IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

SANDRA RUMANEK,)
Plaintiff,)
V.) C.A. No. N11C-04-108 CEB
MARGARET COONS AND THERESA THEODORE,))
,	
Defendants.)

Date Submitted: July 11, 2013 Date Decided: September 26, 2013

ORDER

Upon Defendant's Motion for Costs.

GRANTED IN PART and DENIED IN PART.

On this 26th day of September, 2013, upon consideration of Defendant Margaret Coon's ("defendant") motion for costs, the Court finds that:

1. This case arises from a November 2009 automobile accident in which a vehicle driven by Plaintiff Sandra Rumanek ("plaintiff") was struck from behind by defendant's vehicle. On May 14, 2013, defendant made an offer of judgment in the amount of \$30,000. The offer was not accepted. Following a three-day jury trial, judgment was entered in favor of plaintiff in the amount of \$1. Defendant

now moves for costs pursuant to 10 *Del. C.* § 5101 and Superior Court Civil Rules 54(d) and 68.

- 2. 10 *Del. C.* § 5101 calls for the award of costs to the party in whose favor the judgment was entered. In this case, judgment was for the plaintiff, albeit in a nominal amount. Defendant's reliance on section 5101 is misplaced. Rule 54(d) provides that "[e]xcept 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. . ." Again, judgment was for the plaintiff and not the defendant and again, defendant's reliance on this provision is misplaced.
- 3. Defendant is on stronger ground under Rule 68. Rule 68 mandates that the Court impose costs against a party that has rejected an offer of judgment if the final judgment was not more favorable to the offeree than the offer. The party seeking costs must show that an offer of judgment was filed at least ten days prior to trial and that the costs sought were incurred after the filing of the offer. Thus, Rule 68 differs from Rule 54(d) in that it is non-discretionary with the Court that costs be awarded and the costs that may be awarded are only those incurred after

¹ Bond v. Yi, C.A. No. 05C-05-185 MJB, 2006 WL 2329364, at *1 (Del. Super. Ct. Aug. 10, 2006).

² *Id*.

making the offer of judgment.³ Notwithstanding the mandatory direction of Rule 68, the Court remains constrained by 10 *Del. C.* § 8106 as it relates to the award of expert witness fees: that statute calls upon the Court to award fees for expert witnesses "in its discretion." The bulk of "discretionary" rulings regarding the propriety of expert witness fee applications arise under Rule 54(d), thus making Rule 54(d) rulings relevant, but not controlling applications under Rule 68.

- 4. In this case, defendant made the offer of judgment more than a month before trial, the majority of the requested costs were incurred after the offer was made subject to those mentioned below, and the verdict at trial was lower than the offer amount. Thus, Rule 68 costs are appropriate.
- 5. Defendant requests reimbursement for the \$398.75 cost in preparing the videotape trial deposition of Roxanne Snelling Elliott and the \$429.05 transcript fee for Ms. Elliot's deposition.

whether amounts requested pursuant to Rule 68 are recoverable as costs under Rule 54 and applicable statutes, including 10 *Del. C.* § 8906. Therefore, if Defendant satisfies the requirements of Rule 68, the Court *must* tax costs that may be awarded under Rule 54 and other applicable statutes." *Miller v. Williams*, C.A. No. N10C-10-121 MJB, 2012 WL 3573336, at *1 (Del. Super. Ct. Aug. 21, 2012) (quoting *Summerhill v. Iannarella*, No. 07C-11-071, 2009 WL 891048, at *1 (Del. Super. Ct. Apr. 1, 2009)); *Casarotto v. United Servs. Auto. Ass'n*, CIV.A. 03C-06-018JTV, 2006 WL 336746, at *1 (Del. Super. Ct. Jan. 17, 2006); *Dunkle v. Prettyman*, No. Civ.A. 99C-10-265JRS, 2002 WL 833375, at *3 (Del. Super. Ct. Apr. 24, 2002).

⁴ Miller, 2012 WL 3573336, at *2.

- 6. According to plaintiff, this deposition was of a defense "fact witness," accomplished shortly before trial only because defense counsel advised that his witness was unavailable for trial and a video deposition was the only way the defense would be able to present this testimony. Thus, the deposition was taken only as an accommodation to the defense and in order to further the jury's ultimate search for the truth. Plaintiff's counsel could have resisted, in which case the jury would likely not have had the benefit of the witness' testimony. His cooperation is now being rewarded with a motion to tax the costs of the deposition to the plaintiff. Had the witness testified live, there would be no basis upon which to award costs.
- 7. The Court's dissatisfaction with this result notwithstanding, Rule 68 is mandatory and costs must be awarded. We can only suggest that counsel who accommodates his opponent after an offer of judgment is made would be well served to protect against applications such as this one by agreeing to the deposition only on condition that the party seeking the deposition agree not to seek costs for the deposition in the event the verdict does not exceed the offer of judgment.
- 8. Plaintiff's request will, however, be reduced because the Court does not allow recovery for both the costs of videotaping the deposition and preparing the

transcript, as these costs are duplicative.⁵ Because the defendant introduced the video deposition at trial, she will not be reimbursed for the transcript.⁶

- 9. Next, defendant requests \$5,500 for the travel time and trial testimony of expert witness Dr. Howard Levin, M.D. Defendant has the burden of providing the Court with sufficient documentation to award compensation for the expert witness fees.⁷ Although defendant provided the Court with an invoice in the amount of \$3,500 for trial testimony, she has not provided any support for the additional \$2,000. Therefore, the Court will limit the award to \$3,500.
- 10. Plaintiff further contends that even as so limited, the request is excessive. In *Slawinski v. Duncan*, the Court determined that "when a physician testifies as an expert, for three hours or less, a minimum witness fee should be allowed . . . based upon a flat amount for a one-half day interruption in the physician's schedule." When determining the appropriate amount of fees to award medical experts, the Court frequently defers to the Medico-Legal Affairs

⁵ Summerhill, 2009 WL 891048, at *2; Gress v. Viola, No. Civ. A. 04C-03-014 JTV, 2007 WL 1748657, at *2 (Del. Super. Ct. May 31, 2007).

⁶ *Id*.

⁷ Carlucci v. Kish, Civ. A. No. 93C-02-027, 1994 WL 682535, at *3 (Del. Super. Ct. Oct. 14, 1994).

⁸ 608 A.2d 730, at *3 (Del. 1992).

Committee of the Medical Society of Delaware.⁹ Based on the Committee's 2002 recommendation, a flat fee of \$1,300 to \$1,800 per half day is appropriate.¹⁰ Adjusting for inflation,¹¹ a current reasonable rate for a physician to testify at a flat fee is between \$2,028 and \$2,808.¹² Because defendant's requested fee of \$3,500 is outside the generally accepted range, the Court will reduce the expert fee to \$2,800.

11. Defendant also requests \$437 for Lexis filing fees. Pursuant to Rule 68, defendant is only entitled to costs incurred *after* the making of the offer. ¹³ However, defendant only provides documentation for costs that were incurred prior

⁹ Enrique v. State Farm Mut. Auto. Ins. Co., 08C-07-026, 2010 WL 2636845, at *1 (Del. Super. Ct. June 30, 2010), aff'd, 16 A.3d 938 (Del. 2011).

¹⁰ Dunkle, 2002 WL 833375, at *4.

¹¹ There has been an increase in the consumer price index ("CPI") from May 2002 to July 2013 56%. Compare Bureau of Labor Statistics, U.S. Dep't of Labor. of http://www.bls.gov/news.release/archives/cpi 06182002.pdf (Medical Care Services, May 2002 Unadjusted Index: 291.2), with Bureau of Labor Statistics, U.S. Dep't of Labor, http:// http://stats.bls.gov/news.release/archives/cpi 08152013.pdf (Medical Care Services, July 2013 Unadjusted Index: 453.773).

¹² See Reinke v. Furbush, CIV.A. 08C-09033 WLW, 2011 WL 7063367 (Del. Super. Ct. Dec. 1, 2011) for more information on calculating the correct fee.

¹³ "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." Del. Super. Ct. R. 68 (emphasis added).

to the offer on May 14, 2013.14 Because she has not met her burden of proving

that the costs were incurred after the offer, defendant is not entitled to these costs.

12. Finally, defendant requests \$775.90 for defendant's costs incurred

while staying at a hotel during the trial. Although plaintiff claims the defendant is

not entitled to the lodging expenses, the Court has held that "[t]ravel expenses are a

matter of judicial discretion" based on the circumstances of the case. 15 The Court

finds that defendant is entitled to these expenses because she is physically disabled,

lived in Maryland at the time of trial, and made an offer of judgment which far

exceeded plaintiff's recovery.

For the foregoing reasons, defendant's motion for costs is **GRANTED IN**

PART and DENIED IN PART. Defendant is hereby awarded costs in the total

amount of \$3,974.65.

IT IS SO ORDERED.

/s/ Charles E. Butler

Judge Charles E. Butler

¹⁴ Although defendant's last two Lexis filing costs are listed after the offer date of May 14, 2013, it is clear that the costs were actually incurred prior to this date as the last entry was for the filing

fee of the offer.

¹⁵ Rosenberg v. Crichton, C.A. No. 09C-01-033 (WLW), 2011 WL 5316771, at *1-2 (Del.

Super. Ct. Sept. 23, 2011).

7