

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

IN RE: ASBESTOS LITIGATION

Limited to:	:	
HENDERSON, BRUCE	:	C.A. No. 09C-07-188 ASB
HENDERSON, ELIZABETH	:	C.A. No. 09C-04-293 ASB

**UPON PLAINTIFFS' MOTION FOR COSTS AND INTEREST  
GRANTED IN PART and DENIED IN PART**

Submitted: March 1, 2011

Decided: March 22, 2011

This 23rd day of March, 2011, it appears to the Court that:

1. Plaintiffs, the family members of Elizabeth Henderson and her son Bruce Henderson, filed suit against various manufacturers and suppliers of asbestos-containing products, alleging that Elizabeth and Bruce each died of mesothelioma contracted as a result of asbestos exposure. Plaintiffs proceeded to trial against two automotive parts manufacturers, Defendants Dana Companies, LLC ("Dana") and Zoom Performance Products ("Zoom"). Following a two-week jury trial, both defendants were found liable, and the plaintiffs were awarded a total of \$1.74 million in damages.

2. Plaintiffs filed the instant motion for costs pursuant to Superior Court Civil Rule 54(d) on February 16, 2011. Plaintiffs' motion requests the following costs, which total \$18,188.00:

Filing and Trial Fees	\$538.00
Dr. Barry Castleman Trial Testimony Fee	\$1,400.00
Dr. Barry Castleman Travel and Expenses	\$2,390.00
Dr. Laura Welch Trial Testimony Fee	\$3,400.00
Dr. Laura Welch Travel and Expenses	\$1,065.00
William Ewing Trial Testimony Fee	\$1,640.00
William Ewing Travel and Expenses	\$2,723.00
Mary Hessdorffer Trial Testimony Fee	\$375.00
Mary Hessdorffer Travel and Expenses	\$951.00
Bruce Henderson Video Deposition Conference Room Fee	\$295.00
Bruce Henderson Video Deposition Transcript	\$729.00
Bruce Henderson Video Deposition Videographer Fee	\$1,380.00
Bruce Henderson Discovery Dep. Conference Room Fee	\$187.00
Bruce Henderson Discovery Deposition Transcripts	\$1,115.00

Plaintiffs also seek pre-judgment interest in the amounts of \$38,052.35 from Dana and \$28,279.23 from Zoom, as well as post-judgment interest at the legal rate of 5.75%.

3. Dana and Zoom oppose Plaintiffs' request for a total of \$7,129.00 in expert witness travel fees and expenses, arguing that the amount sought is excessive in view of the travel time required. Defendants further argue that the \$729.00 transcript fee associated with Bruce Henderson's video deposition is not recoverable because the deposition video was played for the jury at trial, rendering the transcript duplicative. Dana and Zoom do not oppose the remaining costs, and do not object to Plaintiffs' demands for pre- and post-judgment interest.

4. Under Superior Court Civil Rule 54(d) and 10 *Del. C.* § 5101, the prevailing party in a civil action may recover costs against adverse parties.<sup>1</sup> In addition, 10 *Del. C.* § 8906 permits the prevailing party to recover expert witness fees in an amount fixed by the Court. Generally, the prevailing party may only recover those expert witness fees associated with time spent testifying or waiting to testify, along with reasonable travel expenses.<sup>2</sup> The amount to be awarded for expert witness testimony is a matter of the trial court's discretion.<sup>3</sup>

5. The Court agrees with Defendants that adjustments must be made to Plaintiffs' requests for their experts' travel fees and expenses, although it declines to reduce Plaintiffs' award as dramatically as Defendants urge. Plaintiffs' use of out-of-state experts was entirely appropriate given the specialized testimony needed in an asbestos-exposure case. Accordingly, the Court finds nothing objectionable in the fact that certain of Plaintiffs' experts may have spent more time traveling than testifying. The Court also cannot conclude that an expert's traveling fees and expenses are unreasonable simply because they exceed the

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<sup>1</sup> 10 *Del. C.* § 5101("Generally a party for whom final judgment in any civil action, or on a writ of error upon a judgment is given in such action, shall recover, against the adverse party, costs of suit, to be awarded by the court."); Super. Ct. Civ. R. 54(d) ("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.").

<sup>2</sup> *Spencer v. Wal-Mart Stores East, LP*, 2007 WL 4577579, at \*1 (Del. Super. Dec. 5, 2007).

<sup>3</sup> *Taveras v. Mesa*, 2008 WL 5244880, at \*1 (Del. Super. Dec. 15, 2008) (citing *Donovan v. Del. Water & Air Res. Comm'n*, 358 A.2d 717, 722-23 (Del. 1976)).

witness's testimonial fee. Nevertheless, reimbursement for an expert's travel time will not be awarded at the same rate charged for the expert's testimonial time.<sup>4</sup> Furthermore, the party seeking costs is expected to provide some itemization or accounting from which the Court and opposing counsel can assess the basis for and appropriateness of the request.<sup>5</sup>

6. Dr. Castleman's invoice to Plaintiffs included \$1800.00 for "travel" (presumably for travel time) and \$590.00 for "expenses," including his hotel room. The invoice does not record the duration of Dr. Castleman's trip or offer any further itemization of his expenses. Dr. Castleman traveled from the Baltimore area. His testimony lasted less than half a day. Even accepting the necessity of a hotel stay and an estimated three to four hours of travel time, the Court considers \$2,390.00 to be an unreasonably excessive amount for his travel time and expenses. Defendants have highlighted cases in which expert physicians' travel fees and expenses have been reduced to \$250.00 for four or five hours of travel time.<sup>6</sup> Taking into account increases in the price index for travel, a single night's

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<sup>4</sup> *E.g., Dunning v. Barnes*, 2002 WL 31814525, at \*4 (Del. Super. Nov. 4, 2002) ("[A]n expert's reasonable and ordinary traveling expenses may be reimbursed. However, costs should not be [assessed] at the expert's hourly testifying rate.").

<sup>5</sup> *Wilson v. James*, 2010 WL 2683023, at \*4 (Del. Super. June 11, 2010); *Barnett v. Braxton*, 2003 WL 21976411, at \*3 (Del. Super. Aug. 15, 2003) (where requested costs are not identified or itemized, thereby "precluding any meaningful review by the Court of the amounts claimed," recovery may be denied).

<sup>6</sup> *See Lang v. Morant*, 2005 WL 1952930, at \*1-2 (Del. Super. Apr. 19, 2005) (collecting and applying cases).

hotel stay, as well as Dr. Castleman's normal hourly rate, which justifiably exceeds that of some physicians, and making conservative estimates due to the lack of information supporting Plaintiffs' request, the Court will adjust the award for Dr. Castleman's travel fees and expenses to \$650.00.

7. Plaintiffs' request of \$1,065.00 for Dr. Laura Welch's travel time and expenses includes \$215.00 for non-itemized travel expenses. Dr. Welch further invoiced Plaintiffs for twenty-six hours of "preparation and trial testimony" at \$425.00 per hour. Dr. Welch traveled from the Maryland-D.C. area to testify. Although her "preparation" time is non-recoverable and no detail is given as to her travel expenses, Dr. Welch would have spent approximately four to five hours of time traveling to and from the courthouse. The Court considers \$750.00 an appropriate amount for Dr. Welch's travel time and expenses.

8. Plaintiffs seek reimbursement of \$951.00 for Mary Hesdorffer's travel time and expenses, reflecting invoiced amounts of \$201.00 for transportation and \$750.00 for travel time. Hesdorffer traveled from northern Virginia. The transportation charge would appear to be high for either a round-trip train ticket or gasoline and tolls, and the invoice does not describe Hesdorffer's means of transportation. Because nothing in the invoice or record indicates that Hesdorffer stayed at a hotel, the Court will presume that she traveled by train to minimize her travel time, and will award a total of \$800.00 for her travel time and expenses.

9. William Ewing provided a far more detailed invoice of the expenses associated with his travel from Georgia than did Plaintiffs' other experts. Nevertheless, some adjustment is still required to Plaintiffs' request of \$2,723.00 for his travel and expenses. Ewing's invoice includes \$1067.12 in recoverable expenses for his airfare, car rental, mileage, and parking. However, Ewing also invoiced his travel time at his full testimonial rate of \$205.00 per hour. He spent approximately 10 hours traveling, for which the Court considers \$1,000.00 to be an appropriate award in view of his full testimonial rate. Thus, Plaintiffs' recovery for Ewing's travel and expenses will be reduced to \$2,067.12.

10. Finally, Defendants correctly point out that Plaintiffs' request for reimbursement of \$729.00 for the transcription of Bruce Henderson's videotaped deposition is duplicative of the videographer's fees. Because the deposition was introduced via video at trial, the written transcript fee is non-recoverable.<sup>7</sup>

11. For the foregoing reasons, Plaintiffs' Motion for Costs and Interest is **GRANTED IN PART and DENIED IN PART** in accordance with the above adjustments to Plaintiffs' claimed costs. Plaintiffs are entitled to recover \$14,597.12 in total costs, reflecting the following items:

Filing and Trial Fees	\$538.00
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<sup>7</sup> *Kerr v. Onusko*, 2004 WL 2744607, at \*1 (Del. Super. Oct. 20, 2004) (“[C]osts for the preparation of a transcript for a trial deposition will not be awarded when the deposition is introduced at trial via videotape.”).

Dr. Barry Castleman Trial Testimony Fee	\$1,400.00
Dr. Barry Castleman Travel and Expenses	\$650.00
Dr. Laura Welch Trial Testimony Fee	\$3,400.00
Dr. Laura Welch Travel and Expenses	\$750.00
William Ewing Trial Testimony Fee	\$1,640.00
William Ewing Travel and Expenses	\$2,067.12
Mary Hessdorffer Trial Testimony Fee	\$375.00
Mary Hessdorffer Travel and Expenses	\$800.00
Bruce Henderson Video Deposition Conference Room Fee	\$295.00
Bruce Henderson Video Deposition Videographer Fee	\$1,380.00
Bruce Henderson Discovery Dep. Conference Room Fee	\$187.00
Bruce Henderson Discovery Deposition Transcripts	\$1,115.00

Plaintiffs are entitled to pre-judgment interest in the amounts of \$38,052.35 against Dana, and \$28,279.23 against Zoom. Post-judgment interest shall accrue on Plaintiffs' awards at the legal rate of 5.75% per annum, running from the entry of the verdicts on November 23, 2010.

**IT IS SO ORDERED.**

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**Peggy L. Ableman, Judge**

Original to Prothonotary

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