WSHB Colorado Case Update

The Colorado Supreme Court Rules on Subrogation, Collateral Source Rule, Prejudgment Interest and Statutory Offers All in One Case!

HOLDING

On February 28, 2011, the Colorado Supreme Court issued a decision in the case of *Ferrellgas, Inc. v. Ellen Yeiser* which helped define the law in a number of areas. First, the case holds that the law of subrogation trumps the collateral source rule in determining if a defendant will get an offset for a subrogation settlement. Second, prejudgment interest is assumed to be settled in a subrogation settlement unless expressly excluded and the date that interest begins to accrue depends on the measure of damages - for diminution in value, interest begins to accrue as of the date that the plaintiff suffered injury to his property and for cost of repair or replacement damages, interest does not begin to accrue until the plaintiff actually spends money on the repair or replacement. Finally, a statutory offer that expressly includes costs and interest has to be compared to a judgment once costs and interest are added in to the judgment. Moreover, the statutory offer must be compared to the "final" judgment - i.e. after any offsets are taken into consideration.

WHY THIS CASE IS IMPORTANT

This case has something for everyone. It helps to define the law of subrogation for insurers and insureds. It helps define the collateral source rule for attorneys. And, it helps judges to properly calculate prejudgment interest and interpret whether the litigants recovered more than the amount in a statutory offer of settlement.

FACTS OF THE CASE

Plaintiff, Ellen Yeiser, contracted with Ferrellgas, Inc. to deliver propane to her vacation house in the Rocky Mountains of Colorado. Ferrellgas failed to timely deliver the propane and, as a result, the pipes in the home froze and burst, causing extensive damage. Ms. Yeiser had a homeowners insurance policy with Farmers which covered the claim, in the amount of $212,071.94. Farmers brought a subrogation action against Ferrellgas for the entire amount. Ferrellgas settled the claim with Farmers by paying $172,657.55.

Ms. Yeiser subsequently sued Ferrellgas for the total amount of the claim. In preparation for trial, Ms. Yeiser filed a motion in limine to preclude Ferrellgas from introducing evidence of the payment by or to Farmers on the grounds that the collateral source rule precluded such evidence. The trial court denied the motion, but ordered the parties not to introduce any evidence of, or otherwise mention, Farmers' payment or the Farmers/Ferrellgas settlement nonetheless. Instead, the judge indicated he would perform a post-verdict setoff (although the court did not make it clear which amount would be used as a setoff, the $212,071.94 or the $172,657.55).

Notwithstanding this Order, at trial, the parties repeatedly discussed details of the Farmers payment and the Farmers/Ferrellgas settlement and discussed how the jury should calculate the setoff. But the

jury was ultimately instructed that they should not reduce the amount of damages by the amounts paid to or by Farmers.

The jury returned a verdict of $314,323.21 in favor of Ms. Yeiser. Post-verdict, Ferrellgas sought to offset the entire $212,071.94 paid by Farmers to Ms. Yeiser. Ms. Yeiser argued that, if anything, Ferrellgas was only entitled to offset the $172,657.55 that Ferrellgas paid to Farmers. The trial court ordered a setoff of $212,071.94.

Because the net amount of the award (after the setoff) was less than Ferrellgas' statutory offer of $197,000, the court awarded Ferrellgas $30,841.62 in costs.

Prejudgment interest was added on the full verdict amount of $314,323.21 for the 366 day period between when Ms. Yeiser's house was damaged and when Ferrellgas paid Farmers pursuant to the subrogation settlement. Then the court set off the $212,071.94 that Farmers paid Ms. Yeiser. Next the trial court added interest on the remaining amount for the several years that had elapsed between Ferrellgas paying Farmers and the court's order of costs. Finally, the court deducted Ferrellgas' $30,841.62 cost award. Interest was denied on the cost award. Post-judgment interest was also denied.

Ms. Yeiser appealed the trial court's ruling on the amount of the setoff, etc. The Court of Appeals held that Ferrellgas was entitled to a setoff of only the $172,657.55 actually paid by Ferrellgas; that Ferrellgas was not entitled to costs since the court should have compared the statutory offer with the full verdict, not the verdict after the set-off; and that the trial court had correctly calculated the pre-judgment interest, except for the fact that the wrong offset amount was used.

Ferrellgas appealed the rulings to the Colorado Supreme Court. The Colorado Supreme Court ruled that the trial court properly set off the entire $212,071.94 that Farmers paid to Ms. Yeiser, but that the trial court erred by failing to set off the $212,071.94 prior to calculating the pre-judgment interest award. Finally, the Colorado Supreme Court remanded on the issue of who was entitled to costs as a result of the statutory offer.

DISCUSSION

With regard to the amount of the setoff, the Colorado Supreme Court reasoned that the collateral source doctrine (which prohibits the jury from knowing that Plaintiff's damages were, or will be, compensated from some source other than the damages awarded against the Defendant), did not govern, but rather the law of subrogation governed. Nonetheless, the Court found that an exception to the collateral source rule applied - i.e. that sums paid by the defendant to avoid liability at trial are not a collateral source. The Court found that the settlement with Farmers was Ferrellgas' way of avoiding some liability at trial.

In short, the Court held that Farmers' subrogation rights allowed Farmers to stand in Ms. Yeiser's shoes (despite the fact that this was not an action by Farmers, but rather by Ms. Yeiser). On the issue of the proper amount of the setoff, Farmers' settlement with Ferrellgas extinguished Ms. Yeiser's right to seek the full $212,071.94 from Ferrellgas.

The Court stated: "When an insurer reimburses a victim for damages pursuant to a claim under the victim's insurance policy, the insurer enjoys a right to subrogation, under which he can stand in the victim's shoes and collect the reimbursed amount from the party responsible for the damages...The right can arise pursuant to an express provision in the insurance policy --

a 'conventional' subrogation right -- or under principals of equity -- an 'equitable' subrogation right...Regardless, once the subrogated insurer has resolved the claim, either through litigation or settlement, the insured is no longer entitled to recover the reimbursed portion of the loss from the responsible party." The court went on to say that "once Ferrellgas settled Farmers' subrogation interest, Yeiser no longer had any claim to the $212,071.94 amount, regardless of the nature of Farmers's subrogation interest." The court was not persuaded by Ms. Yeiser's point that she was not a party to the settlement and therefore should not be prejudiced by Farmers' decision to settle the subrogation claim for less than the full value.

On the issue of pre-judgment interest, the court stated that the obligation on the part of Ferrellgas to pay interest on the $212,071.94 was extinguished by the settlement with Farmers. Thus, when calculating the interest, the entire $212,071.94 should have immediately been deducted from the judgment prior to calculating any interest.

As for the date that the interest began to accrue, the Court went on to state that the date depends on the measure of damages. When damage is measured by diminution in value, interest begins to accrue as of the date that the plaintiff suffered injury to his property. But, when damage is measured by cost of repair or replacement, interest does not begin to accrue until the plaintiff actually spends money on the repair or replacement. In this case, both measures were implicated because there was cost of repair and diminution in value through the loss of use and rental income. However, the jury only returned a general verdict that did not reflect an apportionment of damages between the reasonable cost of repair and diminution in value. Thus, the matter was remanded to recalculate pre-judgment interest.

On the issue of the cost award, Ferrellgas timely offered to settle Ms. Yeiser's claims for $197,000 "inclusive of costs and interest." Since costs and interest were expressly included, the Court ruled that it is "only fair" for the trial court to consider costs and interest when determining whether the judgment exceeded the statutory offer. However, the Court ruled that a post-verdict setoff of a settled subrogation claim "fundamentally differs from litigation costs with respect to the settlement statute." The court ruled that a setoff is "inherently and impliedly a part of the jury's determination of damages, mechanically excluded by legal artifice from the jury's determination and imposed after the verdict only to ensure that the jury's factual determination is an accurate measure of damages untainted by confusion over the legal propriety of the setoff. To exclude such a setoff from the 'final judgment' for purposes of the settlement statute would effectively exclude part of the verdict itself." Thus, the court ruled that the settlement offer should have been compared to the verdict after the setoff had been taken. The Court ruled that, on remand, the trial could should compare Ferrellgas' settlement offer of $197,000 with the $313,323.21 verdict, minus the $212,071.94 amount, plus pre-judgment interest incurred prior to, but not after, the settlement offer.

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