

**SUPERIOR COURT
OF THE
STATE OF DELAWARE**

RICHARD R. COOCH
RESIDENT JUDGE

**NEW CASTLE COUNTY COURTHOUSE
500 N. KING STREET, SUITE 10400
WILMINGTON, DELAWARE 19801
(302) 255-0664**

February 12, 2004

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Re: Fisher et al v. Gray
C.A. No. 03C-09-232 RRC

Submitted: February 11, 2004
Decided: February 12, 2004

**On Defendant's Motion for Reimbursement of Cancellation Fee
Incurred by Plaintiff's Failure to Attend Scheduled Physical
Examination. DENIED.**

Dear Counsel:

Before this Court is a motion of Defendant Jeffery Gray ("Gray")
seeking reimbursement of a \$900 cancellation fee incurred by Gray as a

result of Plaintiff Carol Fisher (“Fisher”) not attending an examination by Gray’s designated physician, Dr. Wai Wor Phoon. Fisher was originally scheduled to be examined on December 15, 2003 but requested a new examination date as she was scheduled for jury duty on that day. The examination was rescheduled for January 5, 2004. Apparently, Fisher, through oversight, neglected to attend the physical exam on January 5. Reimbursement for the cancellation fee incurred by Gray was part of a motion filed by Gray on January 23, 2004 to compel Fisher to attend an examination by Dr. Phoon. The motion to compel was granted on February 10, 2004 and requires Fisher to be examined by Dr. Phoon on February 19, 2004 at 9:00 a.m.

The issue before this Court is by what authority may the Court order a reimbursement of a cancellation fee from a cancelled physical examination in the absence of a prior order requiring the party to submit to a physical exam. The question of which Superior Court Civil Rule(s) may address this issue was raised at oral argument for the first time and had not been briefed. At oral argument, Fisher argued that Superior Court Civil Rules 35 and 37 as a basis for the relief sought by Gray were inapplicable. Gray argued that Superior Court Civil Rule 16 provided the basis for Fisher being required to reimburse him for the cancellation fee.

This Court, however, does not reach this issue of which, if any, of these rules apply. The Court hereby denies Gray's request for reimbursement of the cancellation fee, but without prejudice to Gray to potentially renew it pursuant to Superior Court Civil Rule 54(e) at such time as a judgment shall be entered in the case. Rule 54(e), which addresses judgment and costs, provides that

“[i]f at any time during the progress of an action it appears to the Court that . . . [a] party is otherwise cause[d] unnecessary expense, the Court may, in its discretion, order such unnecessary expense to be taxed against the party causing the same, without regard to the outcome of the action.”

Accordingly, Gray's request to be reimbursed for Dr. Phoon's fee for the cancellation of the examination of Carol Fisher is **DENIED**.

IT IS SO ORDERED.

Richard R. Cooch

cc: Prothonotary