

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

ELAINE T. ROSENBERG and)	
BRIAN ROSENBERG,)	
)	
Plaintiffs,)	C.A. No. 09C-01-033 (WLW)
v.)	
)	
GARRETT CRICHTON,)	
)	
Defendant/)	
Third party Plaintiff,)	
v.)	
)	
MITCH GILBERT,)	
)	
Third Party Defendant.)	

Submitted: July 20, 2011
Decided: September 23, 2011

ORDER

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

Steven F. Mones, Esquire of The Freibott Law Firm, P.A., Wilmington, Delaware;
attorneys for the Plaintiffs.

Arthur D. Kuhl, Esquire of Reger Rizzo & Darnall, LLP, Wilmington, Delaware;
attorneys for the Defendant/Third Party Plaintiff.

Michael A. Pedicone, Esquire of Michael A. Pedicone, P.A., Wilmington, Delaware;
attorney for the Third Party Defendant.

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Facts

_____Plaintiff brought a claim against the Defendant arising from the Plaintiff's personal injury that occurred when a door at the Defendant's rental property slammed on the Plaintiff causing an Achilles injury. On June 30, 2011, the jury returned a verdict in favor of the Defendant. On July 12, 2011, the Defendant brought a Motion for Costs. Plaintiff replied on July 19, 2011. Defendant asks for a total of \$3,643.15, including Lexis filing fees (\$467.00), fees for an expert who testified at trial (\$1,902.90), removal and transport of the door in question (\$900.00), the Defendant's lodging expenses (\$320.76), and Defendant's meal expenses (\$52.49).

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

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

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judicial discretion.¹ The word “generally,” as used in 10 Del. C. § 5101, means “for the most part,” or “usually.”²

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.”³ 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.”⁴ This includes testifying, waiting to testify, or traveling to testify.⁵

Traditionally, the cost of an exhibit is borne by the party presenting it.⁶ Travel expenses are a matter of judicial discretion.⁷ Generally, court filing fees are recoverable.⁸

¹*Donovan v. Delaware Water and Air Res. Comm’n*, 358 A.2d 717, 722-23 (Del. 1976).

²*Id.* at 722.

³*Midcap v. Sears Roebuck and Co.*, 2004 WL 1588343 (Del. Super. May 26, 2004).

⁴*Id.* at *2 (quoting *State v. 0.0673 Acres of Land*, 224 A.2d 598, 602 (Del. 1966)).

⁵*Id.* at *3.

⁶*Foley v. Elkton Plaza Assocs., L.L.C.*, 2007 WL 959521, at *3 (Del. Super. Mar. 30, 2007).

⁷*Nygaard v. Lucchesi*, 654 A.2d 410, 415 (Del. Super. 1994) (citing *Donovan*, 358 A.2d at 723).

⁸See *Midcap*, 2004 WL 1588343, at *7.

Discussion

_____ In a civil suit, determining whether costs should be awarded is a matter of judicial discretion.⁹ The word “generally,” as used in 10 Del. C. § 5101, means “for the most part,” or “usually.”¹⁰ As the prevailing party in this case, the Defendant should be awarded costs unless there exists another consideration that obligates the Court to exercise its discretion. The Plaintiffs note the Court’s exercise of such discretion in several previous cases.¹¹ The Court notes that these previous cases are distinguishable from the case at bar. Unlike the physician defendants in *Welsh*, the Defendants here were not negligent. Further, whereas it made sense for the trip and fall plaintiff who was seriously injured to sue in *Jacques*, the Plaintiff here had an extraordinary injury from an everyday occurrence. Thus, the Court finds the Plaintiff’s cases distinguishable from the case at bar.

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.”¹² In Delaware, it is well settled “that the expert’s fee that is recoverable as a cost of

⁹*Donovan*, 358 A.2d at 722.

¹⁰*Id.* at 722.

¹¹*Jacques v. LaCrosse Homes, Inc.*, 2010 WL 3515463, Silverman, J. (Del. Super. Aug. 27, 2010); *Welsh v. Del. Clinical & Lab. Physicians, P.A.*, 2001 WL 392400 at *5, Witham, J. (Del. Super. Mar. 19, 2001).

¹²*Midcap*, 2004 WL 1588343, at *2.

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litigation is limited to the time necessarily spent in actual attendance upon the Court for the purpose of testifying.”¹³ This includes testifying, waiting to testify, or traveling to testify.¹⁴ The Plaintiff correctly notes that time spent in preparation for court is not recoverable. This eliminates one hour from the expert’s bill. The Defendant’s expert also included time for travel, which is recoverable, but the description “Field Trip – Travel to/from Dover, DE” is not specific enough. The Court will not assume a starting point for the purposes of calculating costs. The Court will, however, award due costs in its discretion if provided the starting point for the expert’s trip. The expert charged \$102.90 for milage, but did not specify a rate or the number of miles traveled. If provided these numbers, the court will award due costs in its discretion. The Defendant’s expert lists three hours for trial. The Plaintiff disputes this stating that the testimony given by the expert was less than one hour. Thus, there is clear merit for roughly an hour of testimony. The Court will award further due costs in its discretion if provided with further detail as to what the expert was doing for the additional two hours billed.

The Defendant seeks recovery of costs for his door exhibit amounting to \$900.00. Traditionally, the cost of an exhibit is borne by the party presenting it.¹⁵ Therefore, this cost is not recoverable.

The Defendant requests costs for a three night stay for a total of \$320.76 and

¹³*Id.* (quoting *State v. 0.0673 Acres of Land*, 224 A.2d 598, 602 (Del. 1966)).

¹⁴*Id.* at *3.

¹⁵*Foley*, 2007 WL 959521, at *3.

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two meals totaling \$52.49 for a grand total of \$373.25. The Court finds that the circumstances of this case warrant the parties paying their own travel expenses, including meals and lodging.¹⁶ Thus, the Court does not award costs in this area.

The Defendant requests filing fees. Generally, court filing fees are recoverable.¹⁷ The Plaintiff opposes several fees. The Court is persuaded by the arguments of the Plaintiff as to costs generated by the Defendant's dispute of a second inspection of the door with the Plaintiff's expert and as to the letter requesting that defense counsel be permitted to attend the pretrial conference by telephone. These two items amount to \$31.00. Therefore, the Defendant is awarded \$436.00 for filing fees.

Conclusion

_____ In sum, the Defendant is entitled to recover the following:

Testimony Fee for Expert (subject to a more specific supplemental filing)\$250.00;

Filing Fees \$436.00; Total \$686.00.

IT IS SO ORDERED.

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

WLW/dmh

¹⁶*Nygaard*, 654 A.2d at 415.

¹⁷*Midcap*, 2004 WL 1588343, at *7.