

[Cite as *Layne v. Progressive Preferred Ins. Co.*, 2003-Ohio-3575.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ALLEN R. LAYNE

Plaintiff-Appellant/Appellee

-VS-

PROGRESSIVE PREFERRED
INSURANCE COMPANY

Defendant-Appellee/Appellant

: JUDGES:
: Hon. John Wise, P.J.
: Hon. Julie Edwards, J.
: Hon. John Boggins, J.
:
:
: Case No. 2002CA00327 and
: 2002CA00335
:
:
:

O P I N I O N

CHARACTER OF PROCEEDING:

Civil Appeal from Stark County Court of
Common Pleas Case 2002CV02047

JUDGMENT:

2002CA00327 - Affirmed
2002CA00335 - Reversed and Remanded

DATE OF JUDGMENT ENTRY:

June 30, 2003

APPEARANCES:

For Plaintiff-Appellee

STEVEN P. OKEY
SCOTT A. WASHAM
337 Third Street, N.W.
Canton, OH 44702-1786

JACK LANDSKRONER

For Defendant-Appellant

WAYNE C. DABB, JR.
ERENEST E. VARGO, JR.
RONALD S. OKADA
BRIDGET M. BRENNAN
3200 National City Center

1360 West 9th St., Suite 200
Cleveland, OH 44113
FRANK J. JANECEK, JR.
TIMOTHY G. BLOOD
KEVIN K. GREEN
401 B. Street, Suite 1700
San Diego, CA 92101

1900 Ninth Street
Cleveland, OH 44114-3485

Edwards, J.

{¶1} In Stark County Appeals Case No. 002CA000335, defendant-appellant Progressive Preferred Insurance Company [hereinafter Progressive] appeals from the September 10, 2002, Judgment Entry of the Stark County Court of Common Pleas which granted summary judgment in favor of plaintiff-appellee Allen R. Layne [hereinafter Layne] and denied Progressive's motion for summary judgment. The trial court thereby found that Layne was entitled to statutory interest, pursuant to R.C. 1343.03(A), from October 31, 2000, when an oral settlement was entered until the date that Progressive paid the amount agreed upon in the oral settlement.

{¶2} In a related Stark County Appeals case, Case No. 2002CA000327, plaintiff-appellant Layne appeals from the September 9, 2002, Judgment Entry of the Stark County Court of Common Pleas which denied Layne's motion for class certification. These cases arose from the same case in the Stark County Court of Common Pleas and were consolidated for oral argument. We shall address these appeals in a joint opinion.

STATEMENT OF THE FACTS AND CASE

{¶3} This matter began when Layne filed a personal injury action against Josh Schueller, Progressive's insured, in the Stark County Court of Common Pleas. A pretrial conference was held on October 31, 2000. According to Layne, the parties agreed to

settle for \$12,500.00, apparently without further agreement as to any other terms or conditions of the settlement.

{¶4} On November 3, 2000, Progressive issued a check in the amount of \$12,500.00. On November 7, 2000, Layne's attorney received a letter, settlement check, written release and a stipulation for dismissal/proposed judgment entry. On November 15, 2000, after modifying the written release by crossing out an indemnification provision, Layne signed the written release. That same day, Layne's attorney signed the stipulation for dismissal/proposed judgment entry.¹

{¶5} Layne brought the action sub judice on June 12, 2002, seeking an award of interest on the settlement agreement he claimed to have entered into with Progressive on October 31, 2000. On June 14, 2002, Layne amended his complaint by adding class action allegations and a claim for a declaratory judgment.

{¶6} Progressive filed an answer and counterclaim. Progressive denied the material allegations of Layne's complaint, including a denial that a settlement was entered into on October 31, 2000, and raised a number of affirmative defenses. Progressive further alleged that Layne had breached his contract with Progressive.

{¶7} On August 8, 2000, Progressive filed a motion for summary judgment which was supplemented on August 26, 2000. In the motions, Progressive contended that the settlement was not concluded until November 15, 2000, when Layne modified and signed a written agreement/release and signed the stipulation for dismissal/proposed judgment entry. Progressive further argued that an integration clause in Layne's written

¹ The stipulation for dismissal/ judgment entry, signed by the trial judge, was filed on November 27, 2000, after being signed by the trial judge.

agreement/release nullified any prior oral settlement agreement between the parties and that Layne was not entitled to interest because Layne had expressly released Progressive from any and all claims to any additional compensation whatsoever.

{¶8} On August 26, 2002, Layne filed a combined motion for summary judgment and opposition to Progressive's motion for summary judgment. Layne filed a supplemental brief in support of his motion for summary judgment and in opposition to Progressive's motion for summary judgment on August 27, 2000. In the motions, Layne contended that an oral settlement agreement had been entered into on October 31, 2000, and that Progressive's settlement check was not issued until November 3, 2000. Layne further contended that Layne was entitled to interest from the date of the alleged oral settlement agreement to the date of payment and that Layne's written agreement released Progressive only from Layne's claims for "tort liability" and not from Layne's statutory entitlement to interest.

{¶9} On September 10, 2002, the trial court entered final judgment denying Progressive's motion for summary judgment, granting Layne's motion for summary judgment and awarding Layne interest on his settlement. The trial court held that Layne was entitled to statutory interest from the date of settlement, October 31, 2000, until date of payment.

{¶10} As to Layne's motion for class certification, on September 9, 2002, the trial court denied Layne's motion for class certification. On September 12, 2002, the trial court entered a further judgment dismissing Progressive's counterclaim.

{¶11} Progressive appealed, raising the following assignments of error:²

² Initially, Progressive appealed from the Judgment Entry which dismissed its

{¶12} “I. THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF DEFENDANT BY DENYING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT, GRANTING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT, AND AWARDING PLAINTIFF POST-SETTLEMENT INTEREST WHEN PLAINTIFF HAD SIGNED A WRITTEN AGREEMENT NULLIFYING ANY PRIOR “ORAL SETTLEMENT AGREEMENT” AND DEFENDANT PAID PLAINTIFF THE SETTLEMENT AMOUNT AT THE TIME PLAINTIFF SIGNED SUCH WRITTEN AGREEMENT.

{¶13} “II. THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF DEFENDANT BY DENYING DEFENDANT’S MOTION FOR SUMMARY JUDGMENT, GRANTING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT, AND AWARDING PLAINTIFF POST-SETTLEMENT INTEREST WHEN PLAINTIFF HAD SIGNED A WRITTEN AGREEMENT IN WHICH PLAINTIFF RELEASED ANY CLAIM FOR OR RIGHT TO ANY ADDITIONAL COMPENSATION, INCLUDING ANY RIGHT FOR OR RIGHT TO POST-SETTLEMENT INTEREST.

{¶14} “III. THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF DEFENDANT BY GRANTING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT WHEN THERE WAS NO EVIDENCE BEFORE THE COURT THAT ESTABLISHED THE TERMS OF THE ALLEGED “ORAL SETTLEMENT AGREEMENT,” INCLUDING SPECIFICALLY THE DATE ON WHICH PAYMENT OF THE SETTLEMENT AMOUNT WAS DUE UNDER SUCH ALLEGED ORAL AGREEMENT.

{¶15} “IV. THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF

counterclaim. However, Progressive moved to dismiss its appeal from the judgment entry dismissing its counterclaim.

DEFENDANT BY GRANTING PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT WHEN THERE WAS A GENUINE ISSUE OF MATERIAL FACT AS TO THE DATE A SETTLEMENT AGREEMENT WAS REACHED BETWEEN PLAINTIFF AND DEFENDANT.

{¶16} “V. THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF DEFENDANT BY GOING OUTSIDE THE RECORD BEFORE IT TO RESOLVE A GENUINE ISSUE OF MATERIAL FACT AS TO THE DATE A SETTLEMENT WAS REACHED BETWEEN PLAINTIFF AND DEFENDANT.”

{¶17} Layne appealed, raising the following assignment of error:

{¶18} “THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING PLAINTIFF-APPELLANT’S MOTION FOR CLASS CERTIFICATION.”

CASE NUMBER 2002CA00335

{¶19} First, we will address Case No. 2002CA000335, which challenges the trial court’s grant of summary judgment and post judgment interest.

I

{¶20} In the first assignment of error, Progressive alleges that the trial court erred when it granted summary judgment in favor of Layne and denied Progressive’s motion for summary judgment and awarded Layne interest even though Layne had signed a written agreement which nullified any prior “oral settlement agreement” and Progressive paid Layne the settlement amount at the time Layne signed that written agreement. We agree.

{¶21} Summary judgment proceedings present the appellate court with the unique opportunity of reviewing the evidence in the same manner as the trial court. *Smiddy v. The Wedding Party, Inc.* (1987), 30 Ohio St.3d 35, 36. As such, we must refer to Civ.R. 56

which provides, in pertinent part:

{¶22} "Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. * * * A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only therefrom, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor."

{¶23} Revised Code 1343.03(A) provides, inter alia, that money becomes due and payable upon any settlement between parties, entitling the creditor to interest at the statutory interest rate of ten percent, unless a contract between the parties provides for a different rate of interest. In *Hartmann v. Duffey*, 95 Ohio St.3d 456, 2002-Ohio-2486, 7698 N.E.2d 1170, the Supreme Court of Ohio held that R.C. 1343.03(A) applies when parties enter into a settlement, whether or not the settlement has been reduced to judgment or order by the court. The accrual date from which the interest begins to run is the date of the settlement. The creditor is entitled to be compensated for the time between the accrual of the right to payment, or the settlement date, and payment. The court stated this view is bolstered by the public policy reasons underlying the award of interest, specifically, compensating a plaintiff for the defendant's use of the money, which rightfully belongs to the plaintiff. Whether either party was at fault was not part of the analysis under *Hartmann*.

{¶24} In the case sub judice, Progressive argues that the written agreement signed

by Layne in exchange for \$12,500.00 nullified any prior oral agreement that may have existed between the parties. The release contained the following language:

{¶25} “no promise, inducement or agreement not herein expressed has been made to [Layne], and that this release contains the entire agreement between the parties hereto.”

{¶26} “When two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing.” *Ed Schory & Sons, Inc. v. Society National Bank*, 75 Ohio St.3d 433, 440, 1996-Ohio-194, 662 N.E.2d 1074 (quotations and citation omitted); *Galmish v. Cicchini*, 90 Ohio St.3d 22, 27, 2000-Ohio-7, 734 N.E.2d 782. “Stated differently, an oral agreement cannot be enforced in preference to a signed writing which pertains to exactly the same subject matter yet has different terms.” *Ed Schory & Sons*, 75 Ohio St.3d at 440, (quotations and citation omitted); *Galmish*, 90 Ohio St.3d at 29 (quotations and citation omitted).

{¶27} Thus, we find that as a matter of law, the written agreement’s integration clause nullified the alleged oral settlement between the parties. Thus, it precluded the trial court from finding that an oral settlement agreement was entered into on October 31, 2000.

{¶28} Therefore, we find that the trial court erred when it awarded summary judgment in favor of Layne and awarded Layne interest from October 31, 2000, until date of payment. Since Progressive provided full payment to Layne on the date that Layne entered into the written agreement containing the integration clause, Layne was not entitled to interest. We find that the trial court should have awarded summary judgment in favor of Progressive.

{¶29} Progressive's first assignment of error is sustained.

II, III, IV, V

{¶30} Pursuant to our holding above, this Court finds the second, third, fourth and fifth assignments of errors are moot.

Case No. 2002CA00327

{¶31} We shall now consider Layne's appeal of the September 9, 2002, Judgment Entry that denied Layne's motion for class certification, Case No. 2002CA00327.

{¶32} Layne alleged that Progressive systematically failed to pay interest on its insurance settlements as required by Ohio law. Layne argues that the trial court abused its discretion by denying his Motion for Class Certification. See also, *Warner v. Waste Management* (1988), 36 Ohio St.3d 91, 521 N.E.2d 1091.

{¶33} In order to bring a class action, the claim of the representative party must be typical of the claims of the class. Civ.R. 23(A)(3). Thus, it is an implicit requirement for certification of class action that the class representative be a member of the class. *Lowe v. Sun Refining and Marketing Co.* (1992), 73 Ohio App.3d 563, 597 N.E.2d 1189.

{¶34} Pursuant to our holding above, Layne is not a member of the class he wishes to certify. As stated previously, this Court finds that Layne is not entitled to interest pursuant to R. C. 1343.03.

{¶35} Layne's sole assignment of error is overruled.

{¶36} The judgment of the Stark County Court of Common Pleas granting summary judgment in favor of Layne and awarding interest is reversed and the matter is remanded for further proceedings in accordance with this decision. However, the decision of the Stark County Court of Common Pleas denying class certification is affirmed.

By Edwards, J.

Wise, P. J. and

Boggins, J. concur

In Re: Post Judgment Interest/Class Action