FILED
APR - 8 1983
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

OSKALOOSA FOOD PRODUCTS CORPORATION,

Plaintiff-Appellant,

vs.

THE AETNA CASUALTY AND SURETY COMPANY,

Defendant-Appellee.

Filed April 8, 1983

2-531
2-68911

Appeal from Mahaska District Court - Richard Vogel, Judge.

Plaintiff appeals from a judgment in its favor against defendant, asserting: 1) that the trial court erred in its allowance of interest on the judgment; and 2) that the trial court erred in not permitting plaintiff's recovery of expenses from defendant under Iowa Rule of Civil Procedure 134(c). AFFIRMED IN PART; REVERSED IN PART.

Charles F. Helsten of Spayde, White & Helsten, Oskaloosa, Iowa, for plaintiff-appellant.

J. B. Hilmes of Duncan, Jones, Riley &Finley, Des Moines, Iowa, for defendant-appellee.

Considered by Oxberger, C.J., Snell, Johnson and Schlegel, JJ. Donielson, J., takes no part.

JOHNSON, J.

Plaintiff, Oskaloosa Food Products Corporation, appeals from a judgment in its favor against defendant, Aetna Insurance Company, asserting: 1) that the trial court erred in its allowance of interest on the judgment; and 2) that the trial court erred in not permitting plaintiff's recovery of expenses from defendant under Iowa Rule of Civil Procedure 134(c). We affirm in part and reverse in part.

Plaintiff won a judgment of over $56,000 against defendant insurance company based on defendant's refusal to pay for a loss under a contract of insurance coverage. The clerk of court entered a judgment which provided for interest from the date the petition had been filed, pursuant to Iowa Code § 535.3, as amended. Defendant then applied for a nunc pro tunc order asking that the judgment be amended to eliminate the interest accrued before the date of judgment. Defendant relied on the fact that plaintiff had not requested interest in its petition or at any time during the proceedings. The trial court granted defendant's application and entered a nunc pro tunc order eliminating the interest award.

Plaintiff subsequently filed its own application for a nunc pro tunc order asking not only that the interest award be reinstated but also that the interest be accrued from the date of the accident which gave rise to the controverted insurance claim. Plaintiff's theory was that the date of the accident was the date on which its damages were complete and fixed.

On the same date, plaintiff filed an application asking that defendant be directed to pay over $15,000 in expert witness fees and other expenses. Plaintiff alleged it had incurred these expenses in proving factual matters whose truth defendant had wrongly denied in responding to a pretrial request for admissions.

The trial court filed an order rejecting plaintiff's request for a nunc pro tunc order regarding interest. The same order awarded plaintiff expert witness fees of $1,760 but rejected plaintiff's request for expenses. From this disposition plaintiff appeals.

I. Scope of Review. Since this is an action at law our review is on assigned error only. Iowa R. App. P. 4.

II. Interest on Judgment. Plaintiff argues that the trial court erred in awarding interest only from the date of judgment and not from the date of its injury, or at least, the date of the commencement of the action. Defendant contends plaintiff did not pray for interest prior to judgment and therefore is not entitled to it. We reverse this portion of the trial court's judgment.

Cases decided prior to a 1980 amendment in the law made it clear that a prayer for interest was essential in certain factual situations. ". . . [I] f [it is] not prayed for an award of interest from the time of the loss cannot be made." Bosch v. Garcia, 286 N.W.2d 26, 27 (Iowa 1979). In Laverty v. Hawkeye Security Insurance Co., 258 Iowa 717, 727, 140 N.W.2d 83, 89 (1966), the court stated: "Plaintiff's petition asked recovery for damage to the automobile and medical expense. There was no prayer for interest. The trial court overlooked this rather unusual omission and allowed interest. Judgment cannot be rendered for items not claimed." Id. at 727, 140 N.W.2d at 89. Although the controversy was remanded in Kuper v. Chicago & North Western Transportation Co., 290 N.W.2d 903 (Iowa 1980), the court stated: "We point out, too, the petition asks interest only from the date of judgment. In no event would plaintiffs be entitled to more than they asked." Id. at 910.

Plaintiff contends, however, that it is entitled to prejudgment interest as a matter of law under the recent amendments to Iowa Code § 535.3 (1981), although its action was filed prior to the effective date of the amendment. The previous statute provided:

> 535.3 INTEREST ON JUDGMENTS AND DECREES. Interest shall be allowed on all money due on judgments and decrees of courts at the rate of seven cents on the hundred by the year, unless a different rate is fixed by the contract on which the judgment or decree is rendered, in which case the judgment or decree shall draw interest at the rate expressed in the contract, not exceeding the maximum

> applicable rate permitted by the provisions of section 535.2, which rate must be expressed in the judgment or decree.

After the 1980 amendment, the statute provides:

> 535.3 INTEREST ON JUDGMENT AND DECREES. Interest shall be allowed on all money due on judgments and decrees of courts at the rate of ten percent per year, unless a different rate is fixed by the contract on which the judgment or decree is rendered, in which case the judgment or decree shall draw interest at the rate expressed in the contract, not exceeding the maximum applicable rate permitted by the provisions of section 535.2, which rate must be expressed in the judgment or decree. The interest shall accrue from the date of the commencement of the action.

We must determine whether the amendment providing that "interest shall accrue from the date of the commencement of the action," applies.

This action was commenced by plaintiff on June 22, 1979. Judgment was entered on June 14, 1982. The amendment to section 535.3 became effective on January 1, 1981. Plaintiff argues that the amendment applies retrospectively; defendant argues that it applies prospectively. Plaintiff asserts that the amendment affects a procedural right. Appleby v. Farmers State Bank, 244 Iowa 288, 294, 56 N.W.2d 917, 920 (1953); defendant argues that a substantive right is involved. Smith v. Korf, Diehl, Clayton & Cleverly, 302 N.W.2d 137 (Iowa 1981).

> The general rule is that if a statute or amendment is "substantive," it will not be applied retrospectively, unless it is clearly made applicable by its terms. Benton County, Iowa v. Wubbena, 300 N.W.2d 168, 170 (Iowa 1981); In re Estate of Parsons, 272 N.W.2d 16, 17 (Iowa 1978). However, if it relates to "procedure," it is not limited to prospective application, even in the absence of clear legislative intent. Walker State Bank v. Chipokas, 228 N.W.2d 49, 51 (Iowa 1975). . . . The retrospective application proscribed by the general rule is one which "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past." Id. (quoting Black's Law Dictionary 1480 (4th Rev. ed. 1968)); accord, 73 Am.Jur.2d Statutes § 348, at 486-87 (1974).

Id. at 139.

Subsequent to the briefing of this issue, the Iowa Supreme Court filed an opinion in Janda v. Iowa Industrial Hydraulics, 326 N.W.2d 339 (Iowa 1982). The court exhaustively detailed the merits of the prospective versus retrospective application of the amended section 535.3 and concluded:

> We already have analyzed the statutory language and found it to be retrospective in character. It also is evident there was a problem to be solved by this legislation. The market interest rates prevailing before this amendment were higher than the seven percent then provided. Thus appeals and delays in appeals were encouraged. The amendment was adopted March 28, 1980. Ordinarily it would have been effective July 1, 1980. Iowa Code § 3.7 (1981). The legislature, however, delayed the effective date of this legislation until January 1, 1981, thus permitting and encouraging an orderly disposition of cases pending March 28, 1980, before the new interest rate would affect them. This is further evidence the legislature intended the amended act to be applied retrospectively. See Pepin, 102 N.H. at 89, 151 A.2d at 235.
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> Finally, we turn to [defendant's] contention the amended statute cannot apply to it because of subsections 2 and 4 of the Iowa Code section 4.13 (general savings provisions).
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> It is true these sections [Iowa Code §§ 4.13(2) and (4)] may save accrued rights and commenced proceedings. In re Estate of Hoover, 251 N.W.2d 529, 531 (Iowa 1977). But under former Iowa Code section 535.3 defendants incurred no obligation for interest, and plaintiff acquired no right to interest, until judgment was rendered. Thus, no obligation for, or rights to, interest attached under the old statute in these circumstances, and the savings clause has no effect here because judgment was not entered until July 10, 1981.
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> Nor does Iowa Code section 4.13(4), quoted above, "save" [defendant] from the operation of amended section 535.3. There was no "obligation" or "liability" of [defendant] to pay judgment interest existing at the effective date of the amended statute. Judgment had not been entered. [Defendant] had no vested right to pay interest at seven percent from the date of judgment only. See generally Eldridge City Utilities v. Iowa State Commerce Commission, 303 N.W.2d 167, 171 (Iowa 1981).

Id. at 344-345. Consistent with this holding, we find that the current section 535.3 is to be applied retrospectively.

Having decided the retrospective issue, we must determine whether interest under section 535.3 is waived by the plaintiff's failure to pray for interest. We find that plaintiff is entitled to interest from the date of the commencement of its action.

The Iowa cases cited to by this court for the proposition that interest is waived by a party's failure to pray for interest involved only prejudgment interest and were decided under the pre-1980 law. See Bosch, 286 N.W.2d at 27; Laverty, 258 Iowa at 727, 140 N.W.2d at 89 (court found no reversible error where plaintiff did not request any interest in its prayer "[e]xcept for the allowance of interest prior to judgment."). We agree with the trial court that plaintiff's failure to request pre-commencement interest is fatal to plaintiff's claim to pre-commencement interest. However, we conclude that plaintiff, by operation of law, is entitled to interest from the "date of the commencement of the action." Iowa Code § 535.3. Accordingly, we reverse the trial court's nunc pro tunc order and order the reinstatement of the original judgment stating the proper interest.

III. Expenses. Plaintiff claims the trial court erred in denying payment of expenses when defendant denied requests for admissions when the issues were later proven at trial. We disagree.

Plaintiff proceeds under Iowa Rule of Civil Procedure 134(c) which permits the allowance of expenses upon a party's failure to admit facts later proven. Unless an abuse of discretion is shown, we will not disturb the trial court's decision regarding such expenses. See Sandhorst v. Mauk's Transfer, Inc., 252 N.W.2d 393, 399 (Iowa 1977). "Generally, an abuse of discretion will be found only where there is a lack of substantial evidence to support the trial court's ruling." Smiley v. Twin City Beef Co., 236 N.W.2d 356, 360 (Iowa 1975). Based upon an examination of the evidence, we do not believe the trial court abused its discretion in denying plaintiff's requested ruling under Iowa Rule of Civil Procedure 134(c).

AFFIRMED IN PART; REVERSED IN PART.