

IN THE SUPREME COURT OF OHIO

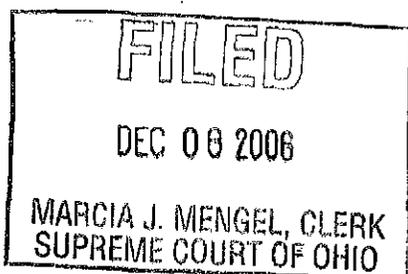
LUCIEN PRUSZYNSKI, et al. : CASE NO. 2006-2072
Appellees, : On Appeal from the Geauga
County Court of Appeals
vs. : Eleventh Appellate District
SARAH REEVES, et al., : Court of Appeals
Appellants. : Case No. 2005-G-2612

**APPELLEES' MEMORANDUM IN RESPONSE TO AND OPPOSING
APPELLANTS' MEMORANDA IN SUPPORT OF JURISDICTION**

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I. **THIS CASE IS NOT A CASE OF PUBLIC AND GREAT GENERAL INTEREST; THE COURT OF APPEALS APPLIED THE PURPOSE AND POLICY BEHIND OHIO REVISED CODE §1343.03(C) SET FORTH BY THE OHIO LEGISLATURE AND PREVIOUSLY RECOGNIZED BY THIS COURT.**

The public interest was served by the Court of Appeals' decision. The underlying policy of Ohio Rev. Code §1343.03(C) is well known. There exists no fundamental reason for this Court to reexamine issues surrounding these policies and principles. The Court of Appeals recognized and applied the statute's underlying purposes and policies in issuing its decision and opinion.

Ohio Rev. Code §1343.03(C) is the embodiment of an intent to encourage settlements prior to trial. The purpose of Ohio Rev. Code §1343.03(C) is to encourage litigants to make good faith efforts to settle their case thereby conserving legal resources and promoting judicial economy. *Peyko v. Frederick*, 25 Ohio St.3d 164, 167 (1986). "The statute was enacted to promote settlement efforts to prevent parties who engage in tortious conduct from frivolously delaying the ultimate resolution of cases, and to encourage good faith efforts to settle controversies outside the trial setting." *Kalain v. Smith*, 25 Ohio St.3d 157, 159 (1986); *Lovewell v. Physicians Ins. Co.*, 79 Ohio St.3d 143, 144 (1997). These policy reasons form the fundamental underpinnings of the Court of Appeals' analysis and decision. Appellants mere disagreement with the Court of Appeals' decision does not warrant this Court's exercise of its discretionary jurisdiction. The compelling purposes and policies do not need to be revisited by this Court.

In fact, the Court of Appeals' decision furthered the purposes of the statute and enforced policy considerations articulated by this and other Ohio courts. Ohio Rev. Code

§1343.03(C), like any statute awarding interest, has the additional purpose of compensating a plaintiff for the defendant's use of money which rightfully belong to the plaintiff. *Lovewell v. Physicians Ins. Co.*, 79 Ohio St. 3d at 144 (citation omitted). The importance of parties engaging in good faith settlement efforts requires that courts strictly construe the requirement that a party make a good faith settlement effort in order to further the statute's purpose. *Garret v. St. Elizabeth Health Center*, 142 Ohio App.3d 610, 613 (Mahoning Cty. 2001).

Ohio Rev. Code §1343.03(C) requires all parties to make an honest effort to settle the case. A party may have failed to make a good faith effort to settle even when he is not acting in bad faith. *Kalain v. Smith*, 25 Ohio St.3d 157 (1986)(citations omitted). This Court has previously set forth which factors which must be considered in awarding prejudgment interest, including the obligation to make a good faith monetary settlement offer or to have responded in good faith to an offer from the other party. *Id. at syllabus*. Ohio courts uniformly address these factors and apply the purposes and policy considerations underlying this statute. There is no reason or justification for revisiting these issues and principles in this case.

II. STATEMENT OF CASE AND FACTS

On March 24, 2000, Appellee, Lucien Pruszynski,¹ was seriously and permanently injured when the driver of the car in which he was a passenger, Sarah Reeves,² lost control of her car causing it to crash into a ditch and roll several times. Reeves was

¹ Lucien Pruszynski was a minor at the time of the accident. Appellees, Robert Pruszynski and Laurel Pruszynski, are Lucien's parents.

² Reeves was a defendant in the lower court proceedings. The jury found her five percent (5%) responsible for Appellees' damages.

swerving to avoid bicycles ridden by Appellants, Charles Kaufman, III and Vance Van Driest. Neither Kaufman nor Van Driest had lighting or reflectors on their bicycles as required by Ohio law. In October, 2004, a jury returned a verdict in favor of Appellees against Appellants, jointly and severally, in the amount of \$231,540.26.

Events at trial were compelling. At the close of Appellees' (Plaintiff's) case, the trial court granted Appellees' Motion to Direct a Verdict as to the negligence of Appellants Kaufman and Van Driest. Moreover, the trial court instructed the jury that the Appellants Kaufman and Van Driest were negligent as a matter of law. These rulings on issues of law contradict any purported claim that "there was a significant question on whether any negligence by the bicyclists and their parents caused the damages to the Appellees." (Memorandum in Support of Jurisdiction of Appellants, Charles Kaufman, III, et al. p. 6). At trial, the jury was further instructed that if it determined that one or more of the Defendants' negligence proximately caused the crash, the jury had to award Appellees no less than \$51,540.26.

Contrary to the implications contained in the Memoranda in Support of Jurisdiction, during trial, only Appellees offered expert testimony with respect to proximate cause issues. A certified accident reconstruction expert, James Crawford, testified as to these issues. Appellants only offered expert testimony on "lighting" issues. The expert did not offer any opinions on causation. The expert's opinions were substantially discredited, particularly in light of the trial court's determination that Appellants were negligent as a matter of law.

Similarly, Appellees offered the only expert medical evidence at trial. An orthopedic surgeon testified that Appellee, Lucien Prusznyski, sustained serious and

permanent injuries which necessitated surgery and which would require additional future treatment. Although Appellants required Mr. Prusznyski to submit to a medical examination by another orthopedic surgeon (chosen by Appellants), Appellants did not offer any testimony or evidence from that surgeon or any other medical expert at trial regarding the cause, nature, extent and permanency of Mr. Prusznyski's injuries. When Appellees obtained copies of Appellants' insurers' files post-verdict, Appellees learned that the surgeon who examined Lucien Prusznyski pursuant to Appellants' request concurred with and even believed more strongly than Appellees' own surgeon that Lucien Prusznyski's injuries were permanent and that he would need additional treatment in the future.

Throughout the pendency of the litigation, Appellants made little or no settlement offers. None of the Appellants made an offer until September 27, 2004, four and a half years after the crash and nearly 2 years 22 months after the lawsuit was filed. Appellants asserted that they were not liable throughout the litigation, even in the face of admitted and uncontroverted evidence that Kaufman and Van Driest were riding bicycles that were not equipped as required by Ohio Rev. Code §§4513.03 and 4511.56. Appellants even failed to offer any settlement amount during a private mediation scheduled by the parties.

Farmers Insurance Company, the insurer for the Van Driest Appellants, acknowledged that the value of this case would be in the \$200,000-\$250,000 range. Yet, Farmers directed its adjuster and counsel to proceed with "nuisance value attempts to settle." Nationwide, the insurer for the Kaufman Appellants, understood that its insured would be negligent and be exposed to pay full liability: "Therefore, we feel probable that

the jury could find... liability on each of the boys..." Nationwide urged its adjuster to be more proactive on the case. Yet, Nationwide refused to make any offer until September, 2004.

Even though the insurers for Appellants failed to turn over their complete files, overwhelming evidence established that Appellants' insurers, Farmers and Nationwide, did not conduct a rational evaluation of their risk. Nationwide's and Farmers' settlement offers to Appellees were not based on a rational evaluation of the potential exposure (particularly in light of the rulings on legal issues); their offers were not in good faith.

III. ARGUMENT AND LAW

REPLY TO THE VAN DRIEST APPELLANTS PROPOSITION OF LAW NO. 1 AND KAUFMAN APPELLANTS PROPOSITION OF LAW NO. I.

AN AWARD OF PREJUDGMENT INTEREST PURSUANT TO OHIO REV. CODE §1343.03(C) IS JUSTIFIED WHERE THE RECORD CONTAINS OVERWHELMING, UNCONTROVERTED EVIDENCE WHICH SATISFIES ALL OF THE ELEMENTS UNDER *KALAIN V. SMITH*, 25 OHIO ST.3d 157 (1986), FOR GRANTING PREJUDGMENT INTEREST.

This case's overwhelming record establishes Appellees' entitlement to prejudgment interest. Ohio Rev. Code §1343.03(C) requires that the party required to pay a judgment make a good faith effort to settle. *Kalain v. Smith*, 25 Ohio St.3d 157, 159 (1986). In determining whether a party made a good faith effort to settle, the party must rationally evaluate its risk and potential liability, and make a good faith monetary settlement offer or respond in good faith to an offer from the other party. *Id.* at syllabus. The statute requires all parties to make an honest effort to settle the case. A party may

have failed to make a good faith effort to settle even when it did not act in bad faith. *Id.* (citations omitted).

Various factors establish whether a party failed to make a good faith effort to settle. A substantial disparity between an offer and verdict is one factor circumstantially demonstrating whether a party made a good faith effort to settle where the adverse party failed to do so. *Andre v. Case Design, Inc.*, 154 Ohio App.3d 323 (Hamilton Cty. 2003). A party must engage in a realistic assessment of defense strategies, intangibles, such as the credibility and opinions of medical experts as to causation, evidence of permanency, the effect of the injury on the Appellee's quality of life, and the Appellee's credibility and sincerity as a witness. *Andre v. Case Design, Inc.*, 154 Ohio App.3d at 320. An offer must not only take into the account the strengths of the evidence in assessing the size of an award should the jury discount the defense's evidence. *Id.* Other factors to be considered include the applicable law, defenses available, and the nature, scope and frequency of efforts to settle. *Champ v. Wal-Mart Stores, Inc.*, 2002 Ohio 1615 (Hamilton Cty. 2002).

Consideration of all of these factors in this case compelled the Court of Appeals to determine that there was only one conclusion that could be reached with respect to Appellees' Motion for Prejudgment Interest: that such an award was justified by applicable law and the record as it existed. Here, the Appellants last offer (when combined with all Defendants) totaled \$120,000.00. The jury entered a verdict of \$231,540.26. There was undisputed and uncontroverted evidence of Appellants' negligence. None of the Appellants produced expert evidence regarding causation issues. Lucien Pruszynski's injuries were substantial and permanent. The Appellants

did not offer any medical testimony, let alone proof, which contradicted Appellees' medical evidence. Appellees numerous efforts to settle were rebuffed; Appellants even failed to make any offer at a mediation. The record is replete with facts justifying the Court of Appeals' determination that prejudgment interest should be awarded. No contrary proof exists.

The mere fact that Appellants made a settlement proposal (albeit, a small one) does not insulate them from prejudgment interest. Whether a good faith effort to the settle the case has been made depends on whether the amount of the offer was based on an objectively reasonable belief. *Andre v. Case Design, Inc.*, 154 Ohio App.3d at 329. A party holding an objectively unreasonable belief is not excused from the obligation to enter into settlement negotiations; an unreasonable belief does not insulate a party from liability for prejudgment interest by relying on his own naiveté. *Loder v. Burger*, 113 Ohio App.3d 669, 675 (Lake Cty. 1996). Appellants never held an objectively reasonable belief as to the extent of their exposure in this case. The record of Appellants' insurers' files, and the trial court ruling established that Appellants could not have possessed an objectively reasonable belief as to their risks and exposure. In this case, the trial court directed a verdict in favor of the Appellees at the close of Appellees' (plaintiffs') case with respect to the negligence of Appellants, Charles Kaufman, III and Vance Van Driest. The trial court instructed the jury that the Appellants, Charles Kaufman, III and Vance Van Driest, were negligent as a matter of law. The trial court further informed the jury that should it determine that negligence was a proximate cause of the injuries, it had to award no less than a specified amount. The insurers' own files established that a value of this

case commensurate with the ultimate jury verdict. Yet, the offers (when they did come nearly three years after suit was filed) were substantially lower than the verdict.

Based upon the record, the Court of Appeals reasoned that an award of prejudgment interest should have been made. The evidence before it was conclusive and the purposes and policies behind Ohio Rev. Code §1343.03(C) were served by such an award. The Court of Appeals' decision was consistent with Ohio law.

REPLY TO THE KAUFMAN APPELLANTS PROPOSITION OF LAW NO. II.

THE COURT OF APPEALS RECOGNIZED THAT THE TRIAL COURT'S DECISION DENYING PREJUDGMENT INTEREST CONSTITUTED AN ABUSE OF DISCRETION BECAUSE THE ONLY EVIDENCE IN THE RECORD DEMONSTRATED THAT APPELLANTS' CONDUCT WARRANTED SUCH AN AWARD.

The Kaufman Appellants acknowledged that several factors requiring an award of prejudgment interest exist in this case:

1. Appellants' offer was much lower than the jury verdict;
2. Appellants were negligent per se for failure to comply with R.C. §§4513.03 and 4511.56; and,
3. Appellants could be held liable for the full verdict amount under joint and several liability.

Memorandum in Support of Jurisdiction of Appellants, Charles Kaufman, III, et al., p. 7.

Their claim that there was a "significant question on whether any negligence by the bicyclists and their parents caused the damages..." (*Id.* at p. 6), is factually incorrect. Appellants failed to offer competent, credible proof that they were not the proximate cause of the damage. Their expert never gave an opinion on causation; only Appellees' expert offered such proof. (See discussion pp. 3-4). Nor did Appellants offer any

medical evidence, thereby conceding that the accident proximately caused Lucien Pruszynski substantial injury. The Court of Appeals did not weight evidence. Rather, it recognized that the only evidence at trial demonstrated that Appellants' negligence proximately caused the damages. On the record of this case, all of the elements for awarding prejudgment interest existed. The only rational and reasonable conclusion required such an award.

**REPLY TO THE KAUFMAN APPELLANTS PROPOSITION OF
LAW NO. III.**

**AN APPELLATE COURT POSSESSES THE AUTHORITY TO
DECLARE THAT THE TRIAL COURT ABUSED ITS DISCRETION.**

This Memorandum addresses the overwhelming factors justifying an award of prejudgment interest. (See discussion pp. 5-8). All four prongs of the *Kalian* test were satisfied.

1. **The Trial Court's Failure to Make Such a Finding
Was an Abuse of Discretion.**

Appellants never claimed in the Court of Appeals that the trial court had to conduct a hearing before ruling on a motion for prejudgment interest. In fact, they argued that an oral hearing was not required. Moreover, the Court of Appeals did not address the issue as to when a hearing was required, declaring that issue moot. Rather, the Court of Appeals held that "the trial court abused its discretion when it denied the Pruszynski's claim for prejudgment interest." (Ct. of Appeals Op. p. 3). The Court of Appeals acted within its authority in rendering its decision.

IV. CONCLUSION

For the reasons set forth above, Appellees, Lucien Pruszynski, Robert Pruszynski and Laurel Pruszynski, respectfully request that this Court refuse to exercise jurisdiction over this case.

Respectfully submitted,

DINN, HOCHMAN & POTTER, LLC

A handwritten signature in black ink, appearing to read "S. B. Potter", is written over a horizontal line.

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V. CERTIFICATE OF SERVICE

A true copy of the foregoing Appellees' Memorandum in Response to and Opposing Appellants' Memoranda in Support of Jurisdiction was mailed this 5 day of December, 2006, by regular U.S. Mail, postage prepaid, to:

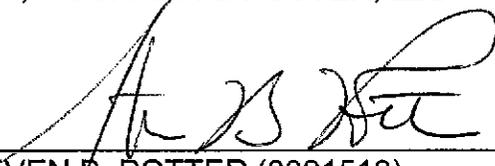
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