[Cite as *Munn v. Rudy Stapleton & Son, Inc.*, 2003-Ohio-5606.]

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

Eldon Munn, Et al.	Court of Appeals No. F-02-030
Appellees	Trial Court No. 01-CV-000057
v.	
Rudy Stapleton & Son, et al.	**DECISION AND JUDGMENT ENTRY**
Appellants	Decided: October 17, 2003

* * * * *

Thomas G. Ilstrup and Dennis P. Strong, for appellees.

Michael P. Murphy and Philip S. Heebsh, for appellants.

* * * * *

HANDWORK, P.J.

{¶1} This case is before the court on an appeal and cross-appeal from a judgment of the Fulton County Court of Common Pleas. The procedural facts relevant to the disposition of this cause are as follows.

{¶2} In November 2000, the home of plaintiffs-appellees/cross-appellants, Eldon and Eileen Munn, was destroyed by fire. The damage to the house and its contents exceeded $200,000. At the time of the fire, Eldon and Eileen had a homeowners insurance policy that provided less coverage than the replacement cost of their home.

{¶3} Eldon and Eileen obtained their homeowners insurance through an agency that included four different business entities. These were: (1) defendants-appellants/cross-appellees, Rudy Stapleton & Son, Inc. and Stapleton Insurance & Risk ("appellants"); and (2) Stapleton Insurance Group and Stapleton Holding Agency, Inc.

{¶4} After collecting the amount of insurance proceeds allowed under their homeowners policy, Eldon and Eileen filed, on March 19, 2001, a negligence suit naming all four entities as defendants. The complaint alleged that the defendants sold the plaintiffs a homeowners insurance policy that provided an inadequate amount of coverage for their home and its contents. Stapleton Insurance Group and Stapleton Holding Agency, Inc. filed a timely answer to the complaint

{¶5} On April 22, 2002, the Munns filed a motion for a default judgment against appellants. On April 24, 2002, appellants requested leave to file an answer instanter. They claimed that their failure to timely answer the complaint was due to "excusable neglect."

{¶6} On June 17, 2002, the trial court held a hearing on both motions. The common pleas judge entered his judgment on these motions on June 21, 2002. He denied the motion to file an answer instanter and granted the motion for a default judgment on the issue of liability only. The court ordered a jury trial on the question of damages. On August 12, 2002, appellants filed, pursuant to Civ.R. 60(B)(1), a motion for relief from judgment, which the trial court overruled. Eldon and Eileen subsequently dismissed, without prejudice, their complaint against Stapleton Insurance Group and Stapleton Holding Agency, Inc.

{¶7} Prior to trial, Eileen Munn died. Carolyn Munn, Executrix of the Estate of Eileen Munn, was substituted as a party plaintiff in this cause. The jury returned a verdict in the amount of $270,000. In its judgment entry on that verdict, the trial court offset the jury award with the amounts, $58,800 and $44,100, allegedly received in insurance proceeds and ordered that ten percent interest be paid on the remaining $167,000 from the date of judgment. The court denied appellees' motion for prejudgment interest.

{¶8} Appellants appeal, and they assert that the following errors occurred in the common pleas court:

{¶9} "The trial court erred in granting default judgment against Rudy Stapleton & Son, Inc. and Stapleton Insurance and Risk Management, Inc. because the facts supported a finding of excusable neglect."

{¶10} "The trial court erred in failing to issue the correct jury instructions regarding the proper measure of damages under Ohio Law."

{¶11} "The trial court erred in instructing on the issue of negligence and proximate cause."

{¶12} "The trial court erred in reducing the damage award by an incorrect amount based on the payments previously received by the appellees."

{¶13} In their first assignment of error, appellants argue the merits of their Civ.R. 60(B)(1) motion for relief from judgment filed after the grant of the default judgment on liability, but before the trial on damages.

{¶14} Civ.R. 60(B)(1) provides, in material part: "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a *final* judgment, order, or proceeding ***." (Emphasis added.) A default judgment that determines the issue of liability but continues the matter for a determination of damages is not a final judgment. *Prather v. American Medical Response, Inc.*, 2002 Ohio 5261 at ¶ 10, citing *Schelich v. Theatre Effects, Inc.* (1996), 111 Ohio App.3d 271, 272-273. Therefore, because the June 21, 2002 judgment was an interlocutory order, the trial court lacked the authority to grant relief pursuant to Civ.R. 60(B). Id. Accordingly, appellants' first assignment of error is found not well-taken.

{¶15} In their second assignment of error, appellants initially contend that the trial court erred in failing to give the jury a requested instruction on damages. This instruction, as found in *Minor v. Allstate* (1996), 111 Ohio App.3d 16, 21, reads:

{¶16} "An insurance agent who, with a view to compensation, undertakes to procure insurance for another is obligated to do so. The agent is liable if, as a result of his or her negligent failure to perform that obligation, the other party to the contract suffers a loss because of a want of the insurance coverage contemplated by the agent's undertaking. See, Couch On Insurance, 3d, Section 46:46. Such a failure has been found where the type of coverage or the amount procured was less than that desired by the insured. *Conestoga Chemical Corp. v. F.H. Simonton, Inc.* (Del. 1970), 269 A..2d 237. In that event, the extent of the agent's liability is the amount the insured would have received from the insurer had the coverage been placed. Id."

{¶17} Appellants requested this instruction in writing and, in addition, verbally at the close of the trial on damages. The common pleas court declined to employ this instruction, noted appellants' objection, and provided the jury with the following instruction:

{¶18} "If you find that the Defendants' negligence proximately caused Plaintiffs to suffer damages, then you will determine from the preponderance of the evidence an amount of money that will reasonably compensate the Plaintiffs for the actual injury and damages proximately caused by the negligence of the Defendants unreduced by any payments already made. In determining this amount you will consider the nature and extent of the losses incurred by the Plaintiffs, including the Plaintiffs' loss and enjoyment of their home. *From these you will determine what sum will compensate the Plaintiffs for their losses to date.* If you find that Defendants' negligence did proximately cause damage then the Plaintiffs' damages as a proximate result of the Defendants' negligence is that amount of money that it will take to repair the Plaintiff' [sic] home or the amount necessary to replace the Plaintiffs' home, whichever is lessor [sic]. Also, Plaintiffs' damages is [sic] that amount of money that it will take to—will take to replace the contents of Plaintiffs' home. *** *In the event that you find that Defendants' negligence prevented or made it impossible for the Plaintiffs to repair the home, then the measure of damages is the cost to repair or rebuild the home today.*" (Emphasis added.)

{¶19} To prove reversible error in the trial court's failure to give the requested jury instruction, appellants must first show that the trial court's refusal to give a proposed jury instruction was an abuse of discretion. *Jaworowski v. Med. Radiation Consultants*

(1991), 71 Ohio App.3d 320, 327; that is, that the refusal was arbitrary, unreasonable, or unconscionable, *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Generally, the court should give a proposed jury instruction if it is an accurate statement of the law applicable to the facts presented at trial and reasonable minds might reach the conclusion sought by the instruction. *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 591. Second, appellants must demonstrate that they were prejudiced by the court's refusal to give the proposed instruction. *Jaworowski v. Med. Radiation Consultants* (1991), 71 Ohio App.3d at 327.

{¶20} Appellants argue that the jury instruction set forth in *Minor* provides the proper measure of damages for an insurance agent's negligence in providing insufficient coverage to his or her client because the damages must be calculated at the time of the loss, in this case, the year 2000[1]. In contrast, the trial court's instruction clearly states the damages are to be calculated at the time of the trial, that is, in the year 2002. Thus, it appears that the trial court's instruction on damages is facially defective and that the trial judge arbitrarily rejected the correct instruction, as proposed by appellants. Nonetheless, we conclude that appellants were not prejudiced by the trial court's error.

{¶21} Eldon Munn's testimony reveals that the $150, 286.77 replacement value for the loss of personal property was prepared "close to the time of the loss" and "as quickly as possible." The exhibit supporting this value was entered into evidence without

[1] This concept is reinforced in Couch on Insurance (3d Ed. 1995) Section 46:74, which provides: “Damages are measured as of the date of the breach (the amount that the claimant would have received had the policy been in effect at the time of loss), even though the value of the property insured may have increased in the interim between the breach and the time of trial."

objection. While Charles Pymale, Sr., a member of a general contracting firm that specializes in insurance repair work, estimated that the replacement cost of appellees' home in 2002 is $250,397, he also stated that in June 2000 that estimate would be five percent less. After deducting five percent of the 2002 figure, we reach an estimate of approximately $237,800 in the year 2000. The jury awarded appellees $270,000, an amount less than the total replacement value for both personal and real property estimated for the year 2000. Accordingly, we conclude that the trial court's failure to include the instruction requested by appellants was harmless error that did not prejudice their cause. Civ.R. 61; *Nelson v. Ford Motor Co.* (2001), 145 Ohio App.3d 58, 67.

{¶22} Appellants also argue that the trial court erred in failing to provide an instruction informing the jury of a clause in appellees' homeowners insurance policy that limited

{¶23} damages. This provision in the contract between appellees and their insurer provides that the insurer will pay no more than "actual cash value of the damage until actual repair or replacement is complete." Although appellants timely requested the giving of this damages instruction prior to jury deliberations, see Civ.R. 51(A), we find that the trial court correctly determined that it was not applicable to the case before it.

{¶24} Specifically, in an insurance context, the insured may bring a negligence action against an insurance agent who negligently fails to procure the amount of coverage desired by the insured. *Minor v. Allstate, 111 Ohio App.3d* at 21. It is undisputed that the case under consideration was such a negligence action—not an action on a contract between the insured and his or her insurer. Consequently, the damages provision in the

contract between appellees and their insurer, Indiana Insurance, is not material to this cause.

{¶25} Appellants, citing *McGlone v. Midwestern Group* (1991), 61 Ohio St.3d 113, further claim that the lower court erred in not instructing the jury that the proper measure of damages in the instant case is the amount of coverage set forth in the policy. While appellants never asked the trial court to give the jury this damages instruction or objected to the trial court's failure to give the disputed instruction at the appropriate time, they did raise this issue in a motion in limine. Even though we are of the opinion that appellants waived the right to claim this alleged failure as error on appeal, see Civ.R. 51(A) and *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 121, we note that the rule set forth in *McGlone* concerning R.C. 3929.25 is applicable in a contract dispute between an insured and his or her insured. It is not applicable in a negligence action brought by a client against his insurance agent. For all of the foregoing reasons, appellants' second assignment of error is found not well-taken.

{¶26} Appellants' third assignment of error challenges the jury instruction given by the trial court on the elements of negligence. Appellants argue that because a default judgment was entered on appellees' claim of negligence, the trial court's instruction was "unnecessary, prejudicial and may have led to a confusion of the issues" before the jury.

{¶27} A careful reading of the record in this case discloses that appellants failed to object to the trial court's instructions on negligence at any time before the jury retired to deliberate. Accordingly, appellants waived error, if any, in the giving of those instructions. Civ.R. 51(A). Furthermore, upon an examination of the jury instructions as

a whole, we conclude that the negligence instruction did not mislead the jury in a matter materially affecting the appellants' substantial rights. *Kokitka v. Ford Motor Co.* (1995), 73 Ohio St.3d 89, 93. Therefore, the common pleas court did not abuse its discretion in the giving of this instruction, see *State v. Martens* (1993), 90 Ohio App.3d 338, 343. Appellants' third assignment of error is found not well-taken.

{¶28} In their fourth and final assignment of error, appellants maintain the trial court erred in calculating the amount of setoff. The only admissible evidence of the amounts received by appellees from the insurance company are $58,800 for damage to their real property and $44,100 for damage to their personal property. Appellants, however, attached unauthenticated documents to their motion for clarification of the trial court's judgment entry awarding appellees $167,100 ($270,000-$58,800-$44,100), plus interest and costs. These documents purportedly demonstrate other payments to appellees for damages stemming from the fire. Unauthenticated documents are not admissible evidence. See Evid.R. 901(A). Consequently, the trial court did not err in refusing to consider the attachments when it determined setoff, and appellants' fourth assignment of error is found not well-taken.

{¶29} Appellees raise a single cross-assignment of error that reads:

{¶30} "The trial court erred to the substantial prejudice of Plaintiff [sic]/appellees by failing to award them prejudgment interest."

{¶31} Appellees filed their motion for prejudgment interest shortly after the jury rendered its verdict. Their motion was brought pursuant to R.C. 1343.03(C), which provides, in pertinent part:

{¶32} "Interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct and not settled by agreement of the parties, shall be computed from the date the cause of action accrued to the date on which the money is paid, if, upon motion of any party to the action, the court determines * * * 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."

{¶33} "* * * [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 v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 659. A trial court's grant or denial of a motion for prejudgment interest will be upheld absent an abuse of discretion. *Kalain v. Smith* (1986), 25 Ohio St. 3d 157, 159.

{¶34} As applied here, appellants did not participate in this case until they became aware of the fact that appellees had filed for a default judgment against them. While there is no evidence in the record of this cause to show that appellants made any offer to settle appellees' claim after the default judgment was entered, there is also no evidence that appellees made a reasonable demand to settle that was substantiated by facts and figures.

For this reason, we find that the trial court did not abuse its discretion in denying appellees' motion for prejudgment interest. Appellees' cross-assignment of error is found not well-taken.

{¶35} On consideration whereof, this court finds that substantial justice was done the parties complaining, and the judgment of the Fulton County Court of Common Pleas is affirmed. Appellants and appellees are ordered to pay the costs of this appeal in equal shares.

JUDGMENT AFFIRMED.

Peter M. Handwork, P.J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, J. _____
CONCUR.
JUDGE