

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

CAROLYN BOND,)
)
Plaintiff,)
) C.A. No. 05C-05-185 MJB
v.)
)
JAMES YI)
)
Defendant.)

Submitted: June 29, 2006
Decided: August 10, 2006

Upon Motion for Costs. **GRANTED.**

ORDER

Glen C. Ward, Esquire, Robinson, Grayson & Dryden, P.A., Wilmington,
Delaware, Attorney for Plaintiff.

Gerald J. Hager, Esquire, McCullough & McKenty, P.A., Wilmington,
Delaware, Attorney for Defendant.

BRADY, J.

Facts and Procedural History

This action arose out of a motor vehicle collision on July 11, 2003 in which Carolyn Bond (“Ms. Bond”) sustained injuries. Liability for the collision was admitted prior to trial. The only issues for the jury’s determination were whether the collision proximately caused injury to Ms. Bond and whether the medical expenses claimed were reasonable and necessary. Prior to trial, James Yi (“Mr. Yi”) filed an Offer of Judgment with the Court in which Ms. Bond was offered \$5,001.00 to settle the case. Ms. Bond chose not to accept the settlement offer and proceeded to trial.

At trial, Ms. Bond sought recovery of a medical bill in the amount of \$290.00 for treatment in September, 2005 and May, 2006. Ms. Bond also sought recovery for pain and suffering due to the collision. The trial was held May 8 through May 9, 2006. On May 9, 2006 the jury returned a verdict in favor of Ms. Bond in the amount of \$1,490.00.

Mr. Yi has filed a Motion for Costs pursuant to Superior Court Civil Rule 68.

Applicable Law

Superior Court Civil Rule 68 requires this Court to award costs to the prevailing party when an offer of judgment is rejected and the amount realized by the offeree is less than the offer of judgment.¹ Rule 68 states:

At any time more than 10 days before 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 within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the Clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. **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.** The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearing to determine the amount or extent of liability. (Emphasis added.)

Defendant must show three things to recover costs pursuant to a request under Rule 68. First, the offer of judgment must have been filed at least 10 days before trial. Second, the costs must have been incurred after

¹ *Sweren v. Sheehy*, 2001 WL 1783076 (Del.Super.); *Mulford v. Haas*, 2001 WL 541023 at *4 (Del.Super.).

the filing of the offer of judgment. Third, the trial verdict must have been less than the amount of the offer.²

The record reflects that Mr. Yi made an offer of judgment to Ms. Bond in the amount of \$5,001.00, which was filed on April 6, 2006. The trial in this matter was held on May 8 through May 9, 2006. Therefore, the first requirement is met because the offer of judgment was filed at least 10 days before trial. The video trial deposition of Mr. Yi's trial expert was taken on April 28, 2006, after the offer of judgment was filed. Therefore, the second requirement is met. Finally, the jury verdict of \$1,490.00 is less than the offer of judgment of \$5,001.00, and therefore, the third requirement is met. The Court must now determine what costs are reasonable under the circumstances.

DEL. CODE ANN. tit. 10, § 8906 governs the award of expert witness fees and states in pertinent part that such fees "...shall be fixed by the court in its discretion, and such fees so fixed shall be collected and paid as other witness fees are now collected and paid." Superior Court Civil Rule 54(h) further states "[f]ees for expert witnesses testifying on deposition shall be taxed as costs pursuant to [DEL. CODE ANN. tit. 10, § 8906] only

² Superior Court Civil Rule 68; *see also Casarotto v. United Services Auto Assoc.*, 2006 WL 336746 (Del.Super.).

where the deposition is introduced as evidence.” Dr. Bonner’s deposition was introduced into evidence in this case.

Ms. Bond concedes that Mr. Yi is entitled to receive \$150.00 for the arbitrator’s fee³ and \$315.00 for the videographer for Dr. Bonner’s deposition. However, the parties disagree on the amount that should be awarded for Dr. Bonner’s testimony. Mr. Yi argues he is entitled to recover \$3,000 in costs for Dr. Bonner’s testimony, which represents the charge for a half-day of testimony. Mr. Yi cites *Sliwinski v. Duncan*⁴ as authority for the rule of law that when a physician testifies as an expert witness for three hours or less, the doctor is entitled to be paid for a half day.⁵ Ms. Bond argues *Sliwinski* is distinguishable because the doctor in that case testified live in court, but Dr. Bonner testified for only 44 minutes in his own office. The Court agrees with Ms. Bond’s argument.

In Delaware, an expert’s fee is recoverable as a cost of litigation only for the time the expert spends in actual attendance in court for the purpose of

³ The arbitrator fee is recoverable under Super. Ct. Civ. R. 16.1(k)(11)(D)(iii), which states in pertinent part: “If the party who demands a trial de novo fails to obtain a verdict from the jury or judgment from the Court, exclusive of interests and costs, more favorable to the party than the arbitrator’s order, that party shall be assessed the costs of the arbitration, and the ADR Practitioner’s total compensation.”

⁴ 608 A.2d 730 (Del. 1992).

⁵ *Id* at *3.

testifying.⁶ “Attendance includes a reasonable time for traveling to and from the courthouse, waiting to testify, and testifying.”⁷

In *Sliwinski* the Delaware Supreme Court stated it “...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.” In reaching this conclusion, the Court emphasized that this rule would operate to cover transportation and waiting time for the physician.⁸ Because Dr. Bonner testified at his own office, these concerns do not apply to this case. Certainly, his schedule was not disrupted for a half-day. Therefore, the Court will not order the payment of Dr. Bonner’s half-day rate because he testified for less than an hour in his own office.

This Court has previously awarded expert witness fees as costs based on a study performed in 1995 by the Medical Society of Delaware’s Medico-Legal Affairs Committee. The use of this study has been previously considered and approved in this Court many times.⁹ Based on the medical

⁶ *State v. 0.0673 Acres of Land, etc.*, 224 A.2d 598, 602 (Del. 1966); *see also Stevenson v. Henning*, 268 A.2d 872, 874 (Del. 1970).

⁷ *Deardorf Associates, Inc., et al, v. Paul*, 2000 WL 1211077 (Del.Super.) *citing Sliwinski v. Duncan*, 608 A.2d 730 (Del. 1992).

⁸ *Id.*

⁹ *Kerr v. Onusko*, 2004 WL 2744607 (Del.Super.); *Cunningham v. Outten*, 2001 WL 879999 (Del.Super.); *Casarotto v. United Services Auto Assoc.*, 2006 WL 336746 (Del.Super.); *Dunkle v. Prettyman*, 2002 WL 833375 (Del.Super.); *Tolson v. Chorman*, 2005 WL 1953039 (Del.Super.); *Preux v. Leap*, 2002 WL 31819250 (Del.Super.).

care price index, this Court has recently ruled “[a] reasonable fee for a two hour deposition would range from \$671.00 to \$1,207.00...”¹⁰ Based on the foregoing, having reviewed the application and response, and considered the trial presentation, the Court awards costs as follows:

Arbitrator Fee:	\$150.00
Videographer Fee:	\$315.00
Dr. Bonner Fee:	\$800.00

Conclusion

Based on the foregoing, the Motion for Costs in the amount of \$1,265.00 is **GRANTED**.

IT IS SO ORDERED.

/s/
M. Jane Brady
Superior Court Judge

¹⁰ *Banks v. J&N Hickman Family Limited*, 2006 WL 240641 at *2 (Del.Super.).