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AUG 28 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MARISOL METZLER, Plaintiff/Appellee, v. BCI COCA-COLA BOTTLING COMPANY OF LOS ANGELES, INC., dba BCI COCA-COLA BOTTLING COMPANY OF ARIZONA, a foreign corporation doing business in Arizona, Defendant/Appellant.	)	2 CA-CV 2012-0173 DEPARTMENT A O P I N I O N

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. C20072433

Honorable Gus Aragón, Judge

AFFIRMED AS MODIFIED

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V Á S Q U E Z, Presiding Judge.

¶1 In this personal injury action, appellant BCI Coca-Cola Bottling Company of Los Angeles, Inc. (BCI) appeals from the judgment entered after a jury verdict in favor of appellee Marisol Metzler and following two prior appeals. In this appeal, BCI contends the trial court erred in determining that prejudgment interest imposed as a sanction under Rule 68(g), Ariz. R. Civ. P., was interest on an "obligation" calculated at ten percent per annum pursuant to A.R.S. § 44-1201(A) and not interest "on a judgment" calculated at one percent plus the prime rate pursuant to subsection (B). For the reasons stated below, we affirm the judgment as modified.

Factual and Procedural Background

¶2 In August 2009, a jury found BCI liable for Metzler's injuries sustained in a fall at a grocery store and awarded her $1.5 million in damages. On September 2, 2009, the trial court entered judgment in favor of Metzler in the amount of $1,855,398.86, which included prejudgment interest under Rule 68(g) as a sanction against BCI for rejecting a prior, more favorable offer of judgment. On December 8, 2009, the court granted BCI's motion for a new trial on liability but denied a new trial on damages. BCI appealed the court's denial of a new trial on damages, and Metzler cross-appealed the grant of a new trial on liability. This court issued a memorandum decision reversing the grant of a new trial on liability, affirming the denial of a new trial on damages, and remanding the matter for entry of final judgment. *Metzler v. BCI Coca-Cola Bottling Co. (Metzler I)*, No. 2 CA-CV 2010-0023, ¶ 16 (memorandum decision filed Mar. 16, 2011).

¶3 In April 2011, BCI unconditionally tendered, and Metzler accepted, payment of $1,906,690.76. According to BCI, the amount included: the damages award; Rule 68(g) sanctions including prejudgment interest from the date of the offer of judgment through September 2, 2009; post-judgment interest from September 3, 2009, through December 8, 2009; and costs on appeal. After this court's mandate in *Metzler I* issued on May 11, 2011, BCI filed a motion for a judgment on the mandate. BCI argued prejudgment interest under Rule 68(g) terminated on September 2, the date the trial court originally entered the judgment on the verdict, because that was "clearly the operative judgment." In response, Metzler maintained that prejudgment interest continued to accrue from the date of the offer of judgment until entry of the judgment on the mandate.

¶4 On June 30, 2011, the trial court entered judgment, specifying that prejudgment interest terminated on September 2. Metzler appealed, and this court vacated the judgment. *Metzler v. BCI Coca-Cola Bottling Co. (Metzler II)*, 230 Ariz. 26, ¶ 1, 279 P.3d 1188, 1189 (App. 2012). In doing so, we explained that the September 2 judgment had been vacated by the trial court in granting BCI's motion for a new trial, thereby leaving the parties "without a judgment for the comparative purposes of Rule 68(g)." *Id.* ¶ 8. And, because the June 30 judgment was vacated pursuant to our decision on appeal, prejudgment interest continued to accrue. *Id.* ¶ 10. Accordingly, we remanded to the trial court for entry of judgment after a redetermination of prejudgment interest. *Id.* ¶ 11. Our mandate in *Metzler II* issued on August 6, 2012.

¶5 On remand, Metzler lodged a form of judgment with the trial court calculating prejudgment interest pursuant to Rule 68(g) at the rate of ten percent per

annum, the same interest rate that had been used in the two prior judgments. BCI objected, asserting that under the recently amended version of § 44-1201, the interest rate should have been calculated at the rate of one percent per annum plus the prime rate or 4.25 percent. After finding the proper interest rate was ten percent, the court entered judgment on October 10, 2012. BCI now appeals from that judgment. We have jurisdiction pursuant to A.R.S. §§ 12-120.21 and 12-2101(A)(1).

Discussion

¶6 Rule 68(a) provides that at any time more than thirty days before trial, "any party may serve upon any other party an offer to allow judgment to be entered in the action." Subsection (g) of the rule states the following:

> If the offeree rejects an offer and does not later obtain a more favorable judgment . . . , the offeree must pay, as a sanction, reasonable expert witness fees and double the taxable costs, as defined in A.R.S. § 12-332, incurred by the offeror after making the offer and prejudgment interest on unliquidated claims to accrue from the date of the offer.

An award of sanctions pursuant to Rule 68(g) is mandatory. *Levy v. Alfaro*, 215 Ariz. 443, ¶ 8, 160 P.3d 1201, 1203 (App. 2007). The purpose of the rule is to promote settlement and to avoid protracted litigation. *Id.* ¶ 12; *Warner v. Sw. Desert Images, LLC*, 218 Ariz. 121, ¶ 52, 180 P.3d 986, 1002 (App. 2008). Metzler offered to settle this case before trial for $150,000, but BCI rejected that offer, and the jury later awarded her $1.5 million in damages. BCI does not dispute that Metzler is entitled to an award of sanctions pursuant to Rule 68(g). Indeed, that issue was put to rest by *Metzler I*, which upheld the jury's liability verdict and damages award in favor of Metzler.

¶7 Instead, BCI contends that the trial court erred by calculating prejudgment interest under Rule 68(g) at the rate of ten percent per annum rather than one percent plus the prime rate, or 4.25 percent, pursuant to § 44-1201, as amended. BCI reasons that prejudgment interest, "by its very nature, inherently indicates an award made in the judgment." Accordingly, it maintains that "prejudgment interest is interest on a judgment" under subsection (B). BCI additionally argues that prejudgment interest "does not change its nature into something else merely because it is awarded as a Rule 68 sanction." Metzler responds that she is entitled to Rule 68(g) prejudgment interest at ten percent pursuant to § 44-1201(A).[1] She contends that "prejudgment interest pursuant to Rule 68 is a sanction," which "is more appropriately classified as an 'obligation' or 'indebtedness'" under subsection (A). The trial court agreed with Metzler, concluding

[1]Metzler alternatively argues she is entitled to interest at the rate of ten percent per annum under the prior version of § 44-1201 because her right to have judgment entered—including Rule 68(g) prejudgment interest—pursuant to the former statute was a substantive right that vested when this court issued its mandate in *Metzler I*. Although the trial court applied the amended statute, it also apparently agreed with Metzler, noting that her right to interest at the rate of ten percent had vested "by no later than" when we issued our mandate in *Metzler I*, "which validated the $1.5 million verdict." But, in *State ex rel. Miller v. Beardsley Industrial Property*, 173 Ariz. 19, 24, 839 P.2d 439, 444 (App. 1992), we held that a statute providing for compound interest in condemnation actions, adopted after the taking but before trial in that case, applied retroactively. We reasoned that the statutory right to interest was "procedural because it relates only to enforcement of the substantive right—just compensation." *Id.*; *see also City of Tucson v. Clear Channel Outdoor, Inc.*, 209 Ariz. 544, ¶ 11, 105 P.3d 1163, 1166-67 (2005) (litigants have no vested rights in procedural enactments). In any event, we need not decide whether the reasoning in *Miller* extends beyond the particular type of statute and constitutional considerations addressed in that case. *See Miller*, 173 Ariz. at 24, 839 P.2d at 444 (noting "the [constitutional] right to just compensation [in condemnation cases] has been enhanced and not abridged by retroactively applying the statute"). Whether we apply the former or amended version of § 44-1201, we conclude the interest rate should be ten percent.

that "the amount of interest owed is an indebtedness or other obligation as set forth in" § 44-1201(A).

¶8 We review questions of law, including the interpretation of statutes and court rules, de novo. *Town of Marana v. Pima Cnty.*, 230 Ariz. 142, ¶ 20, 281 P.3d 1010, 1015 (App. 2012); *Perguson v. Tamis*, 188 Ariz. 425, 427, 937 P.2d 347, 349 (App. 1996). We can affirm the trial court's ruling if it is correct for any reason. *Forszt v. Rodriguez*, 212 Ariz. 263, ¶ 9, 130 P.3d 538, 540 (App. 2006). "In interpreting the meaning of a statute, we seek to discern the legislature's intent, looking primarily to the statutory language and giving effect to statutory terms in accordance with their commonly accepted meanings." *Sierra Tucson, Inc. v. Pima Cnty.*, 178 Ariz. 215, 220, 871 P.2d 762, 767 (App. 1994); *see also* A.R.S. § 1-213. If a statute's language is clear, it is "the best indicator of the authors' intent and as a matter of judicial restraint we 'must apply it without resorting to other methods of statutory interpretation, unless application of the plain meaning would lead to impossible or absurd results.'" *Winterbottom v. Ronan*, 227 Ariz. 364, ¶ 5, 258 P.3d 182, 183 (App. 2011), *quoting N. Valley Emergency Specialists, L.L.C. v. Santana*, 208 Ariz. 301, ¶ 9, 93 P.3d 501, 503 (2004). *See also Fragoso v. Fell*, 210 Ariz. 427, ¶ 7, 111 P.3d 1027, 1030 (App. 2005) (applying same principles to procedural rules).

¶9 Section 44-1201 governs interest on civil judgments generally. In 2011, the legislature amended the statute,[2] which now provides in relevant part:

[2]The prior version of the statute provided: "Interest on any loan, indebtedness, judgment or other obligation shall be at the rate of ten per cent per annum, unless a

judgment had no ‡IRUFH RU HIIHFW· IROORZLQJ See Nielson, RXUW¶V 204 Ariz. 530, ¶ 12, 65 P.3d at 914 . Consequently here, the judgment on mandate was the only judgment ‡ODWHU RI for purposes of determining prejudgment interest pursuant to Rule 68(g) . Of course, we vacate that judgment here. Accordingly, the judgment entered by the court on remand will be the judgment determining prejudgment interest.

Disposition

¶11 For the foregoing reasons, the judgment against BCI and in favor of Miller is vacated , and we remand to the trial court for redetermination and the entry of judgment consistent with this opinion .

/s/ J. William Brammer, Jr.
Judge

Now

/s/ Joseph W. Howard
Chief Judge

/s/ Philip G. Espinosa
Judge

Sess. (Ariz. Apr. 13, 2011). Because Rule 68(g) prejudgment interest is not "interest on [a] judgment" under subsection (B), it must fall under subsection (A).

¶18 Accordingly, we hold that prejudgment interest imposed as a sanction pursuant to Rule 68(g) constitutes an "obligation" under § 44-1201(A).[8] Once imposed, that obligation becomes part of the final judgment. *See Flood Control Dist. of Maricopa Cnty. v* 3 D O R P D , Q Y , 230 Ariz. 29, ¶ 76, 279 P.3d 1191, 1210 (App. 2012) ("[T]he entry of a judgment fixes the amount due and a claim for indemnity on that judgment is then liquidated."). Metzler is thus entitled to Rule 68(g) prejudgment interest calculated at ten percent per annum through entry of the final judgment. *See Metzler II*, 230 Ariz. 26, ¶ 10, 279 P.3d at 1191.

¶19 BCI lastly argues the trial court erred by awarding Metzler ten-percent interest "on the supposedly 'unpaid' prejudgment interest." According to BCI, the approximate $1.9 million tender included the full $1.5 million jury verdict and all that remained due at that time—approximately $200,000—was Rule 68(g) prejudgment interest. And, because the court calculated the amount of Rule 68(g) prejudgment interest due from the date of the tender through entry of the October 10 judgment based on that $200,000 figure, BCI maintains that the court awarded Metzler "prejudgment interest on the prejudgment interest." First, we question whether BCI sufficiently raised this argument below to preserve it for appeal. *See Orfaly v. Tucson Symphony Soc*., 209 Ariz. 260, ¶ 15, 99 P.3d 1030, 1035 (App. 2004) (appellants waived arguments on appeal

[8]At oral argument, BCI asserted that this approach could be applied in a broader context yielding far-reaching results. But, because we limit our analysis to Rule 68(g) "prejudgment interest on unliquidated claims," we disagree.

by not adequately presenting them below). Although BCI argued at a hearing before the trial court that Metzler was "requesting compound interest," it did so without citing authority, and the issue was not squarely presented in BCI's objection to Metzler's form of judgment. Moreover, the trial court did not address it.

¶20 In any event, we disagree with BCI's characterization. The issue presented here specifically concerns Rule 68(g) prejudgment interest, which as BCI agrees, cannot be awarded until entry of the final judgment. Accordingly, the ultimate amount of the prejudgment interest in this case was unknown until the October 10 judgment, regardless of the jury verdict or tender. Furthermore, the tender was unconditional, and, in its letter accompanying the $1.9 million check, BCI acknowledged that Metzler "retain[ed] her rights to claim she is entitled to prejudgment interest."

¶21 Metzler concedes on appeal, as she did below, that the October 10 judgment contained a mathematical error of $62.40 in her favor. "Where the judgment has been properly rendered, but for an incorrect amount, this court may do justice without remanding the case . . . by modifying the amount of the judgment." *Zancanaro v. Cross*, 85 Ariz. 394, 401, 339 P.2d 746, 751 (1959). We therefore modify the judgment to reflect a total of $28,568.80 in prejudgment interest from April 29, 2011, to October 1, 2012. *Cf. Cagle v. Carr*, 101 Ariz. 225, 228, 418 P.2d 381, 384 (1966) (affirming judgment as modified).

Disposition

¶22 For the foregoing reasons, we affirm the judgment as modified.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Boyd T. Johnson
BOYD T. JOHNSON, Judge*

*A retired judge of the Pinal County Superior Court authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Administrative Order No. 2013-02 filed July 10, 2013.