IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

CHRISTOPHER J. COOKE and CONSTANTINE KOUTOUFARIS,	:	C.A. No. K11C-07-023 WLW
Plaintiffs,	:	
v.	:	
GENE GRAY MURPHY,	:	
Defendant.	:	

Submitted: September 16, 2013
Decided: November 26, 2013

ORDER

Upon Plaintiffs' Motion for New Trial. *Denied.*
Upon Defendant's Motion for Costs. *Granted in part.*

Scott E. Chambers, Esquire of Schmittinger & Rodriguez, P.A., Dover, Delaware; attorney for Plaintiffs.

Arthur D. Kuhl, Esquire of Reger RIzzo & Darnall, LLP, Wilmington, Delaware; attorney for Defendant.

WITHAM, R.J.

INTRODUCTION

Before the Court is Plaintiffs' Motion for New Trial, which Defendant opposes. Also before the Court is Defendant's Motion for Costs. Plaintiffs challenge Defendant's ability to recover costs, and specifically object to several of the costs sought by Defendant. For the following reasons, Plaintiffs' Motion for New Trial is **DENIED** and Defendant's Motion for Costs is **GRANTED** in part**.**

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs Christopher J. Cooke, Jr. (hereinafter "Cooke") and Constantine Koutoufaris (hereinafter "Koutoufaris") (collectively "Plaintiffs") filed a civil action against Defendant Gene Gray Murphy (hereinafter "Murphy") for personal injuries arising out of an automobile accident on September 8, 2010. At the time of the accident, Cooke was driving a vehicle owned by Koutoufaris, with Koutoufaris as a passenger, when Murphy struck the vehicle in a rear-end collision. Plaintiffs originally included State Farm Mutual Automobile Insurance (hereinafter "State Farm") as a defendant as well.

A three-day jury trial was held from August 26, 2013 through August 28, 2013. Plaintiffs presented video testimony of their medical expert, Dr. Richard DuShuttle (hereinafter "DuShuttle") on the issue of causation. Murphy presented live testimony from an engineering expert, but Murphy did not retain his own medical expert. On the second day of trial, the Court granted State Farm's motion for a directed verdict.

The jury issued its verdict on August 28, 2013. The jury found that Murphy was negligent in a manner that proximately caused the September 2010 automobile

accident. As to Cooke, the jury found that the accident was not the proximate cause of any injury to Cooke. As to Koutoufaris, the jury found that the accident was the proximate cause of Koutoufaris' injuries, but returned a verdict of $0.00.

Plaintiffs subsequently filed the instant Motion for New Trial pursuant to Superior Court Civil Rule 59. Plaintiffs seek a new trial only on the issue of damages, and contend that the jury's verdict as to both Cooke and Koutoufaris is inadequate and inconsistent as a matter of law. Murphy responds that the jury reasonably concluded that Murphy's negligence did not cause any compensable injury to either Plaintiff.

Murphy has filed the instant Motion for Costs pursuant to Superior Court Civil Rule 54(d), 10 *Del. C.* § 5101 and 10 *Del. C.* § 8906. Plaintiffs challenge Murphy's ability to recover costs on two separate grounds: (1) Murphy's motion is untimely, and (2) Murphy is not a "prevailing party" entitled to recover costs. Plaintiffs also specifically object to several of the costs sought by Murphy.

Standard of Review

A jury's verdict is given "enormous deference" by the Court and, absent "exceptional circumstances," the amount of damages awarded by a jury is presumed to be correct.[1] On a motion for a new trial, "[t]he Court will only set aside a verdict as insufficient if it is clear that the verdict was the result of passion, prejudice,

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

partiality, corruption, or if it is clear that the jury disregarded the evidence or law."[2] When a plaintiff challenges a jury's award of zero damages, the Court must determine "whether a reasonable jury could have returned a verdict of zero damages based on the evidence presented."[3]

A party that receives a final judgment in his favor in a civil action is not necessarily entitled to recover its own costs.[4] The determination of whether to award costs is a matter of judicial discretion.[5]

DISCUSSION

Plaintiffs' Motion for New Trial

Plaintiffs seek a new trial on the issue of damages only. Plaintiffs contend that based on the undisputed medical testimony of DuShuttle, the jury's verdict is inadequate as a matter of law.

A new trial on damages alone cannot be granted when the issues of liability and damages are "inexorably intertwined."[6] In the instant case, Plaintiffs' Motion for New Trial focuses in large part on the jury's verdict that the accident was not the proximate cause of any injury to Cooke. If Plaintiffs wish for this Court to grant a

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[2] *Littleton v. Ironside*, 2010 WL 8250830, at *1 (Del. Super. Oct. 6, 2010) (citation omitted).

[3] *Phillips v. Loper*, 2005 WL 268042, at *1 (Del. Super. Jan. 27, 2005).

[4] *See Donovan v. Delaware Water and Air Res. Comm'n*, 358 A.2d 717, 723 (Del. 1976).

[5] *Id.*

[6] *Chilson v. Allstate Ins. Co.*, 2007 WL 4576006, at *4 (Del. Super. Dec. 7, 2007).

new trial on damages as to Cooke, the issue of causation (which goes to liability) must first be resolved. Thus, were the Court to grant Plaintiffs' motion, the new trial would have to be on liability as well as damages.

Plaintiffs rely on the Delaware Supreme Court's decision in *Maier v. Santucci*[7] in support of their argument. In *Maier,* the medical experts for both parties agreed that the plaintiff suffered an injury as a result of the accident caused by the defendant, yet the jury awarded the plaintiff zero dollars in damages.[8] The Supreme Court held that "[i]n light of the uncontradicted medical testimony that Maier suffered an injury as a result of the accident, the jury's award of $0 damages is inadequate and unacceptable as a matter of law."[9] Subsequent cases in which juries have awarded zero damages have followed *Maier* to either allow additur or grant a new trial when there is "uncontradicted medical evidence of injuries and their proximate cause, confirmed by independent medical testing. . . ."[10] However, motions for a new trial on the basis of a zero damages verdict will be denied when causation is highly controverted,[11] or when medical testimony is based on the plaintiff's subjective

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[7] 697 A.2d 747 (Del. 1997).

[8] *Id.* at 749.

[9] *Id.*

[10] *Amalfitano v. Baker*, 794 A.2d 575, 577 (Del. 2001); *see also Littleton*, 2010 WL 8250830, at *2.

[11] *Dunn v. Riley*, 864 A.2d 905, 907 (Del. 2004); *Streetie v. Progressive Classic Ins. Co.*, 2011 WL 1259809, at *14 (Del. Super. Apr. 4, 2011).

complaints, and the complaints are not confirmed by independent objective testing.[12]

Based on the foregoing principles, Plaintiffs' Motion for New Trial must be denied. Plaintiffs claim that DuShuttle's medical testimony was uncontroverted. This is an incorrect statement. While Murphy did not present his own medical expert, the record reflects that Murphy's counsel vigorously cross-examined DuShuttle on the issue of causation as to both Cooke and Koutoufaris. DuShuttle's testimony on cross-examination revealed that there were other possible causes of Cooke's injuries unrelated to the accident, and that his opinion as to both Plaintiffs' injuries was based on the Plaintiffs' subjective complaints. The record reflects that Plaintiffs' complaints were not confirmed by independent objective medical testing. There was sufficient evidence for a reasonable jury to conclude that: (1) the accident was not the proximate cause of any injury to Cooke, and (2) Koutoufaris suffered no compensable injury because the only evidence of injury was his own, unconfirmed subjective complaints. The record is also devoid of any indication that the jury's verdict was the product of passion, prejudice, partiality, or corruption.

Accordingly, Plaintiffs' Motion for New Trial must be **DENIED.**

Murphy's Motion for Costs

A. Murphy is able to recover costs

The Court now turns to Murphy's Motion for Costs. Superior Court Civil Rule

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[12] *Walker v. Campanelli*, 860 A.2d 812, 2004 WL 2419104, at *4 (Del. Oct. 12, 2004) (TABLE); *Kossol v. Duffy*, 765 A.2d 952, 2000 WL 1780799, at *1 (Del. Nov. 29, 2000) (TABLE); *Phillips*, 2005 WL 268042, at *2-3 (citations omitted).

54(d), as well as 10 *Del. C.* § 5101, allows a "prevailing party" to apply to the Court for costs upon entry of a final judgment.[13] Expert witness fees are also recoverable as costs.[14] Plaintiffs raise two threshold challenges to Murphy's ability to recover costs: (1) Plaintiffs contend that the motion is untimely, and (2) Plaintiffs contend that they, not Murphy, are the prevailing parties in this matter.

As to Plaintiffs' first threshold argument, Plaintiffs contend that Murphy's motion is untimely. Rule 54(d) permits a party to apply to the Court for costs within ten days of the entry of final judgment.[15] The timely filing of a motion for a new trial tolls the finality of judgments.[16] Plaintiffs argue that because their Motion for New Trial tolled the finality of the judgment in their case, Murphy's Motion for Costs is untimely. Murphy timely filed his motion within the ten-day window. Further, this Court, on numerous occasions, has considered motions for costs in conjunction with denying motions for a trial.[17] To only decide Plaintiffs' Motion for New Trial, and then require the parties to re-file separate–and likely redundant–briefings on Murphy's Motion for Costs would be an inefficient and absurd waste of judicial

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[13] Del. Super Ct. Civ. R. 54(d); 10 *Del. C.* § 5101.

[14] 10 *Del. C.* § 8906.

[15] Del. Super. Ct. Civ. R. 54(d).

[16] *Katcher v. Martin*, 597 A.2d 352, 353 (Del. 1991) (citing *Hessler, Inc. v. Farrell*, 260 A.2d 701, 702 (Del. 1969)).

[17] *See, e.g., Streetie*, 2011 WL 1259809, at *9-15; *Patterson v. Coffin*, 2003 WL 22853657, at *2-6 (Del. Super. Oct. 31, 2003).

resources. This argument is wholly without merit.

As to Plaintiffs' second threshold argument, Plaintiffs claim that Murphy is not the prevailing party in this matter, and thus cannot recover costs. Plaintiffs point out that the jury found that Murphy was negligent in proximately causing the accident, and also found that Murphy's negligence was the proximate cause of injury to Koutoufaris. Plaintiffs contend that because Murphy was found liable, the Plaintiffs are the prevailing parties in this matter, notwithstanding the jury's verdict as to Cooke and the zero damages award.

This argument contravenes well-settled Delaware law. Whether a party is a "prevailing party" for purposes of receiving costs under Rule 54(d) is a "purely legal question" to be decided by the Court.[18] The Delaware Supreme Court has defined "prevailing party" as "a party for whom final judgment has been entered in any civil action."[19] Subsequent decisions by the Superior Court have expressly held that the defendant is the prevailing party when the jury awards the plaintiff zero damages.[20] In the instant case, the jury found that Murphy was not the proximate cause of Cooke's injuries. The jury further found that while Murphy was the proximate cause

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[18] *Graham v. Keene*, 616 A.2d 827, 828 (Del. 1991).

[19] *Id.*

[20] *Miller v. Williams*, 2012 WL 3573336, at *2 (Del. Super. Aug. 21, 2012) ("[d]efendant is the prevailing party because [p]laintiff was rewarded zero dollars."); *see also Streetie*, 2011 WL 1259809, at *15 (holding that because plaintiff received an award of $0, "it necessarily follows that [p]laintiff has obtained no judgment from [d]efendant and [d]efendant is indeed the prevailing party for purposes of Rule 54(d).").

of Koutoufaris' injuries, Koutoufaris was not entitled to any compensation and thus received zero dollars in damages. Thus, consistent with Delaware precedent and as a matter of law, Murphy is the prevailing party in this case and is able to recover costs.

B. Costs sought by Murphy

i. Uncontested costs

Murphy seeks to recover fees charged by D.M. Professional Services for service of subpoenas upon police officers Christopher Boyce (hereinafter "Boyce") and Lance Chandler (hereinafter "Chandler"). Each fee is $30, and Murphy has provided D.M. Professional Services' invoices for both fees. These fees were necessarily incurred incidental costs, and are recoverable under Rule 54(d) and § 5101.[21] Plaintiffs do not contest these costs. Accordingly, because there is no indication that these fees were unreasonable, Murphy may recover the $60 total cost of the subpoena service fees.

Murphy also seeks recovery of $204 in LexisNexis File & Serve filing fees, and has provided detailed documentation of the fees for each filing. Plaintiffs do not contest this cost. Generally, court filing fees are recoverable, and this Court has permitted prevailing parties to recover LexisNexis filing costs in the past.[22] The $204

[21] *See Baird v. Owczarek*, 2013 WL 4721375, at *17-18 (Del. Super. Aug. 29, 2013) (citations omitted).

[22] *Reinke v. Furbush*, 2011 WL 7063367, at *1 (Del. Super. Dec. 1, 2011) (citing *Midcap v. Sears Roebuck and Co.*, 2004 WL 1588343, at *2 (Del. Super. May 26, 2004)).

cost of LexisNexis File & Serve fees is reasonable. Accordingly, Murphy will be permitted to recover them.

The last uncontested cost Murphy seeks to recover is the cost of the travel time and testimony of Tom McNamara (hereinafter "McNamara"), Murphy's engineering expert who testified at trial. McNamara, associated with the company Hard Facts, is based in Freehold, New Jersey. Murphy has provided the Court with McNamara's invoice, which includes details of the time and cost associated with McNamara's preparation for trial, his travel expenses, and his testimony. McNamara charged Murphy an hourly rate of $275 per hour. Specifically, McNamara billed Murphy for: five hours of deposition review totaling $1,375; one additional hour of court preparation time totaling $275; nine-and-a-half hours for courtroom testimony, waiting time, and travel time totaling $2,612.50; and $165.29 for tolls and mileage. The total cost of McNamara's services is $4,427.79.

As noted *supra*, 10 *Del. C.* § 8906 allows expert witness fees to be recovered as costs.[23] The statute provides that the amount of such recovery "shall be fixed by the court in its discretion. . . ."[24] There is no fixed formula to determine what constitutes a reasonable expert fee.[25] A prevailing party may generally "only recover those expert fees associated with time spent testifying or waiting to testify, along with

[23] 10 *Del. C.* § 8906.

[24] *Id.*

[25] *Fellenbaum v. Ciamaricone*, 2002 WL 31357917, at *6 (Del. Super. Oct. 16, 2002).

reasonable travel expenses."[26] Fees for consulting services and for trial preparation are not recoverable.[27] The hourly rate awarded for an expert's travel time is generally less than that awarded for testifying time.[28]

McNamara's total fee is clearly excessive; thus, even though Plaintiffs do not contest this cost, this Court will exercise its discretion and shall not permit Murphy to recover the total amount. However, the Court notes that McNamara's invoice, as a whole, is so vague and lacking in detailed information that the Court could exercise its discretion to completely deny recovery of McNamara's fee. The $1,375 billed for "deposition review" amounts to trial preparation, which is not recoverable. Further (and enigmatically), McNamara billed an additional hour at $275 for further preparation time: exactly what this preparation time consisted of is unclear. This too is unrecoverable. The tolls and mileage cost of $165.29 seems to be a reasonable travel expense, and will be allowed to be recovered.

This leaves the final item on McNamara's invoice: $2,612.50 for nine-and-a-half hours of "courtroom testimony, waiting time and travel time." The invoice does not describe how much of the nine-and-a-half hours was allocated to testifying, waiting to testify, and traveling. The Court notes again that nondescriptive itemizations such as this are unacceptable, particularly when courts must rely on such

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[26] *Payne v. Home Depot*, 2009 WL 659073, at *7 (Del. Super. Mar. 12, 2009) (citing *Spencer v. Wal-Mart Stores East, LP*, 2007 WL 4577579, at *1 (Del. Super. Dec. 5, 2007)).

[27] *Spencer*, 2007 WL 4577579, at *1.

[28] *Midcap*, 2004 WL 1588343, at *3.

invoices in calculating costs. This cost also seems particularly egregious given that McNamara only testified for a little over an hour. He was the last of five witnesses called by Murphy on the second day of trial. It was Murphy's choice to call McNamara as his final witness. The Court will permit Murphy to recover one hour's worth of testimony time and another hour's worth of waiting time at McNamara's standard rate of $275 per hour, but no more than that. As to travel time, because the hourly rate for an expert's travel time is generally less than his rate for testifying time, the Court shall reduce McNamara's normal rate to half that amount, from $275 to $137.50 per hour.[29] Murphy shall recover the cost of McNamara's reasonable travel time of four-and-a-half hours for the round trip from Freehold, New Jersey to Dover and back, totaling $618.75.[30]

Thus, Murphy can recover the following expenses related to McNamara's testifying and travel time: $550 for testifying and waiting to testify; $618.75 for

[29] *See id.* (reducing expert's recoverable travel time to half of the expert's normal rate in order to reach a reasonable amount).

[30] The Court is forced to take judicial notice of the distance from Freehold, New Jersey to Dover given the lack of information in McNamara's invoice. Generally, the Court must give prior notice of the taking of judicial notice to the parties so that they may have the opportunity to challenge the propriety of judicially noticing that particular fact. *See Tribbit v. Tribbit*, 963 A.2d 1128, 1131 (Del. 2008) (citing D.R.E. 201). However, Rule 201 of the Delaware Rules of Evidence provides that if prior notification is not given to the parties, a party is entitled to request an opportunity to be heard on the propriety of taking judicial notice after notice has already been taken. D.R.E. 201. Accordingly, if either party questions the propriety of taking judicial notice of the distance from Freehold to Dover and back, the Court shall reopen the proceedings on the limited issue of judicial notice of this fact upon request of either party. If impropriety of judicial notice is established, the Court shall then reevaluate its costs calculation, which may differ from its present calculation based on its taking of judicial notice.

reasonable travel time; and $165.29 for mileage and expenses. The total recoverable cost for McNamara's services is $1,334.04.

ii. Video deposition costs

Videotaped depositions of two of Murphy's witnesses–Officer Boyce and Murphy himself–were played at trial, and the transcripts of both depositions were entered into evidence as court exhibits. Murphy seeks to recover the costs related to the videotaping of both depositions. Plaintiffs challenge this cost on the grounds that because Boyce and Murphy are lay witnesses, the costs of videotaping the depositions are not recoverable. Plaintiffs cite to no authority for this proposition.

Rule 54(f) clearly states that "[t]he production and playback costs associated with any videotape deposition may also be taxable as costs if the video deposition is introduced into evidence."[31] The rule makes no delineation between videotaped depositions of expert witnesses and those of lay witnesses. Indeed, this Court has allowed recovery of deposition transcription costs of lay witnesses.[32] Rule 54(f) does not permit a prevailing party to recover both video costs and transcription fees because such costs are duplicative.[33]

The videotaped depositions of Boyce and Murphy were entered into evidence when played at trial. Murphy seeks only the videography-related costs provided by

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[31] Del. Super. Ct. Civ. R. 54(f).

[32] *See Foley v. Elkton Plaze Assocs.*, 2007 WL 959521, at *3 (Del. Super. Mar. 30, 2007).

[33] *Cimino v. Cherry*, 2001 WL 589038, at *2 (Del. Super. May 24, 2001).

Delmarva Reporting. The video costs of Boyce's deposition totals $484.20, and the video costs of Murphy's deposition totals $494.55. Pursuant to Rule 54(f), Murphy shall be allowed to recover these costs.

iii. Mediation fee

When State Farm was still a party to this case, Robert J. Taylor, Esquire (hereinafter "Taylor) provided mediation services for the parties. By letter dated October 4, 2012 Taylor informed the parties that his mediator's fee was $450. Murphy now seeks $150, which amounts to his one-third share of Taylor's fee. Plaintiffs contend, without citing to any authority, that taxing Plaintiffs for Murphy's share of the mediation fee would be inappropriate.

While Rule 54 does not expressly allow the recovery of mediation fees, this Court has observed that nothing in the rule prohibits such recovery either.[34] The Court has allowed the recovery of mediation fees when mediation fails, the parties negotiated in good faith during mediation, the mediator's fee is reasonable, and the jury awarded no damages to the plaintiff.[35] Based on this precedent, the Court concludes that while Rule 54 does not expressly allow recovery of mediation fees, such fees are still recoverable by the prevailing party, subject to the Court's discretion.

The following factors support the granting of this cost: mediation failed, there

[34] *Baird*, 2013 WL 4721375, at *19.

[35] *Id.*; *Spencer*, 2007 WL 4577579, at *3.

is nothing to indicate the parties did not negotiate in good faith, Taylor's fee is reasonable, and the jury awarded Plaintiffs zero damages. Thus, the Court will grant the $150 mediation cost sought by Murphy.

iv. Total costs awarded

Based on the foregoing, Murphy's Motion for Costs is **GRANTED** in part. Murphy shall recover the following costs:

Videotape costs of Boyce's deposition:	$484.20
Subpoena service fee for Boyce:	$30.00
Videotape costs of Murphy's deposition:	$494.55
McNamara's testimony and travel costs:	$1,334.04
Subpoena service fee for Chandler:	$30.00
Taylor's mediation fee:	$150.00
LexisNexis File & Serve fees:	$204.00
Total costs awarded:	**$2,726.79**

CONCLUSION

Plaintiffs' Motion for New Trial is **DENIED**. Murphy's Motion for Costs is **GRANTED** in part in the amount of $2,726.79. IT IS SO ORDERED.

/s/ William L. Witham, Jr.
Resident Judge

WLW/dmh