

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
FORT MYERS DIVISION

MARCO ISLAND CABLE, INC., a Florida  
corporation,

Plaintiff,

vs.

Case No. 2:04-cv-26-FtM-29DNF

COMCAST CABLEVISION OF THE SOUTH,  
INC., a Colorado corporation,

Defendant.

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**OPINION AND ORDER**

\_\_\_\_\_This matter comes before the Court on Plaintiff's Motion to Alter the Judgment [and] to Enter an Order of Remittitur (Doc. #474), filed on May 25, 2007. Defendant filed a Memorandum in Opposition (Doc. #477) on June 5, 2007.

**I.**

This case was tried by a jury as to the remaining aspects of Count I, a claim under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), and by the Court sitting without a jury as to Count II, a declaratory judgment claim relating to FLA. STAT. § 718.1232. The jury rendered a verdict of \$3,268,392.00 in favor of plaintiff Marco Island Cable, Inc. (MIC), and the Court rendered a verdict in favor of Comcast Cablevision of the South, Inc. (Comcast).

In the post-trial motions, Comcast sought as alternative relief remittitur of the verdict to \$800,000, the largest amount supported by evidence and consistent with the jury instructions.

MIC opposed this relief. The Court's Opinion and Order (Doc. #471, p. 5) stated: "While '[a] federal court has no general authority to reduce the amount of a jury's verdict,' Johansen v. Combustion Eng'g., Inc., 170 F.3d 1320, 1328 (11th Cir. 1999), it has discretionary authority to grant a new trial if the verdict is so excessive as to shock the conscience of the court, Carter v. Decisionone Corp., 122 F.3d 997, 1006 (11th Cir. 1997). With plaintiff's consent, a district court may direct a remittitur of the amount awarded by the jury. Johansen, 170 F.3d at 1328-29." Since MIC had opposed remittitur, that relief was not available and Comcast's motion for remittitur was denied.

The Opinion and Order (Doc. #471) disposed of post-trial motions as follows: Comcast's Motion for Judgment as a Matter of Law on Count I (Doc. #437) was denied because, viewing the evidence as a whole and in the light most favorable to MIC, the Court found that a reasonable jury could find that Comcast committed acts prohibited by FDUTPA which were beyond legitimate competition, that such conduct was not excluded from the reach of FDUTPA by any federal law or by Comcast's right to enforce its legal rights and to seek redress of legitimate grievances, and that a reasonable jury could find that some amount of actual damages were suffered by MIC as the proximate result of conduct by Comcast which violated FDUTPA. Comcast's Motion for New Trial (Doc. #438) was granted as to Count I because the Court found there was no evidence which would support the jury's award of more than \$3.2 million, the

evidence, viewed in a light most favorable to MIC, at most supported damages of \$800,000.00, and the damages awarded by the jury were grossly excessive and shocked the conscience of the Court. The Jury Verdict (Doc. #416) was set aside, and the Judgment (Doc. #434) was vacated in its entirety. Comcast's Motion for Remittitur (Doc. #436) was denied; Plaintiff's Motion for Attorney Fees and Costs (Doc. #441) was denied because plaintiff was no longer the prevailing party; and Comcast's Opposed Motion for Review of Action of the Clerk in Taxing Plaintiff Marco Island Cable, Inc.'s Bill of Costs Against Defendant (Doc. #452) was granted to the extent that the Bill of Costs (Doc. #446) taxed by the Clerk was vacated because plaintiff was no longer the prevailing party.

## II.

Both parties have now changed their positions with regard to remittitur. MIC now agrees to accept a remittitur to \$800,000: "MIC hereby consents to a remittitur that would reduce its damages to \$800,000." (Doc. #474, p. 2.) Comcast now opposes the remittitur.

Comcast argues that MIC's reliance on Rule 59(e) is inappropriate because there is no longer any judgment to amend or alter, the judgment having been vacated by the Court's prior Opinion and Order (Doc. #471), and Rule 59(e) does not apply to an interlocutory order such as an order granting a new trial. Comcast

suggests that the motion is actually one for reconsideration, which is an extraordinary measure to be used sparingly, and that there has been no showing which would justify reconsideration of the new trial order.

The Eleventh Circuit has held that a district court has the authority to reconsider its order granting a new trial and allow a party to consent to entry of a remittitur, and that this "is not subject to the limitations of Rule 59." Toole v. Baxter Healthcare Corp., 235 F.3d 1307, 1315 (11th Cir. 2000). In Toole, the party changed its mind and accepted remittitur four years after a new trial was ordered. Therefore, the Court rejects Comcast's procedural argument that the matter is not properly before the Court.

The Court need not determine whether MIC has a "right" to a remittitur, although it appears that most cases have indeed given plaintiff the option of choosing between a new trial or a remittitur. See e.g., Frederick v. Kirby Tankships, Inc., 205 F.3d 1277, 1284 (11th Cir. 2000) (finding the damages excessive and directing the district court to order a remittitur, or at plaintiff's option, a new trial). The Court had no authority to grant a remittitur until MIC consented, Johansen, 170 F.3d at 1329 ("If the plaintiff does not consent to the remittitur, the court has no alternative but to order a new trial."), and the Court finds that a remittitur should be allowed now that MIC has consented, regardless of Comcast's opposition.

MIC also asserts in passing (Doc. #474, p. 9), that the Court should vacate that portion of its Opinion and Order denying MIC attorney fees and costs since it will again be the prevailing party. The largest amount sought by plaintiff was attorney fees under Fla. Statutes §§ 501.211(2) and 501.2105. These statutes allow recovery of attorney's fees and costs after exhaustion of all appeals. The Court will not vacate its prior Opinion and Order as it relates to attorney's fees and costs. Rather, pursuant to Fed. R. Civ. P. 54(d)(2)(B), the Court will allow a motion for attorney fees and costs to be filed no later than 14 days after the exhaustion of all appeals related to Count I or, if no appeal is taken as to Count I, within 14 days of the expiration of the time in which to perfect an appeal as to Count I.

Accordingly, it is now


**ORDERED:**

1. Plaintiff's Motion to Alter the Judgment [and] to Enter an Order of Remittitur (Doc. #474) is **GRANTED**.

2. Plaintiff may file a motion for attorney fees and costs no later than 14 days after the exhaustion of all appeals related to Count I or, if no appeal is taken as to Count I, within 14 days of the expiration of the time in which to perfect an appeal as to Count I.

3. The Clerk of the Court shall enter an Amended Judgment in favor of Marco Island Cable, Inc. and against Comcast Cablevision of the South, Inc. in the amount of \$800,000.

**DONE AND ORDERED** at Fort Myers, Florida, this 6th day of June, 2007.

  
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**JOHN E. STEELE**  
United States District Judge

Copies:  
Counsel of Record  
USCA