[Cite as *Riley v. Frank*, 2015-Ohio-1478.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
FULTON COUNTY

Rickey D. Riley, et al.

Appellant

v.

Mark Frank, et al.

Appellees

Court of Appeals Nos. F-14-007
F-14-008

Trial Court Nos. 12CV000151
12CV000152

DECISION AND JUDGMENT

Decided: April 17, 2015

* * * * *

David J. Lenavitt, for appellant.

Stephen F. Korhn and Michael C. Wahl, for appellees Mark J. Frank and K&G Auto Sales, Inc.

Matthew J. Rohrbacher and Matthew R. Persinger, for appellee Ruth Schroeder.

* * * * *

JENSEN, J.

{¶ 1} In this accelerated and consolidated appeal, plaintiff-appellant, Rickey D. Riley, appeals the August 7, 2014 judgment of the Fulton County Court of Common Pleas denying his motion for prejudgment interest against defendants-appellees, Mark

Frank, Frank's employer, K&G Auto Sales, Inc., and Ruth Schroeder. Frank and K&G have moved for attorney fees and costs, arguing that Riley's appeal is frivolous. For the reasons that follow, we affirm the trial court's judgment denying Riley's motion for prejudgment interest, and we deny Frank's and K&G's motion for attorney fees and costs.

I. Background

{¶ 2} Riley filed the underlying personal injury actions following two accidents. The first occurred on June 9, 2010, when Frank, who was acting in the course of his employment with K&G, "t-boned" Riley's vehicle. The second occurred on July 9, 2010, when Riley drove into a telephone pole to avert colliding with Schroeder's vehicle. Riley suffered back, shoulder, and knee injuries and ultimately underwent multiple surgeries of his right shoulder and left knee. He also claimed a significant loss of wages. On May 23, 2012, Riley filed separate actions against Frank and K&G (for purposes of this decision, referred to singularly as "Frank"), and Schroeder. The cases were consolidated on September 26, 2013, for purposes of trial.

{¶ 3} Before trial, the defendants in both cases stipulated to negligence, leaving the jury to decide the amount of Riley's damages and to apportion liability between the two accidents. On June 23, 2014, the jury awarded Riley damages totaling $400,000.85. It found Frank responsible for 75 percent of the damages—$300,000.64; it found Schroeder responsible for 25 percent—$100,000.21.

{¶ 4} Following the trial, Riley filed a number of motions, including a motion for prejudgment interest under R.C. 1343.03. In support of his motion for prejudgment interest, Riley argued that the defendants failed to make good faith attempts to settle the claims against them.

{¶ 5} The parties filed briefs, documents were submitted for in camera inspection, and the court conducted a hearing on July 22, 2014, at which the parties examined witnesses, offered exhibits, and presented arguments. On August 7, 2014, the court denied Riley's motion for prejudgment interest. It explained:

> The Court is aware of the procedures that are employed in arriving at a settlement. First you "test the waters." Then, as Discovery reveals more and more, and the issues become crystalized, and more refined, and the real potentialities become manifest [sic]. In some sense this is a "poker game," being played by both side [sic]. Here the Jury awarded a verdict that was within eighty-five cents of the best "guesstimate." There is no evidence of "bad faith" here.

{¶ 6} Riley appealed the judgment denying his motion for prejudgment interest and assigns the following error for our review:

> The trial court erred in not awarding pre-judgment interest against both Defendants-Appellees for their less than good faith efforts in pursuing settlement of Plaintiff-Appellant's claim.

{¶ 7} In connection with his assignment of error, Riley identifies four issues that we should consider:

A. The trial court abused its discretion in ignoring the record of Defendant-Appellees' conduct in denying Plaintiff-Appellant's motion for prejudgment interest pursuant to R.C. 1343.03(C).

B. The trial court abused its discretion by misapplying the standard set forth in R.C. 1343.03(C).

C. The trial court abused its discretion through its unreasonable and arbitrary analysis.

D. It is appropriate for this court to determine the award of prejudgment interest pursuant to authority granted to it under App.R. 12.

II. Standard of Review

{¶ 8} Under R.C. 1343.03(C)(1), a plaintiff in a personal injury action who has been awarded a money judgment is entitled to prejudgment interest if "the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case * * *." The statute was enacted to promote settlement efforts, to prevent tortfeasors from frivolously delaying in resolving cases, and to encourage good faith efforts to settle controversies outside a trial. *Kalain v. Smith*, 25 Ohio St.3d 157, 159, 495 N.E.2d 572 (1986).

{¶ 9} The Ohio Supreme Court has made clear that a party may fail to make a good faith settlement effort without necessarily acting in bad faith. *Id.* In *Kalain*, it held that a party will not be said to have "failed to make a good faith effort to settle" where he or she has:

> (1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party.

{¶ 10} The burden of proof is on the party seeking prejudgment interest. *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 659, 635 N.E.2d 331 (1994). Subjective claims of lack of good faith are generally insufficient. *Id.* The party seeking prejudgment interest must present evidence of a reasonable offer to settle given such factors as "the type of case, the injuries involved, applicable law, defenses available, and the nature, scope and frequency of efforts to settle." *Id.* "Other factors would include responses—or lack thereof—and a demand substantiated by facts and figures." *Id.* A determination of a party's good faith effort to settle requires a review of the settlement efforts of the party's insurance carrier, which is usually contained in the insurer's claims file. *Id.* at 660, citing *Peyko v. Frederick*, 25 Ohio St.3d 164, 166-167, 495 N.E.2d 918 (1986).

{¶ 11} Whether a party's settlement efforts demonstrate good faith is generally within the sound discretion of the trial court. We review the trial court's decision under

an abuse-of-discretion standard. *Id.* at 658. An abuse of discretion is more than a mere error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). An abuse of discretion requires a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Id.*

III. Analysis

{¶ 12} Riley claims that the trial court applied the wrong legal standard in considering his claim for prejudgment interest. He claims that the trial court ignored the record and engaged in an unreasonable and arbitrary analysis. Riley asks that this court exercise its authority to enter an order granting prejudgment interest.

{¶ 13} The trial court in its decision concluded that "there is no evidence of 'bad faith' here." Riley claims that this statement reveals that the trial court applied the wrong legal standard by requiring it to show "bad faith" instead of showing a failure to make a good faith attempt to settle the claim. Frank and Schroeder argue that there is nothing in the record to show that the court strictly applied a bad faith-based analysis. They contend that the trial court's use of quotations around the term "bad faith" evidences that the court used the term merely "to echo" Riley's argument. In the preceding paragraph, the trial court characterized Riley as having asserted that defendants had acted in "bad faith."

{¶ 14} Certainly, a plaintiff need not show bad faith to prevail on a request for prejudgment interest. The question is whether the trial court, in fact, held Riley to an incorrect standard. The court did not set forth a legal standard in its decision and its analysis is terse. It appears to us that the trial court may well have used the phrase "bad

faith" and placed it in quotes as a short-hand. Regardless, applying the proper standard, we find no error in the trial court's conclusion.

{¶ 15} Negligence was admitted by both Frank and Schroeder, leaving the jury to decide which accident caused which injuries. Riley's position that he is entitled to prejudgment interest seems to assume that Frank's and Schroeder's defenses were weak, and that they made only "disproportional" and "token" offers to settle the case. Our review of the record does not support Riley's position.

{¶ 16} There were three orthopedic specialists who provided testimony or opinions with respect to the cause and severity of Riley's injuries. Daniel McNernan, M.D. was the first orthopedic surgeon who treated Riley. Dr. McNernan examined Riley after the first accident, but before the second accident. He testified that Riley made no complaints to him about his right shoulder until after the second accident. It was his opinion that Riley's right shoulder injury was not caused by the first accident. He also testified that Riley's left knee injury was not permanent and he described the injury as "subtle."

{¶ 17} Riley's second treating orthopedic surgeon was Joseph Assenmacher, M.D. He submitted an affidavit in which he attributed Riley's right shoulder injury entirely to the first accident.[1]

[1] Frank states in his appellate brief that Dr. Assenmacher was deposed, but the transcript of that deposition was not transmitted to us on appeal.

{¶ 18} The third orthopedic specialist providing opinions was Richard Deerhake, M.D. He performed an independent medical evaluation of Riley at the request of Frank's counsel. He first issued a report indicating that the first accident was more prominent in causing Riley's right shoulder injury. At his deposition, however, Dr. Deerhake retreated from this opinion entirely after being presented with Dr. McNernan's testimony that Riley did not complain of the right shoulder injury until after the second accident. At that point, Dr. Deerhake opined that the second accident was the more likely cause of the right shoulder injuries. He rationalized this change in opinion by explaining that he had relied too heavily on the medical history provided by Riley, who he described as a "poor historian." Dr. Deerhake also testified to his belief that Riley had significantly exaggerated his levels of pain and the amount of difficulty he experienced in completing tasks requested of him during the examination. When asked by counsel for Riley about Riley's prognosis, Dr. Deerhake stated that he believed that Riley's condition would improve greatly after he settles the lawsuit, implying that Riley was being less than genuine about the extent of his injuries for litigation purposes. He also opined that Riley was employable and could possibly return to his work as a truck driver so long as he was not required to lift heavy objects.

{¶ 19} Frank and Schroeder had support for their respective positions that it was the other who caused the more serious injuries to Riley. Dr. Assenmacher's affidavit and Dr. Deerhake's initial report supported Schroeder's theory, while Frank found support in Dr. McNernan's and Dr. Deerhake's opinions at deposition. The split in the opinions

would play into the amount and timing of the defendants' settlement offers. The fact that Frank and Schroeder allowed discovery to proceed before extending their full settlement authority does not lead us to the conclusion that they purposely caused delay or failed to engage in good faith settlement negotiations with Riley.

{¶ 20} In addition to the disagreement among the orthopedic specialists, Riley claimed to have in excess of $103,000 in medical expenses, but did not immediately substantiate those expenses with documentation. It seems those bills streamed in over the course of discovery. Related to this, defendants wanted to discover the amount the medical providers accepted for their services, which Frank estimated to be between $54,000-$65,000. That information was not immediately made available. There were also competing opinions from vocational rehabilitation experts and economists who disagreed about Riley's future employment possibilities and the total amount of his future lost wages claim, if any.

{¶ 21} Despite the incentive of each defendant to proceed with discovery and wait to see what the witnesses would say at deposition, there were, in fact, offers extended early on by Frank that were not met with any reduction in Riley's settlement demands. Although no specific pre-suit demand was made, Frank's insurer offered $50,000 to settle the case pre-suit. That offer was rejected without further negotiation. After filing suit, Riley demanded Frank's policy limits of $1 million and Schroeder's policy limits of $100,000—amounts that were not commensurate with defense counsels' evaluations of

the value of the case. Frank evaluated the case at $300,000 to $500,000; Schroeder evaluated it at $150,000.

{¶ 22} The parties engaged in mediation in August of 2013 where Frank once again extended his offer of $50,000. Either posturing, tempers, or a simple misunderstanding led to an abrupt end to the mediation and no progress was made toward a resolution. But just three days later, Frank extended an offer of $180,000 to settle the case. Still Riley refused to lower his $1 million demand. Left in the position of "bidding against himself," Frank offered $215,000 after conducting additional discovery. Again, the offer was not met with a reduced demand. Last ditch efforts at the final pretrial in December of 2013 resulted in offers of $253,000, then Frank's full settlement authority of $300,000. Still no reduced demand from Riley.

{¶ 23} Winter snowstorms prevented the January 2014 trial date from going forward and trial was pushed into June. During those six months, Riley made no formal reduction in his demand. It seems that Riley may have agreed to reduce his demand to somewhere between $650,000 to $800,000 in exchange for defendants' agreement to engage in private mediation, but it appears that private mediation—and the reduction in the demand—was conditioned on defendants increasing their offers to a particular floor well in excess of what had already been offered. Again, this far exceeded counsel's evaluation of Riley's claim.

{¶ 24} As for Schroeder, Riley withdrew his demand of $100,000. Schroeder did not make a settlement offer until December of 2013, but up until mid-September of 2013,

the medical experts—including Riley's treating physician—had been pointing the finger at Frank as the cause of the majority of Riley's injuries. In addition, serious credibility issues lingered given Dr. Deerhake's about-face and the competing opinions of the treating physicians. It is true that Schroeder offered only $10,000, but her position was that the medical bills attributable to the second accident totaled only $3,179.80. There is no evidence that Riley ever reduced his $100,000 demand to Schroeder.

{¶ 25} Ultimately, the jury awarded $400,000.85, with Frank to pay 75 percent and Schroeder to pay 25 percent. This was very much in line with Frank's evaluation of the claim and his final settlement offer was essentially dead-on.

{¶ 26} Given the legitimate debate over which accident caused which injuries, ongoing discovery, the timing of depositions, problems with certain medical bills remaining unsubstantiated for a period of time, and Riley's refusal to move off of his $1 million and $100,000 demands despite significant moves by Frank and an offer from Schroeder, we cannot say that Frank and Schroeder failed to make a good faith effort to settle the case.

{¶ 27} Accordingly, we find Riley's sole assignment of error not well-taken.

{¶ 28} Turning to Frank's motion for attorney fees and costs, filed October 9, 2014, Frank argues that Riley's appeal was frivolous and that Riley should be required to pay the attorney fees and costs incurred by Frank in defending against the appeal. We deny Frank's motion. Despite the fact that Riley's appeal was not successful, we find that it was not frivolous, especially given the very sparse analysis provided by the trial

court in denying the motion for prejudgment interest and the confusion caused by the trial court's incorrect reference to the absence of "bad faith," which was clearly not the appropriate standard to apply.

IV. Conclusion

{¶ 29} We find Riley's assignment of error not well-taken and affirm the August 7, 2014 judgment of the Fulton County Court of Common Pleas denying his motion for prejudgment interest. We deny Frank's motion for attorney fees and costs for a frivolous appeal. The costs of this appeal are assessed to Riley pursuant to 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, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE