

Superior Court
of the
State of Delaware

Jan R. Jurden
Judge

New Castle County Courthouse
500 North King Street, Suite 10400
Wilmington, Delaware 19801-3733
Telephone (302) 255-0665

Samuel D. Pratcher, III, Esq.
Weik, Nitsche, & Dougherty
305 North Union Street, 2nd Floor
P.O. Box 2324
Wilmington, DE 19899

Matthew E. O'Byrne, Esq.
Casarino, Christman, Shalk,
Ransom & Doss, P.A.
405 N. King Street, Suite 300
P.O. Box 1276
Wilmington, DE 19899

Date Submitted: January 16, 2013
Date Decided: January 28, 2013

RE: Katina Williams, as Next Friend of Kendall Watts, a minor
v.
Marie E. Rivas
C.A. No. 11C-04-050 JRJ
Upon Plaintiff's Motion for Costs: GRANTED in part and
DENIED in part

Dear Counsel:

This decides Plaintiff's Motion for Costs filed pursuant to 10 *Del. C.* § 8906 and Superior Court Civil Rule 54.

The jury returned a verdict in favor of the Plaintiff on November 20, 2012.¹ During trial, the videotaped trial deposition of Dr. William C. Atkins, Plaintiff's expert, was played for the jury. Plaintiff seeks as costs Dr. Atkins' trial deposition fee of \$2,500.00 and Wilcox & Fetzer, LTD's \$560.00 charge for travel, attendance and videotaping of the deposition.

¹ The jury attributed 54.5% of the negligence to Defendant and 45.5% to Plaintiff. The jury awarded Plaintiff \$2,700.00 which, reduced by 45.5% comparative negligence, resulted in Plaintiff receiving \$1,228.50.

Defendant objects to Dr. Atkins' fee, arguing it is "unreasonable for the testimony of a pain management physician who testified for approximately 35-40 minutes in his own office" Defendant argues that Wilcox & Fetzer's fee is unreasonable and excessive because Dr. Atkins' video trial deposition lasted less than one hour.

Pursuant to Delaware Superior Court Civil Rule of Procedure 54(d), "costs shall be allowed as of course to the prevailing party upon application to the Court... unless the Court otherwise directs." The determination of whether costs should be awarded in a civil suit is a matter of judicial discretion.²

10 *Del. C.* § 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.

In *Miller v. Williams*, the Court held that the prevailing party may only recover fees associated with an expert's time spent testifying or waiting to testify, along with reasonable travel expenses.³ In that case, defendant sought \$5,500.00 for one expert's testimony and \$2,500.00 for another.⁴ The Court in *Miller* found that the \$5,500.00 fee was excessive because the expert testified for less than two hours in the comfort of his own office.⁵ The Court awarded \$1,500.00 as a reasonable rate for his testimony as opposed to the \$5,500.00 sought, and held that that amount was consistent with other opinions of the Court.⁶ The Court in *Miller* found that the fee request of \$2,500.00 for the other expert was excessive because the expert testified at trial for approximately 60 minutes.⁷ Taking into account reasonable travel expenses, the Court determined that \$1,500.00 was a reasonable fee for the second expert.⁸

² See *Rosenberg v. Crichton*, 2011 WL 5316771, at *1 (Del. Super. Sept. 23, 2011) and *Jacques v. Lacrosse Homes, Inc.*, 2010 WL 3515463, at *1 (Del. Super. Aug. 27, 2010).

³ 2012 WL 3573336, at *2 (Del. Super. Aug. 21, 2012).

⁴ *Id.* at *1.

⁵ *Id.* at *2.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

In this case, Dr. Atkins' videotaped deposition was taken in his own office and lasted only 40 minutes. Because Dr. Atkins was not required to travel to court, and further because his testimony lasted only 40 minutes, the Court will not award as costs the entirety of Dr. Atkins' deposition fee of \$2,500.00. The Court will award \$1,500.00 for Dr. Atkins' trial deposition.

With respect to the Wilcox & Fetzer charge, the Court does not find the Wilcox & Fetzer fee of \$560.00 unreasonable or excessive.

In sum, Plaintiff's Motion for Costs is **GRANTED in part** and **DENIED in part**. Plaintiff is awarded \$2,060.00.

IT IS SO ORDERED.

Very truly yours,

Jan R. Jurden
Judge

JRJ:mls

cc: Prothonotary