UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

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| MARY B. BRUMFIELD, *et al.*, | ) | CASE NO. 1:05 CV 847 |
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| Plaintiffs, | ) | JUDGE DONALD C. NUGENT |
| v. | ) | |
| | ) | MEMORANDUM OPINION |
| TYSON FOODS, INC., *et al.*, | ) | AND ORDER |
| | ) | |
| Defendants. | ) | |

This matter is before the Court on Plaintiff's Motion for Pre-Judgment Interest (ECF #174) on the combined jury verdicts that totaled $7,028,687. The period encompassed in this request is from June 12, 2004 through December 14, 2006. For the reasons that follow, Plaintiff's Motion for Pre-Judgment Interest is granted.

## FACTUAL AND PROCEDURAL BACKGROUND

The accident at the center of this case occurred on May 29, 2004. A tractor-trailer driven by Tyson employee Dale Friesen, in the course of his employment with Tyson, left its lane of traffic and hit the vehicle driven by Daniel Brumfield head on. The tractor-trailer was traveling in excess of 60 miles per hour on a stretch or road where the posted speed limit was 55 miles per hour. Mr. Friesen did not touch the brakes of the tractor-trailer until after Daniel Brumfield was hit. Daniel Brumfield was killed on impact. Given these facts, it was apparent from the beginning that liability on the part of Mr. Friesen and Tyson could not reasonably be argued.

On June 9, 2004, Plaintiff's counsel gave written notice of the Plaintiff's claims via certified mail to Susan Luhinec of Custard Insurance Adjusters which was handling the claim on

behalf of Tyson and Dale Friesen.

Counsel for Tyson and Friesen advised Plaintiff's counsel by letter on August 20, 2004 that they were interested in an attempt to resolve the issues related to Daniel Brumfield's death with the Brumfield family. Plaintiff's counsel responded to this and indicated that the Brumfield family needed to have some of their questions answered regarding the accident and would therefore need some discovery before being able to adequately address all necessary issues raised by Daniel's death.

The issues went unresolved and the Plaintiff filed the instant Complaint on March 31, 2005, which included in the prayer a claim for prejudgment interest.

On December 14, 2005 Plaintiff made a written demand to settle their claims in the amount of $10,000,000. The demand was supported by an extensive bound volume of information supporting the demand. Defense counsel replied on January 12, 2006, suggesting mediation. No counter-offer was made at that time.

The parties agreed to attempt to resolve this case by going to mediation. At Defendants' request, in September of 2006 Plaintiffs agreed to lower their demand to $8,000,000. Defendants' first offer, made at the September 29, 2006 mediation, was $200,000. By the end of that mediation, the Defendants' offer was increased to $450,000. Plaintiffs lowered their demand from $8,000,000 to $7,650,000. At the mediation, Defendants told counsel for Plaintiff that they would never settle for a figure with a "3" in front of it. Thus, the mediation was unsuccessful.

On October 13, 2006, Plaintiffs reduced their demand to $3,999,999.99, which was within the $4,000,000 Tyson self-insured retention/deductible. On October 19, 2006,

Defendants offered $1,300,000 with certain strings attached. Specifically, the offer was contingent upon the Brumfield Family reviewing proposals for both a portion of the settlement proceeds being paid on a structured basis as well as a portion being paid up front. That offer was rejected by Plaintiffs. Plaintiffs have consistently rejected any settlement proposal which involved structuring any portion of the settlement throughout this entire experience, including up to this day.

Defendants requested the Court organize and participate in a final settlement attempt. The Court agreed and conducted the final settlement conference on November 27, 2006 where all counsel and all parties participated. Defendants reiterated their $1,300,000 offer and Plaintiffs reiterated their demand of $3,999,999. During that conference Defendants increased their offer to $1,600,000. Defendants' counsel indicated to the Court that $1,600,000 was the limit of his authority. Again, their offer was rejected by Plaintiff because Plaintiff insisted such offer was far too low when the totality of the facts in this case were honestly analyzed.

The final settlement conference conducted by the Court was unsuccessful and trial remained scheduled to commence on December 6, 2006. On November 30, 2006, Defendants offered $2,400,000. In a follow up call on or about December 1, 2006, Plaintiff's counsel, Ron Goldman, indicated to defense counsel Ken Abarno that Tyson's offer must be in the high three million dollar range to settle the case. No further settlement negotiations took place after that call.

Trial commenced on December 6, 2006 and the Jury returned its verdict awarding compensatory damages of $6,000,000 on Plaintiff's wrongful death claim; $6,687.00 for funeral and burial expenses; and, $1,000,000 on Plaintiff's survivorship claim for negligent infliction of

serious emotional distress as well as $22,000 for property damage. In sum, the verdicts totaled $7,028,687.

After Judgment was entered in accordance with the verdicts Defendants moved for a new trial and/or remittitur of the verdicts and for judgment as a matter of on Plaintiff's survivorship claim. Plaintiff filed the instant motion for prejudgement interest. Defendants responded to this motion and the Court held an oral hearing on the motion on July 12, 2007. Subsequent to the hearing, both parties submitted additional filings. The motion is now ready for decision.

## DISCUSSION[1]

The Ohio Revised Code provides a trial court with the authority to award prejudgment interest if the prevailing party had made a good faith effort to settle the case, but the losing party did not. Specifically O.R.C§1343.03 provides that a prevailing party 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 . . . . "

This statute "was enacted to promote settlement efforts, to prevent parties who have engaged in tortious conduct from frivolously delaying the ultimate resolution of cases, and to encourage good faith efforts to settle controversies outside a trial setting." *Kalain v. Smith* , 496 N.E.2d 572, 574(Ohio 1986). Prejudgment interest is not a punishment"but rather, it acts as compensation and serves ultimately to make the aggrieved party whole" by compensating the party for the lapse of time between the accrual of the claim and the final judgment. *Heinz v. Steffen* 678 N.E.2d 264, 273(Ohio

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[1] The facts stated here have been drawn from the briefs and affidavits filed by the parties, as well as from the proceedings before this Court.

1996), quoting *Royal Elec. Constr. Corp. V. Ohio State Univ.*, 652 N.E.2d 687, 692(Ohio 1995).

The Ohio Supreme Court has stated that a party is considered to have made a good faith effort to settle if it has done the following:

(1) fully cooperated in discovery proceedings;

(2) rationally evaluated its 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 another party.

*Id.* at syllabus. A party may have failed to make a good faith settlement offer even though he or she has not acted in bad faith during the litigation proceedings. *Id.* at 574. Prejudgment interest, if awarded, is part of the judgment and is included along with the underlying damage award in the calculation of post-judgment interest. *Nakoff v. Fairview Gen. Hosp.*, 694 N.E.2d 107, 108 (Ohio App.8 Dist. 1997).

In this case, Plaintiff contends that Defendant delayed discovery proceedings by requiring Plaintiff to move to compel certain information; by not responding in good faith to settlement offers; and, by failing to rationally evaluate the risks and potential liability or by failing to make offers based upon the party's true evaluation of the risks and potential liability.

Plaintiff also asserts that Defendant failed to cooperate during discovery because Plaintiff was forced to file a motion to compel Defendants to produce driver's logs and collateral documents for the six-month period prior to the crash and certain global positioning satellite information. The Court eventually granted Plaintiff's motion to compel and denied Defendants' motion for a protective order for the discovery at issue. In addition, Plaintiff complains that Defendants failed to produce print outs of electronic control module data for more than a year

after it was requested in Plaintiff's first request for production of documents, despite the fact that Defendants' expert had the information six days after the collision and Defendants' counsel had the information before he received Plaintiff's first request for production of documents. Finally, Plaintiff contends that Defendants did not produce the documents identified as Defendants' Trial Exhibit N. which were clearly within the parameters of Plaintiff's discovery requests until the day before trial.

Defendants counter that they had legitimate objections to Plaintiff's request for the GPS information which could only be resolved by the Court in a motion to compel. They do not explain why it took so long to produce the ECM data and state that they did not identify the documents in Defendants' Trial Exhibit N until shortly before trial and that they produced them forthwith. Ultimately, the documents were never used at trial because the direct claims against Tyson that the documents were relevant to were dismissed by the Court at trial.

Defendants assert that they rationally evaluated their risks and potential liability because they never disputed that Mr. Friesen was negligent or that he was in the course and scope of his employment and that Tyson was responsible for both his conduct and the damages flowing from Daniel Brumfield's wrongful death. The Court has not seen Defendants' acceptance of liability so clearly. Defendants denied liability in their Answer, admitting only that Mr. Friesen was acting within the scope of his employment at the time of the collision. Defendants did not actually stipulate to liability for the wrongful death until after the close of Plaintiff's case, although Defense counsel admitted Mr. Friesen's negligence and the fact that he was working within the scope of his employment with Tyson at the time of the collision during opening statement. Tyson denied direct liability on the wrongful death claim and any liability on the

survivorship claim of negligent infliction of emotional distress or for punitive damages. While the evidence has always been clear that the collision was caused by Mr. Friesen's negligence, Tyson would not expressly acknowledge that fact. The Defendants put Plaintiff through the effort to prepare for and to present Plaintiff's case at trial. In any event, it appears that Tyson's evaluation of the risks was weighted to the best case scenario for Tyson and without a good faith analysis of its potential risks.

Moving on to the third and fourth factors, it appears that Tyson's initial offers of settlement were well under a rational evaluation of what the case was worth and well under the analysis of its own counsel. The first low ball offer of $200,000 was made twenty nine months after the collision and nine months after Plaintiff made her written settlement demand for $10,000,000. The parties went through the time and expense of mediation where Defendants merely raised their offer to $450,000. Trying to move the pace of negotiations along, Plaintiff made a final demand of $3,999,999.99, which was within Tyson's self insurance limit. Tyson responded with a $1,300,000 offer conditioned upon acceptance of a structured settlement for some of the settlement; raised its offer to $1,600,000 at the final settlement conference held by the Court at Defendants' request one week prior to trial; and, finally made an offer of $2,400,000 the week before trial began after Plaintiff's trial preparations were complete. The settlement negotiations seemed to be insincere by Defendants and never appeared to be serious on the part of Defendants until the eve of trial.

While the Defense may have had some success in other cases in failing to honestly evaluate its risks in an effort to engage in settlement negotiations until right before trial in the hope that a Plaintiff would not be prepared for trial and would be forced to accept a lower offer

as a result, this strategy is what Ohio Rev. Code § 1343.03 is designed to prevent. Plaintiff invested the time, money and effort required to prepare this case and they presented liability and extensive damage information in a timely manner. Plaintiff made a good faith effort to settle this case in a reasonable and common sense manner. On the other hand, the Defense did not make a good faith effort to evaluate the liability and damages that were presented by this accident. Their failure to admit liability at the outset along with their unrealistic evaluation of the risk of significant damages manifests a lack of good faith in the Defense evaluation of this case. Their initial offers of settlement at mediation were so bereft of honest analysis or true evaluation that it would be logical for Plaintiff to conclude that a trial would be necessary as the offer demonstrated that Defendants had no serious intention to fairly settle the case.

The additional defense offers to settle appear to have been motivated by the certainty of the Plaintiff's willingness to present a powerful case at trial rather than the Defense actually making a fair and honest evaluation of their risks and the potential damage award that was probable in this case. This is not good faith.

By the Defense's own admission to this Court, the Defense understood it was responsible for Daniel's death and owed the estate a sum of money in compensation. Defendants' first offer of settlement on September 29, 2006, about two months before trial, of $200,000 was $800,000 less than Defense Counsel's admitted "best" case scenario evaluation made on January 12, 2006. That admission alone is sufficient for the Court to find a failure to make a good faith offer of settlement to Plaintiff in a timely manner.

## CONCLUSION

After reviewing the factors set forth by the Supreme Court of Ohio along with the

evidence and testimony presented to the Court with respect to Plaintiff's Motion for Pre-Judgement Interest, the Court finds that Plaintiff's motion is well taken and that she is entitled to pre-judgment interest to make the Plaintiff whole by compensating Plaintiff for the lapse of time between the accrual of the claims and the final judgment. Accordingly, Plaintiff's Motion for Pre-Judgement Interest (ECF #174) is granted and pre-judgment interest is granted on the amount of $7.028,687 at the statutory rate of six percent (6%) per annum, from June 12, 2004 through December 14, 2006.

IT IS SO ORDERED.

Donald C. Nugent
Judge Donald C. Nugent
UNITED STATES DISTRICT COURT

DATED: October 10, 2007