SUPERIOR COURT
OF THE
STATE OF DELAWARE

CHARLES E. BUTLER
JUDGE

NEW CASTLE COUNTY COURTHOUSE
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Date Decided: June 11, 2013
Date Submitted: May 3, 2013

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Re: ***Johnson v McCaffery***
C.A. No. N11C-07-203 CEB
Plaintiff's Motion for Costs. DENIED.

Dear Counsel:

Plaintiff has moved the Court to award her costs after an April, 2013 jury verdict. The verdict was the result of a two-day trial addressing liability and damages related to an automobile accident. The jury found both the defendant and the plaintiff 50% liable. Plaintiff was awarded $30,000 in damages that was reduced by half in light of the jury's apportionment of fault. For the reasons that follow, plaintiff's motion for costs is **DENIED**.

First, "The Delaware Supreme Court has held that an award of costs under 10 *Del. C.* § 5101 is not automatic, noting that 'there may be circumstances under

which costs do not go to the party to whom a final judgment is awarded.'"[1] Rule 54(d), "leaves room for the Court to decide not to award costs in particular circumstances."[2]

The costs provisions raise an obvious dilemma in cases resulting in a 50/50 apportionment of liability: is there a "prevailing party?"

In their moving papers, the parties failed to identify any Delaware cases on cost shifting after a 50/50 liability finding. But we note that in *Broderick v. Wal-Mart Stores, Inc*., the Court denied costs to the plaintiff where he was found to be 50% at fault:

> In the proper case, this Court has, and will, impose costs in favor of the prevailing party. This is not the proper case to do so. Here, the plaintiffs received a substantial award for their injuries, even after a slight reduction by the Court. Furthermore, the jury also found plaintiffs to be fifty-percent liable for their injuries.[3]

In *Foley v. Elkton Plaza Associates, LLC*,[4] the Court held that an award of costs is appropriate in 50/50 liability cases where the jury award received by the plaintiff is not "substantial," but where the award is substantial costs may not be available. The Court in *Foley* characterized plaintiff's jury award as "not

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[1] *Nelson v. Feldman*, 2011 WL 531946 at *2 (Del. Super. Jan. 26, 2011)(*citing Donovan v. Delaware Water and Air Resources Comm'n*, 358 A.2d 717, 722 (Del.1976).

[2] *Id.*

[3] 2002WL 388117 at *3 (Del. Super. Feb. 27, 2002).

[4] 2007 WL 959521 at *1 (Del. Super. Mar. 30, 2007).

substantial" and awarded plaintiff costs. Likewise, in *Nelson v. Feldman*,[5] the Court considered the financial circumstances of the parties in deciding that the defense should bear its own costs despite having "prevailed" in a 51/49 liability verdict. The defendant was represented by an insurance carrier, the plaintiff was not.

Here, the Court does not find the analysis of the relative financial strength of either party helpful. Both parties were properly insured and each sued the other. Indeed, plaintiff in this case was the defendant in a separate action filed by this defendant as plaintiff.[6] The actions were consolidated[7] and one of them settled, leaving only this one for trial. In fact, the caption was reversed immediately before trial to properly reflect exactly who was suing whom.[8]

The jury's verdict fairly reflected the underlying difficulty with the evidence: exactly who was "at fault" for this accident was fairly a "toss up." The jury had the plaintiff's medical records in evidence and awarded plaintiff $15,000 in damages, commensurate with her "boardable" medical expenses.

We think the jury's finding of 50/50 fault and its award of plaintiff's bare medical expenses is an eloquent statement of how evenly divided the evidence was

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[5] 2011 WL 531946 (Del. Super. Jan. 26, 2011).

[6] *McCaffrey v. Hollingsworth*, *et al*. C.A. No. N11C-07-203.

[7] *Johnson v. McCaffrey*, C.A. No.12C-04-185 Tr. ID: 44778245.

[8] Pretrial Stipulation, Tr. ID: 51374581.

in this case. In the Court's view, an award of costs would be inconsistent with the relative balance in the economic power of the parties, the evidence, and the jury's findings. The parties litigated the case to what, in the Court's view, was a standstill. Under such circumstances, we decline to award costs to either side. Plaintiff's motion for costs is **DENIED**.

Very truly yours,

/s/ Charles E. Butler

Charles E. Butler