

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR SUSSEX COUNTY

HARRY BANKS, an individual )  
Plaintiff, )  
v. ) C.A. No. 04C-03-027-RFS  
J & N HICKMAN FAMILY LIMITED )  
PARTNERSHIP d/b/a J & N HICKMAN )  
FAMILY PARTNERSHIP, a Delaware )  
corporation, )  
Defendant. )

**ORDER**

Upon Plaintiff's Motion for Costs. Granted in Part. Denied in Part.

Date Submitted: January 3, 2006  
Date Decided: January 11, 2006

Upon careful review of the filings together with the positions expressed in oral argument, Plaintiff, Harry Banks', hereafter (Banks") Motion for Costs is granted in part and denied in part. It appears to the Court that:

1) On March 18, 2004, Banks filed suit to recover for personal injuries resulting from a slip and fall accident. Arbitration was held in this case on May 13, 2005. Banks filed an appeal *de novo* on May 24, 2005. On December 8, 2005, a jury trial resulted in a \$15,000 judgment for Banks which was reduced to \$7,500 as the jury found him to be 50% contributorily negligent. Post judgment interest was awarded as well.<sup>1</sup>

2) On December 16, 2005, Banks timely filed a Motion to Recover Costs. The defendant objects to part of the request in a response filed on January 3, 2006.

3) Banks seeks the recovery of the following:

Complaint Filing Fee	\$175.00
Service of Process Fee	30.00
Reimbursement of Arbitrator's Fee	150.00
Trial Request Fee	150.00
Expert Witness Fee for Lawrence Dinoff	6,328.62
Expert Trial Deposition for Dr. Richard DuShuttle	950.00
Videographer's Fee for Dr. DuShuttle	285.00
Court Reporter's Fee for Dr. DuShuttle's Deposition Transcript	<u>203.50</u>
<b>TOTAL COSTS</b>	<b>\$8,272.12</b>

4) Under 10 *Del.C.* § 5101<sup>2</sup> and under Super. Ct. Civ. R. 54(d)<sup>3</sup>, the Court may award costs to the prevailing party in an action. An award of costs is a matter of judicial discretion. *Donovan v. Delaware Water and Air Resources Comm'n*, 358 A.2d 717, 722-23 (Del. 1976).

5) I find that Banks was the prevailing party and that reduction of the award to account for his contributory negligence is not appropriate. Judgment was entered in his favor despite a vigorous defense. Consequently, the Court may, in its discretion, award him certain costs. *See Graham v. Keene Corp.*, 616 A.2d 827 (Del. 1992). Banks first requests compensation for the filing fee, service of process fee and the trial request fee. Court fees, such as those, are necessary to have a trial and are routinely awarded to successful litigants. *See Carson v. Halpen*, 2001 WL 1474791 at 3 (Del. Super. Ct.). The Court will award Banks \$355 for these fees. At oral argument, the parties were informed that there were an additional \$65 in costs for service on the amended complaint. In this regard, defendant's objection was considered that the complaint had to be amended to add

the correct name of the property owner. The originally named party used a family name of a real estate company whereas the family owned the property in a limited partnership. The principals were on notice of the litigation and were essentially the same except for the form of ownership of the property where Banks fell. The fees are necessary to move the case forward. Defendant could have awarded them by an appropriate stipulation. The additional \$65 will, therefore, be added for an award of \$420.

6) Concerning reimbursement of the arbitrator's fee, "[i]f the party who demands a trial *de novo* fails to obtain a verdict from the jury or judgment from the Court, exclusive of interest and costs, more favorable to the party than the arbitrator's order, that party shall be assessed the costs of the arbitration . . ." Super. Ct. Civ. R. 16.1(k)(11)(D)(iii). Here, Banks appealed the arbitrator's order which found for the defense. ". . . Rule 16.1(k) is meant to assess the arbitrator's fee to a party who appeals the arbitrator's order and fails to receive a more favorable verdict at trial than the arbitrator's order - not to reward a party who appeals the arbitrator's order and subsequently does better at trial than the order." *See Hicks v. Best Buy Co. of Minnesota, Inc.*, 2004 WL 249587 at 2 (Del. Super. Ct.). Therefore, the arbitrator's fee will not be awarded.

7) Regarding expert witness fees, 10 *Del.C.* § 8906 states that such fees "shall be fixed by the court in its discretion, and such fees so fixed shall be taxed as part of the costs in each case . . ." Super. Ct. Civ. R. 54(h) further provides that "[f]ees for expert witnesses testifying on deposition shall be taxed as costs pursuant to 10 *Del.C.* § 8906

only where the deposition is introduced into evidence.”

Further, it is well settled 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.” *State v. 0.0673 Acres of Land*, 224 A.2d 598, 602 (Del. 1966). As this case holds at page 602, “Attendance does not include time spent listening to other witnesses for orientation or in consulting with a party or counsel during the trial.” However, time spent waiting to testify and travel time and expenses, including meals and lodging, may be reimbursed, *Nygaard v. Lucchesi*, 654 A.2d 410, 413-14 (Del. Super. 1994).

8) Dr. Richard DuShuttle testified by way of video deposition taken at his office. His testimony lasted for approximately 45 minutes. A reasonable fee for a two hour deposition would range from \$671 to \$1,207 considering changes in the medical care price index. *See Tolson, supra* at 2. A reasonable fee would be \$850 rather than \$950. The usual video charge of \$285 is awarded. However, no allowance will be made for the expense of the deposition transcript for Dr. DuShuttle’s testimony. It was made a court exhibit and not submitted to the jury. Super. Ct. Civ. R. 54(f)<sup>4</sup> provides that only fees for the transcripts submitted into evidence may be awarded as costs to the prevailing party. *See Dunning v. Barnes*, 2002 WL 31814525 at 3 (Del. Super. Ct.) (awarding costs only for the deposition transcripts which were actually entered into evidence in the trial). The transcript would also duplicate the previously awarded video costs. *See Tolson, supra* at

3.

9) Banks seeks reimbursement for his expert, Lawrence Dinoff. The request asks for \$6,115.71 for his trial report and testimony and \$212.91 for travel and hotel expenses totaling \$6,328.62. Mr. Dinoff is an architect and traveled from Lancaster, Pennsylvania to testify on the second day of trial. The subject of his testimony covered design and safety features of sidewalks, ramps, and parking lots in shopping malls. His trial testimony was approximately an hour and one-half. In previous cases, the Court has found an hourly rate of \$150 to be appropriate for an expert engineer which is similar for an architect. *See McKinney v. Brandywine Court Condominiums Council, Inc.*, 2004 WL 2191033 at 4 (Del. Super. Ct.). Mr. Dinoff should be compensated on the basis of one day for the time he spent traveling, waiting to testify and actually testifying. As a practical matter, Mr. Dinoff lost a day's work which would also be true if Banks had used an expert from Wilmington. Banks is awarded \$1,200 for Mr. Dinoff's appearance together with the lodging expense of \$212.91 for a total of \$1,412.91.

10) Defendant argues that the award should be reduced by 50% to reflect Banks' contributory negligence. The Court declines to exercise its discretion in this fashion. In contesting the claim, the defense tested Banks' resolve and should bear the consequences and risks of litigation. The award of a judgment establishes the purely legal question of who is the prevailing party for purposes of calculating costs. *Graham, supra* at 829.

Considering the foregoing, the Court finds Banks is entitled to an award of costs, totaling \$2,967.91, representing \$420 in filing, service and trial request expenses, \$850 for the expert testimony of Dr. DuShuttle, \$285 for the associated video expense and \$1,412.91 for Mr. Dinoff's appearance as an expert.

**IT IS SO ORDERED.**

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Richard F. Stokes, Judge

Original to Prothonotary

cc: Andrea G. Green, Esquire  
Nancy Chrissinger Cobb, Esquire

## ENDNOTES

1. 6 *Del.C.* § 2301(d) provides:

In any tort action for compensatory damages in the Superior Court or the Court of Common Pleas seeking monetary relief for bodily injuries, death or property damage, interest shall be added to any final judgment entered for damages awarded, calculated at the rate established in subsection (a) of this section, commencing from the date of injury, provided that prior to trial the plaintiff had extended to defendant a written settlement demand valid for a minimum of 30 days in an amount less than the amount of damages upon which the judgment was entered.

2. 10 *Del.C.* § 5101 provides:

In a court of law, whether of original jurisdiction or of error, upon a voluntary or involuntary discontinuance or dismissal of the action, there shall be judgment for costs for the defendant. 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.

3. Superior Court Civil Rule 54(d) states:

Except when express provision therefore 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.

4. Rule 54(f) provides:

The fees paid court reporters for the Court's copy of transcripts of depositions shall not be taxable costs unless introduced into evidence. Fees for other copies of such transcripts shall not be taxable costs. The production and playback costs associated with any videotape deposition may also be taxable as costs if the video deposition is introduced into evidence.

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