IN THE SUPERIOR COURT OF THE STATE DELAWARE

IN AND FOR KENT COUNTY

GUSTAMAR NOEL,	)	
	)	C.A. No. K11C-11-042 JTV
Plaintiffs,	)	
	)	
v.	)	
	)	
SEGUNDA RODRIGUEZ, and	)	
JORGE A. DE LA CRUZ,	)	
	)	
Defendants.	)	

Submitted: August 26, 2013
Decided: November 26, 2013

E. Martin Knepper, Esq., Wilmington, Delaware. Attorney for Plaintiff.

Arthur D. Kuhl, Esq., Reger, Rizzo & Darnall, Wilmington, Delaware. Attorney for Defendant Rodriguez.

Shae Chasanov, Esq., and Nicole E. Skiles, Esq., Swartz Campbell, Wilmington, Delaware. Attorney for De La Cruz.

Upon Consideration of Plaintiff's Amended
Motion for Prejudgment Interest Against Defendant Rodriguez
Granted

Upon Consideration of Plaintiff's
Motion for Cost Against Defendant Rodriguez
Granted in part and ***denied in part***

Noel v. Rodriguez
C.A. No. K11C-11-042 JTV
November 26, 2013

Upon Consideration of Defendant Rodriguez's
Motion for Judgment as a Matter of Law
Denied

Upon Consideration of Defendant Rodriguez's
Motion for a New Trial on Liability Only
Denied

VAUGHN, President Judge

OPINION

Plaintiff Gustamar Noel filed this lawsuit against the defendants, Segunda Rodriguez ("the defendant") and Jorge De La Cruz, seeking damages for personal injuries suffered in an auto accident.[1] From July 22, 2013 through July 24, 2013, the case was tried before a jury. The jury found that the defendant was negligent and De La Cruz was not negligent. It awarded damages to the plaintiff against the defendant in the amount of $90,000.

Now before the Court are the following post-trial motions: Plaintiff's Amended Motion for Pre-Judgment Interest; Plaintiff's Motion for Costs Against the Defendant; Defendant's Renewed Motion for Judgment as a Matter of Law; and Defendant's Motion for a New Trial on Liability.

FACTS

On June 22, 2011, the defendant was driving the plaintiff and De La Cruz,

[1] Initially, De La Cruz was a co-defendant in this case. Prior to trial, De La Cruz settled with the plaintiff. De La Cruz remained in the case so the jury could consider the relative degrees of fault of both defendants.

home from work. While enroute, the defendant reached into her pocket to retrieve a Bluetooth headset. As the defendant reached into her pocket, she took her eyes off the road and the vehicle's tire drove over the right shoulder of the road and onto the grass. The defendant then accelerated in an attempt to get the vehicle back onto the road, which caused the vehicle to "zigzag" across both lanes of traffic several times. When the defendant was headed towards a tree, De La Cruz, who was seated in the front passenger seat, grabbed the steering wheel to turn the vehicle right in an attempt to avoid hitting the tree. De La Cruz was unsuccessful and the vehicle subsequently hit the tree thereby injuring the plaintiff.

PARTIES' MOTIONS

Plaintiff's Amended Motion for Pre-Judgment Interest

Applicable Law

6 *Del. C.* § 2301(d) provides a plaintiff with the opportunity to receive pre-judgment interest. 6 *Del. C.* § 2301(d) states in pertinent part:

> [I[n 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 damages, 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.[2]

If the plaintiff complies with the requirements of 6 *Del. C.* § 2301(d), the interest to which plaintiff is entitled is calculated in accordance with 6 *Del. C.* § 2301(a), which states, "[w]here there is no expressed contract rate, the legal rate of interest shall be 5% over the Federal Reserve Discount rate including any surcharge as of the time from when interest is due; . . . ."[3]

Contentions

The plaintiff contends that on September 2, 2011, approximately two months prior to the filing of suit, he extended to the defendant's insurance company, Allstate Insurance Company ("Allstate"), a settlement demand in the amount of $250,000 or the amount of the defendant's insurance policy limits if less than $250,000, which was valid for 31 days (the "Demand"). The defendant's insurance policy limits were $15,000/$30,000. The plaintiff received no response to the Demand. The plaintiff contends that since the amount awarded by the jury exceeded the offer to settle for policy limits of $15,000/$30,000, he is entitled to pre-judgment interest totaling $10,803.76.

The defendant contends that the plaintiff is not entitled to pre-judgment interest because the plaintiff failed to meet two requirements of 6 *Del. C.* § 2301(d): first, when the Demand was served on Allstate, there was no "action" filed; and second, instead of addressing the Demand to the defendant, as required, the plaintiff

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[2] 6 *Del. C.* § 2301(d).

[3] 6 *Del. C.* § 2301(a).

addressed the Demand to the defendant's insurance company–Allstate.

I find that the plaintiff met the requirements of 6 *Del. C.* § 2301(d) and therefore, award the plaintiff pre-judgment interest. I reach this conclusion after considering that "[t]he 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."[4] I do not interpret the text of the statute as requiring that the settlement offer not be made until after suit is filed. I interpret the phrase "[i]n any tort action" as simply referring to the action in which the judgment is obtained. The submission of a settlement offer before a claim is filed serves to promote the General Assembly's goal of "reducing court congestion."[5]

I also reject the plaintiff's contention that the Demand was defective because it was not specifically addressed to the defendant. As the defendant's insurer, Allstate controlled the funds which would be used to pay the settlement offered. I am satisfied that it can be fairly said that in sending the Demand to the defendant's insurance company, it was extending an offer to the defendant. Therefore, I find that the plaintiff is entitled to pre-judgment interest in the amount of $10,803.76.

Plaintiff's Motion for Costs Against Defendant-Rodriguez

Applicable Law

In civil suits, Delaware law generally provides a prevailing party with costs. Pursuant to Delaware Superior Court Rule 54(d), "costs shall be allowed as of course

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[4] *Rapposelli v. State Farm Mut. Auto. Ins. Co.,* 988 A.2d 425, 427 (Del. 2010).

[5] *Id.* at 427.

to the prevailing party upon application to the Court within ten (10) days of the entry of final judgment unless the Court otherwise directs."[6] Additionally, pursuant to 10 *Del. C.* § 5101, "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."[7]

Delaware courts have discretion when awarding the prevailing party with fees for expert witnesses. Pursuant to 10 *Del. C.* § 8906:

> [t]he fees for witnesses testifying as experts or in the capacity of professionals in cases in the Superior Court, the Court of Common Pleas and the Court of Chancery, within this State, shall be fixed by the court in its discretion, and such fees so fixed shall be taxed as part of the costs in each case and shall be collected and paid as other witness fees are now collected and paid.[8]

Delaware courts have held that, "[e]xpert witness fees should be limited to the time spent testifying."[9]

Contentions

The plaintiff contends that the defendant is liable for the following costs and fees:

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[6] Super. Ct. Civ. R. 54(d).

[7] 10 *Del. C.* § 5101.

[8] 10 *Del. C.* § 8906.

[9] *Enrique v. State Farm Mut. Auto. Ins. Co.,* 2010 WL 2636845, at *1 (Del. Super. June 30, 2010) (quoting *Miles, Inc. v. Cookson America, Inc.,* 1995 WL 214397, at *1 (Del. 1995)).

1	E-filing Fees	$704.00
2	Trial Scheduling Fee	$150.00
3	Fees for Service of Subpoenas	$75.00
4	Transcript of Eugene Altidor's Depo.	$70.00
5	Transcript of Defendant Rodriguez's Depo.	$167.50
6	Video Depo. of Paul Harriott, M.D.	$305.00
7	Transcript of Paul Harriott, M.D. Depo.	$370.73
8	Paul Harriott, M.D. Expert Fee	$2,500.00
9	Edwin Juste, D.C. Expert Fee	$1,500.00
10	Interpreter Fees for Plaintiff's Testimony	$48.00
11	Interpreter Fees for De La Cruz's Testimony	Unknown
	Total	**$5,890.23**

The defendant concedes responsibility for $704 in e-filing fees, the $150 trial scheduling fee, $75 in fees for the service of trial subpoenas, $70 for the transcript of Eugene Altidor's deposition, $167.50 for the transcript of the defendant's deposition, and $305 for the deposition of Paul Harriot, M.D. ("Dr. Harriott"). Therefore, I award the plaintiff those costs and fees, totaling $1,471.50.

The defendant contends, however, that the $2,500 expert fee for Dr. Harriott and the $1,500 expert fee for Edwin Juste, D.C. ("Dr. Juste") are both unreasonable and should be reduced to $359.75 and $614.84, respectfully. The defendant contends that Dr. Harriott's expert fee is unreasonable because the video deposition lasted only

50 minutes and the bill does not specify whether this fee includes preparation time. The defendant contends that Dr. Juste's expert fee is unreasonable because Dr. Juste testified at trial for less than one hour and there is no information as to how this fee was calculated.

The defendant further contends that the plaintiff cannot recover fees both for the video deposition of Dr. Harriott and for the transcript of that video deposition because this is duplicative. Therefore, the defendant contends that the plaintiff is not entitled to the $370.73 fee for the transcript of Dr. Harriott's video deposition. The defendant does not address the plaintiff's request for interpreter fees for the testimonies of the plaintiff and De La Cruz.

Discussion

When determining the appropriate amount of fees to award medical experts, the Court frequently utilizes the advice of the Medico-Legal Affairs Committee of the Medical Society of Delaware.[10] In March 2010, the reasonable fee for a deposition lasting up to two hours was $1,160 - $2,320.[11] After adjusting for inflation, the current reasonable fee for a deposition lasting up to two hours is $1,371 - $2,741.[12]

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[10] *Bond v. Yi,* 2006 WL 2329364, at *3 (Del. Super. Aug. 10, 2006) (citing collecting cases).

[11] *Enrique v. State Farm Mut. Auto. Ins. Co.,* 2010 WL 2636845, at *1 (Del. Super. June 30, 2010).

[12] There has been an increase in the consumer price index ("CPI") from March 2010 to September 2013 of 18.16%. *Compare* Bureau of Labor Statistics, U.S. Dep't of Labor, http://www.bls.gov/news.release/archives/cpi_04142010.pdf (Medical Care, March 2010 Unadjusted Index: 387.142) *with* Bureau of Labor Statistics, U.S. Dep't of Labor,

With those guidelines in mind, I award the plaintiff $1,500 for the expert fee related to Dr. Harriott's video deposition and $1,500 for the expert fee related to Dr. Juste's testimony.

As to the fee relating to the transcript of Dr. Harriott's video deposition, this Court has previously held that awarding costs for the videotaping of a deposition introduced at trial and for the preparation of the transcript are duplicative and will not be permitted.[13] Therefore, I do not award the plaintiff the $370.73 fee for the transcript of Dr. Harriott's video deposition.

As to the plaintiff's request for interpreter fees, I award the plaintiff $48 for the interpreter's fee relating to the plaintiff's testimony. I do not award the plaintiff an interpreter's fee relating to De La Cruz's testimony.

Therefore, the total amount of costs and fees that I award the plaintiff is $4,519.50.

Defendant's Renewed Motion for Judgment as a Matter of Law

Applicable Law

Superior Court Civil Rule 50(b) provides a mechanism for a non-prevailing party to have a jury verdict set aside and secure a judgment in the party's favor.[14] "[It] is appropriate only when, under the evidence presented by the plaintiff,

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http://www.bls.gov/news.release/archives/cpi_10302013.pdf (Medical Care, September 2013 Unadjusted Index: 457.458).

[13] *James v. Collison,* 2006 WL 4010212, at *1 (Del. Super. Jan. 31, 2007) (citations omitted).

[14] *Burgos v. Hickok,* 695 A.2d 1141, 1144 (Del. 1997).

reasonable minds could draw but one inference and that inference is that a verdict favorable to the plaintiff is not justified."[15] Stated differently, the jury's verdict should be set aside only "when the verdict is manifestly and palpably against the weight of the evidence, or for some reason, justice would miscarry if the verdict were allowed to stand."[16]

Contentions

The defendant contends that the jury's verdict should be set aside and the Court should enter a judgment as a matter of law in favor of the defendant for the following reasons: first, De La Cruz's act of placing his hands on the steering wheel was negligence as a matter of law; second, the defendant was entitled to a ruling as a matter of law that under 21 *Del. C.* § 4176C, viewing the identity of a call should not be construed as "viewing . . . data"[17]; and third, when De La Cruz grabbed the steering wheel, this was an intervening and superceding act that relieved the defendant from any liability.

The plaintiff contends that the defendant is not entitled to judgement as a matter of law for the following reasons: there was evidence in the record upon which the jury could find that De La Cruz was not negligent; there was evidence in the record to support a verdict for the plaintiff as to the defendant's cell phone use; and there was evidence in the record to support a verdict for the plaintiff that De La Cruz

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[15] *Id.*

[16] *Id.* at 1145.

[17] 21 *Del. C.* § 4176C.

was not negligent and therefore, there was no superceding and intervening negligence.

Discussion

I find that the defendant is not entitled to judgment as a matter of law and therefore, deny the motion. As to the defendant's first contention, I do not find that De La Cruz's act of placing his hands on the steering wheel was negligence as a matter of law. As I ruled during the June 24, 2013 pre-trial conference, the jury could conclude that De La Cruz's act of placing his hands on the steering wheel was an emergency measure taken in a last second attempt to prevent an imminent collision. There was sufficient evidence to support that conclusion. The same reasoning leads me to conclude that De La Cruz's grabbing of the steering wheel was not an intervening and superseding act that relieved the defendant from liability.

As to the defendant's second contention, I reject the defendant's contention that she was entitled to a ruling as a matter of law that under 21 *Del. C.* § 4176C, viewing the identity of a caller should not be construed as "viewing . . . data." As I ruled during the July 19, 2013 pre-trial conference, that statute prohibits using an electronic communication device while the vehicle is in motion; a cell phone is an electronic communication device; and "using" includes viewing data while holding the electronic communication device in one's hand. There was evidence that the defendant held the cell phone to view the name of the caller of an incoming call. I am satisfied that a jury could find that her conduct violated the statute, thus justifying the jury instruction which was given.

Defendant's Motion for New Trial on Liability

Applicable Law

Superior Court Civil Rule 59(a) states in pertinent part, "[a] new trial may be granted as to all or any of the parties and on all or part of the issues in the action in which there has been a trial for any of the reasons for which new trials have heretofore been granted in the Superior Court.[18] When considering a motion for a new trial, there is a presumption that the jury verdict is correct.[19] Moreover, "the court weighs the evidence in order to determine if the verdict is one which a reasonably prudent jury would have reached.[20] The Delaware Supreme Court has noted, "[t]his standard gives recognition to the exclusive province of the jury as established by the Delaware Constitution, while preserving the separate common law function of the motion for a new trial where all of the evidence can be reviewed from the unique viewpoint of the trial judge."[21]

Contentions

The defendant contends that a new trial on liability is warranted for four reasons: first, the jury's verdict was against the great weight of the evidence because there are no facts to support the jury's finding that De La Cruz was not negligent; second, the evidence of the defendant's statements made to the police officer was

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[18] Super. Ct. Civ. R. 59.

[19] *Mills v. Telenczak,* 345 A.2d 424, 426 (Del. 1975).

[20] *Burgos v. Hickok,* 695 A.2d 1141, 1145 (Del. 1997).

[21] *Id.*

inadmissible hearsay and should not have been admitted; third, the jury should not have been instructed on 21 *Del. C.* § 4176C, which concerns the use of electronic communication devices, and the jury should have been instructed on 21 *Del. C.* § 4186(b), which the defendant contends concerns a passenger's duty not to interfere with the driving mechanism; and fourth, the defendant contends that De La Cruz was negligent as a matter of law and therefore, the question should not have gone to the jury.

The plaintiff contends that the defendant is not entitled to a new trial on liability for the following reasons: the jury was instructed on "Actions Taken in an Emergency" and "Credibility of Witnesses - Weighing Conflicting Testimony," and likely found De La Cruz's testimony more credible than the defendant's in that De La Cruz acted as a reasonably prudent person when faced with an emergency situation; the defendant's inadmissible hearsay argument goes to the weight of the evidence, not its admissibility; the jury was properly instructed on 21 *Del. C.* § 4176C because the Court properly concluded that the defendant's act of picking up her cell phone and reading the name on the cell phone display, just prior to reaching for her Bluetooth, constituted the prohibited action of "using" as defined by 21 *Del. C.* § 4176C; the Court was correct not to instruct the jury on 21 *Del. C.* § 4186(b) because the statute does not prohibit De La Cruz's actions in the case *sub judice*; and the Court correctly concluded that De La Cruz was not negligent as a matter of law when the Court denied the defendant's Motion for Summary Judgment as to the Negligence of Co-defendant De La Cruz. Lastly, the plaintiff requests that if the Court grants the Defendant's Motion for a New Trial on Liability then the motion be granted for

damages as well.

Discussion

I find that the defendant is not entitled to a new trial and therefore, deny the motion. I find the defendant's first contention, that there were no facts to support a conclusion that De La Cruz was not negligent, to be unpersuasive for the same reasons that I discussed above in the Defendants Motion for Judgement as a Matter of Law.

As to the defendant's second contention, that the defendant's statements to the police officer were inadmissible hearsay, I find first that statements made by the defendant to the officer and repeated by the officer at trial are not hearsay. They were admissions by a party opponent. The defendant's objection could reasonably be viewed as one based on Rule 403. At trial I carefully considered whether the defendant's statements to the officer should be excluded based on language difficulties. I remain satisfied that her statements were admissible and that the objection goes to the weight of the evidence, not its admissibility.

I find that the jury was properly instructed on 21 *Del. C.* § 4176C for the reasons I discussed above in the Defendant's Motion for Judgment as a Matter of Law.

As to the defendant's contention that the jury should have been instructed on 21 *Del. C.* § 4186(b), I remain satisfied that the statute was not applicable to the facts of this case. The statute is titled "Obstruction to Driver's View of Driving Mechanism" and after reviewing the statute, I find that it concerns a passenger who obstructs the driver's view and does not apply to a passenger who grabs the steering

wheel in what may be viewed as an emergency situation.

As to the defendant's last contention, that a new trial is warranted because the Defendant's Motion for Judgement of a Matter of Law should have been granted, I find that a new trial is not warranted for the reasons I discussed above in the Defendant's Motion for Judgment as a Matter of Law.

CONCLUSION

As to the plaintiff's motions, for the foregoing reasons, the Plaintiff's Motion for Pre-judgment Interest is ***granted*** and I award the Plaintiff $10,803.76 in pre-judgment interest. Additionally, the Plaintiff's Motion for Costs is ***granted in part*** and ***denied in part*** and I award the plaintiff $4,519.50 in costs and fees. This brings the plaintiff's total judgment against the defendant to $105,323.26.

As to the defendant's motions, for the foregoing reasons, the Defendant's Motion for Judgment as a Matter of Law and the Defendant's Motion for a New Trial on Liability are both ***denied.***

IT IS SO ORDERED.

/s/ James T. Vaughn, Jr.

oc: Prothonotary
cc: Order Distribution
File