

**IN THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF ALABAMA  
SOUTHERN DIVISION**

EQUAL EMPLOYMENT OPPORTUNITY )  
COMMISSION, )

Plaintiff, )

JOANN SULLIVAN, *et al.*, )

Plaintiff Intervenors, )

v. )

CIVIL ACTION NO. 97-1189-CB-~~SH~~

OUTRIGGER RESTAURANT, INC., )

SKILSTAF, INC., )

Defendants. )

v. )

MARVIN L. RATCLIFF, JR., )

Third-Party Defendant. )

U.S. DISTRICT COURT  
 SO. DIST. AL.  
 MOBILE, AL 36602  
 2000 JUN 19 P 12:54  
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**ORDER**

This matter comes before the Court on SkilStaf's Submissions in Support of Damages (Doc. 110) and Outrigger's Objection to Submissions in Support of Damages (Doc. 111).

**Procedural Background**

On January 10, 2000, this Court granted summary judgment in favor of SkilStaf, Inc., on its cross claim for contractual indemnity against Outrigger Restaurant, LLC. This Court found that Outrigger was contractually obligated to indemnify SkilStaf for claims of damage asserted against SkilStaf in the underlying Title VII racial discrimination suit and expenses including court costs and attorneys' fees. The indemnity provision provides that "[Outrigger] agrees to [unconditionally] indemnify, defend, and hold [SkilStaf]...harmless from any liability, expense

(including costs and attorneys' fees) and claims for damage of any nature whatsoever...which [SkilStaf] may incur, suffer, or become liable for, or which may be asserted or claimed against [SkilStaf] as the result of the acts, errors or omissions of [Outrigger] including, without limitation,...any violations of federal, state, and local labor laws."

In granting summary judgment on the cross-claim, this Court directed SkilStaf to submit a statement of the amount due under the indemnification provision including a statement of attorneys' fees and costs along with supporting documentation. On January 25, 2000, SkilStaf filed a submission in support of damages which indicates that it is entitled to judgment in the amount of \$463,753.11 (\$150,000.00 for the settlement amount paid to the Plaintiff-Intervenors and \$313,753.11 in attorneys' fees and costs) (Doc. 110). Thereafter, Outrigger filed a response advancing numerous objections to SkilStaf's statement of attorneys' fees and costs (Doc. 111).

In addition to specific objections to attorneys' fees and costs, Outrigger contends that it is entitled to "set-off" because SkilStaf has entered into a pro tanto settlement with Marvin Ratcliff, another defendant in the underlying Title VII case. SkilStaf concedes that Outrigger is entitled to set-off, but argues that the set-off amount should constitute only the amount it has actually received from Ratcliff not the entire amount of the settlement. On May 23, the Court ordered SkilStaf to file under seal the settlement agreement with Ratcliff in order that the Court may assess the amount of set-off due.

#### **Amount of Indemnification Due**

In its statement in support of damages, SkilStaf submits that it is entitled to judgment in the amount of \$463,753.11, which consists of \$150,000.00 for the settlement amount paid to the Plaintiff-Intervenors and \$313,753.11 in attorneys' fees and costs. To support the statement of

attorneys' fees and costs, SkilStaf provides invoices for services rendered and expenses incurred while defending the claims of racial discrimination by the EEOC and Plaintiff-Intervenors and attempting to enforce the indemnity provision. Outrigger does not object to judgment in the amount of the settlement paid to the Plaintiff-Intervenors, but makes several objections to the amount of attorneys' fees and costs submitted by SkilStaf.

The indemnification clause at issue is broad in that it provides that Outrigger agrees to indemnify SkilStaf for *any* liability, expense including attorneys' fees and costs, and claims for damage of any nature whatsoever. Notwithstanding this broad language, this Court finds that Outrigger is obligated to indemnify SkilStaf for only *reasonable* expenses, attorneys' fees and costs. Alabama Education Association v. Black, 752 So. 2d 514, 518 (Ala. 1999). In other words, this Court infers a element of reasonableness into the indemnity provision; "otherwise, [indemnity] agreements that do not specifically speak to the reasonableness of an attorney fee would provide a party with a blank check." Black, 752 So. 2d at 518.

Having duly considered Outrigger's objections, the Court finds that the fees and expenses submitted by SkilStaf should be reduced in the following manner:

(1) Outrigger is obligated to indemnify SkilStaf for the services or work of legal assistants to the extent that such work is traditionally done by an attorney. See Docuet v. Chilton County Board of Education, 65 F. Supp. 2d 1249, 1264 (M. D. Ala 1999 ). Accordingly, the Court reduces the amount of indemnification due by \$4,203.75. This amount represents 56.25 hours of work performed by Ruthee G. Rasberry, De'teena R. Bender, and ALW, which the Court finds to be services or work that would not traditionally be performed by an attorney. In the Court's view, the remainder of work performed by legal assistants constitutes "services

traditionally done by an attorney," and had the assistant not completed the tasks, a lawyer's services and higher rate would have been charged.

(2) The Court finds that the amount of indemnification should also be reduced in the amount of \$49.57, which was charged by the firm of Johnstone, Adams, Bailey, Gordon, & Harris for secretarial overtime. The salary or wage of a secretary is a overhead expense of a law firm and while a client might agree to pay for secretarial overtime when negotiating a fee arrangement with an attorney, the Court finds it unreasonable for Outrigger to pay for secretarial overtime under the indemnity provision.

(3) The Court finds several expenses charged by the firm of Wickliff & Hall excessive and unreasonable. The following expenses are disallowed or reduced: the \$50.00 Continental Airlines upgrade for A. Martin Wickliff is disallowed; \$445.00 for Jeanneret & Associates and \$2,689.30 and \$7,102.40 for Welch Consulting is disallowed without more information indicating what necessary professional services were provided; lodging expenses for Jonathan D. Quander on 7/17/98 for \$291.08 at the Tutwiler is excessive and is reduced to \$130.00; \$483.69 for lodging expenses for Martin Wickliff at the Doubletree Hotel on 7/13/98 and the Tutwiler on 7/16/98 should be reduced to \$260.00, especially considering there is no corresponding charge for professional services performed by Mr. Wickliff on 7/16/98 in Birmingham. Accordingly, the Court reduces the amount of indemnification by \$10,671.47.

In sum, the Court finds that the amount of indemnification due should be reduced by \$14,924.79. The Court finds that the remainder of the fees and costs submitted by SkilStaf are reasonable and have been documented to the Court's satisfaction.

### **Amount of Set Off Due**

Having settled a third party claim for indemnity against Marvin Ratcliff, SkilStaf concedes that Outrigger is entitled to set-off, but argues that Outrigger is only entitled to set-off in the amount actually *paid to and received by* SkilStaf.<sup>1</sup> In the public record, SkilStaf contends that it has received \$5,000 from Ratcliff and pursuant to the settlement agreement it will begin to receive monthly payments beginning in December 2000 for an additional \$45,000. SkilStaf contends that “upon said payments, Outrigger would be entitled to set-off the amounts of each such payment attributable to the \$45,000 settlement figure.” (Doc. 113). In addition, on March 16, 2000, SkilStaf filed a proposed judgment with this Court noting that as a condition of settlement, Ratcliff consented to entry of judgment in favor of SkilStaf in the amount of \$195,000. Pursuant to the settlement agreement, the \$45,000 figure is part of the \$195,000 consent judgment.

It is well settled that a non-settling joint tortfeasor in Alabama is entitled to set-off once a the injured party enters into a pro tanto settlement and release agreement with another joint tort-feasor. Anderson v. Kemp, 279 Ala. 321, 184 So.2d 832 (1966). In fact, such a joint tortfeasor entitled to post judgment relief for the pro tanto settlement even if he was unable to

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<sup>1</sup> For support SkilStaf cites to Green v. Hanover Ins. Co., 700 So. 2d 1354 (Ala. 1997) and Torch v. McLeod, 665 So. 2d 934 (Ala. 1995). SkilStaf contends that the Green Court held that “judgment amount was due to be reduced by the amount of monies that is actually *paid and received* pursuant to the settlement.” (See Doc. 115). While the Green court noted that the Plaintiff “received a judgment in his favor in the amount of \$3,350,000, less a \$500,000 set-off ...for monies previously paid through the pro tanto settlements, leaving an unpaid judgment of \$2,850,000” in its recitation of the procedural facts of the case, this statement cannot and should not be elevated to a holding. Likewise, this Court fails to see how Torch stands for the proposition that any set-off amount for a non-settling joint tortfeasor must be limited to the amount actually received at the time judgment is entered against that non-settling tortfeasor.

plead and prove the settlement at trial because the terms of the settlement were not final.

Hardman v. Freeman, 337 So. 2d 325, (Ala. 1976). “The relief to which the joint tort-feasor is entitled is a set-off *in the amount of the pro tanto settlement* against the amount of the verdict.”

Campbell v. Williams, 638 So. 2d 804, 812 (Ala. 1994) (emphasis added).


According to the foregoing, the Court rejects the suggestion that the amount of set-off due to Outrigger must be limited to \$5,000, the amount paid to date under the settlement. Instead, the Court finds that the set-off amount should be the “amount of the pro tanto settlement.” See Campbell, 638 So. 2d at 812. SkilStaf, in essence, asks this Court to enter two enforceable judgments, the judgment against Outrigger and one consent judgment against Ratcliff, which together would clearly exceed the amount it is due. To the extent SkilStaf argues that the situation is remedied because the judgment against Outrigger would, in essence, be altered every time Ratcliff made a payment under the settlement, the Court is unwilling to invite such unnecessary post-judgment litigation. At the request of SkilStaf, a partial consent judgment against Marvin Ratcliff in the amount of \$195,000 has been entered by separate order this date. In addition, Ratcliff made a payment to SkilStaf in the amount of \$5,000. Accordingly, the Court finds the amount of set-off to be \$200,000.

### **Conclusion**

The Court finds that the amount of indemnification should be reduced by \$14,924.79 and that Outrigger is entitled to set-off in the amount of \$200,000 in light of SkilStaf’s pro tanto settlement with Ratcliff. Accordingly, SkilStaf is entitled to judgment in the amount of \$248,828.32 on its cross-claim for indemnity. Judgment is entered by separate order this date.

This order concludes all matters in this case, and the Clerk is instructed remove it from the active docket of the Court.

DONE this the 19<sup>th</sup> day of June, 2000.



CHIEF DISTRICT JUDGE