SUPERIOR COURT
OF THE
STATE OF DELAWARE

FRED S. SILVERMAN
JUDGE

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Submitted: May 7, 2009
Decided: August 27, 2009

RE: *James Adams and Andrew Godfrey v. Marc Satterfield and City of Wilmington,* C.A. No.: 06C-10-310 FSS

Upon Plaintiffs' Motion for New Trial – **DENIED**
Upon Defendants' Motion for Costs – **GRANTED, in part**

Dear Counsel:

After a jury awarded Plaintiffs $27,187 for injuries stemming from an automobile collision, Plaintiffs moved for a new trial based on "improper arguments" made by defense counsel during closing. Specifically, Defendant referred to the collision as a "minor accident." Before trial, Defendants filed an offer of judgment with the court. Plaintiffs rejected the offer and were ultimately awarded $5,000 less by the jury. Relatively, Defendants prevailed at trial. Plaintiffs' rejecting Defendants' offer of judgment is the basis for Defendants' motion for costs.

In October 2005, Defendant, Marc Satterfield, an on-duty Wilmington police officer, ran a stop sign and collided with a vehicle occupied by Plaintiffs. Plaintiffs filed personal injury claims against Satterfield and Wilmington in October 2006. Around March 26, 2009, Satterfield admitted he proximately caused the collision and Defendants filed an offer of judgment for $32,437.03. As mentioned, a jury awarded Plaintiff Adams $11,385.38 and Plaintiff Godfrey $15,801.65.

Three things from the trial are important here. First, during opening statements, Plaintiffs' counsel stated that Plaintiffs' injuries were not "the most serious injury that ever occurred" and the case was not "a million dollar case." Second, while Defendants' counsel cross-examined Plaintiff Adams, counsel attempted to establish the collision's minimal impact, in contravention of *Davis v. Maute*.[1] The court sustained Plaintiffs' objection and, according to Plaintiffs, "admonished" defense counsel. Lastly, once during Defendants' closing argument, Defendants' counsel referred to the collision as a "minor accident." Plaintiffs immediately asked for a mistrial. The court denied the application without prejudice and asked Plaintiffs' counsel if he wanted a curative instruction, which he did not.

Based on those things, Plaintiffs claim that defense counsel ignored the court's admonition and attempted to correlate a "minor accident" to minimal injuries, despite *Davis*. In *Davis*, the defendant referred to the underlying collision as a "fender-bender" three times; introduced photos of the minimal damage; and failed to present expert testimony linking minimal property damage to minimal physical injuries.[2] *Davis* held that defense counsel's failure to offer expert testimony along with his "playing down the seriousness of the accident," may have mislead "jurors by encouraging them to assume without a basis in the evidence that [Plaintiff's]

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[1] 770 A.2d 36 (Del. 2001) (holding "in general, counsel may not argue that there is a correlation between the extent of the damage to the automobiles in an accident and the extent of the occupants' personal injuries caused by the accident in the absence of expert testimony on the issue").

[2] *Id*. at 38.

alleged serious injuries could not have been caused by a relatively minor accident."[3] *Davis* concluded that the "cumulative effect" of defense counsel's "superficial appeal" to the jury regarding the "minimal damage/minimal injury inference" was error.[4]

This case is not *Davis*. Here, Plaintiffs conceded from the start that the collision was not "the most serious" and Defendant referred to it as a "minor accident" only once. Moreover, Defendant did not attempt to press the "minor impact equals minor injury" position by offering physical evidence, such as photos. Defendants' one-off reference to the collision as a "minor accident" is not enough to mislead the jury, as compared to *Davis*. Moreover, Defendant's statement piggybacks on Plaintiffs' opening statement, thereby further reducing a likelihood that one "minor accident" reference mislead the jury. In any case, a curative instruction, which Plaintiffs declined, would have patched the imperfection here. Therefore, Plaintiffs' motion for a new trial is **DENIED.**

As to Defendants' motion for costs, Defendants seek $2,775 for Dr. Frank Sarlo's deposition fee and $1,399.95 for transcription services. Plaintiffs do not oppose the motion, but argue that Defendants should not recover costs for the deposition transcript, since it was not offered into evidence.

Superior Court Civil Rule 68 explicitly grants a party costs incurred after an offer of judgment is made at least ten days before trial and where the final "judgment obtained by offeree is not more favorable than the offer." Rule 68 does not specify recoverable costs, so the court must look to Superior Court Civil Rule 54 and 10 *Del. C.* § 8906.[5] According to Superior Court Civil Rule 54(h), deposition

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[3] *Id*. at 43.

[4] *Id*.

[5] *See Beaudet v. Thomas*, 797 A.2d 678 (Del. 2002) (TABLE).

fees for expert witnesses are recoverable, "only where the deposition is introduced into evidence."

Because Defendants entered the deposition videotape into evidence, and not its accompanying transcript, Defendants cannot recover the $837.20 transcription costs.[6] Accordingly, Defendants are awarded Dr. Sarlo's $2,775 deposition fee and the $562.75 fee associated with videotaping services.

For the foregoing reasons, Plaintiffs' motion for a new trial is **DENIED** and Defendants motion for costs is **GRANTED,** in the amount of $3,337.75.

IT IS SO ORDERED.

Very truly yours,

/s/ Fred S. Silverman

FSS: mes
cc: Prothonotary (Civil)

[6] *See, e.g., Cubberly v. Orr*, 1995 WL 654144 (Del. Super. Oct. 24, 1995) (If a transcript and videotaped deposition are entered into evidence, costs can be recovered for one, but not both because it is duplicative).