

SUPERIOR COURT
OF THE
STATE OF DELAWARE

RICHARD R. COOCH
RESIDENT JUDGE

NEW CASTLE COUNTY COURTHOUSE
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**Re: *Charles Barnett and Cynthia Barnett v. Thomas Braxton and
Industrial Metal***
C.A. No. 01C-02-183 RRC

Submitted: July 14, 2003
Decided: August 15, 2003

**On Defendants' Motion for Costs.
GRANTED IN PART, DENIED IN PART.**

Dear Counsel:

Currently before the Court is Defendants' Motion for Costs brought "pursuant to Delaware Superior Court Rules 54(d) and 68."¹ Plaintiffs essentially object to any of the claimed costs being taxed against them, and they seek to limit the amount of "costs" that Defendants can recover relative to the fee that Defendants' expert charged for testifying at trial. For the reasons that follow, the Court will limit the amount that Defendants may recover with respect to their expert, and will largely grant the relief that

¹ Defs.' Mot. at 1.

Plaintiffs seek in that most of the amounts Defendants seek are not now recoverable pursuant to Superior Court rules or Delaware statutory authority.

This personal injury action was tried before a jury from April 7 through April 11, 2003. On March 10, 2003, however, an offer of judgment in the amount of \$20,000 was extended to Plaintiffs, which offer was not accepted. Following the extension of the offer, at least one expert deposition was taken by Defendants in preparation for trial.² At trial, Defendants offered the expert testimony of George C. Govatos, Ph.D., P.E.; Dr. Govatos testified in person, and apparently billed Defendants for three hours of his time for the testimony. The jury ultimately returned a verdict of no liability on Defendants' part.

Defendants now move for \$8,318.41 in costs, as follows:

- (a) \$15.00 fee to Legal Beagles, Inc. for service of process of medical records subpoena to Rockford Center;
- (b) \$15.00 fee to Legal Beagles, Inc. for service of process of records subpoena to Shellhorn & Hill;
- (c) \$35.00 fee to Legal Beagles, Inc. for service of process of records subpoena to Delaware State Police S.B.I.;
- (d) \$278.10 fee to Corbett & Associates for deposition transcript of Francis Tannian, Ph.D.;
- (e) \$437.50 fee to John W. Dettwyler, Ph.D. for discovery deposition and preparation;
- (f) \$184.06 fee to Hawkins Reporting Service for discovery deposition of John W. Dettwyler, Ph.D.;
- (g) \$25.00 fee to Legal Beagles, Inc. for service of process of Court Order and subpoena to Rockford Center;
- (h) \$144.35 fee to Corbett & Associates for deposition transcript of Ali Kamali, M.D.;
- (i) \$1,071.90 fee to Optimum Rehabilitation Services for services rendered for written job analysis;
- (j) \$803.10 fee to Talone & Associates for services rendered for surveillance on Charles Barnett, III;
- (k) \$370.00 fee to Act I Imaging for services rendered trial exhibits;
- (l) \$377.48 to Hawkins Reporting Service for trial deposition of John W. Dettwyler, Ph.D.;
- (m) \$350.00 fee to John W. Dettwyler, Ph.D. for trial deposition;

² See Dkt. #61 (“Notice of Trial Deposition of John W. Dettwyler, Ph.D.”).

- (n) \$3,530.50 fee to George C. Govatos, Ph.D., P.E. for research, calculations, drawings, expenses, trial testimony;
 - (o) \$300.00 fee to Karasch-CVP Communications for services rendered at trial for April 8, 2003;
 - (p) \$300.00 fee to Karasch-CVP Communications for services rendered at trial for April 9, 2003;
 - (q) \$53.00 fee to Legal Beagles, Inc. services rendered for trial (retrieval fees and certified copies fees of Superior Court and Court of Common Pleas);
 - (r) \$16.42 fee to Airborne Express for express delivery to Optimum Rehabilitation Services; and
 - (s) \$12.00 fee to National Background Investigations, Inc. for criminal records search.
- [Total: \$8,318.41]**³

In response, Plaintiffs contend that items (a), (b), (c), (g), (q), and (s) (for services billed to Defendants by Legal Beagles, Inc. and National Background Investigations, Inc.) are “pre-trial discovery...items” that “are not recoverable as courts costs....”⁴ Plaintiffs also contend that items (d), (e), and (f) (relating to depositions of Francis Tannian, Ph.D. and John W. Dettwyler, Ph.D.) are not recoverable because “the transcripts...were not admitted into evidence.”⁵ Similarly, Plaintiffs object to items (h), (i), and (m) (relating to depositions of Ali Kamali, M.D. and John W. Dettwyler, Ph.D., and to services billed to Defendants by Optimum Rehabilitation Services) because these items were also not admitted into evidence at trial.⁶ Plaintiffs contend that item (k) (relating to services billed to Defendants by Act I Imaging) is not recoverable and cites Ripsom v. Beaver Blacktop, Inc.⁷

³ Defs.’ Mot. ¶ 3.

⁴ Pls.’ Resp. ¶ 1.

⁵ Id. ¶ 2.

⁶ Id. ¶ 5.

⁷ 1989 WL 147336 (Del. Super. Dec. 4, 1989) (holding that there is no Delaware statutory provision or rule of court that permits the awarding of costs relating to the printing and photocopying of trial exhibits).

for that proposition. Plaintiffs maintain that items (l), (j), (r), and (s) (relating to the deposition of John W. Dettwyler, Ph.D., to services billed to Defendants by Talone & Associates for surveillance of plaintiff Charles Barnett, to services billed to Defendants by Airborne Express, and to services billed to Defendants by National Background Investigations, Inc.) are not recoverable “under any applicable [Delaware] Rule or Statute.”⁸ Plaintiffs argue that items (o) and (p) (relating to services billed to Defendants by Karasch-CVP Communications) are not recoverable “as they are not identified or itemized in any way....”⁹ And Plaintiffs contend that because Dr. Govatos (item (n) of Defendants’ Motion) “billed 3 hours for his testimony[][,]” his costs should be limited at three times his hourly rate of \$275, or \$825.¹⁰

DEFENDANTS ARE NOT ENTITLED TO ANY NON-EXPERT-RELATED “COSTS”

Title 10, section 5101 of the Delaware Code provides that “[g]enerally, a party for whom final judgment in any civil action...is given...shall recover, against the adverse party, costs of suit, to be awarded by the [C]ourt.” Additionally, Superior Court Civil Rule 54(d) provides that “[e]xcept where express provision therefore is made either in a statute or in these Rules, costs shall be allowed as of course to the prevailing party unless the Court otherwise directs.” Determining when costs should be awarded is

⁸ Pls.’ Resp. ¶ 4.

⁹ Id. ¶ 6.

¹⁰ Letter from Kenneth M. Roseman to the Court of 5/27/03, at 1.

therefore a matter of judicial discretion;¹¹ final judgment does not automatically lead to costs being awarded to the prevailing party.¹²

Applying those precepts to the requested costs here, the Court finds that items (a), (b), (c), (g), and (q) (relating to services billed to Defendants by Legal Beagles, Inc.) are not recoverable from Plaintiffs by Defendants. While it is true that Rule 54(d) and section 5101 speak of the “costs” of suit as being recoverable, these provisions have been interpreted as contemplating “the court costs required by the [Superior Court] Prothonotary.”¹³ In its discretion, and pursuant to that rule and to that statute, this Court will not now award “costs” incurred by Defendants through their use of third-party service providers; the Rule and statute do not contemplate as much.

Likewise, items (i) and (r) (relating to services rendered by Optimum Rehabilitation Services and Airborne Express), (j) (services rendered by Talone & Associates in conducting surveillance on plaintiff Charles Barnett), (k) (services rendered by Act I Imaging for trial exhibits), (o) and (p) (services rendered by Karasch-CVP Communications at trial on April 8 and April 9, 2003), and (s) (criminal records search conducted by National Background Investigations, Inc.) are also not recoverable from Plaintiffs by Defendants. In addition to the fact that these “costs” are not those typically “required by the Prothonotary,” Ripsom, *supra*, supports Plaintiffs’ assertion that item (k) would not be recoverable by Defendants in any event, in that “there is no statutory provision or [Superior Court] Rule [that governs the

¹¹ Donovan v. Delaware Water & Air Resources Comm’n, 358 A.2d 717, 722-723 (Del. 1976) (holding that Rule 54(d) and § 5101 are consistent in that an award of costs is a matter of judicial discretion).

¹² Id.

¹³ Nygaard v. Lucchesi, 654 A.2d 410, 412 (Del. Super. Ct. 1994).

printing and photocopying of trial exhibits].”¹⁴ And, as Plaintiffs point out, items (o) and (p) (relating to services billed to Defendants by Karasch-CVP Communications) are not recoverable “as they are not identified or itemized in any way,” thus precluding any meaningful review by the Court of the amounts claimed as taxable “costs.” The Court, in its discretion, therefore declines to award Defendants those amounts.

DEFENDANTS ARE ENTITLED TO SOME OF THE EXPERT-RELATED COSTS THEY NOW SEEK

Under title 10, section 8906 of the Delaware Code, “[t]he fees for witnesses testifying as experts...shall be fixed by the [C]ourt in its discretion[] and...taxed as part of the costs in each case....” Superior Court Civil Rule 54(h) provides, however, that “[f]ees for expert witnesses testifying on deposition shall be taxed as costs...only where the deposition is introduced into evidence.”

Applying those rules here, Defendants cannot now be awarded those amounts listed in items (d), (e), (f), (h), (l), or (m), as the deposition testimony of Drs. Tannian, Dettwyler, and Kamali was not admitted into evidence. And under Superior Court Civil Rule 68,¹⁵ the only possible exception to this finding could have applied to the deposition testimony of Dr. Dettwyler (as his deposition was taken after Defendants made their \$20,000 offer of judgment to Plaintiffs), but, as the Delaware Supreme Court has recognized, where a plaintiff “obtains no judgment from the defendant seeking costs (*i.e.*, judgment if for the defendant), Rule 68 does not apply.”¹⁶

¹⁴ Rispom, 1989 WL 147336 at *1.

¹⁵ Rule 68 provides that if a judgment finally obtained by one to whom an offer of judgment is made is not “more favorable” than the offer, then the one to whom the offer was made “must pay the costs incurred after the making of the offer.”

¹⁶ Hercules, Inc. v. AIU Ins. Co., 784 A.2d 481, 509 (Del. 2001) (citing Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981)).

Because the jury here returned a verdict in Defendants' favor thereby precluding recovery of Dr. Dettwyler's costs, the only possible expert-related costs that Defendants can potentially recover relate to Dr. Govatos (item (n)), as he testified live at trial.

Under section 8906, witness fees are limited "to time necessarily spent in attendance upon the court for the purpose of testifying."¹⁷ Defendants claim they are entitled to \$3,530.50 for Dr. Govatos's services in connection with defending this lawsuit, but Plaintiffs point out that Dr. Govatos billed only three hours of his time for testifying at trial. Defendants have not substantiated the amount of time that Dr. Govatos was in "attendance upon the court," but the three hours billed by him seems to this Court to be a fair recordation of that time. Accordingly, the Court will award Defendants the \$825 that Dr. Govatos presumably charged for his testimony at trial, as his hourly rate has been represented to the Court by Plaintiffs (without objection by Defendants) to be \$275.

Applying all of the above precepts, and pursuant to relevant Superior Court rules and Delaware statutory authority, all of Defendants' requested amounts will not be taxed to Plaintiffs as "costs," with the exception of the \$825 amount relating to the trial testimony of Dr. Govatos.

IT IS SO ORDERED.

Very truly yours,

/jkk

oc: Prothonotary

¹⁷ State ex rel. Price v. 0.0673 Acres of Land, 224 A.2d 598, 602 (Del. 1966).