

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2005-018396

03/26/2009

HONORABLE GLENN M. DAVIS

CLERK OF THE COURT
J. Rutledge
Deputy

BRIAN STEELE, et al.

THOMAS B DIXON

v.

AMERICAN FAMILY MUTUAL INSURANCE COMPANY LYNN M ALLEN

RULING

The Court has reviewed and considered each parties' Motions seeking an award of attorneys' fees along with the related Responses and Replies. The Court has further reviewed the file, the pleadings and the materials filed by the parties in support of their positions. Based upon its consideration of the foregoing and the arguments presented by counsel, the Court makes the following findings and enters the following orders in this case.

First, the Plaintiffs argue that attorneys fees are mandated under A.R.S. § 12-341.01(C) and A.R.S. § 12-349. The Court disagrees. The Court is unable to find by clear and convincing evidence that the defense in this case constituted harassment, was groundless and not made in good faith. Nor is the Court able to find that the defense was frivolous or without substantial justification to the degree that an award of fees is mandated in this case.

However, the Court finds that the Plaintiffs are the prevailing parties in this case. Under the circumstances and considering the factors discussed below, the Court finds that an award of fees in their favor is justified and appropriate.

In addition to the fact that the Plaintiffs prevailed on both the contract and bad faith issues, with the jury finding that the defenses asserted on those issues were meritless, other factors argue in favor of an award of fees. Given the amount of work that had been expended by

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both sides as of the time the offers were made, the Defendant made only minimal offers to settle the case, considering that the offers would have included attorneys fees incurred through the date of the offers. While they did not recover as much as they demanded, Plaintiffs recovered substantially more than the largest amount offered in settlement by the Defendant, even without considering the award of fees.

Plaintiffs prevailed completely as to liability on the substantive claims, even though they did not get as much in damages as they sought. There were no particularly novel legal issues that the Court decided in this case. The Court is unable to find that an award of fees would deter other parties from litigating legitimate defenses. The Court is further unable to find that the award of fees against the Defendant would cause an undue hardship. In fact, under the circumstances, the failure of the Court to award fees in favor of the Plaintiffs would be unjust and would result in hardship to the Plaintiffs in spite of the fact that the jury found them to be the victims of bad faith conduct on the part of the carrier.

Considering all of the above the Court finds that an award of fees in favor of Plaintiffs and against the Defendant is appropriate. The Court finds that under the fee contract the Plaintiffs are legally obligated to pay their counsel, on an hourly rate basis, a total of \$409,600. There is ample documentation provided of the work performed and fees claimed and there was no claim made by Defendant that the time expended or work done by Plaintiffs' counsel was excessive or that the hourly rate charged was unreasonable.

Therefore, based upon the foregoing,

IT IS ORDERED awarding Plaintiffs' attorneys' fees in the total amount of \$409,600.00 against the Defendant American Family Mutual Insurance Company.

The Court has also considered the Plaintiffs' Application for Pre-Judgment Interest, the Objection and Reply thereto. The Court finds that prejudgment interest may be awarded only as to the structural and personal property claims since that is what can be considered as included in the claim asserted in July of 2001. The charges for the appraisal would have been in addition to that amount and should not be included in the amount on which prejudgment interest would be paid.

It is not clear if the amount awarded even included compensation for the appraisal expense. However, the Court finds that excluding all interest on the entire award based upon that uncertainty would not be an equitable resolution. Since the amount claimed for the appraisal cost was \$22,800, the more equitable approach would be to reduce the amount upon which prejudgment interest would accrue by that amount. Therefore,

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IT IS ORDERED prejudgment interest is awarded on the sum of \$52,465.59 from the date of the July 15, 2001 at the statutory rate of 10%.

Finally, the Court has considered the *Defendant's Objection to Certain Costs Claimed by Plaintiffs*. The Court agrees that the charges for the mediator, the cost of the trial transcript and the parking expense are not taxable costs. Therefore,

IT IS ORDERED excluding those costs from the costs awarded in this matter.

The Plaintiffs shall submit a judgment consistent with this order for the Court's review and signature.