

IN THE SUPREME COURT OF OHIO

DIPLOMATE HEALTH CARE LLC	)	CASE NO. 2011-0975
)	
Appellant,	)	On Appeal from the Summit County
vs.	)	Court of Appeals,
	)	Ninth Appellate District
JOHN P. COURY, JR., et al.)	
	)	Court of Appeals
Appellees.	)	Case No. 25181

APPELLEE'S RESPONSE TO APPELLANTS' MOTION TO STAY
COURT OF APPEALS JUDGMENT

The Appellants, Stephen Krutowsky and Thomas Bartlebaugh have filed their Notice of Appeal in this matter, along with a Motion to Stay the Court of Appeals judgment. This Court has ordered that the Appellees, John P. Coury, Jr. and J&R Health Associates, Inc. respond by June 16, 2011.

The Appellees do not object to a stay of the Court of Appeals judgment, but they request that the amount of the security or bond be increased. As the Appellants have acknowledged in their Motion to Stay, the trial court originally set the amount of the bond at \$2.5 million. This amount was deposited by Appellants with the Clerk of Courts for the Summit County Court of Common Pleas pursuant to the trial court's order. (Exhibit A) The Appellees subsequently filed a motion with the trial court to increase the amount of the bond for the reason that the total amount of the judgment plus interest exceeded the amount on deposit with the Clerk of Courts. (Exhibit B) The trial court ordered on May 23, 2011 that the amount of security be increased by

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CLERK OF COURT
SUPREME COURT OF OHIO

\$200,000.00 by Friday, July 1, 2011. (Exhibit C) To date, the Appellants have not posted the additional bond or deposited additional funds with the Summit County Clerk of Courts.

In light of the fact that the Appellants have now filed their Notice of Appeal to the Ohio Supreme Court, the amount of security should be increased further. As indicated in the Appellees' Motion to Increase Supersedeas Bond (Exhibit B) filed in the trial court, the total amount of the judgment plus interest owed as of March 31, 2011 was \$2,665,842.97. That amount is increasing at the rate of \$309.00 per day. As of June 15, 2011, the judgment plus interest is \$2,689,326.00.

The total amount of security ordered by the trial court of \$2,700,000.00 is inadequate to protect the interests of the Appellants. By the time this Court issues its decision on the appeal, the amount of the judgment plus interest will surely exceed \$2.7 million. The Appellees suggest to the Court that a stay of the Court of Appeals judgment should be contingent on the posting of bond or adequate security in the amount of \$2.8 million.

Respectfully submitted,



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G. Brenda Coey #0075879

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Attorney for Appellees,

John P. Coury, Jr., Sovereign Healthcare and
J&R Health Associates, Inc.

CERTIFICATE OF SERVICE

A copy of the foregoing was sent this 16th day of June, 2011 by ordinary U.S. mail to:

Harry A. Tipping, Esq.
Christopher A. Tipping, Esq.
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Cleveland, Ohio 44114-1291


William D. Dowling

DANIEL M. HERRIGAN
IN THE COURT OF COMMON PLEAS
2009 DEC 11 AM 11:51 SUMMIT COUNTY, OHIO

DIPLOMATE HEALTH CARE LLC,
CLERK OF COURTS
Plaintiff,

vs.

JOHN P. COURY, JR., et. al.
Defendants.

CASE NO. CV-2008-03-2374

JUDGE SCHNEIDERMAN

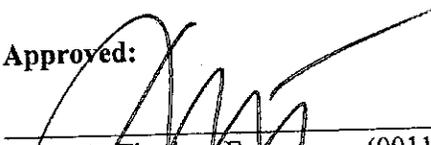
JUDGMENT ENTRY

It being brought to the attention of the Court that the alleged Counterclaim Defendants wish to deposit cash in the amount of \$2,500,000.00 with this Court as and for the supersedeas bond previously set by this Court, and the Court upon due consideration of the foregoing, herewith finds said request to be acceptable and it is therefore ORDERED, ADJUDGED and DECREED that the alleged Counterclaim Defendants, Stephen M. Krutowsky and Thomas E. Bartlebaugh shall deposit with the Clerk of the Summit County Common Pleas Court the sum of \$2,500,000.00 cash as and for the supersedeas bond previously set by this Court to be deposited in an interest bearing account. These funds shall remain on deposit pending further Order of this Court.

BE IT SO ORDERED.

JUDGE SCHNEIDERMAN

Approved:



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Christopher A. Tipping, Esq. (0064914)
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Attorneys for Alleged Counterclaim Defendants
Stephen M. Krutowsky and Thomas E. Bartlebaugh



DANIEL M. HERRIGAN
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SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

218

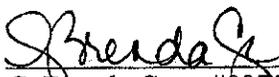
DIPLOMATE HEALTH CARE LLC	)	CASE NO. CV 2008 03 2374
)	
Plaintiff,	)	JUDGE SCHNEIDERMAN
)	
vs.)	
	)	MOTION OF JOHN P. COURY AND
JOHN P. COURY, JR., et al.	)	J&R HEALTH ASSOCIATES, INC. TO
	)	INCREASE SUPERSEDEAS BOND
Defendants.)	

Following a trial by jury, this court ordered Steven Krutowsky and Thomas Bartlebaugh to post a cash bond in the amount of Two Million Five Hundred Thousand Dollars (\$2,500,000.00) to cover the cumulative total of the judgment and interest arising from the verdict in favor of defendants. Krutowsky and Bartlebaugh posted the required bond and appealed the verdict to the Ninth District Court of Appeals. The appellate court has not yet rendered its decision on the appeal and, due to the lapse in time, the bond no longer covers the cumulative total.

For the reasons more fully explained in defendants' memorandum in support, attached hereto and incorporated herein, defendants respectfully request that the court increase the supersedeas bond by Three Hundred Thousand Dollars (\$300,000.00).



Respectfully submitted,



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Attorneys for Defendants,
John P. Coury, Jr., Sovereign Healthcare and
J&R Health Associates, Inc.

MEMORANDUM IN SUPPORT

In November 2009, this court entered judgment on jury verdicts in favor of John P. Coury and J&R Health Associates, Inc. Specifically, the jury awarded One Million Eight Hundred Ninety Two Thousand Two Hundred Forty-One Dollars (\$1,892,241.00) to John Coury on his claim for breach of contract and Three Hundred Sixty Three Thousand Four Hundred Ninety-Four Dollars (\$363,494.00) to J&R in its promissory estoppel claim. Defendants subsequently moved the court to award prejudgment interest, which the court granted. Interest was ordered as follows:

- Prejudgment interest at eight percent (8%) per annum from February 19, 2008 through December 31, 2008
- Prejudgment interest at five percent (5%) per annum from January 1, 2009 through November 20, 2009

(See Order on Prejudgment Interest, attached as Exhibit A.)

In its separate judgment entry, attached as Exhibit B, the court ordered Krutowsky and Bartlebaugh to deposit Two Million Five Hundred Thousand Dollars (\$2,500,000.00) in cash with the Clerk for the Summit County Court of Common Pleas for the supersedeas bond.

Krutowsky and Bartlebaugh subsequently appealed the verdict to the Ninth District Court of Appeals, Case No. 25181. Oral argument was held by the Court in November 2010, and the parties now await the Court's decision. Because of the amount of time that has elapsed, the amount of the supersedeas bond is no longer sufficient to cover the judgment and interest as is required by R.C. 2505.09.

A. THE INTEREST CALCULATION

1. Prejudgment Interest

The period from February 19, 2008 through December 31, 2008 had 317 days. Interest accrued at 8% per annum, which calculates to Four Hundred Ninety-Four Dollars and 41/100 (\$494.41) per day, for a total during this period of One Hundred Fifty Six Thousand Seven Hundred Twenty Seven Dollars and 97/100 (\$156,727.97).

The period from January 1, 2009 through November 20, 2009 had 324 days. Interest accrued as 5% per annum, which calculates to Three Hundred Nine Dollars (\$309.00) per day, for a total during this period of One Hundred Thousand One Hundred Sixteen dollars (\$100,116.00).

The total prejudgment interest is Two Hundred Fifty Six Thousand Eight Hundred Forty Three Dollars and 97/100 (\$256,843.97).

2. Post judgment interest

Since the date judgment was entered, 496 days have elapsed through March 31, 2011. The total post judgment interest through March 31, 2011 is One Hundred Fifty Three Thousand

Two Hundred Sixty-Four Dollars (\$153,264.00), as calculated at an interest rate of five percent (5%) per annum.

B. LAW AND ARGUMENT

R.C. 2505.09 provides that a stay of execution from judgment will be granted when the appellant complies with the Rules of Appellate Procedure and executes a supersedeas bond in an amount not less than the amount of the final judgment plus interest. When the amount of the bond is less than the cumulative total of the judgment and interest, the prevailing party may move the trial court to increase the amount of the bond. *Bibb v. Home Savings and Loan Co.* (1989), 63 Ohio App.3d 751. To protect the interests of the prevailing party, courts have consistently granted motions to increase the bond when delays arising from the appellate process create a deficiency in the bond amount. See, e.g., *Seckler v. Catawba Island Twp. Bd. of Zoning Appeals*, 6th Dist. No. OT-84-15, 1984 Ohio App. Lexis 11864 (Dec. 14, 1984); *Max J. Colvin & Sons Trucking v. Phillip Diniaco & Sons, Inc.*, 4th Dist. No. 87 CA 18, 1988 Ohio App. Lexis 3342 (July 29, 1988); *Cobb v. Cobb* (1957), 10th Dist. No. 5729, 153 N.E. 2d 536.

The bond posted by Steven Krutowsky and Thomas Bartlebaugh no longer covers the cumulative total owed to John Coury and J&R Health Associates. The appellate court has heard the oral arguments of the parties, but has not yet published its decision. Additionally, if Krutowsky and Bartlebaugh are not successful in the appellate court, they may seek relief from the Ohio Supreme Court. To that end, it is possible that this matter may not be fully and finally resolved for many months.

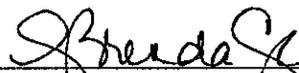
Krutowsky and Bartlebaugh have posted a bond of Two Million Five Hundred Thousand Dollars (\$2,500,000.00), but as of March 31, 2011, the cumulative total owed to Coury and J&R is Two Million Six Hundred Sixty Five Thousand Eight Hundred Forty Two Dollars and 97/100

(\$2,665,842.97). Thus, the bond is insufficient to protect the defendants. If this case were to remain unresolved through mid-2012, the deficit would increase to approximately Three Hundred Seven Thousand Dollars (\$307,000.00). Therefore, defendants move that the court order that the bond requirement be increased by Three Hundred Thousand Dollars (\$300,000.00) to a total of Two Million Eight Hundred Thousand Dollars (\$2,800,000.00).

C. CONCLUSION

The supersedeas bond established by the court following a verdict in favor of defendants John P. Coury and J&R Health Associates, Inc. no longer covers the cumulative total of the judgment and interest. Currently, the bond is deficient by over One Hundred Sixty Five Thousand Dollars (\$165,000.00). To protect the judgment and their financial interests, defendants respectfully request that the court increase the bond and order Steven Krutowsky and Thomas Bartlebaugh post an additional Three Hundred Thousand Dollars (\$300,000.00), in cash, with the Summit County Clerk of Courts.

Respectfully submitted,



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William D. Dowling #0023530

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Attorneys for Defendants,

John P. Coury, Jr., Sovereign Healthcare and

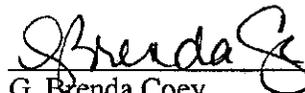
J&R Health Associates, Inc.

CERTIFICATE OF SERVICE

A copy of the foregoing Motion of John P. Coury and J&R Health Associates, Inc. to Increase Supersedeas Bond was sent this 4th day of April, 2011 by ordinary U.S. mail to:

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Cleveland, Ohio 44114-1291



G. Brenda Coey

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DANIEL M. HARRIGAN

2009 DEC 22 PM 3:09

SUMMIT COUNTY THE COURT OF COMMON PLEAS
CLERK OF COURTS

COUNTY OF SUMMIT

DIPLOMATE HEALTH CARE, LLC

Plaintiff

-vs-

JOHN P. COURY, JR., et al.

Defendants

) CASE NO. CV 2008 03 2374
)
) JUDGE SCHNEIDERMAN
)
)
) ORDER ON PREJUDGMENT
) INTEREST
)
)
)
)

On November 20, 2009, a jury rendered a verdict in favor of the Counterclaim Plaintiff, J&R Health Associates, Inc. dba Sovereign Health Care, and against Counterclaim Defendants, Stephen Krutowsky and Thomas Bartlebaugh, in the sum of \$363,494.00 on the promissory estoppel claim; and a verdict in favor of the Counterclaim Plaintiff, John Coury, Jr., and against the Counterclaim Defendants, Stephen Krutowsky and Thomas Bartlebaugh, in the sum of \$1,892,241.00 on the breach of contract claim.

On the same date, a Final Judgment was filed on the above jury verdicts.

On December 1, 2009, the Counterclaim Plaintiffs filed a Motion for Prejudgment Interest, and Counterclaim Defendants filed a response on or about December 11, 2009. Also, the Counterclaim Defendants filed a reply on December 18, 2009.

A hearing was held and concluded on December 11, 2009. Leave was granted until December 18, 2009 for a further response. Counterclaim Plaintiffs filed a reply on December 14, 2009 on this issue.

EXHIBIT
A

This issue is controlled by Ohio Revised Code Section 1343.03(A). It provides, in pertinent part, that an award of prejudgment interest is required as follows:

...when money becomes due and payable ...upon all verbal contracts entered into,...

Further, promissory estoppel is a quasi contract. Glenmoore Bldrs., Inc. v. Smith Family Trust (Ohio App.9th Dist), 2009-Ohio-3174, at p. 42. Therefore, promissory estoppel falls within the purview of R.C. 1343.03(A) and requires the award of prejudgment interest.

A recent Ninth District Court of Appeals decision on an appeal from Summit County Common Pleas Court set forth the applicable rule in Desai v. Franklin (2008), 177 Ohio App.3d 679, 696:

Once a plaintiff prevails on a contract claim, the trial court must award the party prejudgment interest. The only matter within the court's discretion is the determination of the starting date upon which to begin calculating the prejudgment interest.

Therefore, the only remaining issue on this Motion is the date of the breach of contact and the accrual of the promissory estoppel claim. In Zeck v. Sokol, (Ohio App.9th Dist.), 2008-Ohio-727, at p. 46, the Court stated as follows:

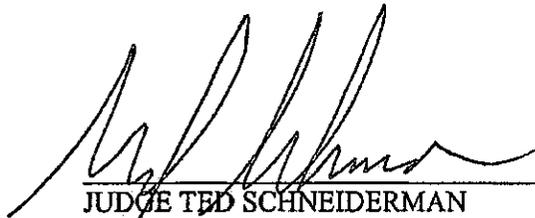
As to the date such interest began to accrue, "the Ohio Supreme Court [has] construed and applied R.C. 1343.03(A), holding that 'the award of prejudgment interest is compensation to the plaintiff for the period of time between accrual of the claim and judgment, regardless of whether the judgment is based on a claim which was liquidated or unliquidated and even if the sum due was not capable of ascertainment until determined by the court.'"

Although the evidence may indicate the 15th to 19th of February, 2008, the proper date for the commencement of prejudgment interest is February 19, 2008.

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In conclusion, the prejudgment interest on both judgments shall be awarded at the statutory rate of eight percent (8%) per annum from on or after February 19, 2008 to December 31, 2008, and then at the statutory rate of five percent (5%) from on or after January 1, 2009 until November 20, 2009, the date of judgment.

IT IS SO ORDERED.



JUDGE TED SCHNEIDERMAN
Sitting by Assignment
Pursuant to Art. IV, Sec. 6
Ohio Constitution

cc: Attorney William D. Dowling
Attorney Harry A. Tipping
Judge Lynn S. Callahan

lcb
08-2374h

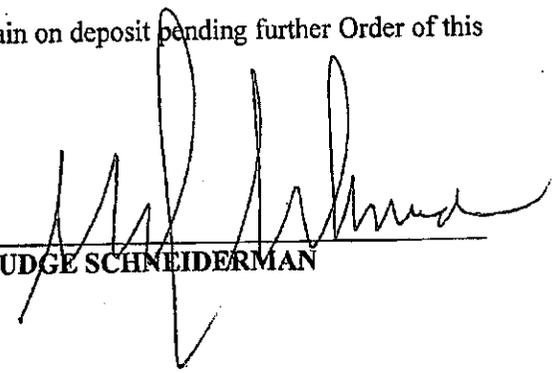
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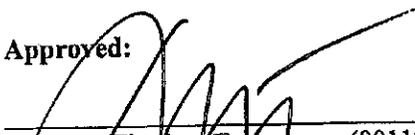
DANIEL M. HERRIGAN
IN THE COURT OF COMMON PLEAS
2009 DEC 11 AM 10:44 SUMMIT COUNTY, OHIO

DIPLOMATE HEALTH CARE LLC, CLERK OF COURTS Plaintiff,	)	CASE NO. CV-2008-03-2374
	)	JUDGE SCHNEIDERMAN
vs.)	
JOHN P. COURY, JR., et. al.	)	JUDGMENT ENTRY
Defendants.)	

It being brought to the attention of the Court that the alleged Counterclaim Defendants wish to deposit cash in the amount of \$2,500,000.00 with this Court as and for the supersedeas bond previously set by this Court, and the Court upon due consideration of the foregoing, herewith finds said request to be acceptable and it is therefore ORDERED, ADJUDGED and DECREED that the alleged Counterclaim Defendants, Stephen M. Krutowsky and Thomas E. Bartlebaugh shall deposit with the Clerk of the Summit County Common Pleas Court the sum of \$2,500,000.00 cash as and for the supersedeas bond previously set by this Court to be deposited in an interest bearing account. These funds shall remain on deposit pending further Order of this Court.

BE IT SO ORDERED.


JUDGE SCHNEIDERMAN

Approved: 

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Christopher A. Tipping, Esq. (0064914)
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8475 Ridgewood Road
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Phone: 330-376-3300 / Fax: 330-376-6237
Attorneys for Alleged Counterclaim Defendants
Stephen M. Krutowsky and Thomas E. Bartlebaugh

EXHIBIT
B

DANIEL M. HERRIGAN

2011 MAY 23 AM 11:31

SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

224

DIPLOMATE HEALTH CARE LLC	)	CASE NO. CV 2008 03 2374
)	
Plaintiff	)	JUDGE SCHNEIDERMAN
	)	Sitting by Assignment
-vs-)	
)	
JOHN P. COURY, JR., et al.	)	<u>ORDER ON MOTION FOR</u>
	)	<u>ADDITIONAL SUPERSEDEAS</u>
Defendants	)	<u>BOND</u>
)	

On April 5, 2011, the Defendants and Counterclaim Plaintiffs, John P. Coury, Jr. and J & R Health Associates, Inc. dba Sovereign Healthcare (Defendants) filed a Motion to Increase Supersedeas Bond.

On April 22, 2011, Counterclaim Defendants, Stephen Krutowsky and Thomas Bartlebaugh, filed a response to the Motion.

A hearing was held on May 23, 2011 and upon consideration of the filings and the oral argument, this Court finds that the Supersedeas Bond be increased from \$2,500,000.00 to \$2,700,000.00, and thus a \$200,000.00 increase.

IT IS ORDERED and ADJUDGED that the Counterclaim Defendants, Stephen Krutowsky and Thomas E. Bartlebaugh, shall post an additional \$200,000.00 Supersedeas Bond by **Friday, July 1, 2011.**

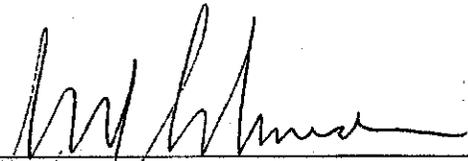


IT IS FURTHER ORDERED that the Counterclaim Defendants shall have the option to deposit \$200,000.00 in cash with the Summit County Clerk of Courts as and for the additional Supersedeas Bond.

This sum shall be held in an interest bearing account by the Clerk.

FINALLY, IT IS ORDERED that this additional Supersedeas Bond shall be held by the Clerk pending further Order of this Court.

IT IS SO ORDERED.



JUDGE TED SCHNEIDERMAN
Sitting by Assignment
Pursuant to Art. IV, Sec. 6
Ohio Constitution

cc: Attorneys G. Brenda Coey / William D. Dowling
Attorney Harry A. Tipping
Attorney Karen Rubin

lcb
08-2374SB