

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
Wheeling**

WESTFIELD INSURANCE COMPANY,

Plaintiff,

v.

CIVIL ACTION NO. 5:18-CV-100
Judge Bailey

SISTERSVILLE TANK WORKS, INC. et al.,

Defendants.

**ORDER GRANTING MOTION FOR AWARD OF ATTORNEYS'
FEES AND EXPENSES**

Pending before this Court is a Motion for Award of Attorneys' Fees and Expenses on Behalf of Defendant/Third-Party Plaintiff Sistersville Tank Works, Inc. [Doc. 322] and accompanying Memorandum in Support [Doc. 323], filed September 17, 2020. Plaintiff Westfield Insurance Company filed a Response in Opposition to Defendant Sistersville Tank Works, Inc.'s Motion for Attorneys' Fees and Expenses [Doc. 327] on September 30, 2020. Defendant/Third-Party Plaintiff Sistersville Tank Works, Inc. filed a Reply [Doc. 329] on October 7, 2020.

On November 16, 2020, plaintiff Westfield Insurance Company filed its Notice of Supplemental Submission Relevant to Defendant Sistersville Tank Works, Inc.'s Motion for Attorneys' Fees and Expenses. [Doc. 332].

On November 14, 2022, the United States Court of Appeals for the Fourth Circuit issued its unpublished Opinion [Doc. 335] in which it certified the following question to the Supreme Court of Appeals of West Virginia:

At what point in time does bodily injury occur to trigger insurance coverage for claims stemming from chemical exposure or other analogous harm that contributed to development of a latent illness?

[Id. at 3]. In consideration of the certified question, this Court stayed the above-captioned matter pending resolution by the appeals courts. [Doc. 336].

On February 2, 2024, the United States Court of Appeals for the Fourth Circuit issued its unpublished Opinion [Doc. 337], which affirmed this Court's prior ruling [Docs. 318, 320 & 321] based upon the analysis of the Supreme Court of Appeals of West Virginia in the certified question proceedings.

On March 1, 2024, this Court set a briefing schedule on supplemental briefing. [Doc. 342]. On March 12, 2024, defendant/third-party plaintiff Sistersville Tank Works, Inc. filed its Supplemental Submission Regarding "Motion for Award of Attorneys' Fees and Expenses on Behalf of Defendant/Third-Party Plaintiff Sistersville Tank Works, Inc." [Doc. 343]. On March 27, 2024, plaintiff Westfield Insurance Company filed its Response to Defendant Sistersville Tank Works, Inc.'s Supplemental Submission Regarding Motion for Attorneys' Fees and Expenses. [Doc. 344]. Defendant/Third-Party Plaintiff Sistersville Tank Works, Inc. filed its Reply to "Plaintiff Westfield Insurance Company's Response to Defendant Sistersville Tank Works, Inc.'s Supplemental Submission Regarding Motion for Attorneys' Fees and Expenses" [Doc. 345] on April 3, 2024.

On April 8, 2024, this Court entered its Order [Doc. 346] instructing the unredacted exchange of billing statements and related documentation and setting an additional briefing schedule. On May 6, 2024, plaintiff Westfield Insurance Company filed a redacted and unredacted Response and Objections to the Submission on Behalf of Defendant/Third-

Party Plaintiff Sistersville Tank Works, Inc. to Order Regarding Motion for Attorneys's Fees and Expenses. [Docs. 348 & 349]. On May 13, 2024, defendant/third-party plaintiff Sistersville Tank Works, Inc. filed a Rebuttal Submission to "Plaintiff Westfield Insurance Company's Resposne and Objection to the Submission on Behalf of Defendant/Third-Party Plaintiff Sistersville Tank Works, Inc. to Order Regarding Motion for Attorneys' Fees and Expenses." [Doc. 351].

Accordingly, and at long last, this matter appears ripe for adjudication. For the reasons that follow, this Court will grant defendant/third-party plaintiff Sistersville Tank Works, Inc.'s its requested attorneys' fees and costs.

BACKGROUND

Over the course of a lengthy litigation, this Court ultimately granted summary judgment to defendant/third-party plaintiff Sistersville Tank Works, Inc. ("defendant") on its claims against plaintiff Westfield Insurance Company ("plaintiff") relating to the parties' diversity insurance dispute. See [Doc. 318]. Plaintiff appealed this ruling to the United States Court of Appeals for the Fourth Circuit, who, after certifying the question of applicable trigger theory to the Supreme Court of Appeals of West Virginia, determined the propriety of this Court's application of the "continuous-trigger" theory to the underlying policies, affirmed summary judgment. [Doc. 337].

The only remaining issue pending before this Court at this stage of the litigation is the question of defendant's alleged entitlement to attorneys' fees and expenses. Having been fully and thoroughly briefed, this Court now turns to the arguments asserted by each party.

I. Defendant's Position

Defendant moves, pursuant to Fed. R. Civ. P. 54(d)(2), for its reasonable attorneys' fees and expenses incurred as a result of this declaratory judgment action instituted by plaintiff. [Doc. 323 at 1–2]. According to defendant, because it substantially prevailed in this litigation, it is entitled to its reasonable attorneys' fees and expenses incurred “as a result of [plaintiff's] efforts to escape its obligations to defend and indemnify [defendant] in the underlying state court actions . . .” [Id. at 2].

Supplementally, defendant moves for its additional attorneys' fees and expenses incurred as a result of plaintiff's initiation of an appeal to the United States Court of Appeals for the Fourth Circuit. [Doc. 343 at 3]. According to defendant, and based upon *Aetna Cas. & Sur. Co. v. Pitrolo*, 176 W.Va. 190, 342 S.E.2d 156 (1986), defendant contends it is entitled to a full recovery of its reasonable attorneys' fees and expenses, with interest, for its work conducted in this matter as a whole. [Id.]. As defendant further indicates, its request for reasonable attorneys' fees and expenses should include the costs it incurred in its preparation of a counterclaim against plaintiff and a third-party complaint against Reagle & Padden, Inc. and David C. Padden (“third-party defendants”). [Doc. 351 at 2–3].

II. Plaintiff's Position

Plaintiff's opposition to defendant's request for attorneys' fees and expenses is two-fold. First, plaintiff contends that defendant is not entitled to attorneys' fees and expenses at all based on relevant law. More specifically, plaintiff argues defendant is not entitled to recovery as the prevailing party in an insurance coverage dispute. [Doc. 327 at 2].

According to plaintiff, the Supreme Court of Appeals of West Virginia has made clear that the principle of recovery defendant seeks to invoke only applies where an insurer was found to have breached its contractual obligation by unjustifiably refusing to defend its insured—it is undisputed here that plaintiff defended defendant against the underlying lawsuits while it pursued declaratory relief, and this Court did not find that plaintiff committed any breach. [Id.]. Moreover, plaintiff asserts that West Virginia law expressly prohibits an award of attorneys' fees based only on a party bringing an action to promote its economic or property interests, even if unsuccessful. [Id.].

Second, plaintiff argues defendant's Motion should be rejected because defendant failed to provide plaintiff with an opportunity to test the evidence that the hours billed and fees/expenses incurred by defendant were reasonable and necessary. [Id. at 3]. More specifically, plaintiff contends defendant withheld its billing records based on an improper blanket assertion of privilege and an unsubstantiated claim that redacting the billing records would be too time-consuming. [Id.]. Plaintiff avers that the one-page summary chart submitted in lieu of billing records was a "woefully inadequate substitute, which itself contains numerous defects that call into question the reasonableness of [defendant's] fees." [Id.].¹

APPLICABLE LAW

I. Attorneys' Fees and Costs

Fed. R. Civ. P. 54(d)(1) provides:

¹The parties' dispute regarding the failure to disclose unredacted billing and fee documentation was mooted in its entirety by this Court's prior Order [Doc. 346] instructing the provision of all unredacted billing and fee documentation to plaintiff by defendant and the subsequent briefing based on a total review of all relevant documentation.

(1) *Costs Other Than Attorney's Fees.* Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party. But Costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 14 days' notice. On motion served within the next 7 days, the court may review the clerk's action.

Id. Further, Fed. R. Civ. P. 54(d)(2)(A) informs: “[a] claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those facts to be proved at trial as an element of damages.” Id.

Fed. R. Civ. P. 54(d)(2)(B)(i)–(iv) sets forth the timing and elements for such a motion:

(B) *Timing and Contents of the Motion.* Unless a statute or court order provides otherwise, the motion must:

- (i) be filed no later than 14 days after the entry of judgment;
- (ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;
- (iii) state the amount sought or provide a fair estimate of it; and
- (iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

Id. Moreover, Rule 54.01 of the Local Rules of Civil Procedure for the Northern District of West Virginia requires that the prevailing party file a bill of costs within 30 days after the entry of judgment.²

II. West Virginia Law

A. General Principles of Fee Awards in Declaratory Judgment Actions

Aetna Cas. & Sur. Co. v. Pitrolo, 176 W.Va. 190, 342 S.E.2d 156 (1986) is the prevailing West Virginia authority on the recovery of attorneys' fees and expenses in insurance declaratory judgment actions. "Where a declaratory judgment action is filed to determine whether an insurer has a duty to defend its insured under its policy, if the insurer is found to have such a duty, its insured is entitled to recover reasonable attorney's fees and expenses arising from the declaratory judgment litigation." *Id.* at Syl. Pt. 2.

There, the Supreme Court of Appeals of West Virginia reasoned:

The general reason stated for allowing recovery of attorney's fees in this situation is that where an insurer has violated its contractual obligation to defend its insured, the insured should be fully compensated for all expenses incurred as a result of the insurer's breach of contract, including those expenses incurred in a declaratory judgment action. To hold otherwise would be unfair to the insured, who originally purchased the insurance policy to be protected from incurring attorney's fees and expenses arising from litigation.

²The parties do not appear to make any dispute as to compliance with these deadlines.

Id. at 194, 342 S.E.2d at 160. Further, the Supreme Court of Appeals of West Virginia acknowledged that “[i]f the insurer can force [its insured] into a declaratory judgment proceeding and, even though it loses such action, compel [its insured] to bear the expense of such litigation, the insured is actually no better off financially . . .” *Id.* at 195, 342 S.E.2d at 161 (internal citation omitted).

Moreover, “[t]here is authority in equity to award to the prevailing litigant his or her reasonable attorneys’ fees as ‘costs,’ without express statutory authorization, when the losing party has acted in bad faith, vexatiously, wantonly or for oppressive reasons.” ***Sall-Mike Props. v. Yokum***, 179 W.Va. 48, 51, 365 S.E.2d 246, 249 (1986).

B. *Pitrolo* Fee Considerations

Pitrolo sets forth numerous factors for this Court to consider in determining an award of attorneys’ fees. More specifically, it provides:

Where attorney’s fees are sought against a third party, the test of what should be considered a reasonable fee is determined not solely by the fee arrangement between the attorney and his client. The reasonableness of attorney’s fees is generally based on broader factors such as: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys;

(10) the undesirability of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Pitrolo, 176 W.Va. 190, 342 S.E.2d 156 at Syl. Pt. 4.

DISCUSSION

I. **Consideration of the *Pitrolo* holdings dictate an award of reasonable attorneys' fees and costs to defendant.**

Initially, this Court must consider whether any award of attorneys' fees and costs to defendant is warranted. A review of the pleadings and all applicable law indicate to this Court that such an award is proper. As previously indicated, both parties rely upon the general holdings contained in **Pitrolo**; the conflict, however, arises as to whether those holdings apply in a case where, as here, plaintiff—as the insurer—did not breach its duties because it provided a defense to the underlying actions. Clearly stated, **Pitrolo** instructs that when a declaratory judgment action is filed to explore whether an insurer has a duty to defend under its policy, “*if the insurer is found to have such a duty, its insured is entitled to recover reasonable attorney’s fees and expenses arising from the declaratory judgment litigation.*” **Id.** at Syl. Pt. 2. Nothing within this Syllabus Point requires that the insurer breach its duty to defendant; instead, this Court must determine only that the duty to defendant was owed. As indicated by defendant, “[t]o hold otherwise would be unfair to the insured, who originally purchased the insurance policy to be protected from incurring attorney’s fees and expenses arising from litigation.” **Id.** at 194, S.E.2d at 160. This exemplifies the Supreme Court of Appeals of West Virginia’s intent to allow the insured to recover its attorneys’ fees and expenses in a declaratory judgment action regardless of

whether a defense has been provided to insulate insureds from being forced to incur attorneys' fees and expenses in coverage disputes brought by insurance companies.

Despite this clear Syllabus Point, plaintiff relies on several subsequent cases to suggest that attorneys' fees and expenses are only recoverable if the insured breaches its duty to defendant; however, as addressed pertinently in defendant's initial Reply [Doc. 329], **Pitrolo** does not appear to have limited its holdings to instances where a breach of the duty to defend occurs.

For example, plaintiff relies upon **W. Heritage Ins. Co. v. Huffman Trucking Co.**, 2008 WL 11380166 (S.D. W.Va. Sept. 2, 2008) (Goodwin, C.J.), but this case is readily distinguishable. In **Huffman**, Chief Judge Goodwin found that the insured had not prevailed on the issue of the duty to defend, and the Court premised its decision denying fee awards upon the insured's failure to provide requested information that could have prevented the underlying litigation. See generally, *id.* Here, defendant substantially prevailed on the issue of the duty to defend and there are no allegations whatsoever that defendant withheld pertinent information that could have mooted claims in an underlying litigation. Accordingly, this Court finds **Huffman** unpersuasive.

Similarly, plaintiff points to memorandum decisions issued by the Supreme Court of Appeals of West Virginia post-**Pitrolo** in support of its contentions that fee awards are not appropriate in this matter. First, plaintiff directs this Court to **Soaring Eagle Development Company, LLC v. Travelers Indemnity Company of America**, 2020 WL 6131741 (W.Va. Oct. 19, 2020) (mem. decision). In **Soaring Eagle**, a construction defect case, the insured initiated an action against its insurer for breach of contract, unfair claims

practices, and declaratory judgment. *Id.*, at *1. The circuit court granted summary judgment in favor of the insurer based upon the following question: “whether the insured party was defended without incurring costs and was indemnified for any payment made to resolve the underlying claim.” *Id.*, at *2. Ultimately, the circuit court found that the insured was defended and fully indemnified throughout the case. *Id.* In granting summary judgment to the insurer, the circuit court relied upon *Admiral Ins. Co. v. Fisher*, 2018 WL 2688182 (W.Va. June 5, 2018) (mem. decision) and *State Auto Prop. Ins. Co. v. Stucky*, 239 W.Va. 729, 806 S.E.2d 160 (2017), to the extent that such authorities provide that an insured cannot maintain a first-party action against its insurer for common law and statutory bad faith and breach of contract where the insured was defended and fully indemnified throughout the case. *Soaring Eagle*, 2020 WL 6131741, at *3–4.

On appeal, the insured argued that the circuit court’s reliance upon *Fisher* and *Stucky* was misplaced. *Soaring Eagle*, 2020 WL 6131741, at *3–4. Instead, the insured alleged that its claims were supported by Syllabus Pt. 1 of *Pitrolo* and that its damages, including attorneys’ fees and expenses, could be recovered “when the insurer ‘has refused without valid justification to defend [it].’” *Soaring Eagle*, 2020 WL 6131741, at *3. The Supreme Court of Appeals of West Virginia held that the circuit court’s reliance upon such authority was appropriate because the insured was defended *and fully indemnified* throughout the case and, as such, could not prevail on its claims. *Id.*, at *5.

This Court finds *Soaring Eagle* readily distinguishable from the case at bar because, in that case, the Supreme Court of Appeals of West Virginia did not even address the issue pending before this Court, *i.e.*, whether an insured–defendant–can

recover its attorneys' fees and expenses incurred in successfully defending a declaratory judgment action initiated by its insurer–plaintiff. Rather, in ***Soaring Eagle***, the court addressed whether claims for bad faith and breach of contract can be maintained where an insured was defended and fully indemnified throughout the case. Moreover, unlike the insured in ***Soaring Eagle***, plaintiff herein did not initiate the declaratory judgment action; instead, defendant was forced to defend against the declaratory judgment action brought by plaintiff seeking to avoid coverage obligations. Further, while defendant did substantially prevail in this declaratory judgment matter, the insured in ***Soaring Eagle*** did not prevail, let alone substantially. Thus, this Court finds ***Soaring Eagle*** unpersuasive.

Furthermore, and perhaps most germane, is the fact that both ***Fisher*** and ***Soaring Eagle*** do not carry the same persuasive authority as ***Pitrolo***. As plaintiff correctly identifies, “unpublished memorandum decisions may be cited as legal authority and are legal precedent.” [Doc. 344 at pp. 4–5]. However, as defendant aptly provides, “memorandum decisions may be cited as legal authority, and are legal precedent” except “where a conflict exists between a published opinion and a memorandum decision.” See Syl. Pts. 1 & 5, ***State v. McKinley***, 234 W.Va. 143, 764 S.E.2d 303 (2014). It appears to this Court that the Supreme Court of Appeals of West Virginia’s subsequent memorandum decisions on this topic may very well conflict with ***Pitrolo***, a published decision, including to the extent that such authorities may suggest that a breach of the duty to defend is a requisite to recover attorneys’ fees and expenses. But, as ***Pitrolo*** appears to be the controlling, definitive authority on the issue, this Court must apply Syllabus Pt. 2 therein, which unambiguously holds that “[w]here a declaratory judgment action is filed to

determine whether an insurer has a duty to defend its insured under its policy, if the insurer is found to have such a duty, its insured is entitled to recover reasonable attorney's fees arising from the declaratory judgment litigation." *Id.* Accordingly, this Court finds as a matter of law that defendant is entitled to recover some attorneys' fees and expenses, and this Court will turn to an examination of the propriety of defendant's specifically requested fees and expenses.

II. The individualized *Pitrolo* factors discussing appropriate awards of attorneys' fees and costs support defendant's requests.

"The party seeking an award of fees 'bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates.'" *Cobranchi v. City of Parkersburg*, 2022 WL 5250297, at *3 (S.D. W.Va. Oct. 6, 2022) (Copenhaver, S.J.) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) and *Plyler v. Evatt*, 902 F.2d 273, 277 (4th Cir. 1990) ("[T]he burden rests with the fee applicant to establish the reasonableness of a requested rate."))).

A. Attorneys' Fees and Costs Considerations

This Court will address each factor in turn having reviewed all unredacted billing and costs statements.

1. The Time and Labor Required.

The voluminous docket and detailed billing statements submitted to this Court for review provide a clear indication of the time consuming nature of this complex and highly contested litigation. As set forth in defendant's summary of its attorneys' fees and expenses incurred as a result of this litigation [Doc. 323-1], as well as an independent review of all unredacted, actual billing and costs documentation, defendant's attorneys and their firm

devoted 3,640.5 billable hours to this litigation from June 2018 until this Court entered its ruling on the parties' dispositive motions in defendant's favor. Moreover, defendant provided supplemental fee and expense records demonstrating it incurred an additional \$81,167.07 in attorneys' fees and expenses defending against plaintiff's appeal to the Fourth Circuit. See [Doc. 343-1].

As further evidenced by the docket, substantial time and labor was required to litigate what can only be categorized as a complex, highly contested case, because (1) this is a document intensive case, involving insurance policies ranging from 1985–2018; (2) substantial written discovery was conducted, including voluminous document production; (3) there were significant discovery disputes, which resulted in numerous discovery hearings before United States Magistrate Judge James P. Mazzone; (4) motion practice was extensive, including dispositive motions submitted by all parties; (5) novel and complex issues were presented; (6) several depositions were necessary; and (7) expert witnesses were necessary. Additionally, counterclaims and third-party claims resulted from the declaratory judgment action initiated by plaintiff and were necessary for the resolution of this litigation due to the inextricably intertwined nature of the claims. This workload is evidenced by the detailed time entries submitted to this Court *in camera* and detail the time and expenses necessitated by this litigation.

2. The Novelty and Difficulty of the Questions.

Traditionally, insurance declaratory judgment actions are considered difficult in that they involve interpretations of policy language, often considered to be ambiguous, to determine the parties' rights under a governing insurance policy or policies. This litigation required thorough review and analysis of each policy, which contained differing terms and

exclusions. As evidenced by the parties' dispositive motions, appeals, and even the Fourth Circuit's certified question, this was not a simple case.

Further, this matter presented novel and complex issues of law and fact, including interpretations of policy language, as well as a determination as to the applicable trigger of coverage by the Supreme Court of Appeals of West Virginia. Undoubtedly, the novel and complex issues presented in this litigation required significant legal research on all sides. Additionally, the organization of the discovery in this case and the case management cost a great deal of time.

3. The Level of Skill Required to Perform the Legal Service Properly.

It is self-evident to this Court that the level of skill required to litigate this case—by counsel for both parties—was at a high level and based upon years of litigation experience. This case was no small task.

4. The Preclusion of Employment by the Attorneys Due to Acceptance of the Case.

This factor does not appear to be directly on point within this Court's consideration as defendant was billed monthly and has paid their litigation fees and expenses in full. However, it is self-evident in viewing the number of hours devoted to this case that counsel for defendant were precluded from other employment in that all involved spent substantial time and effort in this litigation.

5. The Customary Fee.

The fee agreement in this matter called for hourly fees, billed monthly. Again, this Court notes that these are the actual fees and rates charged to and paid by defendant, as evidenced by this Court's review of the detailed billing statements presented to this Court. This Court can only categorize those costs as an enormous financial burden for defendant, a local, family owned small business. As in this case, "determination of the hourly rate will generally be the critical inquiry in setting the 'reasonable fee,' and the burden rests with the fee applicant to establish the reasonableness of the requested rate." *Plyer*, 902 F.2d at 277 (citing *Blum v. Stenson*, 465 U.S. 886, 895–96 n.11 (1984)). In addition to the attorney's own affidavits, the fee applicant must produce satisfactory "specific evidence of the 'prevailing market rates in the relevant community' for the type of work for which he seeks an award." *Spell v. McDaniel*, 824 F.2d 1380, 1402 (4th Cir. 1987) (quoting *Blum*, 465 U.S. at 895). Although the determination of a "market rate" in the legal profession is inherently problematic, as wide variations in skill and reputation render the usual laws of supply and demand largely inapplicable, courts have nonetheless emphasized that market rate should guide the fee inquiry. See *Blum*, 465 U.S. at 895–96 n.11. The Fourth Circuit has recognized that because a district court has "close and intimate knowledge of the efforts expended and the value of the services rendered, [the fee award] must not be overturned unless it is 'clearly wrong.'" *McManama v. Lukhard*, 616 F.2d 727, 729 (4th Cir. 1980) (internal citation omitted).

The actual hourly rates and billing is summarized at [Doc. 323-1]. Moreover, counsel for defendant has attached affidavits from local attorneys William D. Wilmoth, Esq.

[Doc. 323-2] and Jeffrey M. Wakefield, Esq. [Doc. 323-3]. Both Mr. Wilmoth and Mr. Wakefield, who are particularly experienced in litigation, attest that the rates/fees sought are reasonable and customary in the Northern District of West Virginia. Further, defense counsel Patrick S. Casey, Esq. has submitted his own affidavit [Doc. 323-4] attesting to the fees charged to and paid by defendant, and averring that those fees are in the range of what is customary for the firm and the fact that the contract did not change through the course of this litigation.

6. Fixed fees v. Contingent Fees.

Defendant was billed monthly at the hourly rates discussed throughout the litigation and has paid its bill in full.

7. The Time Limitations Imposed by the Client or the Circumstances.

Given the complexity of this case filed in June 2018, and within the amount of work involved, it was no small feat to have this case prepared and ripe for summary judgment within just over one year. This Court notes that all federal timelines and obligations were satisfied.

8. The Amount Involved and the Results Obtained.

Due to the nature of this declaratory judgment litigation, there is no award amount involved. However, the outcome is still significant as defendant will not have to pay for its defense in the underlying state court actions, and defendant will still be indemnified by plaintiff.

However, defendant was still forced to incur attorneys' fees and expenses because plaintiff guessed wrong as to its coverage obligations. The outcome obtained is clearly significant to defendant.

9. The Experience, Reputation, and Ability of the Attorneys.

This Court agrees with defendant's contention that the litigation experience of its counsel played a significant role in this highly contested litigation. As noted by defense counsel, the firm has over 100 years of combined litigation experience, and the identified affiants attest to both counsel's litigation experience and skill.

As previously indicated, this matter involved substantial briefing and attention to massive detail. Further, the organization and analysis of information and documents as well as extensive legal research were also key facts in defendant's success in this litigation.

10. The Undesirability of the Case.

As discussed herein, this litigation was complex, presented novel issues, and was time and labor intensive. Moreover, the financial burden and high stakes nature of this litigation undoubtedly placed substantial stresses upon defendant.

11. The Nature and Length of the Professional Relationship.

Defendant retained counsel in this matter upon recommendation of its corporate counsel. See [Doc. 323-4 at ¶ 4]. Defense counsel avers they have had a close and trusting relationship with defendant, keeping them thoroughly and regularly informed and, in fact, have been retained by defendant members to represent them in other matters.

12. Awards in Similar Cases.

This Court is highly persuaded by the award granted in *Pitrolo* in fashioning an award here. Moreover, affiants have attested as to awards of attorneys' fees and expenses in other similar matters, furthering the justification for the sought-after awards here.

B. Plaintiff's attempts to challenge specific aspects of defendant's requested attorneys' fees/costs are unpersuasive.

In addition to contesting defendant's entitlement to attorneys' fees and costs generally, plaintiff seeks to carve out defendant's entitlement to these requests related to (1) the counterclaim against plaintiff and (2) the third-party complaint against third-party defendants by classifying each as "unsuccessful." [Doc. 348 at p. 3]. This Court disagrees.

Plaintiff's position fails to take into account that each of these claims were clearly a part of the overall defense that succeeded at every level: before this Court, the Supreme Court of Appeals of West Virginia, and the United States Court of Appeals for the Fourth Circuit. Plaintiff omits critical information regarding the nature of both these pleadings. With respect to the counterclaim, which was dismissed by this Court on July 15, 2019 [Doc. 249], it was not adjudicated on its merits; rather, this Court dismissed the counterclaim on ripeness grounds. In dismissing the counterclaim without prejudice, this Court found that "it is necessary to resolve the coverage issues that are the subject of the declaratory judgment claims before addressing [defendant's] common law bad faith and other related claims." [Id. at p. 5]. Further, this Court provided, "[t]hus, it is in the best

interests of the parties and this Court to resolve the question of coverage before proceeding with the remaining claims.” [Id.].³

Similarly, defendant’s third-party claims were extinguished by this Court’s Memorandum Opinion and Order [Doc. 318] finding coverage under plaintiff’s policies in favor of defendant on summary judgment. In other words, the third-party complaint did not fail; instead, those claims were rendered moot by this Court’s determination of coverage in favor of defendant. Notably, defendant’s counterclaim and third-party complaint were contingent upon this Court’s ruling as to the coverage issue. Further, the entirety of defendant’s efforts were directly related to the overall scheme of its defense, including the prosecution of the counterclaim and third-party complaint. The work completed on these issues will not be carved out as plaintiff would have it, as it was all connected to the overall case strategy and all related to the ultimate issue presented in this litigation—namely, did plaintiff owe defendant coverage under the subject insurance policies. Defendant prevailed on this question rendering its other claims moot, but this does not justify eliminated attorneys’ fees and costs associated with the preparation of those elements of defense.⁴

Next, plaintiff seeks to exclude defendant’s efforts related to the attorneys’ fees and associated costs relating to its preparation of the pending fee Motion; however, the only

³Furthermore, this counterclaim appears to have been compulsory pursuant to Fed. R. Civ. P. 13(a).

⁴Plaintiff lodges similar requests for exclusion in the instances of various discovery motions lodged by defendant, which were denied by this Court. This Court declines to exclude associated attorneys’ fees/costs for the same reason it has declined to reduce attorneys’ fees/costs related to the counterclaim and third-party complaint.

reason for such opposition is plaintiff's position that defendant is not entitled to recover its attorneys' fees and expenses at all. Again, this Court disagrees under its reading of *Pitrolo*. Similarly, this Court disagrees with plaintiff's contention that defendant's expenses reports fail to specify to which portion of the case each individual expense relates.

Finally, plaintiff seeks to discredit the work performed on behalf of defendant by arguing "duplicative work by multiple attorneys responding to the same pleadings, researching the same issues, and/or attending the same hearings. Multiple charges for such duplicative work is inherently unreasonable." [Doc. 349 at p. 4]. This Court disagrees with this argument based on an independent review of the associated records as a whole. Instead, it appears to this Court that defendant's counsel's work was not duplicative, but instead reflects ongoing joint efforts by working in concert on various issues.


CONCLUSION

According, the Motion for Award of Attorneys' Fees and Expenses on Behalf of Defendant/Third-Party Plaintiff Sistersville Tank Works, Inc. [Doc. 322] is **GRANTED** in its entirety. Defendant is hereby **ORDERED** to submit a proposed final order of disposition, reflecting the award of **\$832,473.18** (with a specific calculation of all associated interest) to this Court within **fourteen (14) days** of the entry of this Order.

It is so **ORDERED**.

The Clerk is directed to transmit copies of this Order to all counsel of record herein.

DATED: May 16, 2024.


JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE