IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

KIMBERLY SAMSON,	)	
Plaintiff,	)	
	)	
v.	)	C.A. 01C-01-048 PLA
	)	
GREGG M. SOMERVILLE,	)	
Defendant.	)	

Submitted: July 26, 2005
Decided: July 26, 2005

UPON PLAINTIFF'S
MOTION FOR JUDGMENT AS A MATTER OF LAW OR
FOR A NEW TRIAL
DENIED

UPON PLAINTIFF'S
MOTION FOR A NEW TRIAL
DENIED

UPON DEFENDANTS'
MOTION FOR COSTS
GRANTED

ORDER

Ronald L. Stoner, Esquire, Newark, Delaware, Attorney for Plaintiff

Stephen P. Casarino, Esquire, Casarino Christman & Shalk, Wilmington, Delaware, Attorney for Defendant.

ABLEMAN, JUDGE

Upon consideration, Plaintiff's Motion For Judgment As A Matter Of Law Or, In The Alternative, For A New Trial, must be **DENIED**. Plaintiff's Motion For A New Trial, filed separately and on different grounds, must also be **DENIED**. Defendant's Motion For Costs must be **GRANTED**. It appears to the Court that:

1. This was an auto accident case in which the defendant rear-ended the plaintiff as both were merging onto a highway. Defendant did not concede liability. Oddly, and fatally to her case, the plaintiff presented scant evidence regarding liability and never moved for a directed verdict on that issue. Instead, Plaintiff focused exclusively upon the damages she had allegedly suffered. The jury returned a verdict finding the defendant not liable for the accident.

2. Prior to trial, the parties engaged in mandatory arbitration, resulting in an award for the plaintiff of $5,000. The arbitrator's fee was $175. Plaintiff refused the award and demanded a trial *de novo*. This decision forced the defendant to call an expert medical witness to refute the plaintiff's damages allegation, at a cost of $3,000. Defendant's Motion For Costs seeks to recover the $175 arbitration fee and the $3,000 fee for his expert medical witness.

3. To begin with the most obvious, Plaintiff's Motion For Judgment As A Matter Of Law is plainly precluded by Superior Court Civil Rule 50, which states, "Whenever a motion for a judgment as a matter of law *made at the close of all the*

evidence is denied or for any reason is not granted … [s]uch a motion may be renewed by service and filing not more than 10 days after the entry of judgment."(emphasis added). Plaintiff's counsel, somewhat inexplicably, failed to move for a directed verdict on liability at the close of the defense case. The plaintiff cannot now renew a motion that was never made.

4. Plaintiff's Motion For A New Trial must also be **DENIED**. "Unless the evidence preponderates so heavily against the jury verdict that a reasonable juror could not have reached the result, the jury's findings will not be disturbed."[1] The "no reasonable juror" standard is one of "extreme deference" in which a new trial will be granted only if the verdict "shock[s] the Court's conscience and sense of justice."[2]

The evidence in this case did not so heavily favor the plaintiff that the jury's verdict can be termed "unreasonable." The only evidence that the plaintiff presented regarding liability was her own testimony, which consisted of a brief statement that her car was stopped at the time of the accident. The plaintiff then went on for hours, or so it seemed, concerning her subjective claims of injury, describing virtually every cheerleading and dance move that she had ever performed in her life, in an effort to establish damages and to convince the jury that her career plans were shattered as a result of the accident. It was obvious that

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[1] *Walker v. Campanelli*, 860 A.2d 812 (Del. 2004).

the plaintiff was grossly exaggerating her claim by, for example, demanding compensation for her dream of a professional dancing career that she was not likely to have attained even without the accident. It was entirely reasonable for the jury to equate the plaintiff's longwinded hyperbole with a lack of credibility, and to find that her overstatements regarding damages meant that her testimony regarding liability was also suspect, such that she did not carry her burden of proof. The verdict was therefore not against the great weight of the evidence, does not shock the Court's conscience, and must be granted deference.

5. Plaintiff's Second Motion For New Trial must also be **DENIED**. This Motion complains that the defendant testified that he told the police that the plaintiff's car was moving at the time of the accident, rather than stopped at the intersection. Plaintiff objected to this testimony on hearsay grounds because the police officer was not called to testify and the police report was not entered as evidence. The objection was overruled.

The line between asking a witness what is in a report that is not in evidence, and asking him what he said and did during an event that was later included in such a report, is a close one. The Court, in overruling the objection, expected the defendant's comments to be of the latter type, and recollects that they were. Even assuming, however, that the plaintiff is correct and that the Court erred on this

[2] *Maier v. Santucci*, 697 A.2d 747, 749 (Del. 1997).

ruling, a new trial on all issues still is not warranted. Plaintiff misunderstands that her problem in this case was not that she was credible and the Court's error resulted in making the defendant seem more credible. The problem in this case was that the plaintiff had the burden of proof. Plaintiff's counsel tried to highlight Defendant's lack of credibility through previous inconsistent statements that he had given his insurer. Yet, those inconsistencies were hardly significant and did not affect the jury's view – consistent with the Court's – that the defendant was forthright and honest, and not in anyway attempting to mislead the jury. This was in sharp contrast to the impression that the plaintiff conveyed. To the extent that the Court's ruling on the hearsay objection was erroneous, it was inconsequential.

6. Defendant's Motion to recover the cost of the arbitration must be **GRANTED**. Superior Court Civil Rule 16.1(k)(11)(D)(iii) states that, "[i]f the party who demands a trial de novo fails to obtain a verdict from the jury or judgment from the Court, exclusive on interest and costs, more favorable to the party than the arbitrator's order, the party shall be assessed the costs of the arbitration." The Rule is mandatory and absolute: because the plaintiff refused an arbitrator's award greater than what she received at trial, she must pay the arbitration fee.

7. Defendant's Motion to recover his expert witness fee is slightly more complicated. This portion of the motion rests upon Rule 54(d), which holds that,

"costs shall be allowed as of course to the prevailing party upon application to the Court within ten (10) days of the entry of final judgment unless the Court otherwise directs." 10 Del. C. § 8906 states that, "[t]he fees for witnesses testifying as experts … 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."

The Delaware Supreme Court has instructed that the phrase "as of course" leaves the award of costs under Rule 54 to the discretion of trial judges.[3] This is as opposed to Rule 68, which requires an award of costs against a party that fails to obtain a verdict greater than an offer of judgment previously made on the record.[4]

8. Somewhat surprisingly, aside from her motion for a new trial, the plaintiff does not contest the fact that she should be ordered to pay for the defendant's expert witness. Instead, the plaintiff contends that the $3,000 expert witness fee is too high. Plaintiff's filing first suggests an amount of $1,200 without any elaboration as to why that amount is fairer than the amount the defendant negotiated and actually paid. Plaintiff then notes that awards between $1,677 and $2,322 have previously been deemed reasonable. Finally, the plaintiff concedes

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[3] *Donovan v. Delaware Water & Air Resources Comm'n,* Del.Supr., 358 A.2d 717, 722-23 (1976); *Mulford v. Haas*, 2001 WL 541023 (Del. Super.) at *4; *Sweren v. Sheehy*, 2001 WL 1783076 (Del. Super.)("The award of costs for expert witness testimony is committed to the sound discretion of the trial court.").

[4] Sup. Ct. Civ. R. 68 ("If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree *must* pay the costs incurred after the making of the offer.)(emphasis added).

that the expert's fee schedule is $2,200 per hour of Superior Court testimony, that "compensation for his testimony should be for no more than 1.36 hours"[5], the amount of time he was on the stand. When the Court multiplies those figures, it gets $2,992. Thus, I conclude, as does Plaintiff, that a fee award of $2,992 is appropriate.

9. For these reasons, Plaintiff's Motion For A Judgment As A Matter Of Law, Or, In The Alternative, For A New Trial, is **DENIED**. Plaintiff's Motion For A New Trial is **DENIED**. Defendant's Motion For Costs is **GRANTED**. Plaintiff is ordered to pay Defendant $3,167 within thirty days.

IT IS SO ORDERED.

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Peggy L. Ableman, Judge

Original to Prothonotary
cc: Ronald L. Stoner, Esquire
Stephen P. Casarino, Esquire

[5] Pl. Opp. To. Def. Mot. For Costs, D.I. 51, at 1.