IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MARY ANN BULLOCK and THOMAS S. BULLOCK, her husband,	)	
Plaintiffs,	)	C.A. No. 07C-10-010 JRJ
v.	)	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	)	
Defendant.	)	

OPINION

Date Submitted: March 7, 2012
Date Decided: May 18, 2012

Upon Defendant's Motion for Judgment As a Matter of Law: **DENIED**
Upon Defendant's Motion for New Trial: **DENIED**
Upon Plaintiffs' Motion for Costs and Interest: **GRANTED**

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Jurden, J.

I. INTRODUCTION

Before the Court are three motions stemming from a jury verdict in an underinsured motorist ("UIM") automobile accident case awarding Mary Ann Bullock and Thomas S. Bullock ("Plaintiffs") $128,308.95 in damages. After trial, State Farm Mutual Automobile Insurance Company ("Defendant") filed motions seeking: (1) judgment as a matter of law pursuant to Superior Court Civil Rule 50(b); or, alternatively, (2) a new trial pursuant to Superior Court Civil Rule 59. Prior to trial, Plaintiffs made a settlement demand that Defendants rejected, and as a result, Plaintiffs now move for costs and interest pursuant to 10 *Del. C.* § 2301(d). For the reasons that follow, Defendant's Motion for Judgment as a Matter of Law and Motion for New Trial are **DENIED**, and Plaintiffs' Motion for Costs and Interest is **GRANTED**.

II. FACTS AND PROCEDURAL HISTORY

On December 24, 2002, Misael Hernandez lost control of his car and collided with a car driven by Mary Ann Bullock. Mrs. Bullock suffered bodily injuries as a result of the accident.[1] Mr. Hernandez's liability insurance only provided coverage up to $15,000 per person and $30,000 per occurrence.[2] To

[1] Plaintiffs' Complaint ("Pl. Comp.") (Trans. ID. No. 16506309) at ¶ 3-4.

[2] *Id*. at ¶ 10.

cover her medical costs, Mrs. Bullock accepted Mr. Hernandez's policy limit subject to her right to pursue claims against the Defendant.[3]

At the time of the accident, Defendant insured Mrs. Bullock.[4] Her policy provided for UIM coverage of $100,000 per person and $300,000 per occurrence.[5] Defendant contested Mrs. Bullock's injuries and elected not to provide coverage. Mrs. Bullock sued.[6] Before trial on November 21, 2011, Plaintiffs, pursuant to 6 *Del. C.* § 2301(d),[7] offered in writing to settle their claim for $100,000, *i.e.*, Plaintiffs' policy limit.[8] Defendant refused and the parties proceeded to trial.[9]

On November 10, 2011, the parties deposed Dr. Bruce E. Katz, Mrs. Bullock's treating physician and surgeon.[10] Mrs. Bullock met with Dr. Katz for the first time on May 31, 2007,[11] and told him that she had been in a car accident

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[3] *Id.*

[4] *Id.* at ¶ 11.

[5] *Id.*

[6] *Id.* at ¶ 13.

[7] 6 *Del. C.* § 2301(d): In any tort action for compensatory damages in the Superior Court or the Court of Common Pleas seeking monetary relief for bodily injuries, death or property damage, interest shall be added to any final judgment entered for damages awarded, calculated at the rate established in subsection (a) of this section, commencing from the date of injury, provided that prior to trial the plaintiff had extended to defendant a written settlement demand valid for a minimum of 30 days in an amount less than the amount of damages upon which the judgment was entered.

[8] Plaintiffs' Motion for Costs and Interest ("Pl. Mot. for Costs") (Trans. ID. No. 41198173) at Exhibit B.

[9] *Id.* at ¶3.

[10] Plaintiffs' Response in Opposition to Defendant's Motion for Judgment as a Matter of Law ("Pl. Resp.") (Trans. ID. No. 41440541) at ¶ 2. Plaintiffs taped Dr. Katz's deposition testimony because he could not appear to testify at trial.

[11] *Id.* at Exhibit B, p. 10.

on December 24, 2002.[12] Although Mrs. Bullock had minimal back pain prior to the accident, she complained of increasing back pain, and minimal left leg pain after the accident.[13] Dr. Katz examined Mrs. Bullock and took X-rays of her lumbar spine.[14] He determined that Mr. Bullock had a "grade one spondylolisthesis with a possible spondylolysis at the bottom level of her L5-S1."[15] Dr. Katz also reviewed X-rays taken prior to her visit which showed "the slip at the L5-S1 level" and signs of scoliosis.[16] Dr. Katz initially suggested conservative treatment to address Mrs. Bullock's pain rather than a more aggressive approach, such as surgery.

Despite a conservative treatment plan, Mrs. Bullock still complained of localized pain in her lower back[17] and Dr. Katz sent her for an MRI in May 2007.[18] The MRI revealed that Mrs. Bullock has a "left lateralized disc excursion at L5-S1 with superior migration, and there was fragmentation of the facet joint at L5-S1 as

[12] *Id.*

[13] *Id.*

[14] *Id.* at p. 12.

[15] *Id.* A spondylolsis is a defect in the bone. *Id.* A spondylolisthesis is a "slippage of one bone on the other." *Id.* at pp. 12-13.

[16] *Id.* at p. 13. Scoliosis is a curvature of the spine. *Id.*

[17] *Id.* at pp. 13-18.

[18] *Id.* at pp. 18-19.

well and facet hypertrophy at L4-4 with scoliosis."[19] In an effort to relieve her pain, Mrs. Bullock received an epidural injection and started taking prescribed Voltaren (an anti-inflammatory).[20] Despite this treatment, her pain persisted. Mrs. Bullock underwent several more injections while continuing to take prescribed pain relievers.[21] Over time, Mrs. Bullock's leg pain gradually diminished, but her back pain did not.[22] Eventually, she discussed the possibility of surgery with Dr. Katz.[23]

Dr. Katz testified that he examined Mrs. Bullock again and determined that she "was still having left buttock pain, [and] occasional leg pain on the left side . . . [h]er examination demonstrated she had restriction of motion this time in terms of a lumbar forward flexion, [*i.e.*,] bending forwards. She [also] demonstrated discogenic posturing, meaning it's very hard for her to get out of a chair . . . ."[24] Dr. Katz testified that surgery was necessary to repair Mrs. Bullock's back injury and alleviate her pain. [25]

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[19] *Id*. at p. 19.

[20] *Id*. at pp. 19-20. Dr. Katz referred Mrs. Bullock to Dr. Kim, a physiatrist. Physiatrists manage a patient's pain by administering injections and using other alternative methods of treatment. *Id*. at pp. 17-18. Dr. Kim administered Mrs. Bullock's injection on July 9, 2007.

[21] *See id*. at pp. 21-27.

[22] *Id*. at p. 27.

[23] *Id*. at pp. 27-28.

[24] *Id*. at p. 28.

[25] *Id*. at p. 31.

While operating on Mrs. Bullock, Dr. Katz discovered a synovial cyst on her spine.[26] A synovial cyst develops when joints become inflamed and fluid builds up.[27] Over time, the fluid build-up creates a cyst, and in this case, put pressure on Mrs. Bullock's nerves in her back.[28] Notably, contrary to prior diagnoses, Dr. Katz did not find any herniations while operating on Mrs. Bullock's back.[29]

During post-operative visits with Dr. Katz, Mrs. Bullock reported that the pain in her left buttock was completely resolved.[30] The left leg pain Mrs. Bullock previously complained of also had disappeared.[31] Dr. Katz testified that Mrs. Bullock had "good days and bad days," but over time she progressed to the point that she experienced less pain and was doing well.[32] Notwithstanding what Dr. Katz characterized as a successful surgery, he testified that Mrs. Bullock would never be pain-free because her injuries were permanent.[33]

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[26] *Id*. at p. 36.
[27] *Id*.

[28] *Id*. at p. 37.

[29] *Id*.

[30] *Id*. at p. 39.

[31] *Id*.

[32] *See id*. at pp. 39-41.

[33] *Id*. at p. 44.

Dr. Katz opined that Mrs. Bullock's low back pain was directly related to her December 24, 2002 car accident.[34] When asked why he believed the accident was directly related to her injury, Dr. Katz responded: "I don't think she would have seen me except for the car accident occurring at that time."[35] Dr. Katz testified that Mrs. Bullock's degenerative condition, spondylolysis, required surgery to correct "slippage" in her discs.[36] That said, Dr. Katz believed that this condition only caused Mrs. Bullock minimal pain before her accident.[37] Dr. Katz noted, however, that after the accident Mrs. Bullock's condition became symptomatic.[38] Dr. Katz hoped that fusing Mrs. Bullock's discs would alleviate her pain.

Dr. Katz's testimony also addressed a report created by the Defendant's expert, Dr. Brooks.[39] Dr. Brooks reviewed diagnostic images of Mrs. Bullock's back and opined that Mrs. Bullock suffered from a disc herniation that developed over time.[40] Dr. Katz testified that unlike Dr. Brooks, who only reviewed images of Mrs. Bullock's spine and never physically examined her, Dr Katz viewed Mrs.

[34] *Id*. at p. 42.

[35] *Id*. at p. 43.

[36] *Id*. at p. 58.

[37] *Id*.

[38] *Id*.

[39] *Id*. at p. 45. Dr. Brooks is a neuroradiologist.

[40] *Id*. at p. 46.

Bullock's spine first-hand when he operated on her.[41] Dr. Katz disagreed with Dr. Brooks' opinion, noting that Mrs. Bullock suffered from a synovial cyst – not a disc herniation.[42] Dr. Katz testified that a synovial cyst can occur over time, or from trauma, but either way, in his opinion, the cyst was the cause of Mrs. Bullock's pain.[43] In other words, the cyst became symptomatic after the accident.[44] Dr. Katz testified that he reached this conclusion based on the fact that Mrs. Bullock reported that her pain was minimal before the accident.[45] But, after the accident, Mrs. Bullock reported increased pain and sought medical treatment.[46] After surgery, Mrs. Bullock told Dr. Katz that she was in significantly less pain than she had been before surgery.[47]

On the first day of trial, eleven days after Dr. Katz's deposition, and well after the deadline to file motions *in limine* had passed, Defendant moved to exclude Dr. Katz's testimony.[48] The Court heard oral argument on the issue,

[41] *Id*. at p. 47.

[42] *Id*. at pp. 46-47.

[43] *Id*. at pp. 47-48.

[44] *Id*. at pp. 48-49.

[45] *Id*. at p. 48.

[46] *Id*. at pp. 48-49.

[47] *See id*. at p. 49.

[48] Defendant's Motion for Judgment as a Matter of Law ("Def. Mot.") (Trans. ID. No. 41192559) at ¶ 2; Pl. Resp. at ¶ 3, Exhibit A at p. 16. The pretrial order dated April 5, 2011 indicated that motions *in limine* were due twenty days before the pretrial conference, which was October 10, 2011. The Court notes, however, that Dr. Katz's deposition was not taken until November 10, 2011, eleven days before trial.

reviewed Dr. Katz's testimony, and held that his testimony was admissible under Delaware law. At the conclusion of a two day trial, the jury returned a verdict in Plaintiffs' favor, awarding $128,308.95 in damages.[49]

III. PARTIES' CONTENTIONS

A. *Defendant's Motion for Judgment as a Matter of Law, or in the Alternative, a New Trial.*

Defendant argues that it is entitled to judgment as a matter of law, or in the alternative, a new trial, because "Dr. Katz offered no reliable methodology for determining that plaintiff's lumbar spine surgery . . . was related to the accident."[50] According to Defendant, Dr. Katz's response as to why Mrs. Bullock's injury was directly related to the accident was inadequate when he explained:

- A: "I don't think she would have seen me except for the car accident occurring at that time."
- Q: Okay. Can you tell us what caused the synovial cyst? Do you know?
- A: It could be degenerative or it could be trauma.
- Q: Okay. But in this case you just can't tell one way or the other?
- A: Correct.[51]

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[49] Def.'s Mot. at ¶ 1 and Exhibit A. The jury awarded $98,308.95 to cover medical expenses and $30,000 to cover pain and suffering and other general damages.

[50] Def.'s Mot. at ¶ 5.

[51] *Id*. (citing Dr. Katz's deposition at pp. 43, 54.).

Defendant argues that Dr. Katz's answer amounts to *ipse dixit* reasoning, and therefore, is insufficient as a matter of law.[52]

Plaintiffs respond with two arguments. First, Plaintiffs claim that the Defendant's untimely submission of its initial motion on the day of trial should prohibit Defendant's current motions.[53] Specifically, Plaintiffs argue that the Defendant's "eleventh hour" motion "precluded the Court from determining how it wished to proceed on the matter which could have consisted of a hearing wherein Dr. Katz could have been asked to explain or clarify any testimony . . . ."[54] Second, Plaintiffs argue that notwithstanding the Defendant's late submission, the methodology employed by Dr. Katz to render an opinion in this case is reliable[55] because it is "supported by that which is relied upon by other medical experts."[56]

B. *Plaintiffs' Motion for Costs and Prejudgment Interest*

[52] Def.'s Mot. at ¶ 8.

[53] Pl. Resp. at ¶¶ 7-9.

[54] *Id*. at ¶ 9.

[55] *Id*. at ¶¶ 10-13.

[56] *Id*. at ¶ 13.

Plaintiffs argue they are entitled to $4,136.22[57] in costs under Superior Court Civil Rule 54(d).[58] With respect to prejudgment interest, on August 6, 2009, Plaintiffs sent a letter to Defendant, pursuant to 6 *Del. C.* § 2301(d), offering to settle their claim for $100,000.[59] Defendant refused to pay that amount.[60] The jury returned a verdict in Plaintiffs' favor, awarding them $128,308.95 in damages.[61] Plaintiffs claim that because they offered to settle their claim in accordance with 6 *Del. C.* § 2301(d), they are entitled to "recover interest at the legal rate commencing December 24, 2002, the date of the injury."[62]

Defendant opposes Plaintiffs' motion for multiple reasons. First, Defendant claims that Plaintiffs are not entitled to the costs associated with Dr. Katz's

[57] Pl.'s Mot. for Costs at ¶ 1. *See also* Pl.'s Mot. for Costs at Exhibit A. Plaintiffs incurred the following costs:

a. Filing Fees: $191.50
b. Sheriff Service fees: $30.00
c. Insurance Commissioner fees: $25.00
d. Court Trial Fee: $150.00
e. Dr. Katz's trial testimony: $2,700.00
f. Court Reporting fee associated with Dr. Katz's Video Trial Deposition: $556.72
g. Videotaping fee associated with Dr. Katz's Video Trial Deposition: $483.00

Total: $4,136.22

[58] Sup. Ct. Civ. R. 54(d) states: "Costs. -- Except when express provision therefor is made either in a statute or in these Rules or in the Rules of the Supreme Court, costs shall be allowed as of course to the prevailing party upon application to the Court within ten (10) days of the entry of final judgment unless the Court otherwise directs."

[59] Pl.'s Mot. for Costs at ¶ 2.

[60] *Id*. at ¶ 3.

[61] *Id*. at ¶ 4, Exhibit C.

[62] *Id*. at ¶ 5.

testimony because it is inadequate as a matter of law.[63] Second, with regard to Plaintiffs' Motion for Prejudgment Interest, Defendant argues that the jury verdict should be "reduced by the settlement plaintiff received from the tortfeasor's carrier," and thus the net verdict should be $113,308.95.[64] Third, Defendant argues that Plaintiffs' recovery for compensatory damages is limited by her $100,000 underinsured ("UIM") policy limit,[65] and because Plaintiffs offered to settle for $100,000, Plaintiffs are not entitled to recover prejudgment interest.[66] Fourth, Defendant argues that it is "improper to tax interest on the jury award from the date of the tort,"[67] and Plaintiffs' claim for interest should have accrued on the date Mrs. Bullock received the tortfeasor's $15,000 policy limit because prior to her receipt of those funds, no UIM claim existed.[68] Fifth, Defendant claims that applying the interest calculation to the date of the tort is "an unconstitutional taking of defendant's property in violation of the due process clause of the United States Constitution, Amendment V and the Delaware Constitution, Article I, § 9."[69] Last,

[63] Defendant's Opposition to Plaintiffs' Motion for Costs and Interests ("Def. Op. to Costs") (Trans. ID. No. 41387115) at ¶ 1.

[64] *Id*. at ¶ 3. Defendant argues that $15,000 should be subtracted from $128,308.95, leaving Plaintiffs with a verdict of $113,308.95.

[65] *Id*. at ¶ 4.

[66] *Id*.

[67] *Id*. at ¶ 5.

[68] *Id*.

[69] *Id*.

Defendant argues that if the Court finds that Plaintiffs are entitled to prejudgment interest, the calculation is incorrect.[70] According to Defendant, Plaintiffs are entitled to $66,399.88 in prejudgment interest, if at all.[71]

IV. STANDARD OF REVIEW

Judgment as a matter of law under Superior Court Civil Rule 50 is appropriate where "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." In other words:

> When determining a motion for judgment as a matter of law under Rule 50, the Court does not weigh the evidence but, rather, views the evidence in the light most favorable to the non-moving party and, drawing all reasonable inferences therefrom, determines if a verdict may be found for the party having the burden.[72]

Superior Court Civil Rule 59(a) governs a motion for new trial and the Court "will not disturb a jury's verdict unless it is against the great weight of the evidence, resulted from the jury's disregard for applicable rules of law, or was tainted by legal error during trial."[73] A jury's verdict is afforded great deference

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[70] *Id*. at ¶ 6.

[71] *Id*.

[72] *Drayton v. Price*, 2010 WL 1544414, at *4 (Del. Super.) (citing *Gass v. Truax*, 2002 WL 1426537, at *1 (Del. Super.)).

[73] *In re Asbestos Litigation*, 2011 WL 684164, at *4 (Del. Super.).

by the Court and "[i]n the face of any reasonable difference of opinion, courts will yield to the jury's decision."[74]

V. DISCUSSION

A. *Defendant is Not Entitled to Judgment as a Matter of law, or in the Alternative, a New Trial.*

Defendant claims that Dr. Katz's testimony "offered no reliable methodology for determining that plaintiff's lumbar spine surgery . . . was related to the accident."[75] Defendant further claims that Dr. Katz's testimony established that Mrs. Bullock's synovial cyst "was just as likely to have emanated from degeneration as from trauma[,]" and thus, there is no legally sufficient evidentiary basis for a reasonable jury to find that Mrs. Bullock sustained a compensable injury.[76]

To assess the admissibility of an expert witness's testimony, the Court relies upon Delaware Rule of Evidence ("D.R.E.") 702, which states:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

[74] *Id*. (quoting *Young v. Frase*, 702 A.2d 1234, 1236 (Del. 1997)).

[75] Def.'s Mot. at ¶ 6.

[76] *Id*.

D.R.E. 702 is identical to its federal counterpart, Federal Rule of Evidence 702.[77] The Delaware Supreme Court has adopted the United States Supreme Court's holding in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[78] It is worth noting that before *Daubert*, the Delaware Supreme Court identified several factors "to guide the trial courts in determining when to allow an expert opinion to reach the jury[,]" which are:

> (1) The expert is qualified (D.R.E. 702);
>
> (2) The evidence is otherwise admissible, relevant, and reliable (D.R.E. 401 and 402);
>
> (3) The basis for the opinion are those reasonably relied upon by experts in the field (D.R.E. 703);
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> (4) The specialized knowledge being offered will assist the trier of Fact to understand the evidence or determine a fact in issue (D.R.E. 702); and
>
> 5) The evidence does not create unfair prejudice, confuse the issues, or mislead the jury (D.R.E. 403).[79]

These factors assist the Court in maintaining its role as a "gatekeeper,"[80] and of these factors, Defendant only challenges the reliability of Dr. Katz's testimony (factor two) and the methodology used to formulate his opinion (factor three).[81]

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[77] *M.G. Bancorporation v. Le Beau*, 737 A.2d 513, 521 (Del. 1999).

[78] *Id*. (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993) (noting that a trial judge has an obligation to "ensure that any and all scientific testimony . . . is not only relevant, but reliable.")).

[79] *In re Asbestos Litigation*, 911 A.2d 1176, 1198 (Del. Super. 2006)(other citations omitted).

Dr. Katz testified to the following: he is a board certified orthopedic surgeon;[82] he reviewed all pre-accident and post-accident records relating to Mrs. Bullock's care and treatment;[83] he treated Mrs. Bullock from May 31, 2007 to present;[84] he understood and would offer opinions within the standard of a reasonable medical probability;[85] he understood the background behind Mrs. Bullock's injury;[86] after reviewing Mrs. Bullock's medical records and speaking with her during examinations, he was aware of Mrs. Bullock's pre-accident and post-accident conditions;[87] he personally examined Mrs. Bullock and performed diagnostic testing on her back;[88] he understood and explained Mrs. Bullock's condition, "spondylolisthesis with a possible spondylolysis";[89] he thought Mrs. Bullock's pain was caused by the spondylolysis;[90] he created Mrs. Bullock's

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[80] *M.G. Bancorporation*, 737 A.2d at 521.

[81] Def.'s Mot. at ¶ 6.

[82] Pl.'s Resp. at Exhibit B, p. 4

[83] *Id*. at pp. 6 – 9.

[84] *Id*. at p. 10.

[85] *Id*. at pp. 5 – 6.

[86] *Id*. at p. 10.

[87] *Id*. at pp. 10 – 12.

[88] *Id*. at p. 12.

[89] *Id*. at pp. 12 – 13.

[90] *Id*. at p. 13.

treatment plan;[91] he was aware of the treatment Mrs. Bullock received before seeing him;[92] he was aware of the "conservative" treatment Mrs. Bullock received under Dr. Kim's care;[93] after Dr. Kim's conservative treatment methods, Dr. Katz performed a physical exam on Mrs. Bullock which revealed that Mrs. Bullock still suffered from restricted movement and pain;[94] Mrs. Bullock underwent a "left S1 selective nerve root block" to determine the origin of her pain;[95] and the nerve block only provided Mrs. Bullock with "four to five hours [of] complete relief." [96] Therefore, Mrs. Bullock and Dr. Katz decided on surgery to alleviate her pain, specifically a Gill decompression (to decompress the nerve) and a spinal fusion (to stabilize the area).[97]

Dr. Katz's testimony also described Mrs. Bullock's surgery in great detail.[98] He testified that during surgery he found that a synovial cyst, not a herniation, was putting pressure on Mrs. Bullock's nerve and causing her pain.[99] He also testified

[91] *Id*. at pp. 13 – 14.

[92] *Id*. at pp. 14 – 17.

[93] *Id*. at pp. 17 – 28.

[94] *Id*. at p. 28.

[95] *Id*. at pp. 29 – 30.

[96] *Id*. at pp. 30 – 31, 33.

[97] *Id*.

[98] *Id*. at pp. 33 – 38.

[99] *Id*. at pp. 36 – 37.

that during Mrs. Bullock's first visit after surgery, she reported a "complete resolution of her buttock pain."[100] Dr. Katz testified that during subsequent visits, Mrs. Bullock had "good days and bad days, but she didn't have any leg pain."[101]

When asked his opinion as to whether Mrs. Bullock's lower back condition was caused by her accident on December 24, 2002, Dr. Katz testified, "It's directly related[ ],"[102] and explained, "I don't think she would have seen me except for the car accident occurring at that time."[103] Dr. Katz elaborated further:

> The patient really had *minimal symptoms to begin with*. She wasn't pain free, but she had minimal symptoms. After the car accident she seeked [*sic*] medical treatments. She came to see me. She was treated by the chiropractor for many years. *After surgery, her pain was gone*. So we found the pain generator, we corrected it, and she was back to where she was before the accident.[104]

Dr. Katz's testimony also covered whether Mrs. Bullock's treatment was reasonable and necessary, and whether the charges associated with her treatment were customary and appropriate. Dr. Katz agreed that they were.[105]

Dr. Katz's testimony is reliable and the bases for his opinion are those reasonably relied upon by experts in his field. Although Dr. Katz did not use the

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[100] *Id*. at p. 39.

[101] *Id*.

[102] *Id*. at p. 42.

[103] *Id*. at p. 43.

[104] *Id*. at pp. 48 – 49. (emphasis added).

[105] *Id*. at p. 43.

[106] Dr. Katz reviewed all of Mrs. Bullock's records to familiarize himself with Mrs. Bullock's condition and personally treated Mrs. Bullock after her accident. Dr. Katz eventually determined that surgery was necessary to alleviate Mrs. Bullock's pain. Dr. Katz opined that Mrs. Bullock's pain was directly related to the December 24, 2002 car accident because prior to the accident, Mrs. Bullock had minimal pain. After the accident, however, she described her pain as significant. Dr. Katz acknowledged that there was no way to tell when the synovial cyst developed (it could have been pre or post-accident), but either way, the cyst was symptomatic after the accident. Viewing the evidence in the light most favorable to Plaintiffs, the non-moving party, and drawing all reasonable inferences therefrom, there is a legally sufficient evidentiary basis for a reasonable jury to find that Mrs. Bullock had a compensable injury,[107] and thus, Defendant's Motion for Judgment as a Matter of Law is **DENIED**.

In rendering its verdict, the jury did not go against the great weight of the evidence or disregard the applicable rules of law[108] and the verdict was not tainted by legal error.[109] Consequently, Defendant's Motion for New Trial is **DENIED**.

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[106] *Maier v. Santucci*, 697 A.2d 747, 749 (Del. 1997).
[107] *See Drayton*, 2010 WL 1544414, at *4 (citing *Gass*, 2002 WL 1426537, at *1).

[108] *See In re Asbestos Litigation*, 2011 WL 684164, at *4.

B. *Plaintiffs' Motion for Costs and Prejudgment Interest*

1. *Costs*

As the prevailing party in a civil action, Plaintiffs are entitled to costs under 10 *Del. C.* § 5101 and Superior Court Civil Rule 54(d).[110] It is within the Court's discretion to award costs, [111] and the Court often includes expert witness fees when doing so.[112] Defendant opposes paying Plaintiffs' costs associated with Dr. Katz's testimony arguing that such testimony is inadequate as a matter of law. As noted above, because the Court finds Dr. Katz's testimony is adequate under D.R.E. 702 and the jury could reasonably find for Plaintiffs based upon his testimony, Plaintiffs' Motion for Costs is **GRANTED**.

2. *Pre-judgment Interest*

To qualify for prejudgment interest, a plaintiff must meet the requirements set forth in 6 *Del. C.* § 2301(d). Section 2301(d) requires that: (1) the case be a tort action; (2) the plaintiff must have demanded to settle and held that demand open for 30 days; and (3) the damages at trial must exceed the amount the plaintiff

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[109] *Id*.

[110] *Enrique v. State Farm Mut. Auto. Ins. Co.*, 2010 WL 2636845, at *1 (Del. Super.), *aff'd by, State Farm Mut. Auto. Ins. Co. v. Enrique*, 16 A.3d 938 (Del. 2011).

[111] *Id*. (citing *Donovan v. Delaware Water & Air Resources Comm'n*, 358 A.2d 717, 722-23 (Del. 1976)).

[112] *Id*. (citing 10 *Del. C.* § 8906).

agreed to accept for settlement.[113] If the elements of Section 2301(d) are met, prejudgment interest is calculated based on the damages awarded by the jury, not the existence of, or terms of, coverage.[114] The Court's calculation is adjusted, however, when the Court awards prejudgment interest based on UIM coverage.[115]

In *State Farm Automobile Insurance Company v. Enrique*, the plaintiff filed a complaint against the defendant seeking UIM coverage. The policy limit was $100,000. The defendant advanced the plaintiff $25,000 and the plaintiff filed a demand pursuant to 6 *Del. C.* § 2301(d) requesting an additional $65,000 to cover his expenses. All tolled, the plaintiff sought $90,000 from the defendant. The defendant rejected the demand and after a three-day trial, the jury returned a $260,000 verdict for the plaintiff. The plaintiff moved for costs and prejudgment interest, which the trial court awarded. The trial court noted that the basis for its prejudgment interest calculation was the remaining $75,000 in UIM coverage, not the jury verdict of $260,000.[116] The defendant appealed to the Delaware Supreme Court and argued that plaintiff's recovery – damages and prejudgment interest – should be capped at $100,000. The Supreme Court disagreed, holding that "the award of prejudgment interest can be greater than the uninsured motorist policy

[113] *State Farm Mut. Auto. Ins. Co. v. Enrique*, 2011 WL 1004604, at *2 (Del.).

[114] *Id*. (citing *Rapposelli v. State Farm Mut. Ins.*, 988 A.2d 425, 427-29 (Del. 2010)).

[115] *Enrique*, 2011 WL 1004604, at *2. ("[T]he award of prejudgment interest can be greater than the . . . [UIM] limits but [ ] the award must be based on the remaining coverage – not the actual jury damage award.")

[116] *Enrique*, 2011 WL 1004604, at *1.

limits but that the award must be based on the remaining coverage – not the actual jury damage award."[117]

Here, according to Defendant, Plaintiffs "demand of $100,000.00 equals the $100,000.00 compensatory damages judgment," and thus Plaintiffs are not entitled to interest under 6 *Del. C.* § 2301(d).[118]

The Court is not persuaded by this argument for two reasons. First, the *Enrique* Court noted:

> The General Assembly enacted 6 *Del. C.* § 2301(d) to promote earlier settlement of claims by encouraging parties to make fair offers sooner, with the effect of reducing court congestion. A contradictory holding capping State Farm's liability on prejudgment interest to the policy limit would strip section 2301 of its purpose – encouraging settlement – when the insurer is faced with a demand below or at what ultimately may be determined to be at or in excess of the policy limits.[119]

The General Assembly enacted 6 *Del. C.* § 2301(d) to encourage settlement. That is exactly what Plaintiffs attempted to accomplish here. Plaintiffs offered to settle their tort claim for $100,000 and the offer remained open for 30 days. Defendant rejected that offer, and the jury subsequently returned a verdict of $128,308.95. Second, Defendant's argument is inaccurate. Plaintiffs' policy limit is $100,000. The jury awarded Plaintiffs $98,308.95 in compensatory damages. Therefore,

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[117] *Id*. at *2.

[118] Def. Op. to Costs at ¶ 4. Defendant further argues that "[i]f plaintiff had demanded $99,999.00, then plaintiff would have been entitled to pre-judgment interest on the $100,000.00 judgment."

[119] *Enrique*, 2011 WL 1004604, at *3.

Plaintiffs' compensatory damages do not equal their policy limit. Based on their $100,000 policy limit, Plaintiffs are entitled to $51,244.75 in prejudgment interest.[120]

Defendant also argues that awarding prejudgment interest from the date of the tort is unconstitutional because Plaintiffs' UIM claim did not accrue until the tortfeasor's insurance could not cover Plaintiffs' expenses.[121] But "there is a strong presumption that a legislative enactment is constitutional"[122] and it will not be declared unconstitutional "unless it clearly and convincingly violates the Constitution."[123] The party challenging the constitutionality of a legislative enactment bears the burden of overcoming its presumption of validity.[124] Section 2301(d) establishes that the Court calculates prejudgment interest "from the date of injury . . . ." Defendant must pay prejudgment interest from the date of the injury

[120] Prejudgment Interest Calculation:

(1) Date of accident (12/24/02) to jury verdict (11/22/11) = 8 years, 333 days
(2) Legal rate of interest: 5.75% (or .0575) x $100,000.00 = $5,750.00 per year in interest
(3) $5,750.00 divided by 365 days = $15.75 per day in interest
(4) $5,750.00 x 8 years = $46,000
(5) $15.75 of daily interest x 333 = $5,244.75
(6) $46,000 + $5,244.75 = $51,244.75 in prejudgment interest.

[121] Def.'s Op. to Costs at ¶ 5.

[122] *Sheehan v. Oblates of St. Francis de Sales*, 15 A.3d 1247, 1258 (Del. 2011) (quoting *Wien v. State*, 882 A.2d 183, 186 (Del. 2005)).

[123] *Lacy v. Green*, 428 A.2d 1171, 1175-76 (Del. Super. 1981).

[124] *Id*. at 1176 (citing *Justice v. Gatchell*, 325 A.2d 97, 102 (Del. 1974)).

because Defendant stands in the shoes of the tortfeasor.[125] Therefore, Defendant has not demonstrated that Section 2301(d) "clearly and convincingly" violates the Constitution.

Plaintiffs have satisfied the elements of Section 2301(d), and thus, Plaintiffs' Motion for Prejudgment Interest is **GRANTED**.

IT IS SO ORDERED.

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Jan R. Jurden, Judge

cc**:** Prothonotary

[125] *See Elliot v. Lewis*, 1989 WL 12231, at *1 (Del. Super.).