

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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**Re: Connie L. Gates, Individually and as Administratrix of the
Estate of Gordon Edward Gates. v. Texaco, Inc.
C.A. No. 05C-05-043 RRC**

Submitted: December 31, 2007
Decided: March 20, 2008

**Upon Plaintiff's Bill of Costs.
GRANTED in part; DENIED in part.**

Dear Counsel:¹

On October 31, 2007, in the Superior Court of Delaware, a jury returned a verdict in favor of Connie L. Gates ("Plaintiff"), individually and as administratrix of the estate of Gordon E. Gates, and against Texaco, Inc. ("Defendant"). The jury awarded Plaintiff \$3,426,166.28, which will be reduced by 17%, reflecting the jury's comparative negligence finding.

¹ The Court admitted three attorneys for Defendant *pro hac vice*: Loius B. Woolf, Esq., of Woolf, McClane, Bright, Allen & Carpenter, PLLC, of Knoxville, Tennessee; Eric W. Wiechmann, Esq., and Moyahoena N. Ogilvie, Esq., both of McCarter & English, LLP, of Hartford, Connecticut.

Plaintiff brings this motion for costs pursuant to Superior Court Civil Rule 54(d) and 10 *Del. C.* § 8906, and post-judgment interest on any sums due to Plaintiff after October 31, 2007.² Specifically, Plaintiff requests court costs in the amount of \$1,927.06, and seeks costs for four expert witnesses' fees: \$6,223.62 for Bernard Goldstein, M.D; \$11,380.14 for Dr. Peter Infante; \$7,615.85 for Dr. Mark Nicas; and \$1,500 for Andy C. Verzilli. Plaintiff further seeks recovery of costs for service of trial subpoenas totaling \$160, and post-judgment interest in the amount of 10%.

Defendant asks the Court to deny Plaintiff's motion in its entirety because, Defendant argues, the award to Plaintiff was "substantial,"³ and as a result Plaintiff does "not require an award of costs to make [her] whole."⁴ In the alternative, Defendant argues that the Court should deny Plaintiff's application for court costs because Plaintiff has presented its court costs to the Court in the form of a summary prepared by Plaintiff's counsel. Should the Court not choose to deny Plaintiff's application for court costs on this ground, Defendant argues that Plaintiff's *pro hac vice* fees should be denied under Delaware law. Finally, Defendant argues that the Court should reduce, if not deny altogether, Plaintiff's request for expert witness fees.

This is not a case in which a total denial of costs is appropriate. This Court has held that "when a jury award is substantial and both parties have been found to be equally at fault, there will not be an imposition of costs."⁵ In this case, the jury found Defendant to be 83% at fault, and a total denial of costs is therefore not warranted.

Neither will the Court deny the Plaintiff's claim for court costs in total. Plaintiff's counsel has submitted a summary of court costs, and the Court has no reason to doubt the accuracy of plaintiff's counsel's representations. "Courts rely on the integrity and honesty of counsels'

² One other post-trial motion was filed in this case, Defendant's "Motion for a Directed Verdict, or in the Alternative, Motion for a New Trial and Relief from Judgment." The Court denied that motion in *Gates v. Texaco, Inc.*, Del. Super., C.A. No. 05C-05-043, Cooch, J. (March 20, 2008) (Letter. Op.).

³ Def. Opp. to Pl. Bill of Costs, at ¶ 3.

⁴ *Id.*

⁵ *Foley v. Elkton Plaza Associates, LLC*, 2007 WL 959521, at *1 (Del. Super.) (holding that denial of costs was inappropriate where the award was not "substantial," despite the fact that the jury found the parties 50% liable). *See also, Broderick v. Wal-Mart Stores, Inc.*, 2002 WL 388117, at *3 (Del. Super.) ("In the proper case, this Court has, and will, impose costs in favor of the prevailing party. This is not the proper case to do so. Here, the plaintiffs received a substantial award for their injuries, even after a slight reduction by the Court. Furthermore, the jury also found plaintiffs to be fifty-percent liable for their injuries").

representations all of the time; it is an unstated but always relied upon tenet of modern American litigation.”⁶ Nonetheless, the Court does agree with Defendant that the court costs should be reduced in the amount of \$646 – the amount attributed to *pro hac vice* court fees⁷ – since *pro hac vice* fees are not awarded in Delaware.⁸ Thus, the Court will award Plaintiff \$1281.06 (\$1,927.06-\$646) in court costs.

The Court also finds it necessary to award Plaintiff’s less than their requested amount as to expert fees.⁹

Plaintiff seeks \$5,600 for the cost of the testimony of Dr. Goldstein, who testified for less than half a day on the afternoon of October 24, 2007.¹⁰ In previous cases this Court has taken figures from a 1995 report from the Medical Society of Delaware’s Medico-Legal Affairs Committee (finding that fees ranged from \$1,300 to \$1,800 for the half-day testimony of a medical expert¹¹) and then adjusted them by adding the increase in the consumer price index for medical care in order to find the “reasonable” range for expert fees.¹² Here, the Court finds that there has been an increase of 46.6% from the beginning of 1996 to October, 2008.¹³ Thus, the upper limit for the half-day testimony of a medical expert is \$2,638.80. The Court will award this amount. The total amount awarded for Dr. Goldstein is therefore \$2,638.80 plus \$623.62 for travel expenses, i.e., \$3,262.42.

Plaintiff requests \$10,500 for Dr. Infante’s testimony, and traveling expenses in the amount of \$880.14. While Dr. Infante’s started and ended the day of October 23, 2007 on the witness stand, his testimony was interrupted by the testimony of another of Plaintiff’s witnesses.¹⁴ The Court holds that Defendant should not have to bear the burden of Plaintiff’s choice to call this witness in the midst of Dr. Infante’s testimony. Expert fee cost

⁶ *IMC Global, Inc. v. Moffett*, 1998 WL 842312, at *3 (Del. Ch.).

⁷ See Plaintiff’s Bill of Costs, at Exhibit A, citing costs for “CourtLink eFile – Filings + *pro hac vice*.”

⁸ *Immediant Corp. v. Healthtrio, Inc.*, 2007 WL 1982838, at *1 (Del. Super.).

⁹ The Court notes here that Defendant argues, in essence, that Plaintiff should be estopped from requesting any expert fees since “Plaintiff argued [to the jury] that expert testimony was not necessary.” Def. Opp. to Pl. Bill of Costs, at ¶ 4. The Court finds this argument to be without merit.

¹⁰ Tr. Trans. at 59-111 (October 24, 2007 (P.M.)).

¹¹ *Lurch v. Roberts*, 2001 WL 238158, at *1 (quoting the Medico-Legal study).

¹² See, e.g., *Bond v. Yi*, 2006 WL 2329364, at *3 (Del. Super.).

¹³ See U.S. Department of Labor, Bureau of Labor Statistics, *Archived News Releases for Consumer Price Index*, available at http://www.bls.gov/schedule/archives/cpi_nr.htm (last visited March 5, 2008).

¹⁴ Tr. Trans. (October 23, 2007 (A.M. and P.M. sessions)).

awards are “limited to time spent in court for the purpose of testifying but not for listening to other witnesses for orientation or consultation with a party.”¹⁵ Therefore, Dr. Infante’s testimony lasted 3/4 of the day. Using the above calculations, the upper limit for a reasonable expert fee for 3/4 of a day of trial is \$3,958.20. The Court will award this amount, plus Dr. Infante’s travel expenses, which the Court finds reasonable. The total amount awarded for Dr. Infante is \$4,838.34.

Plaintiff’s industrial hygienist, Dr. Nicas, testified for 1.5 hours and Plaintiff requests \$7,615.85 in costs, including \$4,612 in travel time. The Court finds this amount to be unreasonable. The Court will award the amount Dr. Nicas charged Plaintiff for the three hours he spent testifying and waiting to testify, which amounted to \$2,025, which is within the reasonable range for expert medical testimony. The Court will also award the requested \$978.85 in travel expenses, making the total award for Dr. Nicas \$3,003.85.

Finally, Plaintiff requests \$1,500, the amount Plaintiff’s expert in economics, Mr. Verzilli, charged Plaintiff for his testimony. As Defendant notes, Mr. Verzilli testified in another Superior Court case conducted in December, 2006, where he charged \$1,200 for his testimony.¹⁶ The Court awarded that amount to the prevailing plaintiff in that case in March, 2007.¹⁷ The Court does not find, as Defendant argues it should, that Mr. Verzilli’s increased rate is unreasonable. Nor does the Court agree with Defendant that the invoice Mr. Verzilli provided, which clearly notes that the charge was for “testimony,” is insufficiently detailed.¹⁸ For these reasons, the Court will award \$1,500 for the testimony of Mr. Verzilli.

Plaintiff’s request costs for service of trial subpoenas and the request for post-judgment interest are not contested by Defendant, and will therefore be granted.

¹⁵ *Gress v. Viola*, 2007 WL 1748657, at *1 (Del. Super.).

¹⁶ Plaintiff’s Bill of Costs, at Exhibit C.

¹⁷ *Foley v. Elkton Plaza Associates, LLC*, 2007 WL 959521, at *3 (Del. Super.).

¹⁸ *See Id.*, at FN 18 (“Defendants also complain that ... Andy Verzilli, CPA, did not break down [his] bills as to what portion, if any, were for trial preparation. A review of [his] specific invoice[], however, reveals that the fee[] relate[s] only to testimony, and are not inclusive of fees charged for trial preparation. See Ex. G, Mr. Verzilli’s Invoice (“Testimony ... \$1,200”).

In conclusion, the Court will award \$1,281.06 in court costs, \$12,604.61 in expert witness fees, \$160 in costs for service of trial subpoenas, and 10% interest on any sums due to Plaintiffs from Defendant from October 31, 2007 until the judgment is satisfied.¹⁹

Therefore, Plaintiff's motion for costs is **GRANTED in part and DENIED in part.**

IT IS SO ORDERED.

oc: Prothonotary

¹⁹ The legal rate of interest is the Federal Reserve Discount Rate plus 5% pursuant to 6 Del. C. § 2301. The Federal Reserve Discount Rate the day of the verdict was 5%.