



Recent COAKY Decision Discusses Award of Witness's "Per Diem" Expense or "Allowance" as Recoverable Cost (including for Expert)

[David Kramer](#)
dkramer@dbllaw.com

In a recent decision by the Kentucky Court of Appeals that was designated for publication but is now pending on a petition for rehearing, the Kentucky Court of Appeals discussed a seldom used and infrequently cited statute that provides for an award to the prevailing party's of an "allowance" for trial witnesses, including both parties and experts, as a recoverable cost.

In *Bryan v. Correctcare-Integrated Health, Inc.*, <http://opinions.kycourts.net/coa/2012-CA-001500.pdf> (11/8/13), the Court reversed the trial court's award of costs of \$100 per day for expenses incurred by an individual defendant who testified at trial and by two defense expert witnesses. The statute in question, KRS 453.050, provides in pertinent part that the prevailing party in a civil action is entitled to "the allowance to witnesses, which the court may by order confine to not more than two (2) witnesses on any one (1) point." Such expenses are not specified as an item of recoverable costs in CR 54.04.

The reversal was not based on the fact that the trial court awarded the prevailing defendants' a per diem as a "subsistence allowance" for the witnesses' "necessary meals, lodging, and travel," but rather on the fact that the trial court awarded such costs without documentation in the record of the actual costs incurred. Therefore, the Court remanded for "recalculation with more specificity as to the computation of the award." The Court stated there was "a remarkable absence" of authority on this issue and on the statute in question, but also noted that use of a per diem expense for trial witnesses was not inconsistent with prior case law, going back to *Nix v. Caldwell*, 5 Ky.L.Rptr. 324 (Ky. 1883).

Of course, the full expense of an expert's travel, meals and lodging (particularly airfare costs if the expert travels from a distant location) can be considerable. Such expenses are not part of the expert's "fee" for his or her service, which is not recoverable in Kentucky "unless specifically authorized by statute." *Strohschein v. Crager*, 258 S.W.3d 25 (Ky. App. 2007). It was presumably noteworthy that the Court in *Bryan* used the phrases "subsistence allowance" to describe what it would view as an acceptable award of costs for expenses actually incurred by trial witnesses. Subsistence in this context typically means the bare minimum necessary for attendance.

If the Court grants rehearing, It will be interesting to see if the Court harmonizes *Bryan* with an unpublished 2009 opinion of the Court of Appeals that reversed a trial court's award of expert witness travel expenses totalling \$3,944.73 to a prevailing party as erroneous. In *Test v. Expressbill, LLC*, 2009 WL 3321009 (Ky. App.), the Court, while taking note of KRS 453.050, stated that in Kentucky "allowable costs are generally more circumscribed than that allowed in other jurisdictions" and held that the prevailing party must bear his or her own expert witness

expenses for travel, meals and lodging. Though it was not designated for publication, the *Test* decision appears to meet the criteria for citation under CR 76.28(4)(c). Considering *Bryan* in light of *Test*, perhaps the Court of Appeals is authorizing an award of costs for a nominal (subsistence) amount for travel, meals, and lodging, but not full recovery of a significant amount of travel costs.

The decision in *Bryan v. Correctcare-Integrated Health, Inc.*, is not yet final. Nonfinal decisions should not be cited as authority in Kentucky courts. *Test v. Expressbill, LLC*, was not published in the South Western Reporter. See CR 76.28(4)(c) concerning citation of unpublished opinions. Note: The foregoing post includes commentary reprinted from the forthcoming 2014 supplement to 7 Phillips & Kramer, *Rules of Civil Procedure Annotated*, 6th ed. (Kentucky Practice Series), by David V. Kramer, with permission of the author and publisher. Copyright (c) 2013 Thomson Reuters. For more information about this publication please visit <http://store.westlaw.com/rules-of-civil-procedure-annotated-6th-vols-6-7-kentucky/130503/11774808/productdetail>.