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COURT OF APPEALS

STATE OF NEW YORK

CALDWELL,

Appellant,

-against-

No. 19

CABLEVISION SYSTEMS CORPORATION,
et al.

Respondent.

20 Eagle Street
Albany, New York 12207
January 08, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.

Appearances:

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Caldwell v.
2 Cablevision.

3 Counsel, would you like any rebuttal time?

4 MR. PROFETA: Yes, one minute, Your Honor,
5 please.

6 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

7 MR. PROFETA: As you know in this case, the
8 Appellate Division held that disproportionate
9 payments to fact witnesses are improper. And
10 obviously, I - - -

11 CHIEF JUDGE LIPPMAN: Well, how do you
12 determine disproportionate when you have a - - -
13 someone who takes time from a busy practice, a high-
14 paying practice? What's disproportionate about it?

15 MR. PROFETA: Well, in this case, the
16 actual testimony was for about an hour. An hour at a
17 rate of ten - - -

18 CHIEF JUDGE LIPPMAN: It's okay to make up
19 for lost time, right?

20 MR. PROFETA: It's okay to make up for lost
21 time. That's in our - - -

22 CHIEF JUDGE LIPPMAN: But in this case,
23 it's - - -

24 MR. PROFETA: It's wildly - - - wildly - -
25 -

1 CHIEF JUDGE LIPPMAN: - - - you're arguing
2 it's so much above - - -

3 MR. PROFETA: Right.

4 CHIEF JUDGE LIPPMAN: - - - what - - - what
5 a busy doctor in a busy practice would - - -

6 MR. PROFETA: Absolutely. At this rate, he
7 was earning nineteen - - -

8 CHIEF JUDGE LIPPMAN: How do we know that?

9 MR. PROFETA: Well, if one hour of
10 testimony was worth 10,000 dollars, then he was
11 earning at the rate of 19 million a year, which he
12 wasn't.

13 JUDGE READ: Well, how do you know he
14 didn't have surgery, some complicated surgery
15 scheduled? Or that he might have scheduled some
16 complicated surgery that day, if he didn't have to
17 show up in court?

18 MR. PROFETA: He didn't say that.

19 JUDGE SMITH: Or maybe he had an expert
20 witness gig that day, and had to give it up for
21 10,000 bucks.

22 MR. PROFETA: But he never - - - he never
23 testified to any of that. There's no evidence in the
24 record on this question. He was clearly testifying
25 as a fact witness. He never made the case - - - I'm

1 giving up a surgery; I'm giving up patients at my
2 office. He simply came and testified.

3 CHIEF JUDGE LIPPMAN: The jury heard all of
4 this, though, right?

5 MR. PROFETA: The jury - - -

6 CHIEF JUDGE LIPPMAN: The jury heard the
7 basic premise that - - - the insinuation that, gee,
8 this is bribery and that kind of thing. They were
9 exposed to all of this, right?

10 MR. PROFETA: Well, they weren't exposed.
11 It was very limited - - - limited amount - - -

12 CHIEF JUDGE LIPPMAN: Yeah, but they heard
13 him testify - - - why isn't the jury to make the
14 credibility determination?

15 MR. PROFETA: Why shouldn't the jury make
16 it?

17 CHIEF JUDGE LIPPMAN: Yeah.

18 MR. PROFETA: Well, they - - - there's two
19 things to this. They didn't have the special charge
20 that the Appellate Division said is required in this
21 case. So, they didn't have the facts upon which to
22 base a determination that this was disproportionate.

23 CHIEF JUDGE LIPPMAN: Did it make a
24 difference?

25 MR. PROFETA: Did it make a difference?

1 CHIEF JUDGE LIPPMAN: Yeah.

2 MR. PROFETA: Yeah, well, look, my position
3 is that the charge that the Appellate Division
4 crafted is unworkable. It will result in a trial
5 within a trial. You will have people, who come up
6 and testify, I have a widget business and I make
7 fifty-million dollars a year, the business does, and
8 my portion is this. We can't get into those kinds of
9 things on tri - - - in cases like this.

10 JUDGE GRAFFEO: Didn't you use the expert's
11 fee here in your - - - in the summation?

12 MR. PROFETA: He mentioned the ex - - -

13 JUDGE GRAFFEO: Wasn't it also used in the
14 summation?

15 MR. PROFETA: He mentioned the expert's
16 fee, yes, he did. But as - - -

17 JUDGE GRAFFEO: So, I mean, wasn't the jury
18 aware that there was an issue of bias or whatever you
19 want to call it, purchasing testimony?

20 MR. PROFETA: Yes, the jury was aware that
21 there was an issue that he had been paid 10,000
22 dollars for this - - - for the testimony. But my - -
23 - my - - -

24 JUDGE GRAFFEO: I mean, actually, the jury
25 may have considered this case more in the plaintiff's

1 favor based on what was said as opposed to if the
2 surgeon had sat there and said, I had two complicated
3 hip replacements scheduled for this afternoon; I had
4 to cancel. I would have made 14,000 dollars this
5 afternoon, instead.

6 MR. PROFETA: But none of that was said,
7 and - - - but that's all speculation. What happened
8 is, is that in effect he was paid 10,000 dollars for
9 coming to court that day. And as I said, he really
10 testified for about forty minutes.

11 JUDGE GRAFFEO: Right, but - - -

12 MR. PROFETA: Not saying - - -

13 JUDGE GRAFFEO: But he didn't know it was
14 only going to be forty minutes beforehand. He may
15 have had to clear the whole afternoon's calendar.

16 MR. PROFETA: Let's assume that he cleared
17 the whole afternoon's calendar. And - - - well, we
18 don't know that he cleared the calendar. Let's
19 assume that he spent the afternoon there. Then at
20 this rate, he was being paid five million dollars a
21 year.

22 JUDGE PIGOTT: What, in your view, should
23 have happened?

24 MR. PROFETA: What do I - - - I think this
25 testimony should have been excluded. I think it was

1 bribery. I think Professor Siegel - - -

2 JUDGE READ: Didn't you abandon - - -

3 didn't you abandon that argument, the striking?

4 MR. PROFETA: No.

5 JUDGE READ: No?

6 MR. PROFETA: No, we did not abandon the
7 argument. The argument was made that the testimony
8 should be stricken; it's on the record. The next - -
9 - the judge said, if you've got any authority on that
10 point, come back and give it to me.

11 JUDGE READ: The next day, and then when
12 they talked about it the next day, there's was no - -
13 - attorneys said nothing about striking the
14 testimony.

15 MR. PROFETA: Well, that wasn't the issue.
16 The judge started out by saying you have a charge, I
17 understand, counselor. There was nothing on the
18 record to the effect that I abandoned that. I mean,
19 this court in Persky said, you don't have to keep
20 repeating these things. If you made the point that
21 this should be stricken, you don't even have to give
22 any argument. You don't have to give any cases.
23 That's the court's - - -

24 JUDGE SMITH: In this case, wasn't it - - -
25 I mean, I - - - assuming it's troubling. Maybe it is

1 a little troubling that he got all this money for an
2 afternoon's work. But could he possibly have said,
3 and can you imagine him saying anything other than
4 what he said, which is, I don't remember the record,
5 but this is what's written down?

6 MR. PROFETA: Oh, yeah. I think it made a
7 big difference in this case. I think, for example -
8 - - look, the main issue in this case was causation.
9 It was - - - how did this come about? It's very
10 simple. Was it the defendant's trench or - - - which
11 the plaintiff said - - -

12 JUDGE SMITH: Yeah, but he did - - - but
13 the witness didn't have recollection of what she
14 said. He had a note of what she said back then. He
15 wasn't bribed to write the note. You're not claiming
16 that.

17 MR. PROFETA: No, he wasn't bribed to write
18 the note, no. We don't make that claim. But - - -

19 JUDGE SMITH: So, and - - - and his
20 testimony was just - - - essentially just to
21 authenticate the note, so what's the big deal?

22 MR. PROFETA: Well, the big deal, Judge - -
23 - well, there's a couple of big deals. But the
24 biggest deal, I think, is that this man comes in, he
25 testifies - - - he testifies to account of the

1 accident that nobody else gives. The other doctor,
2 the nurse on the record, they don't say anything
3 about tripping over a dog. The plaintiff says how it
4 happened. He says she tripped over the dog.

5 JUDGE READ: Well, he's relying on his
6 contemporaneous note. And his testimony, as Judge
7 Smith said, really didn't go beyond that.

8 MR. PROFETA: Well, what he said, though,
9 is - - - I mean the whole point of the cross-
10 examination was, are you sure that this is what
11 happened in this case? Don't you ever make a mistake
12 when you do - - - when you take a history? And his
13 answer was, no, I never recall making a mistake in a
14 history.

15 JUDGE SMITH: Is that so unfair - - -

16 JUDGE READ: But the jury could consider
17 that.

18 MR. PROFETA: Pardon?

19 JUDGE READ: The jury could consider that.

20 MR. PROFETA: They did. But the point is
21 that's the - - - look, he came - - -

22 JUDGE GRAFFEO: There is a distinction
23 between a witness, say, in a car accident case, who's
24 on the witness stand, and relaying what they saw, and
25 what happened. I can see where your argument about

1 an excessive payment to there, I think, is far more
2 critical than where someone's just reciting what's in
3 a business record. Isn't there a distinction?

4 MR. PROFETA: There's a - - - there's a
5 distinction. I mean, if somebody's coming in and
6 says the light was red or if he says - - - and he's
7 coming in and saying that's what I wrote. But he's
8 saying that's what I wrote and it's absolutely right.
9 I got it right; I didn't get it wrong.

10 JUDGE SMITH: So, your point really is if -
11 - - to be cynical - - - if you'd paid him the 10,000
12 instead of the other side, maybe he would have said,
13 oh, yeah, I make mistakes all the time. You can't
14 rely on those records at all.

15 MR. PROFETA: Well, certainly if he were
16 being - - - if he were being candid, Your Honor, he
17 would have said, yeah, sometimes I make mistakes.
18 Look, let me tell you what I think the proof of the
19 pudding is here. He comes in. The defense knows
20 what he's going to say. They know what they want him
21 for. He's coming in and he's going to testify for an
22 hour, that's what she told me. They decide to pay
23 him 10,000 dollars for that.

24 They say - - - in summation to the jury,
25 the defense attorney says, look, I had no choice; I

1 was behind - - - between a rock and a hard place.
2 He's demanding 10,000 dollars to come in here. I
3 have to pay him; I have no choice. Why did he have
4 no choice? He only had no choice if he couldn't live
5 without that - - - that doctor's testimony.

6 JUDGE PIGOTT: That's why I asked you what
7 the remedy was. It's not necessarily to strike the
8 testimony. You can make that motion, but then
9 shouldn't there be on the defense side, an opposition
10 to your motion to strike, saying this is not a bribe;
11 this is because he wouldn't come if I didn't pay it.
12 And then you'd - - - and then you have a record upon
13 which to base this.

14 MR. PROFETA: Well, there never - - - there
15 wasn't that - - - there wasn't that argue - - - they
16 just submitted a memorandum on the issue. I don't -
17 - -

18 JUDGE GRAFFEO: If we agree with you,
19 looking more globally, what are you suggesting that
20 we should propose as the proper procedure?

21 MR. PROFETA: That this should result - - -
22 when somebody gets a - - - all the commentators say -
23 - -

24 JUDGE GRAFFEO: I take it you're not saying
25 they should be limited to only fifteen dollars.

1 MR. PROFETA: No.

2 JUDGE GRAFFEO: Or are you saying that?

3 MR. PROFETA: No, I am not saying that.

4 I'm not suggest - - - the defendant accuses me of
5 saying that. I've never said that. He should get a
6 reasonable amount. This was wildly unreasonable.

7 JUDGE GRAFFEO: Okay. So, what would you
8 want our court to say should be the proper trial
9 procedure?

10 MR. PROFETA: I would like this court to be
11 in line with the other authorities around the
12 country. When the amounts are paid that are this
13 disproportionate, when they have the odor of bribery,
14 they reflect very poorly on the judicial process when
15 a man is paid 10,000 dollars for this - - -

16 JUDGE SMITH: Are you - - - are you saying
17 they always have the odor or are you saying the court
18 has to sniff each one and decide whether it has the
19 odor of bribery?

20 MR. PROFETA: I - - - I'm saying - - - no,
21 they don't - - -

22 JUDGE GRAFFEO: I'm looking for the general
23 rule - - -

24 MR. PROFETA: Yes.

25 JUDGE GRAFFEO: - - - that's going to apply

1 to other cases.

2 MR. PROFETA: I understand; I'm sorry. I'm
3 getting off. Judge Graffeo, I think the point is - -
4 - the rule is if it's disproportionate in amount,
5 then the evidence should be excluded, because it's
6 not - - - its prejudicial value outweighs its
7 probative value.

8 JUDGE READ: And who has the burden of
9 showing it's disproportionate?

10 MR. PROFETA: The plaintiff has the burden
11 of showing that the payment is - - -

12 JUDGE SMITH: The party complaining - - -

13 MR. PROFETA: Yeah, yeah.

14 JUDGE SMITH: - - - of the payment.

15 MR. PROFETA: Sure, the plaintiff does.

16 JUDGE READ: And it just goes to payment?
17 What about if the witness is brought in - - - I don't
18 know - - - put up at the Ritz, taken out to dine at a
19 five-star restaurant, you know, transported from - -
20 - you know, if a limousine meets the airplane. What
21 about things like that? Does that qualify too?

22 MR. PROFETA: That's covered in the
23 disciplinary rule. He's supposed to be reimbursed
24 for the reasonable time - - -

25 JUDGE READ: Yeah.

1 MR. PROFETA: - - - and expenses. That
2 would be - - - that would also be abusive, and - - -

3 JUDGE READ: That would be abusive, too,
4 rather than going and saying, you've got to go to the
5 Holiday Inn. I don't mean to cast aspersions on the
6 Holiday Inn, but - - - meaning that, you know, you
7 have to go to a lower level of luxury in terms of
8 your lodging.

9 MR. PROFETA: Judge, I'm not - - - I'm not
10 - - - I'm not pretending to be able to tell you where
11 to draw the line, but when something is so
12 disproportionate as this, the line is clearly
13 somewhere way before this.

14 JUDGE GRAFFEO: Is this procedure done in
15 limine, or are you saying as soon as that person gets
16 on the witness stand and is cross-examined, the
17 testimony should be stricken? I'm still trying to
18 figure out the process - - -

19 MR. PROFETA: Okay, yeah, I understand.

20 JUDGE GRAFFEO: - - - that you're
21 recommending.

22 MR. PROFETA: Sure. No, I don't think it
23 should be done - - - it shouldn't be done while the -
24 - - while he's on the stand. I mean, he should be
25 able to complete the cross-examination. I suppose at

1 Wait a minute.

2 MR. SIMONE: - - - and I agree with some -
3 - -

4 JUDGE PIGOTT: You got - - - you got a
5 disinterested witness, I take it, that you can serve
6 a subpoena on and he's got to show up, or you could
7 send a sheriff out to arrest him.

8 MR. SIMONE: Well, Judge - - -

9 JUDGE PIGOTT: It's that - - - wait a
10 minute. And it's that simple. Now, if he wants to
11 call up and say, you know, I - - - you know, I'm an
12 orthopedic surgeon and you may want to change careers
13 and be me, but as far as I'm concerned, in an
14 afternoon, I'm going - - - you know, I'm going need X
15 number of dollars.

16 And if that's, you know - - - then you say,
17 well, you've got to talk to the court about that,
18 because I'm not about to give you 10,000 dollars to
19 come in here and spend an hour to say what you could
20 have said if you were a steel worker, because the
21 only thing you've got to testify to is a simple fact.

22 And - - - and it would seem to me that's
23 when these decisions have to be made, when you've got
24 a judge deciding this stuff. I don't think the
25 doctors, simply because they're doctors, can say, you

1 know, I'm 10,000 dollars an hour. Wouldn't you
2 agree?

3 MR. SIMONE: Well, I agree that on this - -
4 - I agree with something Mr. Profeta said in that,
5 there's no evidence on this record as to what he gave
6 up. And the reason there isn't is because the
7 plaintiff didn't avail himself for the cross-
8 examination.

9 JUDGE SMITH: Well, but - - - well, but, I
10 mean, he - - - wouldn't you think that maybe the - -
11 - I'm kind of sympathetic to your client here. I - -
12 - I'm wondering what he spent his 10,000 dollars for.
13 But wouldn't you expect the defense lawyer in this
14 situation to say, Doctor, that seems a little high.
15 Could you explain to me why you need 10,000 bucks for
16 an afternoon's work?

17 MR. SIMONE: I think those are
18 conversations that certainly would occur, and in this
19 case - - -

20 JUDGE SMITH: I mean, shouldn't - - - I
21 mean, shouldn't you - - - when you have this kind of
22 situation, which should at least set a few antennae
23 quivering, shouldn't you at least say, look, in case
24 I have to tell the court why you're getting 10,000,
25 give me a story to tell them?

1 MR. SIMONE: I think those are - - -

2 JUDGE SMITH: And there's no explanation on
3 the record. That's what the doctor gets, 10,000.

4 MR. SIMONE: Well, honestly, on this
5 record, I don't think that the trial attorney himself
6 knew that had occurred, because it was handled by an
7 associate. I think that's what the record brought
8 out, but - - -

9 JUDGE SMITH: But there was a period - - -
10 he had some time to inform himself and collect
11 himself. I mean, I - - -

12 MR. SIMONE: Well, Dr. Krosser was called
13 to come in to authenticate a record that we needed in
14 evidence, okay? That record was important to the
15 case. The note was important, and plaintiff didn't
16 take any issue with his testimony at trial. He took
17 issue with the note.

18 JUDGE SMITH: But suppose - - -

19 JUDGE GRAFFEO: Once the defense attorney
20 heard the cross-exam, he had to realize that there
21 was an issue being made about the 10,000 dollars. I
22 don't understand why - - - I mean, the record gives
23 the impression that they didn't have a legitimate
24 reason for paying the 10,000.

25 MR. SIMONE: To touch on something you said

1 before, when you were talking about the global rule
2 here. You have to deal with the realities of
3 litigation in New York, okay? And the reality is
4 that both parties, both sides, routinely pay fact
5 witnesses, and, especially treating doctors, for
6 their time. They don't get fifteen dollars a day,
7 and they don't get twenty - - -

8 JUDGE GRAFFEO: Well, certainly, but it's
9 the amount that we're looking at here.

10 MR. SIMONE: True, true.

11 JUDGE GRAFFEO: When there's a question of
12 excessiveness, what should be the procedure?

13 MR. SIMONE: I think the procedure - - -
14 the rule should be what the trial judge did. You
15 cross-examine and sum up; let the jury decide. What
16 the Appellate Division did was take it a step
17 further. They needed a little bit more guidance.
18 Give them a little bit more guidance. And that's
19 fine. But, honestly, I think the juries can assess
20 these issues just like anything else. When you're
21 dealing with the admissibility of testimony, it
22 always - - - you always have that phrase "it goes to
23 - - - it goes to weight, not admissibility." This is
24 no different.

25 JUDGE SMITH: But suppose you had exactly

1 this case with the same - - - same case, same doctor,
2 same record, but the plaintiff subpoenaed the doctor,
3 paid him 10,000 dollars. The doctor came in and
4 said, yeah, I wrote that record, but you know, I
5 can't - - - I'm pretty sure she didn't say that. I
6 think I got it wrong. Would that - - - would that
7 create a problem?

8 MR. SIMONE: I think those are all factors
9 to go in. What if he honestly did get it wrong?

10 JUDGE SMITH: Okay.

11 MR. SIMONE: In this case, contrary - - -

12 JUDGE SMITH: And on those facts, could the
13 judge preclude the testimony?

14 MR. SIMONE: I don't think preclusion is a
15 remedy in this case for anything.

16 JUDGE PIGOTT: Well, you're introducing - -
17 - you're introducing an element that shouldn't be
18 there, is kind of the point. In other words, this
19 doctor couldn't remember - - - he could have been - -
20 - he could have been a maintenance man standing next
21 to the - - - wherever this lady was talking about
22 what happened to her, and he said, yeah, I heard her
23 say that she tripped over her dog, all right. And if
24 you subpoenaed the maintenance man, he - - - and paid
25 him 10,000 dollars, people would be, you know, pretty

1 concerned, it would seem to me.

2 MR. SIMONE: Judge - - -

3 JUDGE PIGOTT: So by introducing the
4 payment, you put a wild card in the deck, and that's
5 the one, it seems to me, that the judge ought to be
6 addressing, or somebody.

7 MR. SIMONE: Well, I agree, and I think
8 that in certain circumstances, as the Appellate
9 Division found, there are times when the payment can
10 be, as a matter of law, disproportionate. For
11 example, if we had a, you know, - - - it's an
12 accident, a car accident, and you're pulling a
13 witness off who witnessed the accident. And this
14 person is - - - I'm not trying to disparage anybody,
15 but - - - an employee at minimum wage.

16 Bringing them to court for a half a day
17 where all he loses is his time from work, 10,000
18 dollars would - - - as I think we'd all agree - - -
19 would be disproportionate; 5,000, maybe even 1,000.
20 But if I had to bring Donald Trump or Warren Buffett
21 to court for half a day, 10,000 dollars wouldn't
22 begin to compensate them.

23 JUDGE PIGOTT: But would you - - - I guess,
24 what I'm - - -

25 MR. SIMONE: So, that's why the jury needs

1 to decide this.

2 JUDGE PIGOTT: What's troubling me is why -
3 - - why are you making the deal? I mean, can it - -
4 - can it - - - I mean, he's got to be there. So, he
5 can complain all he wants, and you can say, show up,
6 or we're going to send a sheriff, and if you want to
7 talk to the judge about the fact that you're being
8 pulled out whatever your profession is, and that it's
9 costing you money, well, then talk to the judge about
10 it, and if he orders me to pay you, I will.

11 MR. SIMONE: Well, I think that - - - I
12 think those are concerns that you have to make. You
13 have to measure the need for this witness versus the
14 appearance that you're going to present to the jury.
15 And it goes back to realities. Parties don't want to
16 have the sheriffs hauling - - -

17 JUDGE SMITH: No, but doesn't it affect - -
18 - but doesn't affect all of us as a profession? If
19 we now say, whichever law firm has the most money,
20 and goes to witnesses and say, look, you know,
21 there's a limit, but I understand that you're going
22 to take a lot of time off, you know, maybe you had a
23 vacation planned that you're now going to have to
24 cancel.

25 Anyway, give it some thought, and what do

1 you think? Six grand to get you in here to say the
2 opposite of what you said to the police at the time
3 of the accident? That's the concern people have - -
4 -

5 MR. SIMONE: Right.

6 JUDGE PIGOTT: - - - is that all of a
7 sudden we're paying for testimony and not for time.
8 And so, I guess, we're searching for a rule - - -

9 MR. SIMONE: Right.

10 JUDGE PIGOTT: It would seem to me in the
11 perfect world here, when the doctor called, you would
12 have said, we're not paying it. You've got to apply
13 to the court. You've got to give me something I can
14 take to the court, maybe, that says this is what, you
15 know, this is why you want to get this money. But I
16 can't simply say ten grand to come in here, and say
17 you don't remember what you did, but you don't make
18 mistakes when you make out your pre-admission - - -

19 MR. SIMONE: I think that goes back to the
20 realities of litigation. Those are the things that
21 have to be made - - - those are the decisions that
22 have to be made, and the conversations that have to
23 be had. But - - -

24 JUDGE GRAFFEO: I mean, I understand that
25 the defendant here felt it was important to get this

1 doctor's testimony. But would it be that much of a
2 stretch to say that during that conversation you
3 should ask the physician, are you going to be able to
4 justify a 10,000-dollar fee?

5 MR. SIMONE: I think those are - - - those
6 are things that - - -

7 JUDGE GRAFFEO: Because none of this is
8 apparent on the record.

9 MR. SIMONE: Well, but it's not apparent on
10 the record, because it wasn't asked by him, by the
11 plaintiff, and they're the proponent of the remedy.

12 JUDGE PIGOTT: Did defendant know - - -

13 MR. SIMONE: The same thing would apply to
14 us if the plaintiff were the one who wants - - -

15 JUDGE PIGOTT: Did the defendant know,
16 though, when he's bringing him in that he's paid him
17 10,000 grand?

18 MR. SIMONE: I - - - I can't tell on this
19 record.

20 JUDGE PIGOTT: Yeah - - -

21 MR. SIMONE: I mean, I don't think defense
22 counsel did, but - - -

23 JUDGE PIGOTT: Another alternative, of
24 course, could have been that you could have videoed
25 the guy. In other words - - -

1 MR. SIMONE: True.

2 JUDGE PIGOTT: - - - say, don't take - - -

3 MR. SIMONE: Well - - -

4 JUDGE PIGOTT: - - - you know, tell us when
5 your surgery's over, doctor. We'll be down there,
6 and we'll take your video, and we're going to ask you
7 ten questions with respect to this report.

8 MR. SIMONE: Right. I mean, again, the
9 purpose of him being there was to authenticate this
10 record to get it into evidence, and it was an
11 important note. Did it affect the case? No, and I
12 have a harmless error analysis for that. I don't
13 think it had any effect on this case at all. But
14 getting back to reality - - -

15 CHIEF JUDGE LIPPMAN: Did you find - - -
16 did you feel you had any viable alternative to just
17 paying him the 10,000 dollars?

18 MR. SIMONE: I can't - - - I can't speak to
19 that, Your Honor, I'm sorry. I mean, I wasn't there,
20 so.

21 JUDGE SMITH: I mean, isn't - - - isn't it
22 a - - - I mean, I guess, what's bothering me, maybe
23 some of the rest of us, about the case is why at some
24 point in this trial - - - why didn't the lawyer, who
25 made the decision to pay the 10,000, stand up and

1 explain to the judge why - - - I guess, it was a she
2 - - - made that decision?

3 MR. SIMONE: I don't know. I can't answer
4 that question on this record. I think, though,
5 getting back to the sheriff and things like that. In
6 state court, courts don't send - - - don't dispatch a
7 sheriff to get a subpoena witness. It doesn't
8 happen.

9 JUDGE PIGOTT: Yes, it does.

10 MR. SIMONE: And - - - well, it doesn't
11 happen that often.

12 JUDGE PIGOTT: Not often, I agree with you.

13 MR. SIMONE: I would - - - doesn't happen
14 often. And if it - - - and if it was a regular
15 practice, you know, you'd have every trial grinding
16 to a halt while you wait. And frankly - - -

17 JUDGE SMITH: If you tell the judge the guy
18 says he wants 10,000 to show up, the judge might be
19 stimulated to send the sheriff.

20 MR. SIMONE: And, but - - - you know what?
21 Parties don't want the sheriff hauling their
22 witnesses into this - - -

23 JUDGE SMITH: Yeah, of course.

24 MR. SIMONE: - - - nobody's in favor of
25 that. And frankly, when you - - -

1 JUDGE SMITH: But that's the problem. You
2 want to - - - you want to be very nice to the
3 witness, because - - -

4 MR. SIMONE: Right.

5 JUDGE SMITH: - - - you're afraid he'll
6 hurt you, but that's obviously opens the door to
7 abuse.

8 MR. SIMONE: When you pay a witness,
9 whether their expert or fact, a fee to be in court,
10 that always inures to your detriment, not the other
11 party. So, nobody wants to do this. Nobody wants to
12 pay these witnesses.

13 JUDGE PIGOTT: Well, take the flip side.

14 MR. SIMONE: That's why you have to measure
15 it.

16 JUDGE PIGOTT: I realize you're on the
17 defense side in this, but let's assume there is an
18 IME here, and the IME turned out fairly good for the
19 plaintiff. Now the plaintiff can subpoena that
20 person in, that doctor, and doesn't have to pay him a
21 nickel, and it's fifteen bucks. I mean, he can make
22 an application.

23 But if it's your doctor and plaintiff is
24 subpoenaing him because he likes what he says,
25 there's no friendship there, and they come in, and

1 have someone - - -

2 JUDGE SMITH: - - - if she's telling you;
3 it's admissible against her.

4 MR. SIMONE: Well, it's only admissible to
5 - - - if it's germane to treatment, and this was a
6 bifurcated trial. So, this - - - not every statement
7 in a record necessarily will come will come in if
8 it's said by a party.

9 JUDGE GRAFFEO: So, you don't think there's
10 any obligation of the defendant's attorney to explain
11 why such a large payment was made?

12 MR. SIMONE: I think that - - -

13 JUDGE GRAFFEO: Because it leaves us with a
14 lot of speculation.

15 MR. SIMONE: The problem with this case is,
16 I don't think this case allows you to make a
17 determination that 10,000 dollars, necessarily, was
18 disparate. I think it's more obvious in other cases.
19 So, you know, this record isn't really - - -

20 JUDGE PIGOTT: That's even more troubling.

21 MR. SIMONE: Well, that's - - - this is not
22 a great record for - - - to propagate this rule.

23 JUDGE SMITH: You're saying you've got a
24 bargain?

25 MR. SIMONE: But I think in the end, the

1 rule is: let the jury decide this, and I think the
2 Appellate Division tweaked the standard charge, but
3 frankly, I don't think that charge is going to get a
4 lot of airtime, because I don't think either party is
5 going to want it.

6 CHIEF JUDGE LIPPMAN: Do you think the jury
7 was able to see this situation and judge it for
8 whatever it was?

9 MR. SIMONE: Just like any other - - - just
10 like any other party. You know, that's really what
11 it comes down to.

12 CHIEF JUDGE LIPPMAN: Okay, counsel.

13 MR. SIMONE: But again, harmless error - -
14 -

15 CHIEF JUDGE LIPPMAN: Okay.

16 MR. SIMONE: - - - on this record. Thank
17 you.

18 CHIEF JUDGE LIPPMAN: Counsel, why did - -
19 - why did it make a difference - - - the doctor's
20 testimony? How did it make a difference in the
21 outcome of this case?

22 MR. PROFETA: Well, it made a difference
23 because - - - look, the reality is that this firm
24 uses this doctor a lot in cases. They know how he
25 testifies. He has a certain persuasive demeanor.

1 You can't tell that, now, from this record, but this
2 defense attorney said, I'm between a rock and a hard
3 place. If I don't pay him, he's not coming in. Why
4 was he so important? He was the only guy who came in
5 live and said this is what she told me.

6 JUDGE PIGOTT: Plus it was bifurcated.
7 You're only doing liability at that point.

8 MR. PROFETA: Yeah.

9 JUDGE PIGOTT: I mean, the other doctors
10 come in later. But if you had to bring in your
11 doctor on the - - - assuming you got the damages - -
12 - you'd pay him or her a lot of money to come in.

13 MR. PROFETA: If we'd come for damages. As
14 an expert.

15 JUDGE PIGOTT: You'd be talking - - -
16 right, you'd be talking about - - -

17 MR. PROFETA: As an expert testimony - - -
18 look, I'm bothered, Judge Pigott, about the disparity
19 between expert witnesses and fact witnesses. But
20 we're not - - - and that's not this case. That's
21 something we can discuss sometime. The expert
22 witnesses get way too much money, also.

23 But in this case, for this amount of
24 testimony, this was sort of ridiculous. Now - - -

25 JUDGE GRAFFEO: Do you have any

1 disagreement with the current PJI charge?

2 MR. PROFETA: Yes. I don't like that
3 charge at all. I think that - - - I don't think a
4 charge should be given. I think the testimony should
5 simply be excluded, because that is - - -

6 CHIEF JUDGE LIPPMAN: But this charge
7 wasn't so much better than the other charge, the PJI
8 charge, right?

9 MR. PROFETA: The PJI charge is more - - -
10 I - - - look, if I had to take the PJI charge, I
11 would take it. When - - -

12 CHIEF JUDGE LIPPMAN: Would it have made a
13 difference, this charge versus that charge?

14 MR. PROFETA: No, I just think - - - I
15 don't think it should be a charge. I think it should
16 simply be excluded.

17 CHIEF JUDGE LIPPMAN: So you're saying you
18 strike it and that's the end of the story.

19 MR. PROFETA: That's the end of it. And
20 let me tell you why - - -

21 CHIEF JUDGE LIPPMAN: By what standard?
22 What standard?

23 MR. PROFETA: Disproportionality.

24 CHIEF JUDGE LIPPMAN: I know, but how does
25 - - - how does one determine disproportionate?

1 MR. PROFETA: Well, easily, when somebody's
2 been paying a wage - - - an hourly wage. There's a
3 guy; he digs a ditch; he repairs a light. You know,
4 he - - -

5 CHIEF JUDGE LIPPMAN: Okay, but what about
6 a doctor in a fancy medical practice?

7 MR. PROFETA: Pardon?

8 CHIEF JUDGE LIPPMAN: What about a doctor
9 in a prosperous medical practice?

10 MR. PROFETA: Well, if it's a doctor, and,
11 you know, and we can find out how much he makes per
12 hour. He wasn't making 10,000 dollars an hour. So,
13 I mean, that's - - - that's why it was
14 disproportional.

15 CHIEF JUDGE LIPPMAN: So he's got to look
16 at it and figure out, let me see, what does this guy
17 earn? He's asking me 10,000 dollars. Gee, what
18 should it be?

19 JUDGE PIGOTT: Well, you know - - - you
20 know, it's more than that. He's got to prepare; he's
21 got to come down; he's got to sit; he's got to wait;
22 he's got to get examined; he's got to go home.

23 MR. PROFETA: That's what - - - well,
24 Judge, that's what an expert does. But that's not
25 what this guy did. This guy's coming in to say - - -

1 JUDGE SMITH: Yeah, he still has to do the
2 sitting and waiting.

3 MR. PROFETA: He - - - pardon?

4 JUDGE SMITH: The sitting and waiting, they
5 both do.

6 MR. PROFETA: Well, he's sitting and
7 waiting. He's sitting and waiting to talk about his
8 record, and to talk about what she told him about
9 this dog in a forceful way. He's paid 10,000
10 dollars. He's not going to vary on this account.
11 He's going to tell that with as much force and vigor
12 as he can, and that's what carried the day in this
13 case. And I just want to say this - - -

14 CHIEF JUDGE LIPPMAN: Okay, counsel.
15 Finish off, the red's light on.

16 MR. PROFETA: I know - - - I understand.
17 But - - -

18 CHIEF JUDGE LIPPMAN: Go ahead.

19 MR. PROFETA: My adversary says that this
20 is routine practice in the city, in the state. Look,
21 it's time - - - if that's the case - - - that it stop
22 being routine practice. I didn't do it when I was
23 practicing trial law. We didn't - - - I was - - - I
24 knew the rule about reasonableness. And I want to
25 say this: it's very important to have the

1 exclusionary rule for this purpose. In this case,
2 Judge Pigott, if this rule - - - if it gets excluded,
3 when the doctor comes up and says, I'm coming in to
4 say the light was red, but - - -

5 JUDGE PIGOTT: What if he gives the money
6 back? Because apparently what he - - - he didn't - -
7 - he didn't commit perjury.

8 MR. PROFETA: How come he didn't get the -
9 - -

10 JUDGE PIGOTT: Well, I mean, you want to
11 exclude some very important testimony for the
12 defense. I don't blame you. But if you're saying,
13 wait a minute, he's getting 10,000 dollars for his
14 testimony, and he's, well, I'll give the money back,
15 but I still don't remember - - - and that's what I
16 put in the chart, and there you are.

17 MR. PROFETA: Well, what I want to say very
18 quickly because I know my time is up. If there's an
19 exclusionary rule, attorneys won't have this problem.
20 Doctor comes up and says ten grand for this, the
21 attorney will say, I can't do that; it's going to
22 come out on cross that you get the ten grand; that
23 testimony's going to be worthless. If there's an
24 exclusionary rule, as there is in other states, this
25 can't happen.

1 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
2 you.

3 MR. PROFETA: Thank you.

4 CHIEF JUDGE LIPPMAN: Thank you both.
5 Appreciate it.

6 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of CALDWELL v. CABLEVISION SYSTEMS CORPORATION, No. 19 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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