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Decided: February 21, 2001

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RE: *Meuser v. Sowiak*
C.A.No. 98C-11-155-JOH
Upon Motion of Defendant for Assessment of Costs

Counsel:

Defendant Joseph Sowiak has moved for assessment of costs seeking reimbursement for expenses incurred as a result of the testimony of Dr. Karl Rosenfeld. Dr. Rosenfeld is an orthopaedic surgeon who performed an independent medical examination on plaintiff Paul Meuser.

Meuser was the driver of a car which was struck by a car driven by Patricia Andrews whose car was hit by a vehicle driven by defendant Sowiak. The jury found Sowiak not to be negligent and plaintiffs' post-trial motion to overturn that verdict has just been denied.¹

Sowiak seeks an expert witness fee for Dr. Rosenfeld in the amount of \$3,400 and reimbursement for a copy of his trial deposition in the amount of \$286. Dr. Rosenfeld was deposed in his office in Pennsylvania (where Meuser lives, also), which lasted 45 minutes. It was read to the jury but a copy was not introduced into evidence.

¹*Meuser v. Sowiak*, Del.Super., C.A.No. 98C-11-155, Herlihy, J. (February 15, 2001).

Superior Court Civil Rule 54(d) provides:

***Costs.* Except when express provision therefor 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.**

Whether to award costs to the prevailing party is a matter of discretion.² The numerous opinions of this Court concerning costs demonstrate how that discretion has been exercised in a number of ways and probably not always consistently.

Where it has been consistent, however, is not to award the cost of a deposition which is not introduced into evidence. Dr. Rosenfeld's deposition was read to the jury. Consistent with this Court's evidentiary practice, a copy was not introduced into evidence. Also, consistent with this Court's practice and Civil Rule 54(h) is that, in these circumstances, the prevailing party is not awarded the cost of the deposition transcript.³ Accordingly, the request for reimbursement of the \$286 deposition fee is DENIED.

There are several factors which go into whether defendant Sowiak is entitled to recover all, part or none of Dr. Rosenfeld's fee. Sowiak was the prevailing party. Meuser, however, had been awarded over \$31,000 by the arbitrator. Sowiak filed for a trial *de novo*. He did not, however, file an offer of judgment as provided in Superior Court Civil Rule 68. The extent of Meuser's injuries was contested at trial. Also, to be taken into account is that Dr. Rosenfeld was deposed in his office. He did not have to travel to Delaware. The deposition took only 45 minutes. He is an

²*Graham v. Keene Corp.*, Del.Supr., 616 A.2d 827, 829 (1992).

³*Maconi v. Price Motorcars*, Del.Super., C.A.No. 91C-08-178, Del Pesco, J. (December 1, 1993).

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orthopaedic surgeon and probably commands higher fees for patient care than a family practitioner.

Meuser offers a myriad of arguments why Sowiak should not be reimbursed for any part of his fee. One of them is that he (the insurance company) should “learn to win with grace.”⁴ That argument has a certain emotional appeal, as well as a practical side. The practical side relates to the often unequal financial position of the opposing parties, the defendant being represented by an insurance company and a plaintiff often with not much discretionary money. Courts must be mindful of the chilling effects on deserving plaintiffs of decisions on these kinds of issues.

Taking into account all of the above, the Court awards a fee for Dr. Rosenfeld in the amount of \$750.

IT IS SO ORDERED.

Sincerely,

JOH/bsr
Original to Prothonotary

⁴See *Sartin v. Pinkowski*, Del.Super., C.A.No. 96C-02-053, Quillen, J. (November 19, 1998).