IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

VAL CUNNINGHAM,	:	
	:	C.A. No. 97C-10-014
Plaintiff,	:	
	:	
v.	:	
	:	
GRACE OUTTEN,	:	
	:	
Defendant.	:	

Submitted: April 30, 2001
Decided: June 28, 2001

O R D E R

Upon Plaintiff's Motion for Additur or, in the Alternative a New Trial. Denied. Upon Defendant's Motion for Costs. Granted in part; Denied in part. Upon Plaintiff's Motion for Costs. Granted.

Darryl K. Fountain, Wilmington, Delaware, attorney for the Plaintiff.

Colin M. Shalk, Casarino Christman & Shalk, Wilmington, Delaware, attorneys for the Defendant.

WITHAM, J.

Cunningham v. Outten
C.A. No. 97C-10-014
June 28, 2001

Before the Court is Plaintiff's Motion for Additur or, in the alternative, a Motion for a New Trial. Also before the Court is Defendant's Motion for Costs and Plaintiff's pre-trial Motion for Costs.

Plaintiff Val Cunningham ("Cunningham" or "Plaintiff") was injured in a motor vehicle accident which occurred on August 16, 1996 south of Dover, Delaware. On February 24, 2000, the Defendant made an Offer of Judgment in the amount of $6,000. This offer expired and the matter went to trial on April 10, 2001. On April 12, 2001, the jury returned with a verdict awarding the Plaintiff $10,000. Judgment was entered by the Court in the amount of $5,000 as the jury found the Plaintiff's comparative fault to be 50%.

The accident occurred on Route 13 as Defendant Grace Outten ("Outten" or "Defendant") changed lanes in front of Cunningham. Outten was driving in the right-hand lane when she moved into the left-hand lane. According to Outten's trial testimony, she looked before she changed lanes, but does not remember if she used her turn signal. Cunningham was traveling behind Outten in the left-hand lane. The vehicles collided just after Outten changed lanes. Police came to the scene and Outten was charged with Inattentive Driving. She contested the ticket but was found guilty of Inattentive Driving. Defense counsel argued that even under the Plaintiff's version of the accident the Plaintiff could have avoided the accident by slowing down and/or not overreacting to Outten's lane change.[1] The jury weighed all of these facts and

[1] **Plaintiff testified that the Defendant was traveling in front of and to the right of him just prior to her lane change.**

arguments and found that each driver was 50% negligent.

In the motion for new trial or additur, Plaintiff argues that the jury's finding of 50% comparative fault was unreasonable and unjustified by the testimony and that the verdict was obviously inadequate. Defendant argues that there was adequate evidence for the jury's liability finding and the award amount. In determining a Motion for Additur and the alternative Motion for a New Trial, the Court must give enormous deference to the jury's verdict. The Supreme Court recounted the standard of review for jury verdicts in *Young v. Frase*, as follows:

> Under Delaware law, enormous deference is given to jury verdicts. In the face of any reasonable difference of opinion, courts will yield to the jury's decision. It follows that, in the absence of exceptional circumstances, the validity of damages determined by the jury should likewise be presumed. Accordingly, a jury award should be set aside only in the unusual case where it is "clear that the award is so grossly out of proportion to the injuries suffered as to shock the Court's conscience and sense of justice."[2]

[2] ***Young v. Frase*, Del. Supr., 702 A.2d 1234, 1236-1237 (1997).**

In light of the deference given to jury verdicts, in considering motions for additur or a new trial the trial court's role is to affirm the jury's verdict unless "on a review of all the evidence, the evidence preponderates so heavily against the jury verdict that a reasonable jury could not have reached the result."[3]

Plaintiff did not bring any specific testimony or evidence to the Court's attention which would affect the jury's liability finding. In arguing the inadequacy of the award, Cunningham provides the amounts from medical bills that were paid by the insurance companies. While these amounts may provide some level of guidance in hindsight, these damages were not presented to the jury and are not proper to consider. In considering the evidence presented at trial, the jury was presented with two different theories of liability and more specifically, causation. Outten's traffic citation was evidence of her negligence but was not dispositive of liability. The jury heard Plaintiff and Defendant recount the details of the accident and apportioned causation as they deemed appropriate. Upon review of the testimony and evidence presented to the jury, there are no exceptional circumstances to warrant ths Court to upset the verdict. Thus, the Court upholds the jury verdict for liability and damages.

[3] ***Storey v. Camper*, Del. Supr., 401 A.2d 458, 465 (1979).**

The Defendant brought a motion for costs pursuant to Superior Court Civil Rule 68. The purpose of Rule 68 is to encourage settlements by shifting part of the risk of proceeding with the lawsuit to the claimant.[4] For the Plaintiff to prevail completely under Rule 68, they must not only win, but win an award amount greater than the Offer of Judgment or pay some of the opposition's costs. Rule 68 contains three requirements for reimbursement of costs: (1) a filed Offer of Judgment at least 10 days before trial, (2) costs that occur after the date of that filing, and (3) a trial verdict below the amount of the offer. While these are straightforward, factually specific requirements, exactly what constitutes a reimbursable cost is not defined in Rule 68. Through the common law, costs under Rule 68 has been interpreted to mean those costs that would be appropriate under Rule 54.[5] The Court must perform a simple evaluation of the number of days between the time of the offer and the start of

---

[4] *Bejger v. Shreeve*, Del. Super., C.A. No. 95c-06-104, Cooch, J. (May 7, 1997), Order at 2.

[5] *Bejger* at 2, *citing to Parsons v. Black*, Del. Super., C.A. No. 89C-JA-102, Toliver, J. (June 5, 1990), Letter Op. at 2, which states that "Rule 68 does not define "costs." However, 10 Del. C. § 5101 and § 8906, as well as Superior Court Civil Rule 54 indicate that "costs" shall be allowed to the prevailing party unless otherwise specified by statute, rule or direction of the Court. And while they do not specifically define that term, they do provide some guidance."

the trial and calculate the difference between the jury's verdict and the Offer of Judgment. Next, the Court must determine which costs occurred after the offer was filed and what costs are appropriate in its discretion under Rule 54 and any applicable statutes, in this case 10 Del. C. § 8906.

In the case at bar, the Defendant filed an Offer of Judgment for $6,000 on February 24, 2000, more than a year before the trial in April, 2001. The videotaped trial deposition of Dr. Ali Kalamchi, an orthopedic surgeon, occurred on March 14, 2000. Defendant requests payment for the following costs: Dr. Kalamchi's videotape deposition fee of $2,000, the videographer's fee of $324 for the videotape production and the court reporter's transcription fee of $171.60. Because these three costs arose after the Offer of Judgment, the Court must evaluate these costs to see if they are appropriate and reasonable. Under Rule 54(h), "[f]ees for expert witnesses testifying on deposition shall be taxed as costs pursuant to 10 Del. C. 8906 only where the deposition is introduced into evidence."

The first cost is Dr. Kalamchi's video deposition fee of $2,000. The $2,000 represents a flat fee charged for the videotaped deposition which lasted for approximately one half of an hour. This Court recently issued an opinion in *Lurch v. Roberts*[6] that dealt with determining a reasonable amount for expert witness fees. In that opinion the Court followed the lead of other decisions which used a 1995 study performed by the Medical Society of Delaware and made adjustments using the

[6] ***Lurch v. Roberts*, Del. Super., C.A. No. 96C-06-004, Witham, J. (Jan. 25, 2001) ORDER.**

medical care price index.[7] Based upon these numbers, the Court determined that for a two hour deposition, a range of $591.50 to $1,064.70 would be a reasonable fee with $188.10 to $295.75 for each hour thereafter.[8] Based on these rates, the Court will require Plaintiff to pay $600.00 for the half hour deposition of Dr. Kalamchi.

The remaining costs are the videographer's taping fee and the court reporter's transcription fee. Superior Court Rule 54(f) details the guidelines the Court will use in assessing court reporter costs. Rule 54(f) states:

> (f) *Court reporter fees*. The fees paid court reporters for the Court's copy of transcripts of depositions shall not be taxable costs unless introduced into evidence. Fees for other copies of such transcripts shall not be taxable costs. The production and playback costs associated with any videotape deposition may also be taxed as costs if the deposition is introduced into evidence.

---

[7] ***Lurch* at 1 (recalling that the Medical Society of Delaware gave the following guidelines: "A reasonable range of fees for court appearances was from $1,300 to $1,800 per half day. For depositions a range of $500 to $900 for a two hour deposition was given as a guideline with a $159 to $250 charge for each additional hour." In addition, the Court noted that the medical care price index has increased by 18.3% from December 1995 to December 2000, according to the U.S. Bureau of Labor Statistics.)**

[8] ***Id.***

Pursuant to Rule 54(f) and because the videotaped deposition was played before the jury at trial, the videographer's fee of $324.00 will be part of the costs Plaintiff must pay. However, the court reporter's fee of $171.60 will not be charged to the Plaintiff "because the testimony of the doctor was introduced through videotape, transcription was duplicative and [will] be borne by defendant."[9] Plaintiff is only required to pay the $324 in costs associated with production and playback of the video but not the transcription costs.

In July of 2000, Plaintiff filed a motion for costs claiming that he was charged an extra $480 because the defense attorney was late for the deposition of Dr. Quinn. The Court deferred this motion until after trial or other resolution of this matter. Superior Court Civil Rule 54(e) discusses "unnecessary costs" and includes in that term actions by the opposite party that "otherwise cause unnecessary expense." Pursuant to Rule 54(e), the Court may, in its discretion, "order such unnecessary expense to be taxed against the party causing the same, without regard to the outcome of the action." The deposition of Dr. Quinn was scheduled to begin at 5:30 p.m. but defense counsel arrived approximately thirty minutes late. Dr. Quinn charged Plaintiff an extra $480 for the additional half an hour of time. The extra half hour was an unnecessary expense which will be taxed against the Defendant. Therefore,

[9] ***Bejger* at 3.**

Plaintiff's motion for a new trial or additur is DENIED. Defendant's motion for costs is GRANTED with respect to the videographer's fee of $324.00, DENIED with respect to the court reporter's fee of $171.60 and GRANTED in the amount of $600.00 with respect to the Doctor Kalamchi's deposition fee. Plaintiff's earlier motion for costs of $480 is GRANTED. Thus, the total net cost Plaintiff must pay Defendant is $444.00.

IT IS SO ORDERED.

_____
J.

dmh
oc: Prothonotary
xc: Order Distribution