

Court of Berkeley County,

Jessica A. Moser,
Plaintiff,

vs.)

Auto Club Property Casualty Insurance
Company,
Defendant

Case No. CC-02-2019-C-165

**Order Granting Judgment On Plaintiff's Motion For Award Of Reasonable Attorneys'
Fees**

This matter came before the Court this 4th day of September 2020, pursuant to Plaintiff's Motion for an Award of Reasonable Attorneys' Fees. The Plaintiff is represented by Mark Jenkinson, Esquire, Ronald M. Harman, Esquire, and the law firm of Burke, Schultz, Harman & Jenkinson. The Defendant is represented by Melanie Norris, Esquire, Katherine Moore, Esquire, and the law firm of Steptoe & Johnson.

The Court has reviewed the Plaintiff's Memorandum of Law, the Defendant's Memorandum in Opposition thereto, and Plaintiff's Reply Brief pertaining thereto.

The Court finds that this matter is now ripe for adjudication.

FINDINGS OF FACT

1. Defendant Auto Club issued an automobile insurance policy (number AUTO 41845795) to Joshua Jandreau in Berkeley County, West Virginia, for the policy term of April 20, 2017, through October 20, 2017. (See policy number 41845795 attached as Exhibit A to Plaintiff's Memorandum in Support of Motion for Summary Judgment).
2. On or about October 17, 2017, Plaintiff Moser was the operator of a 2008 Toyota Scion TC owned by Joshua Jandreau.
3. On or about October 17, 2017, in Berkeley County, West Virginia, Plaintiff Moser suffered bodily injury in a motor vehicle crash resulting from negligence of Jennifer Weaver.

4. The aforementioned automobile insurance policy issued by Defendant Auto Club to Joshua Jandreau included Medical Payments Coverage with a policy limit of \$5,000.00.

5. Subsequent to the aforementioned motor vehicle crash, Plaintiff Moser presented a claim under the Medical Payments Coverage of the policy issued by Defendant Auto Club.

6. On or about April 27, 2018, Plaintiff Moser submitted medical records and bills from Rankin Physical Therapy in the amount of \$2,165.00 to Defendant Auto Club for payment under the Medical Payments Coverage of the policy. (*See Exhibit B to Plaintiff's Memorandum in Support of Motion for Summary Judgment*).

7. By letter dated April 30, 2018, Defendant Auto Club issued a denial letter stating only that no balance was owed by Plaintiff Moser, and that the "auto policy does not allow duplication of benefits under the Medical Payments Coverage." (*See Exhibit C to Plaintiff's Memorandum in Support of Motion for Summary Judgment*).

8. By letter dated May 21, 2018, and faxed on July 13, 2018, Defendant Auto Club once again denied payment for Plaintiff Moser's physical therapy bills, but offered an entirely different basis for the continued denial of payment. (*See Exhibit D to Plaintiff's Memorandum in Support of Motion for Summary Judgment*).

9. In its letter dated May 21, 2018, Defendant Auto Club altered course and denied coverage on the basis that the physical therapy bills were not "incurred" by Plaintiff Moser, as said bills had been previously paid by Medicaid. (*See Exhibit D to Plaintiff's Memorandum in Support of Motion for Summary Judgment*).

10. By letter dated May 25, 2018, Plaintiff Moser, by counsel, asserted that the only non-duplication language in the policy was inapplicable, as it pertained to compulsory insurance laws of other states. Plaintiff Moser once again requested payment of the Rankin Physical Therapy bill in the amount of \$2,165.00. (*See Exhibit E to Plaintiff's Memorandum in Support of Motion for Summary Judgment*).

11. By letter dated August 15, 2018, Plaintiff's counsel disputed Defendant Auto Club's repeated denials of medical payments coverage, and afforded it 15 days to withdraw the denials and issue payment to Plaintiff Moser. (See Exhibit E to Plaintiff's Reply to Defendant's Amended Response in Opposition to Plaintiff's Motion for an Award of Reasonable Attorneys' Fees).

12. By letter dated August 29, 2018, Defendant Auto Club maintained its denial of medical payments coverage. (See Exhibit F to Plaintiff's Reply to Defendant's Amended Response in Opposition to Plaintiff's Motion for an Award of Reasonable Attorneys' Fees).

13. On April 26, 2019, Plaintiff filed this action against Defendant Auto Club, asserting counts for declaratory judgment, breach of contract, breach of the implied covenant of good faith, fair dealing, and unfair claim settlement practices.

14. In the declaratory judgment count of the Complaint, Plaintiff sought this Court's declaration of the rights, duties, and responsibilities of the parties under the policy of automobile insurance issued by Defendant Auto Club to Joshua Jandreau, policy number AUTO 41845795.

15. On or about March 13, 2020, Plaintiff filed a Motion for Summary Judgment, and on March 27, 2020, Defendant Auto Club also filed a Motion for Summary Judgment.

16. By Order dated June 5, 2020, this Court entered an "Order Granting Plaintiff's Motion For Partial Summary Judgment." In this Order, the Court directed Plaintiff to submit a petition for her reasonable attorney fees and costs incurred in securing this judgment from the Court.

17. On June 30, 2020, Plaintiff filed her Motion for Reasonable Attorneys' Fees analyzing the factors presented in Aetna Casualty & Surety Company v. Pitrolo, 176 W.Va. 190, 342 S.E.2d 156 (1986). In her Motion, Plaintiff requested an award of attorney fees in the total amount of \$35,082.50.

18. In its Response in Opposition to Plaintiff's Motion for an Award of Reasonable

Attorneys' Fees dated July 14, 2020, Defendant Auto Club did not dispute that, based on the Court's findings and conclusions contained in its Order Granting Plaintiff's Motion for Partial Summary Judgment, the Plaintiff is entitled to an award of attorney fees. Rather, Defendant Auto Club asserted that the requested attorney fee award was excessive and must be reduced.

19. In its Response, Defendant Auto Club asserted that Plaintiff's award of attorney fees should be reduced by at least the sum of \$9,091.25, plus an additional reduction to be determined by this Court based upon the nature of the case and the minimal relief awarded to Plaintiff.

20. Seeking a reduction of Plaintiff's award of attorney fees, Defendant Auto Club argued, *inter alia*, that: (1) any work performed by Plaintiff's counsel prior to the drafting and filing of the Complaint should be excluded in the attorney fee computation; (2) attorney fees based upon block billing should either be disregarded or reduced; (3) the first time entry on both attorney Harman's and attorney Jenkinson's time sheets should be excluded in the fee computation; (4) a number of entries totaling \$506.25 were excessive and should be reduced; (5) the limited activity in this case demonstrates that the fee requested is unwarranted; and (6) an inaccurate computation resulted in an excessive claim of \$32,500.

21. In Reply, Plaintiff's counsel responded to each of Defendant Auto Club's allegations, and in response thereto amended some time entries and reduced their overall attorney fee claim from \$35,082.50 to \$34,026.25.

CONCLUSIONS OF LAW

The law on this issue in West Virginia is well established. When an insured is forced into litigation to secure their rights to which they are entitled under the terms of the insurance contract then, they are entitled to an award of reasonable attorney's fees in the event that they substantially prevail in their claims. *See Hayseeds Inc. v. State Farm Fire and Casualty*, 177 W.Va. 323, 352 S.E.2d 73 (1986). A reasonable attorney's fee is presumptively one-third (1/3)

of the face amount of the policy, unless the amount of the policy is either extremely small or enormously large. Syl. Pt. 5, Richardson v. Kentucky National Insurance Company, 216 W.Va. 464, 607 S.E.2d 793 (2004); and Fauble v. Nationwide Mutual Fire Insurance Company, 222 W.Va. 365, 664 S.E.2d 706 (2008). In these latter circumstances, the Judge shall conduct an inquiry concerning a reasonable attorney's fee. Id.

Where attorney fees are sought against a third party, the test of what should be considered a reasonable fee is not determined solely by the fee arrangement between the attorney and his client. Pitrolo, at Syl. Pt. 4. Instead, the reasonableness of attorney fees is generally based on broader factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. Id.

In its Reply, Defendant Auto Club does not dispute that Plaintiff substantially prevailed in this matter. Certainly, the Court finds that the Plaintiff did substantially prevail on the contractual issues in dispute between the parties which were litigated on cross-motions for summary judgment. Furthermore, Defendant Auto Club does not dispute Plaintiff's entitlement to an award of reasonable attorney fees in this matter. Instead, Defendant Auto Club asserts that, for various reasons, the amount sought (\$35,082.50) is excessive and should be reduced accordingly.

This Court finds it significant that Defendant Auto Club's Reply fails to even mention the Pitrolo factors, much less specifically argue that any of the Pitrolo factors weigh against the granting of the fees requested by Plaintiff's counsel. Nevertheless,

this Court will now address these Pitrolo factors in turn.

Time and Labor Requirement

Given the complex issues presented, this Court finds it reasonable for Plaintiff to have both attorneys, Harman and Jenkinson, working on her behalf in this civil action. Indeed, this conclusion is supported by the fact that *Defendant Auto Club* did the same.

This Court recognizes that even without extensive discovery, declaratory judgment actions can be time and labor intensive. Both Plaintiff's counsel submitted detailed time entries setting forth the time and labor expended in this case. (*See* Exhibits A and B attached to Plaintiff's Motion for Award of Reasonable Attorney's Fees; *see also* attorney Harman's Amended Attorney Time Sheet attached hereto as Exhibit A). Upon careful review of these time sheets, this Court finds same to be reasonable in both their hourly rates and time expended.

Accordingly, this Court finds that this factor weighs in favor of granting Plaintiff's amended request for attorney fees.

Novelty and Difficulty of the Questions

This Court recognizes that all first-party insurance cases, like the case at hand, require a painstaking reading of the policy and application of the law to both the terms of the policy and any applicable factual pattern relating to the coverage decision. In its Reply, Defendant Auto Club does not specifically contest the novelty and difficulty of the questions presented in this matter. Moreover, Defendant Auto Club submitted a proposed order noting that "[t]he Court acknowledges the novelty of the issue presented in this case;"

Accordingly, this Court finds that this factor weighs in favor of granting Plaintiff's amended request for attorney fees.

Skill Required to Perform the Legal Service Properly

Again, this Court recognizes that first-party insurance claims are unique and require a thorough knowledge of the many rules concerning the construction and application of these

insurance policies to the facts of the case. In its Reply, Defendant Auto Club did not specifically address the issue of requisite skill, but it did submit a proposed order stating that the “Court acknowledges that, in light of the issue presented, the greater amount of skill on behalf of counsel is required to perform the legal service properly.”

Accordingly, this Court finds that this factor weighs in favor of granting Plaintiff's amended request for attorney fees.

Preclusion of Other Employment by the Attorney Due to the Acceptance of the Case

This Court notes that the time spent by each of the Plaintiff's attorneys on this matter, while reasonable, was time that could have been spent on other cases. The Court also recognizes that Plaintiff's counsel primarily earn their fees on a contingency fee basis. In many cases, those contingency fees can result in payment at a rate higher than the hourly rates claimed here.

Accordingly, this Court finds that this factor weighs in favor of granting Plaintiff's amended request for attorney fees.

Customary Fee

This Court finds that the hourly rates claimed herein are in accordance with the amount charged by attorneys of similar experience in similar cases around the State. Plaintiff's claimed hourly rate was supported by an Affidavit signed by Laura Davis, Esquire, a local attorney with extensive experience in the litigation of first-party breach of contract and bad faith claims. (See Affidavit of Laura Davis, Esquire, attached to Plaintiff's Motion for Reasonable Attorneys' Fees as Exhibit C.) In her Affidavit, Ms. Davis stated that the hourly rates charged by Plaintiff's counsel herein were imminently reasonable, particularly for the skill and expertise they bring to their cases.

In its Response, Defendant Auto Club did not contest the hourly rates charged by attorneys Harman and Jenkinson, and submitted a proposed order stating that the fees charges by Plaintiff's counsel were customary in this area for the work performed.

Accordingly, this Court finds that this factor weighs in favor of granting Plaintiff's amended request for attorney fees.

Whether the Fee is Fixed or Contingent

Plaintiff's counsel represents that they undertook representation of the Plaintiff's claim against Defendant Auto Club on a contingency basis, with the understanding that counsel would work the hourly rate stated on Exhibit A and Exhibit B, only if Plaintiff "substantially prevailed" and was able to secure reimbursement of the attorney fees from the Defendant by either settlement or by an award of the Court. In response, Defendant Auto Club does not dispute Plaintiff's position in this regard.

This Court finds that this factor neither weighs in favor nor against a particular award of fees.

Time Limitations Imposed by the Client or the Circumstance

Plaintiff does not believe that this is a relevant factor under the circumstances. Defendant Auto Club states that there are no identified time limitations imposed by the client or the circumstances. Thus, this Court finds that this factor neither weighs in favor nor against Plaintiff's particular award of fees.

Amount Involved and the Results Obtained

While the amount of the Rankin Physical Therapy bill itself and the \$5,000.00 face amount of the Medical Payments Coverage portion of Defendant Auto Club's policy are relatively small, it is quite obvious to the Court that the potential ramifications for Defendant Auto Club are substantial.

This Court notes that Defendant Auto Club did not defend the claim by suggesting that its manner of adjusting and handling the Medical Payments Coverage claim in the matter it did was unique. Rather, Defendant Auto Club wrote at length about the nature, design, and purpose of Medical Payments Coverage policies generally, and asserted that their handling of this claim

was consistent with those stated purposes and the general design of the Medical Payments Coverage portion of this policy.

Now that this Court has ruled that the handling of this claim was contrary to the terms of the policy, Defendant Auto Club, absent a reversal on appeal, will likely re-evaluate its handling of these claims in West Virginia. Assuming that they do this, the amounts involved in the change in how these claims are handled could be extremely large and the impact of this decision could be far reaching around the entire State for Medical Payments Coverage policyholders of this Defendant.

Accordingly, this Court finds that this factor weighs in favor of an award of attorney fees requested by Plaintiff.

Experience, Reputation, and Ability of the Attorney

In its Reply and proposed order, Defendant Auto Club concedes that attorneys Harman and Jenkinson are “seasoned, ‘partner-level’ attorneys.” In addition, the Affidavit signed by attorney Laura Davis stated that Plaintiff’s rates are “imminently reasonable, particularly for the skill and expertise that they bring to their cases.” (*See* Affidavit of Laura Davis, Esquire, attached to Plaintiff’s Motion for Reasonable Attorneys’ Fees as Exhibit C.) The Court agrees, and finds that this factor weighs in favor of an award of attorney fees requested by Plaintiff.

The Undesirability of the Case

The Court finds that there is no undesirability of the case presented by Plaintiff. Thus, the Court finds that this factor weighs in favor of the award of attorney fees requested by Plaintiff.

Relationship with the Client

It is undisputed that attorney Harman already had an attorney-client relationship in the handling of Plaintiff’s third-party personal injury claim when this first-party insurance dispute arose. While Defendant Auto Club does not dispute this, the Court finds that this factor neither

weighs in favor or against a particular award of fees.

Awards in Similar Cases

The undersigned concludes that Plaintiff's claim for fees is reasonable and that similar awards have been made in other cases. See Fauble v. Nationwide Mutual Fire Insurance Company, 222 W.Va. 365, 664 S.E.2d 706 (2008); and Hayseeds Inc. v. State Farm Fire and Casualty, 177 W.Va. 323, 352 S.E.2d 73 (1986). Plaintiff offered the Affidavit of Laura Davis, Esquire, a practicing attorney in West Virginia since August, 1998. (See Affidavit of Laura Davis, Esquire, attached to Plaintiff's Motion for Reasonable Attorneys' Fees as Exhibit C.) Ms. Davis stated that the hourly rate charged and the time expended by Plaintiff's counsel were fair and reasonable. While Defendant Auto Club does not dispute the hourly rate, but disputes the time expended, for reasons stated below, this Court finds such arguments unavailing and finds that Plaintiff's counsel's fees are both reasonable in the terms of the hourly rate and the time expenses.

The Court will now address the arguments submitted by Defendant Auto Club in opposition to Plaintiff's requested attorney fees which are outside the aforementioned Pitrolo factors. First, Defendant Auto Club asserted that any work performed prior to the drafting and filing of the subject civil action be excluded from fee computation. Specifically, Defendant Auto Club asserted that time entries from attorney Harman between April 19, 2018, and October 30, 2018, and time entries from attorney Jenkinson from April 27, 2018, through April 11, 2019, were totally unrelated to the preparation in filing this law suit and must be excluded from consideration.

In Reply, attorney Harman modified his time entry to exclude time wholly unrelated to the preparation for filing this law suit. Upon review of the letters attached to the Reply as Exhibits B-F, this Court is satisfied that the remaining time claimed by attorneys Harman and Jenkinson are substantially related to Defendant Auto Club's denial of coverage and the preparation for filing and continuation of the litigation, and

thus is reasonable to include such time in the fee computation.

Next, this Court finds that Defendant Auto Club's complaints of Plaintiff's counsel's fees based on block billing should be either disregarded or reduced to be without merit. While it is true that block billing makes it difficult for the Court to determine whether the time spent on particular tasks was reasonable, the Court finds that Plaintiff's counsels' claims to have spent only five hours discussing this case among themselves to be imminently reasonable.

Likewise, this Court finds Defendant Auto Club's claims regarding "double billing" for internal meetings, review of filings, and other alleged duplicative work to be unpersuasive. Plaintiff reasonably hired two attorneys to represent her in this matter. So did Defendant Auto Club. This Court notes that both of Plaintiff's counsel were duty bound to exercise reasonable care, due diligence, and to stay up-to-date on the status of Plaintiff's civil action.

The Court also finds Defendant Auto Club's allegation that Plaintiff's counsel engaged in alleged excessive time entry in the amount of \$506.25 is likewise without merit. Once again, this Court finds that Plaintiff's counsels' request for attorney fees reasonable in terms of the amount of the hourly rate and the time expended.

Next, Defendant Auto Club claims that Plaintiff's counsels' attorney fees are unwarranted due to an alleged "limited activity in the case alone." This Court finds that the contract dispute presented to this Court was litigated in a very efficient manner by the parties. Accordingly, Plaintiff's attorney fees should not be reduced because the litigation was conducted in this efficient manner.

Finally, Defendant Auto Club's claim of an inaccurate total award of \$32.50 based upon Plaintiff's mathematical error has been rendered moot by virtue of Plaintiffs' counsel's amended time entry attached to Plaintiff's Reply.

Accordingly, it is hereby **ADJUDGED** and **ORDERED** that Defendant Auto Club

Property Casualty Insurance Company pay the sum of \$34,026.75 to Jessica A. Moser for reasonable attorney fees.

Additionally, this Court has previously noted that this matter shall remain on the Court's docket for further consideration of Plaintiff's claims for UTPA violations and allegations of bad faith. In this regard, the Court notes that the granting of separate trials pursuant to Rule 42(c) of the West Virginia Rules of Civil Procedure generally rests within the discretion of the trial court. State ex rel. State Farm Fire & Casualty v. Madden, 192 W.Va. 155, 160 451 S.E.2d 721, 726 (1994); Bennett v. Warner, 179 W.Va. 742, 748, 372 S.E.2d 920, 926 (1988).

This Court further notes that in a first party bad faith action against an insurer, such as the case at hand, the trial court, pursuant to Rule 42(c), may bifurcate and stay a first-party bad faith cause of action against an insurer in the furtherance of convenience, economy, or to avoid prejudice. Syl. Pt. 2, Light v. Allstate Ins. Co., 203 W.Va. 27 (1998). This Court finds that deciding the coverage issue prior to trying the issues of UTPA violations and bad faith is convenient, furthers judicial economy, and promotes a fair resolution of this civil action. This Court recognizes that the remaining UTPA and bad faith claims involve the presentation of different evidence and the Court's consideration of legal issues that are different than the coverage issue. Furthermore, many or all of these remaining issues may be rendered moot if Defendant Auto Club succeeds on its anticipated appeal, thereby saving the parties and the Court significant time and expense. Given the procedural history of this case and the desire of the Defendant to appeal the Court's ruling on the contractual issue and the award of attorneys' fees, the bifurcation and stay of the Plaintiff's remaining claims for UTPA violations and allegations of bad faith simply makes good sense for both the Court and the parties.

Accordingly, it is further **ADJUDGED** and **ORDERED** that Plaintiff's claims for

UTPA violations and allegations of bad faith are bifurcated and stayed pending appeal by Defendant Auto Club on the issues of summary judgment and attorney fees.

The Court notes the objections and exceptions of the parties to any adverse ruling herein contained.

Prepared by:

/s/Mark Jenkinson

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