IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

CIVIL TRIAL DIVISION

SHAMELL SAMUEL-BASSETT	:	JANUARY TERM, 2001
on behalf of herself and all	:	
others similarly situated	:	
Plaintiff	:	
	:	
vs.	:	
	:	
KIA MOTORS AMERICA, INC.	:	
Defendant	:	NO. 2199

OPINION

Following a jury trial, judgment was entered on behalf of 9,402 class members and against defendant in a total amount of $5,641,200.00. The jury found that the brakes on the Kia Sephia model years 1995 through 2001, needed replacement approximately every 5,000 miles, well below the much higher American standard and violated the express warranty of 36 months or 36,000 miles. The Superior Court affirmed the verdict upon the opinion of the trial court. By Memorandum Opinion dated October 24, 2007, the Superior Court affirmed the class action verdict and remanded "for the filing supplemental Rule 1925(a) opinion with regard to the appeal of the counsel fee award." [1]

On June 6, 2005, counsel for the prevailing party, plaintiff class, timely filed a Petition for award of attorneys' fees and expenses pursuant to 15 U.S.C. §2310(d)(2) seeking attorney's fees in the amount of $4,635,532.00 and costs and expenses in the

[1] Superior Court Memorandum Opinion of October 24, 2007.

amount of $275,153.00. On January 23, 2006, the Court awarded plaintiffs' counsel fees in the amount of $4,125,000.00 and costs and expenses in the amount of $267,513.00.

Together with that petition, counsel filed affidavits from trial counsel, summary spread sheets identifying the work performed by each attorney on the case, the category of work, the amount of time spent on each category and the hourly rates charged. These spread sheets were supported by detailed time records which were at all times available. Incomplete time records produced by defense counsel demonstrated that defense counsel has expended over 7,100 hours in defending the case, and partners had billed at rates ranging from $560.00 to $595.00 higher than the rates requested by plaintiff's counsel.

An evidentiary hearing was held on September 13, 2005, at which time testimony was taken and additional evidence in the form of affidavits were received. Defendant relies upon the testimony of John Marquess to rebut plaintiff's proof. By Order dated January 23, 2006, the Court reduced the requested award of $4,635,532.00 to $4,125,000.00. The Court reduced the award by deducting time attributable to meetings in February in Tampa with in-house counsel, Mr. Waymie and Mr. McClure. The Court eliminated that time because it was an attempt to negotiate a national settlement. Also deducted were time and expenses associated with mediation in California in August, 2005. The Court also eliminated hours spent preparing and filing the fee petition as a ministerial act.

Plaintiffs' counsel were awarded a lodestar or base fee in the amount of $3,000,000.00 and a 1.375 multiplier was applied to determine the award. Expenses as documented were awarded.

To contest the fee petition the defense relied exclusively on the affidavit and testimony of Mr. Marquess, a self-proclaimed "fee auditor." Mr. Marquess is paid to provide insurance companies and other large purchasers of legal services a justification not to pay legal bills by declaring that his idiosyncratic standards for billing explanation detail have not been met. No part of Mr. Marquess's business includes any participation, control or even monitoring of litigation itself. He claims no expertise in reducing costs by the efficient management of litigation and makes no cost-saving suggestions to his client or litigation counsel. Mr. Marquess's only function is to criticize the bills of attorneys who have actually faced a Judge and jury at trial. Apparently Mr. Marquess makes no effort to ascertain a factual basis grounded in the actual litigation for recommending that earned attorney fees not be paid. He has no pretension to knowledge or experience in what counsel for a plaintiff class needs to do to prepare and try a major class action case to verdict. Mr. Marquess does not claim expertise on the staffing requirements of a plaintiff's firm in a class action.[2]

> "Q: Are you qualified, sir, to determine how many lawyers, the quality of lawyers that need to be present in order to try a class action like this?
>
> A: No."

Nonetheless, because the standard for qualifying an expert witness in Pennsylvania is unreasonably lax, requiring only a "reasonable pretension to specialized knowledge,"[3] he is qualified to provide expert opinion testimony in the work for which he is paid. Although qualified to offer "expert opinion testimony," the sincerity with which he conducts his "evaluation," the methodology or lack thereof, the factual basis on which his opinion is based, his candor, self-interest and bias are all matters for the finder

[2] N.T., 9/13/05, p. 200, lines 18-22.
[3] See *Miller v. Brass Rail Tavern*, 664 A.2d 525, 541 Pa. 474 (1995).

of fact to consider in judging credibility and determining whether to accept all or some or none of his testimony.

The success of his business depends upon pretending that paperwork rather than legal work is the proper criteria for judging legal fees. In this case his testimony revealed he made no effort to ascertain the requirements of, or the work performed in the actual litigation he supposedly evaluated. His criticism of the fee award requested is restrictive to the point of irrelevancy:

> "Q: Your complaint is with the format of the bills or the content of the time records; is that right?
>
> A: That would be generally accurate, yes."[4]

> "Q: You don't know one way or another whether we actually expended the time that we claimed, do you?
>
> A: That's correct.
>
> Q: Sir, do you know one way or another whether the time expended by Mr. Francis, Mr. Donovan, Myself and or colleagues was reasonably necessary in order to conduct and prevail in this litigation?
>
> A: Now you've said reasonably necessary. You're talking about the necessity of the work you've done, just so I'm clear, no." [5]

Substantively, Mr. Marquess claimed that plaintiff's fee request should be reduced by 86% to $662,667.15 for a case which has been hotly litigated for 5 years, removed by the defense to Federal Court, remanded to state court on the motion of the defense, tried to verdict and whose docket entries in State Court alone consisted of 47 pages.

He claims this reduction should be made solely because he was incapable of determining the exact work performed. His inability to "determine" whether plaintiffs'

[4] N.T., 9/13/07, p.202, lines 14-17.
[5] N.T., 9/13/07. p.203, lines 6-10, 19-25.

counsel actually performed the documented legal work is the result of a biased analysis and inadequate review.

His testimony also demonstrated a cavalier disregard for legitimate expert inquiry, and a callous insouciance to candor on the witness stand. His testimony was disingenuous, evasive and ultimately self-contradictory. Although he admitted that plaintiff class needed two partner level attorneys, two associates and one paralegal to represent them at trial[6], he refused to concede that any compensation should be awarded for trial work even to that limited extent.

His explanation for refusing any fee for the two partners, two associates and a paralegal which were needed was paperwork:

> "Q: So the reason your calculations allowed for zero fee for any attendance at trial is because it's not sufficiently documented as to what attorneys did, is that it?
>
> A: Yes."[7]

He even specifically refused to concede that Mr. Donovan, lead counsel from the inception of the case should receive a fee for his trial work. To justify that "opinion," he feigned innocence and ignorance:

> "Q: Mr. Donovan, based on your understanding of his participation in this case, would it be reasonable for him to sit through the whole trial?
>
> A: I would say so."[8]
>
> "Q: Is that included in the $366,956.55 that you think his firm, as documented, has earned?
>
> A: No, I would add that back into that figure.
>
> Q: Why didn't you?

[6] N.T., 9/13/05, p. 169, lines 21-24.
[7] N.T., 9/13/05, p. 171, line 22.
[8] N.T., 9/13/05, p.176, line 25-p.177, line 5.

A: Because I don't have the answers even sitting here today as to who attended the trial and why they attended.

Q: You don't have any records of when Mr. Donovan claims to have attended trial?

A: …sure, I do.

Q: Then why didn't you add that in? Why do you say to the Court yeah, I can do that, but you didn't do it before you took the witness stand….?

A: Because I don't know why all of these people attended and what roles they played.

Q: I'm talking about Mr. Donovan, the named partner who handled this case as you know from the orders, from virtually from the beginning in State Court, Federal Court in State Court again. I asked you whether you had an opinion, a professional opinion as to whether or not he should have been at trial and you said yes.

A: I thought you asked me if I would have expected him to be there." [9]

He did not review the trial transcript to evaluate trial time. He made no effort to determine whether the attorneys and assistants present in the courtroom had specialized knowledge of the case or the location or significance of critical documents, which may have become relevant.

This opinion that no fee should be awarded for any plaintiff's attorney at trial was reiterated to the point of absurdity:

"Q: Do you not recognize that some attorney needed to be in court throughout the trial in order to win?

A: Absolutely.

Q: But your opinion as to how much they've earned does not include any fee for that one attorney who absolutely had to be in court in order to win the case, correct?

A: Yes."[10]

[9] N.T., 9/13/05, p.177, line 6-p.178, line 18.

Mr. Marquess changed his testimony within minutes: He said:

> "We have a question about any day in which a time keeper charges over 12 hours."[11]

But reversed that opinion in the very next answer:

> "Q: Do you think it's questionable for a trial attorney to spend more than 12 hours a day at work on a day when he's in trial before a judge who's going to be in court seven or eight hours and is going to insist that court be in session for seven or eight hours the next day?
>
> A: No, no, I don't think that…." [12]

And then tried yet a third opinion:

> "I think once you get over 16 hours a day, I think that time becomes suspect."[13]

He even tried to pretend that he had couldn't verify Mr. Feldman's legal experience because he could not find his firm's internet homepage:

> "A: I tried to find you online. I tried to find your website."
>
> Q: Well if you tried to find my website, sir, were you successful?
>
> A: I called your office and asked what the website was and I think it was Free Credit Report, dot com, or something to that effect. It wasn't Feldman, et. Cetera."[14]

This risible attempt at obfuscation was revealed for what it was when after pretending for a page and a half of recorded testimony that he could not answer whether he had reviewed the Feldman law firm website he finally had to admit that he had.

Nonetheless, having obviously known that Mr. Feldman was one of the most successful and respected trial lawyers in Philadelphia, and had been elected by his peers to become Chancellor of the Bar of Philadelphia, Mr. Marquees persisted in his obviously

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[10] N.T., 9/13/05, p. 183, lines 5-16.
[11] N.T., 9/13/05, p. 221, line 21.
[12] N.T., 9/13/05, p. 221, line 24-p.222, line 9.
[13] N.T., 9/13/05, p. 222, line 22.
[14] N.T., 9/13/05, p. 230, line 20-p.231, line 4.

disingenuous and biased opinion that as lead trial counsel in a class action trial, he should be awarded the same fee the defense paid an inexperienced associate.

The Court as finder of fact must evaluate the truthfulness and accuracy of expert opinion. No one takes the stand entitled to be believed. The court must consider the accuracy and effectiveness of an expert's methodology, the bias or prejudice with which the analysis was performed, and the manner in which the witness testified including the sincerity or 'evasiveness" with which the witness answered questions. A finder of fact must evaluate how the expert "looked, spoke and acted while testifying." Mr. Marquess's testimony fails on every standard of evaluation. His testimony was totally lacking in candor, without any credibility, and is rejected.

Mr. Marquess's opinion is totally and entirely rejected on the basis that he had no pretense to knowledge of what a plaintiff's firm needs to do to prepare and try a class action jury trial to verdict and failed to seek any appropriate factual basis to evaluate the work performed in this case. His testimony is rejected as grossly lacking in necessary and readily obtainable facts.[15] His testimony lacks all credibility, providing misleading and transparently disingenuous answers in a conscious effort to obfuscate.[16]

In *Rode v. Dellarciprete*,[17] the Third Circuit Court of Appeals reviewed a trial attorneys' fee award in a civil rights action. The Third Circuit outlined general legal principles to properly guide a determination of reasonable attorneys' fees. The Third Circuit held that in a statutory fee case, the party seeking attorneys' fees has the initial

[15] See Pa. R. Evid. 705.
[16] Although Mr. Marquess tried to avoid saying what fees should be awarded, he could easily calculate the never previously expressed opinion that out of a requested fee of $4,635,532, he believed that only a fee of $662,667.15 was warranted.
[17] 892 F.2d 1177 (3d Cir. 1990). This claim had been brought under 42 U.S.C. 2000e-3 which prohibits unlawful employment practices. Much like the WPCL, 42 U.S.C. 1988 provides that in civil rights actions, the court, in its discretion, determines a reasonable attorney's fee.

burden of proving that its fee request is reasonable. To meet this burden, the fee petitioner must submit evidence which supports both the hours worked and the rates claimed.[18] Once the fee petitioner has met this initial burden however, the burden shifts to the party opposing the fee award to challenge the reasonableness of the requested fee with sufficient specificity.[19]

Defendant requests reductions to Plaintiffs' base fee on the basis of the testimony of Mr. Marquess.[20] Mr. Marquess's review of the case was biased and intentionally factually restricted. The Court rejects the concept that an expert is nothing more than a hired gun who applies "expertise" to whatever material is provided by counsel without any responsibility to request available information reasonably required to render an honest, valid opinion.[21]

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[18] *Id*. at 1183. *See also Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) ("the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates").

[19] *Id.*, *citing Bell v. United Princeton Properties, Inc.*, 884 F.2d 713 (3d Cir. 1989).

[20] N.T., 4/5/07, p. 51, lines 5-11.

[21] The integrity and honesty of expert witnesses is the bedrock of the Federal philosophy of Evidence incorporated in part into the Pennsylvania Code of Evidence Rule 703. Pennsylvania Rule 703 permits an expert to transcend the rules incorporated into all other rules of evidence by relying on material "inadmissible" into evidence if they testify that it is "routinely used in their profession." The professional witness testifying without integrity, saying whatever their masters pay them to say, makes a mockery of the integrity of our system of justice. Pennsylvania Rule 705 requires that the expert reveal rather than obfuscate or conceal his factual basis. Pennsylvania Rule 705 requires an expert to testify as to "the facts or data on which the opinion or inference is based." Numerous appellate Court decisions have rejected expert opinion testimony not appropriately grounded on facts of records. In, *Viener v. Jacobs*, 834 A.2d. 546 (Pa. Super 2003) expert evaluation testimony was precluded because that expert's factual understanding was not supported by evidence of record. The Superior Court said: "It is well settled that expert testimony is incompetent if it lacks an adequate basis in fact." In *Jones v. Wilt*, 871 A.2d. 210 (Pa. Super 2005) expert opinion grounded in facts not supported by any evidence as to the intent of the decedent was precluded saying: "It is well settled law ….that an expert may not express his opinion upon facts which are not warranted in the record regardless of the expert's skill and experience." In *Kelly v. Thachery*, 874 A.2d. 649 (Pa. Super 2005) expert testimony was rejected in a products liability case because it was grounded in an inaccurate understanding that defendants "had control of the rigging and hoisting." Since the facts did not support the expert's assumptions, the opinion was stricken. In *Hutchinson v. Penske*, 876 A.2d. 978 (Pa. Super 2005) expert testimony as to the crashworthiness of the cab of a truck was inadequately grounded upon National Highway Traffic Safety Administration Reports, University of Michigan Transportation Research Institute reports and Society of Automotive Engineers Reports. The testimony was stricken because there was no demonstration that any of the accidents or vehicles which formed the factual basis for these reports were similar to the accident before the court.

Pennsylvania cases address the standards for the award of attorney's fees. In addition there are Pennsylvania and Federal court cases evaluating and awarding attorney fees under comparable fee-shifting statutes. The reasoning of those opinions is instructive.

To determine reasonable fees to be awarded, the court must determine whether the hours claimed by the fee petitioner were actually and reasonably expended[22] and whether the hourly rate requested is reasonable. A reasonable hourly rate is calculated based on the prevailing market rates in the relevant communities, and comparing the rates requested by the prevailing party with rates of lawyers of reasonably comparable skill, experience and reputation. The court must then multiply the reasonable hourly rate by the reasonably required hours expended. This calculation reveals a base attorney fee sometimes called a lodestar fee. The Court finds that the rates requested by plaintiffs' counsel, the work performed and the allocation of work performed by lead counsel, partner-level counsel, associates, and support personnel is reasonable for a plaintiffs consortium of law firms litigating, on a contingent basis, a class action of this magnitude against a determined and well-financed defendant.

The court has discretion to adjust the lodestar. A party seeking an adjustment to the lodestar has the burden of proving that an adjustment is appropriate. The court can

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While the basic principal of law that an expert opinion has value only if the jury accepts the facts on which it is based (Standard Civil Jury Instruction 5.31) has received renewed interest subsequent to adoption of the Pennsylvania Rules of Evidence, it is not a new concept. In 1998 the Supreme Court rejected expert testimony that a bicycle was defective because the bicycle which the expert had examined had been materially altered after the accident. *Factor v. Bicycle Technology, Inc*., 707 A.2d. 504 (Pa. 1998). It is also obvious that an expert may not bootstrap facts into the record through purported analysis or opinion. *See Commonwealth v. Smith*, 861 A.2d. 892 (Pa. 2004).

[22] *Rode*, 892 F.2d at 1183. The court may also reduce the hours claimed by the number of hours that were spent litigating unsuccessful claims that were distinct from claims on which the party succeeded. Although the Plaintiffs in this case were not successful on all claims, the claims were intertwined and not distinct. The defense resistance to discovery permeated the entire case.

adjust the lodestar by applying a contingency multiplier if the case was taken on a contingent basis.[23] A contingency multiplier is warranted if the Court concludes that this contingent fee case poses significantly higher risks to counsel than hourly fee cases, and requires a determination of what contingent fee would be necessary to attract competent counsel and, whether the prevailing party would have faced substantial difficulties finding counsel without the potential of an adjustment because of the risk taken.[24]

The Pennsylvania Superior Court addressed just such an adjustment in the case of *Signora v. Liberty Travel, Inc*., involving attorneys' fees under the WPCL.[25] The *Signora* trial court applied a contingency multiplier to the earned attorneys' fees. Examining the fee awarded, the Superior Court considered the degree of success as a critical consideration. The Superior Court in *Signora* specifically affirmed the discretion of the trial Court to adjust the lodestar fee because of the contingency of the fee.

The *Signora* Court analyzed Pennsylvania Rule of Civil Procedure 1716 controlling the award of counsel fees in class action litigation.[26] Pennsylvania Rule of Civil Procedure 1716 reads:

> "In all cases where the court is authorized under applicable law to fix the amount of counsel fees it shall consider, among other things, the following factors: (1) the time and effort reasonably expended by the attorney in the litigation; (2) the quality of the services rendered; (3) the results achieved and benefits conferred upon the class or upon the public; (4) the magnitude, complexity and uniqueness of the litigation; and (5) whether the receipt of a fee was contingent on success."

Other relevant factors include the size of the fund created, the number of persons benefited; the skill and efficiency of the attorneys involved; the complexity and duration of the litigation; the risk of nonpayment; the amount of time devoted to the case by

[23] *Signora v. Liberty Travel, Inc.*, 886 A.2d 284 (Pa. Super. 2005).
[24] *Rode*, at 1184.
[25] 886 A.2d 284 (Pa. Super. 2005).
[26] *Id*. at 293.

plaintiffs' counsel; and awards in similar cases. In *Logan v. Marks*[27], the Superior Court said:

> "A comparison of the size of the award to the objectives of the litigation is highly relevant to determining the degree of success obtained, the critical inquiry in determining the reasonableness of a requested fee."

In *Signora* the Superior Court found that class counsel's records and attorney resumes had properly substantiated the hourly rate requested and using the "lodestar" method properly granted class counsel a 1.5 contingency multiplier to that base or lodestar fee.[28] Courts have frequently found a multiplier of three or greater to be reasonable in contingency class action litigation. In this case, a multiplier of 1.375 was properly used to calculate the award..

Plaintiffs' counsel herein have *prima facie* demonstrated that their requested attorneys' fees and costs incurred are reasonable for the litigation of this case. Plaintiffs' attorney team has extensively detailed the time expended by lawyers and paralegals over years of litigation. Plaintiffs' counsel has submitted extensive evidence of the work performed. The qualifications of the individual lawyers and firms involved have been documented.

Having presided over this litigation, this Court can personally confirm the extensive work, time, and effort devoted by both sides and specifically plaintiffs'

[27] 704 A.2d 671, 673 (Pa. Super. 1997).
[28] *Signora*, 886 A.2d at 293-294.

lawyers, pre-certification, at certification[29], pre-trial, trial and post-trial. The reasonableness of Plaintiffs' fee request is established by its detailed documentation and these observations.

BY THE COURT

_____ _____

DATE MARK I. BERNSTEIN, J

[29] While the Court did not preside over the aborted Federal Court sojourn, it notes that the plaintiffs twice proved that class certification was proper.