

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

RICHARD J. HROBUCHAK, individually	:	No. 3:03cv0591
and t/a HROBUCHAK LAWN AND	:	
GARDEN and LAURIE A. HROBUCHAK,	:	(Judge Munley)
Plaintiffs	:	
	:	
v.	:	
	:	
NATIONWIDE PROPERTY & CASUALTY	:	
INSURANCE COMPANY, a/d/b/a	:	
NATIONWIDE INSURANCE COMPANY,	:	
and d/b/a NATIONWIDE MUTUAL	:	
INSURANCE COMPANY,	:	
Defendants	:	

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MEMORANDUM

_____ Before the court for decision is the damages award in this non-jury case. Previously, we granted default judgment to the plaintiffs with regard to liability, and the court held a hearing on damages on August 25, 2004. The following are our findings of fact and conclusions of law with respect to the damages award.

Background

As set forth in our previous opinions in this case, the facts are as follows. On July 20, 2001, Plaintiff Robert Hrobuchak was involved in an accident that occurred while standing in a trailer that was hitched to a pickup truck. He was attempting to remove a garden tractor from the trailer when he was “suddenly and without warning and without any fault of his own, thrown from the trailer to the ground, landing upon his back and various parts of his

body, and suffering injuries therefrom.” Compl. ¶ 10 -11. He suffered the following as a result of the fall: herniated and fragmented discs in his spine; radiating pain including pain into buttocks and legs and foot; impingement upon nerve roots with resulting pain and loss of functions of bodily parts; contusions and scarring; closed head injuries; hand and elbow injuries; and disabling pain accompanied with emotional distress and depression. Compl. ¶ 16. The trailer and the pickup truck were both insured through the defendant insurance company with a commercial insurance policy. Compl. ¶ 4 - 6.

Plaintiffs have sued their insurance carrier, Nationwide, alleging that it is not providing the bargained for wage loss benefits or providing for Plaintiff Richard Hrobuchak’s medical treatment. Plaintiffs further assert that the defendants’ failure to provide the benefits rises to the level of bad faith. On April 8, 2003, the defendants removed the case to the United States District Court for the Middle District of Pennsylvania. Subsequently, the court set the discovery deadline at January 21, 2004. See Doc. 10, Scheduling Order of August 22, 2003. On December 17, 2003, a joint motion for extension of the discovery deadline was filed, and the deadline was extended to February 29, 2004. (Doc. 12, Doc. 14). A second joint motion for extension of the discovery deadline was filed on February 10, 2004, and discovery was extended to March 31, 2004. (Doc. 15, Doc. 17).

A telephonic discovery conference was held on February 24, 2004 where the court ordered the defendant to cooperate with the plaintiffs regarding discovery. The parties once again requested an extension of the discovery deadline on March 18, 2003. (Doc. 20). The

court granted an extension to April 30, 2004, but noted on the order that no further extensions would be granted. (Doc. 21).

Plaintiffs filed a motion for to compel discovery and for sanctions on April 9, 2004. The motion indicated that the defendant failed to respond to written interrogatories, had not provided the self-disclosure discovery required by Federal Rule of Civil Procedure 26, and was not cooperating in arranging the deposition of the defendants' personnel. The court held a telephonic conference on these discovery issues on April 14, 2004. The court's ruling at the conference was memorialized in an order issued April 19, 2004, which ordered that the defendant provide all outstanding discovery and provide four witnesses, identified in the plaintiff's motion, for deposition by May 3, 2004. (Doc. 25). The order further provided that the failure of the defendant to comply would result in the imposition of sanctions. In addition, the discovery deadline was once again extended, this time to June 1, 2004. (Doc. 25).

On May 3, 2004, the plaintiffs filed a motion for sanctions regarding the defendant's violation of the order of April 19, 2004. (Doc. 26). A brief in support of the motion was filed on May 12, 2004. (Doc. 28). The opposition brief was due on May 27, 2004. See L.R. 7.6 (providing parties opposing a motion fifteen days from the filing of the supporting brief within which to file an opposition brief). The defendant filed no response to the motion. A hearing on the motion was held on June 15, 2004. Defendants' counsel was notified of this hearing via electronic filing notification on June 3, 2004. Nevertheless, counsel for the

defendants did not appear at the hearing.

According to the plaintiffs' motion, plaintiffs' counsel attempted several times to schedule the depositions at issue. Defense counsel did not respond to the plaintiffs. Finally, the plaintiffs sent a notice of deposition scheduling the depositions of the employees for April 28, 2004 and April 29, 2004. No one appeared on behalf of the defendants on either date. The June 15th hearing went forward, and Plaintiff Laurie A. Hrobuchak testified. She stated that due to the disruption in receiving the benefits at issue, she, her husband and their two children have suffered great financial distress, including an inability to pay property taxes, the threat of mortgage foreclosure and the loss of health insurance for her and the children. See Notes of Testimony of Hearing on June 15, 2004, pg. 6 - 10. (Doc. 50).

On June 16, 2004, the court held a hearing on defense counsel's failure to attend the June 15th hearing. Defense counsel, Robert Kelly, appeared at the hearing, and acknowledged that he had failed to properly engage in discovery and to comply with the court's order of April 19, 2004. Defense counsel provided no excuse for his conduct. The following exchange occurred at the June 16, 2004 hearing:

The Court: Mr. Kelly, in this case, you have entered your appearance, and you're representing the Defendant, Nationwide Insurance Company, is that correct?

Mr. Kelly: That is correct, Your Honor.

The Court: Now, I want to ask you some questions. Firstly, let me ask you this, under Rule 26 of the Federal Rules, certain initial disclosures must be made in every case, of documents and witnesses, and you are required to do that. You failed to do that in this case. Would you explain to me why?

Mr. Kelly: There is no - - we have provided some of the materials, Your Honor, through - -

The Court: Minimum.

Mr. Kelly: Minimum.

The Court: You have not completely satisfied the dictates of Rule 26.

Mr. Kelly: I do not disagree with that, Your Honor.

The Court: In this case, the Plaintiff has filed interrogatories. Under Rule 33, you have 30 days in which to answer or object to interrogatories filed. You have failed to answer the interrogatories. Would you explain why?

Mr. Kelly: There is no particular reason, Your Honor, I can explain. I mean, other than - -

The Court: On February the 24th, we held a discovery conference addressing your failures to participate in discovery, and at that time, you told me on the phone that you had other matters that were pressing against you.

I advised you and directed you that you make this case a priority and directed you to answer the discovery requests in a timely manner, and that still hasn't been done, and you haven't provided discovery to the Plaintiff in this case. Why?

Mr. Kelly: Your Honor, I have no particular reason that I can explain, other than this case just got ahead of me and it kind of became one of those cases. I'm sorry.

The Court: The Court issued a written order on April 19th, 2004, directing you to comply with discovery obligations and provide four witnesses for depositions by May the 3rd, 2004.

You have ignored the Plaintiff's attempt to schedule these depositions, and the Plaintiff has issued, in furtherance of that, notices for depositions on April 28th and April 29th, and neither you, nor the deponents, have appeared. Why?

Mr. Kelly: Again, Your Honor, there is no particular reason, other than I can say the case just got away from me.

The Court: On May the 3rd, the Plaintiff filed a motion for sanctions, and you have never answered that motion. Why?

...

Mr. Kelly: [T]here is no particular reason that I can say that I did not.

The Court: On June the 3rd, the Court ordered that a hearing for sanctions be held yesterday, June the 15th. We have the order verified electronically. It appears you did not appear for the hearing.

Mr. Kelly: That is correct.

The Court: Why?

Mr. Kelly: The only thing I can determine - I went back, after I got a call from your chambers yesterday, and figured out what happened was when the electronic notice comes in, my practice is to hit the print button so that I can get

a copy of it and then put it into a folder that I keep on the computer for this case, and either I didn't hit the print button correctly or it didn't print for some reason, and I don't remember specifically, but what often happens is that by the time I get out to the printer, a phone call comes in, and I didn't notice that it didn't print, and it just - - I mean, that is not - -

The Court: Mr. Kelly, in light of your conduct in this case and the history that I have just revealed, that answer is not satisfactory to the Court. (Doc. 37, N.T. June 16, 2004, p. 2 - 5).

After the hearing, we found that defense counsel's actions in this case, including the failure to cooperate in discovery with the plaintiff, the failure to follow court orders and the failure to appear at the hearing held on June 15, 2004, merited the award of sanctions under FED. R. CIV. P. 37. We thus ordered the following on June 16, 2004: 1) the defendants were to respond to all of the plaintiff's written interrogatories in full within five (5) days; 2) the defendants were to produce the four named witnesses, Anne Clemmons, Temika Stone, Thomas McMahon and Donna Young, and have them available for depositions on dates to be provided by plaintiffs' counsel, with no more than five business days notice being required; 3) the defendants were to respond and produce all those documents otherwise identified in plaintiffs' letter of March 11, 2004 within five (5) business days; 4) the defendants were to identify any other witnesses with knowledge of the claims of the plaintiffs within five (5) business days; 5) the defendants were to pay as a monetary sanction twenty thousand dollars (\$20,000.00) to the plaintiff within ten (10) days; 6) the defendants were further ordered to pay the plaintiffs' attorney's fees and expenses for plaintiffs filing the motion for sanctions and for the depositions that defendants failed to attend. (Doc. 36, Memo. and Order dated June 16, 2004).

We further granted leave to the plaintiffs to amend their complaint within five (5) days from the date of the order to include defendants' conduct subsequent to the filing of the complaint as part of the bad faith claim. Plaintiffs filed their amended complaint on June 21, 2004. (Doc. 38). We ordered the plaintiffs to submit a bill of costs with respect to the attorney's fees, which they did. Id., (Doc. 40, Plaintiffs' Bill of Costs). Thus on July 1, 2004, we ordered the defendants to pay \$14,463.80 in attorney's fees and costs within five (5) days. (Doc. 44)

On June 29, 2004, the plaintiffs filed a second motion for sanctions. In the motion, they asserted that the defendants failed to comply in any way with our Order of June 16, 2004. (Doc. 41). On June 30, 2004, we ordered the defendants to file a response to the second motion for sanctions by noon on July 6, 2004, or we would consider the motion unopposed and grant sanctions to the plaintiffs.¹ The defendants never filed a response to the motion. The court scheduled a hearing on the second motion for sanctions to be held on July 15, 2004. All parties were notified of the hearing. Without excuse, defense counsel did not appear at the hearing² where plaintiffs' counsel confirmed that the defendants have not complied with any of the directives of the court's June 16, 2004 Order. (Doc. 53, N.T. July

¹Our order provided: "Possible sanctions include, *inter alia*, precluding the defendants from presenting any evidence at trial, granting default judgment in favor of the plaintiff and/or monetary fines." (Doc. 43).

²Defense counsel is Robert E. Kelly, Jr. of Kelly, Hoffman and Goduta, Harrisburg, Pennsylvania. All orders from the court are electronically filed and delivered to both Attorney Kelly and Karen S. Coates, Esq., of the same firm.

15, 2004). We disposed of the second motion for sanctions by granting default judgment to the plaintiffs.

A hearing on damages was held August 25, 2004 pursuant to Federal Rule of Civil Procedure 55, which provides: "If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages. . . the court may conduct such hearings . . . as it deems necessary and proper." The defendants did not appear at the hearing. Six witnesses testified at the hearing, the plaintiffs; Glynn Murphy, an accountant; Richard Fischbein, a psychiatric expert; William Nasser, an accountant; and Ralph DeMario, M.D., Plaintiff Richard Hrobuchak's physician. Based upon the testimony and exhibits of the hearing, we must now determine the proper amount of damages to award the plaintiffs.

Discussion

The first count of plaintiffs' complaint seeks recovery of the disability insurance benefits and interest under 75 P.C.S.A. § 1716, which provides as follows:

Benefits are overdue if not paid within 30 days after the insurer receives reasonable proof of the amount of the benefits. If reasonable proof is not supplied as to all benefits, the portion supported by reasonable proof is overdue if not paid within 30 days after the proof is received by the insurer. Overdue benefits shall bear interest at the rate of 12% per annum from the date the benefits become due. In the event the insurer is found to have acted in an unreasonable manner in refusing to pay the benefits when due, the insurer shall pay, in addition to the benefits owed and the interest thereon, a reasonable attorney fee based upon actual time expended.

The second count of the complaint sounds in breach of contract and also seeks recovery of the first party insurance benefits.

With regard to the damages recoverable under counts one and two of the complaint, Glynn Murphy testified as an expert in the accounting field. He determined, and we accept, that the defendants owed \$226,184.12 in unpaid benefits and interest in the amount of \$48,756.19. See Notes of Testimony of August 25, 2004 Damages Hearing at 21 - 25 (hereinafter “N.T. at page number”); Ex. 1. Accordingly, we shall award \$226,184.12 for the unpaid benefits and interest in the amount of \$48,756.19.

In addition, the plaintiffs seek attorneys fees under 75 P.C.S.A. § 1716 in the amount of \$80,650.00. After a review of the plaintiffs’ exhibit 75 setting forth a breakdown of the 332.6 hours expended by plaintiffs’ counsel and the rate of \$250.00 per hour, we find that \$80,650.00 is a reasonable attorney fee. Our decision is bolstered by the fact that there has been no objection to this fee by the defense.

The third count of plaintiffs’ complaint seeks recovery under the Pennsylvania Bad Faith statute, 42 P.C.S.A. § 8371, which provides as follows:

In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, 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 an 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.

Pertinent to our analysis is the portion of the statute providing that the plaintiffs are entitled to the costs incurred in seeking to enforce their rights under the policy and punitive damages. As set forth in plaintiffs' exhibit 75, they have incurred costs of \$8,104.68, and we shall award that amount as costs.

Next, under count three of the complaint, the plaintiffs seek damages for, *inter alia*, "emotional anguish and humiliation." Compl. ¶ 66. We will deny these damages, however, as the law provides for no separate compensatory damages award under the bad faith statute for emotional harm. These types of damages are instead covered by the punitive damages. Hollock v. Erie Ins. Exchange, 842 A.2d 409, 421-22 (Pa. Sup. Ct. 2004) (noting that under Pennsylvania law, a compensatory award under the bad faith statute does not include recovery for emotional distress); Krisa v. The Equitable Life Assurance Society, 109 F. Supp.2d 316, 323 (M.D. Pa. 2000) (holding that emotional distress claims are not cognizable under breach of contract and bad faith claims).

Finally, we must determine the appropriate amount of punitive damages. The punitive damages claim is derived from the Pennsylvania Bad Faith Statute. The law provides:

[T]he size of a punitive damages award must be reasonably related to the State's interest in punishing and deterring the particular behavior of the defendant and not the product of arbitrariness or unfettered discretion. In accordance with this limitation the standard under which punitive damages are measured in Pennsylvania requires analysis of the following factors: (1) the character of the act; (2) the nature and extent of the harm; and (3) the wealth of the defendant.

Hollock v. Erie Ins. Exchange, 842 A.2d 409, 419 (Pa. Sup. Ct. 2004) (internal citations and

quotation marks omitted).

The United States Supreme Court has held that in order to comport with due process punitive damages must be analyzed with respect to the following “guideposts:” 1) the reprehensibility of the defendants’ conduct; 2) the disparity between the actual or potential harm that the plaintiff suffered and the punitive damages award; and 3) the difference between the punitive damages award and the civil penalties authorized or imposed in comparable cases. State Farm v. Campbell, 538 U.S. 408, 418 (2003). The Supreme Court due process analysis, therefore, includes the factors of the Pennsylvania punitive analysis. We shall address the Supreme Court’s guideposts and note that the analysis applies equally to the factors set forth by the Pennsylvania courts.³

With regard to the “guideposts” set forth in Campbell, the Supreme Court has explained:

The most important of these factors is the one that examines the reprehensibility of the defendant’s conduct. Id. at 419. In considering this guidepost, the Supreme Court has “instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harms was the result of intentional malice, trickery, or deceit, or mere accident.

³The only factor mentioned under Pennsylvania law, but which is not a factor under the Supreme Court analysis is the wealth of the defendant. We note that the defendant’s net worth is approximately 4.8 billion dollars and their profits for 2004 are projected to be approximately half a billion dollars. N.T. at 37 - 39.

Id.

In the instant case, the defendant's conduct was especially reprehensible. The plaintiffs had particular financial vulnerability and have received numerous foreclosure and tax sale notices because of the discontinuance of the disability payments. In addition, the family health insurance policy lapsed and Plaintiff Laurie Hrobuchak and the plaintiffs' children are still without health insurance. N.T. at 14, 18.⁴ The defendants' actions have had a negative impact on the plaintiffs' credit rating and Plaintiff Laurie Hrobuchak's ability to obtain employment. N.T. at 19.

The defendants' were aware of the plaintiffs' financial difficulties. A note dated January 30, 2003 authored by a Nationwide Insurance claims representative states: "Spoke with Attorney John Clary. . . . He stated that this is a sad case and his client left his office crying. Attorney requested that I make a note that Hrobuchaks are probably going to lose their home. . . . Attorney stated this is a very sad case for Richard Hrobuchak." N.T. at 15 - 16; Ex. 73.

Dr. Fischbein testified at the hearing regarding Plaintiff Richard Hrobuchak's mental condition. He stated: "[I]t was quite clear, this was a very depressed, frustrated young man, who always had good health, loved the work he did; it was a family business, and he had major physical limitations and major pain symptoms. . . . He broke down and cried in my office. His wife broke down in my office. He doesn't know where it is all going to end. He

⁴Plaintiff Richard Hrobuchak has insurance through Medicare. (N.T. at 14).

was very, very frustrated over his financial situation. He was scared for his wife and children not having insurance, not being able to provide for them.”

N.T. at 28.

Despite the fact that the plaintiffs were in a dire financial situation because of defendant’s curtailment of the disability insurance payments, the defendant forced them to take legal action to enforce their rights under the policy. Then once the lawsuit was filed, the defendants refused to cooperate in discovery and did little or nothing to defend the action. In light of all this evidence, we find that the defendants’ action were particularly reprehensible and this guidepost favors granting a substantial award of punitive damages.

The second guidepost is a comparison of the actual or potential harm versus the punitive damages award. This factor helps to “ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.” Campbell, 538 U.S. at 426. In Campbell the Court discussed multipliers and ratios. The court explained that no bright line rule exists as to the extent that an award of punitive damages can exceed the compensatory damages. The Court further explained that single digit multipliers are more likely to comport with due process than higher ratios.

The facts of this case are distinguishable from those in Campbell, the punitive damages were solely punitive in nature and meant to punish the defendant above and beyond the compensatory award. In our case, the punitive damage award also includes

compensation for the plaintiff's emotional pain and suffering. See Hollock v. Erie Ins. Exchange, 842 A.2d 409, 422 (Pa. Super. Ct. 2004). Plaintiffs presented substantial evidence at the hearing regarding their pain and suffering as set forth above. See generally, N.T. 5-21; N.T. 25 - 35. This guidepost also leads us to a conclusion that punitive damages located near the high end of the acceptable range are appropriate.

The final guidepost that we must examine is the disparity between the punitive damages award and the civil penalties authorized or imposed in similar cases. Campbell, 538 U.S. at 428. The Unfair Insurance Practices Act, 40 P.S. § 1171.1 et seq., forbids insurance companies from, *inter alia*, refusing to pay claims without conducting a reasonable investigation; not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which the company's liability under the policy has become reasonably clear; and compelling persons to institute litigation to recover amounts due under an insurance policy. See PA. STAT. ANN. tit. 40 § 1171.5. These are examples of the law which defendants may have violated and if they did they could have been fined \$5000.00 for each violation or had their license suspended or revoked. PA. STAT. ANN. tit. 40 §§ 1171.11, 1171.9.⁵ Hence, based upon these potentially harsh penalties, a harsh punitive damages award is justified. Hoffman, 842 A.2d at 422.

Accordingly, bearing all these factors in mind, we find that a punitive damages award of two million dollars is appropriate. This is a multiplication of the compensatory damages

⁵We make no finding that the defendants did or did not violate the act.

of the amount owed under the policy, \$226, 184.12, by a factor of approximately 8. This multiplier is within the single digit guideline suggested by the United States Supreme Court. See Campbell, 538 U.S. at 425 (“Single-digit multipliers are more likely to comport with due process, while still achieving the State’s goals of deterrence and retribution, than awards with ratios in the range of 500 to 1. . . .”).

An appropriate order follows setting forth the damage award discussed above.

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

RICHARD J. HROBUCHAK, individually	:	No. 3:03cv0591
and t/a HROBUCHAK LAWN AND	:	
GARDEN and LAURIE A. HROBUCHAK,	:	(Judge Munley)
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NATIONWIDE PROPERTY & CASUALTY	:	
INSURANCE COMPANY, a/d/b/a	:	
NATIONWIDE INSURANCE COMPANY,	:	
and d/b/a NATIONWIDE MUTUAL	:	
INSURANCE COMPANY,	:	
Defendants	:	

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VERDICT

AND NOW, to wit, this 24th day of September 2004, the Clerk of Court is hereby ordered to enter judgment in favor of the plaintiffs and against the defendants in the amount of \$2,363,694.99, which represents, the unpaid balance on the insurance policy of \$226,184.12; statutory interest of \$48,756.19; attorney fees of \$80,650.00; \$8,104.68 in costs; and \$2,000,000.00 in punitive damages.

BY THE COURT:

JUDGE JAMES M. MUNLEY
United States District Court

Filed: 9/24/04