IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

EMANUEL NELSON,	)	
	)	
Plaintiff,	)	C.A. No. 07C-03-355 WCC
	)	
v.	)	
	)	
BENJAMIN FELDMAN,	)	
	)	
Defendant.	)	

Submitted: October 22, 2010
Decided: January 26, 2011

On Defendant's Motion to Recover Costs and Enter Judgment - DENIED

O R D E R

Beverly L. Bove, Esquire; Vincent J.X. Hedrick, II, Esquire; 1020 West 18th Street, Suite 2, P.O. Box 1607, Wilmington, DE 19899. Counsel for Plaintiff.

Donald M. Ransom, Esquire; 405 North King Street, Suite 300, Renaissance Centre, P.O. Box 1276, Wilmington, DE 19899-1276. Counsel for Defendant.

CARPENTER, J.

Before this Court is Defendant's Motion to Recover Costs and Enter Judgment pursuant to Superior Court Civil Rule 54(d) and Title 10, Section 5101 of the Delaware Code. For the reasons set forth below, the motion is DENIED.

Factual and Procedural Background

This case arose out of an automobile collision that occurred on January 22, 2006. Plaintiff Emanuel Nelson and his wife, Theresa Nelson, were traveling eastbound along Martin Luther King Boulevard ("MLK Boulevard") in Wilmington, Delaware, when their car collided with a vehicle operated by Defendant Benjamin Feldman at the intersection of MLK Boulevard and Walnut Street. The parties dispute who entered the intersection on a red light.

Mr. Nelson and his wife, who both suffered serious injuries in the collision, filed suit in Delaware Superior Court against Mr. Feldman. Mr. Feldman subsequently filed counter-claims against the Plaintiffs. Mrs. Nelson's claim settled prior to trial. The Defendant's medical expert, Dr. Lawrence Piccioni, agreed that the Plaintiff suffered injury as a result of the accident and therefore the two-day trial was centered on the issue of whether the Defendant was negligent in a manner proximately causing the accident. On September 29, 2010, the jury returned a verdict for the Defendant, finding that he had been 49% negligent in causing the accident and that Plaintiff had been 51% negligent in causing the accident.

Defendant has now filed a Motion to Recover Costs pursuant to Superior Court Rule 54. Defendant seeks to recover the cost relating to the testimony and transcript[1] of his expert, Dr. Piccioni and costs associated with the subpoenaing of witnesses.[2] The total amount sought is $2,246.84.

Plaintiff objects to an assessment of costs and requests that the Court deny Defendant's Motion. First, Plaintiff argues that an assessment of costs would be inappropriate because the verdict shows that the liability issue was a very close question that could easily have been decided the other way. Second, the Plaintiff argues that Defendant ought to bear the cost of entering Dr. Piccioni's testimony at trial because his testimony pertained only to the largely uncontested issue of Mr. Nelson's injuries and not to the question of Mr. Feldman's negligence in causing the accident. Finally, Plaintiff argues that he would be unable to pay an award of costs and that Defendant's insurer, State Farm, is better able to bear the cost of the successful defense in this case.

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[1] The cost of the transcript is not recoverable since the transcript was received as a court exhibit and was not introduced into evidence.

[2] Trial testimony of Lawrence Piccioni, M.D., taken July 15, 2010 - $1500.00
Transcript of trial testimony of Lawrence Piccioni, M.D. - $511.84
Subpoena costs for the following witnesses:
Brian Mitchell - $60.00
Corporal James Peifer - $135.00
Lawrence Piccioni, M.D., - $40.00
Total Recovery Sought - $2,246.84

Discussion

As the prevailing party in this action, Defendant is permitted to recover certain costs associated with defending the action. Title 10 of the Delaware Code, Section 5101 provides, "Generally a party for whom final judgment in any civil action […] is given in such action, shall recover, against the adverse party, costs of suit, to be awarded by the court."[3] Similarly, under Rule 54 of the Delaware Superior Court Rules of Civil Procedure, "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*."[4]

However, an award of costs to the prevailing party is discretionary. The Delaware Supreme Court has held that an award of costs under 10 *Del. C.* §5101 is not automatic, noting that "there may be circumstances under which costs do not go to the party to whom a final judgment is awarded."[5] Similarly, the express language of Rule 54(d) leaves room for the Court to decide not to award costs in particular circumstances. On occasion, the Court has concluded that "it is right, and just and fair" for the defendant to bear the cost burden of the successful defense.[6] Such cases are likely to occur where the Court concludes that the plaintiff was justified in

[3] 10 *Del. C.* §5101.
[4] Super. Ct. Civ. R. 54(d) (emphasis added).
[5] *Donovan v. Delaware Water and Air Resources Commission*, 358 A.2d 717, 722 (Del. 1976)
[6] *Moore v. Garcia*, No. 93C-08-26, 1995 WL 945553, *1 (Del. Super. Jul. 10, 1995).

bringing a lawsuit, even if the plaintiff was ultimately unsuccessful.[7] Similarly, a jury finding that the defendant was negligent, even if not ultimately responsible for the plaintiff's injuries, may persuade the Court to deny an award of costs to the defendant.[8]

The Court may also consider the financial circumstances of the individual plaintiff. The Court is more likely to require defendants to bear the costs of a successful defense where the Court finds that an assessment of costs against the plaintiff would impose a "severe financial hardship" and would probably "become an uncollectible assessment serving no real purpose."[9]

This is one of the unusual cases where the defendant should be required to bear the burden of its successful defense. The jury determined that the Plaintiff and the Defendant were negligent in nearly equal proportions. Furthermore, Mr. Nelson is a man of very modest means. Even if costs were assessed against him, it is very unlikely that he would ever be able to repay them. The award would simply impose a severe financial hardship and serve no real purpose. In light of Plaintiff's financial circumstances and the fact that the jury found that Defendant was negligent, the Court

[7] *See id*. ("The female plaintiff had good reason to bring a lawsuit questioning whether the operation was performed prematurely after a very short period of conservative treatment.").
[8] *See Welsh v. Delaware Clinical & Laboratory Physicians, P.A.*, No. Civ. A. 98C-06-003WLW, 2001 WL 392400, *4 (Del. Super. Mar. 19, 2001) (finding that an award of costs was inappropriate "in light of the fact that the jury found the Defendants to have been negligent, although not the proximate cause" of the plaintiff's death).
[9] *Legros v. Jewell*, No. C.A. 98C-02-033, 2001 WL 660106, *1 (Del. Super. Mar. 30, 2001).

finds an assessment of costs against Plaintiff is inappropriate here. As this Court has previously stated, "Sometimes it is important to win with grace."[10] This is one of those cases. Accordingly, Defendant's Motion to Recover Costs and Enter Judgment is hereby DENIED.

IT IS SO ORDERED.

/s/ William C. Carpenter, Jr.
Judge William C. Carpenter, Jr.

[10] *Moore*, 1995 WL 945553 at *1.