IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

MICHAEL DESANTIS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N18C-01-304 WCC
	)	
LISA GARDINER,	)	
	)	
Defendant.	)	

Submitted: September 25, 2019
Decided: January 10, 2020

Defendant's Motion for a New Trial – DENIED

Defendant's Motion for Remittitur and/or New Trial – DENIED

Defendant's Motion to Stay the Execution of Plaintiff's Judgment – DENIED

Plaintiff's Motion for Prejudgment Interest, Costs, and Expert Witness Fees – GRANTED IN PART AND DENIED IN PART

MEMORANDUM OPINION

Kenneth M. Roseman, Esquire; Kenneth Roseman, P.A., 1300 King Street, Wilmington, DE 19899. Attorney for Plaintiff.

Nicholas E. Skiles, Esquire; Swartz Campbell LLC, 300 Delaware Avenue, Suite 1410, Wilmington, DE 19801. Attorney for Defendant.

CARPENTER, J.

Before the Court are Defendant Lisa Gardiner's ("Defendant") Motion for a New Trial, Motion for Remittitur and/or a New Trial, and Motion to Stay the Execution of Plaintiff's Judgment. Plaintiff Michael DeSantis ("Plaintiff") has also filed a Motion for Prejudgment Interest, Costs, and Expert Witness Fees.

For the reasons set forth in this Opinion, Defendant's Motions are **DENIED** and Plaintiff's Motion is **GRANTED IN PART AND DENIED IN PART**.

I. Facts & Procedural Background

This litigation arises out of a motor vehicle collision that occurred on November 21, 2017.[1] Plaintiff alleged that Defendant's negligence caused the accident because Defendant made an illegal U-turn and collided with Plaintiff's motorcycle.[2] At trial, Plaintiff presented evidence that the injuries he suffered "were permanent and affected virtually every aspect of his life."[3] In her defense, Defendant argued that Plaintiff "was also negligent in a manner that proximately caused the accident to occur."[4]

On September 11, 2019, following a three day trial, the jury found that the Defendant's negligence caused the accident and assigned her 100% of the fault.[5]

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[1] Compl. ¶ 3.
[2] *Id.* ¶ 4.
[3] Pl.'s Resp. in Opp'n to Def.'s Mot. for Remittitur and/or New Trial ¶ 6.
[4] Def.'s Mot. for New Trial ¶ 2.
[5] Verdict Form at 1.

They awarded Plaintiff $1.8 million in damages for injuries proximately caused by the collision.[6]

On the morning of September 12, 2019, Juror No. 3 contacted Defendant's counsel and left a voicemail in which she opined that several jurors misunderstood their instructions and that she believed five of the jurors felt that Plaintiff should have been assigned some degree of fault.[7] Juror No. 3 telephoned Defendant's counsel a second time to repeat her message, at which point he informed her of the Court Rules prohibiting this contact.[8] Juror No. 3 subsequently called the Court on multiple occasions reiterating what she told counsel. This is the Court's decision on all pending post-trial Motions.

II. Defendant's Motion for a New Trial

a. Standard of Review

"A motion for a new trial under Rule 59 may be joined with a renewal of the motion for judgment as a matter of law, or a new trial may be requested in the alternative."[9] In considering a motion for a new trial, the Court should give the jury's verdict "enormous deference,"[10] and "should not set aside a verdict . . . unless, on

[6] Verdict Form at 2.
[7] Counsel promptly informed the Court and Plaintiff's counsel of this contact. *See* Def.'s Mot. for New Trial ¶ 4.
[8] *Id.*
[9] Del. Super. Ct. Civ. R. 50(b).
[10] *Cuonzo v. Shore*, 958 A.2d 840, 844 (Del. 2008).

review of all the evidence, [it] preponderates so heavily against the jury verdict that a reasonable jury could not have reached the result."[11] "A new trial should be granted only when the great weight of the evidence is against the jury verdict."[12]

b. Discussion

Juror No. 3 claimed that she and four others felt that Plaintiff should have been assigned some degree of fault and that they misunderstood the instructions with regard to anonymity and comparative negligence.[13] As such, Defendant argues that a new trial is necessary because the jury's deliberations were inadequate and the jury misunderstood the applicable rules of law.[14]

In response, Plaintiff contends that the issues raised by Juror No. 3 are intrinsic to the jury's deliberation.[15] Further, Plaintiff maintains that the Court is barred from performing an inquiry into the juror's claims and the Court cannot conduct an evidentiary hearing to consider the Defendant's argument because the juror would be prohibited from testifying.[16]

Pursuant to Delaware Rule of Evidence 606(b), "during an inquiry into the validity of a verdict, a juror may not testify about any statement made or incident

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[11] *Storey v. Camper*, 401 A.2d 458, 465 (Del. 1979); *see also Town of Cheswold v. Vann*, 9 A.3d 467, 472 (Del. 2010).
[12] *Patterson v. Coffin*, 2004 WL 1656514, at *2 (Del. 2004).
[13] Def.'s Mot. for New Trial ¶ 4.
[14] *Id.* ¶ 7.
[15] Pl.'s Resp. in Opp'n to Def.'s Mot. for New Trial at 4.
[16] *Id.*

that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment."[17] Rule 606 also identifies certain matters about which a juror may testify, such as extraneous prejudicial information improperly brought to the jury's attention, any outside factor improperly influencing a juror, and any clerical errors on the verdict form.[18]

The Delaware Supreme Court has long acknowledged "the sanctity of the jury's deliberations and the common law prohibition against jurors impeaching their own verdict."[19] Upon a court's inquiry into the validity of a verdict, jurors may only testify about factors extrinsic to the jury's verdict, such as "exposure of jurors to news items about the matters pending before the jury, consideration by the jury of extra record facts about the case, communications between third parties and jurors relevant to the case to be decided and pressures or partiality on the part of the court."[20] In contrast, jurors may not testify regarding matter intrinsic to the verdict, which include "discussions among jurors, intimidation or harassment of one juror by another, and other intra-jury influences on the verdict."[21]

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[17] D.R.E. 606(b)(1).
[18] D.R.E. 606(b)(2).
[19] *Baird v. Owczarek*, 93 A.3d 1222, 1228 (Del. 2014); s*ee also Massey v. State*, 541 A.2d 1254, 1257 (Del. 1988).
[20] *Sheeran v. State*, 526 A.2d 886, 895 (Del. 1987).
[21] *Id.* (internal citations omitted); *see also McLain v. Gen. Motors Corp.*, 586 A.2d 647, 652 (Del. Super. Ct. 1988) (finding intimidation or harassment of juror by other jurors is intrinsic to the verdict).

In the instant matter, the Court finds that Juror No. 3's statements to counsel concern solely intrinsic matters. The juror's statements are necessarily based on the opinions jurors expressed to each other while they deliberated. Any inquiry into Juror No. 3's claims would require the Court to evaluate statements made during their discussions. This is precisely the type of post-verdict inquiry that Rule 606 expressly prohibits. Furthermore, the case law is equally as clear. Courts have prevented jurors from impeaching their verdict with testimony that they were coerced by the other jurors or overwhelmed by the majority, as this too would require an evaluation of intrinsic factors.[22] Juror No. 3's statements are necessarily based on sentiments shared during the jury's deliberation and any assessment of their validity would require the Court to inquire into the jury's private deliberations. There are no allegations of juror misconduct or improper consideration of extrinsic evidence. While the Court believes that Juror No. 3's actions were done with the best of intentions, they are simply matters into which the Court has appropriately declined to inquire.

Additionally, the jury submitted a note with questions to the Court and gave no indication of any confusion regarding their instructions. Other than the comments made by Juror No. 3, there is nothing to suggest any of the jurors misunderstood the

[22] *See id.* at 896-97 ("One would expect that those in the majority would argue forcefully in an attempt to persuade those in the minority to accept the views of the majority.").

law nor that the verdict was not the collective judgment of the jury on the issue of damages. This was not a difficult legal or factual case. It was clear that the Defendant's conduct caused this accident and the Court believes it would have been inconsistent with the evidence to suggest that the Plaintiff's conduct was negligent. The Court will uphold the jury's verdict without further inquiry.

III. Defendant's Motion for Remittitur and/or a New Trial

a. Standard of Review

Upon a motion for remittitur, "the trial court must evaluate the evidence and decide whether the jury award falls within a supportable range."[23] In doing so, only the evidence that was placed into evidence should be considered.[24] Remittitur is only required if the damages are "so excessive" that the jury must have based their award on "passion, prejudice or misconduct, rather than on objective consideration of evidence presented at trial."[25] A verdict will only be set aside if 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."[26] Absent these "exceptional circumstances," the jury's verdict will be given "enormous deference."[27]

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[23] *Reid v. Hindt*, 976 A.2d 125, 131 (Del. 2009).
[24] *Young v. Frase*, 702 A.2d 1234, 1237-38 (Del. 1997) ("[A] court's assessment of whether a jury's award of damages is within a range supported by the evidence must necessarily be based on the evidence presented to the jury and not on facts outside of the jury's purview.").
[25] *Barba v. Boston Sci. Corp.*, 2015 WL 6336151, at *9 (Del. Super. Ct. Oct. 9, 2015).
[26] *Mills v. Telenczak,* 345 A.2d 424, 426 (Del. 1975).
[27] *Barba,* 2015 WL 6336151, at *9.

b. Discussion

Defendant contends that remittitur is appropriate because the verdict is the result of "passion, prejudice, partiality, or corruption."[28] Since the verdict of $1.8 million was more than six times the amount of Plaintiff's boardable medical expenses, Defendant argues that it is "excessive" and "shocks the sense of justice."[29]

In response, Plaintiff argues that the verdict is "fair and reasonable" given the extent of his injuries, which include numerous fractures, permanent soft tissue injuries, extensive scarring, and constant pain.[30] Further, Plaintiff cites to *Thomas v. Lagola*,[31] a case in which this Court upheld a $1 million verdict based largely on pain and suffering and the permanency of the injury, as the plaintiff incurred only $223,165 in special damages and underwent only one surgery for his injuries.[32] Plaintiff compares the injuries suffered in *Thomas* to his own, which he contends are far more severe, to argue that the verdict should be upheld in light of the evidence presented.[33]

In the instant matter, Plaintiff's quality of life was dramatically altered after the accident. Plaintiff presented evidence that he was hospitalized for five weeks immediately following the accident. Additionally, Plaintiff required four subsequent

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[28] Def.'s Mot. for Remittitur and/or New Trial ¶ 3.
[29] *Id.*
[30] Pl.'s Resp. in Opp'n to Def.'s Mot. for Remittitur and/or New Trial at 3.
[31] *Id.* at 2.
[32] *Thomas v. Lagola,* 2003 WL 22496355, at *1 (Del. Super. Ct. Oct. 31, 2003).
[33] Pl.'s Resp. in Opp'n to Def.'s Mot. for Remittitur and/or New Trial at 3.

hospitalizations and he underwent multiple surgeries, developed several infections as complications from those surgeries, and continues to suffer from constant pain that makes it difficult for him to stand, walk, or leave his home.[34] Further, Plaintiff's wounds remained open as of the time of the trial and he testified that he continues to suffer from complications with bladder and bowel control. Prior to the accident, Plaintiff was employed as a contractor; however, in light of his injuries and the physical nature of the work, he is no longer able to continue to do such employment. Given this evidence, the Court does not find the award to be grossly unreasonable or so shocking that it warrants a reduction.

IV. Defendant's Motion to Stay the Execution of Plaintiff's Judgment

a. Discussion

Delaware Superior Court Civil Rule 62(b) provides that the Court may "in its discretion . . . stay the execution of . . . a judgment pending the disposition of a motion for a new trial or to alter or amend a judgment."[35] Defendant requests a stay pursuant to Rule 62(b) in light of Defendant's pending Motions for New Trial and Remittitur. As discussed above, Defendant's Motions for New Trial and Remittitur

[34] *Id.* ¶ 6.
[35] Del. Super. Ct. Civ. R. 62.

are denied; therefore, the request to stay pending the resolution of Defendant's Motions is moot.

V. Plaintiff's Motion for Prejudgment Interest, Costs, and Expert Witness Fees

a. Standard of Review

Pursuant to 6 Del. C. §2301(d), a plaintiff in a tort action for compensatory damages for bodily injury is entitled to prejudgment interest 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."[36]

The decision of whether or not to grant costs is within the discretion of the Court. Pursuant to Superior Court Rule 54(d), "costs shall be allowed as of course to the prevailing party upon application to the Court."[37] The definition of costs has been interpreted to mean "allowances in the nature of incidental damages awarded by law to reimburse the prevailing party for expenses necessarily incurred in the assertion of his rights in court."[38] This is not an "attempt by the court to fully compensate a litigant for all the expenses the litigant incurred,"[39] but it allows

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[36] 6 Del. C. §2301(d); *see also Christiana Care Health Servs., Inc. v. Crist*, 956 A.2d 622, 628 (Del. 2008), *as revised* (Aug. 4, 2008) ("Thus, 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.").
[37] Del. Super. Ct. Civ. R. 54(d).
[38] *Peyton v. William C. Peyton Corp.*, 8 A.2d 89, 91 (Del. 1939).
[39] *Wyatt v. Moore*, 1993 WL 138716, at *1 (Del. Super. Ct. Jan. 20, 1993).

recovery of those expenses that "a party cannot litigate its case without incurring."[40] Additionally, pursuant to Rule 54(h), fees for expert witnesses testifying by deposition that have been entered into evidence are specifically allowed.[41]

b. Discussion

i. Prejudgment Interest

Plaintiff asserts that he is entitled to prejudgment interest because he "made a written demand to settle his claim for the lesser of $1,000,000 or the policy limits of the [D]efendant" that remained open for thirty days.[42] As the policy limits were $30,000 per person/$60,000 per accident, the settlement offer was less than the $1.8 million awarded by the jury and Plaintiff maintains that his demand complied with the requirements of Section 2301(d).[43] Therefore, Plaintiff requests interest calculated at a rate of .0625%, totaling $203,365.38. In response, Defendant requests that Plaintiff's request for prejudgment interest be denied.

The Court finds that Plaintiff's written demand complies with the requirements of Section 2301(d). Plaintiff's letter, dated December 7, 2017, offered to settle for less than the amount of damages awarded by the jury and expressly states

[40] *See TranSched Sys. Ltd. v. Versyss Transit Sols., LLC*, 2012 WL 1415466, at *3 (Del. Super. Ct. Mar. 29, 2012).
[41] Del. Super. Ct. Civ. R. 54(h).
[42] Pl.'s Mot. for Prejudgment Interest, Costs, and Expert Witness Fees ¶ 2.
[43] *Id.* ¶ 3.

that the offer will be withdrawn after thirty days.[44] As such, Plaintiff is entitled to the requested prejudgment interest as of the date of the injury, November 21, 2017.

ii. Costs

Additionally, Plaintiff requests the following costs:

Court Costs	$436.25
Deposition Testimony of Dr. Quercetti	$3,500.00
Deposition Testimony of Dr. Cooper	$1,500.00
Deposition Testimony of Dr. Bacon	$750.00
Videotaping Fee for Dr. Quercetti	$885.00
Videotaping Fee for Dr. Cooper	$400.00
Videotaping Fee for Dr. Bacon	$400.00

In response, Defendant argues that she "should not bear the entirety of the costs incurred by Plaintiff."[45]

Plaintiff may recover court costs and the cost of depositions of expert witnesses that were entered into evidence. While Delaware permits recovery of expert witness fees, "the Court fixes those fees in its discretion."[46] As the requested depositions were all entered into evidence, the Court will allow Plaintiff to recover the cost of taking these depositions and videotaping them, as well as the cost of video playback at the trial, but will not allow any other associated costs, such as DVD/MPEG conversion, and fees for processing, handling, and archiving.

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[44] *See* Pl.'s Mot. for Prejudgment Interest, Costs, and Expert Witness Fees, Ex. A.
[45] *See* Def.'s Resp. in Opp'n to Pl.'s Mot. for Prejudgment Interest, Costs, and Expert Witness Fees ¶ 4.
[46] *TranSched Sys. Ltd. v. Versyss Transit Sols., LLC*, 2012 WL 1415466, at *4 (Del. Super. Ct. Mar. 29, 2012).

Plaintiff's requested costs for Dr. Bacon's deposition testimony includes a $250.00 charge for a pre-deposition meeting, which cannot be recovered.[47] Additionally, the requested cost of videotaping Dr. Bacon's deposition will be reduced by the fees charged for DVD/MPEG conversion, processing, handling, and archiving. In sum, Plaintiff may recover $825.00 for the costs of obtaining and taping Dr. Bacon's deposition.

Plaintiff requests $3,500.00 for the one hour deposition of Dr. Quercetti, which the Court finds to be unreasonable. As Dr. Quercetti has failed to provide an itemized billing statement in which this charge is further explained, the Court must assume that some of this fee includes preparation time because it is disproportionately higher than the costs of the other doctors. Likewise, Dr. Cooper has not provided an itemized billing statement; however, the Court finds the requested fee of $1,500.00 for his deposition is reasonable and will permit recovery. Using Dr. Cooper's requested fee as a reasonable comparison, the Court will reduce the requested costs for Dr. Quercetti and permit Plaintiff to recover $1,500.00 for his testimony, as well.

Although Defendant argues that she extended a settlement offer to Plaintiff and it was rejected, this does not determine allowable costs. The Court will allow

[47] *See* Pl.'s Mot. for Prejudgment Interest, Costs, and Expert Witness Fees, Ex. E.

the Plaintiff to recover the following court costs and fees incurred for the expert witness depositions and recording:

Court Costs	$436.25
Deposition Testimony of Dr. Quercetti	$1,500.00
Deposition Testimony of Dr. Cooper	$1,500.00
Deposition Testimony of Dr. Bacon	$500.00
Videotaping Fee for Dr. Quercetti	$750.00
Videotaping Fee for Dr. Cooper	$325.00
Videotaping Fee for Dr. Bacon	$325.00
Total:	**$5,336.25**

VI. Conclusion

For the foregoing reasons, Defendant's Motions are **DENIED** and Plaintiff's Motion is **GRANTED IN PART AND DENIED IN PART**.

IT IS SO ORDERED.

Judge William C. Carpenter, Jr.