



LEXSEE 168 OHIO APP.3D 373

Douglas Hartman, et al., Appellees v. Sheldon Schachner, M.D., c/o Gretchen Schachner, Administrator, et al., Appellants

Court of Appeals No. L-05-1239

COURT OF APPEALS OF OHIO, SIXTH APPELLATE DISTRICT, LUCAS COUNTY

168 Ohio App. 3d 373; 2006 Ohio 3982; 860 N.E.2d 131; 2006 Ohio App. LEXIS 3967

August 4, 2006, Decided

PRIOR HISTORY: Trial Court No. CI-01-1477.
Hartman v. Schachner, 2005 Ohio 7000, 2005 Ohio App. LEXIS 6293 (Ohio Ct. App., Lucas County, Dec. 30, 2005)

DISPOSITION: JUDGMENT AFFIRMED.

COUNSEL: Jeffrey L. Maloon and Janet L. Phillips, for appellees.

Martin T. Galvin and James O'Conner, for appellant.

JUDGES: SINGER, P.J. Arlene Singer, P.J., William J. Skow, J., Dennis M. Parish, J., CONCUR.

OPINION BY: Arlene Singer

OPINION

[*375] [***133] **DECISION AND JUDGMENT ENTRY**

SINGER, P.J.

[**P1] This matter comes before the court from the Lucas County Court of Common Pleas wherein appellees' motion for prejudgment interest was granted. Following a thorough review of the record in this case, we affirm the judgment of the trial court.

[**P2] The relevant facts are as follows. On February 12, 2001, appellees, Douglas A. and Lisa A. Hartman, filed a medical malpractice action against appellant, Dr. Sheldon Schachner. Following a bench trial, on October 19, 2004, the court ruled against Schachner. The Hartmans were awarded \$ 560,803.79 with interest and cost. ¹

¹ This court affirmed the trial court's judgment on December 30, 2005. See *Hartman v. Schachner, 6th Dist. No. L-04-1335, 2005 Ohio 7000*.

[**P3] On November 1, 2004, the Hartmans filed a motion for prejudgment interest. On November 19, 2004, appellants filed a motion to stay execution of judgment which the trial court granted. On June 30, 2005, the trial court granted the Hartmans' motion for prejudgment interest awarding them \$ 213,325.01. [*376] Appellants now appeal setting forth the following assignment of error:

[**P4] "The trial court committed prejudicial error in awarding pre-judgment interest plaintiff's-appellees."

[**P5] The purpose of prejudgment interest is to encourage prompt settlement and to discourage defendants from frivolously opposing and prolonging suits for legitimate claims, between injury and judgment. *Royal Elec. Constr. Corp. v. Ohio State Univ. (1995), 73*

168 Ohio App. 3d 373, *376; 2006 Ohio 3982, **P5;
860 N.E.2d 131, ***133; 2006 Ohio App. LEXIS 3967

Ohio St.3d 110, 116, 1995 Ohio 131, 652 N.E.2d 687. Further, prejudgment interest does not punish the party responsible for the underlying damages, but acts as compensation and serves ultimately to make the aggrieved party whole and compensates for the lapse of time between accrual of the claim and judgment. *Id.* In order to award prejudgment interest, a trial court must find that the party required to pay the judgment failed to make a good faith effort to settle the case, and the party to whom the judgment is to be paid did not fail to make a good faith effort to settle the case. *Moskovitz v. Mt. Sinai Med. Ctr. (1994), 69 Ohio St.3d 638, 658, 1994 Ohio 324, 635 N.E.2d 331.*

[**P6] Regarding prejudgment interest, the Ohio Supreme Court developed a standard of good faith comprised of: 1) full cooperation in discovery proceedings, 2) rational evaluation of risks and potential liability, 3) no unnecessary delay of the proceedings, and 4) a good faith settlement offer or response in good faith to an offer from the other party. *Id.*, citing *Kalain v. Smith (1986), 25 Ohio St.3d 157, 25 Ohio B. 201, 495 N.E.2d 572, syllabus.*

[**P7] The party seeking prejudgment interest bears the burden of proof. *Moskovitz, supra, at 659.* The party must present persuasive evidence of an offer to settle that was reasonable when "considering such factors as the type of case, the injuries involved, applicable law, defenses available, and the nature, scope and frequency of efforts to settle. Other factors * * * include responses-or lack thereof-and a [***134] demand substantiated by facts and figures." *Id.* A subjective claim of lack of good faith will usually not be sufficient. *Id.* "Even though the burden of a party seeking an award is heavy, the burden does not include the requirement that bad faith of the other party be shown * * * a party may have failed to make a good faith effort to settle even though he or she did not act in bad faith." *Id.*

[**P8] The determination to award prejudgment interest rests within the trial court's sound discretion. *Scioto Mem. Hosp. Assn., Inc. v. Price Waterhouse (1996), 74 Ohio St.3d 474, 479, 1996 Ohio 365, 659 N.E.2d 1268.* The trial court's finding on this issue will not be reversed absent a clear abuse of discretion. *Kalain v. Smith, supra, at 159.* The Ohio Supreme Court defines abuse of discretion as an attitude on the part of the trial court that is [*377] unreasonable, arbitrary, or unconscionable. *Huffman v. Hair Surgeon, Inc. (1985),*

19 Ohio St.3d 83, 87, 19 Ohio B. 123, 482 N.E.2d 1248.

[**P9] In granting appellees' motion for prejudgment interest, the trial court found that prior to the final judgment on October 19, 2004, appellant's insurer, Frontier Insurance, had failed to communicate any offer of settlement at any time to appellees despite having sufficient information to evaluate risks and potential liability and having determined their risk of exposure. The court further found that Frontier's conduct had caused unnecessary delays in the proceedings.

[**P10] The record shows that upon a review of appellees' claim, Frontier's in-house doctor deemed the case "dangerous" for the company. A Frontier claim review form shows that before trial, Frontier and their lawyers believed that appellees had a 90 percent chance of prevailing on their claim.

[**P11] On March 31, 2003, appellees submitted their first formal demand letter to Frontier's counsel in which they sought a settlement in the amount of \$ 1,500,000. A court mediation took place on July 24, 2003. Nothing was resolved as Frontier failed to tender a settlement offer. Frontier then requested a private mediation. That mediation was subsequently cancelled, at Frontier's request, when Frontier's counsel notified appellees that Frontier was only willing to pay the cost of the defense to resolve the case.

[**P12] On April 2, 2004, appellees proposed a high/low settlement agreement capping the liability of Frontier at \$ 700,000 and a low figure of \$ 300,000. In addition, appellees agreed to waive their appeal, to dismiss all claims against Dr. Schachner's estate and not to pursue a claim for prejudgment interest. Frontier did not respond to this offer. Based on this evidence, we cannot say that the trial court abused its discretion in granting appellees' motion for pre-judgment interest.

[**P13] Appellants also contend that Frontier's insolvency prevented them from making a settlement offer. This argument is without merit. The trial court correctly noted that the statute governing prejudgment interest, *R.C. 1343.03(C)*, makes no allowances for an insolvent insurer. Moreover, the record shows that Frontier was settling claims on other cases during the time of this trial.

[**P14] Finally, appellants contend that the court erred in considering evidence of settlement efforts that

168 Ohio App. 3d 373, *377; 2006 Ohio 3982, **P14;
860 N.E.2d 131, ***134; 2006 Ohio App. LEXIS 3967

occurred during the trial but before the verdict. Appellants contend that the court may only consider evidence of pretrial settlement efforts. We disagree. The Supreme Court of Ohio in *Galmish v. Cicchini* (2000), 90 Ohio St.3d 22, 27, 2000 Ohio 7, 734 N.E.2d 782, stated:

[**P15] [***135] "[T]he materials proper for the trial court to consider in reaching its decision on prejudgment interest are not limited to the evidence presented at the prejudgment interest [*378] hearing. The court may also review the evidence presented at trial, as well as its prior rulings and jury instructions, especially when considering such factors as the type of case, the injuries involved, applicable law, and the available defenses."

[**P16] Accordingly, appellants' sole assignment of error is found not well-taken. On consideration whereof, the court finds substantial justice was done the party

complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Appellants are ordered to pay the costs of this appeal for which sum judgment is rendered against appellees on behalf of Lucas County and for which execution is awarded. See *App.R.* 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to *App.R.* 27. See, also, *6th Dist.Loc.App.R.* 4.

Arlene Singer, P.J.

William J. Skow, J.

Dennis M. Parish, J.

CONCUR.