IN THE COUNTY COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
HILLSBOROUGH COUNTY, FLORIDA
CIVIL DIVISION

CHIROPRACTIC CLINICS, INC.
(as assignee of Barbara Barriga),

Plaintiff,

vs. Case No. 03-00079-SC
Division J

PROGRESSIVE EXPRESS INSURANCE COMPANY,

Defendant.
/

ORDER GRANTING PLAINTIFF'S MOTION TO TAX ATTORNEYS' FEES AND COSTS AND APPLY CONTINGENCY RISK MULTIPLIER

This case came before the Court for hearing on June 28, 2005, and June 30, 2005 (collectively, the "Fee Hearing"), on the Motion to Tax Attorneys' Fees and Costs and Apply Contingency Risk Multiplier ("Motion") filed by the plaintiff, CHIROPRACTIC CLINICS, INC. (as assignee of Barbara Barriga) ("Plaintiff"), against the defendant, PROGRESSIVE EXPRESS INSURANCE COMPANY ("Defendant"). Counsel for Plaintiff, Joseph E. Nicholas and David W. Lipscomb, and counsel for Defendant, Scott W. Dutton, were present. In addition, Timothy A. Patrick, Plaintiff's expert witness, and Robert D. Adams, Defendant's expert witness, were present. The Court having considered the Motion, together with the entire court file and record; having considered the sworn testimony of Plaintiff's counsel and the parties' expert witnesses; having heard argument of counsel; and having considered the pre- and post-Fee Hearing memoranda submitted by the parties and other applicable law; it is

ORDERED as follows:

Background Facts and Issues

Plaintiff filed this case against Defendant on January 2, 2003. The case ultimately involved a dispute between the parties over two billing statements, the first dealing with Defendant's failure to properly reimburse Plaintiff's charge under CPT Code 99080 (for generating a special report) and the second dealing with Defendant's failure to properly reimburse Plaintiff's charge under CPT Code 97112 (for two units of service). Defendant filed a motion for summary judgment as to the CPT Code 99080 claim and a second motion for summary judgment as to the CPT Code 97112 claim on April 25, 2003, arguing in the second motion that the CPT Code 97112 claim should be dismissed with prejudice for Plaintiff's failure to serve a pre-suit demand letter pursuant to section 627.736(11), Florida Statutes.

A hearing on Defendant's motions took place on May 22, 2003, during which Plaintiff stipulated to the entry of a summary judgment in favor of Defendant as to the CPT Code 99080 claim, but argued against the entry of a summary judgment as to the CPT Code 97112 claim because the necessity of serving a pre-suit demand letter was a question of first impression in Hillsborough County. The Court granted Defendant's motion as to the CPT Code 99080 claim, but denied Defendant's motion as to the CPT Code 97112 claim ruling a demand letter was unnecessary under the version of section 627.736(11) in effect at the time. A summary judgment in favor of Defendant as to the CPT Code 99080 claim was rendered on July 15, 2003.

The parties thereafter attended mediation on August 20, 2003, but no settlement was reached. On or about October 28, 2004, Plaintiff filed a motion for summary judgment on the CPT Code 97112 claim, and a hearing on the motion for December 2, 2004, was noticed by Plaintiff on October 28, 2004. On the eve of Plaintiff's summary judgment hearing, November 29, 2004, Defendant filed a motion requesting the Court to reconsider its denial of Defendant's summary judgment motion on the CPT Code 97112 claim, arguing again that Plaintiff should have provided Defendant a pre-suit demand letter, and a motion to continue the Plaintiff's summary judgment hearing. Defendant also filed an answer on November 29, 2004, and raised as an affirmative defense Plaintiff's failure to send a pre-suit demand letter. Two days later, on December 1, 2004, Defendant filed an amended motion for reconsideration. The hearing on Plaintiff's summary judgment motion nevertheless proceeded on December 2, 2004. The Court granted Plaintiff's motion, and an order granting the motion was rendered on December 15, 2004. On December 22 2004, Defendant filed a notice withdrawing its amended motion to reconsider, and a second order granting Plaintiff's summary judgment motion was rendered on January 3, 2005. Plaintiff, however, failed to immediately submit to the Court a summary final judgment for entry.

The issue of when Plaintiff would submit and whether it was necessary for Plaintiff to submit a summary final judgment for entry was discussed between the parties and the Court on at least three occasions in the months leading up to the Fee Hearing - first, at a hearing within weeks of the entry of the second order granting Plaintiff's motion; second, in connection with Defendant's submission of the summary judgment for entry; and finally, at a hearing just weeks before the Fee Hearing. Plaintiff eventually submitted a summary judgment for entry on the day of the Fee Hearing.

At the Fee Hearing, Plaintiff's counsel Joseph E. Nicholas ("Nicholas") testified, based on his previously filed affidavits as to fees and costs, that he incurred 69.1 hours in litigating the case through January 25, 2005, and another 40.8 hours in litigating the CPT Code 97112 claim from January 26, 2005, through June 24, 2005. Plaintiff's expert witness Timothy A. Patrick ("Patrick") testified that based on his review of the time records for Plaintiff's counsel and applicable case law, he believed 46.7 hours was a reasonable number of hours to have been expended litigating the case through December 31, 2004, and 9.8 hours was a reasonable number of hours to have been expended from January 1, 2005, through January 25, 2005, for a total of 56.6 hours; a rate in the range of $200 - 225 per hour was a reasonable rate for Nicholas; and a rate in the range of $175 to $200 per hour was a reasonable rate for Plaintiff's counsel Cory Baird. He also testified a contingency risk multiplier in the range of 2.0 - 2.5 should be applied to the fee award given, among other reasons, the uncertainty of outcome at the outset of the case

due to the pre-suit demand letter issue of first impression and Plaintiff's difficulty in retaining competent counsel to handle this type of PIP claim against this particular Defendant. Alternatively, Defendant's expert witness Robert D. Adams ("Adams") testified that based on his review of the time records for Plaintiff's counsel and applicable case law, he believed 14.77 hours was a reasonable number of hours to have been expended in litigating the claim up to July 15, 2003, and 12.0 hours was a reasonable number of hours to have been expended from August 5, 2003, through December 22, 2004, for a total of 26.77 hours, and $175 per hour was a reasonable rate for Nicholas. He also testified a contingency risk multiplier of one was appropriate because this was a "home run, lights out" PIP case for Plaintiff; Plaintiff had a long-standing relationship with counsel; and the volume practice, higher hourly rate, and the fee shifting statute mitigated against Plaintiff's risk of loss.

The primary issues now before the Court are (1) the number of hours reasonably expended by Plaintiff's counsel in litigating Plaintiff's CPT Code 97112 claim to a final resolution; (2) the reasonable hourly rate to be awarded for Plaintiff's counsel for this type of litigation; (3) whether the Court should apply a contingency risk multiplier to any fees awarded pursuant to sections 627.428 and 627.736(8), Florida Statutes, and if so, (4) the amount of such multiplier; and (5) whether expert witness fees may be taxed as a cost against Defendant, and if so, in what amount.

For the reasons set forth below and pursuant to sections 627.428 and 627.736(8), Florida Statutes, Plaintiff's Motion is GRANTED.

Reasonable Attorneys' Fees

In determining the amount of reasonable attorneys' fee to award Plaintiff, the Court must utilize the criteria and guidelines for determining reasonable fees articulated by the Florida Supreme Court in *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985). In *Rowe*, the court adopted the federal loadstar approach as an objective means to calculate fees to assist courts in setting reasonable attorney fee awards. 472 So. 2d at 1150. Accordingly, in computing a reasonable fee under the loadstar approach, the Court must first, determine the number of hours reasonably expended in the litigation; second, determine the reasonable hourly rate for the prevailing attorney's services; and third, multiply the reasonable number of hours by the reasonable hourly rate. *See Id.* at 1150-51. The court in *Rowe* also identified eight criteria set forth in Disciplinary Rule 2-106(b) of the Florida Bar Code of Professional Responsibility that courts should consider in determining a reasonable attorney fee. *See Id.*

Utilizing the criteria outlined in *Rowe* and based on the competent evidence presented at the Fee Hearing and the entire record, the Court finds a reasonable number of hours for Plaintiff's counsel to have expended in litigating Plaintiff's CPT Code 97112 claim to a final resolution is 51.4 hours[1] and a reasonable hourly rate for Plaintiff's counsel for this type of litigation is $175.

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[1] The 51.4 hours reflects a deduction of the majority of time incurred by Plaintiff's counsel after December 15, 2004, based on the Court's granting, in part, of Defendant's Second Motion in Limine at the inception of the Fee Hearing, and a deduction of time by Plaintiff's

Applying the loadstar approach, the Court finds Plaintiff is entitled to a reasonable fee award of $8,995.

Contingency Risk Multiplier

In *Rowe*, the court likewise concluded that in contingency fee cases, the loadstar figure calculated by the court is entitled to enhancement by an appropriate contingency risk multiplier. 427 So. 2d at 1151. The *Rowe* court's ruling regarding the application of a contingency risk multiplier subsequently was modified in *Standard Guaranty Ins. Co. v. Quanstrom*, 555 So. 2d 828 (Fla. 1990), and in *Bell v. U.S.B. Acquisition Co., Inc.*, 734 So. 2d 403 (Fla. 1999). In *Quanstrom*, the Florida Supreme Court reaffirmed the principles in *Rowe* and found that a trial court should consider the following factors in determining whether to apply a multiplier in contract cases, such as this one:

> (1) whether the relevant market requires a contingency multiplier to obtain competent counsel; (2) whether the attorney was able to mitigate the risk of nonpayment in any way; and (3) whether any of the factors set forth in *Rowe* are applicable, especially the amount involved, the results obtained, and the type of fee arrangement between the attorney and client.

Quanstrom, 555 So. 2d 828, 834; *Bell*, 734 So.2d 403, 411. The *Quanstrom* court went on, however, to modify the multiplier in *Rowe*. The court announced that a trial court may in a case (1) apply a multiplier of 1 to 1.5 if it determines success was more likely than not at the outset; (2) apply a multiplier of 1.5 to 2.0 if it determines the likelihood of success was approximately even at the outset; and (3) apply a multiplier of 2.0 to 2.5 if it determines that success was unlikely at the outset of the case. 555 So.2d at 834.

During the Fee Hearing, Defendant argued as a preliminary matter that the Court should refrain from applying a contingency risk multiplier in this case in view of the uncertainty as to its application in cases involving the award of fees pursuant to a fee shifting statute, such as the one at issue in this case, section 627.428, Florida Statutes. Although this issue has been certified on two occasions in 2004 by the Fifth District Court of Appeal as one of great public importance, the Florida Supreme Court has not yet granted review of these cases to resolve the issue. As the case law presently supports the application of a contingency risk multiplier to attorneys' fees

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counsel in litigating Plaintiff's unsuccessful CPT Code 99080 claim. The number of hours awarded also reflects the years of experience of Plaintiff's counsel and a recognition by the Court of the skills, experience, and efficiencies of an attorney who has been practicing law for only two to four years (compared to those of an attorney, like the experts and opposing counsel, who have been practicing for ten or more years). The Court also notes that by the May 22, 2003, hearing on Defendant's summary judgment motion, Plaintiff had only incurred 15.7 total hours in the case. Lastly, the number of hours does not reflect any time expended by Plaintiff 's counsel in litigating the appropriate multiplier to apply in this case and in that regard, the Court finds the Second District Court of Appeal case of *State Farm Mutual Automobile Ins. Co. v. Trevino*, 904 So.2d 495 (Fla. 2d DCA 2005), dispositive on the issue. 904 So. 2d 495, 497 ("We conclude that under *Palma* litigating the applicability of a multiplier involves litigating the amount of the fee rather than the issue of entitlement to the fee.")

awards pursuant to a fee shifting statute, the Court declines Defendant's invitation to rule on this issue in advance of a legislative change or a Florida Supreme Court ruling on the issue.

In any event, both Nicholas and Patrick testified at the Fee Hearing that the attorneys' fee agreement between Plaintiff and Plaintiff's counsel was a pure contingency fee contract. Neither Defendant nor its expert Adams presented any contradictory evidence. Accordingly, the Court finds that the contract addressing Plaintiff's counsel's recovery of attorneys' fees was a pure contingency fee contract and thus, the Court must consider applying a contingency risk multiplier to the amount of fees this Court has determined were reasonably incurred by Plaintiff. Utilizing the criteria set forth in *Rowe*, *Quanstrom*, and *Bell*, this Court accordingly finds Plaintiff's likelihood of success was approximately even at the outset of this case, and a continency risk multiplier of 1.5 is reasonable and appropriate. The Courts's application of the 1.5 contingency risk multiplier is premised on the following specific findings:

a. The relevant market requires a contingency risk multiplier to obtain competent counsel in PIP cases. As the Florida Supreme Court noted in *Bell*, " [a] primary rationale for the contingency risk multiplier is to provide access to competent counsel for those who could not otherwise afford it." 734 So. 2d 403, 411 (Fla. 1999). The Court notes that local courts are awarding multipliers in cases handled by leading, local PIP attorneys. Indeed, "[c]ontingency risk multipliers are part of the expectation of practicing PIP law for Plaintiff's lawyers at this point." *Francisco M. Gomez, M.D., P.A., (as assignee of Mohamed Koraitim v. Nationwide Mutual Fire Ins. Co.*, 11 Fla. L. Weekly Supp. 457c. (Fla. 13th Cir. County Court, March 18, 2004). Likewise, as Justice Grimes emphasized in *Lane v. Head*, 566 So. 2d 508, 513 (Fla. 1990), "[t]he justification for a contingency fee multiplier is that without providing an added incentive for lawyers to obtain higher fees, clients with legitimate causes of action (or defenses) may not be able to obtain legal services." 566 So.2d 513 (Grimes, J., concurring). This is especially true in a case like this where the ultimate amount in controversy was less than $15, making it much less desirable than other types of cases.

b. The Court is aware from its own experience and its own review of a significant number of reported decisions in this area of the extremely litigious and contentious nature of PIP cases. In this regard, the Court finds credible Patrick's testimony that this particular Defendant aggressively litigates its cases and that a case against this particular Defendant is much less desirable than cases against other insurers.

c. Despite Defendant's contention that this case was easy from the outset as the coding on the CPT Code 97112 was in error and it simply required a "phone call" to clarify and Adams' testimony that this case was a "home run" for Plaintiff, a successful result on the CPT Code 97112 claim was far from being a *fait accompli*, as evidenced by the manner in which Defendant litigated this case from the outset. Defendant relentlessly pursued its argument that Plaintiff was required to send a pre-suit demand letter pursuant to section 627.736(11). Indeed, this argument was the basis of a motion for summary judgment and an affirmative defense filed after the Court denied Defendant's summary judgment motion and on the eve of the hearing on Plaintiff's summary judgment motion. Defendant in addition not only filed one motion for reconsideration of the Court's denial

of its motion for summary judgment, but also filed an amended motion. Defendant likewise had several opportunities to settle the matter prior to the filing of Plaintiff's summary judgment motion, yet declined to do so. Moreover, Defendant argued during the Fee Hearing that all Plaintiff needed to do was file a motion for summary judgment on the CPT Code 97112 claim, but when Plaintiff did so and attempted to have the motion heard, Defendant filed a motion to continue the hearing. It is clear from the record as a whole that Defendant, from the outset, was doing more than merely defending against any deficiencies in Plaintiff's complaint. Defendant is entitled to aggressively defend its position. However, it seems somewhat disingenuous for Defendant to argue now that the case was an "easy" one or a "home run for Plaintiff" from the outset when the evidence clearly demonstrates Defendant aggressively defended the claim and attempted to forestall the entry of a judgment thereon in Plaintiff's favor.

e. Plaintiff's counsel attempted to mitigate the risk of nonpayment, but was unable to do so.

f. The use of a multiplier is justified based on factors such as the amount of risk involved, the results obtained, and the type of fee arrangement between the attorney and client. Nicholas and Patrick testified that the issue of the necessity of a pre-suit demand letter was one of first impression in Hillsborough County, thus rendering the issue - in Defendant's own words at the May 22, 2003, summary judgment hearing - "harder" for the Court to resolve and in this Court's opinion, riskier for Plaintiff to pursue. Given the difficulty of the issue, Plaintiff's success in obtaining a summary judgment against this Defendant for the entire amount sought on the CPT Code 97112 claim was an excellent result. Lastly, as the Court previously noted, the fee agreement between Plaintiff and its counsel was a pure contingency fee agreement which only allowed for the recovery of attorneys' fees by Plaintiff's counsel if counsel prevailed in establishing Plaintiff's claim for damages against Defendant.

Pre-judgment Interest

Pursuant to *Quality Engineered Installation, Inc. v. Haggle South, Inc.*, 670 So. 2d 929 (Fla. 1996) and *Boules v. Florida Dept. of Transportation*, 733 So. 2d 959 (Fla. 1999), pre-judgment interest on an attorney fee award accrues from the date entitlement to attorneys' fees is fixed through agreement, arbitration, or court determination. Plaintiff therefore is entitled to pre-judgment interest on the attorneys' fees awarded at the statutory rate of 7% from December 2, 2004, the date the Court orally granted Plaintiff 's summary judgment motion against Defendant.

Expert Witness Fees

As to the issue regarding the award of Plaintiff's expert witness fees, the Court finds an award of fees to Plaintiff is appropriate pursuant to the courts' rationale in *Travis v. Travis*, 474 So. 2d 1184 (Fla. 1985); *Stokes v. Phillips*, 651 So. 2d 1244 (Fla. 2d DCA 1995); and *Mandel v. Bob Dance Dodge, Inc.*, 739 So. 2d 720 (Fla. 5th DCA 1999). Accordingly, the Court finds that

15.9 hours expended by Patrick in preparing for and attending the Fee Hearing is a reasonable number of hours to be expended and that the hourly rate of $225 per hour is a reasonable expert witness hourly rate for Patrick[2]. The Court further finds based on Patrick's testimony that he intended and expected to be compensated for his time expended as an expert witness in this case. Plaintiff therefore is entitled to an award of $3,577.50 in reasonable expert witness fees.

Reasonable Costs

The Court has considered the costs affidavit submitted by Plaintiff in this case and determines that Plaintiff is entitled to an award of $144 in reasonable costs expended in obtaining a final judgment as to its CPT Code 97112 claim in this case. The Court notes that neither party presented any testimony as to the reasonableness of the costs incurred by Plaintiff and that Plaintiff's affidavit lacks the requisite specificity to inform the Court as to the nature and necessity of the Berry Hill charges.

Summary of Reasonable Fees and Costs

In summary, the Court hereby finds based on the evidence presented at the Fee Hearing, the entire record as a whole, and applicable case law, as follows

a. reasonable number of hours expended by Plaintiff's counsel - 51.4
b. reasonable hourly rate for Plaintiff's counsel - $175
c. load star attorneys' fees - 51.4 hours x $175 = $8,995.00
d. applicable contingency risk multiplier - 1.5
e. total reasonable attorneys' fees - $13,492.50 (1.5 x $8.995.00)
f. pre-judgment interest - $724.53 (280 days @ $2.5876 per diem)
g. reasonable court costs - $144.00
h. reasonable expert witness fees - $3,577.50 (15.9 hours x $225/hr.)
I. total reasonable fees, costs, interest, and expert witness fees - **$17,938.53**

FINAL JUDGMENT OF ATTORNEYS' FEES AND COSTS AGAINST DEFENDANT

Based on the foregoing findings of fact and conclusions of law, the Court hereby ADJUDGES as follows:

. Plaintiff, CHIROPRACTIC CLINICS, INC. (as assignee of Barbara Barrage), shall have and recover against Defendant, PROGRESSIVE EXPRESS INSURANCE COMPANY, the amount of $13,492.50 in reasonable attorneys' fees; $724.53 in pre-judgment interest; $144.00 in reasonable costs; and $3,577.50 in reasonable expert witness fees, for a total

[2] The amount of hours awarded reflects a deduction of three hours for "allocation of time for deposition" and inclusion of three hours for attending the Fee Hearing. Adams testified he expended 13 hours in preparing for the Fee Hearing and his hourly rate is $200 an hour.

sum due of $17,938.53, that shall bear interest at the rate prescribed in section 55.03, Florida Statutes (2004), of 7% per annum, for all of which let execution issue.

DONE AND ORDERED this _____ day of September, 2005.

ELIZABETH G. RICE
County Court Judge

Conformed copies furnished to:

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