Not Reported in A.3d, 2013 WL 3349956 (Del.Super.)
(Cite as: 2013 WL 3349956 (Del.Super.))

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware
John Houghton, and Evelyn Houghton, his wife, Plaintiffs
v.
Nadiv Shapira, M.D., Nadiv Shapira, M.D., LLC, a Delaware Corporation, and Christiana Care Health Services, Inc., a Delaware Corporation, Defendants.

C.A. No. N11C–06–092 MJB
Submitted: March 25, 2013
Decided: June 27, 2013

Upon Plaintiffs' Motion for Costs, **GRANTED.**
Upon Plaintiffs' Motion for Pre-judgment and Post-judgment Interest, **GRANTED.**
Upon Defendant Christiana Care Health Services' Motion to Reform the Original Verdict Sheet, **DENIED.**

Randall E. Robbins, Esquire, Ashby & Geddes, Wilmington, Delaware, Attorney for Plaintiffs.

John A. Elzufon, Esquire, Elzufon, Austin, Reardon, Tarlov & Mondell, P.A., Wilmington, Delaware, Attorney for Defendants Nadiv Shapira, M.D. and Nadiv Shapira, M.D., LLC.

Dennis D. Ferry, Esquire, Morris James, LLP, Wilmington, Delaware, Attorney for Defendant Christiana Care Health Services, Inc.

NON–ARBITRATION CASE

OPINION AND ORDER

BRADY, J.

INTRODUCTION

***1** The Court has before it several post-trial motions regarding this medical negligence case. On November 14, 2012, the jury returned its verdict and judgment in the amount of $4,400,000 was entered in favor of Plaintiffs John and Evelyn Houghton ("Plaintiffs") jointly and severally against Defendants Nadiv Shapira, M.D., Nadiv Shapira MD, LLC ("Dr. Shapira") and Christiana Care Health Services, Inc. ("CCHS," collectively with Dr. Shapira, "Defendants"). The post-trial motions are: (1) Plaintiff's Motion for Costs; (2) Plaintiff's Motion for Pre-judgment and Post-judgment Interest; and (3) Defendant CCHS's Motion to Reform the Original Verdict Sheet.

(1) Plaintiffs' Motion for Costs

Plaintiffs contend that because judgment was awarded in their favor against the Defendants, the Court should direct the Prothonotary to award costs pursuant to Superior Court Civil Rule 54(d) [FN1] and 10 Del. C. 8906.[FN2] Plaintiffs outline the costs they have incurred, including the following:

-Court Costs: $466

-Expert Witness Fee for Dr. Gryska: $5,400

-Expert Witness Fee for Dr. Streisand: $5,000

-Expert Witness Fee for Dr. Gudin: $6,000

-Expert Witness Fee for Dr. Paynter: $5,000

-Total: $21,866 [FN3]

Plaintiffs state they have voluntarily reduced their expert fees and request that the following costs be taxed:

-Court Costs: $466

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-Dr. Gryska: $3,000

-Dr. Streisand: $3,000

-Dr. Gudin: $3,000

-Dr. Paynter: $1,500

-Total: $10,966 [FN4]

Plaintiffs contend that the Complaint filing fee and service of process are recoverable pursuant to Superior Court Civil Rule 54(d) and 10 Del. C. 5101,[FN5] and the costs of Drs. Gryska, Streisand, Gudin and Paynter's witness fees for trial are recoverable pursuant to Superior Court Civil Rule 54(d) and 10 Del. C. 8906.

FN1. Super. Ct. Civ. R. 54(d):

> Costs. Except when express provision therefor is made either in a statute or in these Rules or in the Rules of the Supreme Court, 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.

FN2. 10 Del. C. 8906. Expert Witness:

> The fees for witnesses testifying as experts or in the capacity of professionals in cases in the Superior Court, the Court of Common Pleas and the Court of Chancery, within this State, 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.

FN3. Pl. Mot. for Costs, ¶ 2.

FN4. *Id.*, ¶ 3.

FN5. 10 Del. C. 5101. Defendant or prevailing party in law actions:

> In a court of law, whether of original jurisdiction or of error, upon a voluntary or involuntary discontinuance or dismissal of the action, there shall be judgment for costs for the defendant. Generally a party for whom final judgment in any civil action, or on a writ of error upon a judgment is given in such action, shall recover, against the adverse party, costs of suit, to be awarded by the court.

***2** Plaintiffs timely filed this Motion and it remains unopposed. The Court finds that the $466.00 of costs associated with Plaintiffs' litigation of this matter are reasonable. As such, the amount will be awarded as appropriate costs.

Plaintiffs are also entitled to recover reasonable fees associated with the testimony of their experts. Plaintiffs have reduced all of the expert fees considerably to roughly half of the original amount. Plaintiffs have submitted documentation and have highlighted each expert's role in the trial.

In a motion for costs regarding expert witness fees, "the prevailing party may only recover fees associated with the expert's time spent testifying or waiting to testify, along with reasonable travel expenses." [FN6] "The award of costs for expert witness testimony is committed to the sound discretion of the trial court." [FN7] When assessing the reasonableness of medical expert fees, Delaware courts frequently rely upon rates set forth in a 1995 study conducted by the

Medical Society of Delaware's Medico–Legal Affairs Committee. [FN8] The Court will adjust "the rates set forth in the study to reflect increases in the consumer price index for medical care." [FN9]

FN6. *Miller v. Williams,* 2012 WL 3573336, at *2 (Del. Super. Aug. 21, 2012)(citing *Merced v. Harrison,* 2009 WL 3022134, at * 1 (Del. Super. Sept. 1, 2009).

FN7. *Taveras v. Mesa,* 2008 WL 5244880, at *1 (Del. Super. Dec. 10, 2008)(citing *Donovan v. Del. Air Res. Comm'n,* 358 A.2d 717, 722–23 (Del. 1976)).

FN8. *Miller,* 2012 WL 3573336, at *2; *Merced,* 2009 WL 3022134, at *1.

FN9. *Miller,* 2012 WL 3573336, at *2; *Merced,* 2009 WL 3022134, at *1.

In *Miller,* this Court found $1,500 to be a reasonable rate for an expert who testified at trial from his own office.[FN10] Dr. Paynter was unable to testify live at trial, and instead testified by telephone. Plaintiff has reduced Dr. Paynter's fee from $5,000 [FN11] to $1,500. Consistent with this Court's holding in *Miller,* Dr. Paynter's fee is reasonable and will be awarded.

FN10. *Miller,* 2012 WL 3573336, at *2.

FN11. Pl.'s Mot. for Costs, Ex. D.

Drs. Gryska, Streisand and Gudin's fees have been reduced to $3,000 each. Dr. Gryska traveled from Boston, Massachusetts to Wilmington and arrived the night before he testified on the second day of trial on November 1, 2012. Dr. Gryska's fee, which included travel expenses, originally was $5,400.[FN12] Drs. Streisand and Gudin both testified at the third day of trial on November 2, 2012 and arrived the night before their testimonies. Dr. Streisand, who traveled from Pelham, New York, charged a flat fee of $5,000 for his appearance.[FN13] Dr. Gudin, who traveled from Englewood, New Jersey charged a flat fee of $6,000 for his appearance.[FN14] Dr. Grudin was present in the courtroom the entire day, waiting for other witnesses to testify to accommodate the schedules of two defense experts.[FN15]

FN12. *Id.,* Ex. A.

FN13. *Id.,* Ex. B.

FN14. *Id.,* Ex. C.

FN15. Pl.'s Mot. for Costs, ¶ 2(d).

In 2009, this Court found "the applicable range of reasonable half-day testimony fees would be $1,953.90 to $2,705.40" using the consumer price index on the Medico–Legal Study figures.[FN16] Using the same calculation, and taking into consideration reasonable travel expenses for each of the experts and time spent waiting to testify, the Court finds their fees of $3,000 to be reasonable.[FN17] The Court also notes that Plaintiff has voluntarily reduced the fees and Defendants have not opposed this Motion.

FN16. *Payne v. Home Depot,* 2009 WL 659073, at *7 (Del. Super. Mar. 12, 2009).

FN17. The Court reached this finding by utilizing the inflation calculator provided by the Bureau of Labor Statistics. Using the CPI Inflation Calculator, the 2009 figure of $2,705.40 has risen to $2,932.31 in 2013. *See* Bureau of Labor Statistics, http://www.bls.gov/data/ # calculators (last visited May 21, 2013).

***3** For the foregoing reasons, Plaintiffs' Motion for Costs is **GRANTED.** Plaintiffs are entitled to

recover **$10,966.00** in costs. The Prothonotary is directed to award costs to Plaintiff in the amount of $10,966.00 pursuant to Superior Court Civil Rule 54(d) and 10 Del. C. 8906.

(2) Plaintiffs' Motion for Pre-judgment and Post-judgment Interest

PARTIES' CONTENTIONS

Plaintiffs, on September 26, 2012, extended identical written settlement demands to Dr. Shapira and to CCHS which were valid for a minimum of 30 days. [FN18] The settlement demands were for the amount of $1.45 million, less than the $4.4 million judgment entered against the Defendants jointly and severally. Plaintiffs contend that pursuant to 6 Del. C. 2301(d),[FN19] they "are entitled to pre-judgment interest commencing from the date of the injury on December 10, 2009 to the date of entry of judgment on November 14, 2012." [FN20]

FN18. Pl.'s Mot. for Pre-judgment and Post-judgment Interest, ¶ 1–2.

FN19. 6 Del. C. 2301. Legal rate; loans insured by Federal Housing Administration:

> (d) In any tort action for compensatory damages in the Superior Court or the Court of Common Pleas seeking monetary relief for bodily injuries, death or property damage, interest shall be added to any final judgment entered for damages awarded, calculated at the rate established in subsection (a) of this section, commencing from the date of injury, provided that prior to trial the plaintiff had extended to defendant a written settlement demand valid for a minimum of 30 days in an amount less than the amount of damages upon which the judgment was entered.

FN20. Pl.'s Mot. for Pre-judgment Interest, ¶ 2.

The Defendants do not dispute that Plaintiffs made their demand on September 26, 2012, nor do they dispute that the settlement was rejected. However, Defendants contend that Plaintiffs did not timely file their demand in conformity with the 30–day requirement of 6 Del. C. 2301(d). Defendants contend that trial commenced on October 24, 2012, when jury selection began, making Plaintiffs' demand two days too late.[FN21] Defendants acknowledge that the definition of when trial begins for the 30–day computation of Section 2301(d) is not set forth in the statute nor is there any Delaware caselaw interpreting the statute on that point. Defendants have cited to Delaware cases discussing the beginning of trial as well as cases from other jurisdictions, based upon which, Defendants contend, trial begins at the jury selection stage.

FN21. Def. Shapira's Opp'n to Pl.'s Mot. for Pre-judgment Interest, ¶ 1–2; Def. CCHS's Notice of Joinder in Def. Shapira's Opp'n to Pl.'s Mot. for Pre-judgment Interest. Defendants contend that jury selection was known to Plaintiffs since the Scheduling Order was entered on October 26, 2011.

Defendants also contend that 6 Del. C. 2301 violates the Due Process and Equal Protection Clauses of the Delaware and United States Constitutions by denying a defendant a forum to assess fault for the delay sought to be avoided and by requiring a defendant to pay pre-judgment interest from the date of injury, before a defendant knows of the impending lawsuit. Defendants further contend that Section 2301 is unconstitutional:

> (1) since it unduly inhibits defendants from exercising their fundamental right to resort to the courts in defense of claims made against them; (2) since the difference in treatment of plaintiffs and defendants bears no reasonable relationship to any legiti-

mate objective of the rule; (3) since it creates an irrebuttable presumption that defendants are responsible for causing delay; and (4) since it abridges the substantive rights of defendants and enlarges those of plaintiffs.[FN22]

FN22. Def. Shapira's Opp'n to Pl.'s Mot. for Pre-judgment Interest, ¶ 9.

***4** Plaintiffs counter by contending, first, that the trial started the day testimony began, and, further, that the language of the statute states the demand must be made "prior to *trial*," not "prior to jury selection," which evinces the General Assembly's intent that demand be made before a trial begins. Plaintiffs further contend that statutes are presumed to be constitutional and a party asserting to the contrary bears the burden of proving that assertion, which Defendants have failed to do.[FN23]

FN23. Pl.'s Mot. for Pre-judgment Interest, ¶ 1 1(citing *Wilm. Med. Ctr. v. Bradford,* 382 A.2d 1338, 1342 (Del. 1978)).

DISCUSSION

"Prior to Trial" Language in § 2301(d)

Section 2301(d) was enacted by the General Assembly "to promote earlier settlement of claims by encouraging parties to make fair offers sooner, with the effect of reducing court congestion." [FN24] "The plain language of § 2301(d) requires that prejudgment interest be awarded when the settlement demand was less than the amount of damages upon which the judgment was entered, regardless of how the jury apportioned fault among the joint tortfeasors for purposes of contribution." [FN25] In order to qualify for pre-judgment interest under Section 2301(d), certain requirements must be met: (1) the action must be a tort action; (2) the claimant must have made and held open a demand for settlement for 30 days; and (3) the damages determined at trial must exceed the amount plaintiff agreed to accept for settlement.[FN26]

FN24. *Rapposelli v. State Farm Mut. Auto. Ins. Co.,* 988 A.2d 425, 427 (Del. 2010).

FN25. *Christiana Care Health Servs., Inc. v. Crist,* 956 A.2d 622, 630 (Del. 2008). "If the settlement demand on a defendant is less than the amount of damages awarded by the jury against that defendant, the plaintiffs can recover prejudgment interest." *Id.,* at 628.

FN26. *State Farm Mut. Auto. Ins. Co. v. Enrique,* 16 A.3d 938, *2 (Del. Mar. 22, 2011)(TABLE)(citing 6 Del. C. 2301(d)).

The Court believes it is not necessary to make a distinction as to precisely when trial began for the purposes of its "prior to trial" analysis under Section 2301(d). Whether trial began at jury selection on October 24, 2012, as Defendants assert, or on October 31, 2012, as Plaintiffs assert, is irrelevant. The fact of the matter is that Plaintiffs settlement demands were valid for 30 days and during that 30–day period, the Defendants rejected the settlement demands. It is also important to note that the Trial Scheduling Order lists Jury Selection for October 24, 2012 and separately lists Trial for October 29, 2012.[FN27] Section 2301(d) was enacted to promote settlement, which is exactly what Plaintiffs attempted to accomplish with their demands of $1.45 million per Defendant. After trial, the jury returned a verdict in the amount of $4.4 million jointly and severally against the Defendants. Thus Section 2301 applies and Defendants are required to pay prejudgment interest.

FN27. Trial Scheduling Order,Transaction ID 43836051 (Apr. 23, 2012).

Constitutional and Other Issues

In Delaware, "there is a strong presumption that a legislative enactment is constitutional." [FN28] A legislative enactment "will not be declared unconstitu-

tional unless it clearly and convincingly violates the Constitution." [FN29] The party challenging the constitutionality of a legislative enactment bears the burden of overcoming its presumption of validity.[FN30] In *Bullock,* this Court held that "Section 2301(d) establishes that the Court calculates prejudgment interest from the date of the injury" and that the defendant "must pay prejudgment interest from the date of the injury because [d]efendant stands in the shoes of the tortfeasor." [FN31]

FN28. *Bullock v. State Farm,* 2012 WL 1980806, at *7 (Del. Super. May 18, 2012)(quoting *Sheehan v. Oblates of St. Francis de Sales,* 15 A.3d 1247, 1258 (Del. 2011)(quoting *Wien v. State,* 882 A.2d 183, 186 (Del. 2005)).

FN29. *Lacy v. Green,* 428 A.2d 1171, 1174–75 (Del. Super. 1981).

FN30. *Id.* at 1176(citations omitted).

FN31. *Bullock,* 2012 WL 1980806, at *7.

***5** The Delaware Supreme Court has interpreted Section 2301(d) many times without raising any concerns about its constitutionality,[FN32] and this Court has recently rejected an argument that the statute is unconstitutional. [FN33] Defendants here raise similar arguments to the defendants in *Bullock.* Defendants' main point of contention is that Section 2301(d) raises an irrebuttable presumption that defendants are to blame for delays in settling cases. The Court is not persuaded by this argument. In support of its position, the Court points to Superior Court Civil Rule 68 which provides, "If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree *must* pay the costs incurred after making the offer." [FN34] The Court finds Defendants irrebuttable presumption argument to lack merit. The only things Section 2301(d) and Rule 68 do show is Delaware's strong policy favoring the settlement of claims.

FN32. *See Enrique,* 16 A.3d 938 (TABLE); *Rapposelli,,* 988 A.2d 425 (Del. 2010); *Crist,* 956 A.2d 622 (Del. 2008).

FN33. *See Bullock,* 2012 WL 1980806, at *7 (Del. Super.).

FN34. Super. Ct. Civ. R. 68(*emphasis added).*

Like the *Bullock* defendants, Defendants have not overcome the strong presumption of validity. Because they stand in the shoes of the tortfeasor, they must pay prejudgment interest from the date of the injury.

Finally, a dispute arose over prejudgment interest on Mrs. Houghton's loss of consortium claim. Plaintiffs contend they are entitled to prejudgment interest on the loss of consortium claim. Plaintiffs submit there is no Delaware authority to support Dr. Shapira's proposition that the loss of consortium claim does not fall within the purview of a "bodily injury, death or property damage" required by Section 2301(d). Plaintiffs cite to the *Crist* [FN35] case, in which the plaintiffs were awarded prejudgment interest, pursuant to Section 2301(d), on claims for medical negligence survival, loss of consortium, and wrongful death.[FN36] In *Crist,* both defendants rejected plaintiffs' identical settlement demands to settle all of their claims for $1,250,000 each, and the jury found joint and several liability and awarded plaintiffs $2 million.[FN37] Although the Supreme Court was not presented with the argument that a loss of consortium claim is excluded from the statute, in its interpretation and analysis of Section 2301(d), the Court included the loss of consortium claim. Because the Supreme Court has not held otherwise, this Court will not accept the Defendants' argument claims for loss of consortium are outside the scope of Section

2301(d). Plaintiffs are entitled to prejudgment interest on Mrs. Houghton's loss of consortium claim.

FN35. 956 A.2d 622.

FN36. *Id.,* at 625.

FN37. *Id.,* at 629–30.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Pre-judgment and Post-judgment Interest is **GRANTED.**

Calculating Interest

Plaintiffs contend that on December 10, 2009, the date of the injury, the Federal Reserve Discount rate was 0.5. Therefore, the legal rate of pre-judgment interest was 5.5%. Calculating 5.5% interest of $4,400,000 yields pre-judgment interest in the amount of $242,000 per year with a daily rate of interest of $663.01. Total pre-judgment interest due through November 13, 2012, the day before the verdict is $709,424.66.[FN38]

FN38. Pl.'s Mot. for Pre-judgment Interest, ¶ 3.

Plaintiff contends that on November 14, 2012, the date of the judgment, the Federal Reserve discount rate was 0.75, therefore the legal rate at the time of judgment is 5.75%. From November 14, 2012 forward, interest is paid at the legal rate as of the time of the judgment. Post-judgment interest is accruing at a daily rate of $693.15.[FN39]

FN39. *Id.,* ¶ 4.

Because 6 Del. C. 2301(d) does not distinguish between pre-judgment and post-judgment interest, the same interest rate will apply to both calculations.[FN40] The rate of interest is 5% over the Federal Reserve discount rate as of the date of commencement of interest liability.[FN41] The interest is "a continuing liability which merely accumulates with the passage of time," it is not "recalculated on the day final judgment is entered to determine a different post-judgment rate."[FN42] The interest rate remains fixed.[FN43]

FN40. *TranSched Sys. Ltd. v. Versyss Transit Solutions, LLC,* 2012 WL 1415466, *6 (Del. Super. Mar. 29, 2012)(citing *Rollins Envtl. Servs., Inc. v. WSMW Indus., Inc.,* 426 A.2d 1363, 1367–68 (Del. Super. 1980).

FN41. *Id.*

FN42. *TranSched Sys. Ltd.,* 2012 WL 1415466 at *6; *Rollins,* 426 A.2d at 1367.

FN43. *TranSched Sys. Ltd.,* 2012 WL 1415466 at *6; *Rollins,* 426 A.2d at 1367.

***6** The Court will apply the same 5.5% rate to both the pre-judgment and post-judgment interest. As a result, Plaintiffs are entitled to pre-judgment interest in the amount of **$709,424.66** and post-judgment interest in the amount of **$663.01** per diem calculated from November 14, 2012, the date judgment was entered.

(3) Defendant CCHS's Motion to Reform the Original Verdict Sheet

INTRODUCTION

On November 14, 2012, the jury returned a verdict in this case in the amount of $3,750,000.00 for Mr. Houghton and $650,000.00 for Mrs. Houghton and apportioned liability 65% to Dr. Shapira and 35% to CCHS.[FN44] CCHS requested the Court to submit to the jury a supplemental verdict sheet to determine how much of the 35% liability assessed to CCHS should be apportioned to Dr. Castellano (CCHS's

director) and how much should be apportioned to Dr. Shapira. The jury apportioned 75% (of the 35%) to Dr. Shapira and 25% (of the 35%) to Dr. Castellano.[FN45] The Court explicitly told the parties that the jury would not disturb the 65/35 original apportionment and that the Court would make that "clear" to the jury.[FN46]

FN44. Def. CCHS's Mot. to Reform the Original Verdict Sheet, Ex. A. [hereinafter, "Verdict Sheet"].

FN45. Def. CCHS's Mot. to Reform the Original Verdict Sheet, Ex. B. [hereinafter, "Supplemental Verdict Sheet"].

FN46. Def. CCHS's Reply to Def. Shapira's Opp'n to the Mot. to Reform the Original Verdict Sheet, Ex. A, Nov. 14, 2012 Trial Transcript. [hereinafter, "Nov. 14, 2012 Tr."]. "No. They're not going to touch the 65/35, and I'll make that clear to them." *Id.*, 24:8–9.

PARTIES' CONTENTIONS

CCHS contends that because of the jury's findings in the supplemental verdict sheet, the original verdict sheet should be amended and reformed to reflect that question 8 read:

Percentage attributable to Dr. Shapira 91.25%

Percentage attributable to [CCHS] 8.75%

Total: 100%.[FN47]

CCHS contends that the issues of joint and several liability may have been confusing to the jury and its request to reform the verdict sheet is because the jury should have been instructed that the *only* way they could find CCHS liable on the independent claim was through the conduct of Dr. Castellano. [FN48]

FN47. Def. CCHS's Mot. to Reform the Original Verdict Sheet, ¶ 3.

FN48. Def. CCHS's Reply to Def. Shapira's Opp'n to the Mot. to Reform the Original Verdict Sheet, ¶ 7.

Dr. Shapira opposes CCHS' motion "on the grounds that there is no legal bas [is] to justify why the Court should reform the jury's original verdict to bring about the substantive change requested." [FN49] Dr. Shapira contends that once the jury returned the verdict assessing 35% to CCHS, "nothing further should have been done" because "[t]he original verdict was clear and consistent with the instructions given before deliberation." [FN50]

FN49. Def. Shapira's Opp'n to Def. CCHS's Mot. to Reform Original Verdict Sheet, ¶ 1.

FN50. *Id.* ¶ 3.

Plaintiffs take no position on the Supplemental Verdict Sheet or CCHS's Motion to Reform. However, Plaintiffs do contend that the Supplemental Verdict Sheet confirms the validity of the original verdict in their favor. Plaintiffs contend that in the original verdict sheet, the jury found CCHS liable for damages because of its own negligence and vicariously liable for the negligence of Dr. Shapira, and in the Supplemental Verdict Sheet the jury "found CCHS was both independently negligent (through the actions of its employee, Dr. Castellano), *and* vicariously liable for Dr. Shapira's negligence." [FN51] Plaintiffs conclude that this shows that "the award of damages was properly assessed against CCHS as a consequence of wrong perpetrated both by CCHS *and* by its agent, apparent agent or employee, Dr. Shapira." [FN52]

FN51. Pl.'s Resp. to CCHS's Mot. to Reform the Original Verdict Sheet, ¶ 9. "[T]he

'Supplemental Verdict Sheet' again reveals that the Jury intended to assess damages against CCHS for the conduct of Dr. Castellano *and* for the conduct of Dr. Shapira. *Id.*

FN52. *Id.*

DISCUSSION

The Jury Instructions

***7** The Court gave the following jury instructions:

ACTS OF CORPORATE DEFENDANT

Christiana Care Health Services, Inc. and Nadiv Shapira MD, LLC are professional corporations. Dr. Castellano was an employee of Christiana Care Health Services, Inc. and its Institutional Review Board Corporate Director. Dr. Shapira was an employee of Nadiv Shapira MD LLC. A corporation is not a living thing and can only act through its respective employees. The acts or omissions of an employee are therefore the acts or omissions of the corporation. Whatever your finding eventually is as to Dr. Castellano automatically pertains to Christiana Care Health Services, Inc., and whatever your finding eventually is as to Dr. Shapira automatically pertains to Nadiv Shapira MD LLC.

APPARENT AGENCY

A physician who is an independent contractor, may, nonetheless be an agent of the hospital if the hospital held out or represented that the physician was its employee or agent in diagnosing or treating a patient, and in doing so caused the patient justifiably to rely upon the care or skill of that physician. The hospital's conduct must be such conduct that would lead a reasonable person to believe an agency relationship existed. In such circumstances, the hospital is liable to the patient for harm caused by any breach in the standard of care by that physician just as if the physician were the hospital's employee. Accordingly, if you should find that Christiana Care Health Services, Inc. held out or represented that Dr. Shapira was an employee or agent in treating Mr. Houghton, and if Christiana Care Health Services, Inc. thereby caused Mr. Houghton to justifiably rely upon the care or skill of Dr. Shapira, then Christiana Care Health Services, Inc. is liable to Mr. Houghton for harm caused by any breach in the standard of care by Dr. Shapira.

AGENT'S NEGLIGENCE IMPUTED TO PRINCIPAL

An agent is one who acts for another, known as a principal, on the principal's behalf and subject to the principal's control and consent.

Plaintiffs contend that Dr. Shapira was an employee or agent of Christiana Care Health Services, Inc. at the time of alleged medical negligence. Dr. Shapira and Christiana Care Health Services, Inc. deny this and contend that Dr. Shapira was not an employee or agent, but rather an independent contractor, who was not subject to Christiana Care Health Services, Inc.'s control or consent.

If you decide that Mr. Houghton's injuries were the result of a negligent act committed by Dr. Shapira, then you must also decide whether or not Dr. Shapira was an employee or agent of Christiana Care Health Services, Inc. acting within the scope of his employment or agency at the time the negligent harm to Mr. Houghton occurred.

If you find that Mr. Houghton's injuries were the result of a negligent act committed by Dr. Shapira, and that at the time of the negligent act Dr. Shapira was an employee or agent of Christiana Care Health Services, Inc. acting within the scope of his employment or agency, then that negligence is the legal responsibility of both Christiana Care Health Services, Inc. and Dr. Shapira. [FN53]

FN53. Jury Instructions, Nov. 13, 2012, p.

5–7.

The Verdict Sheets

***8** In the original Verdict Sheet, the jury was asked to answer eight questions. In their answers to the first five questions, they jury determined that:

(1) Dr. Shapira was negligent;

(2) Dr. Shapira's negligence proximately caused injury and damages to Mr. Houghton;

(3) Dr. Shapira was an agent, apparent agent or employee of CCHS;

(4) CCHS was negligent; and

(5) CCHS's negligence proximately caused injury and damages to Mr. Houghton. [FN54]

Question Eight required the jury to apportion liability between Dr. Shapira and CCHS which they did, 65% to Dr. Shapira and 35% to CCHS.[FN55]

FN54. Verdict Sheet, p. 1–2.

FN55. *Id.* at 2–3.

In the Supplemental Verdict Sheet, the jury was asked to answer one question:

As to your finding of 35% liability for [CCHS], please specify what percentage, if any, you attribute *to [CCHS]* through Dr. Castellano's conduct, and what percentage, if any, you *attribute to [CCHS]* through their agency, apparent agency or employer relationship with Dr. Shapira.[FN56]

The jury apportioned 25% to Dr. Castellano and 75% to Dr. Shapira.[FN57]

FN56. Supplemental Verdict Sheet*(emphasis added)*.

FN57. *Id.*

November 14, 2012 Sidebar

The Court allowed this supplemental question to go forward because it was under the impression, based upon representations from CCHS's counsel, that there was an issue pertaining to CCHS's position as an excess insurance carrier. Specifically, CCHS's counsel stated "It [the supplemental question to the jury] does have an effect. It does, because [CCHS] put [Dr. Shapira] on notice that we were in a position of an excess carrier, and they should settle the case.... That 35% becomes ours exclusively, and so if there's a lawsuit later on, we would need to know whether this was 35% independent or [attributable to CCHS's agency relationship with Dr. Shapira]." [FN58] Later on during the sidebar, CCHS's counsel stated that the purpose of the supplemental question was to "save or clarify litigation later on." [FN59]

FN58. Nov. 14, 2012 Tr. 14:19–22, 15:1–10:

Mr. Ferri:—it does have an effect. It does, because we put his client on notice that we were in a position of an excess carrier, and they should settle the case.

Now—

Mr. Elzufon: That 35%—

Mr. Ferri: That 35% becomes ours exclusively, and so if there's a lawsuit later on, we would need to know whether this was 35% independent or—

The Court: You need them to define—what you're saying is, "I need them to de-

> fine what percentage of that 35% was attributable to Dr. Castellano and what percentage was attributable to our agent relationship with Dr. Shapira."
>
> Mr. Ferri: If they did at all

FN59. *Id.*, 20:6–7.

At the beginning of the sidebar, the Court noted that the jury "made an independent finding that Christiana Care was negligent" [FN60] as to 35% of the direct and total negligence towards Plaintiffs. The Court also noted that no one on the jury seemed confused throughout the entire trial.[FN61] The Court decided it was best to err on the side of caution and allow the supplemental question because it could be undone.[FN62] During the sidebar, counsel for Dr. Shapira specifically asked if the 35/65 apportionment would be changed and the Court told him it would not.[FN63] The Court stated that it would "make it clear" to the jury that they were "not going to touch the 65/35" and that they were only addressing the 35%.[FN64]

FN60. *Id.*, 8:4–5.

FN61. *Id.*, 20:11–14.

FN62. *Id.*, 22:8–10.

FN63. *Id.*, 23:7–14

FN64. *Id.*, 24:8–9.

***9** In its instructions to the jury regarding the Supplemental Verdict Sheet, the Court stated "we're not going to change those percentages [the 65%/35%], but as to that 35%, can you specify, please what percentage of that [CCHS] liability is based upon the conduct of Dr. Castellano, and what percentage of that is based upon their relationship with Dr. Shapira." [FN65] The Court again told the jury, "you won't change the 65/35, that is your verdict." [FN66]

FN65. *Id.*, 25:9–14.

FN66. *Id.*, 25:19–20.

January 4, 2013 Hearing

At the January 4, 2013 hearing on the post-trial motions, CCHS argued that the Original Verdict Sheet should be reformed to reflect the jury's findings in the Supplemental Verdict Sheet. Specifically, that because 75% of CCHS's liability (35%) was attributable to Dr. Shapira's conduct, Dr. Shapira's liability should be modified to 91.25% and CCHS's liability should be modified to 8.75%. The Court emphasized that the jury was not asked to "determine whether any portion of the hospital's responsibility was not the hospital's responsibility." [FN67] The Court went on to say to CCHS's counsel, "In other words, [the jury] attributed a certain percentage of responsibility to the hospital. And ... you didn't ask me to ask [the jury], what percentage of what you awarded the hospital should you have awarded against Dr. Shapira." [FN68] During the hearing, the Court also emphasized that CCHS "had the opportunity to explain to the jury what liabilities the hospital faced on what basis." [FN69]

FN67. Jan. 4, 2013 Hearing Tr. 26:18–20. [hereinafter "Jan. 4, 2013 Tr."].

FN68. *Id.*, 26:20–27:1.

FN69. *Id.*, 28:18–20.

The Court discussed the impact CCHS's counsel's statement that CCHS was in the position of an excess insurance carrier had on its decision to allow the supplemental question:

Because you mentioned that you really were acting

> as an excess insurer. And I thought you asked for that distinction because there would be a difference in how the hospital would or would not be required to pay some portion of their judgment because you mentioned at sidebar that you were acting as an excess insurer for Dr. Shapira.[FN70]
>
> ... And I decided to give the instruction because I thought it meant that it may change how the insurance money—company moneys were distributed.[FN71]

CCHS's counsel acknowledged that he "did not appreciate that at the time." [FN72]

FN70. *Id.,* 31:4–10.

FN871. *Id.,* 31:12–14.

FN72. *Id.,* 31:23–32:1.

The Court expressed its dissatisfaction with CCHS's true purpose in requesting the supplemental instruction:

> [I]f I had appreciated at the time that I gave the supplemental instruction that the purpose of that was to see if the jury really meant what the jury said, I would not have given it because I was satisfied that I had done what needed to be done to properly instruct the jury with the initial instructions and interrogatory sheet as to how to allocate responsibility and the bases upon which define liability. And had I realized at that point in time that the reason you wanted me to give the supplemental instruction was to make sure the jury really meant what they said in the initial verdict sheet, I would not have done it.[FN73]

FN73. *Id.,* 32:16–33:5.

The Court articulated that its "inclination, given my confidence in the initial instructions and the initial verdict sheet is, if that was the purpose, to disregard and strike the supplemental verdict sheet for purposes of the trial court's responsibilities." [FN74] The Court also stated that it thought "there was an insurance issue" and CCHS "needed the clarification for that purpose," and "it was a mistake to ask it if I had known the real reason." [FN75]

FN74. *Id.,* 33:16–20.

FN75. *Id.,* 34:15–20.

Analysis

***10** In Delaware, a "jury's verdict is presumed to be correct and just and is afforded great deference by the Court." [FN76] In *Lavin v. Silver,* [FN77] in which this Court denied a plaintiff's motion to reform the verdict sheet, this Court distinguished reforming a verdict to "correct a clerical error" from changing "the substance of the Verdict Sheet." [FN78] In *Lavin,* this Court noted that the plaintiff had failed to cite any authority "that would allow this Court to substantively change a Verdict Sheet after the jury returned its verdict." [FN79] Finally, this Court held "it does not appear to be sound policy to amend a Verdict Sheet subsequent to the jury making its award. Therefore, this portion of the Plaintiffs' Motion to Amend the Verdict Sheet is denied." [FN80]

FN76. *Glover v. Schwing,* 2011 WL 1102877 (Del. Super. Mar. 17, 2011), *aff'd,* 31 A.3d 76 (Del. Oct. 27, 2011)(TABLE)(citing *Mills v. Telenczak,* 345 A.2d 424, 426 (Del. 1975).

FN77. 2003 WL 21481006 (Del. Super. June 10, 2003).

FN78. *Id.* at *3.

FN79. *Id.*

FN80. *Id.*

CCHS's contention that the jury should have been instructed that the only way they could find CCHS liable was through the actions of Dr. Castellano lacks merit. The jury was properly instructed that Dr. Castellano was an employee of CCHS and the jury's finding as to Dr. Castellano automatically pertained to CCHS, and that Dr. Shapira was an employee of Nadiv Shapira, MD, LLC and the jury's finding as to Dr. Shapira automatically pertained to Nadiv Shapira, MD, LLC.[FN81] The Court then instructed the jury that if they found CCHS:

> [H]eld out or represented that Dr. Shapira was an employee or agent in treating Mr. Houghton, and if [CCHS] thereby caused Mr. Houghton to justifiably rely upon the care or skill of Dr. Shapira, then [CCHS] is liable to Mr. Houghton for harm caused by any breach in the standard of care by Dr. Shapira. [FN82]

The Court is satisfied today, as it was on November 14, 2012, that this was the correct instruction to give. The verdict clearly indicates the jury's finding of independent negligence on the part of CCHS. The Supplemental Verdict Sheet merely clarified that 25% (of the 35%) was attributable to CCHS through Dr. Castellano's actions and 75% (of the 35%) was attributable to CCHS by virtue of Dr. Shapira's agency, apparent agency or employee relationship with CCHS.

FN81. November 14, 2012 Tr. 147:1–16.

FN82. *Id.,* 148:8–16.

Based on the representations of CCHS's counsel regarding CCHS's position as an excess insurer, the Court reluctantly issued the supplemental instruction. CCHS makes no arguments regarding insurance in its Motion to Reform. CCHS is trying to accomplish something the Court explicitly told them they were not permitted to do, i.e., alter the 65%/35% apportionment of liability in the Original Verdict Sheet. CCHS's contentions are insufficient to rebut the presumption that a jury's verdict is correct and just. Much like the plaintiffs in *Lavin,* CCHS seeks to substantively change a verdict sheet and has cited no authority in support of its motion. The Court is not persuaded by the arguments CCHS has made. The Court has stated several times that the jury made a finding that CCHS was independently liable to Plaintiffs and it would not disturb that finding.

The Court will not allow the Supplemental Verdict to be used in any way to change the percentage of liability each party has to Mr. and Mrs. Houghton. However, the Court has determined it will not strike the Supplemental Verdict. Should CCHS have a valid legal reason to utilize the jury's apportionment of their liability as between the two doctors, it is there for them to use.

CONCLUSION

For the foregoing reasons, Defendant CCHS's Motion to Reform the Original Verdict Sheet is **DENIED.**

SUMMATION

***11** Plaintiffs' Motion for Costs is **GRANTED.** Plaintiffs are entitled to recover **$10,966.00** in costs. The Prothonotary is hereby directed to award costs to Plaintiff in the amount of $10,966.00 pursuant to Superior Court Civil Rule 54(d) and 10 Del. C. 8906.

Plaintiffs' Motion for Pre-judgment and Post-judgment Interest is **GRANTED.** Plaintiffs are entitled to pre-judgment interest in the amount of **$709,424.66** and post-judgment interest in the amount of **$663.01** per diem calculated from November 14, 2012, the date judgment was entered.

Defendant CCHS's Motion to Reform the Original Verdict Sheet is **DENIED.**

IT IS SO ORDERED.

Del.Super., 2013
Houghton v. Shapira
Not Reported in A.3d, 2013 WL 3349956 (Del.Super.)

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