

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

ANEITA PATTERSON,)	
Plaintiff,)	
)	
v.)	CA. No.: 10C-07-149 FSS
)	
STATE FARM MUTUAL)	
AUTOMOBILE INSURANCE)	
COMPANY,)	
Defendant.)	

Submitted: July 6, 2012
Decided: October 31, 2012

ORDER

Upon Defendant’s Motion for Costs – GRANTED, in part.

1. This is a breach of contract case involving Defendant’s alleged failure to cover Plaintiff’s medical bills stemming from an August 4, 2009 car crash. Defendant filed a \$10,000 offer of judgment on May 7, 2012, which Plaintiff refused. On June 26, 2012, after a two-day trial, the jury returned a defense verdict. Defendant timely filed a motion for costs in accordance with Superior Court Civil Rules 54 and 68.

2. Defendant wants \$3,000 for Dr. James Bonner’s expert video deposition, and \$355 for the related video services. Additionally, Defendant seeks \$1,900 for Dr. Bakst’s trial deposition, and \$297.88 for related transcription services.

3. Plaintiff does not contest Dr. Bonner's video recording costs. But, Plaintiff argues Dr. Bonner's expenses are excessive for a half-hour deposition held at the doctor's own office. Plaintiff cites *Drayton v. Price*,¹ where the court reduced a \$2,175 fee to \$1,100 for substantially the same reasons Plaintiff urges here.

4. Plaintiff claims Dr. Bakst's costs are not recoverable because the doctor testified as a fact witness. Similarly, Plaintiff contests Dr. Bakst's testimony transcription costs. Plaintiff offers no authority, but Plaintiff is correct that Dr. Bakst's costs for testifying as a fact witness are not recoverable. A prevailing party cannot recover costs for an expert testifying as a fact witness.²

5. Because it was a defense verdict, Superior Court Civil Rule 68 is inapplicable.³ Superior Court Civil Rule 54(d), however, permits costs "as of course to the prevailing party upon application to the Court within ten (10) days of the entry of final judgment." Amounts awarded are a matter of judicial discretion.⁴

¹ 2010 WL 1544414 (Del. Super. Apr. 19, 2010) (Cooch, J.).

² See, e.g., *Gress v. Viola*, 2007 WL 1748657 (Del. Super. May 31, 2007) (Vaughn, P.J.).

³ See *Hercules, Inc. v. AIU Ins. Co.*, 784 A.2d 481, 509 (Del. 2001) ("[W]here, as here, the plaintiff obtains *no* judgment from the defendant seeking costs (i.e., judgment is for the defendant), Rule 68 does not apply.") (citations omitted).

⁴ *Donovan v. Del. Water and Air Res. Comm'n*, 358 A.2d 717, 722-23 (Del. 1976).

6. Having received a “zero” verdict, Defendant is the prevailing party and “as a matter of course,” will be awarded costs within reason.⁵ The court finds that \$3,000 for a half-hour deposition, without travel, is excessive. Because the deposition was short and in Dr. Bonner’s own office, the court reduces the requested costs to \$1,500. Therefore, in addition to the video services, Defendant is awarded \$1,855 in costs.

7. As the prevailing party, Defendant is **GRANTED** \$1,855 in costs for Dr. Bonner. Defendant’s request for Dr. Bakst’s costs is **DENIED**.

IT IS SO ORDERED.

/s/ Fred Silverman

Judge

cc: Prothonotary (civil)
Colin Shalk, Esquire
Kenneth Roseman, Esquire

⁵ *Wilson v. James*, 2010 WL 2683023 (Del. Super. June 11, 2010) (Ableman, J.) (“Both Rule 54(d) and 10 *Del. C.* § 5101 enshrine a policy in favor of awarding costs as a matter of course to the prevailing party in a civil suit.”).