

12-0774

IN THE CIRCUIT COURT OF MARSHALL COUNTY, WEST VIRGINIA

WAYNE A. LEMASTERS, and
MARY JOAN LEMASTERS, his wife,

PLAINTIFFS,

VS.

// CIVIL ACTION NO. 06-C-137H

NATIONWIDE MUTUAL
INSURANCE COMPANY,

DEFENDANT.

DAVID R. EALY

2012 MAY 16 PM 1:34

FILED

ORDER

Following entry of the *Journal Order and Judgment Entry* relative to the above-styled civil action, this Court next addresses matters relating to attorney fees, costs, and expenses.

Hayseeds – Substantially Prevail Damages

To reiterate from the aforementioned entry, "*after due consideration of the evidence presented at trial the Court determines that the Plaintiffs substantially prevailed in their suit to obtain the underinsured motorists coverage provided in their policy of insurance with Nationwide Mutual Insurance Company and are therefore entitled to an award of reasonable fees, costs, and litigation expenses pursuant to syllabus point 6 of Marshall v. Saseen [citation omitted]."*

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Having considered the timely written filings by counsel herein as well as counsels' oral arguments presented on behalf of their respective clients, the Court is of the reasoned opinion that it shall adopt the approach advocated by Plaintiffs in determining the appropriate attorney fee relative to the instant issue; to-wit: Aetna Cas. & Surety Co. v. Pitrolo, 342 S.E.2d 156 (W. Va. 1986).

Applying each of the Pitrolo factors in this case leads to accepting the billing records submitted by the Law Firm of Bordas and Bordas as being both reasonable and reliable in terms of the work performed and the time devoted to each of those tasks. The Court will accept the hourly rates set forth within Plaintiffs' "Exhibit H" as reasonable for purposes of this decision.

Based upon the foregoing, a total fee in the amount of \$25,818.75 is awarded. Insofar as "costs and expenses" have not been parsed out separately, an aggregate sum for both is awarded in the amount of \$639.56. Interest in the amount of 7% per annum shall also be applied to the aforementioned sub-total relating back to the Court's entry of the ***Journal Order and Judgment Entry***; to-wit: \$3,650.40.

It is the **ORDER** of this Court that judgment is hereby awarded in Plaintiff's favor in the amount of \$30,108.71.

Jenkins – U.T.P.A. Violation Damages

At trial, the jury found by a preponderance of the evidence that, "*Nationwide violated the Unfair Claims Settlement Practices Act with such frequency as to indicate a general business practice in adjusting the underinsured motorists' claim of the Lemasters.*" Thereafter, the jury awarded Plaintiffs \$400,000.00 to compensate them for various and sundry non-economic damages. Furthermore, the jury found Defendant responsible for punitive damages related to its, "settling, or failure to settle, the [Lemasters'] underinsured motorist claim" in the amount of \$200,000.00.

To reiterate another passage from the ***Journal Order and Judgment Entry*** for purposes of framing the issue, "*the Court, by pre-trial agreement of the parties, determined that the amount of attorney's fees, costs, litigation expenses and other potential economic damages to be awarded as a result of the jury having determined that the Defendant, Nationwide Mutual Insurance Company, violated the West Virginia Unfair Trade Practices Act... in the handling of Plaintiffs' claim for*

underinsured motorists' benefits shall be ascertained by the Court after full briefing by the parties and the conclusion of an evidentiary hearing regarding the same." Jenkins v. J.C. Penney Casualty Insurance Co., 280 S.E.2d 252 (W. Va. 1981).

A prevailing plaintiff in a Jenkins claim may recover his or her increased costs and expenses, including increased attorney fees, resulting from the insurance company's use of an unfair business practice in the settlement or failure to settle fairly the underlying claim.

Plaintiffs now seek to have this Court enter an order awarding them the, "*reasonable attorneys' fees, costs and expenses required to obtain the jury's verdict herein and vindicate their Jenkins-type/UTPA claim.*" In support of their position, Plaintiffs rely upon McCormick v. Allstate Ins. Co., 197 W.Va. 415, 428, 475 S.E.2d 507, 520 (1981). The Court in McCormick did not modify, amplify, or otherwise create any right, entitlement, or measure of damages different than previously established in Jenkins, *supra*.

Accordingly, the Court is without authority to award Plaintiffs any, "*attorney fees, costs and expenses incurred in vindicating their Jenkins/UTPA claim.*" (Emphasis added.)

Moreover, the record is barren of facts or argument which would tend to support Plaintiffs' entitlement to, "**increased costs and expenses**, including increased attorney fees, resulting from the insurance company's use of an unfair business practice in the settlement or failure to settle fairly the underlying claim." Accordingly, the Court is without a factual basis upon which to grant such an award. As an aside, inasmuch as Plaintiffs have been awarded reasonable fees, costs, and expenses as a result of "Substantially Prevailing," any further award *may* be prohibited as duplicative.

Bad Faith Litigation of "Substantially Prevail" Issue

Above and beyond the briefings contemplated by the Court and as memorialized in the ***Journal Order and Judgment Entry***, Plaintiffs now seek an alternative route to have this Court enter an order awarding them, "*attorneys' fees, costs and litigation expenses incurred in prosecuting all of their common-law bad faith and statutory claims through the time that they received payment of the jury's verdict.*" In support of their tertiary basis, Plaintiffs take the position that the Court should invoke its inherent power in order to grant the aforementioned relief.

Having presided over much of the pre-trial issues as well as the trial itself, the undersigned is particularly familiar with how the parties and counsel conducted themselves. That being said, the Court is of the reasoned opinion that the complained-of actions do not rise to such a level that justice requires the extra-ordinary relief sought by Plaintiffs herein.

The objections of each party are hereby preserved.

IT IS SO ORDERED.

The Clerk of the Circuit Court of Marshall County is to provide an attested copy of this Order to all counsel of record.

Entered: May 15, 2012.



DAVID W. HUMMEL, JR.
Chief Circuit Court Judge