

IN THE SUPREME COURT OF TEXAS

No. 02-0701

CARL J. BATTAGLIA, M.D., P.A., AND TOMMY A. POLK, M.D., P.A.,
PETITIONERS,

v.

LISA JONES ALEXANDER, INDIVIDUALLY AND AS NATURAL REPRESENTATIVE OF
THE ESTATE OF MARK G. ALEXANDER, DECEASED, JAMES ALEXANDER,
INDIVIDUALLY, AND RUBY ALEXANDER, INDIVIDUALLY, RESPONDENTS

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE FOURTEENTH DISTRICT OF TEXAS

Argued October 15, 2003

JUSTICE BRISTER, joined by CHIEF JUSTICE JEFFERSON, and by JUSTICE O'NEILL, concurring
in part and dissenting in part.

I join fully in the Court's opinion except that relating to part IV. The question there is
whether to calculate prejudgment interest under former article 4590i, section 16.02,¹ before or after
applying settlement credits. Because the statute unambiguously requires the former, we should
affirm; because the Court construes the statute otherwise, I respectfully dissent.

¹ Act of May 18, 1995, 74th Leg., R.S., ch. 140, § 3, 1995 Tex. Gen. Laws 985, 988-89 (formerly codified at
TEX. REV. CIV. STAT. ANN. art. 4590i, § 16.02), *amended by* Act of June 20, 1997, 75th Leg., R.S., ch. 1396, § 45, 1997
Tex. Gen. Laws 5249, *repealed by* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.09, 2003 Tex. Gen. Laws 864,
884.

Part (a) of former section 16.02 says prejudgment interest “may not be charged” on claims settled within 180 days of notice of claim; part (b) says that in all other cases “the judgment must include prejudgment interest on past damages found by the trier of fact.”² The settlement here occurred after the 180-day window, so part (b) governs.

That part mandates “prejudgment interest on past damages found by the trier of fact,” and there is nothing ambiguous about that. It cannot include settlement credits, as jurors are not informed of settlements and make no such credits. Three courts of appeals have so construed this statute,³ and we have so construed the same language in a different statute only two years ago in *Roberts v. Williamson* — that “damages found by the trier of fact” means the jury’s verdict *before* settlement credits.⁴ Unless the statute is unconstitutional (which no one suggests), it is irrelevant that we think this might be too much or too little, or that we would calculate interest some better way.

The defendants attempt to create an ambiguity by arguing that (1) section 16.02(d)(1) defines “past damages” as damages “awarded” to the claimant for pre-judgment losses,⁵ (2) only the final judgment makes an “award,” and thus (3) interest should be calculated on the final judgment after deducting settlement credits rather than on the jury verdict.

² Act of May 18, 1995, 74th Leg., R.S., ch. 140, § 3, 1995 Tex. Gen. Laws 985, 988-89 (repealed 2003).

³ See *Cresthaven Nursing Residence v. Freeman*, 134 S.W.3d 214, 222 (Tex. App.—Amarillo 2003, no pet.); *Battaglia v. Alexander*, 93 S.W.3d 132, 147-148 (Tex. App.—Houston [14th Dist.] 2003, pet. granted); *Samples v. Graham*, 76 S.W.3d 615, 619-20 (Tex. App.—Corpus Christi 2002, no pet.).

⁴ *Roberts v. Williamson*, 111 S.W.3d 113, 122-23 (Tex. 2003) (construing proportionate responsibility statute’s “damages found by the trier of fact” to mean jury verdict before reduction by settlement credits or claimant’s responsibility).

⁵ See Act of May 18, 1995, 74th Leg., R.S., ch. 140, § 3, 1995 Tex. Gen. Laws 985, 988-89 (repealed 2003).

But the second step of this argument is flawed, because the Legislature sometimes uses “award” to refer to a jury’s verdict.⁶ Thus, an “award” can mean *either* the jury verdict *or* the final judgment, but “damages found by the trier of fact” can mean *only* the former. Construing this statute to harmonize all its parts,⁷ we must construe the ambiguous term (“award”) to mean the same as the unambiguous one (the verdict).

The Court looks instead to how we have treated interest in other cases, contexts, and statutes. But our cases on interest are all over the map; there has never been a single rule for calculating prejudgment interest. The Court overrules some of those that get in the way, because either the briefing was “scant” or we did not “focus” on the issue. This much recalibrating shows that in fact there is no standard way to calculate interest.

Nor is this statute completely silent (as the Court says) about how settlement credits are to be taken into account. Section 16.02(a) provides a 180-day window during which claims can be settled and “prejudgment interest may not be charged.” Section 16.02(b) provides that if settlement occurs thereafter, prejudgment interest “must” be charged. Interest can be charged in cases of late settlements but not early ones only if early settlements are deducted before calculating prejudgment interest, while those occurring thereafter are not.⁸

⁶ See TEX. CIV. PRAC. & REM. CODE § 71.010(a) (“The *jury may award damages* in an amount proportionate to the injury resulting from the death.”) (emphasis added); TEX. OCC. CODE § 154.006(b)(16) (providing that physician profiles must include description of medical malpractice judgments in which “a *jury awarded monetary damages* to the claimant”) (emphasis added).

⁷ F.F.P. Operating Partners, L.P. v. Duenez, ___ S.W.3d ___, ___ (Tex. 2004).

⁸ The Court says section 16.02 is a “carrot-stick” that applies only to a defendant who settles. ___ S.W.3d at ___. But settling defendants do not pay interest; they pay a settlement amount, and neither this statute nor any other tacks on an interest component to settlement agreements. Further, the section actually says that prejudgment interest may not

The Court holds that all settlements must be deducted before calculating prejudgment interest, regardless of when those settlements occur. As a result, it makes no difference whether the settlement was before or after the 180-day window. But the Legislature created a window, not a hole; after 180 days, something has to close.⁹

It is true that the Legislature's creation leads to somewhat incongruous results the earlier a settlement takes place. If a settlement occurs years after the original occurrence, a claimant certainly has lost the use of money in the interim. But if a settlement occurs early on, that is not the case. Nevertheless, except for settlements within the first 180 days, section 16.02 makes no exceptions. This may be rather rough justice, but it is the only way to give effect to the statute's "window."

"No human document has ever been written or can be written that will meet every conceivable contingency."¹⁰ In reality, medical expenses may be incurred, pain suffered, and wages lost throughout the entire pretrial period. Perhaps a "pure" calculation of prejudgment interest would measure interest at daily rates on each dollar of damage from the day it was incurred until the day it was retired. Compared to that, the Court's assumption that all past damages occur on the day of injury is rather rough justice, too. The Legislature is not required to draft perfect statutes with logical

be charged "*with respect* to a defendant" who settles before the 181st day; interest charged with respect to a settling defendant certainly can be assessed against nonsettling ones.

⁹ The Court also says this construction would mean calculating interest without any adjustment for comparative responsibility. Of course, comparative responsibility — unlike settlement credits — *is* a matter found by the trier-of-fact; but the absence of any such finding in this case would make addressing it here advisory.

¹⁰ *Cramer v. Sheppard*, 167 S.W.2d 147, 155 (Tex. 1942).

consistency in every application.¹¹

Moreover, compensating the plaintiff is not the only goal of prejudgment interest; the Legislature has constitutional discretion to award prejudgment interest for the purpose of expediting settlement and trial as well.¹² Even this Court countenanced a bit of overcompensation when it created prejudgment interest almost twenty years ago.¹³

The Legislature was entitled to make policy choices and compromises in the manner and means of calculating prejudgment interest. Although construing section 16.02 literally may occasionally yield harsh results, that does not entitle us to construe it otherwise.¹⁴

There may be circumstances in which the plain meaning of words would lead to a result so absurd the Legislature almost certainly could not have intended it.¹⁵ But that is not the case here. Because this expired statute required prejudgment interest to be calculated on the jury's verdict for past damages (assuming no settlements occurred in the first 180 days), that is what we should do. Because the Court deducts settlement credits first, to that extent I respectfully dissent.

¹¹ See *Lawrence v. Texas*, 539 U.S. 558, 604 (2003) (Scalia, J., dissenting) (“One of the benefits of leaving regulation of this matter to the people rather than to the courts is that the people, unlike judges, need not carry things to their logical conclusion.”).

¹² *C & H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 326-27 (Tex. 1994); *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 554 (Tex. 1985).

¹³ *Cavnar*, 696 S.W.2d at 555 (noting that forcing litigants “to determine precisely when each element of a plaintiff’s damage award was incurred would impose an onerous burden on both the trial bench and bar”).

¹⁴ *Drilex Sys., Inc. v. Flores*, 1 S.W.3d 112, 123 (Tex. 1999).

¹⁵ *Bridgestone/Firestone, Inc. v. Glyn-Jones*, 878 S.W.2d 132, 135 (Tex. 1994) (Hecht, J., concurring).

Scott Brister
Justice

OPINION DELIVERED: May 27, 2005