IN THE COURT OF COMMON PLEAS
MUSKINGUM COUNTY, OHIO

MELISSA DURHAM, ET AL.,

Plaintiffs,

-vs.-

FOREST RIVER, INC., ET AL.,

Defendants.

CASE NO. CH2007-0448

JUDGE COTTRILL

JOURNAL ENTRY

This matter comes before this court for a determination of attorney fees after this matter was settled prior to trial.

FINDINGS OF FACT

1. Plaintiffs are entitled to mandatory attorney fees. The entitlement to fees was stipulated by the parties.

2. Reasonable hourly rates for the timekeepers of McDowall Co., LPA are as follows:

Laura McDowall, lawyer	$300.00
Alyssa Keeny, lawyer	175.00
Michelle Booth, paralegal	100.00
Latoya White, paralegal	100.00

Laura McDowall testified that the hourly rates are the usual and customary rates for her firm, for clients who pay as time is spent, as well as for clients whose fees are contingent on successful litigation. Expert witness Amy Gullifer, a lawyer with the firm Graham and Graham in Zanesville, testified that the rates are reasonable for Attorney McDowall and personnel of her firm. Attorney Gullifer also testified that the rates are reasonable in the community. Similar hourly rates were recently approved by the Sixth Circuit Court of Appeals for work done by the law firm of Graham & Graham. *Dowling v. Litton Loan Servicing Lp,* 2009, FED App. 0277N (6th Cir.)

Attorney McDowall is on the Board of Directors for the National Association of Consumer Advocates, the country's premier organization of consumer protection attorneys. Her firm received NACA's 2003 award for Best Consumer Protection law firm in the entire country. She has been asked to speak for consumer protection issues in cities around the country. She has tried more than fifty consumer protection cases, and has established law on consumer issues, in courts of appeals and the Ohio Supreme Court.

Defendants' counsel testified that they charge lower hourly rates, but they do not have the years of experience or the demonstrated expertise of Plaintiffs' counsel. There was not evidence that the hourly rates of Plaintiffs' counsel are unreasonable.

3. It is the normal practice of Plaintiffs' counsel to bill for work done by the paralegals employed by the firm, and billing for paralegals is customary in the legal community.

Attorney McDowall testified that she routinely bills for time spent by paralegals. Expert witness Gullifer testified that it is usual and customary to bill for paralegal work. Both defense firms involved in this litigation include charges for paralegal work on their fee bills and both testified it is appropriate to bill for paralegal time.

4. The 302.50 hours spent by Attorney McDowall as set forth in itemized time records submitted prior to fee hearing are reasonable.

Attorney McDowall testified that the time spent was reasonable and she determined such work was necessary to the success of the case at the time the work was performed. Attorney Gullifer testified the time spent was reasonable. Defendants questioned the deposition strategy of Plaintiffs' counsel, but presented no evidence that the time spent was unreasonable for this case. The test for determining whether hours were reasonable expended is whether a reasonable attorney would have believed the work to be reasonably expended in pursuit of success at the point in time when the work was performed. *Wooldridge vs. Marlene Industries Corp.* (6th Cir. 1990), 898, F. 2d 1169, 1177.

> It must be kept in mind that lawyers are not likely to spend unnecessary time on contingency fee cases in the hope of inflating their fees. The payoff is too uncertain, as to both the result and the amount of the fee. It would therefore be the highly atypical civil rights case where plaintiff's lawyer engages in churning. By and large, the court should defer to the winning lawyer's professional judgment as to how munch time he was required by spend on the case; after all, he won, and might not have, had he been more of a slacker. *Moreno v. City Sacramento*, 534 F. 3d 1106, 1112 (9th Cir. 2008).

5. The 119.90 hours spent on Attorney Keeny as set forth in itemized time records are reasonable.

Attorney McDowall testified that the time spent by Attorney Keeny was reasonable and she directed Attorney Keeny to perform work essential to the success of the case. Attorney McDowall also testified that she reduced certain hours spent by Attorney Keeny in accordance with her billing judgment and discretion as the supervising lawyer. Attorney Gullifer testified the time spent was reasonable. Defendants pointed out one error that Attorney Keeny made (failing to update the attorney fee request from the first draft of the demand letter to the date it was actually sent), but presented no evidence from the time spend by Attorney Keeny was unreasonable or unnecessary.

6. The 249.20 hours spent by paralegal Michelle Booth as set forth in itemized time records are reasonable.

Attorney McDowall testified that the time spent by Ms. Booth was reasonable and she directed her paralegal to perform work essential to the success for the case. Attorney Gullifer testified the time spent was reasonable. Defendants presented no evidence that the time was unreasonable or unnecessary.

7. The 57.55 hours spent by paralegal Latoya White as set forth in itemized time records are reasonable.

Attorney McDowall testified that the time spent by Ms. White was reasonable and she directed her paralegal to perform work essential to the success of the case. Attorney Gullifer testified the time spent was reasonable. Defendants presented no evidence that the time was unreasonable or unnecessary.

8. It is normal practice of Plaintiffs' counsel to include expenses in her firm's bills for legal services. Including expenses in fee bills is customary in the legal community.

Attorney McDowall testified that it is normal practice of her law firm to include expenses in her firm's bill for legal services. Attorney Gullifer testified that including expenses in fee bills is customary in her law firm and in the legal community. Both defense firms in this case billed for expenses. The Fifth District Court of Appeals has ruled that it is proper to include expenses in fee bills, in accordance with the actual billing practices of the attorney. *Fortner vs. Ford Motor Co.* (Feb. 9, 1998), Stark App. No. 1997 CA 00177, Fifth District Court of Appeals, unreported, 1998 WL 172862.

9. The expenses listed as part of the fee petition are reasonable.

Attorney McDowall testified that the expenses listed were actual expenditures for the case, and they are reasonable. Attorney Gullifer testified that the expenses are reasonable and customary for a case of this nature. The lion's share of expenses involved deposition fees and transcription fees. The depositions were used heavily in responding to Defendants' motion for summary judgment and in preparing for trial. It cannot be seriously disputed that the expenses

were reasonable and necessary, in that Forest River itself purchased the transcripts and filed them with the Court.

Defendants quibbled about the out of town travel expense fee, with Attorney Connell testified that he "wouldn't have any clients" if he charged a per diem expense fee. The evidence showed that the defense counsel charged for photocopies made on the firm's copier. Plaintiffs' counsel did not charge for in-house photocopies for the thousands of documents involved in this case. Defendant counsel charged for long distance phone calls. Plaintiffs' counsel did not charge for long distance fees, which were significant in this case since all counsel and parties and the Court are from difference cities. Attorney McDowall testified that it is the usual and customary practice of her office to charge a per diem travel expense fee for overnight out of town travel only. The office actually pays such fee to any attorney or staff involved in overnight travel, to offset such items as meals, phone calls to home, tips, and other incidental expenses. The fact that a different law office chooses to charge for photocopies, phone calls and meals, but not a per diem expense, does not make the travel expense unreasonable.

10. The expense for expert witness Amy Gullifer in the amount of $2,317.50 is reasonable.

Attorney Gullifer submitted her bill for the time reviewing the file in preparation of the first day of hearing, in the amount of $1,552.50. The Court observed, and Attorney Gullifer testified that she spent one hour waiting to testify and beginning her testimony on August 3, 2009. Attorney Gullifer testified that she spent an additional 1.4 hours preparing for the second day of her testimony. The Court observed that Attorney Gullifer spent an additional hour in Court on the second day of the fee hearing, August 21, 2009. The total is as follows: $1,552.50 + 225.00 + 315.00 + 225.00, for total of $2,317.50.

Attorney Gullifer spent a reasonable amount of time reviewing the file. Most of the time spent in Court was under cross examination. Attorney Gullifer's bill is reasonable.

11. The reasonable Lodestar Fee is $159,014.62, itemized as follows:

Legal Services	
Laura McDowell, lawyer	
302.50 @ $300.00 per hour =	$90,750.00
Alyssa Keeny, lawyer:	
119.90 hours @ $175.00 per hour =	20,982.50
Michelle Booth, paralegal: 249.20 hours @ $100.00 per hour =	24,920.00
Latoya White, paralegal: 57.55 hours @ $100.00 per hour =	5,755.00
Subtotal, Legal Services	$142,407.50
Case Expenses:	
List on Exhibit 1	$ 14,289.62
Expert Witness Amy Gullifer/Graham & Graham)	2,317.50
Subtotal, Case Expenses	$16,607.12
Total Lodestar Fee, legal services and case expenses	$159,014.62

The evidence supporting each element of the Lodestar Fee is set forth above.

12. Defendants' objections to the fees are unsupported by the evidence.

Once the party seeking fees meets his initial burden of showing that the fees are reasonable, the burden shifts to the other party to specifically identify hours which should not have been expended. *United States ex rel. John Doe vs. Pennsylvania Blue Shield* (D.C. Pa. 1999), 54 F Supp. 2d 410, 415; *Lipsett vs. Blanco* (5th Cir. 1992), 975 F. 2d 934. A general "too much" is insufficient. Id.

Defendants have wholly failed to satisfy this burden. Defendants criticized the litigation strategy and work done in pursuit of the successful result, but failed to present evidence at the hearing of specific hours to be disallowed.

Defendants' argument was that the time spent by Plaintiffs' counsel after Plaintiffs' settlement demand did not advance the case. This argument is incorrect. The depositions, research, briefing, and trial preparation all served to finally force Defendants to buy back this lemon vehicle as the law provides.

Defendants also suggested that the time spent by Plaintiffs' counsel conferring with an associate attorney and paralegals in not compensable. The Court in *Freeman vs. Crown City Minning, Inc.* (1993), 90 Ohio App. 3d 546, 554, rejected this argument. The court stated, "prevailing parties are not necessarily barred from fees for the presence of a second attorney or hours spent by collaborating attorneys," Id. The Court held that such time was reasonable and not duplicative.

13. Plaintiffs made reasonable attempts to reach a settlement in this case and the attorney fees for all parties increased because Defendants did not make reasonable attempts to settle.

Attorney McDowall testified to and presented evidence of the following settlement efforts:

7/8/08 Letter from Attorney Keeny to Defendants (initial demand letter), enclosed chart of lemon law damages totaling $126,512.94 (including attorney fees). This was a buy back demand, with the vehicle to be returned to Forest River.

8/8/08 Following Plaintiffs' depositions in Zanesville – Attorney McDowall spoke to Attorney Connell and Attorney Braun, and urged Defendants to seriously consider settlement before additional fees were expended in out of town depositions. Attorney Connell said he would respond, but he did not.

8/11/08 Just prior to first deposition in Indiana – Attorney McDowall asked Attorney Connell for an offer. Forest River's decision maker was there. Attorney Connell privately spoke with Paul Pierce, and came back with an offer that Forest River would fix

the vehicle and pay $3,500. Attorney Connell said there would be no buyback under any circumstances. Plaintiffs' counsel called Attorney Braun the same date to enlist his assistance or contribution in reaching a settlement, but Holman Motors offered nothing.

August and September, 2008. During these months, Plaintiffs' counsel attempted to discuss settlement with Defendants' counsel on several occasions. Defendants' counsel talked with each other and their clients about settlement, but did not respond to the settlement overtures of Plaintiffs' counsel.

9/16/08 At the first final pretrial, when the Court indicated he was denying Defendant's motion for summary judgment, Attorney Engling said the denial would cause Defendants to re-evaluate their settlement position. They made no offer. Trial date was continued.

9/30/08 Letter from Attorney Engling to the Court saying Defendants want private mediation.

10/3/08 Letter from Attorney McDowall to the Court confirming Plaintiffs are willing to participate in Court mediation.

10/6/08 Letter from Attorney Connell to Attorney McDowall proposing private mediators @ $300.00/hour.

10/8/08 Letter from Attorney McDowall to Attorney Engling confirming Defendants' refusal to participate in court mediation and confirming Defendants' oral offer of $3,500 + repair.

10/13/08 Letter from Attorney Engling to Attorney McDowall confirming Defendants' offer of $3,500.

12/1/08 Phone conference with the attorneys (final p/t is tomorrow). 45 minutes later, Attorney Connell calls Attorney McDowall and leaves message saying he wants to discuss settlement in advance of the final pretrial tomorrow. Attorney McDowall returned the call 30 minutes later. He did not call back.

12/2/08 Final pretrial. Forest River for the first time offers to buy back the vehicle. Case settles.

14. Based on the evidence, Plaintiffs' counsel is entitled to an award of attorney fees in the amount of $159,014.62.

The support for this award is set forth above.

CONCLUSIONS OF LAW

1. It is the policy of Ohio law to encourage the award of attorney fees for the successful prosecution of consumer protection cases.

According to the Ohio Supreme Court, the effectiveness of consumer protection laws depends upon the award of reasonable attorney fees to counsel for prevailing consumers.

Prohibiting private attorneys from recovering for the time they expend on a consumer protection case undermines both the purpose and deterrent effect of the Act.

Bittner v. Tri-County Toyota, Inc. (1991) 58 Ohio St. 3d 143, 144.

Awarding a fair fee in consumer cases serves to discourage petty tyranny;

> Although private parties looking only to their own interests would not invest more in litigation than the stakes of the case, the contribution of self-interest with the American Rule on the allocation of legal costs means that people can get away with small offenses. A two-day suspension may be unconstitutional, but a few hours of legal time costs more than the wages lost. Section 1988 helps to discourage petty tyranny. Awarding the full cost of litigation, which looks excessive in the single case, is sensible because it aids in the enforcement of rules of law. [citation omitted]. Put another way: Monetary awards understate the real stakes. Judicial decisions have efforts on strangers. This litigation was prosecuted by a lawyer retained by a union of public employees and stoutly resisted by the county. If as the defendants say "only $3,700 was at stake, why the tenacious resistance? Defendants do not contend that the exertion on Plaintiff's side was unreasonable in relation to the defense; no more is necessary to show that the judge acted within his discretion in awarding fees exceeding the monetary recovery.

Barrow v. Falck, 977 F2d 1100, 1103-04 (7th Cir. 1992).

2. The United States Supreme Court and the Ohio Supreme Court and courts throughout the country reject the notion that attorney fees must be proportionate to the recovery in consumer cases.

The Ohio Supreme Court in *Bittner v. Tri-County Toyota, Inc.*, 569 N.E.2d 464 (Ohio 1991) stated:

> At the outset, we reject the contention that the amount of attorney fees awarded pursuant to R.C. 1345.09(F) must bear a direct relationship to the dollar amount of the settlement, between the consumer and the supplier ... In order for private citizens to obtain redress under the Act, they must first be able to obtain adequate legal representation.

Private attorneys may be unwilling to accept consumer cases if the dollar amount they are permitted to bill their adversary is limited to the dollar amount of the recovery, especially since

monetary damages in many instances under the Act are limited to $200. An attorney fee expended inordinately large amounts of time and energy pursuing a claim that reaps relatively small monetary benefits for the prevailing plaintiff. We agree with the observation of the United States Supreme Court when it said:

> A rule of proportionality would make it difficult, if not impossible, for individuals with meritorious *** claims but relatively small potential damages to obtain redress from the courts. *Riverside v. Rivera* (1986), 477 U.S. 561, 578, 106 S.C. 2686, 2696, 91L.Ed.2d 466.

In addition to addressing an individual wrong, pursuing a claim under the Act may produce a benefit to the community generally. A judgment for the consumer in such a case may discourage violations of the Act by others. Prohibiting private attorneys from recovering for the time they expend on a consumer case undermines both the purpose and the deterrent effect on the Act.

Id. at 465-466, (Emphasis Added).

It is not at all unusual for attorney fees in consumer cases to exceed the damages. Since the purpose of fee-shifting statutes is to encourage enforcement of important statutory rights that may not involve large sums of money but which provide significant public benefits, it is the inappropriate for a trial court to use the amount of damages recovered as a guide in determining the amount of fees to award. A handful of cases where fees exceed recovery include the following.

- *City of Riverside vs. Rivera* (1986) 477 U.S. 561, 574-578 (affirming a fee award of $245,000 on damages of $33,350)
- *Nightingale vs. Hyundai Motor America* (1994), 31 Cal.App.4th 99 ((lemon law case, court of appeals ultimately affirmed an award of $75,648.00 in fees, where recovery to consumers was $12,088.00)
- *Grant v. Martinex,* 973 F.2d 96 (2d Cir. 1992) (Lodestar figure of $500,000 was upheld in a case where plaintiffs settled for $60,000).
- *U.S. Football League v. National Football League,* 887 F.2d 408, 413, (2d Cir. 1989) (awarding $5,500,000 in fees on $3 recovery).
- *State Farm Fire & Casualty v. Palma,* 555 So.2d 836 (Fla. 1990) (awarding fees for 650 hours, and a multiplier of 2.6% applied to the lodestar, to arrive at a total fee of $253,000 in a case involving $600 in damages).
- *Armstrong v. Rose Law Firm, P.A.,* 2002 WL 31050583 (D. Minn. Sep 05, 2002) (court awarded the full lodestar fee request of over $43,000 at $250 per hour, in case where consumer received the maximum FDCPA statutory damages of $1,000).

3. The attorney fees were necessitated by Defendants' stalwart defense.

Defendants concede that they mounted a vigorous defense to the consumers' claims in this case. The evidence of the work necessary to overcome that zealous defense was undisputed

and was personally observed by this Court. A party cannot litigate tenaciously and then be heard to complain about the time necessarily spent by the consumer in response. *Capeland vs. Marshall*, 641 F.2d 880, 904 (D.C. Cir. 1980) (en banc), citing *Wolf v. Frank*, 555 F2d 1213, 1217 (5th Cir 1977) ("Obviously, the more stubborn the opposition the more time would be required" by the other side).

> [Plaintiff's] counsel did not inflate this small case into a large one; its protraction resulted from the stalwart defense. And although defendants are not required to yield an inch or to pay a dime not due, they may by militant resistance increase the exertion required of their opponents and thus, if unsuccessful, be required to bear the cost.

McGowen v. King, Inc. (5th Cir. (1981), 661 F.2d 48, 51.

See Also Lipsett vs Blanco, 975 F.2d 934, 941 (1st Cir. 1992);

> "In the ordinary course of events, one would not expert a fee award to outpace a substantial award of money damages [$525,000]. In this instance, the discrepancy is explained largely by what we have referred to as the "Stalingrad defense". While this hard-nosed approach to litigation may be viewed as effective trench warfare, it must be pointed out that such tactics have a significant downside. The defendants suffer the adverse effects of that downside here. There is a corollary to the duty to defend to the utmost – the duty to take care to resolve litigation on terms that are, overall, the most favorable to a lawyer's client. Although tension exists between the two duties, they apply concurrently. When attorneys blindly pursue the former, their chosen course of action may sometimes prove to be at the expense of the latter."

> "While [defendant] is entitled to contest vigorously [plaintiff's] claim, once it does so it cannot then complain that the fees award should be less than claimed because the case could have been tried with less resources and with fewer hours expended." *Henson v. Columbus Bank & Trust Co.* (11th Cir. 1985, 770 F. 2d 1566, 1575.

Litigation against a corporate defendant is expensive. *Nightingale v Hyundai Motor America* (1994), 31 Cal. App.4th 99 (affirming award of ($75,648.00 in fees is a lemon law case). "It is unfortunate that such a substantial expense is required in order to force a corporate giant to comply with the law. Having chosen to litigate tenaciously in order to avoid its legal responsibility, Defendant should now be ordered to reimburse Plaintiff for the cost of doing so in full." *Id.*

Affirming a fee award of $253,000, the court in *State Farm Fire & Casualty v. Plama*, 555 So.2d 836 (Fla. 1990) stated:

> "It appears State Farm decided to 'go to the mat' over the bill.... Having chosen to stand and fight over this charge, State Farm, of course, made a business judgment for which it should have known a day of reckoning would come should it lose in the end."

Id.

Furthermore, this entire litigation was caused by the Defendants' refusal to honor is obligation under the Lemon Law and repurchase this vehicle, *before Plaintiffs had to get a lawyer and file a lawsuit.* It is a similar case involving Ford Motor Company, Judge Sinclair of Stark County Common Pleas Court stated as follows:

> "The goal of the Lemon Law is to prevent exactly what has occurred in this case. A major automobile manufacturer sells a defective vehicle to a consumer. When it becomes clear after numerous attempts to repair the vehicle that it is a defective vehicle, the manufacturer should make the owner whole immediately. Here Ford did not step forward. They instead forced the Plaintiff to retain counsel, file a suit and participate in significant litigation expense and time to finally force Ford into submitting to the Lemon Law claim. The conduct of Ford Motor Company in this case is exactly why the Lemon Law permits the recovery of legal fees on behalf of a successful litigant. The goal of the Lemon Law is to make the consumer whole, to put the consumer back where he would have been prior to purchasing the defective motor vehicle. If Ford chooses to force the Plaintiff to fully and thoroughly litigate their claim, then Plaintiff should be entitled to receive a complete and full reasonable fee in this matter.

Fortner v. Ford Motor Company (April 28, 1997), Case No. 1996-CV-01106, Stark County Common Pleas Court, unreported, slip op. at pp. 3-4, *affirmed* (February 9, 1998), Stark App. No. 1997 CA 00177, Fifth District Court of Appeals, unreported (awarding $44,046.02 in reasonable attorney fees in a lemon law case which was settled prior to trial).

CONCLUSION. The Lodestar fee requested is reasonable. Defendants have failed to meet their burden to establish any reduction of the lodestar.

IT IS SO ORDERED.

JUDGE KELLY J. COTTRILL

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Entry has been served upon all counsel record, by placing a copy in the attorney's box in the office of the Clerk of Courts or by regular U.S. Mail, postage prepaid, on this the 15 day of Sept, 2009.

Brenda S Finley

Brenda S. Finley, Assignment
Commissioner for Judge Cottrill

TODD A. BICKLE, CLERK OF COURTS