

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

ANGELA CARUSO

Plaintiff,

v.

**BALLYCROY-MAYO
INTERNATIONAL, LTD, et al.**

Defendants.

) **CASE NOS. CV-01-448754 &
) CV-02-484716 & CV-05-556678**

) **JUDGE DICK AMBROSE**

) **OPINION, ORDER AND FINAL
) JUDGMENT ENTRY REGARDING
) ATTORNEY FEES AND STATUTORY
) DAMAGES**

{¶1} This Opinion and Judgment Entry constitutes the Court's final entry of judgment in this long and tortured litigation regarding the interest of Plaintiff, Angela Caruso, in Defendant, Berardi's Fresh Roast, Inc. For purposes of this Opinion, it is not necessary that the Court review the 11 plus year history of this case. It is sufficient to note that there were three trials involving the above-captioned, consolidated cases. The first involved legal malpractice claims against Plaintiff's prior counsel. The second involved fraud claims by Plaintiff against Defendant Patrick Leneghan Sr. and others. In this third and final trial, the jury returned a verdict on August 13, 2012, after three weeks of trial, in favor of Plaintiff on Plaintiff's claims for breach of fiduciary duty against Defendant Patrick Leneghan, Sr. in the amount of \$987,000.00.¹ The jury also found that Plaintiff

¹ In its Journal Entry of 11/01/2012, the Court granted partial remittitur of the jury's verdict to \$958,776, based on the evidence presented at trial. The Court also found this amount subject to further remission of \$270,000 if Plaintiff does not tender her shares of stock in Berardi's Fresh Roast, Inc. to Defendant within ten (10) days of the Court's entry of final judgment in this case.

was entitled to statutory damages under R.C. 1701.94, and was entitled to an award of punitive damages² and attorney fees.

{¶2} Issues regarding the calculation of attorney fees and statutory damages remain for the Court's determination. The Court conducted a hearing on the issue of attorney fees on 9/20/12.³ Based on the testimony and evidence presented at the hearing and the briefs and arguments of counsel, the Court finds that an award of attorney fees of \$690,968.80 for Plaintiff is appropriate and reasonable in this case. The Court also awards Plaintiff statutory damages in the amount of \$4,510.00. The Court bases these rulings on the following analysis:

ATTORNEY FEES AWARD

{¶3} At the hearing on 9/20/12, Plaintiff requested attorney fees in the amount of \$1,198,732.00. In support of Plaintiff's request, Plaintiff's counsel, William Wuliger, offered testimony as to his qualifications as an attorney and that his reasonable hourly rate for legal services rendered in this case was \$350/hr. Mr. Wuliger also testified that the rate charged for work performed by his associate attorney, Bernadette Matheson, was \$280/hr. and that the rate for his paralegal, Donna Craven, was \$160/hr. Mr. Wuliger admitted that he agreed to provide legal representation for Plaintiff, Angela Caruso, on a contingency fee basis and that, according to that agreement, he was entitled to 40% of the amount recovered at trial.⁴

² After a bifurcated proceeding on August 14, 2012, to determine the amount of punitive damages, the jury awarded Plaintiff punitive damages in the amount of \$1.00.

³ The Court also considered the issue of pre-judgment interest at this hearing, but issued a separate ruling denying Plaintiff's Motion for Prejudgment Interest on 11/01/2012.

⁴ Plaintiff did not provide the Court with a copy of any contingent fee agreement with counsel.

{¶4} Attorney David Bertsch, trial counsel for Berardi's, testified that he has practiced law for 34 years and is a partner at the law firm of Stark & Knoll in Akron, Ohio. Mr. Bertsch testified that his hourly rate for work performed in this case is \$175/hr. He also testified that he was unaware of law firms charging hourly rates in the \$300 - \$350 range and that based on his experience, the hourly rates claimed by Plaintiff were excessive.

{¶5} Although no outside sources of information regarding hourly rates for attorneys of similar experience and expertise in this area were introduced at the hearing, the Court notes that a profile of 2010 attorney hourly billing rates and practices conducted by the Solo, Small Firm & General Practice Section of the Ohio State Bar Association contains such a breakdown.⁵ In its 2010 Economics of Law Practice in Ohio survey, the Bar Association noted that the mean hourly billing rate for attorneys with offices in Greater Cleveland was \$239, with a median rate of \$210. The Survey also noted billing rates of \$175 for attorneys in the 25th percentile; \$300 for attorneys in the 75th percentile; and \$415 for attorneys in the 95th percentile. *Id.* The Survey, although neither authoritative nor binding, provides a useful background to measure the testimony offered at the hearing. Based on that testimony, the Court determines that an hourly rate of \$300/hr. is reasonable for Plaintiff's lead trial counsel, William Wuliger. The Court also finds that an hourly rate of \$195/hr. is reasonable for Bernadette Matheson as an associate attorney with her level of experience, and that an hourly rate of \$95/hr. is appropriate for paralegal services rendered in connection with this case.

⁵ The Ohio State Bar Association Solo, Small Firm & General Practice Section, *The Economics of Law Practice in Ohio in 2010*, available at https://www.ohiobar.org/General%20Resources/pub/2010_Economics_of_Law_Practice_Study.pdf (accessed 12/29/2012).

{¶6} Having determined the reasonable hourly rates to apply, the Court now turns to the hours expended in order to determine the appropriate lodestar amount. It is well established that the first step in determining an award of attorney fees is the computation of the lodestar figure. *Turner v. Progressive Corp.*, 140 Ohio App.3d 112, 115, 2000-Ohio-1777 (8th. Dist.). In this regard, the Court focuses on Plaintiff's Exhibit No. 513, a 30 page document, which was introduced at the hearing as an itemized listing of Plaintiff's attorney fees from May 19, 2010 to September 13, 2012. Mr. Wuliger testified that this exhibit was prepared using time slips created contemporaneous with the work performed. However, this exhibit was not sent to Plaintiff in the form of an invoice as she was not billed on an hourly rate basis.

{¶7} The Court reviewed Ex. 513 in detail and notes that the review was protracted by the fact that the exhibit failed to list total hours worked by either the billing attorneys or paralegal. After reviewing the hours expended for each line item, the Court made reductions where necessary to eliminate time that was excessive and/or unjustified for the services performed. For example, there were several instances throughout the exhibit where the time billed for services by the associate attorney exceeded 24 hours in one day. In addition, there were multiple entries where the associate attorney performed tasks normally reserved for a paralegal, but which were billed at the full hourly rate for the associate. Excessive and duplicative time was also spent on preparation of motions, exhibits, and there were also multiple entries that provided little information in terms of itemization for extended periods of time to be billed – such as “trial prep – 11 hours.” Before the Court reduced the hourly billing rates of Plaintiff's counsel, the total dollar amount sought for the time recorded between May 19, 2010 and September 13, 2012 was \$1,198,732.00. The Court finds this amount to be excessive and therefore reduces

by 649.30 hours, the time listed for the partner (William Wuliger); reduces by 2,244.94 hours, the time listed for the associate (Bernadette Matheson); and reduces by 614.90 hours the time listed for the paralegal (Donna Craven). When multiplied by the reasonable hourly rates determined by the Court, this reduced time results in a deduction of \$507,763.20 from the amount claimed. This leaves \$690,968.80 as the lodestar amount for Plaintiff's attorney fees.

{¶8} In determining the appropriate amount of attorney fees to award, the Court also considers the factors listed in Rule 1.5(a) of the Rules of Professional Conduct. These factors include: (1) the time and labor required; the novelty and difficulty of the questions involved; 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 performing the services; and (8) whether the fee is fixed or contingent.

{¶9} In considering these factors, the Court again notes that this was an extensive lawsuit spanning many years. Plaintiff has made legitimate efforts to limit the request for attorney fees to only that work performed after the prior two trials. The Court, as noted above, undertook a significant review of the attorney fee statement which described those efforts and has ruled accordingly. The issues presented by this case were not unique, however, there were many impediments to the exchange of information during the discovery process that lengthened the time frame of the case and added to the cost

and inconvenience to Plaintiff. The requisite skills necessary to pursue Plaintiff's claims in this case were no more and no less than what would be required of any experienced litigation counsel in a business-related lawsuit. Even though the case required a substantial investment of time by Plaintiff's counsel, the time was spread out over months and years, and therefore did not preclude other employment. The only other factor of significance listed in Rule 1.5(a) that was not previously discussed is the results obtained by Plaintiff's counsel. Defendants have been quick to point out Plaintiff's lack of success on the other claims raised in this portion of the litigation. Indeed, after previously dismissing Plaintiff's state securities law claim, the Court granted Defendants' Motion for Summary Judgment on 1/30/2012 regarding Plaintiff's claim for Tortious Interference and granted summary judgment for Defendants Patrick Leneghan Jr. and Leneghan & Leneghan on Plaintiff's Spoliation of Evidence claim. Ultimately, only Plaintiff's Breach of Fiduciary Duty and Statutory Damages claims (in addition to the issues of punitive damages and attorney fees) made it to the jury for consideration. However, all of these claims were decided in Plaintiff's favor. Viewing the evidence presented in the light of the Rule 1.5(a) factors, the Court finds no basis upon which to modify its prior determination as to the amount of reasonable attorney fees to award to Plaintiff. Therefore, the Court awards Plaintiff the amount of \$690,968.80 in attorney fees for time expended in this matter.

STATUTORY DAMAGES

{¶10} The Court now turns its attention to Plaintiff's Statutory Damages claim. The jury found that Defendants Patrick Leneghan Sr. and Berardi's Fresh Roast, Inc. failed to comply with R.C. 1701.37, which requires corporations to keep correct and complete

books and records of account and to provide shareholders with access to said records upon written demand. Statutory Damages under Revised Code Section 1701.94 are appropriate against corporations and/or officers of the corporation who fail to comply with the duties imposed by 1701.37 and other sections of Chapter 17 of the Revised Code. It is for the Court to determine the amount of Statutory Damages. R.C. 1701.94(C).

{¶11} In accordance with R.C. 1701.94, any officer of a corporation that fails to keep the books and records of the corporation or fails to perform the obligations imposed by R.C. 1701.11(C); 1701.25(C); 1701.38(C) or (D); or 1701.37, shall be subject to a forfeiture of one-hundred dollars (\$100) plus an additional ten dollars (\$10) for every day that such failure continues, beginning with the fifth day after the shareholder's written request. Also, R.C. 1701.94(C) provides the Court with the option to reduce, remit, or suspend any forfeiture amount on such terms as it deems reasonable, when it appears that the failure was excusable or that the imposition of the full forfeiture would be unreasonable or unjust.

{¶12} The evidence at trial established that Defendants Berardi's and Patrick Leneghan, Sr. failed to provide copies of corporate records, minutes of shareholder's meetings and notice of meetings to Plaintiff, Angela Caruso, as a minority shareholder of Berardi's as early as October 2001. However, according to R.C. 1701.37(C), the duty to provide said records is only triggered upon written demand by the shareholder.⁶ In its

⁶ "Any shareholder of the corporation, upon written demand stating the specific purpose thereof, shall have the right to examine...the articles of the corporation, its regulations, its books and records of account, minutes and records of shareholders..."

response to Interrogatory No. 3, the jury found that Defendants Berardi's and Patrick Leneghan, Sr. failed to keep accurate corporate records and failed to provide Angela Caruso with access to corporate records after written demand. The jury then went on to find that Defendant first failed to perform the statutory duties noted above (after written demand) on 5/4/2011. Evidence in support of the jury's finding was produced at trial in the form of Plaintiff's Exhibit 146 - a letter from Angela Caruso to Patrick Leneghan Sr. on 5/4/2011 requesting corporate records. Also, Patrick Leneghan Sr. admitted, during video deposition testimony replayed at trial, that the requested information was not provided to Plaintiff.

{¶13} Defendants introduced evidence at trial that on 7/21/2011 counsel for Berardi's sent corporate minutes from 2003 to 2010 to Plaintiff's counsel (Ex. 362). However, this did not constitute all of the information requested by Plaintiff. There was no evidence at trial establishing a date of full compliance by Defendants with Plaintiff's request for corporate documents. Therefore, the Court will use the start of trial, 7/23/2012, as the cut-off date for Plaintiff's Statutory Damages claim. Based on the initial demand date of 5/4/2011, the five day waiting period (R.C. 1701.37(C)), and the cut-off date of 7/23/2012, the Court finds that Plaintiff is entitled to an award of \$4,510.00, for Statutory Damages in accordance with the formula set forth in R.C. 1701.94(A)(6). That is \$100, plus \$10 a day for 441 days ($\$100 + \10×441 days).

COSTS

{¶14} Plaintiff previously filed a Motion to tax certain litigation expenses as costs, which was granted by the Court on 11/01/12. The Court awarded Civil Rule 54(D) costs of \$9,068.80 for video discovery, court reporter and filing fees. Plaintiff also submitted

invoices seeking reimbursement for other expenses incurred in the litigation, which are not statutorily taxable as costs. These costs are: Expert fees \$75,421.91; Miscellaneous itemized expenses \$27.39; Copying costs \$10,623.28; Postage \$1,368.83; and delivery charges \$789.06.

{¶15} In ruling upon a motion to tax an expense as a litigation cost, courts have established a two-prong test to first determine whether the item is a necessary litigating expense. In making this determination, the focus of the inquiry is whether an itemized expense, not declared taxable by statute, was so vital to the case that it may no longer be viewed as a mere personal expense but must be characterized as a necessary litigating expense. The second step is to decide whether a litigating expense will be awarded as a cost. *See, Jones v. Pierson* (1981), 2 Ohio App.3d 447, 449. "[The] Court has discretion as to how costs of an action shall be assessed." *State ex rel. Fant v. Regional Transit Auth.* (1990), 48 Ohio St.3d 39. "Civ.R. 54(D) allows assessment of the cost of deposition if allowed by the trial court. Certainly taking depositions is good legal practice and considered essential to the proper preparation for trial." *Jones v. Olcese* (1991), 75 Ohio App.3d 34, 42.

{¶16} In the present case, Plaintiff seeks to recover the full amount of expert fees for all of Plaintiff's experts.⁷ Heinz Ikert was Plaintiff's main testifying expert and a majority of the fees sought (\$73,346.91) are Mr. Ikert's fees. Included in Mr. Ikert's fees is the time he spent at Berardi's Fresh Roast trying to obtain and analyze financial data to be used at trial in the presentation of Plaintiff's damages. This analysis was frustrated on several occasions by actions of the Defendants which took the Court's involvement to resolve,

adding to the cost of the expert. The Court finds that a portion of the expense for Mr. Ickert's time is appropriately taxed as costs given the conduct of Defendants in attempting to frustrate Plaintiff's expert's review of the financial records of Berardi's. After considering the testimony at trial, the Court finds that approximately twenty-five percent (25%) of Mr. Ickert's time was spent dealing with Defendants attempts at obfuscation during discovery. Therefore, the Court allows twenty-five percent (25%) of Mr. Ickert's fee, or \$18,336.73 to be taxed as costs.

{¶17} As to the remaining expenses that Plaintiff requests to be taxed as costs of this litigation – copying, postage, delivery and miscellaneous expenses, the court, in its discretion and using the two pronged analysis above, finds that these costs are not so vital to the case that they may no longer be viewed as a mere personal expenses. Therefore, the Court finds that these expenses are not necessary litigation expenses and will not tax them as costs in this case.

PRIOR RULINGS

{¶18} In addition to the above rulings, the Court previously made determinations regarding other post-trial motions filed by the parties. The Court incorporates those rulings into this entry to comply with R.C. 2505.02 and Civil Rule 54.

⁷ Plaintiff requests expert fees for Heinz Ickert of \$73,346.91 (total of separate billings); Garth Tebay \$1,000.00; Paul Pahoresky \$700; and Mark Bronstein \$375.

{¶19} Plaintiff's Motion for Prejudgment Interest was previously denied on 11/01/12. In its Journal Entry, the Court noted that Defendants' offers to settle the case were rationally based on Defendants' evaluation of the case and were therefore negotiations conducted in good faith.

{¶20} Also on 11/01/12, the Court granted Plaintiff's unopposed Motion for Jury's Verdict to be Entered as a Judgment Order Against Defendants BallyCroy-Mayo International, Ltd. and Patrick Leneghan Sr. Therefore, the Court's judgment in this case applies to BallyCroy-Mayo International, Ltd. and Patrick Leneghan Sr., jointly and severally.

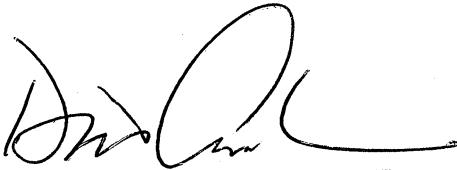
{¶21} The Court previously granted Defendant, Patrick P. Leneghan Sr.'s Motion for Remittitur in part and denied it in part on 11/01/12. On 12/07/12, the Court granted Defendants' Ballycroy-Mayo International LTD and Patrick P. Leneghan Sr. Motion to Set Deadline for Plaintiff to Elect or Reject Remittitur within Ten (10) days of This Court Determining: 1) Statutory Damages; and 2) Attorney Fees and Expenses. Therefore, Plaintiff has ten (10) days from the date of this entry to elect whether or not to surrender her shares of Berardi's to Defendant Patrick P. Leneghan Sr. At that time, the judgment entered herein will become a final judgment. If Plaintiff fails to surrender her shares to Defendant Patrick P. Leneghan within ten (10) days, then the Court will remit the jury's verdict by \$270,000 and will then enter judgment accordingly.

JUDGMENT ENTRY

{¶22} The Court hereby enters judgment for Plaintiff, Angela Caruso, and against Defendants Ballycroy-Mayo International LTD and Patrick P. Leneghan, Sr., jointly & severally, as follows: \$958,776.00; plus litigation costs of \$27,674.27 (reflecting \$9,068.80 for video discovery, court reporter fees and filing fees, plus \$18,336.73 for expert fees); court costs (as assessed by the Clerk of Courts); attorney fees of \$690,968.80; statutory damages of \$4,510.00; punitive damages of \$1.00 and interest from the date of judgment at the current statutory rate of 3%. Final.

IT IS SO ORDERED!

1/28/13
DATE


JUDGE DICK AMBROSE

RECEIVED FOR FILING

JAN 29 2013

CUYAHOGA COUNTY
CLERK OF COURTS
By  Deputy