

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

BRANDYWINE SMYRNA, INC. and )  
BCP SMYRNA, INC., )  
 )  
Plaintiffs, )  
 ) C.A. No. 08C-11-065 MMJ  
v. )  
 )  
MILLENNIUM BUILDERS, LLC and )  
GRAPHIC ARTS MUTUAL )  
INSURANCE CO., )  
 )  
Defendants. )

Submitted: November 22, 2010  
Decided: January 6, 2011

On Plaintiffs' Motion for Inclusion of Pre-judgment Interest and  
Plaintiffs' Motion for Allowance of Specific Costs

**OPINION**

Jeffrey S. Goddess, Esquire, Rosenthal, Monhait & Goddess, P.A.,  
Wilmington, Delaware, Attorneys for Plaintiffs

Francis X. Nardo, Esquire, Tybout, Redfearn & Pell, Wilmington, Delaware,  
Attorneys for Defendant Millennium Builders, Inc.

James S. Yoder, Esquire, Dana Spring Monzo, Esquire, White and Williams,  
LLP, Wilmington, Delaware, Attorneys for Defendant Graphic Arts Mutual  
Insurance Co.

JOHNSTON, J.

## **PROCEDURAL CONTEXT**

Plaintiffs, Brandywine Smyrna, Inc. and BCP Smyrna, Inc., move for expert witness fees and expenses and trial costs against defendant, Millennium Builders, LLC, and pre-judgment interest on the compensatory damages awarded by the jury. Plaintiffs' November 7, 2008 breach of contract and negligence action against defendant sought compensation for damages to plaintiffs' car dealership.

Before trial, plaintiffs made a written settlement demand to defendant for \$1,000,000. Defendant declined to settle. On July 16, 2010, the jury found that Millennium breached its contract with plaintiffs and acted negligently, awarding plaintiffs \$372,362 in property damage, \$134,691 in lost car sales, \$32,956 in lost parts and service sales, and \$72,650 in additional interest expenses—a total of \$612,659.<sup>1</sup>

On July 21, 2010, plaintiffs moved for inclusion of pre-judgment interest in the amount of \$167,060.86. On July 26, 2010, plaintiffs moved for allowance of specific costs: \$1,808 in court costs; \$1,000 for the expert testimony of James Bria; \$1,141.27 for Bria's travel time and expenses<sup>2</sup>; \$360 for Doppler images that Bria used to prepare his testimony; \$1,451 for

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<sup>1</sup> The jury also found that co-defendant Graphic Arts Mutual Insurance Company's policy did not provide coverage for plaintiffs' losses.

<sup>2</sup> Initially, plaintiffs requested \$1441.27. Defendant identified an error in plaintiffs' calculation of Bria's travel time and expenses. Plaintiffs concede this error. As a result, plaintiffs request \$1141.27.

the expert testimony of Clifford Conover; and \$3,500 for the expert testimony of William P. Santora.

## **DISCUSSION**

### **A. Plaintiffs' Motion for Pre-Judgment Interest**

#### *Parties' Contentions*

Plaintiffs argue that, as the prevailing party, they are entitled to pre-judgment interest as a matter of right. Plaintiffs contend that their damages award could have been calculated before trial, a requirement for pre-judgment interest. Plaintiffs assert that, although the jury awarded plaintiffs \$72,650 for interest expenses, they are entitled to an additional award of pre-judgment interest. Plaintiffs claim that the jury awarded them \$72,650 for interest accrued on loans used to repair their building and maintain operations after suffering the water damage. Therefore, plaintiffs argue that they have not been compensated for pre-judgment interest.

Defendant responds that plaintiffs are not entitled to pre-judgment interest because they did not satisfy the requirements of 6 *Del. C.* § 2301(d). Specifically, plaintiffs did not make a pre-suit demand to defendant for an amount less than what the jury awarded plaintiffs. In the alternative, defendant asserts that plaintiffs are not entitled to pre-judgment interest because, prior to judgment, the damages could not be calculated with a

reasonable degree of certainty. Further, defendant argues, the jury awarded \$72,650 in interest expenses, and therefore, awarding pre-judgment would result in “interest on interest,” a windfall for plaintiffs.

***Plaintiffs are not entitled to pre-judgment interest under Section 2301(d).***

Section 2301(d) provides, in pertinent part:

In any tort action for compensatory damages in the Superior Court . . . seeking monetary relief for . . . property damage, interest shall be added to any final judgment entered for damages awarded, . . . 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.

“The General Assembly enacted [section 2301(d)] to promote earlier settlement of claims by encouraging parties to make fair offers sooner . . .”<sup>3</sup>

Plaintiffs demanded \$1,000,000. The jury awarded plaintiffs \$612,659. Therefore, plaintiffs are not entitled to pre-judgment interest pursuant to section 2301(d), because they requested a greater amount in their settlement demand than what the jury awarded.

***Plaintiffs already have been awarded pre-judgment interest by the jury.***

The Court awards pre-judgment interest “where the type of damages permitted testimony from which the amount of the recovery was calculable,

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<sup>3</sup> *Rapposelli v. State Farm Mut. Auto. Ins. Co.*, 988 A.2d 425, 427 (Del. 2010).

that is, testimony of a pecuniary nature.”<sup>4</sup> Pre-judgment interest is awarded as “a matter of right and not of judicial discretion.”<sup>5</sup> Pre-judgment interest compensates the petitioner for the pre-judgment detention of the petitioner’s award.<sup>6</sup> The Court will not award pre-judgment interest to a petitioner who has been compensated, through the judgment itself, for prejudgment interest.

Having scrutinized the trial exhibits, it appears that the jury’s award of interest is consistent with interest on the costs of repair covering the period of time the jury found was reasonable to repair the water damage to the dealership building. Because plaintiffs borrowed funds to make repairs and maintain operations, interest could be calculated precisely in the form of reimbursement for interest on the loans. Therefore, the Court finds that the jury compensated plaintiffs for pre-judgment interest by awarding them \$72,650 in interest expenses. In this case, a post-trial award of pre-judgment interest would be a double recovery for plaintiffs, constituting interest on interest.

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<sup>4</sup> *Transamerica v. Tevebaugh*, 1987 WL 8670, at \*4 (Del. Super.) (quoting *Rollins Envtl. v. WSMW Indus.*, 426 A.2d 1363, 1366 (Del. Super. 1980)).

<sup>5</sup> *Moskowitz v. Mayor and Council of Wilm.*, 391 A.2d 209, 210 (Del. 1978).

<sup>6</sup> *Id.* at 310; see also *Finkelstein v. Liberty Digital, Inc.*, 2005 WL 1074364, at \*26 (Del. Ch.) (“The purpose of the pre-judgment interest award is twofold: first, it compensates the petitioner for the loss of the use of his or her money . . . and second, it forces the respondent to disgorge any benefit that it has received from employing the petitioners’ money in the interim.”).

## **B. Plaintiffs' Motion for Specific Costs**

### ***Parties' Contentions***

Defendant contests the following costs.

- \$1,808 in court costs—Defendant argues that plaintiffs incurred a substantial portion of these costs in pursuit of their claim against co-defendant, Graphic Arts Insurance Company. Thus, defendant challenges half of the court costs, \$904, asserting that Graphic Arts is responsible.
- \$1,000 for Bria's expert testimony—Defendant contends that Bria testified for two hours. Therefore, \$1,000 is excessive.
- \$1,141.27 for Bria's travel time and associated expenses—Defendant asserts that \$1,141.27 is excessive, claiming that Bria only traveled for three hours.
- \$360 for the Doppler images that Bria used to prepare his testimony—Defendant claims that Bria did not use the images while he testified. Therefore, the cost of the images should be disallowed.
- \$1,451 for Conover's expert testimony and expenses—Defendant argues that \$1,451 is excessive because Conover spent less than three hours testifying. Conover bills at \$190 per hour.

- \$3,500 for Santora’s expert testimony—Defendant contends that \$3,500 is excessive because plaintiffs request compensation for four hours that Santora was at court waiting to testify, rather than testifying. Santora bills at \$350 per hour.

### *Analysis*

Pursuant to 10 *Del. C.* § 5101 and Superior Court Civil Rule 54, “[d]etermining when costs are awarded and when they are not is . . . a matter of judicial discretion . . .”<sup>7</sup> Similarly, pursuant to 10 *Del. C.* § 8906, “[t]he fees for witnesses testifying as experts . . . shall be fixed by the court in its discretion . . .” Expert witness fees “should be limited to the time necessarily spent in attendance upon the court for the purpose of testifying.”<sup>8</sup> However, “attendance upon the court” includes expenses for “reasonable time for traveling to and from the courthouse [and] waiting to testify . . .”<sup>9</sup>

After consideration of plaintiffs’ motion for costs and defendant’s partial opposition thereto, the Court awards the following:

- \$1,808 in court costs—There is no basis for reducing court costs because of an additional party. This complex litigation is not readily

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<sup>7</sup> *Donovan v. Del. Water & Air Res. Comm’n*, 358 A.2d 717, 722-23 (Del. 1976).

<sup>8</sup> *State ex rel. Price v. 0.0673 Acres of Land*, 224 A.2d 598, 602 (Del. 1966).

<sup>9</sup> *Sliwinski v. Duncan*, 1992 WL 21132, at \*3 (Del.).

severable, and discovery, pre-trial motions, and trial involved all parties simultaneously.

- \$1,000 for Bria’s expert testimony—The Court finds this figure to be reasonable.
- \$891.27 for Bria’s travel time and associated expenses—The Court finds plaintiffs’ request, \$1,141.27, to be somewhat excessive, and subtracts \$250, reflecting a one-hour deduction in travel expenses.
- \$1,451 for Conover’s testimony and travel expenses—The Court finds this figure to be reasonable.
- \$3,150 for Santora’s testimony—The Court finds plaintiffs’ request, \$3,500, to be somewhat excessive, and subtracts \$350, reflecting a one-hour deduction in testimony compensation.

The Court denies plaintiffs’ request for \$360, the cost of the Doppler images, because the expense does not fall under section 5101 or section 8906.

### **CONCLUSION**

The jury awarded plaintiffs less than plaintiffs demanded in settlement pre-trial. Therefore, pre-judgment interest may not be awarded under section 2301(d). The jury compensated plaintiffs for pre-judgment interest by awarding \$72,650 in interest expenses. For the reasons stated, the



**TOTAL COSTS DUE BY DEFENDANT TO PLAINTIFFS ARE  
\$8,300.27.**

**THEREFORE**, Plaintiffs' Motion for Inclusion of Pre-judgment Interest is hereby **DENIED**, and Plaintiffs' Motion for Allowance of Specific Costs is hereby **GRANTED IN PART**.

**IT IS SO ORDERED.**

*/s/ Mary M. Johnston*  
The Honorable Mary M. Johnston