

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

STEPHEN P. JURINKO and CYNTHIA	:	No. 03-CV-4053
JURINKO, h/w as Assignees of PAUL G.	:	
MARCINCIN,	:	
Plaintiffs	:	
	:	
v.	:	
	:	
THE MEDICAL PROTECTIVE CO.,	:	
Defendant	:	

MEMORANDUM OPINION AND ORDER

RUFE, J.

June 23, 2006

Presently before the Court are Defendant’s Motion for Reconsideration of the post-trial motion for judgment as a matter of law and Plaintiffs’ Post-trial Motion to Mold the Verdict to Reflect an Award of Attorneys’ Fees, Litigation Expenses, and Statutory Interest Pursuant to 42 Pa. Cons. Stat. Ann. § 8371. For the reasons that follow, the Court denies Defendant’s Motion and grants in part and denies in part Plaintiffs’ Motion, subject to certain modifications.

I. BACKGROUND

The factual and procedural history of this case has been thoroughly set forth in the Court’s previous opinions in this matter. The Court incorporates those portions of its previous opinions and recites only those details relevant to consideration of the present motions.

Plaintiffs Stephen P. Jurinko and Cynthia Jurinko (“Plaintiffs”) brought this statutory bad faith case pursuant to title 42, section 8371 of the Pennsylvania Consolidated Statutes against Defendant The Medical Protective Company (“Medical Protective”), a medical malpractice

insurance company. Plaintiffs allege that Medical Protective acted in bad faith when it failed to tender its policy limits to settle a malpractice lawsuit by Plaintiffs against its insured, Dr. Paul Marcincin (“Dr. Marcincin”), a dermatologist, and when it assigned Dr. Marcincin a defense lawyer whose conflict of interest prevented him from vigorously defending Dr. Marcincin. As a result of these acts of bad faith, Plaintiffs’ underlying medical malpractice suit against Dr. Marcincin went to trial in state court, resulting in a jury verdict of \$2.5 million against Dr. Marcincin. The verdict was \$1.3 million in excess of Dr. Marcincin’s total malpractice coverage. In lieu of paying the excess verdict from his personal assets, Dr. Marcincin assigned Plaintiffs his right to bring the instant bad faith suit. After a six-day trial before this Court, a jury returned a verdict in favor of Plaintiffs, finding that Medical Protective acted in bad faith and that its bad faith conduct was a substantial factor in bringing about the harm to Dr. Marcincin in the form of an excess verdict. The jury awarded \$1,658,345 in compensatory damages (as stipulated by the parties) and \$6.25 million in punitive damages.

After the Court entered judgment in favor of Plaintiffs and against Medical Protective in the amount of the total jury award (\$7,908,345), Medical Protective filed a post-trial motion seeking judgment as a matter of law, a new trial, or remittitur. Medical Protective’s motion sought, among other things, judgment as a matter of law to reduce or vacate the punitive damages award as unconstitutionally excessive.

Contemporaneously, Plaintiffs filed their Motion to Mold the Verdict. At Medical Protective’s insistence, the Court deferred consideration of Plaintiffs’ Motion to Mold the Verdict until resolution of Medical Protective’s post-trial motion for judgment as a matter of law, a new trial, or remittitur. On March 24, 2006, the Court issued an opinion denying Medical Protective’s post-

trial motion in its entirety.¹ In particular, the Court denied Medical Protective's request to reduce or vacate the jury's award of punitive damages because it concluded that the award was not grossly excessive in violation of the Due Process Clause.²

On April 11, 2006, Medical Protective timely filed its Motion for Reconsideration of the Court's March 24, 2006 opinion.

II. DEFENDANT'S MOTION FOR RECONSIDERATION

Pursuant to Local Rule of Civil Procedure 7.1(g), a party may move for reconsideration of any judicial ruling within ten days of it being entered. Motions for reconsideration will be granted only where: (1) new evidence becomes available; (2) there has been an intervening change in the controlling law; or (3) a clear error of law or manifest injustice must be corrected.³

Medical Protective seeks reconsideration of the Court's denial of its motion for judgment as a matter of law to reduce or vacate the punitive damages award. It raises three arguments in support of reconsideration: (1) the Court "overlooked" certain facts; (2) the Court misconstrued the holding of a controlling Supreme Court case with respect to permissible ratios of punitive damages to compensable harm; and (3) the Court improperly relied on the possibility that Medical Protective's license could be revoked. None of these arguments presents newly discovered

¹ Jurinko v. Med. Protective Co., No. 03-4053, 2006 WL 785234 (E.D. Pa. Mar. 29, 2006). The Court's opinion was dated March 24, was entered on the docket on March 28, and is listed by Westlaw as issuing on March 29.

² Id. at *6-7.

³ Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros, 176 F.3d 669, 677 (3d Cir. 1999).

evidence or newly decided law, nor is the Court persuaded that any of the arguments warrants correction of clear legal error or manifest injustice.

Medical Protective’s first argument—that the Court “overlooked” certain facts in determining that the punitive damages award was not excessive—is nothing more than a laundry list of issues which the Court *did* consider and which Medical Protective wishes the Court now to reconsider. While this argument may be appropriate grounds for an appeal, it is not an appropriate basis for reconsideration: a motion for reconsideration will not be granted where it “ask[s] the Court to rethink what [it] had already thought through—rightly or wrongly.”⁴

Second, Medical Protective argues that the Court erroneously interpreted the Supreme Court’s decision in State Farm⁵ as holding that all punitive damages awards with a ratio of damages to harm of four to one are constitutionally permissible. However, the Court expressly recognized that State Farm, and its progeny, “declined to impose a bright-line ratio which a punitive damages award cannot exceed.”⁶ Although no “simple mathematical formula” compelled the Court’s evaluation of the constitutional limits on the ratio between punitive damages and harm, the Court found persuasive State Farm’s mention that “an award of more than four times the amount of compensatory damages might be close to the line of constitutional propriety, especially when the compensatory damages are substantial.”⁷ Thus, the Court concluded—based *in part* on State Farm, as well as other similar cases and the particular facts of this case—that the ratio of punitive damages

⁴ Glendon Energy Co. v. Borough of Glendon, 836 F. Supp. 1109, 1122 (E.D. Pa. 1993) (quoting Ciba-Geigy Corp. v. Alza Corp., No. 91-5286, 1993 WL 90412, at *1 (D.N.J. Mar. 25, 1993)).

⁵ State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).

⁶ Jurinko, 2006 WL 785234, at *7 (citing State Farm, 538 U.S. at 425).

⁷ Id.

to harm here (3.77:1) was not unconstitutionally excessive. Accordingly, the Court did not, contrary to Medical Protective's suggestion, misinterpret State Farm to reach an unjust result.

Finally, Medical Protective argues that the Court improperly relied on the possibility that Medical Protective's license could be revoked in evaluating the difference between the punitive damages award and authorized civil penalties for Medical Protective's bad faith. This argument is unavailing. As the Court made clear in its opinion, Pennsylvania's Unfair Insurance Practices Act ("UIPA") authorizes the insurance commissioner of the Commonwealth of Pennsylvania to suspend or revoke the license of an insurer who acted in bad faith.⁸ In contrast to Medical Protective's bald assertion, there was sufficient evidence presented at trial to suggest that revocation of Medical Protective's license was *possible* under UIPA. Moreover, the Court's conclusion was consistent with the Third Circuit's decision in Willow Inn, which upheld a punitive damages award where the insurer's bad faith conduct "arguably amounted to multiple violations of § 1171 [of UIPA], and that the statute provides for escalating civil penalties for repeat violations, up to and including the suspension of one's license to issue insurance policies."⁹ As with the previous two arguments, the Court finds that this argument simply does not approach the clear legal error or manifest injustice standard necessary to grant reconsideration.

Therefore, the Court denies Medical Protective's Motion for Reconsideration and turns to Plaintiffs' Motion to Mold the Verdict.

⁸ 40 P.S. § 1171.5(a)(10).

⁹ Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co., 399 F.3d 224, 238 (3d Cir. 2005).

III. PLAINTIFFS' MOTION TO MOLD THE VERDICT

The Pennsylvania bad faith statute, section 8371, provides that upon a finding that an insurer has acted in bad faith, “the Court may take all of the following actions: (1) Award interest on the amount of the claim from the date the claim was made by the insured in the amount equal to the prime rate of interest plus 3%. (2) Award punitive damages against the insurer. (3) Assess court costs and attorney fees against the insurer.”¹⁰ Pursuant to section 8371, Plaintiffs presently seek to mold the jury verdict to reflect attorneys’ fees, costs, and statutory interest.

A. Attorneys’ Fees

Plaintiffs entered into a contingency fee arrangement with their counsel, as is customary in this type of lawsuit.¹¹ They now claim the thirty percent of the verdict they owe counsel under their contingency fee agreement is a reasonable legal fee to incur in the matter and should be fully reimbursed by Medical Protective. Accordingly, Plaintiffs request \$2,372,503.50 in attorneys’ fees. Medical Protective counters that Plaintiffs are not entitled to fees at all, and, if they are, the amount of reasonable fees equals \$323,167.50, which represents the lodestar value based on Plaintiffs’ representations of the number of hours their counsel worked and their hourly rates.¹² The parties’ dispute raises two issues: (1) whether the Court should exercise its discretion to award attorneys’ fees; and, if so, (2) whether the amount of fees sought by Plaintiffs is reasonable.

Before turning to those issues, the Court notes that the Supreme Court of Pennsylvania has yet to address the application of attorneys’ fees in cases brought under section

¹⁰ 42 Pa. Cons. Stat. § 8371.

¹¹ See Pls.’ Mot. to Mold Verdict Exs. C-H (declarations of attorneys regarding their customary handling of bad faith cases).

¹² The Court presents the calculation of the lodestar figure in Part III.A.2.i, *infra*.

8371. However, in Polselli v. Nationwide Mutual Fire Insurance Company, the Third Circuit made significant predictions about how Pennsylvania’s highest court would approach the assessment of attorneys’ fees in section 8371 bad faith cases.¹³ Since Polselli, the Superior Court of Pennsylvania has provided further guidance on awarding fees under section 8371 in Birth Center v. St. Paul Companies, Inc.¹⁴ Thus, Polselli and Birth Center—along with persuasive authority from this and other jurisdictions—significantly inform the Court’s consideration of the issues at bar.¹⁵

1. Whether to award fees

Polselli held that section 8371 permits a trial court to “assess attorney’s fees against an insured for the time spent (1) litigating the claim under the policy and (2) litigating the bad faith claim itself.”¹⁶ The decision to award attorneys’ fees upon a finding of bad faith “is wholly within the discretion of the trial court.”¹⁷ As Polselli explained: “[A]n award of attorney’s fees under section 8371 is meant ‘to compensate the plaintiff for having to pay an attorney to get that which [the plaintiff was] contractually entitled. . . . [T]he object of an attorney fee award is to make the

¹³ Polselli v. Nationwide Mut. Fire Ins. Co., 126 F.3d 525 (3d Cir. 1997).

¹⁴ Birth Ctr. v. St. Paul Companies, Inc., 727 A.2d 1144 (Pa. Super. Ct. 1999), aff’d on other grounds, 787 A.2d 376 (Pa. 2001).

¹⁵ A federal district court is bound by circuit court interpretations of state law absent a strong indication that the state’s highest court would decide differently. See Williams v. Arai Hirotake, Ltd., 731 F. Supp. 1557, 1559 (S.D. Fla. 1990), rev’d on other grounds, 931 F.2d 755 (11th Cir. 1991); see also Lesnefsky v. Fischer & Porter Co., 527 F. Supp. 951, 954-56 (E.D. Pa. 1981) (applying Third Circuit predictions of Pennsylvania law in the absence of applicable state precedent). See generally 19 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 4507 n.48 (2d ed. 1990). Here, the parties do not cite, and the Court’s research does not reveal, cases suggesting that the Supreme Court of Pennsylvania would presently decide the issues in Polselli differently. Therefore, the Court treats Polselli as binding precedent.

The Court also reviewed Gallatin Fuels, Inc. v. Westchester Fire Insurance Co., No. 02-2116, 2006 WL 1666703 (W.D. Pa. June 2, 2006), the most recent opinion interpreting awards of attorneys’ fees under section 8371.

¹⁶ Polselli, 126 F.3d at 532.

¹⁷ Id. at 534; Willow Inn, Inc. v. Pub. Serv. Mut. Ins., Co., No. 00-5481, 2002 WL 922144, at *2 (E.D. Pa. Apr. 11, 2002) (following Polselli), aff’d, 66 Fed. Appx. 398 (3d Cir. 2003); accord Birth Ctr., 727 A.2d at 1161.

successful plaintiff completely whole.”¹⁸ In other words, when an insurer’s bad faith forces its insured to hire an attorney to obtain the benefits due under the insurance policy, the insured is left less than whole not only by the denial of the benefits of the policy but also the legal fees it was forced to incur to prove the denial was in bad faith. An award of attorneys’ fees—in addition to the benefits of the policy—works to make the insured completely whole.¹⁹

Although this case involves a subtle twist due to Dr. Marcincin’s assignment of rights to Plaintiffs, the Court finds that an award of attorneys’ fees is appropriate. Medical Protective’s failure to tender its policy limits to settle Plaintiffs’ underlying malpractice lawsuit against Dr. Marcincin, which resulted in a \$2.5 million jury verdict against him, left Plaintiffs, as assignees of Dr. Marcincin, with the right to pursue a legal action against Medical Protective for acting in bad faith. In order to make Plaintiffs whole, they should receive an award of the additional attorneys’ fees they incurred to prove Medical Protective’s bad faith and, in turn, obtain the contractual benefit of the policy between Medical Protective and Dr. Marcincin.

Medical Protective argues that the Court should deny an award of attorneys’ fees because Plaintiffs were made whole and Medical Protective was adequately punished by the jury’s verdict, which included a substantial award of punitive damages. The Court disagrees. A trial court may not refuse to award attorneys’ fees under section 8371 simply because it believes the insurer had been punished enough by a punitive damages award.²⁰ An award of attorneys’ fees serves to

¹⁸ PolSELLI, 126 F.3d at 531 (quoting Klinger v. State Farm Mut. Auto. Ins. Co., 115 F.3d 230, 236 (3d Cir. 1997)).

¹⁹ See id.

²⁰ Klinger, 115 F.3d at 236.

compensate a victorious plaintiff rather than punish a losing defendant.²¹ Thus, the Court finds that the work of Plaintiffs' counsel, which resulted in a significant benefit to their clients, and the compensatory rationale of the bad faith statute more than warrant an award of attorneys' fees here.

2. Whether the amount sought by Plaintiffs is reasonable

The second issue logically follows from the first: to the extent an award of attorneys' fees is necessary to make Plaintiffs whole, what amount of fees must Plaintiffs receive to make them whole? Given that Plaintiffs request fees in a specific amount, this second issue may also be framed as whether the amount of fees sought by Plaintiffs is reasonable.

The Court has wide discretion to determine the amount of reasonable attorneys' fees Plaintiffs should receive.²² Although section 8371 itself does not provide the Court with guidance in exercising its discretion, Poselli and Birth Center have held that consideration of reasonable attorneys' fees under that section is guided by Pennsylvania Rule of Civil Procedure 1716.²³ Rule 1716 requires a court to consider: (1) the time and effort reasonably expended by counsel; (2) the quality of the services rendered; (3) the results achieved and the benefits conferred upon the class or the public; (4) the magnitude, complexity, and uniqueness of the litigation; and (5) whether the receipt of a fee was contingent on success. In applying Rule 1716, "[t]he calculation of a reasonable fee [under section 8371] should begin with the actual number of hours spent in pursuing the claim multiplied by a reasonable rate," i.e. the lodestar method.²⁴ The Court then may, at its discretion,

²¹ See id.; Poselli, 126 F.3d at 531.

²² See Lindy Bros. Builders, Inc. v. Am. Radiator & Standard Sanitary Corp., 540 F.2d 102, 115 (3d Cir. 1976).

²³ Poselli, 126 F.3d at 532-33; Birth Ctr., 727 A.2d at 1160.

²⁴ Birth Ctr., 727 A.2d at 1160.

enhance the lodestar “to reflect the contingent risk of the particular bad faith claim at issue”²⁵ or to reflect the quality of an attorney’s work.²⁶

Before proceeding to an application of the Rule 1716 factors, the Court must address Plaintiffs’ argument that the Court’s discretion should be guided by an alternate method of calculation. Plaintiffs urge application of the percentage-of-recovery method—rather than the traditional lodestar method—to arrive at a reasonable fee in bad faith cases. The percentage-of-recovery method awards fees as a fixed portion of the settlement or verdict; thus, in this case Plaintiffs suggest the attorneys’ fees award would equal one third of the overall verdict. Plaintiffs argue that federal courts in this Circuit may elect either method of calculating attorneys’ fees,²⁷ and that the percentage-of-recovery method is more appropriate here because it more accurately and fairly reflects the reality that bad faith cases, *as a class* are uniformly handled on a contingency fee basis.²⁸ They state:

Regrettably, Courts [sic] to date have admittedly focused their efforts on creating and justifying a fictional scenario whereby an attorneys’ fee is calculated by a determination of an hourly rate in a bad faith case that, in reality, exists nowhere outside of the Court’s opinion, multiplied by the number of attorney time put into the case. Such an analysis ignores the fact that almost all bad faith cases are handled on behalf of the insured by an attorney who undertakes that

²⁵ Id. at 1161.

²⁶ Jones v. Muir, 515 A.2d 855, 864 (Pa. 1986).

²⁷ In support of their argument, Plaintiffs cite Perry v. FleetBoston Financial Corp., 229 F.R.D. 105 (E.D. Pa. 2005) (applying the lodestar method in a Fair Credit Reporting Act case), and Lake v. First Nationwide Bank, 900 F. Supp. 726, 734 (E.D. Pa. 1995) (applying the lodestar method in a class action settlement arising out of a Real Estate Settlement Procedures Act dispute).

²⁸ See Memo. in Supp. of Pls.’ Mot. to Mold Verdict at 4. In support of that assertion, they provide declarations of Plaintiffs’ trial counsel and other trial lawyers with significant experience representing plaintiffs in bad faith cases. Id. Exs. C-H.

representation for a contingent fee.²⁹

Thus, Plaintiffs argue for application of the percentage-of-recovery method to produce fee awards equal to the contingency fee arrangements typical in bad faith cases.

Despite the general latitude accorded federal courts in selecting a particular method of calculating attorneys' fees, Plaintiffs' argument ignores the more specific point that Pennsylvania law, as embodied in Rule 1716, governs the determination of fees in a case arising under the Pennsylvania bad faith statute.³⁰ And while it is unclear whether Rule 1716 necessarily precludes the percentage-of-recovery method,³¹ the Pennsylvania Superior Court, in Birth Center, made clear that application of Rule 1716 to a bad faith claim begins with use of the lodestar method.³²

Further, no court has ever adopted the percentage-of-recovery method in a bad faith case. Indeed, Plaintiffs candidly acknowledge the novelty of their position, stating: "Admittedly, in the handful of published decisions pertaining to the award of attorney fees under 42 Pa.C.S.A. § 8371, the trial court has generally elected the 'lodestar' method which begins by examining the hours

²⁹ Id. at 4.

³⁰ See Birth Ctr., 727 A.2d at 1160; see also Polselli, 126 F.3d at 533 (explaining that the trial court "should have looked to Rule 1716 in calculating a reasonable fee" under section 8371).

³¹ A Westlaw search of all Pennsylvania state court cases for "'Rule 1716' and 'percentage of recovery'" produces only two cases, both of which suggest that Rule 1716 and the two alternate methods of calculation are not mutually exclusive. See Pa. Orthopaedic Soc. v. Independence Blue Cross, 2004 WL 2445370, at *2 (Pa. Com. Pl. Sept. 7, 2004); Milkman v. Am. Travellers Life Ins. Co., 2002 WL 778272, at *24 (Pa. Com. Pl. Apr. 1, 2002).

³² See Birth Ctr., 727 at 1160; see also Willow Inn, 2002 WL 922144, at *1-2 (applying the lodestar method to calculate fees under section 8371). Assuming, *arguendo*, that this Court were not guided by Birth Center and instead had to select one of the two methods of calculation applicable in cases arising under federal law, the percentage-of-recovery method would still be inappropriate. The Third Circuit favors the percentage-of-recovery method in cases involving a common fund, and the lodestar method in cases involving fee shifting statutes. In re Prudential Ins. Co. Am. Sales Practices Litig., 148 F.3d 283, 333 (3d Cir. 1998); see also In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liability Litig., 55 F.3d 768, 821 (3d Cir. 1995) ("Courts generally regard the lodestar method, which uses the number of hours reasonably expended as its starting point, as the appropriate method in statutory fee shifting cases."). Section 8371 is plainly a fee shifting statute, and therefore the lodestar method would apply.

worked and the hourly rate of the attorneys involved.”³³ Plaintiffs rely on two cases to suggest that the percentage-of-recovery method is more appropriate here. Those cases are unpersuasive.

The first case, Henderson v. Nationwide Mutual Insurance Company,³⁴ is distinguishable because it dealt with court approval of an unopposed request for attorneys’ fees in the amount of one-third of a proposed settlement of a minor’s bad faith claim.³⁵ In that particular context, the court looked to Pennsylvania law to determine the reasonableness of the request, considering ““whether the court of common pleas in the county with the jurisdiction over the minor has adopted a presumptive lodestar for fees involving the settlement of a minor’s claims.””³⁶ The Court of Common Pleas of Philadelphia County, which had jurisdiction over the plaintiff, had adopted such a presumptive lodestar in Philadelphia Local Rule 2039.2(F), which provides that in settlement of minor’s claims “a counsel fee in the amount of one-third of the net fund recovered shall be considered reasonable.”³⁷ The court thus applied Philadelphia Local Rule 2039.2(F) to uphold the proposed award of attorneys’ fees of one-third of the overall settlement.³⁸ The present case does not involve settlement of a minor’s bad faith claim—and does not implicate Philadelphia Local Rule 2039.2(F) or any similar rule—and, thus, Henderson is inapposite.

The other case cited by Plaintiffs, Zurich American Insurance Company v. American

³³ Pls.’ Mot. to Mold Verdict at ¶ 17.

³⁴ Henderson v. Nationwide Mut. Ins. Co., No. 00-1215, 2001 WL 43648 (E.D. Pa. Jan. 4, 2001).

³⁵ The court in Henderson was acting pursuant to Local Rule of Civil Procedure 41.2, which requires judicial approval of any settlement of a minor’s claim and any distribution from the fund created by that settlement, such as attorneys’ fees. See id. at *1.

³⁶ Id. at *2 (quoting Nice v. Centennial Area Sch. Dist., 98 F. Supp. 2d 665, 667 (E.D. Pa. 2000)).

³⁷ Id.

³⁸ Id.

Alternative Insurance Company,³⁹ is unavailing because it is non-precedential and distinguishable. It is not a bad faith case: in Zurich American the court upheld an award of attorneys' fees equal to a twenty-eight percent contingency arising out of an arbitration dispute between two insurance companies. Moreover, Zurich American approved the trial court's award of fees despite the trial court's reliance on a rationale rejected by the Third Circuit, as the next few paragraphs will demonstrate.⁴⁰

Third, to the extent the Plaintiffs seek application of the percentage-of-recovery method because it more accurately and fairly reflects the handling of bad faith cases as a class, the Third Circuit has already declined to adopt that method. In PolSELLI, the Third Circuit predicted that the Pennsylvania Supreme Court "would reject the use of contingency enhancements that reflect the risk of contingency-fee cases *as a class*."⁴¹ The court explained:

Trial courts are charged with the duty to attempt to calculate a "reasonable" fee in a particular case. To consider the risk of contingency fee cases as a class skews that calculation. Recognizing the individualized inquiry necessary to the calculation of a "reasonable" fee, we predict that the Pennsylvania Supreme Court would reject the argument that trial courts may enhance a lodestar amount to account for the riskiness of contingency-fee cases as a class.

Similarly, we predict that the Pennsylvania Supreme Court would not permit trial courts to enhance a lodestar amount to account for the purported riskiness of a more limited class of contingency-fee cases (e.g., insurance cases "as a class" or civil rights cases "as a class"). To the extent that it is permitted at all, enhancement must be

³⁹ Zurich Am. Ins. Co. v. Am. Alternative Ins. Co., PICS No. 051636 (Pa. Sup. Ct. Sept. 23, 2005) (unpublished, non-precedential opinion).

⁴⁰ Id. at 4 (noting that "the trial court in the instant matter stated that it based its award of attorney's fees on evidence of what was standard for the practice").

⁴¹ PolSELLI, 126 F.3d at 534 (emphasis added).

based on the specific risks of the specific case.⁴²

The court expressly dismissed the argument that a fee award in a bad faith case should recognize the risk inherent in handling such cases on contingency basis, reasoning that “[a]n attorney’s inability to obtain fees in unrelated cases should have no bearing on the attorney’s ‘reasonable fee’ in the case in which he is successful.”⁴³ Thus, the idea that Plaintiffs should receive a percentage of the overall recovery in this case simply because that method more accurately reflects the nature of bad faith cases as a class has been rejected.

Fourth, and finally, Plaintiffs’ proposed approach under the percentage-of-recovery method does not achieve the objective of awarding fees under section 8371. As explained in Part III.A.1 of this opinion, an assessment of attorneys’ fees against an insurer under section 8371 serves to make a plaintiff whole for the additional loss he suffered from having to hire an attorney to spend time establishing the insurer’s bad faith conduct. The fact that the plaintiff and his attorney agreed upon a contingency fee arrangement bears no relationship to the additional loss the insurer inflicted on the plaintiff by making him resort to pursuing a bad faith claim. The contingency fee contract between plaintiff and his attorney represents nothing more than a specific allocation of risk between the two: the attorney is willing to take on the expense of the litigation in exchange for the opportunity to receive a significant percentage of the jury verdict if successful; likewise, the plaintiff is willing to give up a large portion of the verdict in exchange for the attorney covering the expense of his case. What a plaintiff owes his attorney under their contract in the event of success neither represents nor affects what the insurer may owe plaintiff in attorneys’ fees to compensate for

⁴² Id. at 536-37 (internal footnote omitted).

⁴³ Id. at 537 n.15.

plaintiff's loss. That loss is better represented, at least presumptively, by the number of hours an attorney would spend litigating the bad faith claim multiplied by the hourly billing rate of that attorney, i.e. the lodestar.

Thus, for all the foregoing reasons, the Court concludes that the percentage-of-recovery method is not appropriate in this case. Having rejected Plaintiffs' innovative attempt to calculate attorneys' fees using a percentage-of-recovery method, the Court is satisfied that Rule 1716, as applied by PolSELLI and Birth Center, supplies the proper framework for determining reasonable attorneys' fees in this case. The Court's conclusion does not necessarily preclude it from finding that fees equal to one-third of the verdict are reasonable: although the Rule 1716 framework begins with the lodestar method, the Court may enhance the lodestar amount "to reflect the contingent risk of the particular bad faith claim at issue."⁴⁴ Thus, the Court turns to an application of the factors set forth in Rule 1716.

i. Time and Effort

"The calculation of a reasonable fee should begin with the actual number of hours spent in pursuing the claim multiplied by a reasonable fee."⁴⁵ This initial calculation, the lodestar figure, is presumed to be the reasonable fee.⁴⁶ The time records submitted by Plaintiffs' counsel document approximately 881 hours of work in this case performed at hourly rates ranging from \$150

⁴⁴ Birth Ctr., 727 A.2d at 1161.

⁴⁵ Id.; see Lindy Bros., 540 F.2d at 108.

⁴⁶ Pennsylvania v. Del. Valley Citizen's Council for Clean Air, 478 U.S. 546, 564 (1986).

to \$400.⁴⁷ Medical Protective does not dispute the hours spent, nor the hourly rates charged by the various attorneys representing Plaintiffs.⁴⁸ Thus, both parties agree that the fee calculation using those hours and rates amounts to a lodestar figure of \$323,167.50.

However, Plaintiffs ask the Court to increase the lodestar figure to approximately \$2.3 million (which represents thirty percent of Plaintiffs' recovery). This adjusted fees award is *seven times greater* than the lodestar figure, and thus examination of the remaining Rule 1716 factors is necessary to determine whether the lodestar should be significantly increased.

ii. Quality of Services Rendered

In assessing the quality of services rendered, the Court examines: (1) the results obtained for the plaintiffs in comparison with the best possible recovery; (2) the overall benefit conferred on the plaintiffs; and (3) counsel's professional methods.⁴⁹

Throughout this litigation, the Court has been impressed by the quality and

⁴⁷ As represented in Exhibit P to Plaintiffs' Motion to Mold the Verdict, the rates and hours worked of the attorneys involved here are as follows:

<u>Attorney</u>	<u>Rate</u>	<u>Hours worked</u>	<u>Total</u>
Mark W. Tanner, Esq.	\$400/hour	356.1	\$142,440.00
Peter M. Newman, Esq.	\$275/hour	148	\$40,700.00
Thomas More Marrone, Esq.	\$285/hour	8	\$2,422.50
Carolyn Chopko, Esq.	\$210/hour	2	\$420.00
Mark B. Frost, Esq.	\$400/hour	277.6	\$111,040.00
Gregg L. Zeff, Esq.	\$300/hour	84.65	\$25,395.00
Bess M. Collier, Esq.	\$150/hour	<u>5</u>	<u>\$750.00</u>
		881.85	\$323,167.50

The law firm of Frost & Zeff, which employs Mark B. Frost, Esq., Gregg L. Zeff, Esq., and Bess M. Collier, Esq., also handled the Plaintiffs' underlying malpractice lawsuit against Dr. Marcincin. Upon careful review of the billing records submitted in support of Plaintiffs' Motion, the Court is satisfied that all of the hours represented in the chart above were performed exclusively for the present bad faith lawsuit and not the underlying malpractice lawsuit.

⁴⁸ Def.'s Resp. to Pls.' Mot. to Mold Verdict at 16.

⁴⁹ Lindy Bros., 540 F.2d at 117-18.

professionalism of counsel's work. The results obtained and the overall benefit conferred on Plaintiffs are considerable: counsel's adroit advocacy yielded the largest bad faith insurance verdict on record in Pennsylvania. Not only did counsel convince the jury to award compensatory damages, counsel also persuaded the jury to award a significant amount of punitive damages to punish Medical Protective for its bad faith treatment of Plaintiffs' underlying malpractice claim against Dr. Marcincin. Given that the task of calculating the appropriate amount of punitive damages was assigned exclusively to the jury—and that counsel could not even propose a specific amount or range of punitive damages—counsel for Plaintiff obtained the best possible recovery realistically achievable.

Furthermore, “a court can increase or decrease the lodestar fee in light of . . . the quality of the work performed.”⁵⁰ Such enhancements require exceptional circumstances:

The “quality of representation,” however, generally is reflected in the reasonable hourly rate. It, therefore, may justify an upward adjustment only in the rare case where the fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rates charged and that the success was “exceptional.”⁵¹

Notwithstanding the Court's favorable impression of counsel's work, Plaintiffs have not offered sufficient evidence to justify a quality enhancement here. Simply stated, Plaintiffs were represented by top quality trial attorneys to litigate their bad faith claim with the expectation that their work would deliver the optimum result, commensurate with the rate they command on the open market. The attorneys who shouldered almost sixty percent of the workload—more than 600 hours—charge

⁵⁰ Jones, 515 A.2d at 864.

⁵¹ Blum v. Stenson, 465 U.S. 886, 899 (1984).

\$400 an hour, and this Court now holds that the use of that hourly rate in the lodestar calculation adequately incorporates the quality of representation in the base lodestar figure.⁵² Therefore, no further enhancement is appropriate.

iii. Results Achieved and Benefits to the Public

Not only did counsel's effort reap significant results for their clients, they also conferred substantial benefits on the public. The punitive damages award issued by the jury sent a clear and powerful message to Medical Protective and other insurers that intentional bad faith conduct towards their insureds can subject them to large financial liability. That kind of punishment serves to deter insurers from intentionally mistreating their insureds in the future.

iv. Magnitude and Complexity of the Litigation

While there were many documents used to present Plaintiffs' case, the actual legal issues and factual disputes were not considerably complex. However, those documents were carefully intertwined with witness testimony, and Plaintiffs' counsel skillfully utilized each to corroborate the necessary elements of bad faith, paving the way for the jury to reach a decisive verdict in favor of their clients. On balance, this factor reaffirms that the lodestar amount of \$323,167.50 is a reasonable fees award.

v. Contingency

Courts may "enhance the lodestar amount to account for a particular case's contingent risk *only to the extent that those factors creating the risk are not already taken into account* when

⁵² See Willow Inn, 2002 WL 922144, at *2 n.3 (declining to enhance the lodestar because the court took the quality of work into consideration when arriving at the lodestar fee).

calculating the lodestar amount.”⁵³ Although PolSELLi declined to provide trial courts “with a specific list of factors to consider in determining whether and to what extent a contingency enhancement is appropriate in any given case,”⁵⁴ it did provide two specific examples of relevant considerations. First, courts should consider whether “the complexity of a case is reflected in the high number of hours researching the complex issues or in the relatively high regular hourly rate of the attorney.”⁵⁵ Second, courts should consider whether counsel mitigated the risk of the contingency, such as by entering into a contingency-fee contract.⁵⁶

Here, the Court finds that a contingency enhancement of the lodestar amount is not warranted because any risk of contingency is fully incorporated in the base lodestar amount. The Court finds that the complexity of the case—in particular, the challenge of establishing Medical Protective’s bad faith conduct to persuade the jury to award punitive damages—is reflected in the overall hours worked and rates charged by Plaintiffs’ attorneys. The lodestar figure already incorporates higher rates for more experienced attorneys, charges for additional hours spent researching and briefing unsettled areas of law, and current hourly rates for work performed in the past.⁵⁷ The three most experienced attorneys representing Plaintiffs, Mark W. Tanner, Esq., Mark Frost, Esq., and Peter Newman, Esq. shouldered the bulk of the work in preparing and prosecuting this case. In particular, Mr. Tanner, a highly skilled trial attorney with extensive experience, as

⁵³ PolSELLi, 126 F.3d at 535 (emphasis added); see also Birth Ctr., 727 A.2d at 1161.

⁵⁴ PolSELLi, 126 F.3d at 536.

⁵⁵ Id. at 535.

⁵⁶ Id.

⁵⁷ See City of Burlington v. Dague, 505 U.S. 557, 562-63 (1992) (enhancement of attorneys’ fees for contingency is unnecessary as higher hourly rates for more experienced counsel and higher number of hours worked to overcome the uncertainty of outcome already compensate attorneys adequately).

established by his performance before this Court and his recognition by other courts and lawyers,⁵⁸ handled all argument and examination of witnesses at trial. His considerable skill and experience is reflected in his “relatively high regular hourly rate” of \$400, which was the rate used in computing the lodestar figure. Further, the extensive number of hours he worked as lead counsel—the most of any attorney representing Plaintiffs—reflects the effort Plaintiffs’ counsel marshaled to persuade the jury to find a large compensatory and punitive verdict.

Moreover, counsel entered into a contingency fee agreement with Plaintiffs whereby counsel were guaranteed to receive one-third of any jury verdict in Plaintiffs’ favor. Thus, counsel “significantly mitigated the contingent risk; in exchange for accepting the risk of nonpayment, the attorney obtain[ed] the prospect of compensation under the agreement substantially in excess of the lodestar amount.”⁵⁹

In light of all the factors discussed above, the Court holds that the lodestar amount of \$323,167.50 represents a reasonable award of attorneys’ fees in this matter and that no adjustments to the lodestar are warranted. Plaintiffs’ contention that the fees award should equal the one-third contingency fee of the verdict, which includes compensatory and punitive awards, is based on an erroneous premise. Plaintiffs assume that having to pay *any* amount of money to their attorneys from the jury award would make them less than whole. While Plaintiffs will ultimately use funds from the jury award to pay their attorneys the difference between the \$323,167.50 in fees assessed against Medical Protective and the approximate \$2.3 million owed under the contingency arrangement, that is a direct result of the bargain Plaintiffs made with their attorneys by entering a

⁵⁸ See Pls.’ Mot. to Mold Verdict Ex. C ¶¶ 4-12.

⁵⁹ PolSELLI, 126 F.3d at 535.

contingency fee arrangement. Plaintiffs and their counsel contemplated the possibility of a large, undetermined amount of punitive damages in addition to the stipulated compensatory award, and they specifically allocated the contingent risk involved in obtaining that additional award. Plaintiffs cannot recast the risk of that bargain as additional compensation due from Medical Protective under the attorneys' fees provision of section 8371, when they can adequately, albeit handsomely, be compensated by the jury's verdict, which the court upheld. On these facts, and pursuant to PolSELLI, the Court will assess fees against Medical Protective in the amount of \$323,167.50.

B. Costs

Pursuant to section 8371, Plaintiffs also seek an assessment of "court costs" against Medical Protective in the amount of \$51,746.19.⁶⁰ Medical Protective argues that Plaintiffs seek costs which are not allowable under the bad faith statute and that Plaintiffs have inadequately documented their request for costs.

Willow Inn, Inc. v. Public Service Mutual Insurance Company is nearly identical to the present case and addresses both of the arguments advanced by Medical Protective.⁶¹ In Willow Inn, the plaintiff sought assessment of costs against its insurer under section 8371. A large portion of the expenses sought by plaintiff related to expert fees. The court held that fees for privately-retained experts, as opposed to court-appointed experts, are not costs recoverable under section 8371. The court reached this holding by looking to a federal statute dealing with allowable costs, 28 U.S.C.

⁶⁰ 42 Pa. Cons. Stat. § 8371.

⁶¹ Willow Inn, 2002 WL 922144, at *2-3.

§ 1920, which does not include private expert fees.⁶² The court, however, did award plaintiff its remaining costs—mostly relating to copying and transcription expenses—despite the defendant insurer’s argument that those costs were “insufficiently supported.”⁶³

The Court finds Willow Inn persuasive, and thus will assess some but not all of Plaintiffs’ costs against Medical Protective. Here, Plaintiffs incurred \$36,308.13 in non-recoverable expert fees for the services of attorney James Griffith of Fox, Rothschild. Consistent with Willow Inn, those expert fees are not recoverable as costs under section 8371. The remaining costs sought by Plaintiffs, however, relate mainly to copying and other incidental litigation tasks and thus are recoverable under section 8371. The Court finds those remaining costs, which amount to \$15,438.06, are sufficiently documented. Therefore, the Court assesses costs against Medical Protective in the amount of \$15,438.06.

C. Interest and Delay Damages

Before the case went to the jury, the parties stipulated to the amount of compensatory damages which would fully compensate the Plaintiffs, and ultimately the jury awarded this stipulated sum. The stipulated compensatory damages calculation included \$72,030.04 in delay damages in the stipulated compensatory damages calculation. Plaintiffs seek no additional delay damages, and none will be awarded.

The stipulated compensatory damages calculation also included an award of

⁶² Id. Section 1920 provides what fees and expenses may be taxed as costs by a judge or clerk of court. 28 U.S.C. § 1920 (2000). Medical Protective also cites In re Kling, 249 A.2d 552, 554 (Pa. 1969), for the general proposition that expert fees are not recoverable as costs. In re Kling dealt with the specific statutory scheme governing eminent domain law in Pennsylvania. Thus, that case does not compel the conclusion that expert fees are not recoverable in the bad faith context, but it further informs the Court’s decision that such fees are not recoverable under section 8371.

⁶³ Willow Inn, 2002 WL 922144, at *3.

\$286,315.22 in post-verdict interest on the \$1.3 million excess verdict. Plaintiffs now seek an additional award of \$432,482.00 in statutory interest pursuant to section 8371.⁶⁴ Medical Protective opposes this request as duplicative of the previously awarded interest.⁶⁵ It argues that the bad faith statute was not intended to grant a plaintiff a double recovery of interest,⁶⁶ but only to compensate the plaintiff fully.

As the parties stipulated to an award of interest during the trial,⁶⁷ the Court considers the issue of interest owed through the date of the verdict to be waived. Therefore, the Court will award interest on the compensatory award *only* from October 19, 2005 through the present, at the rate of prime plus three percent.

IV. CONCLUSION

For the reasons provided, the Court denies Defendant's Motion for Reconsideration and grants in part and denies in part Plaintiffs' Motion to Mold the Verdict. Thus, the Court awards attorneys' fees in the amount of \$323,167.50, costs in the amount of \$15,438.06, and interest from October 19, 2005 through present at the rate of prime plus three percent. An appropriate Order is

⁶⁴ Section 8371 provides that a court may "award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%." 42 Pa. Cons. Stat. § 8371. Interest was calculated from April 26, 2002 through October 18, 2005 at a rate of six percent of the amount of the excess verdict plus delay damages (i.e., six percent of \$1,372,303.04).

⁶⁵ Medical Protective also argues that the Plaintiffs' calculation of statutory interest is improper as it is based on incorrect dates and also is improperly calculated using compound interest. The Court need not address these arguments.

⁶⁶ Citing Knauer v. Salter, 459 A.2d 1233, 1236-37 (Pa. Super. Ct. 1983), aff'd, 482 A.2d 1277 (Pa. 1984); United States v. Botany Worsted Mills, 98 F.2d 880, 883 (3d Cir. 1938).

⁶⁷ The parties stipulated to an interest award of six percent of the \$1.3 million excess verdict, calculated from February 4, 2005 (the date the Pennsylvania Supreme Court denied review of the underlying action) through October 18, 2005, the date of the verdict. This amount was included in the compensatory damages the jury awarded in its verdict.

attached.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

STEPHEN P. JURINKO and CYNTHIA	:	No. 03-CV-4053
JURINKO, h/w as Assignees of PAUL G.	:	
MARCINCIN,	:	
Plaintiffs	:	
	:	
	:	
v.	:	
	:	
	:	
THE MEDICAL PROTECTIVE CO.,	:	
Defendant	:	

ORDER

AND NOW, this 23rd day of June 2006, upon consideration of Defendant's Motion for Reconsideration [Doc. #93] and Plaintiffs' Response thereto [Doc. #96], and for the reasons set forth in the attached Memorandum Opinion, it is hereby **ORDERED** that Defendant's Motion is **DENIED**.

Furthermore, upon consideration of Plaintiffs' Motion to Mold the Verdict [Doc. #77] and Defendant's Response [Doc. #82], and for the reasons set forth in the attached Memorandum Opinion, it is hereby **ORDERED** that Plaintiffs' Motion is **GRANTED IN PART AND DENIED IN PART**. The jury's verdict is molded to reflect:

1. An award of attorneys' fees in the amount of \$323,167.50;
2. Costs in the amount of \$15,438.06; and
3. Interest on the compensatory award from October 19, 2005 through the date of this

Order, at the rate of prime plus three percent.

Judgment for Plaintiffs and against Defendant is hereby **ENTERED** in the total amount of \$8,246,950.56, plus interest on the compensatory award to be computed from October 19,

2005 through the date of this Order, at the rate of prime plus three percent.

It is so **ORDERED**.

BY THE COURT:

/s/ Cynthia M. Rufe

CYNTHIA M. RUFÉ, J.