

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

THERMAL-TEC/MICHIGAN, INC., a
Michigan corporation,

Plaintiff,

vs.

JOSEPH McINNIS; JOHN BLAIN DAYTON;
TIMOTHY DEVRIES; COMMERCIAL &
INDUSTRIAL BUILDING MAINTENANCE,
LLC, a Michigan limited liability company;
and COMMERCIAL COATING SYSTEMS,
LLC, a Michigan limited liability company,

Defendants.

Case No. 13-08339-CKB

HON. CHRISTOPHER P. YATES

ORDER ADDRESSING BILL OF COSTS AND PROPOSED JUDGMENT

After an acrimonious trial, a jury returned a verdict for Plaintiff Thermal-Tec/Michigan, Inc. (“Thermal-Tec”) and against Defendants Joseph McInnis and his company, Commercial & Industrial Building Maintenance, LLC (“CIBM”), on a claim for misappropriation of proprietary information or trade secrets. See Verdict, Third Claim (Oct 30, 2015). The jury verdict reflected damages in the amount of \$51,000 against McInnis and \$9,100 against CIBM. The jury did not impose any other damages upon any other defendant on any other claim. Thermal-Tec contends that the jury’s verdict reflects an aggregate award of \$60,100, whereas McInnis and CIBM insist that the aggregate award is \$51,000 with CIBM responsible for only a portion of that amount. In addition, Thermal-Tec has submitted a bill of costs under MCR 2.625(F), which has drawn several objections from both of the defendants. Thus, the Court must resolve the disagreement about the amount of the judgment as well as the disputes about Thermal-Tec’s allowable costs.

I. The Disagreement About the Judgment

The jury's verdict establishes that Plaintiff Thermal-Tec suffered damages of \$51,000 based upon Defendant McInnis's actions and \$9,100 based upon Defendant CIBM's actions. See Verdict, Third Claim (Oct 30, 3015). Thus, Plaintiff Thermal-Tec insists that the judgment should reflect an aggregate award of \$60,100 to account for both damage figures. The defendants contend, however, that CIBM had three principals – two of whom were absolved of liability by the jury, so the damage caused by CIBM necessarily constitutes a mere subset of the damage caused by McInnis. Moreover, the defendants bolster this argument by referring to a discussion on the record in response to several juror questions, which prompted Thermal-Tec's attorney to note that "what we have here is all these defendants . . . would be jointly and severally liable" for damages. See Excerpt of Jury Trial at 11 (Oct 30, 2015). As the discussion developed outside the presence of the jury, counsel and the Court arrived at the position that "whatever numbers they come back on, if they come back with numbers on [the trade secrets and proprietary information claim], would have to be treated as joint and several liability rather than stacked liability." Id. at 12. Indeed, when the Court framed the analysis in that way, counsel for Thermal-Tec responded: "Exactly." Id. This agreement among the attorneys and the Court leads to the conclusion that the damages awarded to Plaintiff Thermal-Tec and against the defendants, McInnis and CIBM, should be treated as joint and several, yielding an aggregate award of \$51,000, rather than cumulative with an aggregate award of \$60,100.

II. The Disputes About Taxable Costs

Defendants McInnis and CIBM have chosen not to challenge Plaintiff Thermal-Tec's status as a "prevailing party" entitled to tax costs under MCR 2.625(A)(1), but the defendants have raised

objections to several elements of Thermal-Tec's revised taxed bill of costs. Accordingly, the Court must consider each of the defendants' challenges as well as the uncontested elements of requested costs to arrive at a final figure for taxable costs.

The Court shall disallow Plaintiff Thermal-Tec's request for a \$75 additional cost (listed as an attorney fee by Thermal-Tec) under MCL 600.2441(2)(e), which is only available in "actions in which a default judgment or consent judgment is entered[.]" In contrast, the Court shall approve the entire requested amount of \$255 for filing fees under MCL 600.2529(1)(a), (c), and (e). Similarly, the Court shall award Thermal-Tec \$89 for fees resulting from motions concerning the defendants,¹ see MCL 600.2529(1)(e), but the Court shall disallow \$43 for the fees resulting from motions against third parties. The Court shall also disallow as a taxable cost \$731.25 that Thermal-Tec paid to the mediator enlisted by the parties. Although a "mediator's fee is deemed a cost of the action" under MCR 2.411(D)(4), the Court did not order the parties to participate in mediation, so the cost of the mediation ought not be taxed. Conversely, the Court finds that Thermal-Tec is entitled to tax \$20 under MCL 600.2441(2)(a) for "proceedings before trial" and \$150 under MCL 600.2441(2)(c) for "the trial of the action or proceeding[.]" Thus, Thermal-Tec is entitled to a total of \$514 for the most basic elements of taxable costs.

Witness fees comprise the largest component of Plaintiff Thermal-Tec's taxable costs. The defendants have conceded that Thermal-Tec is entitled to \$189.85 for lay witness expenses as well as \$2,000 for the expenses associated with expert witness Jonathan Siterlet, so the Court shall permit Thermal-Tec to tax those costs. Although the defendants have challenged the costs incurred

¹ Our Legislature has prescribed a filing fee of \$20 for motions, see MCL 600.2529(1)(e), but the Court imposes an additional \$3 fee for all motions filed electronically in the specialized business docket. Thus, Plaintiff Thermal-Tec had to pay a total fee of \$23 to file many of its motions.

for expert witness P. Geoffrey Allen in the amount of \$7,800, the Court concludes that those costs likewise should be taxed. Under MCL 600.2164(1), the Court may “award expert witness fees as an element of taxable costs[,]” including fees “for the expert’s preparation time.” Guerrero v Smith, 280 Mich App 647, 675 (2008). The defendants argue that the jurors rejected Dr. Allen’s testimony through their verdict. To be sure, the jury did not employ Dr. Allen’s approach to damages, but Dr. Allen plainly devoted substantial time to the preparation of his testimony and then appeared at trial to offer expert testimony that bore directly upon the issues presented to the jury.² Without a doubt, Dr. Allen’s testimony served as the cornerstone of Thermal-Tec’s trial presentation. Accordingly, the Court concludes that Thermal-Tec, as a “prevailing party,” may tax the costs associated with Dr. Allen’s testimony at trial. Thus, the Court shall permit Thermal-Tec to tax costs for witnesses in the full amount of its request, *i.e.*, \$9,989.85, for a total amount of \$10,503.85 in taxable costs, *i.e.*, \$514 in basic costs plus \$9,989.85 in costs for witnesses.

Having resolved all issues concerning taxable costs and interpretation of the jury verdict, the Court invites Plaintiff Thermal-Tec to submit a proposed judgment under the seven-day rule, MCR 2.602(B)(3), reflecting the Court’s rulings in this order as well as judgment interest.

IT IS SO ORDERED.

Dated: April 27, 2016



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge

² On at least one occasion, our Court of Appeals has permitted taxation of costs for an expert witness who did not even testify because “the case was dismissed before defendant had a chance to call its proposed expert witness at trial.” See Herrera v Levine, 176 Mich App 350, 357 (1989).