IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

SAMANTHA L. MUSICK, ETC.,	)	
	)	
Plaintiff,	)	Case No. 1:11CV00005
	)	
v.	)	**OPINION AND ORDER**
	)	
DOREL JUVENILE GROUP, INC.,	)	By: James P. Jones United States District Judge
	)	
Defendant.	)	

Travis J. Graham, Gentry Locke Rakes & Moore, LLP, Roanoke, Virginia, for Plaintiff; Lynne Jones Blain, Harman, Claytor, Corrigan & Wellman, Richmond, Virginia, for Defendant.

Following a jury verdict against her, the plaintiff has objected to the award of costs under Federal Rule of Civil Procedure 54(d)(1) in this products liability personal injury case. For the reasons that follow, I will exercise my discretion to deny costs.

I

In this diversity case, the plaintiff Samantha L. Musick, suing by her mother, Amy Musick, sought recovery against the defendant Dorel Juvenile Group, Inc. ("Dorel"), following an accident in which Samantha suffered serious brain injury while seated in a child safety seat manufactured by Dorel. After a lengthy trial, the

jury found its verdict in favor of the defendant, upon which judgment was entered. Thereafter, the defendant filed a bill of costs to which the plaintiff has objected. The parties have briefed and orally argued the matter and the question of costs is ripe for decision.

II

Costs should be allowed as a matter of course to the prevailing party unless the court otherwise directs. *See* Fed. R. Civ. P. 54(d)(1); *Teague v. Bakker*, 35 F.3d 978, 996 (4th Cir. 1994). Costs may be refused under this rule only if the district court "justif[ies] its decision by 'articulating some good reason for doing so.'" *Id.* (quoting *Oak Hall Cap & Gown Co. v. Old Dominion Freight Line, Inc.*, 899 F.2d 291, 296 (4th Cir. 1990)). The losing party's good faith is insufficient to stand alone, although it is a prerequisite to denying costs to the winner. *See Cherry v. Champion Int'l Corp.*, 186 F.3d 442, 446 (4th Cir. 1999).

The defendant here seeks costs totaling $51,237.47, representing court reporter fees and fees for subpoenas, printing, and photocopies, among other things. The plaintiff makes specific objections to certain items, but generally objects to the award of costs on the grounds of the family's financial situation and that the issues in the case were difficult and close.

The Fourth Circuit has held that financial inability to pay may be considered by the court in denying an award of costs. *See id* at 446; *Teague*, 35 F.3d at 996. Similarly, this court has previously ruled that the losing party's financial resources merit consideration in determining whether to deny costs. *Crusenberry v. Boddie-Noell Enters., Inc.*, No. 2:99CV00129, 2001 WL 418737, at *2 (W.D. Va. Mar. 15, 2001).

In the present case, it is undisputed that the Musick family has very modest income and assets. Samantha's mother, Amy Musick, reported that the Musick family has less than $1,000 in the bank. Amy Musick provides the main source of income for the family, as she is paid $31,676 each year to provide full-time care for Samantha. Samantha's father, Earl Musick, is a stone mason, earning a modest income that fluctuates depending on the availability of work in the area. In 2010 and 2011, for example, Earl Musick earned only approximately $10,000 per year. Given these meager financial resources, as well as unchallenged testimony at trial that it will cost around $9 million to provide care to Samantha over the course of her life, I do not believe the Musick family has a present or future ability to pay costs.

Additionally, the plaintiff cites *Teague*, 35 F.3d at 996, in support of her claim that, when a case is particularly close and difficult, courts are willing to deviate from the general rule and deny a request for costs. A case's closeness '"is judged not by

whether one party clearly prevails over another, but by the refinement of perception required to recognize, sift through and organize relevant evidence, and by the difficulty of discerning the law of the case.'" *Va. Panel Corp. v. MAC Panel Co.*, 203 F.R.D. 236, 237 (W.D. Va. 2001) (quoting *White & White, Inc. v. Am. Hosp. Supply Corp.*, 786 F.2d 728, 732-33 (6th Cir. 1986)).

I find that this case was a relatively close and difficult one, particularly given the factual complexity of the issues. Due to their limited financial resources, the Musick family is currently unable to pay costs to Dorel. Furthermore, because they are left with the immense financial burden of providing life-long care to Samantha, the Musick family is unlikely to ever have the ability to pay. Under all of these circumstances, I believe that costs should not be awarded in this case.[1]

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[1] Plaintiff's counsel accuses defense counsel of engaging in "unconscionable" and "morally repugnant" conduct by pursuing taxable costs. (Pl.'s Opp'n 1, 2.) These allegations are based on an email sent after the jury verdict by one of Dorel's attorneys, Walter C. Greenough, offering to forego costs if the plaintiff would not appeal and would join in asking the court to vacate a discovery sanction previously awarded against Dorel. In the email, it was stated that counsel would seek to collect any costs awarded "by all legal means available." (*Id.* Ex. A.) Greenough also expressed sympathy for the Musick family and the hope that both sides could move on.

In the first place, while it may be a matter of opinion, I do not believe that it is "morally repugnant" for an attorney to seek an end to expensive litigation by advising the opponent that the client intends to assert its legal rights absent settlement. More importantly, however, such aspersions against opposing counsel not only do not help to persuade the court but are highly unprofessional.

As I advised counsel at oral argument, I take a share of the blame for not earlier restraining the unnecessary rancor often exhibited in this case. I recognize that the nature

III

For the foregoing reasons, it is **ORDERED** that, upon review, the defendant's Bill of Costs (ECF No. 290) is DENIED.

ENTER: February 13, 2012

/s/ James P. Jones
United States District Judge

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of the case – a terrible injury to an innocent child for which a large jury award was sought – may engender the type of emotion and zeal not present in more mundane litigation. But that is not a justification. In fact, difficult cases such as this require more careful adherence to professionalism.