

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

M&G POLYMERS USA, LLC, a)	
a Delaware Limited Liability)	
Company,)	
)	
Plaintiff,)	
)	C.A. No. 07C-11-242 PLA
v.)	
)	
CARESTREAM HEALTH, INC.,)	
a Delaware Corporation,)	
)	
Defendant.)	

ON PLAINTIFF'S MOTION FOR COSTS
GRANTED

Submitted: October 28, 2009

Decided: May 21, 2010

This 21st day of May, 2010, it appears to the Court that:

1. In this breach of contract case, Plaintiff M&G Polymers, LLC ("M&G") alleged that Defendant Carestream Health, Inc. ("Carestream") failed to fulfill a supply contract obligating it to purchase a significant portion of its requirements of the resin polyethylene terephthalate (PET) from M&G. After a three-week trial, lasting from September 9 to September 25, 2009, the jury returned a verdict in M&G's favor and awarded \$15.5 million in damages. By opinion dated April 21, 2010, this

Court denied a Motion for a New Trial filed by Carestream and granted M&G's Application for Attorneys' Fees and Expenses.¹

2. M&G has moved for costs pursuant to Superior Court Civil Rule 54(d), as well as 10 *Del. C.* §§ 5101 and 8906. M&G's motion outlines the following requested costs:

(1) Court Costs	\$2,086.50
(2) Robert Reilly Expert Witness Fee	\$9,425.25
(3) Dr. Stephen Derezinski Expert Witness Fee	\$7,220.00
Total	\$18,731.75

In addition, M&G seeks post-judgment interest at the legal rate of 5.5%.

3. Carestream's response does not oppose M&G's requests for court costs and post-judgment interest,² nor does it contest that M&G is entitled to recover some portion of its experts' fees. However, Carestream argues that M&G seeks an excessive recovery with regard to its two expert witnesses. Carestream submits that \$8,750 in costs associated with 17.5 hours Reilly spent waiting to testify on September 14 and 15, 2009, are not fully recoverable because Reilly's waiting time was caused by M&G's choice of witness order in its case-in-chief. As to Derezinski, Carestream

¹ The time required to release the instant decision resulted from the breadth of the Court's substantially lengthier April 21 opinion, which as a practical matter needed to be completed first.

² M&G's requested court costs originally included *pro hac vice* fees in the amount of \$907.50. M&G eliminated this portion of its request after Carestream raised concerns that these non-recoverable costs had been incorporated into M&G's motion.

submits that his travel expenses are entirely excludible because his presence at trial “was not necessitated by his expert testimony,” but rather by M&G’s decision to have Derezinski present throughout the trial to consult with and assist its counsel.³

4. Under Superior Court Civil Rule 54(d) and 10 *Del. C.* § 5101, the prevailing party in a civil action may recover costs against the adverse party.⁴ In addition, 10 *Del. C.* § 8906 permits the prevailing party to recover expert witness testimony 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.⁵ The amount to be awarded for expert witness testimony is a matter of the trial court’s discretion.⁶

³ Def.’s Resp. to Pl.’s Mot. for Costs, ¶ 4.

⁴ 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.”).

⁵ *Spencer v. Wal-Mart Stores East, LP*, 2007 WL 4577579, at *1 (Del. Super. Dec. 5, 2007).

⁶ *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)).

5. The request for expenses associated with Reilly's trial testimony includes \$8,750, for 17.5 hours of time spent testifying or waiting to testify at a rate of \$500 per hour,⁷ plus \$675.25 in undisputed travel expenses. Carestream asks that Reilly's professional fees be limited to the six hours he actually spent testifying, because it contends that "if he did wait, [Reilly] only waited because plaintiff had him present on September 14, 2009, but elected to call other witnesses."⁸

6. Carestream relies upon this Court's opinion in *Payne v. Home Depot*⁹ for the proposition that fees charged for an expert witness' waiting time are not recoverable to the extent that the prevailing party failed to minimize delays and wait time. In contrast to *Payne*, however, the trial in this case involved unusually lengthy cross-examinations by the defendant, which led to unanticipated delays in the plaintiff's case-in-chief that were outside of the plaintiff's control—a fact that the Court and counsel commented on during the trial.¹⁰ Therefore, the Court will permit M&G to

⁷ M&G's motion itemizes this entry as "8.75 hours of time testifying or waiting to testify @ \$500/hour = \$8,750," whereas Reilly's invoice describes two days of 8.75 hours spent testifying or waiting to testify, which supports the \$8,750 figure. The Court therefore presumes that M&G intended by its motion to request Reilly's fee of \$500 per hour for two days, each 8.75 hours in length.

⁸ Def.'s Resp. to Pl.'s Mot. for Costs, ¶ 3.

⁹ 2009 WL 659073, at *8 (Del. Super. Mar. 12, 2009).

¹⁰ Trial Tr., Sept. 14, 2009 (P.M. Session), at 105:20-106:1.

recover Reilly's charge for three hours of waiting time to reflect that M&G was not wholly responsible for the circumstances that led to his spending an extra day in the courtroom prior to his testimony. M&G is entitled to recover \$4,500 for Reilly's time spent testifying or waiting to testify, as well as \$675.25 to compensate for his travel expenses.

7. Unlike Reilly, Derezinski was present throughout the first two weeks of trial to observe other witnesses' testimony and consult with M&G counsel. In its decision granting M&G's Application for Attorneys' Fees and Expenses, the Court awarded M&G fees associated with Derezinski's role as a trial consultant, which M&G estimated at \$81,000. That estimate excluded the expenses claimed in the instant Motion for Costs, in which M&G seeks to recover \$7,220 in costs associated with Derezinski's trial testimony, his travel time and travel expenses, and a single night's hotel accommodations.

8. Carestream contends that Derezinski's travel expenses—consisting of \$3,200 for 16 hours of travel time charged at \$200 per hour, plus \$324 in mileage for the 720-mile round trip—are nonrecoverable. Because Derezinski acted as both a testifying expert and a trial consultant, Carestream argues that his “travel from Rochester, New York to Wilmington

and back was not necessitated by his expert testimony. . . . He was going to travel to Delaware to assist M&G counsel in any event.”¹¹

9. The Court concludes that Derezinski’s “double duty” as a trial consultant does not vitiate M&G’s right to recover the fees and expenses arising from his travel to and from Wilmington. In *Stevenson v. Henning*, the Delaware Supreme Court indirectly addressed the recoverability of travel expenses under 10 *Del. C.* § 8906 where a testifying expert has provided trial consultation to the prevailing party.¹² The Supreme Court overturned the trial court’s expert witness fee award to the extent it “included time spent [by defendants’ testifying experts] in the court room listening to plaintiff’s witnesses and consulting with counsel.”¹³ The *Stevenson* Court held that, in addition to the experts’ time spent testifying, “*only travel time* and waiting time may be added as ‘time necessarily spent in attendance upon the court.’”¹⁴ This Court reads *Stevenson* to support the prevailing party’s right to recover travel time and expenses to the extent they are attributable to an expert’s “attendance upon the court” to testify, regardless of whether the

¹¹ Def.’s . Resp. to Pl.’s Mot. for Costs, ¶ 4-5.

¹² 268 A.2d 872 (Del. 1970).

¹³ *Id.* at 874.

¹⁴ *Id.* at 874-75 (emphasis added).

expert also provided trial consultation. Carestream has not cited, nor has the Court been able to find, any case law suggesting that a testifying expert's dual role as a trial consultant overrides the general rule that travel time and expenses occasioned by the expert's trial testimony are to be included in an award under 10 *Del. C.* § 8906.

10. If a testifying expert incurred travel expenses solely attributable to consulting or other non-recoverable activities—for instance, by traveling a significant distance to and from the courthouse on days he or she was not testifying—then clearly the Court would be required to exclude that portion of the requested expenses as time not “necessarily” spent in attendance upon the Court for the purposes of testifying. However, under the circumstances of this case, the fees and expenses requested have been properly limited to those traceable to Derezinski's testimony. Derezinski would have incurred time and expense traveling to testify even if he had not also acted as a consultant during trial. Although he lives a significant distance from the courthouse, it cannot seriously be contended that it was inappropriate or unreasonable for M&G to retain him as an expert despite his location.¹⁵ Prior to their falling out, the parties mutually selected him to work as an

¹⁵ The Court notes that flights between Rochester and Philadelphia would not have saved a significant amount of travel time when compared to Derezinski's eight-hour drive, and might have increased his total travel expenses.

independent consultant on alleged technical issues arising from Carestream's use of M&G's PET. Thus, he was intimately familiar with the underlying events. During trial, both parties repeatedly referred to his unique expertise, not only on the topic of extrusion technology generally, but with regard to the particular extruder at issue in this case, which he designed.

11. Furthermore, because Derezinski's testimony involved technical information and was in part responsive to earlier trial testimony from other witnesses, there was ample reason for M&G—not to mention the jury—to prefer that he testify in person, rather than via a pre-recorded trial deposition. M&G's request appropriately discounts the rate for Derezinski's travel time to \$200 per hour, as compared to his rates of \$400 per hour for consulting work and \$700 per hour rate for trial testimony.

12. The Court concludes that the request for Derezinski's travel time and expenses is proper and reasonable. M&G is entitled to recover its total requested fee of \$7,220, which encompasses \$3,500 for Derezinski's five hours of trial testimony, \$3,524 for his travel time and vehicle use, and \$196 for one night's hotel stay necessitated by his trial testimony.

13. Finally, M&G is entitled to post-judgment interest calculated at the legal rate defined in 6 *Del. C.* § 2301(a).¹⁶ Post-judgment interest

¹⁶ See, e.g., *Wilm. Country Club v. Cowee*, 747 A.2d 1087, 1097 (Del. 2000).

accrues from the date that “judgment is entered as final and determinative of a party’s rights.”¹⁷ Accordingly, post-judgment interest will run from September 25, 2009, the date the jury rendered its verdict. The Court takes judicial notice that the Federal Reserve discount rate at that time was 0.5%, and therefore the applicable legal rate of interest is 5.5%.

14. For the foregoing reasons, M&G’s Motion for Costs is **GRANTED**. After adjustment to reduce the fees associated with Reilly’s waiting time, M&G is awarded costs in the total amount of \$14,481.75. In addition, interest is to accrue on the judgment at the rate of 5.5%, running from September 25, 2009.

IT IS SO ORDERED.

/s/
Peggy L. Ableman, Judge

Original to Prothonotary
cc: Somers S. Price, Esq.
Daniel F. Wolcott, Jr., Esq.
Steven T. Margolin, Esq.
Andrew D. Cordo, Esq.

¹⁷ *Id.*