[Cite as *Caraman v. Bailey*, 2011-Ohio-481.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94986

NICOLAE CARAMAN, ET AL.

PLAINTIFFS-APPELLEES

vs.

SHAWN BAILEY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-653539

BEFORE: Cooney, J., Stewart, P.J., and Keough, J.

RELEASED AND JOURNALIZED: February 3, 2011

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COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Shawn Bailey ("Bailey"), appeals the trial court's judgment granting plaintiff-appellee, Nicolae Caraman's, post-trial motions seeking

prejudgment interest, attorney fees and litigation expenses, and the court's denial of Bailey's motions for a setoff of underinsured motorist benefits and to reduce the punitive damages award. We find no merit to the appeal and affirm.

{¶ 2} In March 2008, plaintiff-appellee Nicolae Caraman ("Caraman") filed a complaint alleging that he was injured in a car accident in which Bailey, who was intoxicated, collided with his car and fled the scene. The complaint stated a claim for punitive damages, which alleged that Bailey consumed "an excessive amount of alcohol prior to operating a motor vehicle," which represented "the conscious disregard" for Caraman's safety. The complaint also included a claim for underinsured motorist ("UIM") coverage against Caraman's own automobile insurance carrier, defendant State Auto Insurance Company ("State Auto").

{¶ 3} Caraman settled with his carrier State Auto for $25,000 before trial, and his claims proceeded to trial against Bailey. The jury returned a verdict in favor of Caraman for $20,000 in compensatory damages and $50,000 in punitive damages. The jury further indicated that Caraman was entitled to recover reasonable attorney fees and litigation expenses as part of the punitive damage award.

{¶ 4} Both parties filed post-trial motions. Caraman filed motions for prejudgment interest and to determine the award for attorney fees and litigation expenses. Bailey filed a motion to "setoff" the value of any personal exposure beyond his own insurance policy limits

against the value of UIM benefits Caraman received from his own carrier. Bailey also filed a motion to reduce the punitive damages award pursuant to R.C. 2315.21. Following a hearing, the trial court granted Caraman's motion for prejudgment interest on the compensatory damages award but not on the punitive damages award. It also granted Caraman's motion to award attorney fees and litigation expenses but denied Bailey's motion to "set off" the portion of Caraman's UIM benefits that represented the amount of Bailey's personal exposure beyond his own policy limits. The trial court granted Bailey's motion to reduce the punitive damage award but only to $40,000. Bailey now appeals, raising four assignments of error challenging the court's rulings on these four post-trial motions.

Punitive Damages

{¶ 5} In his first assignment of error, Bailey argues the trial court failed to properly limit damages when it reduced the punitive damages award. Bailey contends that pursuant to R.C. 2315.21, the punitive damage award should have been reduced to just 10% of his net worth rather than twice the compensatory damage award. He also claims the trial court erred in ruling that R.C. 2315.21 is unconstitutional. However, the court first determined that Bailey failed to demonstrate his net worth at the time of the accident, as is required by R.C. 2315.21(D). Thus the court followed R.C. 2315.21 by doubling the compensatory damage amount and thereby capping punitive damages at $40,000. Since Bailey was given the opportunity to show his net worth when the tort was committed and failed to provide

adequate evidence, we find no error in the court's ruling on punitive damages. See *Doepker v. Willo Sec., Inc.,* Stark App. No. 2007-CA-00184, 2008-Ohio-2008, ¶60.

Prejudgment Interest

{¶ 6} In the second assignment of error, Bailey argues the trial court erred in granting prejudgment interest to Caraman because Caraman failed to demonstrate that he negotiated in good faith or that Bailey failed to negotiate in good faith.

{¶ 7} R.C. 1343.03 provides that prejudgment interest may be awarded in the following instance:

> "If, upon motion of any party to a civil action that is based on tortious conduct, that has not been settled by agreement of the parties, and in which the court has rendered a judgment, decree, or order for the payment of money, 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 * * * ." R.C. 1343.03(C).

{¶ 8} The purpose of prejudgment interest is to promote settlement efforts and to discourage defendants from frivolously prolonging suits for legitimate claims. *Royal Elec. Constr. Corp. v. Ohio State Univ.*, 73 Ohio St.3d 110, 116, 1995-Ohio-131, 652 N.E.2d 687. Prejudgment interest does not punish the party responsible for the underlying damages, but acts as compensation 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.,* 69 Ohio St.3d 638, 658, 1994-Ohio-324, 635 N.E.2d 331.

{¶ 9} In determining whether a party has "failed to make a good faith effort to settle" as contemplated by R.C. 1343.03(C), the trial court must consider the following:

> "A party has not 'failed to make a good faith effort to settle' under R.C. 1343.03(C) if he 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. If a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer."

Kalain v. Smith (1986), 25 Ohio St.3d 157, 495 N.E.2d 572, paragraph one of the syllabus.

{¶ 10} Later, the Ohio Supreme Court explained that *Kalain* placed the burden of proof on the party seeking prejudgment interest:

> "[I]t is incumbent on a party seeking an award to present evidence of a written (or something equally persuasive) offer to settle that was reasonable 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 would include responses — or lack thereof — and a demand substantiated by facts and figures. Subjective claims of lack of good faith will generally not be sufficient. These factors, and others where appropriate, should be considered by a trial court in making a prejudgment interest determination."

Moskovitz at 659. The trial court's determination of whether the parties negotiated in good faith will not be disturbed absent an abuse of discretion. *Kalain* at 159, citing *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 482 N.E.2d 1248.

{¶ 11} In granting the motion for prejudgment interest, the trial court found that Bailey's insurance carrier, Progressive, failed to make a good faith effort to settle the case, and we find the post-verdict hearing transcript supports this finding. Progressive's claims specialist, Stacy Semancik ("Semancik"), testified that Progressive was aware early in its investigation of Caraman's claim that its insured, Bailey, was not only intoxicated at the time of the accident but also had prior convictions. This was also Bailey's fourth DUI conviction. Yet, despite the likelihood of a punitive damage award under these circumstances, Semancik admitted that Progressive did not evaluate the injury claim until after suit was filed.

{¶ 12} Caraman's lawyer, Craig Bashein ("Bashein"), sent a settlement demand to Progressive in which he offered to accept the limits of Bailey's policy before suit was filed. He also sent a letter to Progressive from Caraman's treating physician regarding Caraman's diagnosed conditions along with his opinion on causation. Thus, Caraman presented evidence of a written demand to settle the case along with a medical evaluation of his injuries as required by *Moskovitz*. Bashein testified that he would have recommended that his client accept the policy limits that he presumed, based on prior experience with Progressive insureds, were less than $100,000.

{¶ 13} Semancik testified that she used an evaluation software program known as "COA" to assess the value of Caraman's claim but did not include the diagnoses for Caraman's herniated disc and spinal cord compression in the evaluation. Nevertheless,

Semancik admitted that despite these omissions, the COA system advised her that Caraman's claim was worth more than Bailey's policy limits.

{¶ 14} In addition, Bailey retained private counsel who sent a letter to Progressive warning that its insured had been left in a "very precarious position[.]" This lawyer reminded Progressive that because Bailey's limits were only $15,000, Bailey would be personally liable for a verdict over that amount and for punitive damages. Yet, when Progressive finally made an offer, it offered only $11,300 of the $15,000 available under the policy limits. Although Progressive eventually offered the policy limits, by that time Caraman had filed suit and invested in the prosecution of his claim such that the $15,000 was no longer acceptable. Thus, the record supports the trial court's finding that Progressive failed to make a good faith effort to settle the case. Furthermore, since there is no evidence that Caraman failed to negotiate in good faith, the trial court did not abuse its discretion in awarding prejudgment interest.

{¶ 15} Accordingly, the second assignment of error is overruled.

Litigation Expenses

{¶ 16} In the third assignment of error, Bailey argues the trial court erred in granting the entire amount of Caraman's litigation expenses. Bailey contends Caraman was entitled to recover only the expenses recoverable under Civ.R. 54(D).

{¶ 17} Civ.R. 54(D) governs the award of costs to the prevailing party in civil cases. However, the trial court did not award the entire amount of litigation expenses pursuant to Civ.R. 54(D), but rather as part of the punitive damage award. The Ohio Supreme Court has held that litigations expenses may be recovered where there is evidence that the defendant's conduct involved actual malice. *Sorin v. Bd. of Edn.* (1976), 46 Ohio St.2d 177, 181, 347 N.E.2d 527. In that same vein, courts throughout the state have held that litigation expenses may be awarded as part of punitive damages. *Parrish v. Machlan* (1997), 131 Ohio App.3d 291, 722 N.E.2d 529; *Davis v. Sun Refining & Marketing Co.* (1996), 109 Ohio App.3d 42, 60, 671 N.E.2d 1049; *Chapman v. Mull* (March 10, 1983), Cuyahoga App. No. 45190 (affirming award of litigation expenses where evidence supported finding of fraudulent conveyance).

{¶ 18} The jury found that Bailey acted with actual malice when he caused Caraman's injuries, and therefore it awarded punitive damages. The jury further indicated that Caraman was entitled to recover attorney fees and litigation expenses as part of the punitive damage award. Thus, the award of the entire amount of litigation expenses as part of punitive damages was not only permissible but warranted pursuant to the jury's verdict.

{¶ 19} Accordingly, the third assignment of error is overruled.

Setoff

{¶ 20} In his fourth assignment of error, Bailey argues the trial court erred in denying his motion to set off the value of his personal exposure beyond his $15,000 policy limits against the $25,000 of UIM benefits Caraman had already received from his insurance carrier prior to trial. Bailey contends he is entitled to a reduction of the compensatory damage award by $5,000, which represents the difference between the jury award of compensatory damages ($20,000) and his policy limits ($15,000) because the $25,000 of UIM benefits Caraman received from his own UIM carrier were paid in partial satisfaction of Caraman's compensatory damage claim. We disagree.

{¶ 21} Bailey claims he is entitled to $5,000 of UIM benefits provided under Caraman's policy because denial of these benefits would contravene R.C. 3937.18(C), which states, in part: "Underinsured motorist coverage in this state is not and *shall not be excess coverage* to other applicable liability coverages * * *."

{¶ 22} In support of his argument, Bailey relies on *James v. Michigan Mut. Ins. Co.* (1985), 18 Ohio St.3d 386, 981 N.E.2d 272, and *Clark v. Scarpelli*, 91 Ohio St.3d 271, 2001-Ohio-39, 744 N.E.2d 719. However, neither of these cases are applicable to the instant case because they involved a UIM carrier's right to set off benefits paid by other insurance policies including the tortfeasor's liability policy. In this case, Bailey is not an insurance carrier but rather the individual tortfeasor. Caraman obtained a judgment against Bailey for $20,000. Although State Auto settled with its insured Caraman and paid $25,000 of UIM

benefits to Caraman prior to trial, Bailey is not entitled to avail himself of those benefits because he is not an insured under the State Auto policy and did not pay a premium for that benefit.

{¶ 23} This case involves an unusual situation where the UIM carrier settled with its insured before trial. In its evaluation of Caraman's claim that included a likelihood of punitive damages, State Auto decided to limit its risk. More commonly, when a plaintiff obtains a judgment against an underinsured tortfeasor, the plaintiff's UIM carrier pays UIM benefits up to its policy limits less the amount received from the tortfeasor's liability carrier. This is a typical setoff. The UIM carrier then has either a legal or equitable right of subrogation to sue the tortfeasor to recover the amount of UIM benefits it paid to its insured as a result of the tortfeasor's tortious conduct. *Craven v. Nationwide Mut. Ins. Co.* (March 11, 1998), Summit App. No. 18490. Despite the availability of UIM coverage, the tortfeasor is still liable for the full amount of the judgment. The same holds true here.

{¶ 24} Although R.C. 3937.18(C) states that UIM coverage "shall not be excess coverage to other applicable liability coverages," it also provides that UIM coverage only provides protection "for insureds thereunder * * * for bodily injury * * * suffered by any insured under the policy." Once Caraman recovers the $5,000 above Bailey's policy limits from Bailey personally, State Auto may be entitled to reimbursement of that amount from Caraman depending on the terms of its policy. But this is an issue strictly between State

Auto and its insured Caraman and has nothing to do with Bailey, who is not a party to that contract. Bailey is not an insured under the policy and therefore may not avail himself of the UIM coverage under Caraman's policy with State Auto.

{¶ 25} Accordingly, the fourth assignment of error is overruled.

Judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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COLLEEN CONWAY COONEY, JUDGE

MELODY J. STEWART, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR