IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

RONALD W. PAYNE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 03C-05-130-PLA
	)	
THE HOME DEPOT,	)	
a Georgia corporation,	)	
	)	
Defendant.	)	

ON DEFENDANT'S MOTION FOR NEW TRIAL
AND
MOTION FOR REMITTITUR
DENIED
ON PLAINTIFF'S MOTION FOR COSTS
DENIED IN PART and GRANTED IN PART

Submitted: February 2, 2009
Decided: March 12, 2009

James P. Hall, Esquire, PHILLIPS, GOLDMAN & SPENCE, P.A., Wilmington, Delaware, Attorney for Plaintiff.

Sean T. O'Kelly, Esquire, CROSS & SIMON, LLC, Wilmington, Delaware, Attorney for Defendant.

Kenneth M. Dubrow, Esquire, THE CHARTWELL LAW OFFICES, LLP, Philadelphia, Pennsylvania, Attorney for Defendant.

ABLEMAN, JUDGE

I. Introduction

This is the Court's decision on a Motion for New Trial and a Motion for Remittitur filed by the defendant, The Home Depot, Inc. ("Home Depot"), and a Motion for Costs filed by plaintiff Ronald W. Payne ("Payne"). In this personal injury action stemming from an incident at a Home Depot store, Payne alleged that a stack of eighteen doors fell upon him, causing serious personal injury to his neck and back, and resulting in permanent disability.

After five days of trial, from January 12 to January 16, 2009, the jury returned a verdict in favor of Payne and awarded $2.9 million in damages. Home Depot contends in its Motion for New Trial that (1) no reasonable jury could find that Plaintiff proved the acts of negligence committed by the defendant; and (2) prejudicial comments by Plaintiff's counsel in closing argument and by Plaintiff during his testimony prevented the jury from reaching a fair decision. In its Motion for Remittitur, Home Depot argues that the verdict is "unsupported by the evidence, and so excessive that it should shock the Court's conscience."

In response to Home Depot's request for a new trial or remittitur, Payne contends that the jury's finding should control where the evidence is susceptible to two equally reasonable conclusions, even if the Court would have reached a different conclusion. Payne further submits that any improper comments made by counsel in closing argument were corrected immediately by the Court's curative instruction and that no

objection to the instruction was raised by Home Depot, nor did Home Depot move for a mistrial.

For reasons that will be discussed more fully herein, the Court concludes that the evidence in this case did not preponderate so heavily against the jury's finding that the verdict should be set aside. Secondly, Plaintiff's counsel's improper remark during closing argument was so insignificant in light of all the evidence presented that it does not justify the Court in setting aside the verdict or granting a new trial. Moreover, any prejudice was immediately cured by the Court's express instruction to the jury to disregard counsel's statement.

With respect to the request for remittitur, the Court is satisfied that the jury award is not excessive, is supported by the evidence, and is not so out of proportion to the injuries as to shock its conscience and sense of justice.

Finally, the Court finds that the Payne's requests for costs include several items that are either excessive or wholly nonrecoverable. Accordingly, Plaintiff's Motion for Costs will be denied in part and granted in part.

II. Statement of Facts

Sometime during the afternoon or evening of June 26, 2001, Payne visited the Home Depot store in Christiana, Delaware, to check the prices of doors for a job he was doing in connection with his contracting

business. While in an aisle in the millwork department, Payne claims that he was injured when eighteen doors fell from a shelf approximately five feet from the floor, striking him on his back and shoulders and pinning him underneath.[1]

At trial, a host of physicians testified concerning the extensive injuries Payne sustained as a direct result of the incident at Home Depot, and of the magnitude of the therapies and treatments he has undergone in the almost eight years since the accident. All of the medical experts who testified at trial opined that Payne's severe back injuries, including a lumbar disc herniation at the L4-5 level and a lumbar disc tear at the L3-4 level, were the result of the incident at Home Depot. By the time of trial, the treatment for these injuries consisted of two separate surgical procedures, rehabilitative physical therapy, nerve blocks, lumbar epidural steroids and injections, chiropractic treatment, and lumbar facet injections. In addition, Plaintiff developed depression as a result of the chronic pain and his inability to work or provide for his family. The evidence further established that, as of June 13, 2007, Payne was deemed to be totally disabled by the Social Security Administration, and he has not been employed at all since 2004. At trial, plaintiff presented evidence of his medical expenses, which were in excess of $71,000.00, and of his need for future medical expenses, as well as evidence of his past and future lost wages.

[1] Excerpted Trial Tr., Test. of Ronald W. Payne (Jan. 12, 2009), 7:2-9:19.

Home Depot disputed Payne's description of the accident and the manner in which it occurred, if at all. Indeed, its entire case was premised upon challenging Payne's credibility through a presentation of the numerous instances in which it claimed Payne had been dishonest in other contexts. It also took great pains to dispute Payne's fundamental contention by challenging whether the accident occurred at all, whether Payne sustained any injury on June 26, 2001, while shopping at the Home Depot store, and whether Payne's description of the incident was accurate. In addition, through cross-examination Home Depot disputed the opinions of the treating medical providers by attempting to establish that they were not properly and adequately informed of Payne's medical history.

Significantly, and especially critical for this motion, Home Depot presented no medical experts to dispute the testimony of the plaintiff's treating physicians, but chose instead to rely entirely upon its effort to convince the jury either that the incident never occurred at all, or that Payne was not injured as a result of any negligence on Home Depot's part, or that Payne's injuries were the result of other causes arising before or after the alleged 2001 Home Depot accident, or that the incident could not possibly have occurred in the manner described by Payne. Thus, while the extent and nature of the damages were not the primary focus of dispute, the parties vigorously contested liability.

In the final analysis, then, the case hinged entirely upon the credibility of the plaintiff. Indeed, the parties implicitly conceded this conclusion, since at no time during the course of the trial did either party move for judgment as a matter of law.

At the conclusion of trial, the jury returned a verdict in favor of Plaintiff and awarded him the sum of $2.9 million.

III. Standard of Review

Historically, the trial judge's inherent power to grant a new trial has been limited by the deference that must be given to a jury's findings. A Court will not set aside a jury's verdict unless "the evidence preponderates so heavily against the jury verdict that a reasonable juror could not have reached the result,"[2] or the Court is convinced that the jury disregarded applicable rules of law, or the jury's verdict is tainted by legal error committed by the Court during the trial.

Similarly, a jury award that is challenged as excessive in a motion for remittitur will not be disturbed unless it is clearly "the result of passion, prejudice, partiality or corruption,"[3] or it was "manifestly the result of disregard of the evidence or applicable rules of law."[4] A jury

[2] *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979).

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

[4] *Storey v. Castner*, 314 A.2d 187, 193 (Del. 1973).

award will not be set aside by remittitur "unless it is so grossly excessive as to shock the Court's conscience and sense of justice."[5]

V. Analysis

Motion for New Trial

I turn first to the question of whether a new trial should be granted. In the Court's judgment, there is no basis to disturb the jury's findings. The parties presented conflicting accounts concerning whether the injuries occurred at the Home Depot store, and if so, how Payne could or could not have sustained them. All of the witnesses were subjected to thorough and vigorous cross-examination, and the Court did not in any way limit defense counsel in its dogged efforts to impeach the witnesses. Nor did the Court exclude evidence of prior instances of the plaintiff's dishonesty, as it ruled favorably for Home Depot on all motions in limine that sought to limit the evidence, deeming evidence of Payne's motor vehicle accidents, prior use of marijuana, and tampering with a medication prescription admissible in the context of the defense challenge to Payne's credibility.[6] The jury had ample opportunity to assess the credibility of the lay witnesses and the weight to be given to the expert testimony. In the final analysis, these are quintessential factual issues for resolution by the jury.

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[5] *Id.*

[6] *Payne v. The Home Depot, Inc.*, 2007 WL 4577624 (Del. Super. Dec. 14, 2007).

Home Depot's Motion for New Trial amounts to little more than an effort to rehash the facts favorable to its case in the hopes of having the Court view them differently from the way the jury did. It reads like a closing argument. Not only did the jury have before it far more evidence than what is argued in this motion, but under the law its decision is entitled to great deference -- especially when "any margin for reasonable difference of opinion exists in the matter of a verdict"[7] -- and the Court must view the evidence in the light most favorable to the plaintiff. There is no basis to conclude that the jury found negligence on the basis of anything other than the admissible evidence and any reasonable inferences drawn from that evidence. Home Depot implicitly acknowledged this fact when it determined to forego moving for judgment as a matter of law. Having failed to request Rule 50(a) relief during the trial on the ground that no legally sufficient evidentiary basis existed for a reasonable jury to find for the plaintiff, it is disingenuous for defendant to ask for that relief now that the jury has decided against it.

Fundamentally, Defendant must face the fact that litigation is risky business, and especially so with jury trials. As this Court has preached on numerous occasions, the Court cannot make the process risk free.[8] When parties demand a jury trial, as they did here, "they

[7] *Id.*

[8] *Beatty v. Smedley*, 2003 WL 23353491, at *3 (Del. Super. Mar. 12, 2003).

[knowingly] activate the risk inherent in the system."[9] Given the evidence adduced at trial, the Court cannot excuse Defendant from the consequences of its decision to submit the matter to a jury, and it would be improper for the Court to substitute its judgment for that of the chosen finder of fact.

Defendant next complains that comments made by Plaintiff's counsel in closing argument and by Plaintiff's expert witness were improper or prejudicial, thus warranting a new trial. Specifically, the defendant argues that the Court should not have permitted an expert to testify that "Plaintiff did not seek medical or psychiatric treatment because he could not afford it."[10] Defendant submits that such a statement is "the equivalent of the expert testifying that Plaintiff was not insured and did not seek treatment for that reason."[11] Without citing any evidentiary rule, Home Depot further objects to Payne's testimony that he did not have medical insurance and to any mention of Payne's lack of insurance.

Unfortunately for Home Depot, the text of the Rule of Evidence that is implicated here -- Rule 411 -- provides it with no basis for relief:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully. This rule does not

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[9] *Dunkle v. Prettyman*, 2002 WL 833375, at *3 (Del. Super. May 1, 2002).

[10] *See* Trial Tr., Test. of Neil Kaye, M.D. (Jan. 14, 2009), 19:2-17.

[11] Docket 148 (Def.'s Mot. for New Tr.), ¶ 9.

> require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership or control, or bias or prejudice of a witness.[12]

The plain language of the rule is intended to protect the tortfeasor from the prejudicial effect of the mention of insurance, but there is no similar prohibition against the admission of evidence concerning the plaintiff's insurance coverage. In fact, the rule specifically allows insurance to be mentioned "for other purposes."

Moreover, the collateral source rule, which is firmly embedded in Delaware law, dictates that "a tortfeasor has no right to any mitigation of damages because of payments or compensation received by the injured person from an independent source."[13] Under the rule, a plaintiff may recover damages from a tortfeasor for the reasonable value of medical services, even if the plaintiff has received complete recompense for those services from a source other than the tortfeasor. In light of this principle, the defendant cannot be heard to complain of the prejudicial effect, if any, that such evidence may have had when the tortfeasor is required to bear the entire cost of his negligent conduct, even if it results in a windfall for the innocent plaintiff.[14]

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[12] D.R.E. 411.

[13] *Mitchell v. Haldar*, 883 A.2d 32, 38 (Del. 2005) (quoting *Yarrington v. Thornburg*, 205 A.2d 1, 2 (Del. 1964)); *see also State Farm Auto. Ins. Co. v. Nalbone*, 569 A.2d 71, 73 (Del. 1989).

[14] To the extent that this Court may have limited any such testimony at trial, it acknowledges its error, but is now firmly convinced that Defendant is incorrect in this evidentiary argument.

As a last ground for requesting a new trial, Home Depot contends that Plaintiff's counsel improperly referred to a forklift being operated in the next aisle when there was no evidence to support this comment. Defendant argues that this reference was not only improper but warrants a new trial because the jury was misled to believe that an accident in fact occurred, which was a central issue in the case.

During closing argument, after Plaintiff's counsel made a brief, cursory mention of a forklift, the defense interposed an objection, which was sustained at sidebar. At Defendant's request, the Court instructed the jury to disregard the previous statement made by counsel.[15] No further objection was made to the substance of the curative instruction, nor did Defendant request a mistrial. The Court is satisfied that this mention of a forklift was random and that there was no elaboration on the matter before the Court was able to prevent counsel from making any further improper comments. The possible prejudice flowing from such a remark was minimal, if any, and was cured by the Court's cautionary instruction to the jury to disregard counsel's comment.

Plaintiff presented substantial evidence to support his case. The jury weighed this evidence against Defendant's evidence, judged the believability of all the witnesses, and found Plaintiff's version of the facts more likely true. In the Court's judgment, the jury would have placed

[15] Trial Tr. (January 15, 2009), 82:13-83:10.

little, if any, significance upon this careless misstatement on counsel's part.

Motion for Remittitur

In support of its argument that the $2.9 million damage award is excessive, Home Depot submits that Payne's medical experts conceded that he suffered from stenosis and degenerative disc disease unrelated to the accident, and that he had experienced symptoms of depression, anxiety, and bi-polar disorder before the date of the Home Depot incident. Home Depot also points out that Payne was involved in two motor vehicle accidents in 1997 and in 2004, and that he was treated for back pain after each incident. Home Depot identifies several other cases where the jury awards were lower than the verdict here and argues that those cases involved similar injuries.

In a nutshell, none of the foregoing arguments are persuasive. This is so because the Court's conscience is not shocked by the damage award, which, in the Court's judgment, is not excessive given the extent of the plaintiff's injuries.

Payne has undergone far-reaching treatment for his back and shoulder injuries, including two surgeries to date. None of these interventions have been successful, and Payne is no longer able to work. One of Plaintiff's physicians characterized his condition as "failed back syndrome."[16] He is heavily medicated with painkillers, and it has even

[16] Excerpted Trial Tr., Test. of Peter Bandera, M.D. (Jan. 13, 2009), 83:7-8.

been suggested that he may need the permanent insertion of a morphine pump to control the pain.[17] The restrictions and limitations caused by his injuries, and the persistent and chronic pain that he experiences, will most likely be permanent. Plaintiff was only 30 years old at the time of trial, with a life expectancy of 43.3 years. He has been deemed permanently disabled by the Social Security Administration and has not been able to work since 2004. Payne's vocational rehabilitation expert projected his wage loss claim, including past and future earning losses and substitute services, to be in excess of $790,000.00.[18] His pain management specialist, Dr. Falco, predicted his future medical expenses to be $1,756,705.00.[19]

Notably, Home Depot offered not a single witness to challenge the testimony of Payne's medical, vocational, and economic experts, although it did have medical witnesses available. The reason for this strategic decision is obvious. The case hinged entirely on the credibility of Payne and his experts, all of whom based their opinions in part on information provided by Payne. There was no dispute that Payne was hurt and that he was hurt seriously. The focus of the defense at trial was not the nature and extent of Payne's injuries, nor was it the degree of his permanency, nor even the economist's projection of his lost wage claim.

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[17] Trial Tr., Test. of Frank J. Falco, M.D. (Jan. 14, 2009), 161:22-162:6.

[18] Trial Tr., Test. of Robert F. Minnehan, Ph.D. (Jan. 14, 2009), 204:23-212:14.

[19] Trial Tr., Test. of Frank J. Falco, M.D. (Jan. 14, 2009), 168:7-169:21.

The gist of the defendant's case was the question of whether Payne was injured at the Home Depot store in the manner he described, or whether he had fabricated the accident solely in an effort to receive compensation from the defendant, a large corporate entity, presumably with extensive resources. Having employed that strategy with all of its inherent risks, Home Depot cannot now be heard to complain that the large damage verdict is against the weight of the evidence, particularly when all of the testimony on this issue was uncontroverted.

Similarly, the effort on Defendant's part to draw comparisons with other personal injury cases is equally unavailing, and particularly inappropriate when one considers that none of the cited cases have facts identical to the case at bar. The fact that the injuries may have been "similar" does not address the characteristics of the individual plaintiffs (such as age), the nature of their disability from employment (if any), the differences in expert opinions, or any of the whole host of factual differences that necessarily exist between every unique personal injury case. Furthermore, it is of no value to the Court for counsel to cite a case such as *Queen v. Hubbard*, in which the damage award may have been half as much as the award here, when the trial in the cited case took place almost thirteen years ago.[20] Indeed, this Court has aptly described the perils of comparing other verdicts to support remittitur:

[20] 1996 WL 659467 (Del. Super. Sept. 26, 1996).

> '[I]t is difficult, if not dangerous, to refer to other cases to argue that a particular verdict is too high or too low.' It is inevitable that there will be dissimilar results in personal injury suits because no two juries will judge the effect of a plaintiff's injuries identically.[21]

All of the facts emphasized by Home Depot in its Motion for Remittitur were presented at trial. These included the inconsistencies in Payne's story, the timing of his decision to leave his car sales job, the fact that he was able to continue working in his construction business for fifteen months after the Home Depot accident, as well as all of his prior accidents and instances of dishonesty. It was the province the jury, as the trier of fact, to believe the witnesses it considered most credible and reject the evidence it deemed not believable. The jury was instructed that it should award to the plaintiff a sum that, in its judgment, would fairly and reasonably compensate him for past pain and suffering, future pain and suffering, permanent injury, and past and future medical bills. This is a highly fact-sensitive determination in each individual case and defies comparison to any other situation, no matter how similar. In short, the Court's role in deciding a Motion for Remittitur is not to "compare apples and oranges," but to determine -- according to the well-established standard applied by this Court for decades -- whether the award is "so grossly out of proportion with the injuries as to shock the

[21] *Bounds v. Delmarva Power & Light Co.*, 2004 WL 343982, at *8 (Del. Super. Jan. 29, 2004) (quoting *Berl v. Cyrus Trading Corp.*, 1998 WL 109855 (Del. Super. Feb. 19, 1998)).

Court's conscience and sense of justice."[22] Here, the verdict does not shock the Court's conscience and is not out of proportion to Payne's injuries. There is thus no basis to disturb the jury's decision.

Motion for Costs

Having concluded that Defendant's motions must be denied, the Court turns to Plaintiff's Motion for Costs. Payne seeks an order in his favor awarding trial costs in the following amounts:

(1) Dr. Bandera Expert Witness Fee	$3,750.00
(2) Dr. Neil Kaye Expert Witness Fee	$8,000.00
(3) Dr. Frank Falco Expert Witness Fee	$4,000.00
(4) Robert Paré Expert Witness Fee	$2,365.35
(5) Robert Minnehan, Ph.D. Expert Witness Fee	$1,620.00
(6) TrialWorks Fee	$6,323.33
Total	$26,058.68

In addition, Payne asserts that he incurred $207.00 in expenses related to filing and service of the Complaint. Home Depot argues that each of the expert witness fees include amounts that are excessive or disallowed, and further contends that the fees charged by TrialWorks for trial consulting services are not recoverable costs.

Under Superior Court Civil Rule 54(d) and 10 *Del. C.* § 5101, the prevailing party in a civil action may recover costs against the adverse

[22] *Young*, 702 A.2d at 1236-37; *see also Reigel v. Aastad*, 272 A.2d 715, 717-718 (Del. 1970).

party.[23] In addition, 10 *Del. C.* § 8906 permits the prevailing party to recover expert witness testimony fees in an amount fixed by the Court. Generally, the prevailing party may only recover those expert witness fees associated with time spent testifying or waiting to testify, along with reasonable travel expenses.[24] The amount to be awarded for expert witness testimony is a matter of the trial court's discretion.[25]

In assessing the reasonableness of medical experts' testimonial fees, this Court has frequently relied upon rates set forth in a 1995 study conducted by the Medical Society of Delaware's Medico-Legal Affairs Committee, as adjusted to reflect increases in the consumer price index for medical care.[26] The Medico-Legal Study reported that fees for a half-day of medical expert testimony ranged from $1,300 to $1,800.[27] Here, the Court finds that there has been an increase of 50.3% in the consumer price index for medical care from the beginning of 1996 to

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[23] 10 *Del. C.* § 5101("Generally a party for whom final judgment in any civil action, or on a writ of error upon a judgment is given in such action, shall recover, against the adverse party, costs of suit, to be awarded by the court."); Super. Ct. Civ. R. 54(d) ("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.").

[24] *Spencer v. Wal-Mart Stores East, LP*, 2007 WL 4577579, at *1 (Del. Super. Dec. 5, 2007).

[25] *Taveras v. Mesa*, 2008 WL 5244880, at *1 (Del. Super. Dec. 15, 2008) (citing *Donovan v. Del. Water & Air Res. Comm'n*, 358 A.2d 717, 722-23 (Del. 1976)).

[26] *See Bond v. Yi*, 2006 WL 2329364, at *3 (Del. Super. Aug. 10, 2006) (collecting cases); *Gates v. Texaco, Inc.*, 2008 WL 1952164, at *1 (Del. Super. Mar. 20, 2008).

[27] *See Gates*, 2008 WL 1952164, at *1.

January 2009.[28] Therefore, the applicable range of reasonable half-day testimony fees would be $1,953.90 to $2,705.40.

The Court agrees with Home Depot that Plaintiff's Motion for Costs is riddled with excessive and disallowed expert witness fees.[29] Furthermore, the Court concludes that the cost of trial consultation and trial support services provided by TrialWorks cannot be recovered. The Court will address each of these items in turn.

Dr. Bandera's Expert Witness Fee

Plaintiff has requested $3,750.00 in fees for the testimony of Dr. Peter Bandera, one of Plaintiff's medical experts. This amount reflects charges of $750.00 for an independent medical exam and $3,000.00 for trial testimony. The independent medical exam is not a recoverable cost, and will be excluded.[30] In addition, Dr. Bandera's trial testimony fee is excessive. Dr. Bandera's invoice does not reflect the length of his trial

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[28] *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Archived News Releases for Consumer Price Index*, *available at* http://www.bls.gov/schedule/archives/cpi_nr.htm (last visited Mar. 6, 2009).

[29] Because even a cursory perusal of the relevant statutory sections and case law should have alerted Plaintiff's counsel that its motion requests numerous unrecoverable expenses, the Court suspects that Plaintiff's counsel chose to submit all of the trial experts' total invoice amounts and rely upon opposing counsel and the Court to identify the recoverable portions. The Court was only able to assess the appropriateness of each expense and issue a ruling because Plaintiffs' experts helpfully itemized their invoices. Counsel is cautioned that this approach is highly disfavored. Quite simply, a motion for costs is not an opportunity for the prevailing party to "throw everything at the wall" (or, more to the point, at the opposing party) and see what sticks. In particular, if full invoice amounts are submitted upon a motion for costs without adequate itemization, the Court may decline to award costs. *See Barnett v. Braxton*, 2003 WL 21976411, at *3 (Del. Super. Aug. 15, 2003).

[30] See, e.g., *McKinney v. Brandywine Court Condo. Council, Inc.*, 2004 WL 2191033, at *2 (Del. Super. Aug. 12, 2004).

testimony, nor does it itemize any waiting time or travel expenses. The trial transcript reflects that Dr. Bandera's testimony took slightly less than half a day. To account for a reasonable projection of waiting time and travel expenses in the absence of a more specific invoice, the Court will adjust the recoverable amount to $2,700.00, which is very near the upper range of reasonable medical expert witness fees for a half-day time period.

Dr. Kaye's Expert Witness Fee

Plaintiff seeks $8,000.00 for the testimony of Dr. Neil Kaye. Dr. Kaye's invoice reflects the following charges: $2,000.00 fee for records review; $4,000.00 for court time on January 13; and $2,000.00 for four hours of testimony on January 14. The $2,000.00 records review fee is not recoverable under Rule 54. Furthermore, Dr. Kaye's $4,000.00 charge for January 13 is nonrecoverable, because he did not testify that day. The decision as to when Dr. Kaye was to testify was in Plaintiff's discretion, and he will not be awarded costs directly attributable to his own failure to plan witnesses' attendance at court in a manner that minimizes wait times. The remainder of Dr. Kaye's total fee is a reasonable amount for the duration of his testimony. Therefore, Plaintiff will be awarded $2,000.00 for Dr. Kaye's testimonial fee.

Dr. Falco's Expert Witness Fee

Plaintiff requests $4,000.00 for the medical expert testimony of Dr. Frank Falco, who testified for two hours at trial. Dr. Falco's fee greatly

exceeds reasonable rates under the Medico-Legal Study for a half a day of medical expert testimony, and his testimony did not span a complete half-day. In view of the Medico-Legal Study rates, the Court will reduce Plaintiff's award for Dr. Falco's testimonial fee to $2,500.00.

Robert Paré's Expert Witness Fee

Plaintiff submitted a detailed invoice for Robert Paré, his vocational rehabilitation expert. Mr. Paré's total fee of $2,376.35 includes amounts for the following items: reviewing expert medical reports; reviewing depositions; updating materials and preparing for trial; reviewing with counsel; providing trial testimony; waiting and preparing for trial testimony at the courthouse; and traveling expenses. As discussed previously, the only portions of Mr. Paré's expert fees recoverable upon a motion for costs under Rule 54(d) are time spent testifying, along with reasonable waiting and travel expenses. Consistent with Mr. Paré's invoice, Plaintiff will be awarded $600.00 for Mr. Paré's three hours of trial testimony. Mr. Paré invoiced Plaintiff $250.00 for two hours of time spent waiting at the courthouse, including "prep time" and meeting with Plaintiff's attorney. Because the invoice makes clear that at least some of Mr. Paré's lengthy non-testimonial court time was spent on preparatory activities and attorney consultation, this amount will be reduced to $75.00. Mr. Paré's reasonable traveling and parking fees, totaling $110.35, are recoverable. Accordingly, Plaintiff will be awarded a total of $785.35 for the costs of Mr. Paré's testimony.

Robert F. Minnehan's Expert Witness Fee

Plaintiff seeks reimbursement of $1,620.00 for expenses incurred in presenting its economic expert witness, Robert F. Minnehan. This amount reflects charges for the following services: $240.00 for forty-five minutes of trial testimony; $800.00 for pre-trial preparation; $500.00 for five hours of waiting time prior to testimony; and $80.00 for travel to the courthouse. Of these amounts, only the trial testimony fee, travel expenses, and a reasonable fee for waiting time are recoverable. I find that the five-hour waiting fee is excessive, because, as previously discussed, Plaintiff bore responsibility for minimizing expert witnesses' waiting times during trial. Therefore, as to Mr. Minnehan's fees, Plaintiff will be permitted to recover a total of $420.00, reflecting $240.00 for trial testimony, $80.00 for travel, and $100.00 for wait time.

TrialWorks Consulting Fee

Home Depot argues that Plaintiff cannot recover any portion of the $6,323.33 TrialWorks consulting fee sought in its motion. The Court agrees with Home Depot. The Court awards costs to a prevailing party on the principle that they "are allowances in the nature of incidental damages . . . to reimburse the prevailing party for expenses *necessarily incurred* in the assertion of his rights in court."[31] The cost of a trial consulting service is not one "necessarily incurred" to assert a party's

[31] *Donovan*, 358 A.2d at 723 (quoting *Peyton v. William C. Peyton Corp.*, 8 A.2d 89 (Del. 1939)) (emphasis added).

rights, and reimbursement for such services is not authorized by statute. Similar costs have been held nonrecoverable on the basis that they were incurred "for the use of the party and not for use by the court."[32] Accordingly, Plaintiff's request for reimbursement of consulting fees paid to TrialWorks will be denied.

V. Conclusion

For all of the foregoing reasons, the Motion for New Trial and the Motion for Remittitur are hereby **denied**.

Plaintiff's Motion for Costs is **granted in part** and **denied in part**. Plaintiff is entitled to recover $8,612.35 as reimbursement for the following costs:

(1) Dr. Bandera Expert Witness Fee	$2,700.00
(2) Dr. Neil Kaye Expert Witness Fee	$2,000.00
(3) Dr. Frank Falco Expert Witness Fee	$2,500.00
(4) Robert Paré Expert Witness Fee	$785.35
(5) Robert Minnehan, Ph.D. Expert Witness Fee	$420.00
(6) Summons, Complaint, and Service Fee	$207.00

IT IS SO ORDERED.

PEGGY L. ABLEMAN, JUDGE

[32] *Kerr v. Onusko*, 2004 WL 2744607, at *2 (Del. Super. Oct. 20, 2004) (denying recovery of costs incurred for enlargement of exhibits).

Original to Prothonotary
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