

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

SANGAY S. MILLER)	
)	
)	
Plaintiff,)	
)	
v.)	C.A. No. N10C-10-121 MJB
)	
)	
JOHN H. WILLIAMS, JR., as the)	
personal representative of the)	
Estate of RALPH L. GRAHAM,)	
)	
)	
Defendant.)	

Submitted: August 2, 2012
Decided: August 21, 2012

Upon Defendant's Motion to Tax Costs. GRANTED.

OPINION

Joseph J. Rhoades, Esquire, The Law Office of Joseph J. Rhoades,
Wilmington, Delaware, Attorney for Plaintiff.

Kenneth M. Doss, Esquire, Casarino, Christman, Shalk, Ransom & Doss, P.A.,
Wilmington, Delaware, Attorney for Defendant.

BRADY, J.

I. INTRODUCTION

John H. Williams, Jr. (“Defendant”) has filed a Motion to Tax Costs against Sangay S. Miller (“Plaintiff”) pursuant to Superior Court Civil Rules 54¹ and 68,² as well as 10 *Del. C.* § 8906.³ Upon consideration of Defendant’s motion, the Court finds that it should be **GRANTED**, but the amount Defendant requests to be taxed is excessive and unreasonable.

II. BACKGROUND

The instant case arises out of a motor vehicle accident that occurred on December 16, 2008.⁴ Plaintiff filed suit against Ralph L. Graham (“Graham”) on October 13, 2010.⁵ Graham subsequently passed away on May 26, 2011.⁶ Defendant was appointed as the personal representative of the Estate of Ralph L. Graham on December 22, 2011.⁷ The parties agreed prior to trial that Graham’s negligence was the proximate cause of the accident; however, they disputed whether his negligence proximately caused Plaintiff to

¹ Superior Court Civil Rule 54(d) provides:

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.

Super. Ct. Civ. R. 54(d).

² Superior Court Civil Rule 68 provides:

At any time more than 10 days before the trial begins a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. . . . An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. 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.

³ 10 *Del. C.* § 8906 provides:

The fees for witnesses testifying as experts or in the capacity of professionals in cases 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.

10 *Del. C.* § 8906.

⁴ Def.’s Resp. to Pls.’ Mot. for Substitution of Parties, ¶1 (Jan. 13, 2012).

⁵ Pl.’s Mot. for Substitution of Parties, ¶1 (Dec. 22, 2011).

⁶ Pl.’s Mot. for Substitution of Parties, ¶2; *Id.* Ex. A.

⁷ Pl.’s Mot. for Substitution of Parties, ¶3; *Id.* Ex. B.

sustain injuries.⁸ Defendant made Plaintiff an offer of judgment on April 27, 2012.⁹ Plaintiff rejected Defendants offer by failing to accept it¹⁰ and the matter proceeded to trial.¹¹ Following a two day trial, the jury returned a verdict in favor of Defendant, finding that Plaintiff was not injured as a proximate cause of the December 2008 automobile accident.¹² On June 29, 2012, Plaintiff filed a motion for new trial.¹³ The Court denied Plaintiff's motion on August 2, 2012.¹⁴ Defendant filed Motion to Tax Costs on July 2, 2012 seeking to recover \$8,572.50 in trial costs. Specifically, Defendant seeks the following costs: (1) \$2,500 for the expert medical testimony of Dr. Michael L. Brooks, M.D, who testified for approximately sixty minutes at trial;¹⁵ (2) \$5,500 for the expert medical testimony of Dr. Ali Kalamchi, M.D, who testified from his medical office for approximately eighty minutes via video deposition that was presented at trial;¹⁶ (3) \$355 for videotaping Dr. Kalamchi's video deposition;¹⁷ and (4) \$217.50 for editing Dr. Kalamchi's video deposition.¹⁸

III. DISCUSSION

A. Applicable Law

The prevailing party may move to tax costs pursuant to (1) Superior Court Civil Rule 54, (2) Superior Court Civil Rule 68, and (3) 10 *Del. C.* § 8906.¹⁹ The Delaware Supreme Court has made clear that it is the award of a judgment that “determines the purely legal

⁸ Def.'s Resp. to Pls.' Mot. for Substitution of Parties, ¶1.

⁹ Def.'s Mot. to Tax Costs Ex. 1 (July 2, 2012).

¹⁰ Super. Ct. Civ. R. 68 (“An offer not accepted shall be deemed withdrawn.”).

¹¹ Civil Trial Activity Sheet, (June 19, 2012).

¹² Verdict Form (June 19, 2012).

¹³ Pl.'s Mot. for New Trial (June 29, 2012).

¹⁴ Opinion Upon Pl.'s Mot. for New Trial Denied (Aug. 3, 2012).

¹⁵ Def.'s Mot. to Tax Costs, ¶4 (July 2, 2012); Def.'s Mot. to Tax Costs Ex. 2 (July 2, 2012).

¹⁶ Def.'s Mot. to Tax Costs, ¶4; Def.'s Mot. to Tax Costs Ex. 3 (July 2, 2012)

¹⁷ Def.'s Mot. to Tax Costs, ¶4; Def.'s Mot. to Tax Costs Ex. 4 (July 2, 2012).

¹⁸ Def.'s Mot. to Tax Costs, ¶4; Def.'s Mot. to Tax Costs Ex. 4.

¹⁹ *Summerhill v. Iannarella*, No. 07C-11-071, 2009 WL 891048, at *1 (Del. Super. Ct. April 1, 2009).

question of who is the prevailing party for purposes of an award of costs.”²⁰ Unlike Rule 54, which allows the Court to retain discretion when deciding whether to award costs,²¹ Rule 68 provides, “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.”²² However, in order to qualify for costs under Rule 68, the defending party must serve upon the plaintiff an offer of judgment no later than ten days before trial.²³ “Because Rule 68 does not define what constitutes a recoverable cost, the Court analyzes whether amounts requested pursuant to Rule 68 are recoverable as costs under Rule 54 and applicable statutes, including 10 *Del. C.* § 8906.”²⁴ Therefore, if Defendant satisfies the requirements of Rule 68, the Court *must* tax costs that may be awarded under Rule 54 and other applicable statutes.

Costs associated with videotaping a deposition are taxable pursuant to Superior Civil Rule 54(f).²⁵ Rule 54(f) provides:

The fees paid court reporters for the Court's copy of transcripts of depositions shall not be taxable costs unless introduced into evidence. Fees for other

²⁰ *Graham v. Keene Corp.*, 616 A.2d 827, 828 (Del. 1992). In the present case, Defendant is the prevailing party because his offer (\$10,001) was greater than Plaintiff's award (\$0).

²¹ *Donovan v. Delaware Water & Air Resources Comm'n*, 358 A.2d 717, 723 (Del. 1976) (“Determining when costs are awarded and when they are not is, in our judgment, a matter of judicial discretion under the statute.”). Compare, Super. Ct. Civ. R. 68 (At any time more than 10 days before the trial begins a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the Clerk shall enter judgment. . . . 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. . . .), with Super. Ct. Civ. R. 54(d) (“Except when express provision therefore 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 directs otherwise.*”) (emphasis added).

²² Super. Ct. Civ. R. 68 (emphasis added).

²³ *Id.* But see Super. Ct. Civ. R. 68 (“When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.”).

²⁴ *Summerhill*, 2009 WL 891048, at *1.

²⁵ See e.g., *Nygaard v. Lucchesi*, 654 A.2d 410 (Del. Super. Ct. 1994); *Summerhill v. Iannarella*, No. 07C-11-071, 2009 WL 891048, at *1 (Del. Super. Ct. April 1, 2009).

copies of such transcripts shall not be taxable costs. The production and playback costs associated with any videotape deposition may also be taxable as costs if the video deposition is introduced into evidence.²⁶

Additionally, a prevailing party may recover fees for expert witness testimony at an amount fixed by the Court in its discretion pursuant to 10 *Del. C.* § 8906.²⁷ Section 8906 states, in pertinent part:

The fees for witnesses testifying as experts or in the capacity of professionals in cases 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.²⁸

However, the prevailing party may only recover fees associated with the expert's time spent testifying or waiting to testify, along with reasonable travel expenses.²⁹ Delaware courts have frequently relied upon rates set forth in a 1995 study conducted by the Medical Society of Delaware's Medico-Legal Affairs Committee when assessing the reasonableness of medical expert fees.³⁰ The Court adjusts the rates set forth in the study to reflect increases in the consumer price index for medical care.³¹

B. Costs to be Taxed

In the present case, Defendant is entitled to tax costs pursuant to Rule 68. Defendant submitted an offer of judgment to Plaintiff on April 27, 2012, which was more than ten days before trial.³² Plaintiff did not accept the offer³³ and pursuant to Rule 68 it was deemed

²⁶ Super. Ct. Civ. R. 54(f).

²⁷ *Summerhill v. Iannarella*, 2009 WL 891048, at *1.

²⁸ 10 *Del. C.* § 8906.

²⁹ *Merced v. Harrison*, No. 07C-10-012, 2009 WL 3022134, at *1 (Del. Super. Ct. 2009).

³⁰ See e.g., *id.*

³¹ See e.g., *id.*

³² Def.'s Mot. to Tax Costs Ex. 1 (July 2, 2012).

³³ Def.'s Mot. to Tax Costs, ¶2 (July 2, 2012)

withdrawn.³⁴ Defendant is the prevailing party because Plaintiff was awarded zero dollars.³⁵ Therefore, Defendant satisfies the requirements of Rule 68 and is entitled to tax costs.

Defendant seeks to tax costs relating to two, separate expert witnesses, Dr. Kalamchi and Dr. Brooks.³⁶ Defendant seeks \$5,500 for Dr. Kalamchi's testimony and \$2,500 for Dr. Brooks' testimony.³⁷ The Court finds that \$5,500 is excessive because Dr. Kalamchi testified for less than two hours from his own office. Taking into consideration the increases in the consumer price index for medical care, the Court finds that \$1,500 is a reasonable rate for Dr. Kalamchi's testimony.³⁸ The amount awarded is consistent with other opinions of the Court.³⁹ For the same reasons, the Court also finds Defendant's fee request relating to Dr. Brooks' testimony to be excessive. Dr. Brooks testified at trial for approximately sixty minutes. Considering reasonable travel expenses and the duration of Dr. Brooks' testimony, the Court finds that \$1,500 is a reasonable rate.⁴⁰

Finally, Defendant seeks to tax \$572.50 in costs for expenses incurred to videotape and edit Dr. Kalamchi's video deposition.⁴¹ The costs of recording and editing a videotaped deposition may be taxed pursuant to Superior Court Civil Rule 54(f) providing the

³⁴ Super. Ct. Civ. R. 68.

³⁵ Civil Trial Activity Sheet, (June 19, 2012). *See Graham v. Keene Corp.*, 616 A.2d 827, 828 (Del. 1992).

³⁶ *See supra* note 17-18 and accompanying text.

³⁷ *See supra* note 17-18 and accompanying text.

³⁸ The Court reached this range by utilizing the inflation calculator provided by the Bureau of Labor Statistics. *See* Bureau of Labor Statistics, <http://www.bls.gov/data/#calculators> (last visited August 3, 2012). Additionally, the Court considered that Dr. Kalamchi spent approximately thirty minutes preparing for the video deposition.

³⁹ *Summerhill v. Iannarella*, No. 07C-11-071, 2009 WL 891048, at *1 (Del. Super. Ct. April 1, 2009) (finding that \$753 to \$1,355.40 was the range for reasonable fees for a two-hour deposition); *id.* at *2 (finding that \$400 was the reasonable rate for Dr. Kalamchi's thirty-six minute long deposition that was filmed at his office); *Foley v. Elkton Plaza Assocs., LLC*, No. 05C-05-176, 2007 WL 959521, at *3 (Del. Super. Ct. 2007) (awarding \$800 for expert testimony that lasted thirty seven minutes); *Kerr v. Onusko*, No. 03C050303, 2004 WL 2744607, at *1 (Del. Super.Ct. 2004) (awarding \$600 for an expert's testimony that lasted slightly over an hour).

⁴⁰ Defendant's Motion to Tax Costs does not address Dr. Brooks' travel expenses, but the Court took into account "reasonable travel expenses" when determining that \$1,100 is the appropriate amount to tax.

⁴¹ Def.'s Mot. to Tax Costs, ¶4; Def.'s Mot. to Tax Costs Ex. 4 (July 2, 2012).

