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

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| **CARL A. LAWSON,** | ) | |
| | ) | |
| **Plaintiff,** | ) | |
| | ) | |
| **v.** | ) | **C.A. N11C-07-172 PRW** |
| | ) | |
| **KELLOGG MARINE, INC., a/k/a LAND 'N' SEA DISTRIBUTING, INC., a subsidiary of BRUNSWICK CORPORATION,** | ) | |
| | ) | |
| **Defendants.** | ) | |

**ORDER**

WHEREAS trial in the above-captioned matter was held on the issues of liability only from April 29 to May 1, 2013;[1]

WHEREAS the jury returned a verdict for Defendant, and this Court entered a judgment in favor of the same;

WHEREAS Defendant had filed a pre-trial Motion to Compel on February 9, 2013 and a related Motion for Sanctions on February 20, 2013;

[1] The trial proceedings had been bifurcated by agreement of the parties and approval of the Court on April 18, 2013. *See* Docket Item No.155, Trans. I.D. No. 51847803, Apr. 18, 2013.

WHEREAS Plaintiff had filed a pre-trial Response to the Motion to Compel on February 22, 2013;

WHEREAS the Court pre-trial had granted Defendant's Motion for Sanctions against Plaintiff after oral argument on April 1, 2013;

WHEREAS Defendant pre-trial had submitted an accounting of "the actual costs incurred by defendant in preparing its Motion to Compel, Motion for Sanctions and supplemental briefing as well as preparing for and attending oral argument in pursuit of its discovery," totaling $7,232.50.[2]

WHEREAS Plaintiff's Counsel pre-trial had provided full payment of these costs in the amount of $7,232.50 on April 22, 2013;[3]

WHEREAS Defendant filed a post-trial Motion for Costs pursuant to Del. Super. Ct. Civ. R. 54(d) for the amount of $7,500.75 on May 2, 2013,

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[2] *See* Def's Ltr. to Court re: Sanctions Against Pltf, Trans. ID No. 51805786, April 16, 2013;

[3] After the Defendant's accounting of costs related to the Motion to Compel was submitted to the Court on April 16, 2013, there was no Plaintiff's response thereto filed with the Court. Thus, the Court believed this to be a matter still outstanding and invited Plaintiff Counsel's response to that accounting. *See* Court's Ltr. to Counsel, Trans. I.D. No. 52134250, May 6, 2013. For reasons unknown to the Court, rather than notify the Court that the costs/sanctions related to the Motion to Compel had been paid, Plaintiff's Counsel again opposed the sanction in its subsequent Response. *See* Pltf's Resp. in Opposition to Def's Mot. to Compel, Trans. ID No. 52303766, May 15, 2013.

requesting the following:

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| Filing and Service Fees: | $944.50 |
| Transcription Fees (Trooper Kanterakis): | $361.25 |
| Transcription Fees (Dr. Bonner): | $195.00 |
| Witness Deposit (Dr. Wank): | $3,000.00 |
| Expert Witness Deposition (Dr. Bonner) | $3,000.00 |
| **TOTAL** | **$7,500.75**; |

WHEREAS Plaintiff filed a Response to Defendant's Motion for Costs on May 15, 2013, and Defendant filed a subsequent Reply on May 20, 2013;

THE COURT, having considered each party's submissions, HEREBY ORDERS the following:

With regard to the Motion to Compel and the related Motion for Sanctions, the Court will not reduce the amount of those costs/sanctions already paid by Plaintiff's Counsel to the Defendant.

With regard to the post-trial Motion for Costs, "DEL. CODE ANN. tit. 10 § 5101 and Superior Court Civil Rule 54(d) permit the Court to award costs to a prevailing party in any civil action."[4]

Plaintiff is ordered to pay Defendant $944.50 for service and filing fees.[5]

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[4] *Foley v. Elkton Plaza Assoc., LLC*, 2007 WL 959521, at *1 (Del. Super. Ct. March 30, 2007).

Defendant moved to recover $361.25 for a transcript of Trooper Vasilios N. Kanterakis's deposition.[6] While the deposition was played during the trial, the transcript was not introduced into evidence in whole or in part. Therefore, pursuant to Civil Rule 54(f), Defendant is not entitled to recover the costs of transcribing the deposition.[7]

Defendant is similarly not entitled to receive the $195 in costs for Dr. Bonner's deposition, since neither the deposition, nor the transcript of the deposition was introduced at trial.[8] Moreover, no part of the total $195 went toward creating a Court's copy of the transcript.[9]

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[5] *See* Del. Super. Ct. Civ. R. 54(d); *Dunning v. Barnes*, 2002 WL 31814525, at *3 (Del. Super. Ct. Nov. 4, 2002); *Chaplake Holdings, Ltd v. Chrysler Corp.*, 2002 WL 148088, at *46 (Del. Super. Ct. Jan. 10, 2002); *Nygaard v. Lucchesi*, 654 A2d 410, 412 (Del. Super. 1994); *see also* Ex. A to Def's Mot. for Costs.

[6] *See* Ex. B to Def's Mot. for Costs.

[7] *See Foley*, 2007 WL 959521, at *3; *Banks v. J&N Hickman Family Ltd. P'ship*, 2006 WL 240641, at *2 (Del. Super. Ct. Jan. 11, 2006); *Dunning*, 2002 WL 31814525 at *3; *Bejger v. Shreeve*, 1997 WL 524057, at *3 (Del. Super. Ct. Apr. 15, 1997). *Contra Nygaard*, 654 A.2d at 413 (citing *Sliwinski v. Duncan*, 1992 WL 21132, at *4 (Del. Jan. 15, 1992)). Even if the transcript of Trooper Kanterakis's deposition had been introduced into evidence, Defendant would only have been entitled to recover for the Court's copy of the transcript and would not be entitled to costs for the additional copy ordered or the "Courier Charge." *Foley*, 2007 WL 959521, at *3; *McNatt v. Colonial Sch. Dist.*, 2005 WL 1953032, at *2 (Del. Super. Ct. Aug. 4, 2005); *and see* Del. Super. Ct. R. 54(f); Ex. B to Defendant's Motion for Costs.

[8] *Id.*

[9] *See supra* note 7.

Defendant moved to recover a $3,000 deposit paid to Dr. Harvey Wank to secure Dr. Wank's live courtroom testimony.[10] Dr. Wank, however, did not testify. Therefore this deposit will not be deemed taxable as costs.[11]

Finally, Defendant moved to recover $3,000 in costs associated with taking a deposition of the trial testimony of its medical expert, Dr. James Bonner.[12] Defendant decided to move forward with this deposition notwithstanding the stipulated - to bifurcation of the trial the day before. Defendant incurred this expense at its own risk. Because Dr. Bonner's deposition was not introduced into evidence, it will not be deemed taxable as costs.[13]

AND NOW, in consideration of Defendant's Motion for Costs and Motion to Compel, Plaintiff's Responses to the same, and Defendant's

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[10] *See* Ex. C to Def's Mot. for Costs.

[11] Del. Super. Ct. Civ. R. 54(g); *State v. 0.0673 Acres of Land*, 224 A.2d 598, 602 (Del. 1966) ("A retained expert may or may not become a witness. If he does, a witness fee is taxable as costs under § 8906 . . . ."); *Banks*, 2006 WL 240641 at *2 ("Further, it is well settled that the expert's fee that is recoverable as a cost of litigation is limited to the time necessarily spent in actual attendance upon the Court for the purpose of testifying." (quotations omitted)).

[12] *See* Ex. D to Def's Mot. for Costs.

[13] DEL. CODE ANN. tit 10, § 8906; Del. Super. Ct. Civ. R. 54(h); *Bond v. Yi*, 2006 WL 2329364, at *2 (Del. Super. Ct. Aug. 10, 2006).

Replies thereto; Defendant's Motion for Costs is GRANTED IN PART. Plaintiff is ordered to pay Defendant $944.50.

**SO ORDERED this 24TH day of May, 2013**

**PAUL R. WALLACE, JUDGE**

Original to Prothonotary
cc: Counsel via File and Serve