Date Submitted: September 10, 2001
Date Decided: November 15, 2001

Eric C. Howard, Esquire
Wilson, Halbrook & Bayard
107 W. Market Street
Georgetown, DE 19947

Michael J. Goodrick, Esquire
1122 West Street
P.O. Box 134
Wilmington, DE 19899

Re: Faw Casson v. Halpen
C.A. No. 00C-01-015

Dear Counsel:

Following a bench trial, the Court entered a judgment in Plaintiff's favor in the amount of $5,275.00 together with pre and post judgment interest at the legal rate. The Court made an additional award of attorney's fees. The factual and legal background is discussed in a letter opinion dated August 7, 2001.

Concerning the background, Plaintiff demanded a trial de novo following arbitration. At trial, Plaintiff, an accounting firm, sought damages for the loss of two clients under an employment agreement. Defendant opposed these claims in their entirety. Defendant, a public accountant, worked with the clients whose business was at issue while previously employed with Plaintiff. Both the arbitrator and the Court entered judgment reflecting the economic loss of one client.[1]

[1] Plaintiff's Complaint requested compensation for its financial loss associated with Defendant's acquisition of two of Plaintiff's clients: the Milford Grain Company and the Georgetown Fire Company. Both the arbitrator and this Court found Plaintiff's loss of the

Georgetown Fire Company as a client was not attributable to Defendant's actions and, therefore, Plaintiff was not entitled to recovery for any related financial loss.

Presently, the parties disagree about the assessment of costs and fees. Plaintiff seeks complete recovery through trial, while Defendant denies responsibility for post arbitration expenses and desires fees for this phase of the litigation.

As the award and judgment found the same compensatory damages, except for attorney's fees, how should costs, fees, and the arbitrator's compensation be assessed? The response to the question lies in an understanding of the purpose of arbitration and judicial precedent.

The almost overwhelming number of civil cases filed in Superior Court is well known to the Bar. Justice delayed is indeed justice denied. Litigation expenses are substantial and raise concerns about access to the system. In 1983, a report of the Delaware Supreme Court Advisory Committee on court-related mandatory arbitration was completed. Mandatory arbitration was recommended and ultimately adopted.

In June, 1984, the Arbitration Implementation Committee, under the auspice of the Superior Court, circulated a document entitled: *Arbitration — Administrative Procedures Manual* (hereinafter "Manual"). The Court has published additional manuals since that time, and has also posted related materials on its web site.[2] Although many points about arbitration are desirable, these come to mind in this case:

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[2] The website for the Delaware judiciary is located at: www.courts.state.de.us. Specific alternative dispute resolution information is available at the website for the Superior Court: www.courts.state.de.us /superior/alternative.htm.

(a) Arbitration is intended to provide a quicker means to resolve a case in a fair and just manner;

(b) It is intended to promote settlement of a dispute;

(c) An arbitrator is a judge of the facts and law and is performing a service to the Superior Court;

(d) A hearing is scheduled for no more than 1 ½ or 2 hours;

(e) At a hearing, the rules of evidence are relaxed;

(f) A hearing permits the issuance of subpoenas to secure the attendance of witnesses or the production of documents;

(g) An Independent Medical Examination may be performed and experts may testify (a lawyer's judgment call should the case merit the expense);

(h) The program has been successful with an effective appeal rate of 17% in fiscal year 1993;[3] the dollar amount of mandatory arbitration has been increased from $30,000 to $100,000; parties may stipulate to arbitration regardless of the limit and often do; and the arbitrator's fee for holding the hearing and entering the order has been increased to $300;

(I) The "Statement of Philosophy" provided to arbitrators reads:

> Arbitration is intended to provide a speedy alternative to a jury trial. It should not be a replication of a Superior Court trial. Please keep the hearing short and simple. Don't dwell on technicalities if they are incidental to the outcome. Hear both sides and decide the case. Every party has de novo appeal rights if they cannot live with your decision.

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[3] The rate for subsequent years is believed to be within this range as well.

When a trial de novo is filed, the case returns to the docket and proceeds in the usual fashion. When decided, a trial judge then considers assessment of costs. On this point, the applicable arbitration provision states:

> If the party who demands a trial de novo fails to obtain a verdict from the jury or a judgment from the Court, exclusive of interest and costs, more favorable to the party than the arbitrator's order, that party shall be assessed fees and costs of the arbitration, and the arbitrator's compensation.

Super. Ct. Civ. R. 16.1(h)(4).

According to the 1983 report on arbitration, this provision was fashioned so ". . . that any party who obtains a judgment for less than the arbitrator's order awarded him is to be assessed the full cost of the arbitration. *This provision is intended to discourage frivolous requests for a trial de novo*." *Report of Delaware Supreme Court Advisory Committee on Court-Related Mandatory Arbitration*, at 5 (May 17, 1983) (emphasis added). The prototype became Rule 16(c)(8)(D), and the pertinent language today is the same except for the substitution of gender neutral words ("the party," "that party" for "to him," "he"). As established, "the fees and costs of the arbitration include, but are not limited to, any expert witness fees assessed by the Court during arbitration as costs, Prothonotary's costs for issuing of subpoenas and sheriff's mileage." Manual, *supra*, at 30.

I conclude that the judgment obtained in this Court was more favorable to Plaintiff. It included an additional award of attorney's fees, and Defendant's counterclaim was denied. It is immaterial that the arbitrator did not address legal costs in the abbreviated, concise, and expeditious arbitration proceeding.

This result is supported by additional reasons. Defendant could have offered judgment under Rule 68, while admitting attorney fee liability through time of the award. Notwithstanding this approach, following arbitration, Defendant filed a motion to dismiss, a request for production of documents, and interrogatories, all of which required Plaintiff's response. In the pre-trial stipulation filed on June 28, 2001, Defendant denied any responsibility and sought damages on a counterclaim (denied after trial, as the Court found no interference by Plaintiff with Defendant's professional relationships). Having tested Plaintiff's resolve, Defendant bears the consequences and the risks of litigation.

This conclusion also is consistent with the purpose of arbitration and the trial de novo procedure. Fair and just settlements are encouraged and frequently occur early in the litigation process. After the arbitration, Plaintiff was partially successful. Considering the relatively small recovery, Defendant could have offered settlement with payment of the accrued legal expense through the offer of judgment procedure. If that had occurred, the Court's decision would have been different. Moreover, the request for a trial de novo was meritorious and not a futile, frivolous, or bad faith effort.

In this case, the aggregate award, with attorney's fees, exceeds the arbitrator's order and is more favorable. In *Law v. Lee*, Del. Super., C.A. No. 84C-OC-16, Babiarz, J. (Sept. 26, 1988) (Letter Op.), the Court awarded exemplary and compensatory damages in a trial de novo. There the defendant argued without success that the Court's award was not more favorable, arguing that "the arbitrator's award was for compensatory damages only while the Court's award included substantial amount of exemplary damages." *Id*. at 1. Presumably, the compensatory figures were the same.

Here the attorneys fee's award can be analogized to the exemplary damages. The Court noted that the purpose of the arbitration rule was to make a plaintiff whole. *Id*. It matters not whether the delay is occasioned by aggressive defense litigation or by the filing of a trial de novo by a defendant. While Plaintiff is the one who requested the de novo trial in this case, the principle nonetheless applies: Plaintiff should be made "whole," when forced to litigate through trial.

In determining legal fees, Defendant does not question reasonableness.[4] Nevertheless, I have reviewed the affidavit submitted by Plaintiff's counsel independently under Rule of Professional Conduct 1.5. The figure requested is reasonable for the time and effort required, as well as for the result obtained in this case. Consequently, attorney's fees in the amount of $2,871.00 are awarded.

Defendant requested an award of legal fees and costs. This request is denied as Plaintiff obtained a more favorable judgment. Furthermore, the reference to "fees" in Rule 16.1 does not include legal fees. On the other hand, recovery of an expert's fee is recognized in the 1984 Manual. Without a contractual provision permitting the recovery of attorney's fees, no award could be made even to Plaintiff as the prevailing party. Absent statute or agreement, litigants pay the legal expenses, and Rule 16.1 did not change well established Delaware precedent on this point. *See* 10 *Del. C.* § 5101 (stating ". . . Generally a party for whom final judgment in any civil action . . . shall recover, against the adverse party, costs of suit to be awarded by the court"); *Stephenson v. Capano*

[4] Attorney's fees are recoverable under the former employment agreement at issue between the parties.

Dev., Inc., Del. Supr., 462 A.2d 1069, 1078 (1983) (noting that "attorney's fees . . . are not generally recoverable unless there is a specific statutory authorization for such an award); Super. Ct. Civ. R. 54(I) ("No appearance fees for attorneys will be permitted or taxed as costs in any action or cause in the Superior Court.").

Concerning costs, $405.00 is awarded, representing the filing fee, service of process fee, arbitrator's fee, and demand for trial de novo fee. These costs are routinely awarded to successful litigants. *See Gaur v. Arocho*, Del. Super., C.A. No. 98C-09-033WLW, Witham, J. (Dec. 28, 2000) (Order). However, $158.80 of photocopying expenses are disallowed. These were incurred for the convenience of Plaintiff and were not an aid to the Court at trial. *See Brittingham v. Food Lion*, C.A. No. 99C-10-013, Stokes, J. (Aug. 10, 2001) (Letter Op.).

Considering the foregoing, Plaintiff is awarded an additional $3,276.00 for its fees and costs incurred in this litigation. No award is made for Defendant.

IT IS SO ORDERED.

Very truly yours,

Richard F. Stokes

cc: Prothonotary's Office