IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

ANNA M. GREENAGE and JOHN R. GREENAGE, SR.,	:	
	:	C.A. No. 95C-06-020
Plaintiffs,	:	
v.	:	
JAMES E. WARD and GEORGE & LYNCH, INC.,	:	
Defendants.	:	

Submitted: May 24, 2001
Decided: August 1, 2001

O R D E R

Upon Plaintiffs' Motion for Costs. Denied.
Upon Defendant's Motion for Costs.
Granted in part; Denied in Part.

Gary R. Dodge, Esquire, Law Offices of Gary R. Dodge, P.A., Dover, Delaware, attorneys for the Plaintiffs.

Mark L. Reardon, Esquire, Elzufon, Austin, Reardon, Tarlov & Mondell, P.A., Wilmington, Delaware, attorneys for Defendant George & Lynch, Inc.

WITHAM, J.

Greenage v. Ward and George & Lynch
C. A. No. 95C-06-020
August 1, 2001

On this 1st day of August, 2001, upon consideration of the Plaintiffs' Motion for Costs, the Defendant's Motion for Costs and the Responses thereto, the Court finds that:

(1) On January 19, 2001, a jury returned a verdict in the amount of $18,000 in favor of Anna M. Greenage and awarded nothing to her husband John R. Greenage (collectively "Plaintiffs"). This Court denied Plaintiffs' post-trial motions for Additur or a New Trial on May 10, 2001.[1] Subsequent to the denial of Plaintiffs' post-trial motions, both parties filed Motions for Costs. Defendant brings their Motion for Costs pursuant to the Offer of Judgment they filed under Superior Court Civil Rule 68 on December 20, 2000. Plaintiffs bring their Motion for Costs claiming that pursuant to Superior Court Rule 54(d) they should be awarded the Costs they incurred prior to the Defendant's Offer of Judgment.

[1] ***Greenage v. Ward*, Del. Super., C.A. No. 95C-06-020, Witham, J. (May 10, 2001), ORDER.**

(2) In their motion for costs, Plaintiffs argue that Superior Court Civil Rule 68 does not divest them of their right to seek costs for expenses incurred prior to the Offer of Judgment. Plaintiffs concede that any costs incurred after the Rule 68 offer of judgment cannot be recovered. However, they claim that under *Graham v. Keene Corp.*, the prevailing party is not required to prevail in every sense in order to receive their costs pursuant to Superior Court Civil Rule 54(d).[2] Because the jury awarded Plaintiff $18,000, Plaintiffs argue that they prevailed at trial for Rule 54(d) purposes; therefore, the costs accumulated before the offer of judgment are recoverable. Defendant argues that when a Plaintiff rejects a Rule 68 settlement offer and the verdict is less than the Rule 68 offer, the Plaintiff loses some of the benefits of any victory less than the offer.[3] One of the lost benefits is the Rule 54(d) presumption that the prevailing party recovers costs.[4] The offer of judgment in the immediate case

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[2] ***Graham v. Keene Corp.*, Del. Supr., 616 A.2d 827, 827-828 (1992).**

[3] ***See Napolski v. Davis*, Del. Super., 734 A.2d 637, 638 (1999), *citing Delta Air Lines, Inc. v. August*, 450 U.S. 346 (1981).**

[4] ***See Delta Air Lines, Inc. v. August*, 450 U.S. 346, 351 (1981) (discussing the altered presumption of Rule 54(d) in light of Rule 68 offers of judgement).**

specifically stated that it was for $75,000, "together with court costs and interest accrued to date." The Court agrees with Defendant that by rejecting the offer of judgment and receiving an award less than the offer at trial, Plaintiffs lost the opportunity to recover costs. The purpose of Rule 68 is to encourage settlement, as the U.S. Supreme Court stated in *Marek v. Chesny*:

> To be sure, application of Rule 68 will require plaintiffs to "think very hard" about whether continued litigation is worthwhile; that is precisely what Rule 68 contemplates.[5]

The Court finds that by rejecting a Rule 68 offer of judgment, Plaintiffs increased their burden to recover costs under Rule 54(d) to victory in excess of the pre-trial offer of judgment. Plaintiffs did not meet this burden; therefore, their motion for costs is DENIED.

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[5] ***Marek v. Chesny*, 473 U.S. 1, 11 (1985).**

(3) Defendant's motion for costs essentially includes a list of expenses they incurred after filing their Rule 68 Offer of Judgement on December 20, 2000. As this Court previously noted in *Gaur v. Arocho*,[6] there are three preliminary objective factors, involving simple determinations of time and amounts, that must be analyzed initially in a post-trial Rule 68 recovery of costs motion. Those three requirements are: "(1) a filed offer of judgment at least 10 days before trial; (2) costs that occur after the date of that filing, and (3) a trial verdict below the amount of the offer."[7] In the case *sub judice* these requirements are met. The offer of judgment was filed on December 20, 2000, and trial did not start until January 8, 2001, thereby making the offer at least 10 days before trial. The expenses sought to be recovered occurred after December 20, 2000, and the jury's verdict of $18,000 is clearly below the Rule 68 offer of $75,000. The only inquiry that remains is determining whether Defendant's costs are appropriate.

(4) To make this determination the Court will use its discretion and evaluate

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[6] ***Gaur v. Arocho*, Del. Super, C.A. No. 98C-09-033, Witham, J. (Dec. 28, 2000), Order at 3.**

[7] ***Id.***

the claimed costs in light of Rule 54(d) and any applicable statutes. Defendant seeks to recover costs totaling $18,525.11, including the following:

Trial Exhibit Enlargements	250.00
Joint Trial Exhibit Notebooks	873.11
Superior Court Jury List	25.00
Biomechanical Experts	10,377.00
Dr. Wofram Rieger, Psychiatric Expert	3,600.00
Dr. Alan Fink, Neurologist	3,400.00

While generally the awarding of costs to the prevailing party is a matter of judicial discretion,[8] Rule 68 arguably takes much of the discretion away, stating that the "offeree must pay the costs incurred after the making of the offer." The term "costs" is not defined in Rule 68, which is why this Court looks to other rules and statutes to assist in determining what costs are appropriate.

[8] ***Donovan v. Delaware Water & Air Resources Comm'n*, Del. Supr., 358 A.2d 717, 722-723 (1976).**

(5) In looking at Rule 54(d) and 10 *Del. C.* § 8906, the Court notes that "[i]t is well settled in Delaware that the expert's fee that is recoverable as a cost of litigation is limited to the time necessarily spent in actual attendance upon the Court for the purpose of testifying."[9] Delaware law has further established that "attendance" includes the following: a reasonable time for traveling to and from the courthouse, waiting to testify, testifying, meals and lodging.[10] Delaware courts have also established what are inappropriate costs for expert fees as follows: time the expert spent listening to the testimony of other witnesses for orientation, consulting and advising counsel during the trial, and consulting and advising other witnesses during trial.[11] These guidelines for determining costs apply to Rule 54(d) motions where the prevailing party presumptively recovers certain costs. While the Court looks to Rule 54 and other statutes to help determine what costs are appropriate, the Court is mindful that the policy behind Rule 68 causes it to encompass more costs. After reviewing the costs associated with Defendant's biomechanical experts, the Court will reduce that cost by $2,700 based on the above standards for appropriate expert witness fees charged as costs. The Court bases this determination on the documentation included by Defendant which showed that only 14 of the 22 hours charged by Michael

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[9] ***988 Acres of Land v. State*, Del. Supr., 274 A.2d 139, 141 (1971).**

[10] ***See Sliwinski v. Duncan*, Del. Supr, No. 260, 1991, Christie, C.J. (Jan. 15, 1992), Order at 3; *Cimino v. Cherry*, Del. Super., C.A. No. 98C-04-127, Cooch, J. (May 24, 2001), Order at 2; *Deardorf Associates, Inc.* v. Paul, Del. Super, C.A. No. 96C-10-260, Toliver, J. (April 27, 2000), Op. and Order at 1.**

[11] ***Deardorf Associates, Inc.* at 1.**

Lee Woodhouse at $275/hour and only 9 of the 11 hours charged by Alfred L. Cipriani at $250/hour were for testifying, waiting to testify, travel and lodging expenses. The remaining time was spent in consultation and review and will not be charged to the Plaintiffs as a cost. For the same reasons, only $2,160 of the $3,600 charged by Dr. Rieger will be charged to the Plaintiffs as costs.

(6) The Court is also going to reduce Dr. Fink's trial deposition fee from $3,400 to $1,000. Dr. Fink testified by deposition at trial. This Court has determined that "for a two hour deposition, a range of $591.50 to $1,064.70 would be a reasonable fee with $188.10 to $295.75 for each hour thereafter."[12] According to the documents submitted by Defendant, Dr. Fink's deposition lasted for two hours; therefore, the Court will charge $1,000 to the Plaintiffs for Dr. Fink's deposition. All of the other costs claimed by Defendant appear to be appropriate; therefore, the following expenses will be taxed to the Plaintiffs as costs:

Trial Exhibit Enlargements	250.00
Joint Trial Exhibit Notebooks	873.11
Superior Court Jury List	25.00
Biomechanical Experts	7,677.00
Dr. Wofram Rieger, Psychiatric Expert	2,160.00
Dr. Alan Fink, Neurologist	1,000.00

Therefore, because the verdict returned by the jury was less than the offer of judgment, Plaintiffs must pay $11,985.11 of the Defendant's costs. Defendant's

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[12] ***Lurch v. Roberts*, Del. Super., C.A. No. 96C-06-004, Witham, J. (Jan. 25, 2001), ORDER.**

motion for costs is therefore GRANTED in part and DENIED in part.

IT IS SO ORDERED.

Judge

dmh
oc: Prothonotary
xc: Order Distribution