IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

EDWARD THOMAS,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**C.A. No. 98C-09-084 SCD**
	:	
JOHN J. BEAUDET,	:	
	:	
Defendant.	:	

Submitted: June 13, 2001
Decided: June 29, 2001

ORDER

Upon Defendant's Motion for Reargument from the Court's
Decision of May 9, 2001; and
Upon Plaintiff's Cross-Motion for Reargument

This 30th day of June 2001, upon consideration of the defendant's motion for reargument and the plaintiff's cross-motion, it appears that:

1)   This Court's award to the plaintiff of a $100.00 to reimburse the payment of the trial fee claimed by plaintiff was incorrect. The records of the Prothonotary indicate that the fee was paid by the defendant. The plaintiff does not state to the contrary in its response. Therefore, that portion of the cost award is stricken.

2)   This Court's award included $125.00 as the cost of the arbitration. Defendant correctly points out that Rule 16.1(h)(4) imposes the arbitration fee on a party only if that party achieves less desirable results. In this case the defendant achieved better results; to-wit, a verdict of $1,000 instead of the arbitrator's award of $40,000. Therefore, that portion of the cost award is also stricken.

3)   **Defendant seeks an award in its favor for $3,100.00 for the two expert witnesses**

who testified. Defendant argues that I am compelled by Rule 68 to award the defendant costs.

The United States Supreme Court has put that argument to rest:

> **The purpose of Rule 68 is to encourage the settlement of litigation. In all litigation, the adverse consequences of potential defeat provide both parties with an incentive to settle in advance of trial. Rule 68 provides an additional inducement to settle in those cases in which there is a strong probability that the plaintiff will obtain a judgment but the amount of recovery is uncertain. Because prevailing plaintiffs presumptively will obtain costs under Rule 54(d), Rule 68 imposes a special burden on the plaintiff to whom a formal settlement offer is made. If a plaintiff rejects a Rule 68 settlement offer, he will lose some of the benefits of victory if his recovery is less than the offer.**

Delta Air Lines, Inc. v. August, **450 U.S. 346 352, 67 L. Ed. 2d 287, 293 (1981).** *See also*
Napolski v. Davis, **Del. Super., 734 A.2d 637 (1999). The defendant is not entitled to an award**
of his fees for expert witnesses because the plaintiff did recover.

4)   **Plaintiff seeks to support its earlier request for a New Trial, denied by the order**

of May 9, 2001, with an argument derived from the recent decision of *Davis v. Maute*, Del.

Supr., No 307, 200, March 30, 2001. In *Davis*, the Supreme Court reversed the verdict below

on the grounds that the trial court erred in admitting in evidence a photograph which showed

minimal damage to the automobile. The plaintiff argues that "had [*Davis*] been applied to the

case at bar the outcome of the trial would have been different." Plaintiff further argues,

without transcript support, that [t]he photographs and arguments made during summation

by defense counsel were improper and confused the jury that resulted in a grossly unfair

decision." (Reply at 2).

5)   **The defendant counters that the response was untimely, and the plaintiff made**

no objection to admission of the photographs.

      6)   I find the plaintiff's position to be without merit. The plaintiff waived his right to object to the admission of the photograph. No record has been offered to support the claim that an improper argument was made. That being the case, I cannot conjecture on what the plaintiff may or may not have in mind.

      The motion for reargument is GRANTED. The decision of May 9, 2001, is VACATED. An award is entered in favor of the plaintiff in the amount of $155.00. As to the cross-motion, it is DENIED.

      IT IS SO ORDERED.

                                          Judge Susan C. Del Pesco

Original to Prothonotary
xc: **Michael C. Heyden, Esquire**
        James J. Haley, Jr., Esquire