STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: April 22, 2013)

FERRIS AVENUE REALTY, LLC	:	
	:	
V.	:	**C.A. No. PB 07-1995**
	:	
HUHTAMAKI, INC. as successor to HUHTAMAKI FOODSERVICE, INC. and HUHTAMAKI-EAST PROVIDENCE, INC.	:	

DECISION

SILVERSTEIN, J. A Superior Court jury awarded $251,121.06 to Plaintiff Ferris Avenue Realty (Plaintiff and/or Ferris Avenue) for Defendant Huhtamaki, Inc.'s (Defendant and/or Huhtamaki) breach of an indemnity agreement. The $251,121.06 award was the full amount requested by Ferris Avenue, and an approximate amount known to the parties throughout this six-year litigation. Pursuant to provisions in the Indemnity Agreement, Ferris Avenue now seeks to recover $1,095,036.57 in attorneys' fees and costs. For its part, Huhtamaki's counsel racked up $1,839,996.98 in attorneys' fees and costs during this case. Against this backdrop of "litigation run amok,"[1] the Court considers Ferris Avenue's Motion for Attorneys' Fees, Costs and "Damages" (Motion).

I

Facts and Travel

The Court detailed the essential facts of this case in a recent Decision on Huhtamaki's post-trial motions. See Ferris Avenue Realty, LLC v. Huhtamaki, Inc., No. PB-2007-1995, filed Mar. 19, 2013, Silverstein, J., at 1-3. Those facts need not be repeated here. However, the Court

[1] Blackburn v. Goettel-Blanton, 898 F.2d 95, 96 (9th Cir. 1990).

will explain how a Decision on a motion for attorneys' fees can be rendered more than four months after the entry of judgment.

The judgment resulting from the jury verdict was entered on December 17, 2012. On January 4, 2013, Ferris Avenue filed its Motion for Attorneys' Fees, Costs and "Damages." Huhtamaki objected to the Motion on January 14, 2013. On January 31, 2013, Ferris Avenue filed both a reply memorandum to Huhtamaki's objection and a "Supplemental Submission" in support of its Motion, consisting of an additional bill for expert services.

On February 11, 2013, the Court heard argument on this Motion and the other post-trial motions for nearly three and one-half hours. (Hr'g Tr. 1, 55, 75, 123, Feb. 11, 2013.) The Court had to address disagreements about procedural issues that underlay the request for attorneys' fees. Huhtamaki wanted to file an expert affidavit; Ferris Avenue argued that Huhtamaki waived that opportunity. Ferris Avenue sought Huhtamaki's counsel's time records to support its argument that its own fees were reasonable; Huhtamaki opposed. The Court permitted Huhtamaki to file a counter-affidavit on the reasonableness of the fees, and also ordered that Huhtamaki make available redacted copies of its counsel's time records. Id. at 27-28. Acknowledging that these events would take time and responses may be warranted, the Court scheduled a telephone conference for March 4, 2013, three weeks out. Id. at 120-23. Unfortunately, this was not the last time that the parties had to appear in Courtroom 17.

On the Sunday night before the Monday morning telephone conference, Huhtamaki produced unredacted time records to Ferris Avenue. However, those records did not contain the bills from Huhtamaki's pro hac vice attorneys from Foley & Lardner (both the Boston and Miami offices) for the period from November 2012 through February 2013—the time frame during which the Court heard pre-trial motions, held a thirteen-day jury trial, and received many

post-trial motions. When repeated email requests to Huhtamaki's counsel did not produce the desired records, Ferris Avenue filed a Motion to Adjudge in Contempt. The Court heard argument on that Motion on March 12, 2013. Although no one from Foley & Lardner appeared for this hearing (only local counsel appeared), the Court permitted one additional week to turn over the bills. Finally, on March 19, 2013, Huhtamaki produced Foley & Lardner's pro forma bills for November 2012 through February 2013, disclosing additional fees of $388,958. But the paper trail did not end here.

Yet another push of paper commenced. On March 27, 2013, the Court received the following from Ferris Avenue: (1) Supplemental Memorandum in Support of Plaintiff's Motion for Award of Attorneys' Fees and Litigation Costs; (2) Supplemental Motion for Award of Attorneys' Fees and Costs for the Time Period from December 18, 2012 through February 28, 2013; and (3) Supplemental Affidavit of Richard J. Welch, Esquire, in Support of Plaintiff, Ferris Avenue Realty, LLC's Motion for Award of Attorneys' Fees. Also on that day, the Court received Huhtamaki's Supplemental Memorandum in Support of Its Objection to Motion of Plaintiff for Award of Attorneys' Fees, which included an expert affidavit opining on the reasonableness of Ferris Avenue's attorneys' fees and costs. On April 1, 2013, Huhtamaki filed an Objection to Ferris Avenue's Supplemental Motion for Award of Attorneys' Fees and Costs. On April 5, 2013, Ferris Avenue filed a Reply to Defendant's Supplemental Memoranda on Attorneys' Fees and Litigation Costs, primarily addressing the arguments raised in Huhtamaki's expert affidavit. On April 10, 2013, Huhtamaki filed a Sur-Reply to Plaintiff's Reply Regarding Its Motion for Award of Attorneys' Fees, which argued that Ferris Avenue had waived its entire request for fees by framing its argument slightly differently in its April 5 memorandum. Ferris

Avenue responded to that April 10 Huhtamaki memorandum on April 15, 2013, via the Plaintiff's Response to Defendant's "Sur-Reply" on Attorneys' Fees and Litigation Costs.[2]

The above-described hearings and filings account only for events in the last four months of a six-year litigation, and they account only for filings and events relative to the request for attorneys' fees and costs. In addition to the many trees slain in the name of this litigation, it is easy for one to see how each printed page ticked the cost-meter higher and higher, and how the attorneys' fees grew out of the inordinate time spent putting fingers to keyboard.

II

Standard of Review

Rhode Island "adheres to the 'American rule' that litigants generally are responsible for their own attorneys' fees and costs. However, attorneys' fees may be appropriately awarded, at the discretion of the trial justice, given proper contractual or statutory authorization." Pearson v. Pearson, 11 A.3d 103, 108-09 (R.I. 2011) (internal quotations and citations omitted). "[W]hen a contractual fee provision is included by the parties, the question of what fees are owed 'is ultimately one of contract interpretation,' and our primary obligation is simply to honor the agreement struck by the parties." AccuSoft Corp. v. Palo, 237 F.3d 31, 61 (1st Cir. 2001) (quoting MIF Realty, L.P. v. Fineberg, 989 F. Supp. 400, 402 (D. Mass. 1998)); see Pearson, 11 A.3d at 109 ("We decline to read nonexistent terms or limitations into a contract."). However, "the amount awarded in counsel fees is within the sound discretion of the trial judge in light of the circumstances of each case." Schroff, Inc. v. Taylor Peterson, 732 A.2d 719, 721 (R.I. 1999).

[2] Although unrelated to attorneys' fees, the Court notes that counsel to the parties had to appear before this Court yet again on April 17, 2013, because they could not agree as to whether the money put up to stay the execution of the judgment pending appeal should be done via supersedeas bond or an escrow account.

When considering the reasonableness of a request for attorneys' fees, the Court considers a variety of factors. See infra Section III.B.1.

III

Discussion

A

The Appropriate Provision

Ferris Avenue seeks attorneys' fees and costs through two avenues of the Indemnity Agreement: (1) Paragraph 2—the substantive indemnity clause—with an application of the definition of "Damages" from Paragraph 1, and (2) Paragraph 7 (the "Prevailing Party Provision").[3] The difference is more than a matter of semantics; it has an effect on two preliminary issues before the Court: whether attorneys' fees had to be proved at trial and whether Ferris Avenue is entitled to prejudgment interest if the Court awards attorneys' fees and costs.

Paragraph 1(b) of the Indemnity Agreement defines "Damages" as

> any and all . . . claims, litigation, demands, defenses, judgments, suits proceedings, costs . . . of any kind or of any nature whatsoever (including, without limitation, reasonable attorneys', consultants' and experts' fees and disbursements incurred in

[3] At times, Ferris Avenue collapsed all three paragraphs into a single argument for attorneys' fees as "Damages." The Court reads the Prevailing Party Provision as a stand-alone provision because the Prevailing Party Provision does not use the word "Damages"; thus, the definition of "Damages" in Paragraph 1 does not apply to Paragraph 7. In its April 10, 2013 filing, Huhtamaki contends that, because Ferris Avenue took the position that attorneys' fees and costs under the Prevailing Party Provision were part and parcel of "Damages" defined in Paragraph 1, Ferris Avenue's "entire fee request has been waived." (Def.'s Sur-Reply to Plaintiff's Reply Regarding Its Motion for Award of Att'ys' Fees 1.) Ferris Avenue's argument does not waive its fee request in toto, and the Court will interpret and apply the provisions of the Indemnity Agreement. Notably, Huhtamaki arguably waived its challenge to Ferris Avenue's request for attorneys' fees via the Prevailing Party Provision when it stated, "Paragraph 7 . . . is a prevailing party provision, which may ultimately provide Plaintiff with a basis for requesting fees." (Def.'s Obj. to Pl.'s Mot. for Award of Att'ys' Fees 2.)

> investigating, defending against, settling or prosecuting any claim, litigation or proceeding) which may at any time be imposed upon, reasonably incurred by or asserted or awarded against such Indemnified Party or the Property.

Paragraph 2 provides that Huhtamaki will "indemnify, protect and hold harmless [Ferris Avenue] . . . against any and all Damages . . . ." Meanwhile, Paragraph 7 states that

> [i]f any legal action or other proceeding is brought for the enforcement or interpretation of any rights or provisions of this Agreement (including the indemnification and noncompetition provisions), or because of an alleged dispute, breach, default or misrepresentation in connection with the provisions of this Agreement, the successful or prevailing party shall be entitled to recover reasonable attorneys' fees and all other costs and expenses incurred in that action or proceeding, in addition to any other relief to which it may be entitled.

"Attorneys' fees can be either an element of damages to be proven at trial or a collateral matter to be determined following adjudication of the relevant claims." Pride Hyundai, Inc. v. Chrysler Financial Co., LLC, 355 F. Supp. 2d 600, 602 (D.R.I. 2005). While our Supreme Court does not appear to have spoken directly to which circumstances should result in which avenue of adjudication, the United States District Court for the District of Rhode Island has recently synthesized the law directly relevant to our situation:

> In evaluating contractual fee claims, . . . courts have differentiated between claims for attorney's fees based on prevailing party contractual provisions, which generally may be raised in a postjudgment motion (because only then can the prevailing party be determined), and claims for attorney's fees based on other types of contractual provisions, which generally must be proved at trial. Lifespan Corp. v. New England Medical Center, Inc., 2011 WL3841085, at *5 (D.R.I Aug. 26, 2011) (internal quotations and citations omitted).

Other federal district court decisions are in accord. See, e.g., Doucot v. IDS Scheer, Inc., 734 F. Supp. 2d 172, 191 (D. Mass. 2010); Pride Hyundai, 355 F. Supp. 2d at 602-607; Kraft Foods North America v. Banner Engineering Sales, Inc., 446 F. Supp. 2d 551, 578 (E.D. Va. 2006).

Additionally, courts have held that Fed. R. Civ. P. 54(d)(2)(A) "creates a division in the handling of attorneys [sic] fees claims between claims that are not part of the underlying substantive claim, which must be made by motion, and claims that are an element of damages, which presumably must be made by complaint."[4] Carolina Power and Light Co. v. Dynegy Marketing and Trade, 415 F.3d 354, 358 (4th Cir. 2005); cf. House of Flavors, Inc. v. TFG-Michigan, L.P., 700 F.3d 33, 37 (1st Cir. 2012) (judgment not final for appeal purposes "where there remains an outstanding claim for attorneys' fees sought as an element of damages") (emphasis in original).

Here, Ferris Avenue did not prove, or even raise, attorneys' fees as an element of damages for the jury's consideration at trial. Therefore, Ferris Avenue waived any possible recovery for attorneys' fees as "Damages" by not raising and proving the fees at trial.[5] Nevertheless, the Prevailing Party Provision is still in play. Having won a jury verdict fully in its favor, Ferris Avenue is clearly the prevailing party under the Indemnity Agreement.[6] However, because the attorneys' fees are "not part of the underlying damages," Ferris Avenue is not entitled to prejudgment interest on any award by the Court. Diaz v. Jiten Hotel Management, Inc., 704 F.3d 150, 155 (1st Cir. 2012).

---

[4] Fed. R. Civ. P. 54(d)(2)(A) provides: "A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages." The Rhode Island Superior Court Rules of Civil Procedure do not address how the Court should handle requests for attorneys' fees.

[5] Because the Court decides that attorneys' fees as "Damages" has been waived, the Court need not and does not take a position as to whether "Damages" through Paragraphs 1(b) and 2 contemplates attorneys' fees as "Damages" between the parties, in light of the Prevailing Party Provision, which addresses the issue directly.

[6] Huhtamaki contends that this issue is not ripe for a decision as an appeal on the merits is planned. However, judicial economy favors a decision now. Our Supreme Court seeks to avoid piecemeal review, which is what would occur if the Supreme Court was to hear and decide an appeal on the merits, and then have this Court decide the attorneys' fees issue, which would likely result in a second appeal to the Supreme Court. See Borland v. Dunn, 113 R.I. 337, 339, 321 A.2d 96, 98 (1974) (noting "the well-established principle that this court will not afford a litigant a piecemeal review of his case").

While Ferris Avenue is entitled to fees and costs under the Prevailing Party Provision, those fees and costs must still be reasonable. Therefore, the Court will next address whether the attorneys' fees and costs incurred by Ferris Avenue in connection with this litigation were reasonable.

B

Are Attorneys' Fees and Costs Four Times the Amount of the Judgment Reasonable?

1

The Factors

Under the Prevailing Party Provision, Ferris Avenue may recover "reasonable attorneys' fees and all other costs and expenses incurred" in this case. (Indemnity Agreement ¶ 7.) "A trial justice determines the reasonableness of the fee by considering the factors enumerated in Rule [of Professional Conduct] 1.5." Keystone Elevator Co., Inc. v. Johnson & Wales University, 850 A.2d 912, 921 (R.I. 2004). Originating with our Supreme Court's decision in Palumbo v. United States Rubber Co., 102 R.I. 220, 229 A.2d 620 (1967), the factors were "later embodied in the disciplinary rule." Colonial Plumbing & Heating Supply Co. v. Contemporary Const. Co., Inc., 464 A.2d 741, 743 (R.I. 1983). The factors are:

> (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
>
> (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
>
> (3) The fee customarily charged in the locality for similar legal services.
>
> (4) The amount involved and the results obtained.
>
> (5) The time limitations imposed by the client or by the circumstances.

> (6) The nature and length of the professional relationship with the client.
>
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
>
> (8) Whether the fee is fixed or contingent. Id.; see R.I. Sup. Ct. Rules, Art. V, R. 1.5(a)(1)-(8).

"Each of these factors is important but no one is controlling." Palumbo, 122 R.I. at 224, 229 A.2d at 622-23.

These factors are employed by many courts. See, e.g., Schoonmaker v. Lawrence Brunoli, Inc., 828 A.2d 64, 98 n.60 (Conn. 2005); Matter of Fordham, 668 N.E.2d 816, 920 (Mass. 1996). The New Jersey Supreme Court employs the same eight factors in its analysis of the reasonableness of attorneys' fees and recently considered a case with similar facts. See Litton Industries, Inc. v. IMO Industries, Inc., 982 A.2d 420, 428-29 (N.J. 2009). In Litton Industries, the plaintiff, pursuant to a contract, sought $6,411,354 in attorneys' fees and costs on a $2,100,000 jury award.[7] See id. at 424. The trial court reduced that fee to $5,975,903, but the New Jersey Supreme Court remanded the case with instructions to consider whether "to reduce even more the amount of the fee in light of the fee request that exceeded the amount of the recovery." Id. at 430.

The New Jersey Supreme Court laid out its analysis for an award of attorneys' fees. After deciding that the plaintiffs were entitled to fees, the court stated that "[t]he next step in determining the amount of the award is to calculate the 'lodestar,' which is that number of hours reasonably expended by the successful party's counsel in the litigation, multiplied by a

[7] The Plaintiffs sought $9,022,042 at trial. Litton Industries, 982 A.2d at 424. The jury actually awarded $2,300,000, but the parties agreed to reduce the amount to $2,100,000 to correct an error. Id.

reasonable hourly rate." Id. at 428. In that analysis, the court considered the same eight factors derived from the Rules of Professional Conduct. Id. at 428-29. Finally, the court concluded that:

> Beyond the lodestar amount, in cases in which the fee requested far exceeds the damages recovered, the trial court should consider the damages sought and the damages actually recovered. In addition to that proportionality analysis, the court must evaluate the reasonableness of the total fee requested as compared to the amount of the jury award. That is, when the amount actually recovered is less than the attorney's fee request, the court must consider that fact in determining the overall reasonableness of the attorney's fee award. To be sure, there is no precise formula for that portion of the reasonableness analysis. The ultimate goal is to approve a reasonable attorney's fee that is not excessive. Id. at 429 (internal quotations omitted) (emphasis added).

This Court shares the concerns of the New Jersey Supreme Court regarding the proportionality of attorneys' fees to a jury award. Although the New Jersey Supreme Court framed this consideration as something apart from the eight factors delineated in the Rules of Professional Conduct, this Court thinks the better view is that the proportionality analysis described above is really just a more detailed description of what should be considered under the fourth factor: "the amount involved and the results obtained." See Colonial Plumbing, 464 A.2d at 743. Additionally, the New Jersey Supreme Court and other courts frame the number resulting from the application of the eight factors as the "lodestar amount." See Litton Industries, 982 A.2d at 428-29. This Court believes that the clearer terminology is to refer to the product of the reasonable number of hours worked multiplied by the reasonable hourly rate as the "lodestar amount," and any changes to that amount—via the eight factors or otherwise—are "adjustments to the lodestar amount."[8] Nomenclature aside, it seems clear that the starting point

[8] The Maryland Supreme Court observed the following when discussing its approach to a statutory award of reasonable attorneys' fees:

> Most of the cases applying lodestar have involved the adjustments to be made to a strict hours times rate methodology, and nearly all of the courts have stressed that hours times rate is simply the

is the product of the reasonable number of hours worked multiplied by the reasonable hourly rate, and then the analysis continues to a multi-factoral, fact-specific analysis, which includes the consideration of the amount in controversy and the amount of damages awarded by a jury.[9] See, e.g., Litton Industries, 982 A.2d at 429.

Ferris Avenue relies upon a United States Supreme Court case for the proposition that "'reasonable attorney's fees . . . are not conditioned upon and need not be proportionate to an award of money damages.'" (Pl.'s Reply Mem. 7) (quoting City of Riverside v. Rivera, 477 U.S. 561, 574-76 (1986)). In Riverside, the Court upheld an award of $245,456.25 in attorneys' fees on a $33,350 recovery of damages. While the United States Supreme Court can be a highly persuasive authority even on state law issues, the facts of Riverside are not applicable to our case because the plurality's reasoning focuses on statutory interpretation and the civil rights nature of the case.[10] See Riverside, 477 U.S. at 567-81. Here, the Court considers a contractual prevailing party provision in an indemnity agreement without a civil rights hook.

> beginning point. Indeed, the adjustments, up or down, may well produce a result that, in the end, has little relationship to the actual time spent on the case. Whether those adjustments, which are largely case-specific, are denominated as an alternative approach to lodestar or are regarded as embraced within the overall lodestar calculus may well be a matter of semantics. Friolo v. Frankel, 819 A.2d 354, 370-71 (Md. 2003).

This reasoning underscores the point that the hours and rate are merely a guidepost, not a destination. See id. at 356 n.1 (citing Webster's Unabridged Dictionary at 1062) ("The term 'lodestar' has an Anglo-Saxon origin-'lad,' a way or path, and 'sterre,' a star. It thus was a guiding star.").

[9] Some states have an even harsher rule. In New York, for example, "as a general rule, [courts] will rarely find reasonable an award to a plaintiff that exceeds the amount involved in the litigation." F.H. Krear & Co. v. Nineteen Named Trustees, 810 F.2d 1250, 1264 (2d Cir. 1987). Exceptions will only be made when there are "transcending principles involved which make it economically feasible and reasonable." Id. Our Supreme Court does not seem to follow that strict general rule, however, as it has affirmed an award of $12,383 in attorneys' fees on an $11,075 judgment. See Keystone Elevator, 850 A.2d at 916, 921.

[10] Indeed, the Plaintiff's ellipsis omits "under § 1988," i.e., the section of the United States Code.

2

The Application

a

Ferris Avenue's Counsel's Efforts

Plaintiff's counsel skillfully litigated this case on behalf of their client. This is most apparent by the fact that the jury awarded Ferris Avenue exactly the amount requested in counsel's closing argument. Additionally, Huhtamaki did not contest the quality of Ferris Avenue's counsel's work, and its expert agreed with their qualifications. (Brenner Aff. ¶ 39.)

The first of the eight factors in the Rules of Professional Conduct is the labor and time required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly. Here, the case was aggressively litigated by both parties, resulting in a large amount of labor and time required. While just a breach of contract action on its face, the case was somewhat complex given the underlying issue of environmental contamination. There does not seem to be information in the record about the second factor—the preclusion of other employment—although given the amount of time ultimately spent on this case, it is possible that Plaintiff's counsel may have had to refuse other clients.

Regarding the third factor, the Court finds the hourly rates charged by Plaintiff's counsel are commensurate with the prevailing rate in Rhode Island for attorneys of their skill level. The Defendant's expert agrees that the rates were reasonable. (Brenner Aff. ¶ 35.) Skipping ahead to the seventh factor—experience, reputation, and ability of the lawyers—the Court holds these lawyers in high regard, both relative to their work in this case and in others. The Defendant's expert also does not dispute this element. (Brenner Aff. ¶ 39.)

Huhtamaki's expert argues that "there is likely a contingency fee or a fixed fee arrangement between Ferris and its counsel" because the client has not made a payment to its attorneys since 2010 and contends this fact bears negatively on Ferris Avenue's fee request.[11] (Brenner Aff. ¶¶ 24, 40.) Ferris Avenue responded that it does not have a contingent fee arrangement and pointed out that the affidavit gave no reason why this would merit a deduction. (Pl.'s Reply to Def.'s Suppl. Mem. 4.) In this case, either fee arrangement would have benefits and drawbacks. Even if the Plaintiff had a contingency fee arrangement, this would not necessarily incentivize counsel to run up bills; if Ferris Avenue lost, its attorneys would receive no payment and might have been precluded from other engagements. Therefore, this factor is not a significant help to either side. Similarly, factors five and six, which relate to time limitations and the lawyers' professional relationship with the client, are of little or no relevance here.

As for the results obtained, part of the fourth factor in the Rules of Professional Conduct, Ferris Avenue won a jury verdict of exactly the amount requested. Thus, there can be no reduction for lack of success. See Litton Industries, 892 A.2d at 429 (noting that "the trial court should consider the damages sought and the damages actually recovered"). Beyond the monetary award, Ferris Avenue's counsel protected its client's rights under the Indemnity Agreement, which is still in force today, and saved their client from having to pay the Defendant's attorneys' fees and costs.

[11] The Court notes that, while possible, it has never seen a contingent fee agreement which contemplated a fee in excess of the amount recovered.

b

The Total Fees and Costs Requested as Compared to the Amount of the Jury Award

The elephant in the room is the remaining factor: the amount involved. While no one factor is controlling, our Supreme Court has observed the following regarding the role of the trial justice when making a fee award determination:

> It is well within the authority of the trial justice to make an attorneys' fees award determination after considering the circumstances of the case. The trial justice is in the unique position of observing the attorneys requesting the fees and is better able to judge the merits of a particular request. This trial justice observed firsthand the work product of counsel throughout the trial and thus was better situated to assess the course of litigation and the quality of counsel. Keystone Elevator, 850 A.2d at 920 (emphasis added).

"[T]he relationship between the fee requested and the damages recovered is a factor to be considered by the trial court because the notion of proportionality is integral to contract fee-shifting to meet the reasonable expectation of the parties." Litton Industries, 982 A.2d at 430. In the Court's discretion, with its knowledge of the facts and circumstances of this case, the relationship between the amount recovered—here it is equal to the amount in controversy—and the fee requested is the most significant factor in considering the reasonableness of the fee requested in this case.

In this case, each side blames the other for the amount of time spent litigating this case. Ferris Avenue blames Huhtamaki's "Stalingrad defense" or "scorched earth litigation strategy," noting that the Defendant spent nearly $2 million defending this case. Ferris Avenue contends that it did not have to capitulate just because the Defendants filed many motions, and because Huhtamaki should know that it would be on the hook for such a fee because of its own strategy. Indeed, authority supports the premise that Ferris Avenue should not be penalized for responding. Huhtamaki responds that it had a right to present a vigorous defense, especially in

light of unproductive settlement discussions. Indeed, it is the Defendant's right to aggressively defend itself, and authority also supports the proposition that an award of attorneys' fees should be looked at in light of the amount in controversy.

With the parties' legal bills rising, then approaching, and eventually exceeding the amount in controversy, how did this case not settle? The parties again play the blame game. Huhtamaki contends that Ferris Avenue sought an unreasonable amount in negotiations, even rejecting a $1 million offer after closing arguments. Ferris Avenue responds that all of Huhtamaki's offers required a full release from the Indemnity Agreement, and Huhtamaki did not properly value such a release. Huhtamaki retorts, via its expert, that the Plaintiff bears the burden to initiate settlement dialogue, and did little to try to settle. (Brenner Aff. ¶ 32.)

Both parties are to blame in this costly debacle. Broadening the scope of the settlement resolution beyond the precise legal issue can be an effective tool to getting to a resolution and sometimes even wards off future litigation. However, after discussions either failed to include or displayed a dramatically different view of the value of the Indemnity Agreement beyond this case, the parties and their respective counsel should have seen that a broader agreement was not going to work here. At that point, the parties should have sought a narrower solution to avoid the situation we have now.

In remanding the case to the trial court for it to consider whether "to reduce even more the amount of the fee in light of the fee request that exceeded the amount of the recovery," the New Jersey Supreme Court noted that such an analysis "is necessarily fact-sensitive as there is no precise test or mathematical calculation for that adjustment." Litton Industries, 892 A.2d at 430. "The trial court is in the best position to weigh the competing arguments in making any fee adjustment to ensure that the counsel fee award is reasonable." Id.

Here, the Court will not award the full fee requested by Ferris Avenue; such a fee is not reasonable in light of the amount in controversy and the amount awarded by the jury. See Litton Industries, 982 A.2d at 429. It shocks the conscience that such an amount could be spent litigating a case with such a comparatively smaller amount in controversy and ultimately awarded. Even in Riverside—where the United States Supreme Court upheld an attorneys' fee award of more than seven times the amount of the judgment in a civil rights lawsuit—five of the nine justices thought that the award was unreasonable. Justice Powell concurred in the judgment largely on standard of review grounds. Riverside, 477 U.S. at 581-86 (Powell, J., concurring) ("In sum, despite serious doubts as to the fairness of the fees awarded in this case, I cannot conclude that the detailed findings made by the District Court, and accepted by the Court of Appeals, were clearly erroneous, or that the District Court abused its discretion in making this fee award."). In addition to the four dissenters, who found the fee unreasonable even in its appellate posture, Justice Powell wrote in his opening paragraph, "On its face, the fee award seems unreasonable." Id. at 581. Notably, the loudest of the dissenters, Chief Justice Burger, wrote, "only to add that it would be difficult to find a better example of legal nonsense than the fixing of attorney's fees by a judge at $245,456.25 for the recovery of $33,350 damages." Id. at 587 (Burger, C.J., dissenting).

Although the Indemnity Agreement is a private contract, the Court notes that it is addressing a prevailing party provision that provides for "reasonable attorneys' fees." Because that phrase and, in particular, the word "reasonable" are otherwise unadorned, the concept is given its meaning under the Court's jurisprudence.[12] Indeed, that is how the parties have

[12] If the parties meant for "reasonable attorneys' fees" to mean only reasonable rates and reasonable number of hours worked, the term could have been defined as such in the Indemnity

presented the arguments to the Court. Thus, we have come to a point where the Court must place its judicial stamp of approval on the reasonableness of a request for fees and costs. If that stamp is to mean anything, the Court cannot award a fee so in excess of the amount in controversy and the amount of the judgment.

c

The Amount of Fees Awarded

"In ordinary private litigation, . . . a fee exceeding the damages is usually not 'reasonable.'" Cole v. Wodziak, 169 F.3d 486, 488 (7th Cir. 1999). As discussed above, this case is different because the amount of the Plaintiff's attorneys' fees is not wholly the Plaintiff's fault. The Court awards $734,199.73 in reasonable attorneys' fees and costs to the Plaintiff. This awards the full amount of costs and expenses incurred by Ferris Avenue, but reduces attorneys' fees to the amount half-way between the amount of fees requested by the Plaintiff (the unadjusted lodestar amount) and the jury's award of damages.[13] This number takes into account the lodestar guidepost, the amount of judgment because of its relevance to proportionality, and both parties' and their counsel's fault in creating this conscience-shocking mess. Beyond this case, the Court believes that the principles espoused in this Decision should discourage civil litigants and members of the bar from pressing cases and positions that essentially result in what appears to be a competition for attorneys' fees. Fees far exceeding the amount of the judgment do not automatically warrant a reduction, but instead, the reasonableness depends on the unique

---

Agreement. Under the Court's jurisprudence, the meaning of reasonable attorneys' fees is much more circumspect than that. See supra Sec. III.B.1.

[13] The Court's award was calculated via this equation: (($972,794.75+$251,121.06)/2) + $122,241.82. See Suppl. Welch Aff. ¶ 11, Mar. 27, 2013. Notably, the $122,241.82 in costs alone is nearly half the amount in controversy.

facts of each case. Here, such a reduction is warranted, and, above all else, the Court believes that this is a fair and reasonable fee.

IV

Conclusion

The parties spent over $2,855,513.04 in billable time and out-of-pocket expenses litigating a $251,121.06 case: attorneys' fees and costs that total more than eleven times the judgment. After the protracted case on the merits ended, the parties continued to play games with each other and to inundate the Court with at least thirteen new motions, memoranda, and other filings relating to attorneys' fees, each responding to every new nuance in the opposition's position. In civil practice, the judicial system should be used, inter alia, as a conduit to dispute resolution, not as an arena for fee generation. The Court cannot say that the prevailing party's fees sought in this case are reasonable given the amount in controversy and the amount recovered. Therefore, the Court reduces the Plaintiff's award of attorneys' fees and costs under the Prevailing Party Provision to $734,199.73. Prevailing counsel shall present an order consistent herewith which shall be settled after due notice to counsel of record.

RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: Ferris Avenue Realty, LLC v. Huhtamaki, Inc., et al.

CASE NO: PB 07-1995

COURT: Providence Superior Court

DATE DECISION FILED: April 22, 2013

JUSTICE/MAGISTRATE: Silverstein, J.

ATTORNEYS:

For Plaintiff: Richard J. Welch, Esq.
Michael T. Eskey, Esq.

For Defendant: Stephen J. Darmody, Esq.
Thomas W. Lyons, III, Esq.