UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 00-8845-CIV-HURLEY/LYNCH

MELANIE L. SUMMERS and
LEE C. SUMMERS,

Plaintiffs,

v.

TMJ IMPLANTS, INC.

Defendant.
_____/

ORDER ADOPTING REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE, AND GRANTING DEFENDANT'S MOTION FOR FEES AND COSTS

THIS CAUSE comes before the court upon the defendant's motion for entitlement to attorneys' fees and costs, and the report and recommendation of the Honorable Frank J. Lynch, Jr., United States Magistrate Judge, recommending that the defendant's motion be granted. On November 18, 2002, the jury rendered a verdict in favor of the defendant, TMJ Implants, Inc., on plaintiff's product liability claim. Accordingly, TMJ Implants is the prevailing party in the underlying litigation. On March 7, 2003, plaintiffs filed an objection.

Pursuant to Fed. R. Civ. P. 72(b), "The district judge . . . shall make a *de novo* determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule." The rule requires that objections be filed within ten days of service of the report and recommendation, and that the objecting party arrange for transcription of sufficient portions of the record. Fed. R. Civ. P. 72(b). The district judge may then "accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate judge with instructions." Id. Portions of the

report and recommendation that are not specifically objected to are subject to the clear error standard. The identical requirements are set forth in 28 U.S.C. § 636(b)(1).

In the objection, plaintiffs raised essentially the same arguments as they presented to Judge Lynch. The court finds these arguments to be without merit for the same reasons as stated in the report, and plaintiff's objections are overruled.

Upon review of the report of the magistrate judge, it is hereby **ORDERED** and **ADJUDGED**:

1. The Report and Recommendation of the United States Magistrate Judge [DE # 177] is **ADOPTED** in its entirety and incorporated herein by reference.

2. The defendant's motion for an award of attorneys' fees and costs [DE # 166] is **GRANTED**. A final cost judgment will be issued in a separate order.

DONE and **SIGNED** in Chambers at West Palm Beach, Florida this 11th day of March, 2003.

Daniel T. K. Hurley
United States District Judge

Copies provided to:

Robert P. Avolio, Esq.
Scott A. Ferris, Esq.

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CASE NO. 00-8845-CIV-HURLEY/LYNCH

MELANIE L. SUMMERS
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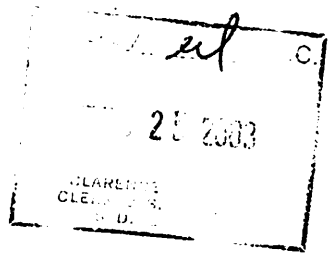

REPORT AND RECOMMENDATION ON DEFENDANTS' MOTION FOR ENTITLEMENT TO ATTORNEY FEES AND COSTS (DE 166)

THIS CAUSE comes before this Court upon an Order of Reference from the Honorable Daniel T. K. Hurley for a Report and Recommendation on the above-referenced Motion. Having reviewed the above Motion and accompanying filings, and being otherwise advised in the premises, this Court recommends as follows:

BACKGROUND

1. The Plaintiffs initially brought suit against the Defendants in state court in May 2000. On September 6, 2000, Defendants served the Plaintiffs with individual Proposals for Settlement, pursuant to § 768.79, Fla. Stat. and Rule 1.442, Fla. R. Civ. P., but the Plaintiffs rejected them. The Defendants then removed the case to federal court based on diversity of citizenship.

2. The matter was tried before a jury in the District Court. The jury returned a verdict for the Defendants, and on November 19, 2002, the District Court entered a Final Judgment in their favor.

3. The Defendants now move for an award of reasonable attorney's fees and taxable costs under Florida law, i.e., § 768.79, Fla. Stat., and move for costs under 28 U.S.C. § 1920.

4. The Plaintiffs responded to the Motion, moving to strike it for failing to comply with Local Rule 7.3 (for failing to attach supporting documentation) and also raising substantive arguments in opposition to an award. This Court denied the motion to strike, giving the Defendants leave to amend with supportive documentation and giving the Plaintiffs leave to respond. To-date the Plaintiffs have not responded to the Defendants' Notice of Filing and Re-Affirmation of Motion for Entitlement to Attorney's Fees and Costs (DE 173), and consequently, this Court relies on their Motion to Strike for their arguments against entitlement to fees and costs.

DISCUSSION

This Court turns first to the issue of the Defendants' entitlement to costs taxable under federal law. Rule 54(d) of the Fed. R. Civ. P. provides that "costs . . . shall be allowed as of course to the prevailing party unless the court otherwise directs;" 28 U.S.C. § 1920 sets forth those costs that a court

may tax in favor of the prevailing party. As explained in Dictiomatic, Inc. v. U.S. Fidelity & Guaranty Co., 2000 WL 33115333 (S.D. Fla. 2000): "Taxable costs under Section 1920 include fees of the clerk and marshall, fees of the court reporter for stenographic transcripts 'necessarily obtained', fees for printing, fees for exemplification and copies of papers necessarily obtained for use in the case, docket fees under Section 1923, and compensation for 'court appointed experts' and interpreters. Costs not specifically enumerated are not recoverable. For instance, costs incurred in mailing and sending documents by mail; express mail; facsimiles; travel expenses; and expert witness fees are not recoverable. Additionally, 'general copying, computerized legal research, postage (and) courthouse parking fees . . . are clearly not recoverable. Likewise, costs incurred in enlarging exhibits are not recoverable. The costs incurred for equipment rental and fees to a videographer for playback of video depositions at trial are not taxable costs." Id. at *15 (citing Tang How v. Edward J. Gerris, Inc., 756 F.Supp. 1540 (S.D. Fla. 1991), Duckworth v. Whisenant, 97 F.3d 1393 (11th Cir. 1996), Charter Med. Corp. v. Cardin, 127 F.R.D. 111 (D. Maryland 1989), and Morrison v. Reichhold Chem., Inc., 97 F.3d 460 (11th Cir. 1996).

This Court instructed "the Defendants to attach all supporting documentation in respect to their costs as the form

Bill of Costs directs." The Defendants did not file a Bill of Costs, as provided by the Clerk of Court and which sets out those costs taxable under § 1920, but they did file voluminous invoice records with an accompanying "detailed listing of all costs expended in this case". This Court reviews that listing to determine which of their claimed costs are taxable.

The Defendants' first category of claimed costs are Experts and Doctors Fees totaling $179,873.04, but these are not recoverable under § 1920.[1] Of the $78,682.71 in "Costs Associated with Litigation," such as court reporting, process servers, copies, and depositions of witnesses and parties, this Court finds $47,511.60 thereof is not taxable. These non-taxable items include "bulk copies" from Kinko's, and because this Court is unable to attribute them to any particular use in the litigation, this Court construes them as general copying. This amount also includes FedEx, telephone, mediation, videotapes, blow-ups and media presentation, shredding, and mailing costs, which are also not taxable. See E.E.O.C. v. W&O, Inc., 213 F.3d 600 (11th Cir. 2000). The Defendants are entitled to recover the $150.00 filing fee.

This Court next turns to the issue of entitlement to

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[1] A prevailing party may recover a daily attendance fee for each witness, see 28 U.S.C. § 1821, but the Defendants' Motion and accompanying documentation provide this Court with no basis from which to calculate such an award.

attorney's fees and costs under § 768.79, Fla. Stat. Although the Defendant served its Proposals before removing the action to federal court, this Court finds no reason why those Proposals should be of no effect in the instant proceedings. The Plaintiffs imply that after removal, the Defendants would have been required to make an offer of judgment under Rule 68, Fed. R. Civ. P.; however, § 768.79, Fla. Stat., applies to federal proceedings with equal force. See McMahan v. Toto, 256 F.3d 1120 (11th Cir. 2001), Tanker Mgt. Inc. v. Brunson, 918 F.2d 1524 (11th Cir. 1990)(§ 768.79, Fla. Stat., is substantive law and applicable in federal court in a diversity action).

The Plaintiffs argue that the Defendants' Proposals were not made in good faith and thus an award of costs and attorney's fees should be disallowed, citing § 768.79(7)(a) and Levine v. Harris, 791 So. 2d 1175 (Fla. 4th DCA 2001). The Defendants served Plaintiff Melanie Summers a Proposal for Settlement for $10,000.00 and Plaintiff Lee Summers a Proposal for Settlement of $2,500.00, but this Court does not find the Defendant's move to remove the action to federal court indicative that the Defendants believed that the real value of the Plaintiffs' claim exceeded $75,000.00. Rather, removal was based on the Plaintiffs' estimation that the value of their claim exceeded $75,000.00 as stated in their response to the Defendants' Requests for Admissions. While the total $12,500.00 is substantially less than

both the minimum for federal diversity jurisdiction and the Plaintiffs' settlement demand of $990,000.00, this Court finds no basis to believe that the Defendants extended a patently unreasonably low offer. Rather, the offer amount reflects the Defendants' belief that the claim had no merit, for which the Defendants point to the jury's forty minutes' deliberation as confirmation.

Lastly, the Plaintiffs contend that the form of the Defendants' Proposals did not comply with the requirements of a proper § 768.79 offer - namely, that the Defendants did not seek an entry of judgment. However, this Court finds no requirement that an offer of settlement must include as a term that a judgment be entered, unless of course the offeror intends to seek an entry of judgment upon settlement. See Abbott & Purdy Group, Inc. v. Bell, 738 So. 2d 1024 (Fla. 4th DCA 1999). The Proposals specifically called for an aggregate settlement to cover "all compensatory, consequential, incidental and punitive damages, as well as costs, including attorney's fees incurred to date," in exchange for a dismissal with prejudice and execution of all requested releases. Thus, this Court construes the offer as encompassing all damages which could be awarded, seeking a final end to the litigation, and otherwise complying with the form and content requirements set forth in Rule 1.442, Fla. R. Civ. P., and § 768.79, Fla. Stat.

Having determined that the Defendants are entitled to an award of attorney's fees and costs pursuant to its offer of settlement, the final matter is to assess the award amount. The Defendants may collect a reasonable attorney fee award for defending against the suit from the date the offer was served (September 6, 2000) through the end of litigation. Florida applies the federal lodestar approach for calculating the amount of an attorney fee award. See Fla. Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985); see also, Island Hoppers, Ltd. v. Keith, 820 So. 2d 967 (Fla. 4th DCA 2002)(applying the lodestar approach to calculate a fee award under § 768.79, Fla. Stat.).

The hourly rate at which Defendants' counsel actually billed is $160.00. However, the Defendants contend that pursuant to the lodestar approach, counsel should be entitled to a "reasonable" rate of $225.00 an hour. This Court finds that counsel's actual billing rate to be a good indicator of what the reasonable rate should be, and furthermore, the Defendants provide no basis for this Court to assess a rate substantially higher than what was actually billed.

Although the Defendants move for a fee award under § 768.79, Fla. Stat., they seek compensation for all of their fees incurred in defending the action and include "an itemized continuous, running invoice reflecting the hours expended in attorney's fees

on behalf of the Defendants . . . from the inception of the case on or about June 29, 2000 until December 30, 2002." As with the matter of assessing the cost award, the Defendants' documentation is not presented in a way that enables this Court to fashion an award in accordance with the relevant statute's requirements. Because the Defendants provide little organization to the voluminous records, this Court must therefore pare out those attorney's fees incurred before the time the offers were made from the claimed total. Based on invoice sub-totals, this Court estimates that counsel expended 36 hours before and around the time when the Proposals were extended. The claimed total of 1,484.08 hours less 36 hours is 1,448.08 hours; this times $160 an hour yields a reasonable fee award of $231,692.80.

Section 768.79, Fla. Stat., also entitles the Defendants to post-Offer taxable costs. See C&S Chemicals, Inc. v. McDougald, 754 So. 2d 795 (Fla. 2d DCA 2000). This Court notes that under Florida law, an item of cost is taxable if a movant shows that it served a useful purpose towards litigation and that it is directly related to the development of the case and the trial. See Schumacher v. Wellman, 415 So. 2d 120 (Fla. 4th DCA 1982), Winn-Dixie Stores, Inc. v. Vote, 463 So. 2d 459 (Fla. 2d DCA 1985). The Defendants provide this Court, however, with no argument or explanation as to what costs it should be awarded under § 768.79, Fla. Stat., that would be in addition to those

awardable under federal law. However the state law criteria for awarding costs of depositions, court reporters and transcripts, subpoenas, photocopies, and the like is sufficiently similar with those of 28 U.S.C. § 1920 to lead to an equivalent award.

Federal and state law do differ in their treatment of expert witness fees, a cost ($179,873.04) which comprises a significant portion of the Defendants' requested relief. Section 768.79(6)(a), Fla. Stat., entitles a prevailing defendant to recover "reasonable costs, including investigative expenses . . . calculated in accordance with the guidelines promulgated by the Supreme Court, incurred from the date the offer was served . . . ." The Statewide Uniform Guidelines for Taxation of Costs in Civil Actions provides criteria for awarding expert witness fees. These Guidelines basically allow for the recovery of expert witness fees where the expert charges for time spent researching, testifying (either in court or through proffered deposition testimony), and in some instances, travel time. In other words, a movant is not entitled to recover all expert witness expenses. See Centex-Rooney Constr. Co. v. Martin County, 725 So. 2d 1255 (Fla. 4th DCA 1999).

Although the Defendants show entitlement to a cost award, they provide little more than a date-by-date listing of the experts' invoices, leaving this Court unable to assess the amount of the award. This listing does not enable this Court to

determine for what purpose each charge was incurred or how that particular service related to the litigation. For example, the Defendants do not identify those experts whose opinions were used as trial evidence or otherwise served a useful purpose, expert witness time used for trial purposes as opposed to that time spent in conference with counsel, or taxable travel time. Consequently, this Court is unable to extrapolate those expert witness expenses that would be awardable under the Guidelines.

CONCLUSION

ACCORDINGLY, this Court recommends to the District Court that the Defendants be entitled to recover a total cost award of $31,321.11 and a total fee award of $234,732.80.

The parties shall have **ten (10) days** from the date of this Report and Recommendation within which to file objections, if any, with the Honorable Daniel T. K. Hurley, United States District Court assigned to this case.

DONE AND SUBMITTED in Chambers at Fort Pierce, Florida, this 25 day of February, 2003.

FRANK J. LYNCH, JR.
UNITED STATES MAGISTRATE JUDGE

cc: Hon. Daniel T. K. Hurley
Scott A. Ferris, Esq.
Robert P. Avolio, Esq.