

NEWS & DEVELOPMENTS

Fact Witness Compensation and the Potential for a Witness Bias Charge

New York's highest court has addressed whether the testimony in a civil action of a subpoenaed fact witness, who received a fee alleged to be disproportionately in excess of the minimum statutory fee requirement for attendance at trial, was inadmissible as a matter of law. In *Caldwell v. Cablevision Sys. Corp.*, 960 N.Y.S.2d 711 (N.Y. 2013), the New York Court of Appeals held that such testimony is generally admissible but that the trial court should in a proper case charge the jury as to the witness's potential bias in light of the fee's perceived excessiveness. It went on to find that where the party that subpoenaed the witness offers no explanation for a fee that is seemingly in excess of reasonable compensation for the witness's lost time and incidental expenses, the trial court, upon a timely request by an objecting party, must charge the jury as to the witness's potential bias. *Id.* at 712. The trial court's failure to give a potential witness bias charge in *Caldwell* was held under the circumstances of that case to constitute harmless error. *Id.* at 715.

The plaintiff tripped and fell while crossing a street at night with her dog. At the time of that incident, Cablevision Systems Corp. (CSC) had completed its installation of cable under the street where plaintiff fell, but had not yet repaved the street. The plaintiff and her husband later brought a negligence suit against CSC and others for her injuries from the fall. CSC at trial subpoenaed the doctor who had treated the plaintiff in the emergency room the morning after her fall. The doctor was not called as an expert and gave no professional opinion. Rather, he testified for one hour as a fact witness to verify his consultation note with plaintiff and the entry therein that plaintiff "tripped over a dog while walking last night in the rain." During cross-examination, the doctor testified that CSC paid him a \$10,000 fee for appearing and testifying at trial. *Id.* at 713.

New York's Civil Practice Law and Rules provides that a witness compelled to testify at trial is entitled at a minimum to a \$15 daily attendance fee and (except for travel within a city) \$0.23 per mile in mileage fees for travelling to and from the court to testify. N.Y. C.P.L.R. 8001(a) (2014). The maximum witness fee a subpoenaed witness may be entitled to receive is not specified by statute and courts in New York recognize that a subpoenaed witness may be "reasonably" compensated for time lost in complying with a subpoena. 960 N.Y.S.2d at 714. Neither CSC nor the doctor sought at trial to justify the \$10,000 fee as reasonable compensation for the doctor's one-hour testimony. *Id.* at 714.

The trial court denied the plaintiff's request to strike the doctor's testimony or, in the alternative, issue a jury charge as to the doctor's potential bias and the \$10,000 fee. It instead permitted the parties to address the fee and potential bias in their summations to the jury, and gave the jury a general witness bias charge without any reference to the doctor or the \$10,000 payment. The jury ultimately found that CSC was negligent but that its negligence was not a substantial factor in causing the plaintiff's accident. The Appellate Division later affirmed. It did find, however, that the trial court erred in not giving the jury a potential bias charge specifically addressed to the doctor's testimony, but that error was held to be harmless. Appeal was then taken to the court of appeals. *Id.* at 713-14. New York's highest court was "troubled by what appears to be a substantial payment to a fact witness in exchange for minimal testimony." *Id.* at 714. It agreed with the lower courts, however, that the doctor's fee was not a basis to exclude or strike his testimony. The defendant's payment to the doctor was not contingent upon the outcome of the case and a witness is permitted to be compensated in excess of the statutory minimum fee for the witness's actual expenses in attending court and a reasonable compensation for the loss of his or her time in testifying. *Id.* at 715.

The court of appeals, however, did agree with the plaintiff that the trial court should have issued a potential bias charge to the jury that specifically addressed the \$10,000 payment CSC made to the doctor where there was no attempt by CSC at trial to justify the payment's amount. "The distinction between paying a fact witness for testimony and paying a fact witness for time and reasonable expenses can easily become blurred," and it is for the jury to draw the line between the two. *Id.* at 715. The *Caldwell* jury, therefore, should have been instructed that a fact witness may be compensated for the loss of time and reasonable expenses and that it is for the jury to assess whether that compensation was disproportionately more than what was reasonable for the loss of that witness's time from work or business.

If it concludes that the fee paid was disproportionate, the jury need then consider whether that payment influenced the witness's testimony. A potential bias charge must be requested in a timely fashion and it is within the trial court's discretion to determine whether such a charge is warranted in the context of a payment to a particular witness. The trial court will control how much testimony at trial should be permitted relative to lost time and other expenses for which the witness is being compensated. *Id.* at 715.

While the trial court erred in not providing the jury a potential bias charge specific to the doctor's testimony, the court of appeals determined that error was harmless. There was no contention that the doctor fabricated the content of the consultation note that was the focus of his testimony, and thus the substance of his testimony was only "tangentially" related to his credibility. *Id.* at 715. Nevertheless, the decision is instructive on circumstances in which compensation paid to a subpoenaed witness may give rise to a potential bias charge.

Keywords: litigation, commercial, business, fact witness, witness compensation, witness potential bias charge, witness lost time, witness bias, *Caldwell*

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