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ALABAMA JUDICIAL DATA CENTER
JEFFERSON COUNTY
CERTIFICATE OF JUDGEMENT

CV 2002 004270.00
JOSEPH L. BOOHAKER

IN THE CIRCUIT COURT OF JEFFERSON COUNTY

DONALD WHITFIELD CROSS ET AL VS MAHAN MAHAN & MAHAN INC ET AL

DEFENDANT

PARTY'S ATTORNEY:

MAHAN MAHAN & MAHAN INVESTMENTS INC
% WILLIAM B MAHAN SR
901 BOYLSTON STREET
LEESBURG , FL 34748-0000

I, ANNE-MARIE ADAMS , CLERK OF THE ABOVE NAMED COURT HEREBY CERTIFY THAT ON 02/25/2005 PLAINTIFF, CROSS DONALD WHITFIELD RECOVERED OF DEFENDANT IN SAID COURT A JUDGEMENT WITHOUT WAIVER OF EXEMPTIONS FOR THE SUM OF $1,290,978.09 DOLLARS PLUS $473.00 DOLLARS COURT COSTS, AND THAT THE PLAINTIFF'S ATTORNEY(S) OF RECORD WAS:
HEIDT FRANCES

SEE ATTACHED ORDER PER SEPARATE PAPER

GIVEN UNDER MY HAND THIS DATE 05/02/2005

Anne-Marie Adams

CLERK: ANNE-MARIE ADAMS
RM 400 JEFF CO COURTHOUSE
BIRMINGHAM AL 35203
(205)325-5355

OPERATOR: EDH
PREPARED: 05/02/2005

PLAINTIFF'S ATTORNEY:

WHITE JAMES HERBERTIV
SUITE 1600
420 NORTH 20TH STREET
BIRMINGHAM AL 35203

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
CIVIL DIVISION

DONALD WHITFIELD CROSS, et al.
Plaintiff,

v.

CIVIL ACTION NUMBER:
CV 02-4270

MAHAN, MAHAN & MAHAN
INVESTMENTS, INC. et al
Defendants.

ORDER

This matter comes before the Court on Plaintiffs' motion to set and determine a reasonable attorney's fee as provided by the terms and conditions of Plaintiffs contract with Defendant Mahan, Mahan & Mahan Investments, Inc. The Court, after having considered Plaintiffs' motion, brief and all attachments as well as Defendants' objection and evidentiary submission and the oral arguments of counsel conducted before the Court on March 4, 2005 finds the following:

The parties to this action were parties to a contract which contained the following provision:

> "In connection with any dispute or litigation arising out of this Agreement, the prevailing party shall be entitled to recover from the non-prevailing party its reasonable costs and attorney's fees in addition to all other sums due hereunder."

As the result of trial commenced on September 13, 2004, Plaintiff was awarded a verdict consisting of compensatory damages in the amount of $237,274.00 upon the jury's finding for Plaintiff under counts alleging breach of contract, fraudulent misrepresentation with regard to representations that Defendants could transfer the assets of the Miracle Ear franchise free and clear of any encumbrances, fraudulent suppression and conversion. The jury also awarded punitive damages in the amount of $1,500,000.00, for a total verdict of $1,737,274.00.

Upon motion made by Defendants that the judgment of the Court in light of this verdict must comply with the punitive damage limitations specified in *Ala.Code §6-11-*

21(a) (1975), the Court has reduced the amount of the punitive award so that it shall conform to the limitations contained in the said statute and has entered judgment on the verdict rendered in the amount of $949,096.00.

The Court finds the decision in ***Beal Bank, SSB v. Schilleci***, *— So.2d ----, 2004 WL 870446 (Ala. 2004)* instructive on the issue of setting the attorney's fee in this action. The Court wrote:

> "In ***Peebles v. Miley***, *439 So.2d 137 (Ala. 1983)*, the Court adopted five additional criteria to the seven already existing that a court may consider when making a determination regarding the reasonableness of an attorney fee. Those 12 criteria are:
>
> '(1) the nature and value of the subject matter of the employment; (2) the learning, skill, and labor requisite to its proper discharge; (3) the time consumed; (4) the professional experience and reputation of the attorney; (5) the weight of his responsibilities; (6) the measure of success achieved; (7) the reasonable expenses incurred; (8) whether a fee is fixed or contingent; (9) the nature and length of a professional relationship; (10) the fee customarily charged in the locality for similar legal services; (11) the likelihood that a particular employment may preclude other employment; and (12) the time limitations imposed by the client or by the circumstances.' ***Van Schaak v. AmSouth Bank, N.A.***, *530 So.2d 740, 749 (Ala. 1988)*.
>
> We stress that these criteria are evaluative and not an exhaustive list of specific criteria that all must be met when reviewing the reasonableness of an attorney fee. This Court stated as much in ***Graddick v. First Farmers & Merchants National Bank of Troy***, *453 So.2d 1305, 1311 (Ala. 1984)*: 'We do not suggest that all of these criteria must be met. Indeed, there would hardly ever be a case where the application of attorney's fees brought into play every criterion. But they are available for the trial court to consider in connection with each claim for an award of attorney fees."
>
> Our case law otherwise has developed the following body of principles pertinent to our review in this case:
>
> 'In the matter of fixing attorney's fees, wherein the evidence consists of the opinions of competent witnesses expressive of their judgment as to the value of the services, the register may call to his aid his own judgment of their value, and fix the fee accordingly. This latter rule extends to the trial judge, and on to this court on appeal.' ***Dent v. Foy***, *214 Ala. 243, 249, 107 So. 210, 216 (1925)....*
>
> . . . "However, this court has the right, as did the trial court, to look to the whole record on the question of the value of attorneys' services, and may treat opinions of witnesses as advisory and may render such decree fixing attorneys' fees as it deems right and proper under all the circumstances. ***King v. Keith***, *[257 Ala. 463, 60 So.2d 47 (1952)]*; ***Frazier v. First Nat. Bank of Mobile***, *[235 Ala. 252, 178 So. 441 (1938)]*. But we make such review with the presumption in favor of the ruling of the court below and will not set

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> aside its decree unless we are convinced that that court abused the discretion wisely vested in it. ***King v. Keith**, supra.*' ***Ingalls v. Hare**, 266 Ala. 221, 228, 96 So.2d 266, 274 (1957).*
>
> However, while we have recognized that 'the reasonableness of an award of attorney fees is within the discretion of the trial court, subject to correction only for an abuse of discretion,' we have noted that when an appellate court reviews the award of an attorney fee '*we must be able to discern from the record what factors the trial court considered* in determining the amount of attorney fees.' ***Lanier v. Moore-Handley, Inc.** 575 So.2d 83, 85 (Ala. 1991)*, citing ***Van Schaack v. AmSouth Bank, N.A.**, supra*. (emphasis added).
>
> 'We now turn to the question regarding the amount of attorney fees awarded. 'The determination of whether an attorney fee is reasonable is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion.' ***Ex parte Edwards**, 601 So.2d 82, 85 (Ala. 1992)*. Our deference to the trial court in attorney-fee cases is based upon our recognition that the trial court, which has presided over the entire litigation, has a superior understanding of the factual questions that must be resolved in fee determinations. See ***Hensley v. Eckerhart**, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)*. Nevertheless, the trial court's order regarding an attorney fee must allow for meaningful review by articulating the decisions made, the reasons supporting those decisions, and the performance of the attorney-fee calculation. ***American Civil Liberties Union of Ga. V. Barnes**, 168 F.3d 423, 427 (11th Cir. 1999)*; see also ***Hensley**, 461 U.S. at 437, 103 S.Ct. 1933*." 2004 WL 870446 at 7-9.

Plaintiffs' counsel has submitted a 77 page document of time expended, services rendered and rates per hour per attorney through the course of representation Plaintiffs which total $352,245.75. Plaintiff has also submitted schedules and back up invoices for costs incurred in the prosecution of this case which total $25,522.32 paid by Plaintiffs and an additional $28,699.79 incurred by counsel for a total cost claim of $54,222.11, making the total amount claimed in fees and costs, the amount of $406,467.86.

The Court has reviewed the deposition testimony of Plaintiffs' expert, Mr. John Haley, Esq. with regard to the appropriateness of the fee request. Mr. Haley testified that Plaintiffs appeared to have been billed hourly by Plaintiffs' counsel and to have paid approximately $40,000 toward the fee and approximately $25,000 toward the cost before the litigation was completed. As it appeared that much more time would be required, well beyond the ability of Plaintiffs to pay on hourly billing, that the fee arrangement became more contingent. As explained by Mr. Haley, the economics and reality of the representation would indicate that in the event that counsel did not prevail, counsel would not have been able to collect the balance of its fees or expenses. Though counsel maintained a billing record, there was not an expectation of payment in the event that Plaintiffs did not prevail.

Considering this as well as all factors set out hereinabove, Mr. Haley was of the opinion that a fee and cost bill of approximately $400,000 on a verdict of $1.7 million represented a 24% fee and that this was a reasonable fee.

The Court also reviewed the affidavit of Defendant's expert, Mr. Andrew Campbell, Esq. and has taken into consideration all matters set forth therein, including his recommendation that any sum in excess of $200,000 would be an unreasonable charge.

The Court, having presided over this case has also taken into consideration 11 of the 12 factors to be considered in the following light:

(1) The nature and value of the subject matter of the employment – the Court places a high value on the nature of this employment as it involved very technical issues;

(2) the learning, skill, and labor requisite to its proper discharge – The Court places a high value on the skill necessary to prosecute the case and on managing the volume of paperwork generated throughout this case;

(3) the time consumed – The Court has reviewed the time sheets, all 77 pages of them;

(4) the professional experience and reputation of the attorney – the Court finds the experience and reputation of Plaintiffs' counsel to be very high

(5) the measure of success achieved – Plaintiffs won a substantial verdict, even though by law it was required to be reduced in its punitive aspects;

(6) the reasonable expenses incurred;

(7) whether a fee is fixed or contingent;

(8) the nature and length of a professional relationship – the Court did not give this aspect much weight;

(9) the fee customarily charged in the locality for similar legal services;

(10) the likelihood that a particular employment may preclude other employment; and

(11) the time limitations imposed by the client or by the circumstances.' – neither of which the court attached much weight.

In reviewing these records the court found that fees charged in excess of $250/hour to be generally excessive and reduced the fees accordingly. The Court has also taken into account that this case was tried once to a mistrial prior to being finally tried to a verdict. The Court notes that the reason the case mistried was due to a discovery made during the third day of trial that one of the key documents in the case contained certain discrepancies of which Plaintiff was not aware until Defendant raised the issue during the cross examination of Defendant, whom Plaintiff had called as an adverse witness. Plaintiff then pressed the Court in a 3 hour hearing on the 4th day of trial to introduce a document which had previously been included only on a privilege log and which had not otherwise been made available to Defendant. After losing one-half of a trial day, the Court mistried the case due to the fact that certain jurors had already notified the court of their inability to sit on the case beyond certain specified days which could have been met had the half day not been lost taking up this evidentiary matter.

For this reason, the Court has decided to disallow attorney's fees which have been charged and which the Court could identify from the billing records reflective of trial time spent during the first attempted trial of this matter.

Further, there was litigation involving these parties in a Florida court, which case was subsequently dismissed. To the extent that the Court could identify such charges in the billing records, these charges have been disallowed as well, as well as the cost element of $10,569.37, representing attorney's fees incurred in the Florida litigation.

The Court has attached to this order its rendering of the 77 pages of billing reflecting the changes that it deems appropriate which are reflective of the factors set our herein.

Accordingly, the Court hereby approves an attorney's fee for Plaintiff in the amount of $298,229.35. The Court further approves the cost bill of $25,522.32 of costs paid by Plaintiffs as well as $18,130.42 of additional costs which reflect a deduction of the approximate $10,000 incurred in the Florida litigation, for a total cost approved of $43,652.74. Total fees and costs hereby approved as reasonable are $341,882.09 which are hereby charged against Defendant party to the contract, Mahan, Mahan & Mahon, Investments, Inc.

DONE AND ORDERED THIS THE 22nd DAY OF MARCH, 2005.

CIRCUIT JUDGE

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IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
CIVIL DIVISION

DONALD WHITFIELD CROSS, et al.,
Plaintiffs,

v.

CIVIL ACTION NUMBER:
CV 02-4270

MAHAN, MAHAN, & MAHAN, INC.,
Et al.
Defendants.

FILED IN OFFICE

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ANNE-MARIE ADAMS
Clerk

ORDER

This matter comes before the Court on Defendant's motion to reduce the amount of the punitive damages award rendered in this action. The Court, having reviewed Defendant's motion and brief, as well as the opposition filed by Plaintiff and their brief and after having considered the oral argument of counsel made with regard to this motion on February 22, 2005, enters the following findings:

The Court tried this cause of action on Plaintiff's counts alleging breach of contract, fraudulent misrepresentation, fraudulent suppression and conversion to a jury verdict, rendered and filed with the Clerk of the Circuit Court on October 26, 2004. The jury rendered a compensatory damage verdict of $237,274.00 and a punitive damage award of $1,500,000.00, for a total judgment of $1,737, 274.00.

The jury did not consider the issue of assessment of attorney fees. Though Plaintiff demanded damages which included "interest, attorney fees and costs", the Court reserved to itself the setting of attorney's fees under the provisions of the contract made the basis of the cause of action.

Defendants' motion raises two issues which the Court shall now address. First, whether the jury's verdict shall be reduced, and second, whether the attorney's fees and costs are proper elements of compensatory damages to be used in any recalculation of the punitive damages award.

Addressing the first issue, <u>*Ala. Code*</u> *§6-11-21 (1975)*[1] establishes a 3:1 ratio of punitive to compensatory damages as a statutorily imposed limit on such awards. The Court finds that none of the exceptions which would take this action out of the scope of this provision applies and therefore the Court shall grant Defendants' motion as the amount of punitive damages awarded by the jury is, when compared to the compensatory award, in excess of the statutorily imposed limit.

Second, with regard to whether the attorney's fees should be combined with the jury verdict for compensatory awards prior to applying the punitive damages cap, the Court is called upon to address a matter of first impression under *§6-11-21*, in its current form after being amended by the Legislature (Act 99-358, p. 563, §1) and which became effective on June 7, 1999. The issue is whether attorney's fees are an element of compensatory damages.

In arguing that these said fees should be included in the award, Plaintiff cites the Court to ***Mobile Infirmary Medical Center v. Hodgen,*** *884 So.2d 801 (Ala. 2003).* ***Hodgen*** presented the Court with a unique set of circumstances in which the jury awarded a $2.5 million dollar punitive award without an award of compensatory damages. ***Hodgen*** was a personal injury action, which was tried in the wake of ***Marsh v. Green,*** *782 So.2d 223 (Ala. 2000),* which upheld <u>*Ala. Code*</u> *§6-5-545 (1975)* by which the collateral source rule in Alabama was abrogated. Thus the jury was aware that though Plaintiff had incurred medical expenses, they were told that the expenses had nevertheless been paid and therefore could not be part of a compensatory award.

The Court was called upon to interpret the application of *Ala. Code §6-5-545 (1975)* in light of *Ala. Code §6-11-21(1975),* which based punitive damages on first determining the amount of the compensatory award. The Court ruled:

> "We are here presented with an opportunity in a proper case to apply the holding of Smith addressing compensatory damages that could have been awarded, in the context of the renewed vitality of *§ 6-5-545*, which abrogates the collateral-source rule. In such situations, a special interrogatory should be propounded to the jury that gives the jury the opportunity to state the amount

[1] **§ 6-11-21. Punitive damages not to exceed certain limits.**
(a) Except as provided in subsections (b), (d), and (j), in all civil actions where an entitlement to punitive damages shall have been established under applicable laws, no award of punitive damages shall exceed three times the compensatory damages of the party claiming punitive damages or five hundred thousand dollars ($500,000), whichever is greater.

> of compensatory damages it would have awarded, but did not so award because of the evidence of the availability of compensation to the plaintiff from a collateral source. Armed with such information, the trial court can apply the cap set forth in *§ 6-11-21(d)* by determining 'the compensatory damages of the party claiming punitive damages.'" 884 So.2d at 818.

The Court interpreted *§6-11-21* to require that the punitive award be limited to three times the compensatory damages, not three times the amount of compensatory damages *awarded*. This Court, however, distinguishes the finding in ***Hodgen*** from the facts in the present case as medical expenses are clearly recognized as elements of damages in a tort action, once proved to be reasonable and necessary by Plaintiff and proximately incurred as the result of Defendant's wrongdoing.

Such is not the general rule with regard to the treatment of attorney's fees as elements of damages in breach of contract or fraud actions. The Court in *Highlands* ***Underwriters Ins. Co. v. Elegante Inns, Inc.****, 361 So.2d 1060 (Ala. 1978)*, addressed the issue as follows:

> "In Alabama and most other jurisdictions, the general rule is that attorneys' fees or expenses of litigation are not recoverable as damages, in absence of a contractual or statutory duty, other than a few recognized grounds of equity principles. ***State v. Alabama Public Service Commission****, 293 Ala. 553, 307 So.2d 521 (1975);* ***Hartford Accident & Indemnity Co. v. Cosby****, 277 Ala. 596, 173 So.2d 585 (1965); 22 Am.Jur.2d, Damages, §165, p. 235.* The reason of the rule disallowing attorneys' fees is that they are a remote loss. 1 Sedgwick on Damages (9th ed.), s 239m o, 464.
>
> However, it is generally recognized that where the natural and proximate consequences of the defendant's wrongful act causes the plaintiff to become involved in litigation *with a third person*, attorneys' fees and other expenses incurred in such litigation may be recovered as damages. *22 Am.Jur. 2d, Damages §166, p. 235; 25 C.J.S. Damages §50, p. 787.*
>
> In order to recover attorneys' fees against a defendant in a tort suit, the following elements are necessary:
>
> (1) The plaintiff must have incurred attorneys' fees in the prosecution or defense of a *prior action.*
>
> (2) *The litigation must have been against a third party and not against the defendant in the present action.*
>
> (3) The plaintiff must have become involved in such litigation because of some tortious act of the defendant. *45 A.L.R.2d 1183.* (emphasis added)" 361 So.2d at 1065-66.

In the present action, Plaintiff claims a right to attorney's fees by virtue of Paragraph 13 of the Stock Purchase and Sale Agreement, which is the basis of Plaintiff's claim against Defendants. The provision states:

> "In connection with any dispute or litigation arising out of this Agreement, the prevailing party shall be entitled to recover from the non-prevailing party its reasonable costs and attorney's fees in addition to all other sums due hereunder."

The Defendant, Mahan, Mahan & Mahan, Inc., was party to this contract, otherwise designated in the said contract as the "Seller". Though Plaintiff is entitled to attorney's fees from Defendant Mahan, Mahan & Mahan, Inc., since their contract so provides, the Court cannot find that such award of attorney's fees and costs should be considered as a component part of compensatory damages for purposes of applying Ala. Code *§6-11-21(1975)* to establish the amount of punitive damages allowable in this case.

Though the Court has not yet issued its order with regard to the amount of attorney's fees and costs which will be awarded to Plaintiff, its ruling on Defendants' motion to apply Ala. Code *§6-11-21(1975)* to the verdict rendered in this case, in light of the foregoing matters and authority having been considered by the Court, should not await that determination.

Wherefore, Defendants' motion is hereby GRANTED and the jury's verdict is hereby rendered subject to application of Ala. Code *§6-11-21(1975)* and judgment is hereby entered as follows:

1. Compensatory damages: $237,274.00
2. Punitive damages: $711,822.00
3. Total verdict: $949,096.00

DONE AND ORDERED THIS THE 25 DAY OF Febru, 2005.

CIRCUIT JUDGE