

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

PAUL CASAROTTO,	:	
	:	C.A. No. 03C-06-018 JTV
Plaintiff,	:	
	:	
v.	:	
	:	
UNITED SERVICES	:	
AUTOMOBILE ASSOCIATION,	:	
	:	
Defendant.	:	

Submitted: October 20, 2005
Decided: January 17, 2006

ORDER

Upon Defendant's Motion for Costs.
Granted.

Mary E. Sherlock, Esquire, Dover, Delaware; attorney for the Plaintiff.

Brian T. McNelis, Esquire of Young & McNelis, Dover, Delaware; attorneys for the Defendant.

WITHAM, R.J.

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Upon consideration of the Defendant's Motion for costs, and having received no response from the Plaintiff, it appears that:

Defendant, United Services Automobile Association, filed a motion for costs pursuant to Superior Court Civil Rule 68. The Defendant may also seek fees for witnesses testifying as experts under 10 *Del. C.* § 8906.¹ In support of its motion, Defendant stated that it made an Offer of Judgment to Plaintiff, Paul Casarotto, in the amount of \$15,101.00. However, Plaintiff rejected that offer and the case proceeded to trial. A jury awarded Plaintiff \$22,500.00, but \$15,000.00 was subtracted from that amount because Plaintiff had settled with the under insured tortfeasor for \$15,000.00. Thus, Plaintiff was left with a total judgment against Defendant in the amount of \$7,500.00. Defendant asserts that the costs it incurred after the unsuccessful Offer of Judgment were \$6,800.00. This amount consists of \$800.00 for its independent medical expert's evaluation and report, and \$6,000.00 for the expert's trial preparation and live testimony. Defendant's independent medical expert was Dr. Richard I. Katz, a neurologist.

For the reasons set forth below, Defendant's motion for costs is *granted* in the amount of \$4,600.00.

Discussion

Superior Court Civil Rule 68 states, in pertinent part:

¹ Section 8906 states, in pertinent part, "The fees for witnesses testifying as experts . . . 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 and shall be collected and paid as other witness fees are now collected and paid."

At any time more than 10 days before the 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 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.

In *Sweren v. Sheehy*,² this Court discussed awarding costs pursuant to Rule 68, specifically, medical expert witness fees. It is clear that an award of costs under this Rule is mandatory.³ However, the Rule does not give guidance as to what constitutes “recoverable ‘costs.’”⁴ In terms of medical expert witness costs, this Court has held, “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.’”⁵ Additionally, this Court recognizes the Medico-Legal

² 2001 Del. Super. LEXIS 541.

³ *Id.* at *1.

⁴ *Id.* at *1-2.

⁵ *Id.* at *3.

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Committee⁶ regarding fees for court appearances.⁷ Notably, in its committee meeting of May 4, 2005, the Medico-Legal Committee set the rate of a neurologist's live testimony at \$2,000.00 for the first hour and \$1,200.00 for each additional hour.

In the case *sub judice*, Dr. Katz's bills are broken down as follows:

Initial evaluation and report	\$800.00
Review of medical file in preparation for live testimony (1 hour)	\$400.00
Review of medical file and discussion with Mr. McNelis (1.5 hours)	\$600.00
Travel from Philadelphia to Kent County Superior Court (5 hours)	\$2,000.00
Live testimony in Kent County Superior Court	\$3,000.00

As mentioned earlier, these amounts total \$6,800.00. However, I find that these costs are unreasonable, and adjust them as follows:

Initial evaluation and report	\$500.00
Review of medical file in preparation for live testimony (1 hour)	\$200.00
Review of medical file and discussion with Mr. McNelis (1.5 hours)	\$300.00
Travel from Philadelphia to Kent County Superior Court (3 hours)	\$600.00
Live testimony in Kent County Superior Court	\$3,000.00

Regarding the initial evaluation and report, without further information this

⁶ The *Sweren* case refers to the Committee as the "Delaware Medico-Legal Affairs Committee." However, the committee report that this Court has refers to the committee as the "Joint Medico-Legal Relations Committee." For clarification purposes, this Court will refer to the committee as the "Medico-Legal Committee." See *Clough v. Wal-Mart Stores, Inc.*, 1977 Del. Super., LEXIS 427.

⁷ *Id.*

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Court, not knowing how long the examination was, finds that \$500.00 is reasonable for one office visit and accompanying doctor's report. I find that a \$400.00 hourly rate is unreasonable, and reduce that amount to \$200.00. The time allocations for review of the medical file are reasonable, however, the rate is now \$200.00 an hour. I find that the travel time from Philadelphia to Dover is one and a half hours; thus, the round trip travel time is three hours and the total compensation is for three hours at \$200.00 an hour. Lastly, I have kept the live testimony fee at \$3,000.00, which is a reasonable amount in light of the Medico-Legal Committee's fee schedule for a neurologist. Dr. Katz's total reasonable fees amount to \$4,600.00.

Based on the foregoing, Defendant's motion for costs is *granted* in the amount of \$4,600.00. IT IS SO ORDERED.

/s/ William L. Witham, Jr.

R.J.

WLW/dmh

oc: Prothonotary

xc: Order Distribution