

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

JUAN ALFREDO HUGHES et. al.	)	
Plaintiffs	)	CIVIL NO. 384/1982
	)	
v.	)	
	)	
DOCTOR ESTELLA AGARRO, et al	)	
Defendants	)	

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MEMORANDUM OPINION
(May 3/, 1982)

FEUERZEIG, J

The court previously issued a memorandum opinion and order outlining in some detail why it considered the defendants prevailing parties and, therefore, entitled to costs and attorneys fees within the meaning of 5 V.I.C. §541 (1967). Consequently, it now must consider the affidavit of counsel for the defendants and the plaintiffs' opposition to the requested award of costs and attorney's fees.

At the root of this court's award is the fact that the evidence in this medical malpractice action showed that the minor was treated in compliance with applicable medical

standards. However, as previously stated, if the defendant Dr. Estella Agarro was guilty of wrong doing, it was no more than rudeness in her conversation with plaintiff's mother, Betty Hughes. The court reiterates that while rudeness is unacceptable conduct, it is not the type of conduct that provided a basis for recovery in this action. Given the facts as presented to the jury, which rendered a verdict of no liability and no damages, the defendants clearly are prevailing parties and as such should be partially indemnified in accordance with 5 V.I.C. §541.

COSTS

Having determined that the defendants are the prevailing parties and are entitled to costs and attorneys fees, the court turns to the affidavit of defendants' counsel. In addition to attorney's fees, defendants claim costs in the amount of \$1,363.70. The court's granting and denial of these costs will be done with little discussion because the court writes on anything but a clean slate. Specifically, Kriegel v. St. Thomas Beach Resorts, Inc., 18 V.I. 365 (D.V.I. 1981), dictates the results of most of the claimed costs of the defendants. Taking the claimed costs seriatim:

1. Long distance telephone calls in the amount of \$6.80. This will be disallowed as such costs customarily have been considered as usual and normal expenses of running

a law office and are not to be included in an award of costs. See, e.g. Smith v. Sparky's, Inc., Civil No. 78-232 (D.V.I., Div. St. Thomas and St. John, March 2, 1981), and Tyler v. American Airlines Inc., Civil No. 76/369 (D.V.I., Div. St. Thomas and St. John, June 21, 1979).

2. Xerox costs of \$271.40. Such an expenditure is not to be included as costs where the necessity for them has not been shown and none of the claimed copies was introduced in evidence. Kriegel v. St. Thomas Beach Resorts, Inc., 18 V.I. at 369. Because a judgment of liability would have required an insurance company to indemnify some of the defendants, the defendants assert that they should be reimbursed for counsel having to keep its clients abreast of developments at every stage of the case. The court does not agree. While it is sound practice to keep a client advised, it clearly is nothing more than a part of the normal cost of running any law office. As such it is not to be included in any award of costs. This is particularly so where there has been no showing of a need for such activity to ensure proper presentation of the case. Accordingly this item will be disallowed.

3. Deposition transcript costs of \$440.50.

Where depositions are taken but not used at trial, the cost of the transcript of such depositions is not recoverable as a matter of right. . . . The cost of the transcript of a deposition though not used at trial may be taxed as cost in the discretion of the court if the deposition was reasonably necessary for the proper presentation of the case and was not merely investigative in nature.

Id. at 368. In this instance, the depositions of Dr. William B. Woods and Juan and Betty Hughes were not used, and there has been no showing that they were anything but investigatory. Accordingly, the costs of \$115 and \$117 respectively for those depositions will be disallowed.

The deposition of Dr. Nestor Rivera Perez was utilized by the plaintiffs as part of their case in chief, and the deposition of Dr. Cyprian A. Gardine was utilized by the defendants in presenting their defense. Consequently, the court believes the cost of each transcript is appropriately allowable in accordance with Kriegel. Costs of \$53.00 and \$155.50 respectively, therefore, will be allowed.

4. Expert witness fees for depositions of \$175. Generally, experts are entitled to the regular statutory witness fee only, and costs incurred in excess of that amount are not taxable. However, upon prior application and good cause shown additional charges may be allowed. Id. at 368. Since the deposition of Dr. Woods was not used, the court believes the rationale of Kriegel requires a disallowance of a witness fee in excess of the statutory rate. Also, in the absence of an application before trial for costs in excess of the statutory rates, even though the deposition of Dr. Gardine was used at trial, the \$75.00 that is claimed must be reduced to the statutory fee of \$30.00. Consequently, costs of \$30.00 for each witness will be awarded for a total of \$60.00 in witness fees.

5. Defendants claim reimbursement for the cost of airfare and expenses for the taking of three depositions, two in St. Thomas at a cost of \$68.00 each and one in Puerto Rico in the amount \$152. They also claim reimbursement for airfare for conferences with witnesses in the amount of \$68.00 and airfare for trial in St. Thomas in the amount of \$114.

"It now seems to be generally assumed that expenses incurred in travelling to take depositions, as well as charges for meals and lodging are properly taxable costs. This does not appear to be the generally accepted view, for absent special circumstances, no allowance is made for such expenditures." Kriegel, 18 V.I. at 368. As pointed out earlier, the deposition of Dr. Rivera Perez was utilized at trial. Therefore, there clearly was a necessity for defense counsel to travel to Puerto Rico for his deposition and the claimed costs of \$168.00 will be allowed. However, no special circumstances for any of the other claimed travel costs have been shown. Therefore, the cost of airfare and expenses incurred for the other depositions must be disallowed.

The claimed travel expenses for conferences with witnesses and for trial also will be disallowed. "[I]f a litigant elects to choose counsel residing in a division of the court other than that in which the case is filed, this is an expense that the litigant should properly bear and not attempt to pass on to the opposing side." Heyl & Patterson

International, Inc. v. F.D. Rich Housing of the Virgin Islands, Inc., Civil No. 75-785 (D.V.I., Div. St. Thomas and St. John, October 24, 1980), and Creque v. Sofarelli Associates, Inc., Civil No. 471-1982 (Terr. Ct., Div. St. Croix, December 2, 1983). 1/

As a result, the court concludes defendants are entitled to reimbursement of costs in the amount of \$436.00, deposition costs of \$53.00 and \$155.00, travel expenses for the taking of Dr. Rivera Perez' deposition of \$168.00, and statutory witness fees of \$60.00.

1/ In denying the requested travel reimbursements, this court is not unmindful of the most recent statements by the Third Circuit Court of Appeals in Danny Kresky Enterprises Corp. v. Magid, 716 F.2d 206, 217-218 (3d Cir. 1983), in which the court discussed the appropriateness of awarding costs and attorney's fees as a result of the plaintiff having chosen an attorney from Philadelphia when the suit was filed in Pittsburgh. The trial court disallowed the claimed travel time and costs incurred in connection with that travel. It said the plaintiff was fully aware that the litigation would take place in Pittsburgh yet chose Philadelphia counsel "knowing that capable attorneys were present in Pittsburgh who could have handled this case." In overruling the trial court, the Third Circuit stated:

Even if it were ever appropriate to deem unreasonable the travel time from the city for the day of a party's chosen counsel to the place of trial on such a basis, this is not an appropriate case to fault plaintiff for selecting a counsel from outside the city of trial. Plaintiff's counsel was from the same state, not from across the country, and under Pennsylvania rules is free to practice throughout the state. The selection of Kramer as plaintiff's counsel to try this case was undoubtedly and reasonably influenced by Kramer's involvement in other antitrust litigation pending in Philadelphia against Electric Factory. Kramer was therefore thoroughly familiar with many

Attorneys Fees

Defendants request attorney's fees in the amount of \$8,145 representing 90.50 hours at a rate of \$90 per hour. Clearly, 5 V.I.C. §541 authorizes this court to exercise its discretion and grant defendants' request and such an award will not be subject to challenge absent a clear abuse of that discretion. Trainberg v. Trainberg, 456 F.2d 173 (3d Cir. 1972).

The factors for the court to consider in exercising

1/ continued

important facts about the industry. Significantly, defendant Electric Factory also chose Philadelphia counsel for this case. Therefore, the selection of both counsel from the same city reduced the total costs and the number of hours which were expended in this litigation.

This language might suggest that Heyl & Patterson and Cregue are of questionable validity. Assuming that to be true, the facts at issue are such as to cause this court to believe that the rationale of Heyl & Patterson and Cregue still applies. First, as the Third Circuit pointed out in Kresky one of the defendants in that case also chose counsel from Philadelphia which resulted in a reduction in total costs and the number of hours that were needed. That cannot be said of this litigation. Secondly, the Third Circuit emphasized plaintiff counsel's expertise in the antitrust field as well as counsel's familiarity with other antitrust litigation in Philadelphia against one of the defendants. Those considerations also are lacking here. There has been no showing here that defense counsel has some unique expertise in the medical malpractice area to the exclusion of counsel on the island of St. Thomas. Moreover, there has been no showing that the facts in this case were such as to require or merit selection of a St. Croix lawyer or law firm to the exclusion of a St. Thomas lawyer or law firm. Thus, this court believes it still must be bound by the holding of the District Court of the Virgin Islands as expressed in Heyl & Patterson.

its discretion have been articulated by the Third Circuit Court of Appeals and the District Court of the Virgin Islands on numerous occasions. E.g. Lindy Bros. Builders, Inc. of Philadelphia v. American R. & R. San Corp. 487 F.2d 161 (3rd Cir. 1973), and Estien v. Christian, 11 V.I. 464, 507 F.2d 61 (3rd Cir. 1975). Lindy, Estien and their progeny express the philosophy that §541 is intended to provide a prevailing party idemnification "for a fair and reasonable portion of his or her attorney's fees incurred in the prosecution or defense of the action and not for the whole amount charged by the attorney. . . ." Lucerne Investment Co. v. Estate Belvedere, Inc., 411 F.2d 1205, 1207 (3rd Cir. 1969).

However, before the value of an attorney's services can be determined, the court is required to ascertain just what services were rendered. Toward this end the court has to look to the hours spent by the attorneys, i.e. how many hours were spent and in what manner by which attorney. While the Third Circuit has counselled that "[i]t is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted . . . without some fairly definite information as to the hours devoted to various general activities, e.g., pretrial discovery, settlement negotiations and the hours spent by various classes of attorneys, . . . the court cannot know the nature of the services for which compensation is sought." Lindy 486 F.2d at 167.

In this instance, contrary to defendants assertions, plaintiffs are correct in contending that the affidavit submitted by counsel for the defendants falls short of the Lindy criteria. For example, counsel claims reimbursement for 51 hours under the heading "trial preparation." However, she states no more than "File and deposition review and general preparation for trial; Witness interviews and attendance at trial on 12/13-14/83; Preparation of voir dire questions; jury instructions; research and preparation of Motion in Limine, with accompanying Memorandum of Law; preparation and marking of exhibits." This is not "some fairly definite information as to the hours devoted to various general activities." To the contrary, this narrative is far too general. Consequently, the court is not able to undertake with any degree of certainty the next step required by Lindy, which is the value of those services.

Obviously, the value of an attorney's time is reflected by his or her normal billing rate, which in this instance is claimed to be \$90 per hour. Lindy, however, cautions that a court not fix attorney's fees merely by multiplying the hourly rate for each attorney times the number of hours worked on the case. More importantly, the United States Supreme Court in awarding attorney's fees under 42 U.S.C. §1988 has cautioned in language equally applicable here that, "The initial estimate of a reasonable attorney's fee is calculated by multiplying the number of hours reasonably

expended on the litigation times a reasonable hourly rate." Blum v. Stenson, 52 U.S.L.W. 4377 (March 21, 1984). (Emphasis added). In other words, the court must evaluate the quality of an attorney's work. To do that it has to consider the complexity and novelty of the issues presented, the quality of work that the judge has been able to observe and the amount of recovery obtained. Therefore, the court must know with some degree of specificity exactly what an attorney did before it can determine whether those labors necessarily benefited the client.

Jury selection in this case was accomplished in 40 minutes the morning of December 12. Trial was conducted in 7 3/4 hours on December 13, and the jury delivered its verdict the next day. It was not a difficult case. In fact, it was a very straight forward medical malpractice case that did not require a great deal of preparation or trial skill on the part of the defendants' counsel. The court makes that statement primarily because the defendants had at their disposal, almost at the outset of this case, the medical reports of Dr. William B. Woods. He treated the minor plaintiff within two hours of the alleged medical malpractice by the defendant Dr. Estella Agarro and expressed the belief that there was no deviation from the standard of medical care regularly practiced in this community. In fact, as discovery in this case took place, defendants became confidently aware that plaintiffs had an

extremely difficult burden of establishing negligence or malpractice on the part of the defendants. As a result, the court believes that much of the time devoted to this case was unnecessary.

While the defendants could not have achieved better results, counsel's performance or skill does not warrant any increase in the value of the time spent. In addition, although it now appears that in some instances the prevailing rate being charged by attorneys in this community is \$90 per hour, Trailer Marine Transportation Corp. v. Charley's Trucking, Inc., Civ. No. 1228/1981 (Terr. Ct., Div. St. Thomas & St. John, March 15, 1984), the court believes the \$75.00 being assessed by some judges is more appropriate for the services rendered in this case. See Alexander v. Montoute, Civil No. 343/82 (Terr. Ct., Div. St. Croix, December 8, 1982). The total trial time in this matter being slightly more than one full day, the court believes defendants are entitled to compensation for one day of trial at the customary rate of \$650 per diem for trial. Goldstein v. John Hambers Watersports Center, Inc., Civil No. 78-286 (D. V.I., Div. St. Thomas and St. John, Feb. 26, 1981).

Given the inability of the court to appropriately assess and evaluate the work listed in the affidavit of defendants' counsel, the court is going to be guided by the comments of Chief Judge Miles W. Lord, who was quoted

recently in Danny Kresky Enterprises Corp. v. Magid, 716 F.2d at 218: "It has been this court's experience that a good rule of thumb to apply in litigation is that three days of preparation are necessary for every day in court."

Applying this rule of three days of preparation per day of trial, the appropriate amount of preparation would have been three days or 24 hours. The court will add to that three hours for travel to and from Puerto Rico for the deposition of Dr. Nestor Rivera Perez for a total of 27 hours. When multiplied by \$75.00 per hour that constitutes \$2,025.00. Cf Smith v. Sparky's Inc., Civil No. 78-232 (D.V.I., Div. St. Thomas and St. John, March 2, 1981). Accordingly, defendants will be awarded \$2,025.00 in attorneys fees and \$436.00 in costs.

DATED: *May 31/84*


HENRY L. FEUERZEIG
JUDGE

ATTEST: _____

VIOLA E. SMITH
Administrator/Clerk of the Court