IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2011 Term

FILED
November 17, 2011
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

No. 101556

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Defendant Below, Petitioner

v.

SHEILA ANN RUTHERFORD,
Plaintiff Below, Respondent

Appeal from the Circuit Court of Kanawha County
The Honorable Jennifer F. Bailey, Judge
Civil Action No. 03-C-2908

REVERSED AND REMANDED

Submitted: September 28, 2011
Filed: November 17, 2011

David A. Mohler, Esq.
Greg S. Foster, Esq.
Bowles Rice McDavid Graff & Love
Charleston, West Virginia
Attorneys for State Farm Mutual Automobile Insurance Company

Tim C. Carrico, Esq.
Carrico Law Offices
Charleston, West Virginia
Attorney for Sheila Ann Rutherford

The Opinion of the Court was delivered PER CURIAM.

JUSTICE DAVIS concurs, in part, dissents, in part, and reserves the right to file a separate opinion.

CHIEF JUSTICE WORKMAN disqualified.

SYLLABUS BY THE COURT

1. "The primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syllabus Point 1, *Smith v. State Workmen's Comp. Com'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975).

2. "A statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syllabus Point 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951).

3. "Under *W. Va. Code*, 56-6-31, as amended, prejudgment interest on special or liquidated damages is calculated from the date on which the cause of action accrued, which in a personal injury action is, ordinarily, when the injury is inflicted." Syllabus Point 2, *Grove by and through Grove v. Myers*, 181 W. Va. 342, 382 S.E.2d 536 (1989).

Per Curiam:

Petitioner State Farm Mutual Automobile Insurance Company appeals the July 16, 2010, order of the Circuit Court of Kanawha County that determined prejudgment interest on a jury verdict awarded to Respondent Sheila Ann Rutherford in her action against State Farm for underinsurance benefits. After careful consideration of the parties' arguments and the applicable law, this Court reverses the circuit court's order and remands this case for the circuit court to recalculate prejudgment interest on the judgment against State Farm in a manner consistent with this opinion.

I.

FACTS

Respondent and plaintiff below, Sheila Ann Rutherford, was injured in a car accident on July 13, 2002. Ms. Rutherford filed suit against defendants Olive McClanahan and the Kanawha County Commission and provided notice of the suit to her underinsured carrier, State Farm. She subsequently entered into a partial settlement with Defendant Olive McClanahan for $100,000, which represented the policy limits of Ms. McClanahan's liability

insurance coverage. Thereafter, Ms. Rutherford entered into a partial settlement agreement with the other tortfeasor, the Kanawha County Commission, for $30,000.

Ms. Rutherford then proceeded against State Farm, her underinsurance carrier. State Farm elected to defend the action in the name of one of the tortfeasors, Ms. McClanahan, and challenged both liability and damages at trial.

On September 29, 2008, the jury in Ms. Rutherford's action against State Farm returned a verdict of $175,000, in favor of Ms. Rutherford which included $170,000 in special damages.[1] As a result of the previous settlements with Ms. McClanahan's liability insurer and the Kanawha County Commission, the circuit court found that State Farm was entitled to a *pro tanto* offset of $130,000. Thus, State Farm owed a judgment in the amount of $45,000 to Ms. Rutherford which it subsequently paid.

Thereafter, Ms. Rutherford and State Farm disputed the proper method the circuit court was to use in determining the amount of prejudgment interest on the special

---

[1]The jury assessed damages in favor of Ms. Rutherford as follows:

Medical Expenses	$147,000
Loss of Wages and Future Loss of Earnings	$20,000
Pain and Suffering, Past and Future	$5,000
Loss of Enjoyment of Life, Past and Future	$0
Loss of Household Services	$3,000

damages portion of the judgment. Ms. Rutherford asserted that she is entitled to prejudgment interest on the entire amount of her special damages of $170,000, at the statutory interest rate of 10% from the date of her car accident on July 13, 2002, to the date of the verdict on September 29, 2008. Ms. Rutherford alleged that prejudgment interest on $170,000 based on her method of calculation is $105,819.18.

State Farm asserted, on the other hand, that in determining the amount of prejudgment interest, the circuit court first should deduct the pretrial settlement proceeds of $130,000 from the verdict amount of $175,000. State Farm noted that the special damages of $170,000 amount to 97% of the total verdict of $175,000. Therefore, State Farm contended that 97% of the remaining amount of $45,000, after the application of the *pro tanto* offset, is the proper amount on which to calculate the prejudgment interest. According to State Farm, because 97% of $45,000 is $43,650, this is the amount of special damages on which to calculate prejudgment interest. State Farm further averred that the proper statutory rate of interest to use in determining the amount of prejudgment interest is not the 10% which was the applicable rate of interest in 2002, but rather 8.25% which was the applicable rate of interest in 2008, the year of Ms. Rutherford's judgment against State Farm. Using a rate of interest of 8.25% and a special damages figure of $43,650, State Farm concluded that Ms. Rutherford's prejudgment interest should be $22,326.98.

The circuit court rejected the arguments of both parties. By order entered on July 16, 2010, the circuit court calculated the prejudgment interest as follows:

> This Court finds that as a matter of law the figure used to calculate the Plaintiff's prejudgment interest for the period of July 13, 2002 through March 9, 2004 is $170,000. This Court further finds that for the period of March 10, 2004, the date upon which plaintiff received $100,000 from Defendant Olive McClanahan's liability carrier, to March 16, 2008, the figure used to determine the plaintiff's prejudgment interest is $70,000. This Court further finds that for the period from March 17, 2008, the date upon which the Plaintiff received $30,000 from the Defendant, Kanawha County Commission, through September 29, 2008, the date of the jury verdict, the figure used to determine plaintiff's prejudgment interest is $40,000. Therefore, the Plaintiff, Sheila Rutherford, is entitled to prejudgment interest in the amount of $58,517.81. (Footnote omitted).

State Farm now appeals the circuit court's July 16, 2010, order and raises three assignments of error.

II.

STANDARD OF REVIEW

In this case, this Court is asked to decide three issues, all of which concern the proper way to determine the amount of prejudgment interest on a judgment or decree. Each of the three issues is a question of law. Therefore, this Court's review is *de novo. See*

Syllabus Point 2, in part, *Walker v. West Virginia Ethics Com'n*, 201 W. Va. 108, 492 S.E.2d 167 (1997) (holding that "[q]uestions of law are subject to a *de novo* review.").

III.

DISCUSSION

A.

The issues in this case are controlled by W. Va. Code § 56-6-31 (1981), our prejudgment interest statute, and this Court's case law construing the statute.[2] West Virginia

[2]West Virginia Code § 56-6-31 was amended in 2006. However, the 1981 version of the statute is applicable under these facts because this version of the statute was in effect when Ms. Rutherford's case accrued in 2002. The 2006 version of the statute provides:

> (a) Except where it is otherwise provided by law, every judgment or decree for the payment of money, whether in an action sounding in tort, contract or otherwise, entered by any court of this state shall bear interest from the date thereof, whether it be so stated in the judgment or decree or not: Provided, That if the judgment or decree, or any part thereof, is for special damages, as defined below, or for liquidated damages, the amount of special or liquidated damages shall bear interest at the rate in effect for the calendar year in which the right to bring the same shall have accrued, as determined by the court and that established rate shall remain constant from that date until the date of the judgment or decree, notwithstanding changes in the federal reserve district discount rate in effect in subsequent years prior to the date of the judgment or decree. . . .
>
> (b) Notwithstanding the provisions of section five [§ 47-6-5], article six, chapter forty-seven of this code, the rate of interest on judgments and decrees for the payment of money, including prejudgment interest, is three percentage points above the Fifth Federal Reserve District secondary discount rate in effect on the second day of January of the year in which the judgment or decree is entered: Provided, That the rate of prejudgment and post-judgment interest shall not exceed eleven percent per annum or be less than seven percent per annum. The administrative office of the Supreme Court of Appeals shall annually determine the interest rate to be paid upon judgments or decrees for the payment of money and shall take appropriate measures to promptly notify the courts and members of the West Virginia State Bar of the rate of interest in effect for the calender year in question. Once the rate of interest established by a judgment or decree as provided in this section, that

Code § 56-6-31 (1981), provides:

> Except where it is otherwise provided by law, every judgment or decree for the payment of money entered by any court of this State shall bear interest from the date thereof, whether it be so stated in the judgment or decree or not: Provided, that if the judgment or decree, or any part thereof, is for special damages, as defined below, or for liquidated damages, the amount of such special or liquidated damages shall bear interest from the date the right to bring the same shall have accrued, as determined by the court. Special damages includes lost wages and income, medical expenses, damages to tangible personal property, and similar out-of-pocket expenditures, as determined by the court. The rate of interest shall be ten dollars upon one hundred dollars per annum, and proportionately for a greater or lesser sum, or for a longer or shorter time, notwithstanding any other provisions of law.

> established rate shall thereafter remain constant for that particular judgment or decree, notwithstanding changes in the Federal Reserve District discount rate in effect in subsequent years.
>
> © Amendments to this section enacted by the Legislature during the year two thousand six regular session shall become effective the first day of January, two thousand seven.

The 1923 version of W. Va. Code § 56-6-31, addressed only post-judgment interest and provided that "[e]very judgment or decree for the payment of money, except where it is otherwise provided by law, shall bear interest from the date thereof, whether it be so stated in the judgment or decree or not." In 1981, in our opinion in *Bond v. City of Huntington,* 166 W. Va. 581, 276 S.E.2d 539 (1981), *superseded by statute as stated in Rice v. Ryder,* 184 W. Va. 255, 400 S.E.2d 263 (1990), this Court extended the traditional availability of prejudgment interest in contract actions to those based on tort. In Syllabus Point 5 of *Bond, supra,* this Court held that "[a] rule permitting additional damages by way of compensatory interest on pecuniary losses incurred prior to trial in personal injury actions as well as wrongful death claims is consistent with our prior case law and our liberal interest statute." Shortly thereafter, the Legislature amended W. Va. Code § 56-6-31 to provide for prejudgment interest, effective July 5, 1981.

In applying this statute to the facts before us, this Court is mindful that "[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." Syllabus Point 1, *Smith v. State Workmen's Comp. Com'r*, 159 W. Va. 108, 219 S.E.2d 361 (1975). We are further cognizant of our rule that "[a] statutory provision which is clear and unambiguous and plainly expresses the legislative intent will not be interpreted by the courts but will be given full force and effect." Syllabus Point 2, *State v. Epperly*, 135 W. Va. 877, 65 S.E.2d 488 (1951). This Court now turns to the specific issues in this case.

First, State Farm assigns as error the circuit court's treatment of the prior settlements in calculating the prejudgment interest on the verdict below. According to State Farm, the circuit court should have determined prejudgment interest on the special damages portion of the judgment against State Farm after deducting the $130,000 in settlements from the $175,000 verdict. State Farm cites several cases from other jurisdictions in support of its position. *See, e.g., CAMC v. Parke-Davis,* 2001 WL 34852736 (N.D. W. Va.).

Ms. Rutherford replies that the Legislature did not intend for courts to calculate prejudgment interest after reducing the amount of the jury verdict by the amount of settlement monies previously paid. Ms. Rutherford points out that the prejudgment interest statute clearly provides that "the amount of special or liquidated damages shall bear interest at the rate in effect for the calender year in which the right to bring the same shall have

accrued, and determined by the court." The statute does not say that the amount of special or liquidated damages *after offset* shall bear interest. Also, if the Legislature had intended for the calculation of prejudgment interest on the verdict after allowing for offsets, it could have so provided as it clearly did in W. Va. Code § 56-6-27, which indicates that in any action founded on contract, the jury "shall find the aggregate of principal and interest due at the time of the trial, *after allowing all proper credits, payments and set-off.*" (emphasis added).

In addition, Ms. Rutherford contends that her position is supported by the fact that our common law establishes that prejudgment interest is an additional compensatory damage that is necessary to make the person whole. For this reason, prejudgment interest should be based on the entire amount of special damages awarded by the jury notwithstanding the receipt of settlement monies before trial. Moreover, Ms. Rutherford asserts that State Farm's prejudgment interest calculation contains inherent problems which the Legislature intended to avoid. Specifically, under State Farm's method, trial courts would be required to involve themselves in the complications associated with determining prejudgment interest on each element of special damages from the respective dates on which each element was incurred. Finally, Ms. Rutherford asserts that State Farm's reliance on decisions of other courts is misplaced because those decisions can be distinguished from the present facts.

After carefully considering the parties' arguments, decisions of other jurisdictions, and the applicable statutory language, this Court finds that the circuit court should have calculated prejudgment interest on the special damages portion of the $45,000.00 judgment against State Farm and not the special damages portion of the entire verdict of $175,000. Significantly, W. Va. Code § 56-6-31 provides for the payment of prejudgment interest on the special damages portions of "every judgment or decree for the payment of money." This language is clear and unambiguous. It plainly indicates that payment of prejudgment interest shall be on the special damages portions of *judgments* or *decrees* for the payment of money, not on verdicts. Ms. Rutherford's judgment against State Farm was not for $175,000. Rather, the judgment directed that State Farm pay to Ms. Rutherford $45,000.00 on her underinsurance claim. Therefore, State Farm should pay prejudgment interest on the special damages portion of the $45,000 judgment.

Our conclusion on this issue is in line with the general rule that "[w]here a settlement is made with a codefendant, interest generally is to be computed only on the amount of the judgment obtained against a remaining codefendant, and not on the amount of a settlement which the plaintiff has made with one of defendants before trial or after an action has begun but before judgment." 47 C.J.S. *Interest & Usury* § 129, p. 163 (2005) (footnote omitted). For example, in *Awedian v. Theodore Efron Mfg. Co.*, 66 Mich. App. 353, 239 N.W.2d 611 (1976), the plaintiffs assigned error in the trial court's computation of

statutory interest on the $85,000 judgment against the defendant rather than on the $150,000 amount of total damages without regard to the monies obtained from a settlement with the other defendants. The Court of Appeals of Michigan rejected this position and explained:

> We find this argument novel and interesting but without merit. As defendant notes, M.C.L.A. § 600.6013; M.S.A. § 27A.6013, provides for interest on "any money judgment *recovered*". (Emphasis [in original]) Plaintiffs did not recover $150,000 from [Defendant] Efron. By accepting $65,000 in settlement, plaintiffs waived the right to statutory interest on that amount because no final judgment was rendered against the other defendants. Plaintiffs traded off the loss of this interest for the value of a settlement.

Awedian, 239 N.W.2d at 614. *See also, Freysinger v. Taylor Supply Co.*, 197 Mich. App. 349, 494 N.W.2d 870 (1992) (finding that when a plaintiff accepts a settlement, the plaintiff waives the right to prejudgment interest on that amount of the total judgment); *Silisky v. Midland-Ross Corp.*, 97 Mich. App. 470, 296 N.W.2d 576 (1980) (reasoning that when plaintiff voluntarily settled with other defendants, plaintiff traded off loss of interest for waiting period in exchange for certainty of settlement).[3] Likewise, in *Witt v. State Farm Mut. Auto. Ins. Co.*, 942 P.2d 1326 (Colo. App. 1997), the court found error in requiring the

[3]In *Setliff v. Stewart*, 694 N.W.2d 859 (S.D. 2005), the court rejected the view that a prior settlement should be deducted prior to the calculation of prejudgment interest. The court referred to the Michigan cases that this Court cites above but distinguished those cases. The court found that while the applicable Michigan statute provides that interest is to be allowed on a money judgment recovered in a civil action, the South Dakota statute provides for the right to recover from the day that loss or damage occurred rather than the right to recover interest on a final judgment. The West Virginia prejudgment interest statute is similar to the Michigan statute in that it provides for prejudgment interest on a judgment or decree for the payment of money.

plaintiff's underinsurance carrier, State Farm, to pay prejudgment interest on the plaintiff's settlement with the negligent driver's insurance carrier. The court opined:

> Here, plaintiff negotiated a complete settlement with the tortfeasor. Accordingly, the prejudgment interest she now seeks is deemed subsumed in that settlement amount. *See Martinez v. Jesik*, 703 P.2d 638 (Colo.App. 1985). Thus, we conclude that plaintiff, by accepting the settlement and the distribution of its proceeds, has waived any right to assert a claim for prejudgment interest on the $50,000 settlement. *See Gutierrez v. Bussey*, 837 P.2d 272 (Colo.App.1992) (party is not entitled to prejudgment interest on settlement amounts received before trial).

Witt, 942 P.2d at 1327.

In the instant case, the applicable statute provides for prejudgment interest on judgments and decrees for the payment of money, and the judgment against State Farm was for $45,000, not $175,000. Also, Ms. Rutherford willingly accepted $130,000 in settlement from the two defendants below. It is not unreasonable to presume under these facts that prejudgment interest either is included in the settlements agreed to by Ms. Rutherford or that Ms. Rutherford waived the right to prejudgment interest by agreeing to the settlements. Therefore, in the computation of prejudgment interest, the circuit court should have deducted $130,000 from $175,000 and then calculated prejudgment interest on the special damages portion of the remaining amount of $45,000.

B.

State Farm's second assignment of error is that the circuit court erroneously calculated prejudgment interest from the date of Ms. Rutherford's car accident on July 13, 2002, rather than from the date the cause of action accrued against State Farm as the underinsurance carrier. State Farm explains that under West Virginia law, an action against an underinsurance carrier does not accrue at the time of the accident but when the insured may assert a claim to recover under her underinsurance coverage. In addition, notes State Farm, this Court has stated in dicta that an insurance carrier is liable for prejudgment interest from the date the insurance carrier has a duty to pay the underinsured motorist benefits to the policyholder. *Citing Miller v. Fluharty,* 201 W. Va. 685, 701 n.22, 500 S.E.2d 310, 326 n.22 (W. Va. 1997). State Farm argues that otherwise, the prejudgment interest statute would unfairly prejudice the underinsurance carrier by permitting a defendant's liability insurer to simply drop prejudgment interest damages into the lap of the underinsurance carrier which has no control over litigation prior to settlement. Finally, State Farm asserts that its action against State Farm is one based on a contract and the action did not accrue until Ms. Rutherford settled with the tortfeasors.

Ms. Rutherford responds that State Farm's argument on this issue has no merit because her underlying action seeking underinsurance proceeds was against Ms. McClanahan

and not against State Farm and does not involve any breach of duty by State Farm. According to Ms. Rutherford, she and Ms. McClanahan are the parties of record as well as the parties arguing before this Court over the amount of prejudgment interest.

We find that the circuit court correctly calculated prejudgment interest against State Farm from the date of Ms. Rutherford's car accident which occurred on July 13, 2002. In Syllabus Point 2 of *Grove by and through Grove v. Myers*, 181 W. Va. 342, 382 S.E.2d 536 (1989), this Court held that "[u]nder *W. Va. Code,* 56-6-31, as amended, prejudgment interest on special or liquidated damages is calculated from the date on which the cause of action accrued, which in a personal injury action is, ordinarily, when the injury is inflicted." This syllabus point applies to the instant facts.

Subsection (d) of W. Va. Code § 33-6-31 (1998), our statute dealing in part with uninsured and underinsured motorists' coverage, provides that

> Any insured intending to rely on the coverage required by subsection (b) of this section [regarding uninsured and underinsured coverages] shall, if any action be instituted against the owner or operator of an uninsured or underinsured motor vehicle, cause a copy of the summons and a copy of the complaint to be served upon the insurance company issuing the policy, in the manner prescribed by law, as though such insurance company were a named party defendant; such company shall thereafter have the right to file pleadings and to take other action allowable by law in the name of the owner, or operator, or both, of the uninsured or underinsured motor vehicle or in its own name.

> Nothing in this subsection shall prevent such owner or operator from employing counsel of his or her own choice and taking any action in his or her own interest in connection with such proceeding.

State Farm's petition for appeal indicates that when Ms. Rutherford filed suit against Olive McClanahan and the Kanawha County Commission, she provided notice of the suit to State Farm as her underinsurance carrier. Pursuant to W. Va. Code § 33-6-31(d), set forth above, State Farm had the right upon receiving such notice to file pleadings and to take other actions allowable by law in the name of the underinsured driver, Ms. McClanahan. This means that State Farm had many of the same rights of a party to the case. In light of this fact, this Court sees no compelling reason to depart from our holding in *Grove* under these specific facts.[4] We find therefore that the prejudgment interest on the judgment against State Farm should be calculated from the date that Ms. Rutherford's cause of action accrued which was at the time of her injury.

C.

State Farm's last assignment of error is that the circuit court wrongly applied a 10% interest rate to calculate the prejudgment interest on the special damages portion of the judgment below. State Farm bases its argument on the language in the 2006 version of

[4]This Court cautions that in a case in which the underinsurance carrier did not receive notice of the suit against the underinsured motorists pursuant to W. Va. Code § 33-6-31(d), we may reach a different decision on this issue.

W. Va. Code § 56-6-31. As set forth above, however, this Court has determined that the 1981 version of the statute applies. This version of the statute clearly indicates that "[t]he rate of interest shall be ten dollars upon one hundred dollars per annum, and proportionately for a greater or lesser sum, or for a longer or shorter time, notwithstanding any other provisions of law." Because this language is clear and unambiguous, we simply apply it to the instant facts and conclude that the proper rate of interest to be applied to the special damages portion of the judgment below is 10% per annum as provided for in the statute.

D.

Finally, Ms. Rutherford presents this Court with a cross-assignment of error in which she challenges the circuit court's method of determining that the amount of prejudgment interest is $58,517.81 instead of $105,632.87 as Ms. Rutherford contended below. Because of the way in which this Court has decided the issues raised by State Farm above, we do not deem it necessary to separately address Ms. Rutherford's cross-assignment of error.

IV.

CONCLUSION

For the reasons set forth above, this Court reverses the July 16, 2010, order of the Circuit Court of Kanawha County that calculated prejudgment interest on Ms. Rutherford's judgment against State Farm in the amount of $58,517.81, and we remand this case to the circuit court for the court to recalculate prejudgment interest in a manner consistent with this opinion.

Reversed and remanded.