

reason.⁸ The judge also instructed the jury that questions asked during the trial are not evidence. The jury are presumed to follow the judge's instructions. *Commonwealth v. Degro*, 432 Mass. 319, 328, 733 N.E.2d 1024 (2000). There was no error and no need to give additional instruction, particularly when there was no further reference to the booking videotape.⁹

[8] The defendant alleges additionally that the prosecutor's assertion that the police were "familiar" with him was improper and prejudicial because it suggested that the police had "undisclosed [u]negative information about him." There was no objection to the question. Any impropriety was rendered moot by the prosecutor's impeachment of the defendant with numerous prior convictions, and by a police officer's earlier testimony that he had known the defendant for about twenty-one years.

Judgments affirmed.



8. It is improper to pose such a question asking whether a witness "would be surprised" by certain facts. The witness's state of mind regarding the booking videotape is irrelevant; it has no "rational tendency to prove an issue in the case." *Commonwealth v. Quincy Q.*, 434 Mass. 859, 875, 753 N.E.2d 781 (2001), quoting *Commonwealth v. Fayerweather*, 406 Mass. 78, 83, 546 N.E.2d 345 (1989).

9. To the extent that the defendant complains that there was no basis for inquiring at all about the videotape of the booking, the trial

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J. Sean FABRE

v.

Amalia WALTON.

Supreme Judicial Court of Massachusetts,
Suffolk.

Argued Jan. 5, 2004.

Decided Feb. 9, 2004.

Background: After former girlfriend obtained protective order against former boyfriend, he brought action for abuse of process against her. The District Court Department, Cambridge Division, Suffolk County, Severin B. Singleton, J., denied girlfriend's special motion to dismiss under statute barring suits based on petitioning (anti-SLAPP statute). Girlfriend applied for leave to prosecute an interlocutory appeal. After Cowin, J., sitting as a single Justice, allowed application, the Supreme Judicial Court, 436 Mass. 517, 781 N.E.2d 780, reversed and remanded. Thereafter, Cordy, J., sitting as a single Justice, ordered boyfriend to pay girlfriend 56,510 in appellate attorney fees and costs. Boyfriend appealed.

Holding: The Supreme Judicial Court, Greaney, J., held that the determination as to whether, and in what amount, appellate attorney fees are to be awarded will no longer be a matter left solely to a single Justice of the Supreme Judicial Court in

record indicates the existence of the tape: a police officer had already testified that the defendant's booking was videotaped. There was no allegation that the videotape shows a string on the defendant's pants. Thus, it appears that the prosecutor had a basis for asking the question. However, even if there had been no reasonable basis for the question, there still would have been no error, because the judge curtailed this colloquy after one question. See *Commonwealth v. Christian*, *supra* at 563, 722 N.E.2d 416.

the first instance, and henceforth, the Justices who heard and decided the appeal will consider the supporting legal arguments and documentation and set the specific amount to be awarded, abrogating *Stowe v. Bologna*, 417 Mass. 199, 629 N.E.2d 304, and *Edgar v. Edgar*, 406 Mass. 628, 549 N.E.2d 1128.

Affirmed.

1. Costs \Leftrightarrow 264

In cases where a party seeks an award of appellate attorney fees, he or she must make that request in the appellate brief.

2. Costs \Leftrightarrow 264

The determination as to whether, and in what amount, appellate attorney fees are to be awarded will no longer be a matter left solely to a single Justice of the Supreme Judicial Court in the first instance, and henceforth, the Justices who heard and decided the appeal will consider the supporting legal arguments and documentation and set the specific amount to be awarded; abrogating *Stowe v. Bologna*, 417 Mass. 199, 629 N.E.2d 304, and *Edgar v. Edgar*, 406 Mass. 628, 549 N.E.2d 1128..

3. Costs \Leftrightarrow 264

A party who prevails on appeal before the Supreme Judicial Court is directed to file with the clerk of the court for the Commonwealth his or her submission detailing and supporting the appellate attorney fees and costs sought; the opposing party will be afforded a reasonable opportunity to respond to that submission, and the Supreme Judicial Court will then enter an appropriate order, with any party aggrieved by the order allowed to request reconsideration, with the Supreme Judicial Court acting on that request as well.

John P. Fulginiti, Boston (Ann Wagner with him) for the defendant.

Bruce T. Macdonald, Cambridge, for the plaintiff.

Present: MARSHALL, C.J.,
GREANEY, IRELAND, SPINA, COWIN,
& SOSMAN, JJ.

GREANEY, J.

Sean Fabre appeals from an order of a single justice of this court requiring Fabre to pay Amalia Walton \$56,510 in appellate attorney's fees and costs. The single justice's order followed the full court's determination that Walton was entitled to fees and costs pursuant to G.L. c. 231, § 59H (anti-SLAPP statute). See *Fabre v. Walton*, 436 Mass. 517, 525, 781 N.E.2d 780 (2002) (stating that "Walton may apply to the single justice for an award of attorney's fees and costs in connection with the appeal").

On appeal, Fabre does not challenge the amount of the appellate attorney's fees and costs the single justice required him to pay. Rather, he challenges Walton's entitlement to such fees and costs. That issue, however, already was determined by the full court when it denied Fabre's petition for rehearing, which raised 110 (for the first time) the same issues he presses here. *Edgar v. Edgar*, 406 Mass. 628, 630, 549 N.E.2d 1128 (1990) (where liability for appellate attorney's fees was established in original appeal, court need not reexamine issue in appeal from single justice's award of fees).

Walton requests that we award her additional attorney's fees and costs related to this appeal. We allow her request. Because this appeal is an extension of the original appeal, an award of appellate attorney's fees and costs is appropriate here as well.

[1] In cases where a party seeks an award of appellate fees, he or she must make that request in the brief. See *Yorke Mgt. v. Castro*, 406 Mass. 17, 20, 546 N.E.2d 342 (1989). We take this opportunity to announce a new procedure on the award of appellate attorney's fees and costs. The practice in this court until now has been for the court to refer the application for fees and any supporting legal arguments and documentation to a single justice (usually the author of the court's opinion) to determine the amount of the award, where appropriate. See *id.* This practice has often (as is the case here) led to another appeal—from the decision of the single justice to the full court—either disputing the amount of the award by the single justice or (in some instances, but again the case here) to reargue the question of entitlement to an award, even though the court has previously directed that, on application, an award be made. See, e.g., *Stowe v. Bologna*, 417 Mass. 199, 200, 629 N.E.2d 304 (1994); *Edgar v. Edgar*, *supra*. It is this portion of the process that we revise today.

[2, 3] In fee requests filed after the date of this opinion, the determination as to whether, and in what amount, appellate attorney's fees are to be awarded will no longer be a matter left solely to a single justice in the first instance. Henceforth, the Justices who heard and decided the appeal will consider the supporting legal arguments and documentation and set the specific amount to be awarded. Thus, a party who prevails on appeal before this court is directed to file with the clerk of

1. In many cases a hearing will be unnecessary. The court will base the order on the parties' respective written submissions. If a hearing is needed for any reason, the court may refer the matter to a single justice in order to conduct the hearing and make an appropriate recommendation to the quorum; the quorum, not the single justice, will be

the court for the Commonwealth his or her submission detailing and supporting the attorney's fees and costs sought; the opposing party will be afforded a reasonable opportunity to respond to that submission; and the court will then enter an appropriate order.¹ Any party aggrieved by the order may request reconsideration, and the court will act on that request as well.

Walton shall have the benefit of this new practice on her request for appellate attorney's fees and costs with respect to this appeal. She may file her application for fees and costs, with any appropriate supporting materials, with the clerk of the court for the Commonwealth within fourteen days of the date of the rescript.

Judgment affirmed.



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12 Donna CURCURI¹

v.

ROSE'S OIL SERVICE, INC. (and
four companion cases²).

Supreme Judicial Court of Massachusetts,
Suffolk.

Argued Oct. 9, 2003.

Decided Feb. 9, 2004.

Background: Widows of four crew members, who were lost at sea and presumed

responsible for disposing of the request with an order setting a specific amount.

1. Individually and as administratrix of the estate of Nicholas Curcuro.
2. Joanne Giovinco, individually and as administratrix of the estate of Peter Giovinco, vs. Rose's Oil Service, Inc.; Vera Curcuro.