Court Civil Rule 54(d), Plaintiff timely filed this motion for costs on September 7, 2011. As the prevailing party in this case, Plaintiff should be awarded costs unless there exists another consideration that obligates the Court to exercise its discretion.

Plaintiff requests service of process fees, a trial fee, LexisNexis filing fees, expert fees, videographer’s fees, and one-half of a mediation fee. The Court addresses the fees in turn.

Generally, court filing fees are recoverable.¹⁰ Therefore, the service of process fees and the trial fee are hereby awarded. In regard to the Lexis fees, Defendant contends that the trial was originally scheduled for September 2010 and was continued at the request of Plaintiff. Plaintiff responds that the first trial date was in January 2010. Plaintiff also argues that Defendant consented to the continuance and benefitted materially from it through further damage-reducing medical treatment of Plaintiff. After review of the request for a revised scheduling order of September 23, 2009, the Court finds that Defendant indeed consented to seeking a new date. Therefore, the Court grants Plaintiff’s request for LexisNexis filing fees.

Title 10, Section 8906 of the Delaware Code provides, “The fees for witnesses

⁸*Donovan*, 358 A.2d at 722.

⁹*Id.* at 722.

¹⁰*See Midcap*, 2004 WL 1588343, at *7.

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testifying as experts . . . in the Superior Court . . . shall be fixed by the court in its discretion, and such fees so fixed shall be taxed as part of the costs in each case and shall be collected and paid as other witness fees are now collected and paid.”¹¹ In Delaware, it is well settled “that the expert’s fee that is recoverable as a cost of litigation is limited to the time necessarily spent in actual attendance upon the Court for the purpose of testifying.”¹² This includes testifying, waiting to testify, or traveling to testify.¹³

Plaintiff requests \$4,050 for 3 hours of video testimony by Alex Bodenstab, M.D. Plaintiff also asks for \$2,500 for the live testimony of Richard Appleby, D.O. Defendant does not dispute Appleby’s fee. Therefore, the Court grants this fee. Defendant disputes Bodenstab’s fee on the basis that it is excessive, citing *Foley v. Elkton Plaza Associates, LLC*.¹⁴ In *Foley*, the Court, in an attempt to provide uniformity for expert costs, relied on a study by the Medical Society of Delaware’s Medico-Legal Affairs Committee.¹⁵ According to the formula provided in *Foley*, Defendant complains that Bodenstab’s fee is well in excess of accepted guidelines. Plaintiff states that the guidelines used by Defendant are out of date and opts for a

¹¹*Id.* at *2.

¹²*Id.* (quoting *State v. 0.0673 Acres of Land*, 224 A.2d 598, 602 (Del. 1966)).

¹³*Id.* at *3.

¹⁴2007 WL 959521 (Del. Super. Mar. 30, 2007).

¹⁵*Id.* at *2.

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more recent case, *Enrique v. State Farm*.¹⁶ The Court in that case noted that, according to the Medico-Legal Affairs Committee's 2006 report, the fee range for a deposition lasting up to two hours is \$1000 to \$2000.¹⁷ The Court then adjusted for inflation using the month that the report was released as the starting point and the month of the motion's submission as the end point.¹⁸ The Court finds this method of calculation to be proper and applies it to the case at hand for the purposes of determining whether the fee charged by Bodenstab is reasonable. From March 2006 to September 2011, the increase in the consumer price index for medical care was 20.3 percent.¹⁹ Based on this percentage increase, the going rate for a two hour deposition would be between \$1,203 and \$2,406 with an additional charge of \$962.40 to \$1443.60 for each additional half hour. Thus, the maximum charge for a 2 hour deposition that ran for 3 hours would be \$5,293.20. Bodenstab's fee is well within this range and is hereby awarded.

Defendant's counsel contests the videographer's editing fees since she states that the editing was required to remove Plaintiff counsel's objectionable references

¹⁶2010 WL 2636845 (Del. Super. June 20, 2010).

¹⁷*Id.* at *1.

¹⁸*Id.* at *1 n.13.

¹⁹*Compare* BUREAU OF LABOR STATISTICS, CONSUMER PRICE INDEX: MARCH 2006 (2006), available at http://www.bls.gov/news.release/archives/cpi_04192006.pdf (Medical Care, March 2006 Unadjusted Index: 333.8) with BUREAU OF LABOR STATISTICS, CONSUMER PRICE INDEX – SEPTEMBER 2011 (2011), available at http://www.bls.gov/news.release/archives/cpi_10192011.pdf (Medical Care, September 2011 Unadjusted Index: 401.605).

to the AMA Guide Impairment Rating and to a future second total knee replacement. The Court agrees that Defendant should not have to bear such cost and adjusts the videographer's costs to \$587.50.

The final area in which Plaintiff seeks reimbursement is one-half of the mediator's fee. Defendant objects on the ground that the fee is normally evenly split and one side is not required by statute or rule to bear the full cost of mediation. Defendant cites to *Foley* for the proposition that the parties are to split the mediator's fee.²⁰ *Foley*²¹ cites to *Brown v. Capital Management Company*,²² which in turn cites to Superior Court Civil Rule 16.2(g). This rule no longer exists. As counsel for both sides are well aware, alternative dispute resolution is now compulsory with a few notable exceptions.²³ In its discretion however, the Court sees no reason to disturb the equitable division of this fee. Therefore, one-half of the mediator's fee is hereby denied.

CONCLUSION

In summary, Plaintiff is entitled to recover the following costs:
Sussex County Council, Service of Process Fee: \$30.00
Certified Mail, Service of Process: \$12.14

²⁰2007 WL 959521, at *1.

²¹2007 WL 959521, at *1 n.10.

²²2002 WL 338130, at *2 (Del. Super. Feb. 28, 2002).

²³*See* Super. Ct. Civ. R. 16(b)(4), (e).

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Prothonotary, Trial Fee: \$150.00

LexisNexis File and Serve, E-Filing Fees: \$1,213.50

Video Expert Testimony of Alex Bodenstab, M.D.: \$4,050.00

Live Expert Testimony of Richard Appleby, D.O.: \$2,500.00

Videographer's Fees: \$587.50

Total: \$8,543.14

IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh

oc: Prothonotary

xc: Counsel