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Michael I. Silverman, Esquire
Silverman & McDonald
1010 N. Bancroft Parkway
Suite 22
Wilmington, DE 19805

Bruce W. McCullough, Esquire
McCullough & McKenty, P.A.
824 Market Street, 4th Floor
P.O. Box 397
Wilmington, DE 19899-0397

Re: Sweren v. Sheehy
C.A. No. 99C-10-249-JRS

Dear Counsel:

Please accept this letter as the Court's decision on Defendant's Motion for Costs. For the reasons that follow, the motion is **GRANTED in part and DENIED in part.**

This matter was tried to a jury on November 7 & 8, 2001. Although fault and some degree of injury was admitted, the jury declined to award damages. For reasons set forth on the record, the Court ordered additur in the amount of \$4,500. Unbeknowst to the Court, this amount was \$500 less than an Offer of Judgment in the amount of \$5,000 which was served on the plaintiff on October 5, 2000. Defendant has now moved for costs under Delaware Superior Court Civil Rule 68 ("Rule 68").

This Court previously has determined that the award of costs under Rule 68 is mandatory.¹ And, unlike *Mulford*, there is no contention here that the Offer of Judgment was not effective. Accordingly, on this motion, the Court must simply determine the amount of costs recoverable. In this regard, “Rule 68 offers no interpretive guidance as to what are or are not recoverable ‘costs.’”²

Defendant has requested reimbursement of costs in the amount of \$1,725. This amount is broken down as follows: \$100 for court costs; \$125 for trial exhibit enlargements; and \$1500 for an expert witness fee. The first two components of defendant’s request can be disposed of summarily. Defendant is entitled to recover the \$100 for court costs,³ but is not entitled to recover costs for trial exhibit enlargements.⁴ The request for expert witness fees, however, requires further discussion.

Defendants presented the testimony of a chiropractor, Joseph Irwin, D.C.. Dr. Irwin reviewed plaintiff’s medical records and provided his opinion regarding the limited extent of the injuries sustained by him. Dr. Irwin has now submitted a bill for \$1,500 which, according to defendant, includes Dr. Irwin’s travel time to and from

¹*Mulford v. Haas*, Del. Super., C.A. 98C-12-296-JRS, Slights, J. (Apr. 25, 2001)(Letter Op. at 11).

²*Mulford*, supra (Letter Op. at 12-13).

³10 *Del. C.* § 5101; Rule 54(e).

⁴*Sliwinski v. Duncan*, Del. Supr., No. 261, 1991, Christie, C.J. (June 15, 1992) (ORDER) (the costs of presenting trial exhibits at trial is traditionally borne by the party presenting the evidence).

the courthouse and his trial testimony. The total time expended by Dr. Irwin is said to be two (2) hours.

The award of costs for expert witness testimony is committed to the sound discretion of the trial court.⁵ In determining reasonable reimbursement for expert costs, the Court must “recognize that a significant disruption to a physician’s practice occurs when a physician is called to testify as an expert witness and that such testimony is important to the Court since it assists the trier of fact and serves a significant public interest.”⁶ There is no fixed formula to determine reasonable expert fees.⁷ Nevertheless, this Court has referred to studies of the Delaware Medico-Legal Affairs Committee for guidance. The most recent pronouncement of this committee of which the Court is aware is the 1995 study. This study indicated that a reasonable range of fees for court appearances for medical experts is \$1,300 to \$1,800 per half day.⁸ In *Clough*, the Court adjusted this figure in accordance with the medical care price index. This approach has been followed in other cases as well.⁹

⁵*See Donovan v. Delaware Water & Air Resources Com’n*, Del. Supr., 358 A.2d 717, 723 (1976); 10 Del. C. § 8906.

⁶*Sliwinski*, supra (ORDER at 7).

⁷*Id.*

⁸*Clough v. Walmart Stores, Inc.*, Del. Super., C.A. No. 94C-05-030-HDR, Ridgely, P.J. (Sept. 9, 1997)(Letter Op. at 1).

⁹*E.g. Lurch v. Roberts*, Del. Super., C.A. No. 96C-06-004, Witham, J. (Jan. 25, 2001)(ORDER at 3).

In *Sliwinski*, the Court determined that “when a physician testifies as an expert, for three hours or less, a minimum witness fee should be allowed based upon a flat amount for a one-half day interruption in the physician’s usual schedule.”¹⁰ And, as stated, the most recent studies of the Medico-Legal Affairs Committee indicates that a flat fee of \$1,300 to \$1,800 per half day is appropriate.

In this case, defendant has indicated that Dr. Irwin consumed only two hours in connection with his trial testimony: one hour for travel and one hour for actual in-court testimony. Accordingly, the Court is satisfied that a fee at the low end of the recommended range is appropriate in this case. The Court will award \$1,300 as reimbursement for Dr. Irwin’s fee. While normally it may be appropriate to adjust a flat fee drawn from the 1995 study to reflect the current medical care price index, the Court has not been supplied with up-to-date information with respect to the index and, therefore, it declines to make the adjustment in this case.

Based on the foregoing, the Court awards costs to defendant pursuant to Rule 68 as follows: \$100 in court costs and \$1,300 for expert witness fees.

IT IS SO ORDERED.

Very truly yours,

Joseph R. Slights, III

JRS, III/sb

Original to Prothonotary

¹⁰*Sliwinski*, supra (ORDER at 7).