

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002234-MR

HARLON BARNETT, INDIVIDUALLY
AND AS ADMINISTRATOR OF THE
ESTATE OF STEVEN RAY BARNETT

APPELLANT

v. APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE DOUGLAS M. GEORGE, JUDGE
ACTION NO. 00-CI-00004

HAMILTON MUTUAL INSURANCE
COMPANY OF CINCINNATI, OHIO

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS AND DIXON, JUDGES; ISAAC,¹ SENIOR JUDGE.

DIXON, JUDGE: Appellant, Harlon Barnett, individually and as Administrator of the Estate of Steven Ray Barnett, appeals from a decision of the Taylor Circuit Court denying his claim for prejudgment interest on a statutory interest award in a

¹ Senior Judge Sheila Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

bad faith action against Appellee, Hamilton Mutual Insurance Company of Cincinnati, Ohio. Finding no error, we affirm.

As this is the second time the matter is before this Court, we shall rely upon the facts underlying this case as set forth in the prior panel's opinion:

Steven Ray Barnett was a passenger in a fatal head-on collision on June 2, 1995. The drivers of both vehicles were intoxicated. The estates of all five of the young men killed in the accident filed various lawsuits in Marion Circuit Court, which were promptly consolidated into one action.

Harlon Barnett, Steven's father and administrator of Steven's estate, filed an underinsured motorist insurance claim (hereinafter "UIM"), requesting the full policy limits of \$900,000.00 in May of 1996. Simultaneously, Barnett filed a complaint in Marion Circuit Court seeking damages as a result of his son's death. On December 6, 1996, the Marion Circuit Court issued an order stating that (1) Steven was at all times a resident of the Barnett household; (2) it was uncontested that the Barnetts had UIM coverage on three automobiles and paid premiums for all three vehicles; (3) there was UIM coverage of \$300,000.00 per vehicle; (4) "stacking" was allowable under Kentucky law; and therefore (5) there was \$900,000.00 available in UIM protection.

On January 9, 1997, Barnett's attorney sent a letter to one of Hamilton Mutual's attorneys demanding settlement for the policy limits of \$900,000.00. Hamilton Mutual responded to this demand in a letter dated January 31, 1997, which proposed a structured settlement with a present value of \$200,000.00. The letter explained that there were two concerns with Barnett's claim. First, Steven was riding with an intoxicated driver, which invoked comparative negligence. Second, while Barnett could claim damages in excess of \$2,000,000.00, the reality was that conservative juries in Kentucky and Marion County specifically rarely awarded such substantial verdicts in wrongful death cases, especially where liability was not clear. Barnett rejected this offer.

On July 14, 1997, Barnett lowered his demand to \$850,000.00. Mediation was held on November 7, 1997, with all parties to the consolidated action being present. As a result of the mediation, Barnett reduced his demand to \$775,000.00, and Hamilton Mutual offered a structured settlement with a present value of \$300,000.00. Barnett rejected this offer.

With a trial date set for January 9, 1999, Barnett resumed settlement negotiations. In early December 1998, Barnett made a \$690,000.00 settlement demand and indicated that he was not interested in a structured settlement. Hamilton Mutual responded to this demand with an offer of a structured settlement with a present value of \$410,000.00. On December 21, 1998, Barnett reduced his settlement demand to \$675,000.00, and Hamilton Mutual responded the following day with an offer of a structured settlement with a present value of \$500,000.00. Barnett again refused. A follow-up letter reiterating the initial concerns Hamilton Mutual had regarding Barnett's claim was then sent, which concluded by urging Barnett to demand \$587,500.00, the midpoint between the parties' last settlement positions. This demand was forwarded to Hamilton Mutual and, on January 8, 1999, the parties settled for an unstructured settlement amount of \$587,500.00.

The complaint in this action was filed January 4, 2000, and proceeded to trial September 25, 2006. Barnett alleged that Hamilton Mutual violated its duty to exercise good faith in the handling and settlement of his UIM claim. Furthermore, he asserted that Hamilton Mutual violated duties established under the Unfair Claims Settlement Practice Act and the Consumer Protection Act. Barnett contended that said actions were done fraudulently, maliciously, intentionally, oppressively, and with reckless disregard of his rights. He complained that he sustained the following damages: 1) enormous amount of pain, suffering, and emotional distress; 2) embarrassment and humiliation; 3) court costs and legal expenses; and 4) loss of interest and investment income on the money ultimately settled. He also claimed that he

was entitled to recover punitive damages against Hamilton Mutual.

At trial, Hamilton Mutual asserted that it had relied on the experience of its attorneys in handling wrongful death claims to place a reasonable settlement value on the Barnett claim. On September 27, 2006, a jury returned a verdict in favor of Barnett with an award of \$150,000.00 for loss of interest and investment income; \$5,000.00 for legal costs expended in the underlying case; and punitive damages in the amount of \$600,000.00. The court subsequently awarded Barnett an additional \$195,833.33 pursuant to KRS 304.12-235 for legal expenses incurred in the underlying action.

Hamilton Mutual Insurance Company of Cincinnati Ohio, et al v. Harlon Barnett, Administrator of the Estate of Steven Ray Barnett, 2007-CA-000029-MR and 2007-CA-000064-MR (August 8, 2008).

On the first appeal to this Court, the panel agreed with the trial court that awards for both loss of interest and investment income and 12% interest under KRS 304.12-235 would amount to a double recovery. However, the Court noted,

[W]e would be deviating from clear legislative intent on how to adequately compensate an injured insured under KRS 304.12-235 if we endorsed loss of interest and investment income over the statutorily established 12% per annum. Therefore, we find that awarding loss of interest and investment income was an abuse of discretion, and we instruct the trial court to award 12% per annum from January 5, 1997, to the date of settlement, January 8, 1999, on the final settlement amount of \$587,500.00.

Following the Kentucky Supreme Court's denial of a motion for discretionary review, Hamilton Mutual paid Barnett \$150,196.96, which represented the amount of 12% interest on the final settlement amount of \$597,500

from January 5, 1997 to January 9, 1999. Barnett thereafter moved the trial court to additionally award 8% prejudgment interest on the \$150,196.96 from January 9, 1999. By order entered November 13, 2009, the trial court denied the motion on the grounds that the 12% interest award was not a liquidated amount and further that the panel of this Court on the prior appeal previously ruled that it was within the trial court's discretion not to award prejudgment interest after January 8, 1999. This appeal ensued.

On appeal, Barnett argues that the trial court erred in denying the 8% prejudgment interest because the 12% interest due under KRS 304.12-235 was liquidated on January 8, 1999, when Hamilton Mutual tendered payment in the wrongful death claim. Accordingly, Barnett contends that because the \$150,196.96 was fixed and certain, he was entitled to 8% prejudgment interest as a matter of right and the trial court did not have the discretion to deny such. We disagree.

At the outset, we agree with the trial court that the panel of this Court that rendered the 2008 decision considered the issue of prejudgment interest. Even in light of the decision to order the trial court to award Barnett 12% interest under KRS 304.12-235, the panel concluded, “[a]fter careful review, however, we decline to reverse the trial court’s decision to deny prejudgment interest after January 8, 1999, as it was within its sound discretion to do so.” Notwithstanding, even if we were to accept Barnett’s argument that the panel did not properly

consider prejudgment interest with respect to the \$150,196.96, we nevertheless conclude that Barnett's argument is without merit.

In *Nucor Corp. v. General Electric Co.*, 812 S.W.2d 136 (Ky. 1991), the Kentucky Supreme Court addressed the issue of prejudgment interest, at that time in a claim for property damages.

When the damages are "liquidated," prejudgment interest follows as a matter of course. Precisely when the amount involved qualifies as "liquidated" is not always clear, but in general "liquidated" means "[m]ade certain or fixed by agreement of parties or by operation of law." Black's Law Dictionary 930 (6th ed.1990). Common examples are a bill or note past due, an amount due on an open account, or an unpaid fixed contract price.

Id. at 141. In contrast, "unliquidated" damages are defined as " [d]amages which have not been determined or calculated, ... not yet reduced to a certainty in respect to amount." *Id.* at 141-42 (*Quoting Black's Law Dictionary* 1537 (6th ed.1990)). In the *Nucor Corp.* case, the parties agreed that the amount due as damages was unliquidated, rather than liquidated. In such cases, the Court determined that the trial court must use its discretion to weigh the equities in deciding whether an award of interest is appropriate. *Id.* at 143.

Our Supreme Court again addressed this issue in *3D Enterprises Contracting Corp. v. Louisville and Jefferson County Metropolitan Sewer District*, 174 S.W.3d 440, 450 (Ky. 2005), observing that "[t]he longstanding rule in this state is that prejudgment interest is awarded as a matter of right on a liquidated demand, and is a matter within the discretion of the trial court or jury on unliquidated demands." The *3D Enterprises* Court relied upon the definition of

“liquidated claims” in 22 Am.Jur.2d DAMAGES § 469 (2004), stating that such claims are “of such a nature that the amount is capable of ascertainment by mere computation, can be established with reasonable certainty, can be ascertained in accordance with fixed rules of evidence and known standards of value, or can be determined by reference to well-established market values.” *3D Enterprises*, 174 S.W.3d at 450. Importantly, however, the Court emphasized that “in determining if a claim is liquidated or unliquidated, one must look at the nature of the underlying claim, not the final award.” *Id.* In other words, the fact that it is ultimately determined that a party is owed damages “should not be construed as confirmation that the original claim was liquidated.” *Id.* See also *Wittmer v. State Farm Mutual Automobile Ins. Co.*, 864 S.W.2d 885, 891 (Ky. 1993) (Prejudgment “interest should not be required except for a claim which is for a liquidated amount, and which is not disputed in good faith.”)

To be certain, the amount of the claim herein was known in January 1999, when Hamilton Mutual and Barnett settled the underlying action for \$587,500. Although Barnett argues that the 12% interest subsequently awarded by the trial court was a liquidated sum, in that it was a simple mathematical calculation, the fact remains that he was not even entitled to the 12% interest until a jury in 2006 found that Hamilton Mutual had acted in bad faith. Until that point, Hamilton Mutual had vigorously defended their conduct and there was a genuine dispute as to whether it exercised good faith in the underlying wrongful death action.

Based upon our review of the controlling precedent, it appears that if damages are both undisputed and liquidated, prejudgment interest is payable as a matter of law. However, if the damages are either disputed or unliquidated, or both, then the decision as to whether prejudgment interest is due is left to the sound discretion of the trial court. *Nucor Corp*, 174 S.W.3d 440; *3D Enterprises Contracting Corp.*, 174 S.W.3d 440; *see also Owensboro Mercy Health System v. Payne*, 24 S.W.3d 675, 680 (Ky. App. 1999). Hamilton Mutual in good faith disputed its liability in the bad faith action, and it was not until almost seven years after the settlement was tendered that Hamilton Mutual's liability was established. As the Court in *3d Enterprises* stated, "in determining if a claim is liquidated or unliquidated, one must look at the nature of the underlying claim, not the final award." 174 S.W.3d at 450. We are of the opinion that the trial court herein properly characterized the 12% interest award as unliquidated, and thus acted well within its discretion in denying prejudgment interest.

The order of the Taylor Circuit Court is affirmed.

ALL CONCUR.

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