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

LETONI WILSON, Mother and Next Friend of, TIRESE JOHNSON, a minor child, Plaintiffs, v. DR. PHYLLIS JAMES, and NEW CASTLE FAMILY CARE, Defendants.	)	C.A. No. 07C-04-025 PLA

UPON PLAINTIFF'S MOTION FOR COSTS
GRANTED

Submitted: June 4, 2010
Decided: June 11, 2010

This 11th day of June, 2010, it appears to the Court that:

1. In this medical malpractice case, Plaintiff Letoni Wilson alleged that her son, Tirese Johnson, suffered brain damage and other injuries as a result of Dr. Phyllis James's failure to promptly and adequately treat his bilirubinemia.[1] During pre-trial settlement negotiations, Dr. James's insurance carrier tendered her $1 million policy limits as a credit against any judgment against her, without requiring

[1] Defendant New Castle Family Care is Dr. James's practice. For convenience, the Court will refer to Defendants in the singular.

that Plaintiff execute a release of claims. The case proceeded to a four-day trial from March 22 to March 25, 2010. The jury found in favor of Plaintiff and awarded $6.25 million in damages.

2. Plaintiff has moved for costs pursuant to Superior Court Civil Rule 54(d). Several of the expert fee invoices offered to support Plaintiff's initial motion were insufficiently itemized, and the original motion did not detail the requested court costs. After the Court required further explanation, Plaintiff provided more particularized invoices and removed certain nonrecoverable items from her overall costs request. As adjusted, Plaintiff's motion seeks the following costs:

Court Costs	$1,472.40
Dr. Francis Tannian Expert Fee	$747.00
Dr. Donna Stephenson Expert Fee	$3,600.00
Dr. Howard Bauchner Expert Fee	$6,845.42
Terri Patterson Expert Fee	$1,693.00
Total	$14,357.82

3. Defendant's response presents two arguments in opposition to Plaintiff's motion. First, Defendant urges that the Court should consider denying Plaintiff any award of costs in view of the fact that Dr. James's insurer tendered full policy limits prior to trial. Defendant notes that Plaintiff's counsel rejected the tender as a final settlement and chose to proceed to trial as part of a plan "to obtain a verdict and pursue a 'bad faith' claim against Defendants' carrier, knowing that

the defendant had no assets upon which a judgment could be attached."[2] Defendant argues that the need for a trial resulted solely from Plaintiff's "risky[,] circuitous course of action" in pursuing a "meritless" bad faith claim, and that Plaintiff should therefore bear her own costs.[3] To the extent the Court does find Plaintiff entitled to recover costs, Defendant argues in the alternative that several of Plaintiff's requests are excessive or include nonrecoverable amounts.

4. Under Superior Court Civil Rule 54(d), the prevailing party in a civil action may recover costs against the adverse party.[4] In addition, 10 *Del. C.* § 8906 permits the prevailing party to recover expert witness testimony fees in an amount fixed by the Court. Generally, the prevailing party may only recover those expert witness fees associated with time spent testifying or waiting to testify, along with reasonable travel expenses.[5] The amount to be awarded for expert witness testimony is a matter of the trial court's discretion.[6]

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[2] Defs.' Resp. to Mot. for Costs, ¶ 2.

[3] *Id.*

[4] Super. Ct. Civ. R. 54(d) ("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.").

[5] *Spencer v. Wal-Mart Stores East, LP*, 2007 WL 4577579, at *1 (Del. Super. Dec. 5, 2007).

[6] *Taveras v. Mesa*, 2008 WL 5244880, at *1 (Del. Super. Dec. 15, 2008) (citing *Donovan v. Del. Water & Air Res. Comm'n*, 358 A.2d 717, 722-23 (Del. 1976)).

5. As an initial matter, the Court must reject Defendant's creative argument that Plaintiff should not recover costs because she pursued a trial in this case with the expectation that her eventual recovery would derive from the assignment claims against Defendant's insurer and attorney, and not from the apparently nonrecoverable verdict against Dr. James and New Castle Family Care. The Court is acutely aware that the success of Plaintiff's strategy depends upon a number of contingencies, and that there is some risk that she will ultimately find herself unable to recover any significant amount above the $1 million policy limits tendered prior to trial in this case. Indeed, the Court was sufficiently concerned about Plaintiff's awareness of this risk that it discussed these issues with Plaintiff before trial to ensure that she wanted to proceed.

6. Nevertheless, the Court concludes that the uncertainties regarding Plaintiff's ability to recover the jury's award should not affect her entitlement to costs. 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.[7] The Court retains discretion, but that discretion is almost invariably exercised in determining the *amount* to be awarded.[8] This was not a case in which there was an

[7] *See* 10 *Del. C.* § 5101("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.").

[8] *See Bosler v. Up the Creek, Inc.*, 2002 WL 1767533, at *1 (Del. Super. July 24, 2002).

offer of judgment in excess of the verdict, such that the defendant should receive costs pursuant to Rule 68 because Plaintiff went to trial in spite of a settlement proposal that exceeded her damages.[9] Rather, Plaintiff went to trial under the belief that the amount of Defendant's liability was greater than the offered policy limits, and that belief was borne out by the jury's verdict. Nothing in the Court's rules or § 5101 calls for an inquiry into the prevailing party's ultimate prospects for recovery of a judgment as a predicate to an award of costs, and for several reasons the Court is disinclined to start making such inquiries. First and foremost, a non-prevailing party that is judgment-proof when trial occurs may not always be so. Furthermore, the prevailing party generally cannot predict with perfect accuracy what the jury will award in advance of trial, and thus may not know how remote the prospects of full recovery are until after the jury's determination. In contrast to a Rule 68 scenario, where it is evident at the conclusion of trial that the offeree's decision to proceed to trial resulted in unnecessary expense, it is far less clear that a prevailing party has incurred unnecessary costs merely because the adverse party lacks assets to satisfy the judgment at the time the verdict is rendered. The possibility that a trial may result in a fully or partially

[9] 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 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.").

nonrecoverable award can and often does factor into parties' pre-trial settlement negotiations, but—at least on the facts of this case—the Court does not perceive it as a basis for departing from the usual rule that the prevailing party is entitled to costs.

7. Having concluded that Plaintiff is entitled to costs under Rule 54(d), the Court now turns to the specific fees and expenses requested. The revisions to Plaintiff's motion have addressed some, but not all, of the Court's concerns regarding excessive and inappropriate requests. In response to the Court's inquiry, Plaintiff has submitted various receipts and cancelled checks reflecting $1,472.40 in court costs. Unfortunately, many of these receipts are less self-explanatory than might be hoped, and counsel has not provided a summary assigning each receipt to a particular event or filing. Upon examination of the provided receipts, it appears that some portion of the requested costs may be related to Plaintiff's claim against Defendant's physician assistant, who received judgment in her favor before trial based upon Plaintiff's failure to secure a qualified standard-of-care expert. In the absence of a more detailed explanation from Plaintiff, the Court will exercise its discretion in reducing Plaintiff's recoverable court costs to $1,100.00.

8. Next, Plaintiff seeks $747.00 in fees associated with Dr. Francis Tannian's testimony as an economic expert, based upon a rate of $195.00 per hour for one hour of travel time, one hour of waiting time, and 1.8 hours of testimonial

time, along with $6.00 in parking fees. Plaintiff revised the request for Dr. Tannian's fees to remove nonrecoverable trial preparation time. Because an expert's travel time is not to be assessed at his or her full testimonial rate,[10] the Court will further adjust Dr. Tannian's fees by halving his hourly fee to $97.50 for his travel time. Plaintiff will therefore recover $649.50 for Dr. Tannian's expert testimony.

9. In assessing the reasonableness of Plaintiff's medical experts' fees, the Court is guided by the rates set forth in a 1995 study conducted by the Medical Society of Delaware's Medico-Legal Affairs Committee, as adjusted to reflect increases in the consumer price index for medical care.[11] The Medico-Legal Study reported that fees for a half-day of medical expert testimony ranged from $1,300.00 to $1,800.00.[12] Here, the Court finds that there has been an increase of 54.4% in the consumer price index for medical care from the beginning of 1996 to

[10] *See Gress v. Viola*, 2007 WL 1748657, at *1 (Del. Super. May 31, 2007); *Bailey v. Beebe Med. Ctr., Inc.*, 2005 WL 2155704, at *7 (Del. Super. Aug. 31, 2005); *Dunning v. Barnes*, 2002 WL 31814525, at *4 (Del. Super. Nov. 4, 2002) ("[A]n expert's reasonable and ordinary traveling expenses may be reimbursed. However, costs should not be accessed [*sic*] at the expert's hourly testifying rate.").

[11] *See Bond v. Yi*, 2006 WL 2329364, at *3 (Del. Super. Aug. 10, 2006) (collecting cases); *Gates v. Texaco, Inc.*, 2008 WL 1952164, at *1 (Del. Super. Mar. 20, 2008); *Fellenbaum v. Ciamaricone*, 2002 WL 31357917, at *6 (Del. Super. Oct. 16, 2002).

[12] *See Gates*, 2008 WL 1952164, at *1.

March 2010.[13] Therefore, reasonable fees for a half-day of expert testimony at the time of trial ranged from $2,007.00 to $2,779.00.

10. Plaintiff requests $3,600.00 for Dr. Donna Stephenson's trial testimony, explaining that she billed at a flat rate of $2,200.00 for the first hour of testimony and $1,400.00 for each additional hour, inclusive of travel time. Defendant contends that Dr. Stephenson's fee is unreasonable because she "did not spend any time waiting to testify, and testified for less than two hours."[14] Dr. Stephenson's fee is notably disproportionate to the range set forth in the Medico-Legal Study, given the length of her trial testimony and her geographic location. Assuming that she incurred some minimal travel time and that her testimony entailed a half-day interruption to her schedule, the Court will permit recovery of $2,700.00 for her testimony.

11. After adjustments, Plaintiff has requested $6,845.42 for Dr. Bauchner's expert fee. Dr. Bauchner invoiced Plaintiff for one-and-one-quarter days of time spent traveling and in court, charged at a flat rate of $5,000 per day, plus $1,395.42 in air fare, car rental, and parking expenses. Plaintiff has deducted $800.00 from her fee request for two hours Dr. Bauchner spent preparing for trial during that time, basing the deduction on his usual hourly rate of $400.00.

[13] *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Archived News Releases for Consumer Price Index, available at* http://www.bls.gov/schedule/archives/cpi_nr.htm.

[14] Defs.' Resp. to Pl.'s Mot. for Costs, ¶ 6.

Defendant argues that Dr. Bauchner's fee is unreasonable because he did not spend time waiting to testify and testified for less than two hours. The Court finds that Dr. Bauchner's fee must be adjusted, but for a different reason: his significant travel time should not be assessed at the same $5,000.00 day rate applied to his time spent testifying. Although his trial testimony took less than two hours, as it has done in previous cases,[15] the Court will attribute a one-half day interruption to his schedule at his full rate and permit recovery of $2,500.00 for his testimonial time on March 24, 2010. For his travel time, which will account for three-quarters of a day, the Court will reduce his day rate by half and permit recovery of $1,875.00. After deducting $800.00 for nonrecoverable trial preparation time, Plaintiff is entitled to $4,970.42 for Dr. Bauchner's expert fee.

12. Finally, Plaintiff requests reimbursement of $1,693.00 for the testimony of Terri Patterson, R.N. Patterson testified for approximately ninety minutes, and charged $600 per hour for her testimonial time. She also spent three hours traveling, which were charged at a lowered rate of $250 per hour. In addition, she incurred $43.00 in travel expenses. Plaintiff's current request has been decreased more than $800.00 to remove nonrecoverable consultation and preparation time, to which Defendant quite justifiably objected. Patterson's

[15] *Dunning*, 2002 WL 31814525, at *4.

testimonial and travel time are charged at reasonable rates, and Plaintiff will therefore recover the full amount of the revised request.

13. With the adjustments described above, Plaintiff's Motion for Costs is hereby **GRANTED** in the amount of $11,112.92. This total encompasses recovery for the following fees and costs:

Court Costs	$1,100.00
Dr. Francis Tannian Expert Fee	$649.50
Dr. Donna Stephenson Expert Fee	$2,700.00
Dr. Howard Bauchner Expert Fee	$4,970.42
Terri Patterson Expert Fee	$1,693.00

Although the Court permitted Plaintiff to revise her request due to the summary nature of some of her experts' invoices, Plaintiff's counsel is cautioned that a more detailed accounting of costs is required upon submission of a Rule 54(d) motion. When opposing counsel and the Court are left to guess blindly at the basis for the costs and fees sought, the result is likely to be the exclusion of potentially recoverable costs, rather than a second chance to provide further information.

IT IS SO ORDERED.

/s/
Peggy L. Ableman, Judge

Original to Prothonotary
cc: Kenneth M. Roseman, Esq.
Daniel P. Bennett, Esq.
Daniel J. McCarthy, Esq.