

Submitted: January 14, 2002
Decided: January 18, 2002

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Re: *Farm Family Casualty Ins. Co. v. Whaley Seed Store, Inc.*
Civil Action No. 00C-04-002 JRS/SCD

Dear Counsel:

The defendant seeks an award of costs, reimbursement for the cost of expert testimony at trial. Superior Court Rule Civil 54(d) provides that "costs shall be allowed . . . to the prevailing party upon application to the Court . . . unless the Court otherwise directs."

The defendant was successful at trial. The plaintiff resists the payment of costs, \$1,404.00, not for the usual reasons--too high a rate or too many hours--but because the defendant failed to comply with the discovery rules and the specific case management order requiring identification of the expert. Not until the plaintiff compelled the production of the expert's report, after the expiration of all deadlines and shortly before the trial date, did the expert's report become available. Plaintiff contends that he was denied the opportunity to discover the expert's opinion by any means other than a deposition, which was rescheduled twice, according to the docket, in order to accommodate the defense attorney.

The case management order in this case was entered on March 9, 2001, after a conference with counsel. The deadline for production of the defendant's expert report was June 30, 2001, three months **after** the production of the plaintiff's report. At trial the defendant's expert, Mr. Carlson, testified that he was first retained to evaluate the case on July 26, 2001. The plaintiff filed a motion to compel the expert's report on September 25, the motion was granted on October 29. The expert had issued his report on October 26.

That report was delivered to plaintiff's counsel on or before the date set by the Court as a result of the motion to compel, November 7. At that point the report was four months overdue. It was then only six weeks prior to the date of trial. As a result of the tardy delivery of the report, the plaintiff had no opportunity to file a summary judgment motion, the date for such a motion having transpired on September 30, or to take further discovery. Plaintiff took the expert's deposition on November 29, the earliest date available.

The plaintiff was required to pay the costs of the deposition of the defendant's expert, in the normal course. But the defendant objects to the full payment for the time expended by the expert at trial because of the chronic delays associated with expert discovery.

The delays enumerated are enhanced by another fact not discussed by the parties in connection with this motion. I did not handle this case pre-trial; it was transferred to me on the day of trial. The morning of the trial I was presented with a *Daubert*¹ motion by the defendant. The motion had been filed three days before. Under the circumstances, and having no familiarity with the case, it was unreasonable to present a *Daubert* motion which would, in effect, be case dispositive. The case went forward and all the testimony was presented, the plaintiff's expert testifying over the objection of the defendant. The jury returned a verdict for the defendant, a verdict well grounded in the evidence at trial. Had the *Daubert* motion been presented in a timely fashion, it is probable that it would have been granted. Without experts, the plaintiff could not have proceeded to trial. The delays associated with the failure to adhere to case management deadlines had a cost to the system, and to the parties who sought redress of their grievances.

In the exercise of my discretion, I am denying the defendant's motion for costs.

IT IS SO ORDERED.

Very truly yours,

Susan C. Del Pesco

SCD/msg
xc: Prothonotary Civil File

¹ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993).