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STATE OF VERMONT
WINDSOR COUNTY

ROBIN L. BUKER

v.

RICHARD JOHNSTON KING,
Special Administrator of the
Estate of Joseph Brouillard

Windsor Superior Court
Docket No. 523-11-05 Wrcv

DECISION
Plaintiff's Motion for Costs

The present post-trial matter before the court is plaintiff Robin Buker's motion for costs. In October 2008, the jury returned a verdict in Ms. Buker's favor in the amount of approximately \$876,000. Ms. Buker now seeks an award of costs in the amount of \$111,817.48, as follows:

Filing fee	\$225.00
Deposition costs	\$2,081.63
Trial exhibits	\$1,381.50
Expert witness fees	\$55,040.35
Prejudgment Interest—Past Earnings	\$27,219.00
Prejudgment Interest—Medical	\$25,220.00
Cost of reopening estate	\$650.00
Total	\$111,817.48

Defendant Richard Johnston King does not oppose an award for the costs of the filing fee, trial exhibits, and cost of reopening the estate of Joseph Brouillard. He does oppose, however, awards for deposition fees, expert witness fees, and prejudgment interest.

The first issue is whether the court should award costs for deposition fees and transcripts. The rule is that such costs may be awarded in the discretion of the court so long as the court finds that "the taking of the deposition was reasonably necessary, whether or not the deposition was actually used at trial." V.R.C.P. 54(g). Ms. Buker has requested \$2,081.63 in deposition costs and transcript costs for five depositions that were taken at the request of Mr. King and three depositions that were taken at her request. Mr. King contends that the depositions were not reasonably necessary.

It is not persuasive for Mr. King to argue that the depositions taken *at his request* were not reasonably necessary for trial. He obviously felt them to be necessary preparation. The depositions were furthermore objectively reasonable under the circumstances of this trial—the deponents were the plaintiff and plaintiff's four expert

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witnesses. The court will award costs for the five depositions taken at the request of Mr. King.

The court will also award costs for the three depositions taken at the request of Ms. Buker. Two of the deponents were the defendant and the defendant's expert witness on the issue of the foreseeability of the hypoglycemic event. The third deponent was the decedent's son, who reasonably may have had information about the decedent's activities on the day of the accident (including whether or not he had followed his prescribed blood-sugar routines). The court accordingly grants the motion for costs with respect to the depositions.

The second issue is whether the court should award costs for expert witnesses. The rule is that expert witnesses are entitled to compensation in the amount of \$30 per day plus mileage for in-state travel. 32 V.S.A. § 1551. The court has no discretion to award extra compensation for additional expert witness costs. *Ianelli v. Standish*, 156 Vt. 386, 390 (1991).

Ms. Buker argues that the court may award extra costs for expert witnesses because *Ianelli* has been overruled by legislative action. Her contention does not appear to be supported by the relevant history of statutory amendments. The general rule has always been that parties bear their own costs of expert witnesses except for attendance fees and in-state mileage; the purpose of the general rule is to encourage parties to limit their expenses. 32 V.S.A. § 1551. There used to be an exception that permitted the state to recover extra costs for expert witnesses that it called to testify. See *Ianelli*, 156 Vt. at 390 (referring, in dicta, to the exceptions set forth in 32 V.S.A. §§ 1554 & 1555 (1990)). These exceptions were later repealed without explanation as part of an annual appropriations bill. 1991, No. 245 (Adj. Sess.), § 94(b)(3). There are no longer any statutory exceptions to the general rule.

The circumstances of repeal do not have any obvious connection with *Ianelli*. Nor is the court persuaded that the Legislature meant (by repealing the only exceptions to the general rule) to establish a new rule allowing courts to award extra compensation to expert witnesses in any case (despite § 1551). The court accordingly concludes that § 1551 governs the present request for expert witness costs, and that the court has no discretion to award extra compensation. *Ianelli*, 156 Vt. at 390.

Even assuming that the court had discretion to award extra compensation to expert witnesses, it would not exercise that discretion here. After the continuances were granted, Ms. Buker had the ability to make her own determinations as to whether additional trial costs were justified in light of the anticipated benefits of the expert testimony. The court is not persuaded that the circumstances surrounding the continuances warrant the shifting of costs here.

The court therefore concludes that the expert witnesses are entitled to \$30 per day plus in-state travel expenses. Such expenses are normally submitted for approval in the form of certificates signed and sworn to by each witness, specifying the number of miles

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traveled from his or her usual place of abode and the number of days attended as a witness. 32 V.S.A. § 1553. Since Ms. Buker has not submitted the required certificates, the court must set this issue for hearing. See *Jordan v. Nissan N. Am., Inc.*, 2004 VT 27, ¶ 17, 176 Vt. 465 (requiring trial court to hold a hearing on the issue of costs when the required certificates are lacking rather than deny the award). The parties may avoid the need for a hearing by submitting a stipulation prior to the scheduled hearing date.

The final issue is whether Ms. Buker is entitled to an award of prejudgment interest on her claims for past medical expenses and past lost wages. Prejudgment interest is normally awarded as a matter of right when the damages are liquidated or reasonably ascertainable. See *Smedberg v. Detlef's Custodial Service, Inc.*, 2007 VT 99, ¶¶ 33–39, 182 Vt. 349 (explaining that lost wages and medical expenses are reasonably ascertainable in personal injury actions). Prejudgment interest is intended to make the plaintiff whole where there has been a delay between the date of injury and the date of the award. *Turcotte v. Estate of LaRose*, 153 Vt. 196, 199 (1989).

The purposes of prejudgment interest would not be served by an award in this case because the jury was already instructed (without objection) to consider the delay between injury and trial and to award “additional damages in lieu of interest” as it deemed appropriate. Since the court must assume that the jury followed its instructions, *Greene v. Bell*, 171 Vt. 280, 285 (2000), the court must assume that the jury has already considered the delay between injury and trial and fashioned an award that made the plaintiff whole as of the date of the verdict. The purposes of prejudgment interest would not be served by awarding additional sums beyond this amount. The request for prejudgment interest is accordingly denied.

ORDER

Plaintiff's Motion for Costs (MPR #35) is ***granted in part and denied in part***. The motion is granted as to the filing fee, trial exhibits, deposition costs, and the cost of reopening the estate. The motion is denied as to prejudgment interest and extra compensation for expert witnesses. The request for ordinary expert witness costs shall be ***set for hearing***. The parties may avoid the need for a hearing by submitting a stipulation prior to the scheduled date.

Dated at Woodstock, Vermont this 11 day of August, 2009.



Hon. Harold E. Eaton, Jr.
Superior Court Judge

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AUG 11 2009