

MARLENE CARIDE, COMMISSIONER  
OF THE NEW JERSEY DEPARTMENT  
OF BANKING AND INSURANCE,

Plaintiff,

V.

HARMONY B. HEFFERNAN,

Defendants.

SUPERIOR COURT OF NEW JERSEY  
SPECIAL CIVIL PART- MONMOUTH  
COUNTY

DOCKET NO.: MON-DC-6241-19

Civil Action

**ORDER**

This matter was tried before the court in a one-day bench trial on October 7, 2020. Appearing before the court were counsel for Plaintiff, Gurbir S. Grewal, Attorney General (Brian R. Fitzgerald, Deputy Attorney General, appearing) and counsel for Defendant Harmony B. Heffernan ("Defendant"), Louis H. Miron, Esq. The Court having considered the evidence presented at trial, and for good cause shown, entered its decision on the record on October 15, 2020, and this trial verdict and final judgment following trial shall memorialize and accompany the court's decision on the record;

**IT IS** on this 18th day of February, 2021, that plaintiff's motion is hereby **GRANTED**; and

**ORDERED**, that verdict and judgment is entered in favor of Plaintiff, the Commissioner of Banking and Insurance on Count One of the Commissioner's Complaint in this action; and

**IT IS FURTHER ORDERED**, that this court finds that Defendant violated the New Jersey Insurance Fraud Prevention Act, N.J.S.A. 17:33A-1 to -30 ("Fraud Act"), specifically N.J.S.A. 17:33A-4(a)(4)(b), as alleged in Count One of the Complaint, by making a knowingly false material statement for the purpose of obtaining an insurance policy. Specifically, defendant falsely stated to Mutual of Omaha Insurance Company that he had not been injured between the time he applied for an individual disability policy and the issuance of the policy, in violation of N.J.S.A. 17:33A-4(a)(4)(b); and

**IT IS FURTHER ORDERED** that after consideration of the factors relevant to the calculation of civil penalties, as set forth in Kimmelman v. Henkels & McCoy, Inc., 108 N.J. 123 (1987), that judgment shall be and hereby is entered in the total amount of \$1,000.00 against Defendant, which consists of a \$1,000.00 civil penalty against Defendant for his violation of N.J.S.A. 17:33A-4(a)(4)(b), pursuant to N.J.S.A. 17:33A-5(b).

**IT IS FURTHER ORDERED** that a statutory fraud surcharge of \$1,000.00 is entered against defendant, pursuant to N.J.S.A. 17:33A-5.1; and

**IT IS FURTHER ORDERED** that after consideration of the factors relevant to the calculation of an award of reasonable attorneys' fees incurred by plaintiff, defendant is subject to an award of reasonable attorneys' fees and court costs to the Commissioner

under N.J.S.A. 17:33A-5(b) in the amount of \$26,245.50. This amount is for proceedings in the trial court only, and does not include any attorneys' fees for any potential appeal in this case, which fees shall be separate.

**IT IS FURTHER ORDERED**, pursuant to R. 1:5-1(a) that a copy of this Order will be served on all parties not served electronically, nor served personally in court this date, within seven (7) days of the date of this Order.

/s/ MARA ZAZZALI-HOGAN, J.S.C.

Opposed (X)

Unopposed ( )

**\*\*\*SEE ATTACHED STATEMENT OF REASONS\*\*\***

**STATEMENT OF REASONS PURSUANT TO R. 1:6-2(f) GRANTING  
PLAINTIFF'S MOTION FOR ATTORNEYS' FEES  
PURSUANT TO N.J.S.A. 17:33A-5(b)**

**MARLENE CARIDE, COMMISSIONER OF THE NEW JERSEY DEPARTMENT OF  
BANKING AND INSURANCE,**

**v.**

**HARMONY B. HEFFERNAN.**

**DOCKET NO. : MON-DC-6241-19**

This motion for attorneys' fees was filed by plaintiff, Marlene Caride, Commissioner of the New Jersey Department of Banking and Insurance ("plaintiff"), who is represented by Deputy Attorney General, Brian R. Fitzgerald, Esq., from the Attorney General's office. This motion is opposed by defendant, Harmony B. Heffernan ("defendant"), who is represented by Louis H. Miron, Esq., of the law office of Louis H. Miron.

**I. BACKGROUND**

On October 7, 2020, a one-day bench trial was held by this Court. Consequently, on October 15, 2020, this Court issued its decision on the record, finding that defendant violated the New Jersey Insurance Fraud Prevention Act ("Fraud Act"), specifically N.J.S.A. 17:33A-(a)(4)(b). The Disposition Order allowed plaintiff to submit an application for attorneys' fees pursuant to N.J.S.A. 17:33A-5(b). Although the Disposition Order imposed a \$1,000.00 civil penalty for defendant's one violation of the Fraud Act, it did not include the mandatory \$1,000.00 mandatory Fraud Act Surcharge pursuant to N.J.S.A. 17:33A-5.1, which plaintiff requested at trial.

Pursuant to N.J.S.A. 17:33A-5.1, in addition to any other penalty, fine, or charge imposed pursuant to law, a person who is found in any legal proceeding to have committed insurance fraud shall be subject to a mandatory Fraud Act surcharge in the amount of \$1,000.00. Accordingly, as stated in plaintiff's motion, plaintiff respectfully requests that the surcharge be included in the final

order in this case. The opposition does not address the surcharge of \$1,000.00 and therefore the Court finds this request is supported by law and unchallenged.

## II. PLAINTIFF'S ARGUMENT

Plaintiff argues under N.J.S.A 17:33A-5(b), the statute mandates attorneys' fees. The New Jersey Department of Law and Public Safety, Division of Law ("DOL") has established a Schedule of Attorneys' Fees that provides a uniform hourly rate of compensation: for paralegals, the hourly rate is \$75.00 per hour; for attorneys with eleven to twenty years of legal experience, the hourly rate is \$260.00 per hour; and for attorneys with more than twenty years of legal experience, the hourly rate is \$300.00 per hour. Plaintiff contends that these rates are reasonable based on prevailing market rates and the level and years of experience.

In support of the motion, plaintiff states that Deputy Attorney General Brian R. Fitzgerald ("D.A.G. Fitzgerald") spent 136 hours over the course of approximately a year and a half working on this case. This work included drafting and filing the complaint, drafting and propounding written discovery requests to defendant; drafting and filing a motion for summary judgment; participating in settlement discussions with defendant's counsel; preparing and participating in the trial in this matter; and engaging in extensive correspondence and telephone calls with Defendant's counsel. D.A.G. Fitzgerald's hourly rate is \$260.00 per hour. Accordingly, plaintiff claims she is entitled to reasonable attorneys' fees for D.A.G. Fitzgerald's work on this case in the amount of \$35,360.00.

With respect to the work performed on this case by Assistant Section Chief/Deputy Attorney General Nicholas Kant, he spent 4.3 hours on this case, which work included supervising D.A.G. Fitzgerald and reviewing and revising drafts of the complaint and discovery requests.

Assistant Section Chief Kant's hourly rate is \$260.00 per hour. Accordingly, plaintiff claims she entitled to reasonable attorneys' fees for Assistant Section Chief Kant's work on this case in the amount of \$1,118.00.

As for Section Chief/Deputy Attorney General Richard Wegryn, he spent 0.8 hours reviewing and revising a draft of the summary judgment motion. Section Chief Wegryn's hourly rate is \$300.00 per hour. Accordingly, plaintiff asserts she is entitled to reasonable attorneys' fees for Section Chief Wegryn's work spent on this case in the amount of \$240.00.

Furthermore, with respect to work performed on this case by Assistant Attorney General Raymond Chance, he spent 0.3 hours supervising the above-mentioned attorneys who worked on this case. Chance's hourly rate is \$300.00 per hour. Accordingly, plaintiff asserts she is entitled to reasonable attorneys' fees for Assistant Attorney General Chance's work on this case in the amount of \$90.00

Lastly, with respect to work performed on this case by paralegal Kristine Chichester ("Paralegal Chichester"), she spent 1.3 hours working on this case, which included drafting counsel's certification for the summary judgment motion. Plaintiff asserts that the work Paralegal Chichester performed on this case was not duplicative of any of the work performed by attorneys on this case. As such, paralegal Chichester's hourly rate is \$75.00 per hour. Therefore, plaintiff claims she is entitled to reasonable fees for paralegal Chichester's work on this case in the amount of \$97.50.

### **III. DEFENDANT'S OPPOSITION**

In opposition, defendant states her primary objection to plaintiff's application is the number of hours for which plaintiff seeks fees. Defendant contends that plaintiff filed this action seeking a maximum total of \$6,000 (\$5,000 in civil penalties and a \$1,000 surcharge) and is now requesting

that the Court award the government six (6) times this amount. Defendant states that this request is simply outrageous and grossly disproportional to the nature and simplicity of this case, particularly in light of the Court's decision to impose only a \$1,000 penalty on defendant.

Moreover, defendant states that plaintiff fails to address the eight (8) factors articulated in RPC 1.5(a). For example, defendant claims that plaintiff's application does not address "the novelty and difficulty of the questions involved" in this case. As such, defendant states that the parties only exchanged basic paper discovery because there was simply nothing complex or voluminous about the issues and facts involved. Moreover, defendant asserts that plaintiff's application also omitted any reference to "the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer." Lastly, defendant states that plaintiff's application omits any discount for, or other consideration of, the actual results of the trial.

#### IV. ATTORNEYS' FEES

Under N.J.S.A. 17:33A-5(b):

Any person who violates any provision of [N.J.S.A. 17:33A-(a)(4)(b)] shall be liable, in a civil action brought by the commissioner in a court of competent jurisdiction, for a penalty of not more than \$5,000 for the first violation, \$10,000 for the second violation and \$15,000 for each subsequent violation. The penalty shall be paid to the commissioner to be used in accordance with subsection e. of this section. The court shall also award court costs and reasonable attorneys' fees to the commissioner.

It is well settled that New Jersey follows the "American Rule" with respect to the award of attorneys' fees. See Kolczycki v. City of Orange, 317 N.J. Super. 505, 520 (App. Div. 1999). "[T]he American Rule 'has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor.' " In re Estate of Lash, 169 N.J. 20, 43 (2001) (quoting Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717

(1967)). On occasion, common law, as well as statute may provide an exception to the American Rule. See, e.g., DiStefano v. Greenstone, 357 N.J. Super 352 (App. Div. 2003) (allowing recovery for attorneys' fees in a medical malpractice action).

R. 4:42-9(a) provides the limited the exceptions to the "American Rule"; it states in relevant part:

a) Actions in Which Fee Is Allowable. No fee for legal services shall be allowed in the taxed costs or otherwise, except

.....

(6) In an action upon a liability or indemnity policy of insurance, in favor of a successful claimant.

(7) As expressly provided by these rules with respect to any action, whether or not there is a fund in court.

(8) In all cases where attorney's fees are permitted by statute.

Ibid.

An attorney seeking counsel fees must comply with the procedures set forth in R. 4:42-9(b), which states in pertinent part:

Except in tax and mortgage foreclosure actions, all applications for the allowance of fees shall be supported by an affidavit of services addressing the factors enumerated by RPC 1.5(a). The affidavit shall also include a recitation of other factors pertinent in the evaluation of the services rendered, the amount of the allowance applied for, and an itemization of disbursements for which reimbursement is sought. If the court is requested to consider the rendition of paraprofessional services in making a fee allowance, the affidavit shall include a detailed statement of the time spent and services rendered by paraprofessionals, a summary of the paraprofessionals' qualifications, and the attorney's billing rate for paraprofessional services to clients generally.

Ibid.

R.P.C. 1:5(a), in turn, provides:

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;



- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- (8) whether the fee is fixed or contingent

Ibid.

The New Jersey Supreme Court has strongly discouraged the use of an attorney-fee application as an invitation to become mired in a second round of litigation. Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 24 (2004). Indeed, the Supreme Court has noted that “a plenary hearing should be conducted only when the certifications of counsel raise material factual disputes that can be resolved solely by the taking of testimony,” and that such hearings “will be a rare, not a routine, occurrence.” Ibid. Further, the Appellate Division has noted that since R. 4:42-9 does not call for a plenary hearing. Rather, it requires that all applications for attorney's fees “shall be supported by an affidavit of services addressing the factors enumerated by R.P.C. 1.5(a),” implying that an affidavit is sufficient to determine the amount of attorney's fees. Triffin v. Automatic Data Processing, Inc., 411 N.J. Super. 292, 308-309 (App. Div. 2010). Additionally, trial courts are invested with “wide latitude in resolving attorney-fee applications,” and appellate courts will not disturb the decision to deny a plenary hearing unless there is a “clear abuse of discretion.” Furst v. Einstein Moomjy, Inc., 182 N.J. 1, 25 (2004) (citing Rendine v. Pantzer, 141 N.J. 292, 317 (1995)). Finally, the Appellate Division has found that the mere filing of opposition to an affidavit of services does not, in of itself, necessitate a plenary hearing. See Jacobitti v. Jacobitti, 263 N.J. Super. 608, 618 (App. Div. 1993) (“We do not read Mayer v. Mayer, 180 N.J. Super. 164, 169, 434 A.2d 614 (App. Div.), certif. denied, 88 N.J. 494, 443 A.2d 709 (1981), to require a plenary

hearing whenever one party challenges the attorney's fees sought by another party in a matrimonial action.”); see also Furst, supra, 182 N.J. at 25 (“The court should be able to determine in most cases the lodestar and any entitlement to an enhancement based on the supporting and opposing papers and argument of counsel.”).

Pursuant to N.J.S.A. 17:33A-5(b), the court shall award reasonable attorneys’ fees to the commissioner for the violation of N.J.S.A. 17:33A-(a)(4)(b). Accordingly, because the Court on October 15, 2020 found that defendant violated the statute, this Court must determine whether the present motion seeks reasonable attorneys’ fees. In determining what are reasonable attorneys’ fees, the Court relies on R.P.C. 1:5(a). Under R.P.C 1:5(a) there are eight factors for the Court to consider. In opposition to the present motion, defendant’s primary objection is the number of hours for which plaintiff seeks fees. While plaintiffs assert that 136 hours of work performed by D.A.G. Fitzgerald is reasonable, the Court disagrees. The Court recognizes that the case was approximately a year and half of work. The Court, however, believes a reasonable amount of time working on the motion for D.A.G. Fitzgerald would be ninety-five (95) hours. A breakdown of the courts reasoning is as follows: Drafting and filing the complaint – 10 hours; drafting and propounding written discovery requests to defendant – 20 hours; drafting and filing a motion for summary judgment – 20 hours; participating in settlement discussions with defendant’s counsel; preparing for the trial in this matter – 10 hours; preparing for trial in this matter – 20 hours; participating in the trial of this matter – 5 hours; and engaging in correspondence and telephone calls with defendants’ counsel – 10 hours.

The Court believes that the remaining hours of work performed by Assistant Section Chief Kant, Section Chief Wegryn, Assistant Attorney General Chance, and Paralegal Chichester were reasonable. Turning next to whether the rate of fees charged is reasonable, the Court finds that it

has me its burden. While defendant states that the amount involved is six (6) times the amount plaintiff sought in civil penalties and surcharges, under the statute the Court shall award reasonable attorneys' fees. As such, the Court believes that reasonable attorneys' fees in this matter is \$26,245.50. A breakdown of that amount is as follows: 95 hours of work performed by D.A.G. Fitzgerald (\$24,700.00); 4.3 hours of work performed by Assistant Section Chief Kant (\$1,118.00); 0.8 hours of work performed by Section Chief Wegryn (\$240.00); 0.3 hours of work performed by Assistant Attorney General Chance (\$90.00); and 1.3 hours of work performed by Paralegal Chichester (\$97.50).

Lastly, pursuant to N.J.S.A. 17:33A-5.1, in addition to any other penalty, fine, or charge imposed pursuant to law, a person who is found in any legal proceeding to have committed insurance fraud shall be subject to a mandatory Fraud Act surcharge in the amount of \$1,000.00.

Therefore, the Court awards \$26,245.50 in reasonable attorneys' fees to plaintiff and imposes the \$1,000.00 surcharge pursuant to N.J.S.A. 17:33A-5.1. For the aforementioned reasons, plaintiff's motion for reasonable attorneys' fees is hereby **GRANTED**.

/s/ MARA ZAZZALI-HOGAN, J.S.C.