

Caldwell v. Cablevision Systems Corp.:
The New York Court of Appeals Rules that High-Paid Witness
Testimony is Admissible, But May Require a Jury Charge as to Potential Bias

In a unanimous decision written by Judge Eugene Pigott, the New York Court of Appeals held in *Caldwell v. Cablevision Systems Corp.* that the testimony of a subpoenaed fact witness receiving a fee substantially greater than the minimum fee requirements of CPLR 8001 is generally admissible, but may require a jury charge as to the witness's potential bias "in light of the perceived excessiveness of the fee."¹

I. Background and Procedural History

Defendants Cablevision Systems Corporation and Communications Specialists, Incorporated (CSI) were sued for negligence by plaintiff Bessie Caldwell, who fell and sustained injuries on a street where defendants were installing high-speed fiber-optic cables. At trial, to rebut plaintiff's testimony that her injuries were caused when she tripped and fell in a trench dug by defendants, defendant CSI subpoenaed an emergency room physician to testify as to the authenticity of consultation notes he prepared following his examination of plaintiff's injuries, which indicated that plaintiff "tripped over a dog while walking in the rain."² The physician's testimony was limited to authenticating the notes and lasted for approximately one hour, for which he was paid \$10,000 for his time and expenses.³ Plaintiff's counsel objected to the excessiveness of the fee paid to the witness and requested that the court strike the testimony or provide a jury charge regarding the witness's compensation and potential influence on his testimony.⁴ The court refused to strike the witness's testimony and provided the jury with a general bias charge, which did not specifically reference the physician's testimony or the compensation he received for his appearance.⁵ Finding that defendants' negligence was not a substantial factor in bringing about plaintiff's injury, the jury issued a verdict in favor of defendants. Plaintiff's motion to set aside the verdict was denied and the Appellate Division affirmed the order, holding that the "substantial payment" received by the physician in connection with his testimony did not require exclusion of the witness's testimony and that although the court erred in failing to "adequately charge the jury regarding the suspect credibility of factual testimony by a paid witness," the error was harmless and did not require reversal.⁶

II. The New York Court of Appeals' Decision

The Court of Appeals affirmed the order of the Appellate Division, holding that although it was "troubled by what appears to be a substantial payment to a fact witness in exchange for minimal testimony," which may "create an unflattering intimation that the testimony is being bought or, at the very least, has been unconsciously influenced by the compensation provided," the compensation of a witness for time and reasonable expenses in excess of the minimum compensation required by CPLR 8001⁷ is not precluded.⁸ Recognizing the risk that "the

¹ *Caldwell v. Cablevision Sys. Corp.*, No 00783 slip. Op. at 2 (N.Y. Feb. 7, 2013) (hereinafter "Slip Opinion").

² Slip Opinion at 3.

³ *Id.* at 3, 8.

⁴ *Id.* at 3-4.

⁵ *Id.* at 4.

⁶ *Id.* at 4-5.

⁷ CPLR 8001(a) provides that "Any person whose attendance is compelled by a subpoena, whether or not actual testimony is taken, shall receive for each day's attendance fifteen dollars for attendance fees and twenty-three cents as travel expenses for each mile to the place of attendance from the place where he or she was served, and return."

distinction between paying a fact witness for testimony and paying a fact witness for time and reasonable expenses can easily become blurred,” the Court held that “[w]here, as here, the party that subpoenaed the witness offers no explanation for a fee that is seemingly in excess of reasonable compensation for lost time and incidental expenses, the trial court, upon a timely request by an objecting party, must charge as to the witness’s potential bias.”⁹ Specifically, the Court indicated that such a jury instruction should note that “fact witnesses may be compensated for their lost time but that the jury should assess whether the compensation was disproportionately more than what was reasonable for the loss of the witness’s time from work or business. Should the jury find that the compensation is disproportionate, it should then consider whether it had the effect of influencing the witness’s testimony.”¹⁰ The Court also noted that the trial court has discretion to determine whether the charge is appropriate in a particular case and whether to limit the scope or duration of a witness’s testimony in relation to the amount of time or other expenses for which the witness is receiving compensation.¹¹

The Court held that a jury charge was warranted in light of the “disproportionate fee for a short amount of time at trial” provided to the physician in connection with his testimony.¹² In reviewing the jury charge issued by the trial court, the Court concluded that it was insufficient because it failed to specifically address the payment defendant made to the physician in connection with his testimony.¹³ However, the Court agreed with the Appellate Division that under the circumstances the error was harmless because “the substance of the doctor’s testimony was such that the jury’s assessment was only tangentially related to the doctor’s credibility.”¹⁴

III. Significance of the Decision

By declining to categorically disqualify testimony of witnesses receiving substantial compensation in relation to the time and expenses associated with their appearances or subscribe to a blanket rule capping the maximum amount that a subpoenaed witness may be paid, but still requiring an appropriate jury charge to address instances where a disproportionately high fee has been paid, the Court’s decision strikes a balance between the need to compensate subpoenaed witnesses for the time and expenses associated with leaving their jobs and responsibilities in order to appear in court with the need to limit the risk that excessive compensation may have the effect of influencing testimony. The decision therefore draws a line “between compensation that enhances the truth seeking process by easing the burden on testifying witnesses, and compensation that serves to hinder the truth seeking process because it tends to ‘influence’ witnesses to ‘remember’ things in a way favorable to the side paying them.”¹⁵

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Jon Mark at 212.701.3100 or jmark@cahill.com; John Schuster at 212.701.3323 or jschuster@cahill.com; or Christine Mott at 212.701.3015 or cmott@cahill.com.

⁸ *Id.* at 5, 7.

⁹ *Id.* at 2, 7.

¹⁰ *Id.* at 8.

¹¹ *Id.* at 8-9.

¹² *Id.* at 7.

¹³ *Id.* at 8.

¹⁴ *Id.* at 9.

¹⁵ *Id.* at 7 (quoting Formal Opinion 668 of the New York State Bar Association Committee on Professional Ethics).