

No. 33352 - Jeffrey A. Horkulic, Rebecca A. Horkulic, His Wife, and Jeffrey Horkulic, as Natural Parent and Legal Guardian of Stephanie Horkulic and Benjamin Horkulic, Minors v. William O. Galloway, Galloway Law Offices, Professional Liability Services, and Acordia of West Virginia, Inc., and John Does Unknown, and TIG Insurance Company,

and

No. 33353 - TIG Insurance Company, v. the Honorable Arthur M. Recht; William E. Galloway, Galloway Law Offices; Cambridge Professional Liability Services and John Does Unknown; Jeffrey A. Horkulic; Rebecca A. Horkulic, His Wife and Jeffrey Horkulic, as Parent and Natural Guardian of Stephanie Horkulic and Benjamin Horkulic, Minors.

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released at 3:00 p.m.

RORY L. PERRY II, CLERK

SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Davis, J., Concurring:

I agree fully with all portions of the majority's decision in this case. I choose to write separately merely to point out that, in granting as moulded the petition for writ of prohibition on the issue of attorney fees filed by TIG Insurance Company (hereinafter "TIG"), this Court has made no determination with respect to the reasonableness of those fees. Insofar as TIG was denied the opportunity to participate in the hearing wherein it was required to pay the attorney's fees incurred in connection with the Horkulics' efforts to compel enforcement of the compromise settlement agreement, this Court has properly remanded the case for "a full evidentiary hearing to determine the extent of TIG's culpability in delaying the settlement." Maj. Slip Op. at 25. *See, e.g., Kanawha Valley Radiologists, Inc. v. One Valley Bank, N.A.*, 210 W. Va. 223, ___, 557 S.E.2d 277, 283 (2001) ("We have previously determined, on numerous occasions, that a circuit court has erred by failing to afford a party notice and the

opportunity to be heard prior to awarding attorney's fees."); *Czaja v. Czaja*, 208 W. Va. 62, 75-76, 537 S.E.2d 908, 921-22 (2000) ("In failing to accord Appellant's counsel an opportunity to respond to the lower court's basis for assessing fees and costs, the most basic of all protections inherent to our judicial system has been violated."); *Daily Gazette Co. v. Canady*, 175 W. Va. 249, 251, 332 S.E.2d 262, 264 (1985) ("Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record.") (quoting *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766-67, 100 S. Ct. 2455, 2464, 65 L. Ed. 2d 488, 501-02 (1980)).

Additionally, this Court has properly pointed out that, in the event that the lower court determines that attorney fees should be assessed against TIG, the lower court must evaluate the reasonableness of the award pursuant to the factors set out in Syllabus point 4 of *Aetna Casualty & Surety Company v. Pitrolo*, 176 W. Va. 190, 342 S.E.2d 156 (1986). Indeed, nothing in the majority opinion should be read as concluding that the amount of the attorney fees claimed by the Horkulics' is *per se* excessive. See, e.g., *Claypool v. Barnhart*, 294 F. Supp. 2d 829 (S.D.W. Va.2003) (awarding \$18,000 in attorney's fees for 12.56 hours of legal work based on contingency fee agreement); *Arneault v. Arneault*, 216 W. Va. 215, 605 S.E.2d 590 (2004) (awarding \$241,034.42 for attorneys and experts based upon proper

proof). The determination of whether the fees are reasonable is simply a fact driven question that must be assessed under the *Pitrolo* factors.

Accordingly, I concur in the majority opinion. I am authorized to state that Chief Justice Maynard joins in this concurrence.