IN THE SUPREME COURT OF THE STATE OF DELAWARE

KIMBERLY SAMSON,	§	
	§	No. 392, 2005
Plaintiff Below,	§	
Appellant,	§	Court Below: Superior Court of the
	§	State of Delaware in and for
v.	§	New Castle County
	§	
GREGG M. SOMERVILLE,	§	C.A. No. 01C-01-048
	§	
Defendant Below,	§	
Appellee.	§	

Submitted: January 6, 2006
Decided: March 17, 2006

Before **HOLLAND**, **BERGER** and **RIDGELY**, Justices.

O R D E R

This 17th day of March 2006, upon consideration of the briefs of the parties and their contentions at oral argument, it appears to the Court that:

(1) This is a personal injury case arising from an automobile accident. Plaintiff-Appellant Kimberly Samson appeals the judgment of the Superior Court after a jury trial in favor of Defendant-Appellant, Gregg M. Somerville. Plaintiff claims that the Superior Court erred when it 1) failed to grant her motion for a directed verdict or motion for judgment as a matter of law; 2) admitted inadmissible hearsay evidence from a police accident report; 3) awarded costs for

an arbitrator fee; and 4) when it awarded a medical expert witness fee. We find no merit to Plaintiff's first, third, and fourth claims. On Plaintiff's second claim, we conclude that the Superior Court erred, but that the error was harmless. Accordingly, we affirm.

(2) This case arises from a rear-end collision which occurred as two vehicles merged onto a highway. Plaintiff was a passenger in the lead vehicle which stopped abruptly even though no other vehicles were approaching on the highway. Defendant tried to avoid the collision but could not. The jury returned a verdict for the defendant.

(3) Prior to trial, the parties engaged in mandatory arbitration, resulting in an award for the plaintiff of $5,000. The arbitrator's fee was $175. Plaintiff refused the award and demanded a trial *de novo*. At trial, the defendant called an expert medical witness to refute the plaintiff's damages allegation. The Superior Court granted defendant's Motion for Costs of the $175 arbitration fee and a fee of $2,992 for the expert medical witness.

(4) Plaintiff contends that the Superior Court erred when it denied her motion for judgment as a matter of law and that it erred in denying her the opportunity to move for a directed verdict on the issue of Defendant's negligence.

We review Plaintiff's first contention to determine:

> whether the evidence and all reasonable inferences that can be drawn therefrom, taken in a light most favorable to the nonmoving party, raise an issue of material fact for consideration by the jury. In a tort action, however, it is the plaintiff's burden to establish a prima facie basis for recovery as to all elements of his claim.[1]

Appellant contends that as a matter of law, the evidence presented would require a reasonable juror to find Appellee negligent. We disagree.

(5) Plaintiff had the burden to prove negligence on the part of Defendant. As a general rule, such determinations are fact intensive; and while some exceptions to this general rule do exist, the issue of negligence is for the jury to decide.[2] Therefore, a court can grant a plaintiff's motion for judgment as a matter of law only where the facts are so clear and undisputed as to allow the jury only one reasonable conclusion in favor of the plaintiff.[3]

(6) The record shows that there were issues of material fact. Defendant testified that Plaintiff had moved forward. While Plaintiff asserted (and continues to do so on appeal) that no such movement occurred, the Superior Court was required to view the evidence in the light most favorable to Defendant when it decided the motion. We conclude that the Superior Court properly denied Plaintiff's motion for judgment as a matter of law.

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[1] *Fritz v. Yeager*, 790 A.2d 469, 470-471 (Del. 2002) (citations omitted).
[2] *See, e.g., Duphily v. Delaware Elec. Coop.*, Inc., 662 A.2d 821 (Del. 1995)
[3] *See, e.g., Parks v. Ziegler*, 221 A.2d 510 (Del. 1966).

(7) Plaintiff also contends that the Superior Court erred when it denied her the opportunity to move for a directed verdict on the issue of Defendant's negligence. Plaintiff did not move for a directed verdict. Rather, the record reflects that during a prayer conference, Plaintiff's counsel inquired if it was "too late" for a motion for directed verdict. The trial judge responded that it was too late.

(8) Plaintiff relies on Superior Court Rule 50(b) to argue that she was entitled to renew her motion for judgment after trial.[4] Plaintiff claims that the Superior Court judge erred in commenting that it was "too late" to file a motion for directed verdict. Plaintiff also claims that the trial judge erred by failing to consider the motion in open court. Because we have already determined that the Superior Court properly denied Plaintiff's motion for judgement as a matter of law, this issue is moot.

(9) Plaintiff's second claim challenges Defendant's redirect examination testimony; portions of which included reference to Defendant's statements to a

[4] Del. Super. Ct. R. Civ. Pro. 50(b). Renewal of motion for judgment after trial; alternative motion for new trial. – Whenever a motion for a judgment as a matter of law made at the close of all the evidence is denied or for any reason is not granted, the Court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Such a motion may be renewed by service and filing not later than 10 days after entry of judgment. A motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative. If a verdict was returned, the Court may, in disposing of the renewed motion, allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as a matter of law. If no verdict was returned, the Court may, in disposing of the renewed motion, direct the entry of judgment as a matter of law or may order a new trial.

police officer included in the police report. Plaintiff objected to the use of the police report. She cites 21 Del. C. § 313(b) for the proposition that such evidence was inadmissible.

§ 313(b) reads, in pertinent part:

> The fact that such [police reports] reports have been so made shall be admissible in evidence solely to prove a compliance with this section but no such report or any part thereof or statement contained therein shall be admissible in evidence for any other purpose in any trial, civil or criminal, arising out of such accident.

We review evidentiary rulings for abuse of discretion.

(10) In *Halko v. State*, this Court held that "it is permissible for a testifying police officer to use the accident report made out by him to refresh his recollection and, in turn, be cross-examined upon the basis of the report."[5] The issue before us is whether statements within the police report were properly used to rehabilitate a witness.[6] Specifically, defense counsel asked Defendant on re-direct examination:

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[5] *Halko v. State*, 204 A.2d 628, 631 (Del. 1964)

[6] Plaintiff questions the extent to which the inconsistencies between Defendant's in-court testimony and his prior statement to his insurance carrier may be categorized as such. It appears from the record that Plaintiff was attempting to impeach Defendant's credibility by calling into question his accounts of the accident, thus allowing rehabilitation.

> Q. Now, your testimony here today is that you saw this car in front of you move forward either a half a car or a car length. Correct?
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> ***
>
> Q. Now, in the statement, sir, you said that you had a little—looked a little bit over your shoulder to see when you would be able to get into traffic, 'And for some reason, I thought the guy in front of me had cleared.'..
> Do you remember saying that back in February of '99?
>
> ***

Q. Right after this accident occurred, Mr. Somerville, did you give a statement to the police officer?
A. I did.
Mr. Stoner: Your Honor, I'm going to object as hearsay to the recitation of the police officer in the report. I believe that that's where this is going.
The Court: The objection is overruled.

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A. Read it [the police statement] out loud?
Q. No, just take a look.
Do you see what you told the police officer?
Is that what you told the police officer?
A. Yes…

Counsel for Defendant then recited the contents of the report, often line-by-line, and after each recital, asked whether the statements were, in fact, made by the Defendant. Use of the police report in this manner introduced parts of the report into evidence contrary to 21 Del. C. § 313(b).

(11) The Superior Court should have limited the method of the examination consistent with *Halko*. Section 313(b) is explicit that "no such report or any part thereof or statement contained therein shall be admissible in evidence for any other purpose in any trial, civil or criminal, arising out of such accident." While Defendant could testify about his prior consistent statements to the police,

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Q. So you're agreeing with me back in February of '99 you weren't sure whether the car had moved forward or not; you had assumed it had moved forward. Is that right?

The Plaintiff's cross-examination was intended to impeach Defendant's recollection of the events. There are inconsistencies between the in-court testimony (that the witness saw the car in front of him move forward) and the statement to Defendant's insurance carrier (that "for some reason, I thought the guy in front of me had cleared"). There is no merit to Plaintiff's implicit contention that there was not an inconsistency.

repeated references to the content of the police report were improper. Even so, we conclude on the facts before us that this error was harmless. The Superior Court correctly concluded that:

> a new trial on all issues still is not warranted. Plaintiff misunderstands that her problem in this case was not that she was credible and the Court's error resulted in making the defendant seem more credible. The problem in this case was that the plaintiff had the burden of proof. Plaintiff's counsel tried to highlight Defendant's lack of credibility through previous inconsistent statements that he had given his insurer. Yet, those inconsistencies were hardly significant and did not affect the jury's view – consistent with the Court's – that the defendant was forthright and honest, and not in anyway attempting to mislead the jury. This was in sharp contrast to the impression that the plaintiff conveyed. To the extent that the Court's ruling on the hearsay objection was erroneous, it was inconsequential.[7]

(12) Appellant's third claim is that the Superior Court erred when it awarded the costs of arbitration. Superior Court Rule 16.1(iii) provides:

> If the party who demands a trial *de novo* fails to obtain a verdict from the jury or judgment from the Court, exclusive of interests and costs, more favorable to the party than the arbitrator's order, that party shall be assessed the costs of the arbitration, and the ADR Practitioner's total compensation. In addition, if the plaintiff obtains a verdict from the jury or judgment from the Court more favorable than the arbitration order, and the defendant demanded a trial de novo, interest on the amount of the arbitration order shall be payable in accordance with 6 Del. C. § 2301 beginning with the date of the order. (emphasis added)

Plaintiff contends that the Superior Court "failed to address Appellant's argument and supporting documents … that showed that the arbitration award was already

[7] *Somerville*, 2005 Del. Super. LEXIS 240, *5-6.

appealed by another plaintiff before Appellant filed her appeal." Regardless of who else may have appealed the arbitrator's award, Plaintiff did so and failed "to obtain a verdict from the jury or judgment from the Court … more favorable to the party than the arbitrator's order." The Superior Court did not err when it awarded the costs of arbitration to Defendant.

(13) Plaintiff's fourth issue on appeal is that the Superior Court erred when it awarded fees of $2,992 for the medical expert called by Defendant. The award of costs for expert witness testimony is within the sound discretion of the trial court.[8] The fee awarded was calculated using the expert's fee schedule and the time he was on the witness stand. While Plaintiff has argued for a lesser fee, the award made was within the bounds of reason. We find no abuse of discretion by the Superior Court.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is AFFIRMED.

BY THE COURT:

/s/Henry duPont Ridgely
Justice

[8] *See Donovan v. Delaware Water & Air Resources Com'n.*, 358 A.2d 717, 723 (Del. 1976); 10 Del. C. § 8906.