

STEVEN OLSON and
SHIRLEY OLSON,

Plaintiffs,

v.

A-DEL CONSTRUCTION
COMPANY, INC.,

Defendant.

C.A. No.: N12C-03-219 FSS

ORDER

Upon Defendant's Motion for Costs – GRANTED, in part.

1. This is a negligence case arising from injuries sustained by Plaintiff following a motorcycle accident in a work zone. Defendant was the construction project's lead contractor. On November 5, 2013, the jury returned a verdict for Defendant. On November 19, 2013, Defendant timely filed a motion for costs in accordance with Superior Court Civil Rule 54 and 10 *Del.C.* 8906. Plaintiff responded November 22, 2013.

2. Defendant requests \$3,108.65 for Mr. Steven Schorr's trial testimony. Additionally, Defendant seeks \$9.00 for LexisNexis filing fees.

3. Plaintiffs dispute the invoice for Mr. Schorr's testimony as overly general, as it includes uncompensable preparation costs in addition to compensable travel and testimony charges. Further, neither the invoice nor Defendant's motion attempts to separate and define the compensable costs. Additionally, Plaintiffs request the court exercise its discretion to deny costs entirely because Plaintiffs cannot afford to pay following the accident, which left Mr. Olson undisputedly seriously and permanently injured and unable to work.

4. Superior Court Civil Rule 54(d) permits costs "as of course to the prevailing party upon application to the Court within ten (10) days of the entry of final judgment." Amounts awarded and denying costs are matters of judicial discretion.¹ The defendant may appropriately bear his defense costs where a lawsuit is justified because the situation requires a full explanation from the defendant.² Further, the court has held a party should not be responsible for its opponent's choice of an unnecessary, exorbitant expert.³ *McMillan* limited costs where the defendant hired an expert from Atlanta, Georgia who was significantly overqualified for the situation. The court may also consider the parties' financial situation.⁴

¹ *Donovan v. Delaware Water & Air Res. Comm'n*, 358 A.2d 717, 722-723 (Del. 1976).

² *Moore v. Garcia*, 1995 WL 945553 (Del. Super. 1995).

³ *McMillan v. Masten Lumber and Supply Co.*, Del. Super. C.A. No. 97C-01-089, Silverman, J. (Sep. 29, 2000).

⁴ *Nelson v. Feldman*, 2011 WL 531946 (Del. Super. 2011).

5. Courts make successful defendants bear their own costs in situations where the claim was particularly meritorious or based on a protective statute. For example, *Nelson v. Feldman* denied costs in a motor vehicle collision case where the jury found both parties negligent and defendant 49% at fault.⁵ Costs were also denied in *Sammons v. Kang*, where a priest impregnated an 18-year-old plaintiff.⁶ *Sammons* found the Child Victims' Act was crafted to permit these actions to have their day in court and, paired with the defendant's clearly inappropriate behavior, supported requiring the defendant to bear his costs.⁷

6. Here, neither party offers a public policy or factual basis justifying the suit. While Mr. Olson was seriously and permanently injured, the jury was unconvinced that Defendant's negligence caused Mr. Olson's motorcycle to go down. Unlike *Nelson*, the jury here found Defendant was not negligent, let alone the proximate cause of the injury. While it is likely true, as Plaintiffs allege, that Defendant "has resources many times greater than plaintiffs," this alone does not justify denying costs.

7. Compensable expert witness fees are "limited to time spent attending court for the purpose of testifying" and reasonable costs incurred in

⁵ *Id.*

⁶ *Sammons v. Kang*, 2013 WL 4492779 (Del. Super. 2013).

⁷ *Id.* at *2.

traveling to and from the courthouse.⁸ The rate for travel is generally less than that for testifying time.⁹

8. Plaintiffs clearly established the amount claimed by Defendant is unreasonable because it includes non-compensable costs. Although the invoice lists tasks by date, it does not specify billable hours for each task. Instead, it summarily records hours by broad groupings, such as “professional time” and “technical time.” Where an invoice as a whole is vague and lacking in detailed information, as here, the court has discretion to completely deny recovery.¹⁰ Even so, the jury’s defense verdict was appropriate and Mr. Schorr’s testimony was not overkill like *McMillan*. Therefore, recoverable costs will be allowed.

9. All the tasks qualified as “technical time” are not compensable. The only compensable task under “professional time” is the trial testimony. Although the invoice fails to specify how long the expert testified, Plaintiffs acknowledge it was “no more than 45 minutes.” Accordingly, only \$221.25, which is 45 minutes at the witness’s \$295 per hour rate, is recoverable. Lastly, the invoice requests \$82.15 for tolls and mileage, which seems a reasonable travel expense, and is allowed.

9. Lastly, Defendants request \$9.00 for filing fees on LexisNexis.

“The Court has previously ruled that the costs associated with the LexisNexis filing

⁸ *Moyer v. Saunders*, 2013 WL 4138116 (Del. Super. 2013).

⁹ *Cooke v. Murphy*, 2013 WL 6916941, *4 (Del. Super. 2013).

¹⁰ *Id.*

process are recoverable.”¹¹ Accordingly, the \$9.00 is also recoverable.

10. Based on the foregoing, Defendant’s Motion for Costs is
GRANTED in part. Defendant shall recover the following costs:

Mr. Schorr’s Trial Testimony:	\$221.25
Mr. Schorr’s Travel Expenses:	\$ 82.15
<u>LexisNexis Filing Fees:</u>	<u>\$ 9.00</u>
Total Costs Awarded:	\$312.40

IT IS SO ORDERED.

/s/ Fred S. Silverman
Judge

cc: Prothonotary (Civil)
Nancy Chrissinger Cobb, Esquire
Michael L. Sensor, Esquire

¹¹ *Id.*