

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

DAVID DEICHER and
MARY MEZERA,

Plaintiffs,

v.

MEMORANDUM AND ORDER

CITY OF EVANSVILLE, WISCONSIN,
CHRISTOPHER JONES and COMMUNITY
INSURANCE CORPORATION,

06-C-356-S

Defendants.

On February 14, 2007 judgment was entered in the above entitled matter in favor of plaintiff Mary Mezera against defendant Christopher Jones in the amount of \$14,500 together with costs, in favor of plaintiff David Deicher against defendant Christopher Jones in the amount of \$5,000.00 together with costs and in favor of plaintiffs against defendants in the amount of \$5,500.00 together with costs for a total of \$25,000.

On March 1, 2007 plaintiffs moved pursuant to Rule 59, Federal Rules of Civil Procedure, to set aside the jury verdict on damages and for a new trial on damages. Plaintiffs also move for costs and attorney fees. These motions have been fully briefed and are ready for decision.

FACTS

Plaintiffs commenced this action on June 30, 2006 claiming that defendants violated the Driver Privacy Protection Act. In their second amended complaint they sought both actual and punitive damages together with attorney fees. Plaintiffs' motion for partial summary judgment was denied on December 18, 2006.

In the joint final pretrial report plaintiff listed special damages as follows: Medical Bills; \$14,600.00 (Mezera); \$322,368.00 (Deicher); Medication, \$1,553.00; Lost wages, \$2,930.00 and relocation expenses, \$32,000.00. Jury trial commenced on February 12, 2007. The jury found for plaintiffs on liability on February 12, 2007.

The damages phase of the trial commenced on February 13, 2007. The jury began deliberating on damages at 4:16 p.m. on February 13, 2007. At 5:28 p.m. the Court convened to address the following question from the jury: "On what date was this case filed by plaintiff?" Plaintiffs' counsel stated, "The only piece of evidence in the record is the notice of claim." Defendants' counsel stated, "Your honor, I can only say that the date on which this case is filed is not in evidence. And, therefore, I don't think it can be given to them."

The Court responded to the jury question as follows, "Members of the jury, the case was filed by the plaintiffs in this Court on

June 30, 2006 at 1:48 p.m." Plaintiffs' counsel continued to object to this answer.

The jury deliberated until 7:42 p.m. They asked six more questions. The jury returned a verdict finding plaintiff Mezera was entitled to \$14,500.00 in compensatory damages and plaintiff Deicher was entitled to \$1,000.00 in compensatory damages. The Court amended the verdict to award plaintiff Deicher \$5,000 in damages as required by statute.

The jury then found that one or more defendants demonstrated a wilful or reckless disregard for the law in the disclosure of plaintiffs' address to a stranger over the telephone. The jury awarded plaintiffs \$5,500.00 in punitive damages.

MEMORANDUM

Motion for a New Trial on Damages

Plaintiffs seek to set aside the jury verdict on damages and to have a new trial on damages. In deciding plaintiffs' motion for a new trial pursuant to Rule 59, Federal Rules of Civil Procedure, the Court must consider whether the trial was unfair to the moving party. Forester v. White, 846 F. 2d 29 (7th Cir. 1988). The Court must determine whether the verdict is against the weight of the evidence or whether the damages are excessive or inadequate. Briggs v. Marshall, 93 F.3d 355, 360 (7th Cir. 1996).

Plaintiffs argue that they are entitled to a new trial on the issue of damages because of the Court's answer to the jury's first question during their deliberations in the damages stage of trial. The District Court has broad discretion in answering questions asked by the jury during deliberations. U.S. v. Hewlett, 453 F. 3d 876, 889 (7th Cir. 2006).

The jury asked, "On what date was this case filed by plaintiff?" The Court answered, "Members of the jury, the case was filed by the plaintiff in this Court on June 30, 2006 at 1:48 p.m."

Plaintiffs argue that this was new evidence that could not be submitted to the jury. In Lussier v. Runyon, 50 F.3d 1103 (1st Cir. 1995), the Court held, "...a district court, absent waiver or consent, ordinarily may not receive additional factual information of a kind not susceptible to judicial notice unless it fully reopens the record" (emphasis added). The filing date was a fact of which the Court could and did take judicial notice. It was proper to provide this fact to the jury when asked.

Plaintiffs argue that instead of answering the question that the jury asked the Court should have provided the date the notice of claim was filed. This argument is speculative at best because the jury did not ask for or refer to the notice of claim. If, in fact, the jury wanted to know when the notice of claim was filed, or was not satisfied with the Court's answer, it could have asked that question in the subsequent two hours of deliberation as

suggested by plaintiffs' counsel during discussion over the answer to be provided.

Plaintiffs further argue that the Court's answer to this question affected the verdict. Had the answer to the question been false the Court would decide whether there is a reasonable possibility that the Court's communication altered the verdict. It did not. Plaintiffs presented evidence in the damages phase of trial that they had filed a notice of claim against the City of Evansville on April 21, 2006 and that defendant Jones altered his report in May. It is plaintiffs' contention that because the jury was provided the date the case was filed in this Court and not the date the notice of claim was filed the jury found that Jones had not altered his report in response to the suit. This argument lacks merit. Had the jury wanted to know when the notice of claim was filed it would have asked that question instead of the one it did. Whether they wished it or not plaintiffs presented evidence during the damage phase as above that notice of claim was filed April 21, 2006 and defendant Jones altered his report in May.

Plaintiffs are not entitled to a new trial as to damages on this ground.

Plaintiffs also argue that the punitive damages award is unfair because it is grossly inadequate.

The jury's award of compensatory damages suggests that it awarded damages for the injury suffered after defendant Jones

released plaintiffs' address to Jimmy Reiners. That damage arose from Jimmy Reiner's one contact with plaintiffs after receiving their address. This award was reasonable based on the evidence.

The jury then found that the conduct demonstrated by one or more defendant to be a wilful or a reckless disregard for the law by disclosing the plaintiffs' address.

The jury was instructed as follows concerning punitive damages:

If your verdict is in favor of one or both plaintiffs you may, but are not required to, assess punitive damages against defendants. The purposes of punitive damages are to punish defendants for their conduct and to serve as an example or warning to a defendant and others not to engage in similar conduct in the future.

Plaintiffs must prove by a preponderance of the evidence that punitive damages should be assessed against defendants. You may assess punitive damages only if conduct demonstrating a wilful or reckless disregard of the law is shown. Conduct is in willful disregard of the law if it is shown defendants knew they were violating the law. Conduct is in reckless disregard of the law if, under the circumstances, it reflects complete indifference to a plaintiff's safety or rights.

If you find that punitive damages are appropriate, then you must use sound reason in setting the amount of those damages. Punitive damages, if any, should be in an amount sufficient to fulfill the purposes that the court has described to you, but should not reflect biases, prejudice or sympathy toward any party. In determining the amount of any punitive damages, you should consider the following factors:

The reprehensibility of the defendant's conduct

The impact of defendant's conduct on plaintiffs
The relationship between plaintiffs and defendants
The likelihood that defendants would repeat the conduct if an award of punitive damages is not made
The relationship of any award of punitive damages to the amount of actual harm suffered by the plaintiffs.

The jury was not required to award any punitive damages according to this instruction but could do so where it found a defendant wilfully or recklessly disregarded the law. The jury was instructed to consider certain factors including the relationship of the award of punitive damages to the amount of actual harm suffered by the plaintiffs. Another factor to be considered was whether the punitive damages would deter future misconduct. The jury awarded plaintiffs \$15,500.00 in actual damages. The award of \$5,500.00 in punitive damages is reasonably related to the actual damages awarded and would deter future misconduct.

The jury followed the instructions it was provided. This punitive damages verdict is not grossly inadequate nor is it against the weight of the evidence. Briggs v. Marshall, 93 F.3d at 360. Accordingly, plaintiffs' motion for a new damages trial will be denied.

Motion for Attorney Fees

Plaintiffs request attorney fees in the amount of \$194,312.50 and costs in the amount of \$13,342.67. In their reply brief

plaintiffs reduce their request to \$192,062.50 to reflect a reduction for the amount spent on a motion to reconsider which was not filed. Under the Driver Privacy Protection Act the Court may award plaintiffs reasonable attorney fees and other litigation costs reasonably incurred. 18 U.S.C. §2724(b).

The starting point for determining the amount of reasonable attorney's fees to be awarded is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. Hensley v. Eckerhart, 461 U.S. 424, 433 (1982). Defendants do not object to the hourly rate requested for Attorneys Richard Burnham (\$300.00), Betty Eberle (\$275.00) and Sarah Siskind (\$475.00).

Defendants do make specific objections to the number of hours reasonably expended by these attorneys in Table One, attached to Attorney Mark Hazelbaker's affidavit. The objections to specific time entries include duplicative, excessive and unnecessary. The Court has reviewed these objections and the plaintiffs' responses to them and determines that the specific time entries were duplicative, excessive and/or involved unnecessary time spent by plaintiffs' attorneys. Accordingly, the Court finds that defendants requested reductions for the time spent by plaintiffs' attorneys are reasonable. These reductions include the reduction to which plaintiffs concede in their reply brief.

Based on these reductions, the attorney fees for Attorney Burnham would be \$59,176.25, for Attorney Eberle, \$82,541.00 and

for Attorney Siskind, \$0.00, for a total of \$141,717.50. This is the lodestar amount.

Defendants argue that this lodestar amount should be reduced because of the difference between the judgment received and the recovery sought. First, defendants seem to be arguing that the offer they made in settlement discussions immediately prior to the trial in this matter is relevant to this discussion. Such offers are confidential and are not relevant to the recovery to be provided. Were an offer of judgment made under Rule 68, Federal Rules of Civil Procedure, it could have been considered. But that is not the case here. Where considered it is only for the amount plaintiffs were requesting.

The United States Court of Appeals for the Seventh Circuit has held in cases where a damage award is minimal in relation to the amount of damages sought that a three part test should be used to determine the relative indicia of success. The three factors to be considered are: 1) the difference between the judgment received and the recovery sought; 2) the significance of the legal issue on which the plaintiff prevailed and 3) the public purpose of the litigation. The first factor bears the most weight, whereas the second factor bears the least. Simpson v. Sheahan, 104 F.3d 998, 1001 (7th Cir. 1997).

The Court of Appeals has held that in determining the proper amount to reduce a plaintiff's fee award to reflect the degree of

success obtained, the district court has considerable discretion. Spegnon v. Catholic Bishop of Chicago, 175 F.3d 544, 558 (7th Cir. 1999) .

In this case plaintiffs prevailed on the claims they raised. There is a significant difference, however, between the recovery sought and the judgment they received. Specifically, in his closing argument in the damages phase of trial plaintiffs' counsel sought a range of between one to five million dollars in compensatory damages and one million dollars in punitive damages. Prior thereto plaintiffs' final demand was \$2,200,000. The jury returned a compensatory award for \$14,500 and punitive damage award for \$5,500.00 as aforesaid. The recovery sought by plaintiffs was outlandish as well as unreasonable based on the evidence in this case. The jury verdict was reasonable based on the evidence presented. The Driver Privacy Protection Act serves a public purpose to protect drivers' privacy but not to provide a windfall to counsel.

With the reasonable reductions in attorney fees proposed by defendants and accepted by the Court, the plaintiffs' attorney fees award could be \$141,717.50. Defendants suggest, however, that the fees be further reduced to a third of the recovery, \$8,333.00 or to the amount plaintiffs recovered in damages, \$25,000.00. These amounts may very well be reasonable considering the excessive demand suggested by counsel. As previously stated, the awards were

reasonable while the recovery sought was substantially unreasonable and perhaps even incredible based on the evidence in this case.

The jury awarded \$21,000 and the statute provided another \$4,000 for a total award of \$25,000. When the reasonable amount of the award is compared to the demand made by plaintiffs, the award was minimal. The award of \$25,000 compared to the demand of \$2,200,000 made the week before trial is one percent; compared to the demand of \$1,000,000 made to the jury is three percent and compared to the demand of \$6,000,000 also offered to the jury is less than one percent. The Court uses these percentages as guidelines to determine a reasonable fee based on the minimal award received by plaintiffs. Looking at the ratios suggested by the Court, a fair fee is anywhere from \$1,417.18 to \$4,251.53. Although plaintiffs prevailed it was certainly not a successful endeavor as plaintiffs recognize in their post-judgment motion.

With the significant difference between the recovery sought and the judgment received, plaintiffs are entitled to the \$25,000 attorney's fees suggested by defendants. The Clerk of Court is directed to address plaintiffs' bill of costs pursuant to 28 U.S.C. § 1920.

ORDER

IT IS ORDERED that plaintiffs' motion for a new trial on damages pursuant to Rule 59, Federal Rules of Civil Procedure, is DENIED.

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IT IS FURTHER ORDERED that plaintiffs are AWARDED attorney's fees from defendants in the amount of \$25,000 with judgment to be AMENDED accordingly.

Entered this 12th day of April, 2007.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge