Court of Appeals of Ohio, Second District, Champaign County.
Danny D. McDONALD, Plaintiff-Appellee-Cross-Appellant,
v.
AMERICAN SELECT INSURANCE COMPANY, Defendant-Appellant-Cross-Appellee.
Nos. 87-CA-01, 87-CA-12.
Aug. 31, 1988.
Keith M. Karr, Spencer R. Benedict, Columbus, for plaintiff-appellee.
Jerome G. Menz of Miller, Finney & Clark, Xenia, for defendant-appellant.

OPINION

BROGAN, Judge.
***1** This appeal arises out of a claim brought by Danny McDonald, the appellee, against American Select Insurance Company (American), the appellant, for failure to pay on a fire insurance policy. American based its refusal on allegations that Mr. McDonald set the fire and that he did not properly submit a sworn proof of loss. McDonald brought this action in the Champaign County Common Pleas Court alleging that American was guilty of negligent and intentional bad faith, negligent and intentional infliction of emotional distress, negligent and intentional misrepresentation and breach of contract. The jury at trial returned ten interrogatories and a general verdict for $63,000 in favor of McDonald. The jury found that all damages were actual; none punitive. On appeal, American takes issue with the trial court's refusal to grant motions for summary judgment, directed verdict and judgment notwithstanding the verdict and with a jury instruction dealing with the law of waiver. On cross appeal, McDonald finds error in the trial court's refusal to grant him prejudgment interest.

The facts are hotly disputed. Both parties do agree however that McDonald lost an eye in a shotgun accident in 1980 and he is legally blind in his one remaining eye (Rated at 20/400). McDonald can only read with the aid of an optical viewer that significantly magnifies the printed page. On June 30, 1983, McDonald's home was insured by American against loss due to fire. A fire occurred on that day rendering the house uninhabitable. In that fire, McDonald lost all of his personal property including his optical viewer. McDonald's mother possessed his power of attorney both before and after the fire. The fire insurance policy contained the following important provision under "Conditions:"

2. *Your Duties After Loss*

a. * * *

b. * * *

c. prepare an inventory of damaged personal property showing in detail, the quantity, description, actual cash value and amount of loss. Attach to the inventory all bills, receipts and related documents that substantiate the figures in the inventory;

d. as often as we reasonably require:

(1) exhibit the damaged property;

(2) provide us with records and documents we request and permit us to make copies; and

(3) submit to examination under oath and subscribe the same.

e. submit to us, within 60 days after we request, your signed, sworn proof of loss which sets forth, to the best of your knowledge and belief:

(1) * * *

* * *

(5) specifications of any damaged building and detailed estimates for repair of the damage;

(6) an inventory of damaged personal property described in 2c;

(7) receipts for additional living expenses incurred and records supporting the fair rental value loss;

* * *

8. *Suit Against Us.* No action shall be brought unless there has been compliance with the policy provisions and the action is started within one year after the occurrence causing loss or damage.

***2** The remaining facts are less clear. In 1982, before the fire, Thomas Miller met McDonald while adjusting an unrelated claim on behalf of American. Miller, presently a property claims manager out of American's home office in Columbus, Ohio, apparently clashed with McDonald over that claim. McDonald contends that heated words were exchanged. Miller reported at the time that Mr. McDonald was a "character" and that he was blind, but he denies personal ill will towards McDonald.

On July 5, McDonald contacted the agent he bought his policy from, William Stickley, and informed him of the fire. McDonald also contends that he asked Stickley for a copy of his policy at that time because his copy was lost in the fire. Stickley denies the request was made. Someone accidently listed the date of the fire in American's files as June 24, 1983 instead of June 30, 1983.

The case was given to Bonnie Botschner, the local claim manager for American. She hired an independent agency, employing Ted Galbreath, to act as field adjustor for American. Galbreath met with McDonald at McDonald's mother's house on July 11, 1983 to get a taped statement. Galbreath cannot recall, but McDonald, his mother and his father insist that Galbreath promised to pay $30 a day for McDonald to stay with his parents after the fire. Galbreath claims he gave McDonald a blank proof of loss form, a blank contents sheet and blank inventory forms at that meeting. McDonald denies this. Galbreath also claims he told McDonald to get estimates of repair costs, complete an inventory of and compile receipts for lost furniture and collect receipts for additional living expenses. McDonald denies this. Galbreath also claims that he told McDonald to have a contractor look at the property and get an estimate that could be compared to American's estimate and negotiated. McDonald denies this, too.

At the meeting, McDonald asked Galbreath for a cash advance. He claims that he told Galbreath it was to purchase a new optical viewer. Galbreath denied the request.

On July 20, 1983, Galbreath submitted his first report to American. The report noted that the damage would require removal and replacement of 70% of the wall area, 50 to 65% of the roof and 100% of all interior paneling and exterior aluminum siding. It also reported that the optical viewer was destroyed and the investigation into the fire cause was still ongoing.

Among the enclosures submitted with the report was a "Non-Waiver Agreement" signed by McDonald, his mother and his then girlfriend. The date of the Non- Waiver Agreement was the same date Galbreath had met with McDonald. The agreement said that no acts by American or its representatives would operate as a waiver or invalidate any policy conditions. The form also said that it was meant to allow further investigation by American without their admitting liability.

On July 23, 1983, Galbreath called the local adjustor, Botschner, to tell her that he could not link McDonald to the fire and that the loss exceeded the policy coverage. That same day, Miller, in the home office, sent Botschner a memo telling her not to renew McDonald's policy. On July 26, 1983, Botschner sent a memo to Miller saying that she could not see how a blind man could carry a gas bomb through his own house with a cigarette in his mouth. On July 28, Miller responded with a memo saying the following:

***3** Having met Mr. McDonald personally, I would readily believe he did just such a thing. He is legally blind, but he does have some limited vision. You must remember he was also critically injured when he had the accident with the shotgun and almost blew his head off (soon after his ex-wife left him).

I would suggest that you demand a Proof of Loss from the insured, then reject the proof, and deny the claim based on the fact that this was a 'set' fire, rather than an accidental loss. When he retains an attorney, then we can cross that bridge when we come to it--a lawsuit.

(Parentheses in original). On August 2, 1983, Botschner relayed the following in a letter to Galbreath:

At this time our Home Office suggests that we demand a proof of loss from the insured and after the proof is submitted we will more than likely reject the proof and deny the claim based on the fact that the fire was set rather than an accidental loss.

Therefore, at this time we suggest that you give the insured a proof of loss blank, ask him to complete it as best is possible and return it to us within the next sixty days. If he asks about another advance tell him that at this time we are still unable to make an advance.

On August 10, 1984, Galbreath met with McDonald again. McDonald was given a blank proof of loss form which he subsequently filled in. The parties dispute the extent to which Galbreath helped McDonald fill out the form. They also dispute whether Galbreath told McDonald what needed to be submitted with the form in order to comply with the policy provisions. The form was submitted on September 22, 1983, but it was not signed and the amount of damages listed exceeded the policy limits as to the amount claimed. The policy limits were $86,700 (Dwelling house: $51,000. Personal Property: $25,500. Additional Living Expenses: $10,200.) but the claim was for $95,400.

Upon receiving the unsigned proof of loss form, Galbreath called Botschner and told her of its deficiencies. She told him to submit the form anyway. A rejection letter was not sent until November 14, 1983, fifty three days after the form was submitted. In that fifty three day period, Galbreath left his job and Richard Shay was assigned to take his place. Also, McDonald met with the attorney for American who took a sworn statement from him concerning the loss. The attorney alleged that he told him about the conditions required to make the proof proper, but McDonald denied this.

The November 14, 1983 rejection letter asked McDonald to resubmit his proof of loss within sixty days. It also listed seven areas where the form was improperly completed including a notation that there was no documentation, verification or proof attached to the form to substantiate the damage claim. The letter also set out separately that an inventory list be completed and that the rejection was not in any way a waiver of rights.

The second proof of loss form was not submitted within the sixty days requested. It came March 9, 1984, one hundred and twenty seven days later. This form was also rejected. The rejection letter from Botschner on March 19, 1984 did not reject the form because the 60 day limit was exceeded. In fact, it said that another blank proof was enclosed which may be resubmitted. She then requested that Mr. McDonald refer to his policy conditions, and that he must comply with those conditions by June 24, 1984. June 24 would be one year after the incorrectly recorded date of the fire. The letter again notes that this rejection was not a waiver of the policy conditions.

***4** Between the time the first proof was rejected and the second proof was submitted, a number of relevant events took place. First, Botschner sent a letter to the new field adjustor, Shay, telling him that he was not to discuss the matter with McDonald but, if contacted, he was to refer McDonald directly to her. Second, McDonald attempted suicide by consuming a large quantity of alcohol and drugs. This resulted in 2 weeks of hospitalization and 2 to 3 weeks in a mental ward. A note on February 17, 1984 indicates that Botschner was aware that McDonald was in the mental ward. In March 1984, also before the second proof was rejected, McDonald was discharged and McDonald's new sighted girlfriend moved in with him for three weeks. However, his mother, who possessed his power of attorney, was seriously injured in an auto accident. She was hospitalized for some time and she allegedly became mentally impaired as a result of her head hitting the windshield.

A psychiatrist at trial contended that McDonald's suicide attempt was caused by, among other factors, being jerked around by an insurance company that continued to refuse his requests for advances and the rejection of his first proof of loss. American contends that the suicide attempt was a result of the general depression of losing his previous girlfriend, losing custody of his son because he did not have a house and because of losing his sight. The psychiatrist testified that all of these factors helped contribute to the depression.

The second proof of loss was submitted back on March 9, 1984, after McDonald returned from his hospitalization. McDonald brought the proof to his agent, Stickley, to have it notarized before submission. McDonald alleges that Stickley looked it over and said that it was all fine and that the claim would be settled. Stickley admits that he said the figures were all right, if McDonald wished to assume a total loss, but he denies that he went over the proof or said that American would settle. McDonald did testify that he knew Stickley could not settle the claim without approval. However, he also said that he assumed that everything was taken care of after he talked to Stickley.
Before the March 19 rejection, American began negotiating with a mortgage company holding McDonald's home mortgage. American wished to purchase the outstanding mortgage on the burned dwelling. $29,000 was the agreed upon price. American filled out the proof of loss form required and gave it to the mortgage company to sign. However, consummation of the transaction did not occur until August 1984, more than one year after the fire.
On March 27, 1984, after receiving the second rejection letter, McDonald's girlfriend called Botschner who insisted that McDonald join the conversation. After McDonald came on the line, Botschner again explained about the required documentation, though McDonald claimed that this was the first he was made aware of it. McDonald told Botschner that the property receipts were burned in the fire. She told him to call stores and try to find comparable furniture to guess from. She also told him to refer to his policy conditions, to which he responded that the policy was burned in the fire. (This turned out to be false. McDonald claims he later found the policy unburned more than a year after the fire in the garage attached to the burned out house). He claims that he reiterated that he had asked for a copy of the policy back on July 5, 1983. Botschner denies this.
***5** Botschner sent a copy of the policy to McDonald the next day but it returned undelivered in the mail on April 24, 1984. She resent it and it was received by McDonald's mother on April 27, but, due to her accident, she allegedly did not deliver it to McDonald until sometime in June. Allegedly, no contact between McDonald and American took place between the March 27 phone call and one year after the fire. During that time, on April 11, 1984, the new field adjustor, Shay, was told to close the file and hold onto it in case it needed to be reopened.
A May 30 memo from Miller to Botschner answering questions about the unfinalized mortgage purchase says "Let's get the second (mortgage) and ride this out" supposedly referring to the June 30, 1984 deadline to file suit.
On July 5, 1984, the mortgagee was sent the finalized documents which were signed later that month. A phone call was allegedly made by McDonald in August to Botschner after he found out that American had bought his mortgage. Botschner allegedly told him then, for what he claims was the first time, that he had one year to file suit but the year had expired. This suit was then filed seven months later on March 18, 1985. That was one year and nine months after the fire. A verdict in favor of McDonald was rendered in the court below along with answers to ten jury interrogatories. Both sides appeal from that verdict.
American raises two assignments of error. The first can be characterized as having two parts. The first part of the first assignment alleges that the trial court erred in overruling American's motions for summary judgment and for a directed verdict because McDonald failed to bring suit before one year after the fire as provided in the insurance contract. The second part of the first assignment alleges that the jury instruction on the issue of waiver was prejudicial to American. The second assignment alleges that American was entitled to judgment as a matter of law, based upon the interrogatories returned by the jury, and overruling American's motion for judgment notwithstanding the verdict, which asserted that argument, was error.
First, we address the motions for summary judgment and directed verdict. Both motions will be granted only if, after construing the evidence most strongly in favor of the non-moving party, the court below finds upon any determinative issue that reasonable minds could come to but one conclusion. Civ.R. 50(A)(4) and 56(C). As pertains to the motion for summary judgment, the court in this case was restricted to the evidence that was

submitted in the pleadings and the submitted affidavits and is further restricted if there exists any question of material fact. Civ.R. 56. McDonald's affidavits and pleadings allege that the words, actions, and bad faith exercised by American acted as a waiver of the contract provision limiting when the insured can bring actions and that American was estopped from raising that provision.

The law dealing with waiver of insurance contract limitations rests in the ruling in *Houndshell v. American States Ins. Co.* (1981), 67 Ohio St.2d 427. *Houndshell* provides that contractual limitations as to when a lawsuit may be filed on an insurance claim are lawful based on the court's prior ruling in *Appel v. Cooper Ins. Co.* (1907), 76 Ohio St. 52. This is even true where the limitation is shorter than that provided in the statute of limitations. *Houndshell,* supra, at 429-30. [FN1]

***6** *Houndshell* also provides that the right to assert limitation clauses in insurance contracts can be lost by estoppel or waiver. *Houndshell,* supra, at 430. Such a waiver may occur

[W]hen the insurer, by its acts or declarations, evidences a recognition of liability under the policy, and the evidence reasonably shows that such expressed recognition of liability and offers of settlement have led the insured to delay in bringing an action on the insurance contract.

Houndshell, supra, at 431.

However, the court in *Houndshell* goes on to say:

It is not our conclusion here that all offers of settlement made by the insurance companies to the insured are to be construed as waivers of the time limitation. Where there is a specific denial of liability upon the policy, either totally or in part, there would generally be no waiver occasioned by an offer of settlement. We recognize and endorse the principle that a waiver comes into existence upon an offer that is an express or implied admission of liability.

Houndshell, supra, at 433.

In the case of *Broadview Savings & Loan Co. v. Buckeye Union Ins. Co.* (1982), 70 Ohio St.2d 47, the Supreme Court does not find a waiver or estoppel where there is no showing on the record that the insurance company either admitted liability or made a settlement offer. In that case, an adjuster claiming that there was "no problem" with the claim did not nullify the fact that the insurer was evidently still in the process of evaluating the claim. *Broadview,* supra, at 51.

Looking at *Houndshell* and *Broadview* as compared to the case at bar, it is not clear whether any waiver existed. In our case, the insured signed an agreement of non-waiver, no advances were granted, no settlement offers were made, and the insurance company never expressly admitted liability.

Reasonable minds could have found that liability was implicitly admitted if they chose to believe the following facts: Galbreath's alleged statement that $30 a day would be paid to McDonald's parents for housing him after the fire; combined with (the insurance agent) Stickley's alleged comments that the second proof of loss form was all right and that the form should be accepted; combined with the insurance companies' letters requesting resubmission of proper proofs of loss; combined with the failure of the letters rejecting proofs of loss to list a denial of liability as one of the many reasons listed for refusal; combined with Galbreath's alleged help to McDonald in filling out the proof of loss forms; combined with the allegation that McDonald was never told he was being investigated for arson or that his claim would be denied; combined with McDonald's allegation that the actions of the insurance company induced him to rely on their representations to his detriment. Taken together, these actions could constitute an estoppel if the jury chose to believe them all. However, such a finding would appear very weak and we choose not to rely our decision on such a finding.

***7** Even if waiver or estoppel could not be found, the question of Mr. McDonald's competence was in issue. Psychological evidence indicated that he was severely depressed and he in fact did spend time in a mental ward. If he were incompetent, the one year limitation provided in the contract could be tolled. We do not know if in fact McDonald was incompetent. No interrogatory was presented to the jury requesting such a

determination, however a request to make such a determination was made in the jury instructions. Since such a finding could be made, summary judgment or a directed verdict was not proper.
It was held in *Shields v. State Farm Ins. Group* (1984), 16 Ohio App.3d 19, 21 by the Butler County Court of Appeals that:
[I]f due to death, incompetency, or other similar circumstances, an insured is unable to comply with the provision of an insurance contract which limits the time within which a suit against the company must be filed, the running of time is to be tolled for such a period as will not exceed the statute of limitation legislatively provided, in the absence of undue prejudice to the insurer.
Not only was there evidence of incompetency before the jury at the time of the motion for directed verdict and before the court on the summary judgment motion but there was evidence of "other similar circumstances." These other circumstances included the insured's blindness, combined with the destruction of his optical viewer and his policy in the fire and the incapacitation of his attorney in fact, his mother. These factors could toll the required time to file suit from the date of incapacity of McDonald's mother, sometime in March 1983, to the date of her recovery. This constitutes the time within which McDonald could not legally act for himself. There is additional evidence that his mother has yet to recover from her mental impairment. Therefore, McDonald could have shown that the contract provision was tolled to include the March 1985 filing of this suit.
If there was no waiver, no estoppel and no tolling of the one year provision, the claim of a breach of the duty of good faith arises in tort separate from the contract. *Hoskins v. Aetna Life Ins. Co.* (1983), 6 Ohio St.3d 272. This claim would exist irrespective of any liability arising from breach of contract. *Staff Builders, Inc. v. Armstrong* (1988), 37 Ohio St.3d 298. Therefore, the tort claims are separate from the contract claim and the limitation period expressed in the contract does not apply to them. *Plant v. Illinois Emp. Ins. of Wausau* (1984), 20 Ohio App.3d 236.
The following facts, if believed, would support an action for breach of the duty of good faith: Miller met McDonald in 1982, evinced hostility, and labeled McDonald a "character" in his files. American knew McDonald was blind at the time. McDonald requested a copy of his policy when he first contacted American's agent, Stickley, within a week after the fire. The policy never got to McDonald until June, 1984. American knew McDonald lost his optical viewer in the fire and that he could not read without it. American knew that they could not link McDonald to the fire's cause as early as July 23, 1984, but they still planned to deny his claim. Miller's memo of July 28 could be construed as malicious. He planned to reject the claim no matter what the proof of loss said. Galbreath and Stickley helped McDonald fill out the two proof of loss forms. Stickley even reviewed the second one after it was complete and gave assurances that the claim would be settled. American took fifty three days to reject the first form and ten days to reject the second one. The second proof was not rejected for being beyond the sixty day limit. Although American informed McDonald that he must comply with the insurance policy terms by June 24, 1984, there was evidence that McDonald had lost his policy. Also, June 24, 1984 had little significance to McDonald since it was one year after the date that the fire was mistakenly recorded as occurring and not one year after the fire. The new field adjustor, Shay, was told not to talk with McDonald. He was also told to close the file before the year was up. American knew of McDonald's hospitalization. They also knew of the accident involving his attorney in fact yet they continued to send documents, including the policy, to her. American settled with McDonald's mortgage company before one year after the fire. In the settlement, American filled out the proof of loss form for them. An internal memo from Miller to Botschner said to get the mortgage and "ride this out."
***8** These facts if believed by the jury would sustain a cause of action for breach of the duty of the insurer to deal in good faith with its insured. Such a tort action survives regardless of the contractual limitation. Therefore, again, this claim was not subject to summary judgment or a directed verdict as being precluded by the one year limitation.
The intentional and negligent misrepresentation claims and the intentional and negligent infliction of emotional distress claims are tort claims as well. Therefore, these claims,

also, are not subject to the contractual limitation period. Again, summary judgment or a directed verdict would be improper.
The tort claims below survive the one year contractual limitation and the contract claim could reasonably survive the limitation provision if it were tolled. Therefore, the court below acted properly when they denied the motions for summary judgment and directed verdict.
The first part of the first assignment of error is not well taken.
The second part of the first assignment of error takes issue with the jury instruction regarding waiver. American contends in its brief that there was no evidence that McDonald was incompetent, that his disability constituted some "other similar circumstance" (under *Shields,* supra), and that there was not any evidence of waiver or bad faith. As we said in dismissing the first part of this assignment of error, there was evidence from which reasonable minds could conclude that there was waiver, bad faith, incompetency or that the disability constituted "other similar circumstances." While the evidence of a waiver of the one year limitation was weak, inclusion of the instruction was harmless since waiver of the sixty day requirement for resubmitting proofs of loss could reasonably be found to exist. More important, the inclusion of instructions pertaining to the claim of waiver were not prejudicial to American. Furthermore, the instructions concerning bad faith, incompetency and other circumstances of disability were proper.
The second part of the first assignment of error is not well taken.
The third assignment of error basically asserts that American was entitled to judgment as a matter of law based upon the interrogatories returned. They also assert that it was error to refuse a request for judgment notwithstanding the verdict based on these interrogatories.
To address this assignment of error, we must reproduce the interrogatories and the responses of the jury.

Interrogatory No. 1

Was the fire of June 30, 1983 on the premises of Danny D. McDonald an incendiary or a set fire caused by the use of gasoline or other accelerant?
Yes.

Interrogatory No. 2

Did Danny D. McDonald before or after the fire of June 30, 1983, misrepresent facts concerning personal property?
Yes.

Interrogatory No. 3

Did Danny D. McDonald before or after the fire of June 30, 1983, commit fraud or false swearing?
Yes.

Interrogatory No. 4

***9** Did Danny D. McDonald submit a sworn statement in proof of loss as required by the policy to American Select Insurance Company after the fire of June 30, 1983?
No.

Interrogatory No. 5

Was the sworn statement in proof of loss exaggerated, false and fictitious?
Yes.

Interrogatory No. 6

Do you find by a preponderance of the evidence that Defendant American Select Insurance Company by and through its representatives, made negligent misrepresentations to Plaintiff Danny McDonald during the course of its conduct through the entire processing of his claim.
Yes.

Interrogatory No. 7

If your answer to Interrogatory No. 6 is yes, do you find by a preponderance of the evidence that Plaintiff Danny McDonald relied on such representation and such reliance was reasonable and justifiable under the circumstances?
Yes.

Interrogatory No. 8

If your answer to Interrogatory No. 7 is yes, do you find by a preponderance of the evidence that such conduct was a direct and proximate cause of any injury or damage suffered to Plaintiff Danny McDonald, if any?
No.

Interrogatory No. 9

Do you find that Defendant breached its duty of good faith in handling the claim of Plaintiff?
Yes.

Interrogatory No. 10

Do you find by a preponderance of the evidence that Defendant acted with malice or acted with the willful or intentional purpose to deceive or mislead Plaintiff Danny D. McDonald in the entire course of conduct during the processing of this claim?
Yes.

First, American asserts, according to Interrogatory No. 4, that because no proof of loss (as required under the policy) was submitted, a general verdict in favor of McDonald is inconsistent because such submission is a prerequisite to recovery under the policy. Of course, if the alleged bad faith actions of American prohibited McDonald from abiding by the policy terms, American would have waived this requirement and the general verdict would be consistent. Therefore, this argument is meritless.

Second, American asserts, pursuant to Interrogatory No. 5, that since McDonald exaggerated a false and fictitious proof of loss, he is precluded from recovery under the policy. Of course, since McDonald asserts that he was given the false and fictitious information by American's agent, Galbreath, and that he had the approval of Stickley, these comments could have estopped American from asserting its proof of loss condition. This waiver could exist even if waiver of the one year limitation did not exist. Therefore, this finding can also be consistent with the general verdict.

Third, American asserts, pursuant to Interrogatory No. 3, that McDonald committed fraud or false swearing either before or after the fire, therefore he is precluded from asserting his claim under the policy. Of course, "fraud or false swearing" does not necessarily mean both fraud and false swearing. While both require an intentional false act, only fraud requires an intent to induce others to rely upon the deception. Also, "before or after" the fire could refer to either time period. This interrogatory does not specify what or when it refers to. Was the fraud in his actions before the fire implicating a potential arsonist? Was it in statements to his son? Was it the figures on the proof of loss? Was it his story about the cause of fire? Was it in his statements to the police? Was it in his dealings with American representatives? Was it the discrepancies in the number of times or the dates he contacted American after the fire? Was it his assertion that he had lost his policy in the fire? (We do know the "fraud" could not be setting the fire itself because the interrogatory asks only for fraud "before or after" the fire). Since the interrogatory is open to a number of interpretations, some of them consistent with the general verdict, we cannot find it to be inconsistent.

***10** American also implies that the interrogatory asserting one element of arson, Interrogatory No. 1, finding that the fire was set, combined with No. 3, finding McDonald committed fraud, can be combined with testimony about motive and opportunity, which are the two other elements of arson, to show the interrogatories are inconsistent. Of course, there was evidence contradicting both of the other elements of arson as well as evidence in support. The jury could reasonably have believed that McDonald did not set the fire even though someone had. Therefore, this argument is spurious at best.

Further, we must note that the arguments above all assume the general verdict is based upon the breach of contract claim. In fact, any of the six other causes of action in tort could have been the basis for the verdict, but no interrogatory asks to clarify this matter.

American also asserts, once again, that there was no evidence of malicious bad faith to support Interrogatory No. 9 or 10. They point to the award of no punitive damages as indicative of their claim. However, punitive damages are not mandatory, only allowable. See: *Hoskins,* supra, at 277-8. Absence of punitive damage is not evidence of a finding of

no malicious bad faith.
American claims that the negligent misrepresentation charge could not support the general verdict since, when Interrogatories No. 6, 7 and 8 are read together, no damages could be caused by this action. We agree. Of course, that still leaves intentional misrepresentation and the other five claims on which to base the award. This finding is not inconsistent.
Finally, American asserts that there was no evidence of intentional or negligent infliction of emotional distress. Since malicious bad faith was reasonably found and McDonald did suffer severe depression which allegedly led him to attempt suicide and incur expenses therefrom, the jury could have found that such a cause of action existed.
In conclusion, the general verdict can be construed consistently with the interrogatories under a number of interpretations. Therefore, we will not reverse the verdict as being inconsistent.
The second assignment of error is not well taken.
On cross appeal, McDonald asserts that pretrial interest on the judgment was improperly denied below. Three additional assignments of error on cross appeal are raised.
The first assignment of error on cross appeal is that pretrial interest was proper because all of the elements of R.C. 1343.03(C) had been satisfied. R.C. 1343.03(C) reads:
Interest on a judgment, decree or order for payment of money rendered in a civil action based on tortious conduct and not settled by agreement of the parties, shall be computed from the date the cause of action accrued to the date on which the money is paid, if, upon motion of any party to the action, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case.
***11** The second assignment of error contends that no evidence of a good faith effort to settle was offered by American at the required hearing. We will take these assignments of error together for, if any evidence of good faith was offered at the hearing, then the court below could have found that the elements of R.C. 1343.03(C) were not all met and we will be required to uphold the trial court's finding.
We notice that a transcript of the hearing on this issue is absent from the record. The existence of an evidentiary hearing is, however, noted on the record. Absent a transcript, we cannot determine if the trial judge acted properly, therefore, the question of what evidence was presented at that hearing is waived. *Clinard v. McCoury* (Feb. 3, 1988) Montgomery App. No. 10523, unreported.
The purpose of the evidentiary hearing at R.C. 1343.03(C) is to document the trial court's decision and to provide a record for appeal. *King v. Mohre* (1986), 32 Ohio App. 56, 58. We cannot rely on unsworn pleadings as to what was presented. We must assume that the evidence presented supported the judge's finding that there was no bad faith on the part of American to settle the suit, therefore the elements of R.C. 1343.03(C) would not have been present.
The court below noted in its August 4, 1987 entry on the record that a course of conduct of parties before a suit is filed can be inconsistent with efforts to settle made after filing. We agree with this position. See: *King,* supra. Bad faith in settling a "claim", as found by the jury, can coexist with good faith in settling a "lawsuit." We must assume the court below in fact had sufficient evidence before it to find such good faith.
The first and second assignments of error on cross appeal are not well taken.
The third assignment of error on cross appeal asserts that where the amount of debt is clear, "pursuant to a liquidated debt, the creditor is entitled to prejudgment interest." McDonald cites *Braverman v. Spriggs* (1980), 68 Ohio App.2d 58 for the above proposition. Even as McDonald frames the rule, pretrial interest is mandated under *Braverman* only where the amount of debt is clear. The amount is not clear in our case. The policy in question had limits. However, whether the loss under the policy was less than, equal to, or in excess of the limits was in issue. While we concede that American would not be liable in contract for any amounts above the policy limits, this case contained testimony by both sides asserting differing values of the loss. Even if American

admitted the dwelling was a total loss, they presented depreciated estimates of the value of the dwelling and of repair at amounts below the policy limits. Additionally, the amount of incurred additional living expenses was never agreed to and it was subject to proof at trial as was the amount of lost personal property. Furthermore, the requested awards in tort were in no way meant to be liquidated damage awards and we have no way of telling if damages were awarded in tort or in contract.
***12** The third assignment of error on cross appeal is not well taken. The judgment of the court below is affirmed.

WILSON and WOLFF, JJ., concur.

FN1. The applicable statutes of limitation in our case are fifteen years for breach of a written contract (R.C. 2305.06) and two years for the tortious breach of the duty of good faith. *Houndshell,* supra and *Plant v. Illinois Emp. Ins. of Wausau* (1984), 20 Ohio App.3d 236.