

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

PAULINE AYALA,)	
)	
Plaintiff,)	
)	
v.)	C.A. No. 10C-08-014 WCC
)	
STEVEN A. TERRANOVA, M.D.,)	
)	
Defendant.)	

Submitted: March 9, 2012
Decided: April 11, 2012

On Defendant’s Motion for Costs: GRANTED IN PART

ORDER

Bradley J. Goewert, Esquire; Monica A. Horton, Esquire. Marshall, Dennehey, Warner, Coleman & Goggin, 1220 Market Street, 5th Floor, P.O. Box 8888, Wilmington, DE 19899. Attorneys for Defendant.

Kenneth Roseman, Esquire. Kenneth Roseman, P.A., 1300 N. King Street, P.O. Box 1126, Wilmington, DE 19899. Attorney for Plaintiff.

CARPENTER, J.

On this 11th day of April, 2012, upon consideration of Defendant Dr. Steven

A. Terranova's Motion for Costs, it appears to the Court that:

1. Plaintiff Pauline Ayala commenced this medical negligence action against Dr. Terranova in August 2010, alleging he unintentionally left a foreign object in her body during a partial nephrectomy. The issue at trial was whether the object removed was a pledget intended to be left in the patient's body after surgery or some other material that should have been removed. After a four-day trial, the jury found for Dr. Terranova. Dr. Terranova now seeks to recover from Ayala the costs of his expert witnesses pursuant to Delaware Superior Court Civil Rule 54(d). Specifically, Dr. Terranova seeks \$12,249.30 for costs relating to the courtroom testimony of his two experts and \$750 for the fee associated with Ayala's cancellation of an expert's scheduled deposition.
2. Rule 54(d) provides that "costs shall be allowed as of course to the prevailing party."¹ Expert fees are taxed as costs according to 10 *Del. C.* § 8906. However, the Court fixes the costs of expert witness fees in its discretion.² As the Supreme Court of Delaware wrote in *Donovan v.*

¹ Super. Ct. Civ. R. 54(d).

² See 10 *Del. C.* 8906 (noting that the fees for witnesses testifying as experts in cases in the Superior Court "shall be fixed by the court in its discretion"), see also *Samson v. Somerville*, 2006 WL 686586, at *3 (Del. Mar. 17, 2006) ("The award of costs for expert witness testimony is within the sound discretion of the trial court.").

Delaware Water and Air Resources Commission, “there may be circumstances under which costs do not go to the party to whom a final judgment is awarded. Determining when costs are awarded and when they are not is, in our judgment, a matter of judicial discretion.”³

3. The Court will grant Dr. Terranova the \$750 fee assessed for Ayala’s cancellation of one expert’s deposition. The record reflects that Dr. Terranova requested this fee during a pre-trial conference and that the Court reserved decision on the matter. The Court finds this award appropriate. Ayala’s counsel made the decision to cancel the original deposition of the expert even though he had not yet received the expert’s formal report. When subsequent representations by defense counsel raised issues Ayala needed to address, it became clear that Ayala’s decision to cancel the deposition was unwise, and significant efforts had to be undertaken to rectify the situation. This included the defendant having to pay the expert’s cancellation fee so that another deposition could be taken before trial. For these reasons, the Court grants Dr. Terranova’s request for the \$750 cancellation fee.

³ 358 A.2d 717, 722-23 (Del. 1976).

4. However, this is not a circumstance under which all costs should go to the prevailing party. The Court is convinced that Ayala commenced this action in good faith and Dr. Terranova refused to participate in any form of alternative dispute resolution prior to trial. Ayala was not a litigious patient, and she was a patient who endured very real and very painful post-surgical symptoms. This is no less true because the jury found her suffering unrelated to medical negligence. Dr. Terranova testified that he cared deeply for the well-being of his former patient and he clearly is aware that Ms. Ayala is a person with limited economic means and the hardship that would occur if the Court awarded these costs. Frankly the Court is shocked and extremely disappointed that this motion was even filed by the doctor. If the Court accepts Dr. Terranova's testimony as true, to award him the costs he seeks in their entirety would literally add insult to injury and would be inconsistent with the representations made to this Court. While the doctor's carrier may want to squeeze this patient for the cost of litigation, the Court seriously doubts that the real client, Dr. Terranova, holds a similar position.

5. For the foregoing reasons, Defendant's Motion for Costs is hereby
GRANTED in the amount of \$750.00. The other costs are DENIED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.

Judge William C. Carpenter, Jr.