

IN THE SUPREME COURT OF OHIO

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

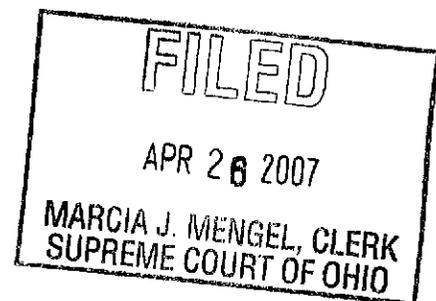
MERIT BRIEF APPELLANTS CHARLES KAUFMAN III,
CHARLES KAUFMAN, JR. AND DINAH KAUFMAN

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STATEMENT OF THE FACTS

This case arises from a November 25, 2002 automobile accident that resulted in injuries to Appellee Lucien Pruszyński, a minor. Appellee was a passenger in a vehicle operated by Sarah Reeves who crashed her car into a ditch after overreacting to the presence of Appellants Charles Kaufman III and Vance Van Driest, both minors, who were riding bicycles on the gravel berm of the roadway.

Pruszyński and his parents filed a complaint against Reeves, the two bicyclists, and their parents (collectively referred to as "Kaufman" and "Van Driest"). Kaufman and Van Driest heavily disputed liability based upon the fact that they were on the berm of the roadway, that Reeves had overreacted to their presence and that a lighting expert opined that Reeves should have seen the bicyclists from at least 150 feet away.

Although the parties engaged in pretrial settlement negotiations, the case did not settle and went to trial. On October 21, 2004, a jury returned a verdict for the Appellees in the amount of \$231,540.26. The jury assessed negligence against Reeves (the driver) at 5%, against the bicyclists and their parents at 95%. The Appellees filed a motion for prejudgment interest. Appellants filed a brief in opposition. The trial court denied the motion without conducting a hearing.

Appellees appealed the denial of the motion for prejudgment interest to the Eleventh District Court of Appeals. Appellee raised two assignments of error: (1) that the trial court erred in denying the motion without conducting a hearing; and (2) that the trial court erred in denying the motion. The Appellate Court found that the Appellees made good faith efforts to settle the case and that the Appellants (Kaufman and Van Driest) did not. The matter was remanded to the trial court only for a determination on the amount of the prejudgment interest, not for a determination of whether

interest should be awarded at all. In light of this ruling, the Appellate Court declared the first assignment of error regarding the need for a hearing on the motion moot.

Appellants Kaufman filed their notice of appeal to the Supreme Court of Ohio on November 15, 2006. On February 28, 2007, the Supreme Court granted jurisdiction to hear the case and allowed the appeal.

ARGUMENT

Proposition of Law No. I: R.C. 1343.03(C) requires an oral hearing before a court may grant an award of prejudgment interest.

R.C. 1343.03(C) states in pertinent part as follows:

(1) If, upon motion of any party to a civil action that is based on tortious conduct, that has not been settled by agreement of the parties, and in which the court has rendered a judgment, decree, or order for the payment of money, *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, interest on the judgment, decree, or order shall be computed ***

(Emphasis added).

In *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 658, this Court analyzed the statute and laid out the requirements for a grant of prejudgment interest as follows:

The statute sets forth certain requirements. First, a party seeking interest must petition the court. The decision is one for the court-not any longer a jury. The motion must be filed after judgment and in no event later than fourteen days after entry of judgment: *Cotterman v. Cleveland Elec. Illum. Co.* (1987), 34 Ohio St.3d 48, 517 N.E.2d 536, paragraph one of the syllabus. ***Second, the trial court must hold a hearing on the motion.*** Third, to award prejudgment interest, the court must find that the party required to pay the judgment failed to make a good faith effort to settle and, fourth, the court must find that the party to whom the judgment is to be paid did not fail to make a good faith effort to settle the case. R.C. 1343.03(C).

(Emphasis added).

In *Furr v. State Farm Mut. Auto. Ins. Co.* (1998), 128 Ohio App.3d 607, 622, the Sixth District Court of Appeals emphasized that any award of prejudgment interest cannot stand if the court does not follow the statutory requirements for the award. The *Furr* court stated as follows:

We find that the statutory interest award must be stricken. As stated in *Zoppo[v. Homestead Ins. Co.]* (1994), 71 Ohio St.3d 522, “[a]n insured who seeks prejudgment interest must follow the specific statutory procedures set forth in R.C. 1343.03.” *Zoppo, supra*, 71 Ohio St.3d at 558, 644 N.E.2d at 402. R.C. 1343.03(C) states:

“(C) Interest on a judgment, decree, or order for the 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.*” (Emphasis added.)

The statute sets forth certain requirements: the party seeking interest must petition the court, the decision is one for the court-not the jury, the trial court must hold a hearing on the motion, and the trial court must find that the party required to pay the judgment failed to make a good faith effort to settle and that the party to whom the judgment is to be paid did not fail to make a good faith effort to settle. *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 658, 635 N.E.2d 331, 347-348.

None of the requirements set forth in R.C. 1343.03(C) was met in this case. Accordingly, we vacate the award of prejudgment interest.

Subsequently, the Appellate Courts created an exception to the hearing requirement, stating that where the record on appeal demonstrates that a motion for prejudgment interest is obviously not well-taken, the trial court can deny the motion without a hearing. *Novak v. Lee* (1991), 74 Ohio App.3d 623, 631 ; *Fazio v. Meridian Ins. Co.* (Apr. 9, 1998), Cuyahoga App. No. 73320, unreported, 1998 WL 166124, *2. Some Courts have held that the decision to convene a hearing on such a motion is discretionary if an award is unlikely. *Werner v. McAbier* (Jan. 13, 2000), Cuyahoga App.

No. 75197, 75233, unreported, 2000 WL 23108, *7. The *Novak* court explained the reasoning behind this proposition of law as follows:

The trial court following a trial certainly possesses enough information about a case to make a threshold determination as to whether a motion for prejudgment interest might succeed. The court has had the opportunity to view the pleadings, observe the parties, and examine the evidence. If it appears to the trial court that there may be grounds for awarding prejudgment interest, then the court must hold an evidentiary hearing. If it appears no award is likely, the court, in its discretion, may decline to hold such a hearing. Should the party requesting prejudgment interest believe there is a compelling reason in favor of the motion, that party may by memorandum and affidavit bring the reason to the attention of the court.

The advantage of this approach is that judicial resources are preserved by avoiding what may frequently be a perfunctory or meaningless hearing on a prejudgment interest motion. At the same time, a party's right to a hearing before prejudgment interest is granted is preserved.

74 Ohio App.3d at 631-632.

Where the record does *not* demonstrate that the motion is obviously not well taken, the reviewing court must remand the matter for an evidentiary hearing on whether interest is owed (not just the amount of interest) pursuant to the statute. *Augustine v. North Coast Limosine, Inc.* (Aug. 10, 2000), Cuyahoga App. No. 76742, 76993, unreported, 2000 WL 1144970, *1; *Duvendack v. Hall* (March 29, 2002), Lucas App. No. L-01-1443, unreported, 2002 WL 471751, *1; *Kluss v. Alcan Aluminum Corp.* (1995), 106 Ohio App.3d 528, 541; *Kmetz v. MedCentral Health Sys.* (Nov. 12, 2003), Richland App. No. 02CA0050, unreported, 2003-Ohio-6115, 2003 WL 22715631 at ¶41; *Physicians Diagnostic Imaging v. Grange Ins. Co.* (Sept. 24, 1998), Cuyahoga App. No. 73088, unreported, 1998 WL 655503, *3-4.

In other words, while a hearing can be waived if the trial court, in its discretion, determines that it is obvious from the record that no interest is owed, the hearing cannot be waived if interest

may be owed. Prejudgment interest cannot be awarded without a hearing but it can be denied.

The Appellate Court's decision ignores this rule. Instead, the Appellate Court awards prejudgment interest without a hearing. This is a violation of R.C. 1343.03 and *Moskovitz, supra*.

Proposition of Law No. II: An Appellate Court lacks the authority to grant a motion for prejudgment interest without a hearing where the motion was denied by the trial court.

This Proposition of Law asks a more specific question that falls under Proposition of Law No. 1. If R.C. 1343.03 does require a hearing for a grant of prejudgment interest, can a reviewing Court of Appeals grant the motion without a hearing and remand only to determine the amount of interest? As indicated under the first Proposition of Law, the Appellate Court cannot do this. The statute and *Moskovitz, supra* clearly state that a hearing is required before a court may grant a motion for prejudgment interest.

As stated by this Court in *Zoppo, supra*, the specific statutory procedures of R.C. 1343.03 must be followed before an award of statutory interest can be made. R.C. 1343.03(C) requires a hearing, not only on the amount of damages, but on the key question of whether interest is owed at all. *Furr, supra*.

There is no special exception for a reviewing court to grant such a motion when the trial court denied it. The proper procedure is for the Appellate Court to first make an affirmative finding that the trial court abused its discretion, then remand the matter to the trial court for a hearing on whether the motion should be granted.

The Appellate Court's ruling acts as an impermissible usurpation of the trial court's statutory and common law role in determining whether to award prejudgment interest. While Appellate Courts have adjusted the amounts of such awards or reversed the grant of an award, it is beyond their

authority to award prejudgment interest after a trial court has denied the motion without an oral hearing. The only power the Appellate Court has is to remand the matter for a hearing. Yet the Eleventh District's current ruling ignores this procedure thereby circumventing R.C. 1343.03(C). Allowing this ruling to stand renders the statutory hearing requirement meaningless.

CONCLUSION

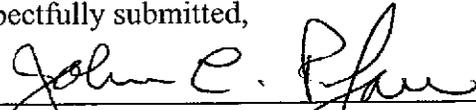
The decision below is in direct contravention to the specific requirements of R.C. 1343.03(C) and this Court's statement of the law in *Moskovitz*. The decision robs the trial court of the duties assigned to it despite the fact that the trial court was in the best position to weigh the evidence and assess the behavior and negotiation posture of the parties. If the lower court felt the trial judge abused his discretion, then it should have simply remanded the matter for a hearing on whether interest is owed. Instead, the lower court itself determined that interest was owed and remanded only for a determination of the amount of interest due. This usurpation of the trial court's power violates Ohio law and sets a dangerous precedent for Ohio's courts.

Appellants respectfully ask this Court to reverse the decision of the Court of Appeals and affirm the decision of the trial court.

Alternatively, Appellants seek a remand of this matter to the trial court for a full hearing on the whether prejudgment interest is owed, as opposed to a hearing merely on the amount.

A reversal will restore the trial court's power to determine whether interest is owed and erase the confusion that the decision below has created about the hearing requirement of R.C. 1343.03(C) and this Court's decision in *Moskovitz*.

Respectfully submitted,



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IN THE SUPREME COURT OF OHIO

06-2072

LUCIEN PRUSZYNSKI, et al.)
)
 Appellees)
)
 vs.)
)
 SARAH REEVES, et al.)
)
 Appellants)

On Appeal from the Geauga County Court
of Appeals, Eleventh Appellate District

Court of Appeals Case No. 2005-G-2612

NOTICE OF APPEAL
OF APPELLANTS CHARLES KAUFMAN III, CHARLES KAUFMAN, JR. AND
DINAH KAUFMAN

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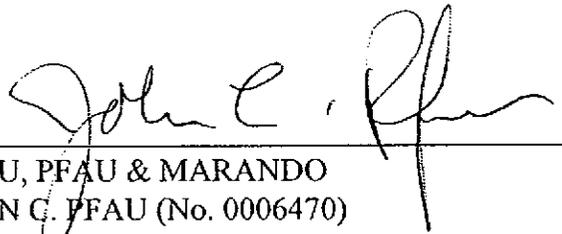
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VAN DRIEST

Appellants Charles Kaufman III, Charles Kaufman, Jr. and Dinah Kaufman hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Geauga County Court of Appeals, Eleventh Appellate District, entered in Court of Appeals case No. 2005-G-2612 on September 29, 2006.

This case is one of public or great general interest.

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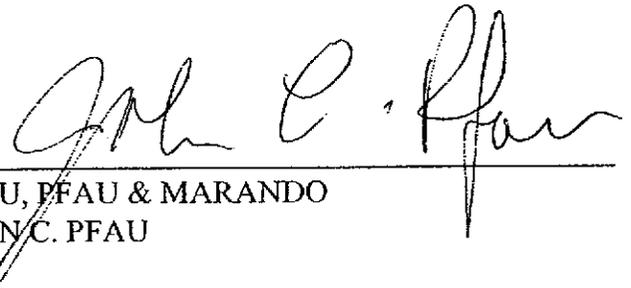
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IN COURT OF APPEALS

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CLERK OF COURTS
GEAUGA COUNTY

THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
GEAUGA COUNTY, OHIO

LUCIEN PRUSZYNSKI, et al.,	:	OPINION
Plaintiffs-Appellants,	:	
- vs -	:	CASE NO. 2005-G-2612
SARAH REEVES, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 02 P 001060.

Judgment: Affirmed in part, reversed in part and remanded.

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COLLEEN MARY O'TOOLE, J.

{¶1} Appellants Lucien Pruszynski, ("Lucien"), Robert Pruszynski and Laurel Pruszynski (the "Pruszynskis"), appeal from a judgment of the Geauga County Court of

Common Pleas, denying the Pruszynskis' motion for prejudgment interest against appellees, Sarah Reeves, ("Reeves"), Charles Kaufman, a.k.a., Charles Kaufman, III, ("Kaufman, III"), Charles Kaufman a.k.a., Charles Kaufman, Jr. ("Kaufman, Jr."), Dinah Kaufman, a.k.a., Dinah Zirkle, ("Zirkle"), (collectively referred to as "Kaufmans"), Vance H. Van Driest ("Van Driest"), and Denise Van Driest, a.k.a., Denise Deitz, ("Dietz"), (collectively referred to as "Van Driests").

{¶2} The relevant facts are as follows. Lucien was injured on March 24, 2000, when the driver of the car in which he was a passenger, Reeves, crashed the car into a ditch where it rolled several times. Reeves was swerving to avoid bicycles driven by Kaufman, III and Van Driest. Neither Kaufman, III nor Van Driest, minor children at the time, had lighting or reflectors on their bicycles.

{¶3} On November 25, 2002, the Pruszynskis filed a complaint against the appellees. Their claim against Reeves alleged negligent operation of a vehicle and failure to control it. Their claims against the Van Driests and Kaufmans related to the operation of a bicycle without appropriate reflectors, reflective clothing, and the derivative acts of Kaufman, III's, and Van Driest's parents.¹

{¶4} Appellees timely answered the complaint denying negligence. Cross claims were filed by and between all three sets of the parties. Defense for all appellees was provided by insurance companies. State Farm Mutual Automobile Insurance Company, ("State Farm") defended Reeves. Farmers Insurance Company, ("Farmers") defended the Van Driests. Nationwide Mutual Fire Insurance Company ("Nationwide") provided a defense for the Kaufmans.

1. In their complaint, the Pruszynskis sought judgment against appellees under joint and several liability.

{¶5} On October 14, 2003, the trial court conducted a pretrial. The parties were unable to resolve the lawsuit at the pretrial. The case was originally scheduled for trial on June 8, 2004. However, on May 14, 2004, the parties filed a motion to continue the trial pending the outcome mediation. The motion was granted and the trial was continued to October 19, 2004.

{¶6} Mediation was unsuccessful. State Farm offered \$33,333.33, one-third of its policy limits, with indemnification, and no settlement offers were made by Nationwide, within its \$300,000 policy limits, or Farmers, which had a \$100,000 policy limit. Trial commenced on October 19, 2004. On the day of trial, the Pruszynskis reduced their demand of settlement to \$200,000. In response, State Farm raised its offer to \$50,000, and Nationwide and Farmers offered \$35,000 each, for a total of \$120,000 offer as to all appellees. The offer was refused and the trial proceeded.

{¶7} At trial, the Pruszynskis established that medical bills in the amount of \$51,540.26 had been incurred as a result of injuries from the March 24, 2000 accident. As a result of the accidents, Lucien fractured his right ankle, partially tore a ligament in his right ankle, ruptured three ligaments in his left knee, damaged his meniscus, and sustained permanent cartilage damage to his left knee. The Pruszynskis provided the only expert medical testimony offered at the trial. Patrick Hergenroder, M.D., testified that as a result of the March 24, 2000 accident, Lucien sustained serious and permanent injuries which necessitated surgery and would require additional future treatment. At the close of their case, the trial court granted the Pruszynskis' motion to direct a verdict as to the negligence of Kaufman, III and Van Driest. The trial court instructed the jury that Kaufman and Van Driest were negligent as a matter of law for

failure to comply with R.C. 4513.03 and R.C. 4511.56 regarding lights and illumination devices required to be placed on their bicycles. On October 21, 2004, the jury returned a verdict in favor of the Pruszynskis in the amount of \$231,540.26, and assessed negligence as follows: Reeves, 5 percent; Kaufman, III and Van Driest, 25 percent; and each set of parents, Dietz, Kaufman, Jr. and Zirkle, 35 percent. Stated differently, the combined share of the Kaufmans and Van Driests verdict was 95 percent, \$219,963.24, and Reeves' share was 5 percent, \$11,577.01.

{¶8} The Pruszynskis then filed a motion for prejudgment interest on October 29, 2004. A brief in support, affidavit and documents were submitted with the motion. Appellees filed briefs in opposition to the motion for prejudgment interest. Pursuant to discovery, the Pruszynskis served subpoenas directly upon the insurance carriers which provided defense in the case, seeking pertinent claims filed information. Farmers and Nationwide refused to produce certain documents, and Nationwide filed a motion for in-camera inspection to determine if certain documents were privileged. In the meantime, the Pruszynskis filed a supplemental brief in support of their motion for prejudgment interest on December, 16, 2004, attaching the partial responses to the subpoenas, including documents received from the claims files of the insurance companies. The court did not rule on Nationwide's motion for protective order. On December 21, 2004, the trial court denied the Pruszynskis' motion for prejudgment interest, without conducting a hearing or identifying the basis for its decision in its judgment entry.

{¶9} It is from that judgment that appellants filed a timely notice of appeal setting forth the following assignments of error for our review:

{¶10} “[1.] Whether the trial court erred by denying appellants’ motion for prejudgment interest (T.d. 104; T.d. 126) without conducting a hearing or providing any reasons for its ruling. (T.d. 128).

{¶11} “[2.] Whether the trial court erred by denying the motion for prejudgment interest (T.d. 104; T.d. 126) when the record reveals that appellants satisfied all of the requirements under Ohio Rev. Code 1343.03(C) for granting prejudgment interest (T.d. 1128).”

{¶12} We shall first address the Pruszynskis’ second assignment of error as it is dispositive of this appeal.

{¶13} R.C. 1343.03(C) governs the award of prejudgment interest. It states: Interest on a judgment, decree, or order for the 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.”

{¶14} The trial court is vested with the discretion to decide whether a party has made a good faith effort to settle a case. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87. Thus, the trial court’s decision will not be overturned absent a showing of abuse of discretion. *Ziegler v. Wendel Poultry Serv., Inc.* (1993), 67 Ohio St.3d 10, 20. The “term ‘abuse of discretion’ connotes more than an error of law or judgment; it

implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶15} In *Kalain v. Smith* (1986), 25 Ohio St.3d 157, 159, the Ohio Supreme Court held: "A party has not 'failed to make a good faith effort to settle' under R.C. 1343.03(C) if he has (1) fully cooperated in discovery proceeding, (2) rationally evaluated his risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party." A party has not failed to make a good faith effort, if it has complied with all the above four factors. Stated differently, it is not necessary for all four criteria to be denied to find a lack of good faith. *Szitas v. Hill*, 8th Dist. No. 85839, 2006-Ohio-687, at ¶11, citing *Detelich v. Gecik*, 90 Ohio App. 3d 793, 797.

{¶16} For purposes of prejudgment interest, a lack of "good faith" is not the equivalent of "bad faith." *Kalain* at 159. To determine whether a party has failed to make a good faith effort to settle under R.C. 1343.03(C), it is necessary only to apply *Kalain's* four-prong test. *Detelich* at 797.

{¶17} In the case *sub judice*, there is no allegation that the appellees failed to fully cooperate in discovery proceedings. Thus, the first prong of the *Kalain* test is uncontroverted. Nor is there evidence that any of the appellees attempted to unnecessarily delay the proceedings, as the third prong of the test prohibits.

{¶18} The Pruszynskis argues that the insurance companies failed to rationally evaluate their risks and potential liability and as a result, failed to make good faith

monetary settlement offers. Thus, they assert that the record supports a finding of lack of good faith based upon the second and fourth factors of the *Kalain* test.

{¶19} “The lack of good-faith effort to settle is not demonstrated simply by comparing the amount of a settlement offer to the verdict actually returned by a jury. Although a substantial disparity between an offer and a verdict is one factor circumstantially demonstrating whether a party made a good-faith effort to settle or the adverse party failed to do so ***.” *Andre v. Case Design, Inc.*, 154 Ohio App.3d 323, 328. “A rational evaluation of the risk of exposure assumes more than simply a defendant’s admission of liability. The value of a case for settlement depends on a realistic assessment of defense strategy and tangibles such as the credibility of the opinions of medical experts as to causation, evidence of permanency, the effect of the injury on the plaintiff’s quality of life, and the plaintiff’s credibility and sincerity as a witness.” *Id.* at 329.

{¶20} In respect to State Farm, the Pruszynskis asserts that State Farm’s highest settlement offer of \$50,000 was inconsistent with the values and potential exposures as set forth in its claims files. We disagree.

{¶21} The record reveals that State Farm made offers of settlement, rationally evaluated liability and actively sought settlement offers from the other tortfeasors in this case.

{¶22} State Farm was the insurer for Reeves, the driver of the car in which Lucien was riding when the accident occurred. State Farm’s evaluation of the case was from \$175,000 to \$225,000. The evidence reveals that when evaluating the claim, State Farm took into account reasonable and customary medical costs, medical evaluation,

and Lucien's long term prognosis. State Farm also considered the issues of liability and comparative negligence of the Kaufmans and Van Driests. It is clear from the onset that State Farm identified the negligence per se of Kaufman, III and Van Driest, and took the position that all three tortfeasors should share equally in any monetary settlement. State Farm offered an initial pre-suit offer of \$33,333.33. This offer was never revoked and was renewed at mediation. On the day of trial, State Farm increased its offer of settlement to \$50,000. The jury verdict assessed 5 percent comparative negligence against Reeves, \$11,577.01. Thus, consideration of the disparity between State Farm's final offer and the jury verdict does not provide any evidence that State Farm lacked in good faith in its monetary offer to settle, under *Kalain*.

{¶23} This court further notes that the record shows that State Farm encouraged Nationwide and Farmers to cooperate in participating in settlement negotiations. The State Farm activity logs reveal the following:

{¶24} June 14 2004: "**** We offered 1/3 of our limits, \$33,333.33 as a restatement of our prior offer. Our position is that the other two defendants, bicyclists share an equal fault ***. The carriers for the other two defendants are unwilling to make offers unless our limits are offered."

{¶25} August 24, 2004: "Our position is that the two other defendants, bicyclists share an equal fault ***. To date the other two carriers have not made any offers."

{¶26} August 30, 2004: "The joint tortfeasor carriers [Nationwide and Farmers], continue to resist making any offers."

{¶27} In reviewing the record, State Farm's offer was based upon a rational evaluation and thus, its offer was in good faith. Thus, the Pruszynskis' assignment of error as to State Farm is without merit.

{¶28} We now address Nationwide and Farmers, insurers for the bicyclists and their parents. Nationwide was the insurer for the Kaufmans, and Farmers for the Van Driests. The Pruszynskis make several arguments that evidence in the record establishes that Nationwide and Farmers failed to rationally evaluate their risks and potential liability.

{¶29} First, the Pruszynskis argues that Nationwide and Farmers unduly delayed any offer of settlement.

{¶30} The record reveals Nationwide's and Farmers' position of no liability or very limited liability was not a rational assessment. Nationwide and Farmers failed to make any offers at the mediation hearing held on June 10, 2004. The first offer of settlement by Nationwide and Farmers did not occur until September 27, 2004, nearly two years after suit was filed. The joint offer of Nationwide and Farmers at that time was \$24,000.00, \$12,000 each. On October 1, 2004, their joint offer increased to \$40,000. On October 19, 2004, the first day of trial, Nationwide and Farmers increased their offers to \$35,000, each, for a total of \$70,000. No additional offers were made by either during trial, even after the court granted the Pruszynskis' motion for a directed verdict as to the negligence of Kaufman, III and Van Driest.

{¶31} The Pruszynskis further contend that the negotiating position of Nationwide and Farmers was inconsistent with values and potential exposures as set forth in the records of their own claim files.

{¶32} In a May 24, 2004 memo, Farmers' adjuster, Salvatore Nuzzo stated in pertinent part: "I concur with defense counsel that the verdict for this case will be in the \$200,000-\$250,000 range should the jury apply full contribution to the two bicyclists ***
[.] Proceed with nuisance value attempts to settle in mediation if not successful in resolution proceed with trying the case. "

{¶33} Nationwide's activity logs and reports reveal the following:

{¶34} "1/13/2003: [N]o offer was made."

{¶35} "10/14/03: Attended ***pretrial. I was only prepared to offer a few thousand dollars to stop expenses. We [Nationwide] hung firm on a no liability decision position and Farmers indicated 'We will pay what [Nationwide] pays.' Judge indicated if we were only thinking of defense costs we would be going nowhere. *** The judge finally set the case for trial ***."

{¶36} "4/12/04 Casualty File Evaluation: Considering the significant knee injury and strong possibility of multiple knee replacement surgeries and lifetime impact I would feel this filed could easily have a full value up to \$250,000."

{¶37} During the course of pretrial discovery, Lucien submitted to a medical exam by Robert Fumich, M.D. ("Dr. Fumich"), an orthopedic surgeon. Although Dr. Fumich was not called to testify at trial, his report was provided to the Pruszyńskis. In his report, Dr. Fumich stated: "[Lucien] has permanent injury and more likely than not will require some future treatment and restriction of activities. With the brace, he should be able to return to some sports activities but will never return to same degree as he had prior to the accident. Running, jumping*** will all be affected. *** [M]ore likely than not, he will require a knee replacement later in life. Prognosis for the left knee is fair

short term and poor long term.” In addition, medical expenses of \$51,540.26 associated with Lucien's injuries were uncontested, stipulated to by the parties, and included in the jury instructions at trial. It is clear that both Nationwide's and Farmers' offers of settlement fell far short of the severe extent of Lucien's known injuries and medical expenses incurred.

{¶38} In response to the Pruszynskis' motion for prejudgment interest, Nationwide and Farmers argued that based upon issues of proximate cause and comparative negligence, they were justified on asserting claims of no liability and/or limited liability. We disagree.

{¶39} When liability is clear, as in this case at bar, the policy of R.C. 1343.03(C) requires an insurer to make a determined effort to settle a claim prior to trial. *Loder v. Burger* (1996), 113 Ohio App.3d 669, 676; *Guerrieri v. Allstate Ins. Co.*, 8th Dist. Nos. 73869, 73870, 75132, 75133, 1999 Ohio App. LEXIS 4049, at 23. Nationwide and Farmers contend they believed the Pruszynskis' case was against Reeves, who was defended by State Farm. This argument must fail because it relies upon a determination of the degree of fault between the defendants. Nationwide and Farmers were aware that Kaufman, III and Van Driest were negligent as a matter of law for failure to comply with R.C. 4513.03 and R.C. 4511.56. Any negligence by Reeves would not exonerate Nationwide's and Farmers' insureds from liability in this matter. The trial court directed a verdict in favor of the Pruszynskis at the close of their case with respect to the negligence of those insureds. It is clear that Nationwide and Farmers chose to disregard factors of liability and the value of the claim.

{¶40} We further note that both Nationwide and Farmers acknowledged in their claim filed records that under the joint and several liability statutes each could be held liable for the full verdict valued up to \$250,000.

{¶41} Although it is but one factor in determining lack of good faith, we agree with the Pruszynskis that there is a significant disparity between the settlement offers of Nationwide and Farmers and the jury verdict and assessment of negligence. The jury awarded \$231,540.26 in damages. The jury found the Van Driests and Kaufmans to be 95 percent liable, in the sum of \$219,963.24. Thus, there was a significant disparity between Nationwide's and Farmers' combined final settlement offers of \$70,000, and compared to their share of the jury verdict. The record demonstrates that Nationwide and Farmers determined early on either to make no offer, and/or, an unfairly low, take it or leave it offer.

{¶42} "The purpose of R.C. 1343.03(C) is to encourage litigants to make a good faith effort to settle their case, thereby conserving legal resources and promoting judicial economy." *Peyko v. Frederick* (1986), 25 Ohio St.3d 164,167. The Supreme Court of Ohio has observed that: "The statute was enacted to promote settlement efforts, to prevent parties who have engaged in tortious conduct from frivolously delaying the ultimate resolution of cases, and to encourage good faith efforts to settle controversies outside a trial setting." *Kalain* at 159.

{¶43} From the record before this court, we conclude there was no rational evaluation risk exposure by Nationwide and Farmers. Thus, the second prong of *Kalain* is met. Since we conclude that Nationwide's and Farmers' settlement offers to the Pruszynskis were not based on a rational evaluation, we further conclude their offers

were not in good faith. Thus, the fourth prong of *Kalain* is satisfied. The Pruszynskis' argument is well-taken.

{¶44} Our inquiry does not end here. R.C.1343.03(C) requires the party seeking prejudgment interest to prove they made a good faith effort to settle. *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 659; *Gemberling v. Sepulveda*, 11th Dist. No. 99-P-0088, 2000 Ohio App. LEXIS 6124, at 6.

{¶45} The Pruszynskis submitted evidence demonstrating that they made good faith settlement demands and counter-proposals. At the outset of the case, they demanded \$500,000. At mediation, they reduced their settlement demands to \$450,000. In a June 11, 2004, letter to Nationwide and Farmers, counsel for the Pruszynskis expressed disappointment over their failure to present any settlement offer. In subsequent correspondence dated October 1, 2004, counsel on behalf of the Pruszynskis again urged settlement, expressing concern over the failure of Farmers and Nationwide to attempt good faith settlement. On the day of trial, the Pruszynskis reduced offer of settlement for \$200,000 was unsuccessful.

{¶46} We conclude that the Pruszynskis aggressively made attempts to settle, and Nationwide and Farmers failed to make good faith efforts to settle pursuant to *Kalain*. Thus, the Pruszynskis' second assignment of error as to Nationwide and Farmers is with merit.

{¶47} Based upon our determination of the second assignment of error, the Pruszynskis' first assignment is rendered moot.

{¶48} We conclude the trial court abused its discretion when it denied the Pruszynskis claim for prejudgment interest against Nationwide and Farmers.

Accordingly, we affirm in part, and reverse in part, the judgment of the trial court denying prejudgment interest, and remand this matter for a determination of the amount of prejudgment interest against Nationwide and Farmers, pursuant to R.C. 1343.03(C).

WILLIAM M. O'NEILL, J.,

DIANE V. GRENDALL, J.,

concur.

STATE OF OHIO
COUNTY OF GEAUGA

) IN THE COURT OF APPEALS
) **FILED** ELEVENTH DISTRICT
) IN COURT OF APPEALS

SEP 29 2006

LUCIEN PRUSZYNSKI, et al.,
Plaintiffs-Appellants,

DENISE M. KAMINSKI
CLERK OF COURTS
GEAUGA COUNTY

JUDGMENT ENTRY

- vs -

CASE NO. 2005-G-2612

SARAH REEVES, et al.,

Defendants-Appellees.

For the reasons stated in the opinion of this court, it is the judgment and order of this court that the judgment of the trial court is affirmed in part, reversed in part and the matter is remanded for a determination of the amount of prejudgment interest against Nationwide and Farmers, pursuant to R.C. 1343.03(C).


JUDGE COLLEEN MARY O'TOOLE

FOR THE COURT

12/007

FILED
IN COMMON PLEAS COURT

2004 DEC 21 PM 1:41

DENISE B. WORKUM
CLERK OF COURTS
GEAUGA COUNTY

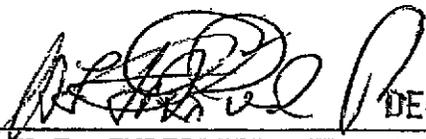
IN THE COURT OF COMMON PLEAS
GEAUGA COUNTY, OHIO

LUCIEN PRUSZYNSKI, et al :
Plaintiffs : CASE NO.: 02P001060
-vs- : JUDGE H. F. INDERLIED, JR.
SARAH REEVES, et al : ORDER OF THE COURT
Defendants :

This matter comes on for consideration on December 21, 2004, upon Plaintiff's Motion for Prejudgment Interest. Briefs have been submitted in favor and opposition to said motion.

The Court finds the motion not well taken.

IT IS THEREFORE ORDERED that the within motion be and it is hereby denied.


DEC 21 2004
H.F. INDERLIED, JR., JUDGE

cc: Steven B. Potter, Esq.
Roger H. Williams, Esq.
Clark D. Rice, Esq.
Denise B. Workum, Esq.

DEC 22 2004

Not Reported in N.E.2d
Not Reported in N.E.2d, 2000 WL 1144970 (Ohio App. 8 Dist.)
(Cite as: Not Reported in N.E.2d)

C
Augustine v. North Coast Limosine, Inc. Ohio App. 8 Dist., 2000. Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District, Cuyahoga County.

James F. AUGUSTINE, et al., Plaintiffs-Appellants.
v.

NORTH COAST LIMOSINE, INC., et al.,
Defendants-Appellees.
Nos. 76742, 76993.

Aug. 10, 2000.

Civil appeal from the Court of Common Pleas, Case No. CV-326429.

James A. Sennett, Esq., Adam E. Carr, Esq. Williams, Sennett & Scully, Twinsburg, Ohio, for Plaintiffs-Appellants.

Brian D. Sullivan, Esq., James J. Turek, Esq., Reminger & Reminger, Cleveland, Ohio, for Defendants-Appellees.

JOURNAL ENTRY AND OPINION

DYKE.

*1 Appellants, James Augustine and Jean Augustine, appeal the trial court's denial of prejudgment interest in Case Number 76742. Appellants appeal the trial court's award of postjudgment interest through July 2, 1999 in Case Number 76993. For the following reasons we affirm.

Plaintiffs-appellants sued defendants-appellees, North Coast Limos, Inc. and Arthur Young, for damages arising out of an automobile accident. Appellants had medical bills of \$13,300.00. Appellees' last offer before trial was \$90,000.00.

Appellees' motion in opposition to prejudgment interest

states as follows: The trial court directed liability against appellees. The parties attempted to negotiate a settlement amount. The trial court suggested appellees offer a total of \$135,000 to the Augustines and the Schonfields (plaintiffs in another case arising out of the same accident). Appellees made this offer, but appellants rejected it. Before closing arguments, appellants requested \$125,000 and appellees offered \$110,000.

On April 28, 1999, the jury rendered a verdict of \$220,000 in favor of plaintiffs-appellants.

Appellants moved for prejudgment interest, claiming that appellees did not make a good faith effort to settle. Appellants argued that appellees' offer of \$90,000 was not a rational evaluation of potential risks and liability, given the jury verdict. On June 28, 1999, the trial court awarded appellants videotape costs of \$585.00 and denied the prejudgment interest.

On July 2, 1999, appellees sent a check for \$220,000.00 to appellants. The execution of a satisfaction of judgment was not a condition for acceptance of this payment.

On August 3, 1999, appellants filed a motion for postjudgment interest. The court awarded postjudgment interest from April 28, 1999 to July 2, 1999. Appellant also filed a motion for additional videotape costs of \$175.00, which was granted. On August 26, 1999, appellees sent appellants a check for \$4,073.71. On October 6, 1999, appellees sent a corrected check for \$3,857.53 for the postjudgment interest and video costs.

I.

Appellant's assignment of error in case number 76742 states:

WHETHER THE COURT COMMITTED PREJUDICIAL ERROR WHEN IT FAILED TO HOLD A HEARING ON PLAINTIFFS-APPELLANTS' MOTION FOR PRE-JUDGMENT INTEREST.

The general rule is that the court must conduct an oral hearing on the motion for prejudgment interest. See Lovewell v. Physicians Ins. Co. of Ohio (1997), 79 Ohio St.3d 143, 147, 679 N.E.2d 1119; Kluss v. Alcan Aluminum Corp. (1995), 106 Ohio App.3d 528, 541, 666 N.E.2d 603; Andrews v. Riser Foods, Inc. (Oct. 16, 1997), Cuyahoga App. No. 71658, unreported. If the motion for prejudgment interest is obviously not well taken, the court can deny the motion for prejudgment interest without conducting a hearing. Fazio v. Meridian Ins. Co. (Apr. 9, 1998), Cuyahoga App. No. 73320, unreported. The trial court has the discretion to decline to convene a hearing if it appears no award is likely. Werner v. McAhier (Jan. 13, 2000), Cuyahoga App. No. 75197, 75233, unreported. The record must demonstrate that the motion is obviously not well taken, or this court must remand for a hearing. Physicians Diagnostic Imaging v. Grange Ins. Co. (Sep. 24, 1998), Cuyahoga App. No. 73088, unreported.

If the record does not demonstrate that the defendant made any offer, we must remand for a hearing. Physicians, supra. In order to be entitled to a hearing, the plaintiff must demonstrate his aggressive prejudgment settlement efforts and his adversary's lack of aggressive prejudgment settlement efforts. Werner, supra. If the record reflects the defendant made an offer, but does not show whether the plaintiff made a settlement demand or any counteroffer, plaintiff is not entitled to a hearing. Id.

*2 In this case, it is uncontested that appellees made an offer of \$90,000. There is no evidence that appellants made a counter-demand, or evidence as to any other settlement proceedings. The allegations in appellees' brief in opposition are not evidence. If we consider these allegations, it is established that the offers made by appellees were a rational evaluation of the risks and liabilities, and the trial judge was aware of the settlement offers. In any case, it is obvious from the record that appellants were not entitled to prejudgment interest. The trial court did not err in denying appellants' motion for prejudgment interest without a hearing.

Accordingly, this assignment of error is overruled.

II.

Appellant's assignment of error in case number 76742 states:

WHETHER THE COURT COMMITTED PREJUDICIAL ERROR WHEN IT TERMINATED THE ACCUMULATION OF POST-JUDGMENT INTEREST EVEN THOUGH THE JUDGMENT DEBTOR DID NOT MAKE PROPER TENDER OF VERDICT AND POST-JUDGMENT INTEREST.

Tender of unconditional payment in full of the amount then due will stop the accrual of post-judgment interest. See Braun v. Pikus, (1995), 108 Ohio App.3d 29, 669 N.E.2d 880. In Braun, the defendant paid the amount of the verdict only, acceptance conditional on executing a satisfaction of judgment. The plaintiff refused to accept the payment. This court held that the payment was not unconditional, and did not stop the accrual of postjudgment interest.

In this case, appellees did not condition acceptance of the \$220,000 payment upon execution of a satisfaction of judgment. However, appellants assert that appellees did not tender the full amount due on July 2, 1999, because appellees did not pay any post-judgment interest. According to appellees, interest continues to run on the \$220,000 after July 2, 1999.

Appellees did not tender the full amount due as of July 2, 1999. Post-judgment interest was due as of July 2, 1999. Post-judgment interest is required to be paid even if the party entitled thereto fails to request it or the trial court's entry awarding judgment fails to order a losing party to pay it. Wilson v. Smith (1993), 85 Ohio App.3d 78, 80, 619 N.E.2d 90.

The judgment creditor can accept partial payments without jeopardizing their right to interest, unless accepting payments is conditioned upon executing a satisfaction of judgment. See Prepakt Concrete Co. v. Koski Constr. Co. (1989), 60 Ohio App.3d 28, 573 N.E.2d 209. In this case, unlike Braun, supra, appellants could have accepted the \$220,000 without jeopardizing their right to post-judgment interest.

If the defendant pays the amount of the original judgment, this is pertinent to the calculation of postjudgment interest. See Moore v. Jock (1993), 90 Ohio App.3d 413, 417, 629 N.E.2d 508; Shaffer v. Cornwell (Dec. 18, 1990), Franklin App. No. 90AP-772, unreported. If the debtor makes a partial payment, they no longer have use of this money, and interest should no longer be charged on the full amount of the judgment. See generally Lovewell v. Physicians Ins. Co. of Ohio (1997), 79 Ohio St.3d 143, 679 N.E.2d 1119.

*3 Where partial payments on a judgment are made, they apply, (1) in payment of the interest due on the interest; (2) then in payment of interest due on the principal; and (3) finally, in payment of the principal. Viocck v. Stowe-Woodward Co. (1989), 59 Ohio App.3d 3. Technically, some amount of the principal would still be due after the payment of \$220,000, because part of this payment applied to interest. If the trial court's journal entry stating that interest is due from April 28, 1999 to July 2, 1999 was incorrect, it was not prejudicial to appellants. As of July 2, 1999, postjudgment interest was no longer due on the amount of \$220,000, although part of this amount was principal and part was interest. Interest was still due on the amount of unpaid interest, which amount, according to the Viocck case would technically be considered principal.

Appellees made a proper tender of \$220,000 and did not owe interest on that amount after July 2. In effect, appellants' unjustified refusal of the partial payment resulted in a waiver of the interest on this payment. See Moore, supra at 416.

Accordingly, this assignment of error is overruled.

The decision of the trial court is affirmed.

It is ordered that appellees recover of appellants their costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this

Court directing the Common Pleas Court to carry this judgment into execution.

ROCCO, J., and PORTER, J., concur.

N.B. This entry is an announcement of the court's decision. See App.R.22(B), 22(D) and 26(A); Loc.App.R.22. This decision will be journalized and will become the judgment and order of the court pursuant to App. R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also S.Ct.Prac.R. II, Section 2(A)(1).

Ohio App. 8 Dist.,2000.

Augustine v. North Coast Limosine, Inc.

Not Reported in N.E.2d, 2000 WL 1144970 (Ohio App. 8 Dist.)

END OF DOCUMENT

Not Reported in N.E.2d
Not Reported in N.E.2d, 2002 WL 471751 (Ohio App. 6 Dist.), 2002-Ohio-1512
(Cite as: 2002 WL 471751 (Ohio App. 6 Dist.))

H

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Sixth District, Lucas County.

Amy DUVENDACK, Appellee,
v.

James J. HALL, et al., Appellants.
No. L-01-1443.

March 29, 2002.

Motorist, who was awarded \$125,000 on her personal injury claim arising out of automobile collision, filed motion for prejudgment interest. The Court of Common Pleas, Lucas County, granted motion without hearing, and defendant appealed. The Court of Appeals, Sherck, J., held that trial court erred in failing to hold an evidentiary hearing when it appeared likely that it would award prejudgment interest.

Judgment vacated.

West Headnotes

Interest  39(2.6)

219k39(2.6) Most Cited Cases

Trial court erred in failing to hold an evidentiary hearing when it appeared likely that it would award prejudgment interest in personal injury action brought by motorist arising out of automobile collision. R.C. § 1343.03(C).

Michael J. Leizerman and Claudia A. Ford, for appellee.

Michael A. Bruno and Kevin A. Pituch, for appellants.

DECISION AND JUDGMENT ENTRY

SHERCK, J.

*1 This is an accelerated appeal from a judgment of the Lucas County Court of Common Pleas, awarding prejudgment interest.

Appellee, Amy Duvendack, was injured in a 1996 motor vehicle collision caused by appellant, James J. Hall. Appellee's medical expenses alone exceeded \$11,000.

Appellee brought suit for compensation for her damages. Appellant admitted negligence, but contested the amount of his liability. Prior to trial, appellee offered to settle the suit for \$20,000. Appellant responded with a counteroffer of \$8,700 which was eventually raised to \$10,262. Appellee declined the offer and the matter went to trial on the issue of damages only. At the conclusion of the trial, the jury awarded appellee a verdict in the amount of \$125,000.

The trial court entered judgment on the verdict. Appellee then moved for prejudgment interest pursuant to R.C. 1343.03(C). Appellant filed a memorandum in opposition to which appellee replied.

On these submissions, the trial court, in a written opinion, concluded that appellant had failed to make a good faith effort to settle the suit and that appellee was, therefore, entitled to prejudgment interest pursuant to R.C. 1343.03(C).

Appellant now appeals this judgment asserting, in two assignments of error, that the trial court erred by (1) granting prejudgment interest, and (2) failing to hold an evidentiary hearing on the motion.

In Novak v. Lee (1991), 74 Ohio App.3d 623, 630, 600 N.E.2d 260, we held that a trial court, in its discretion, may decline to hold a prejudgment interest evidentiary hearing absent threshold indicia that the motion might succeed. However, we further held that, "If it appears to the trial court that there may be grounds for awarding prejudgment interest, then the court must hold an evidentiary hearing." *Id.*

Accordingly, appellant's second assignment of error is

well-taken. The trial court erred in failing to hold a hearing when it appeared likely that it would award prejudgment interest pursuant to R.C. 1343.03(C).

As the court's order must be vacated and remanded for an evidentiary hearing, appellant's first assignment of error is moot.

On consideration whereof, the judgment of the Lucas County Court of Common Pleas is vacated. This matter is remanded to said court for further proceedings consistent with this decision. Costs to appellee.

JUDGMENT VACATED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4, amended 1/1/98.

JAMES R. SHERCK, RICHARD W. KNEPPER, JJ.,
and MARK L. PIETRYKOWSKI, P.J., concur.

Not Reported in N.E.2d, 2002 WL 471751 (Ohio App. 6 Dist.), 2002-Ohio-1512

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Not Reported in N.E.2d
Not Reported in N.E.2d, 1998 WL 166124 (Ohio App. 8 Dist.)
(Cite as: Not Reported in N.E.2d)

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Fazio v. Meridian Ins. Co.
Ohio App. 8 Dist., 1998.

Only the Westlaw citation is currently available.
CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District, Cuyahoga
County.

Thomas FAZIO, et al. Plaintiff-appellants
v.

MERIDIAN INSURANCE COMPANY
Defendant-appellee
No. 73320.

April 9, 1998.

Civil appeal from Court of Common Pleas Case No.
CV-334761. Affirmed.

M. David Smith, Esq., Michael L. Eisner, Esq.,
Friedman, Domiano & Smith Co., L.P.A., Cleveland,
for plaintiff-appellants.

Terrence J. Kenneally, Esq., Shawn Allen, Esq.,
Terrence J. Kenneally & Associates, Rocky River, for
defendant-appellee.

JOURNAL ENTRY AND OPINION
PER CURIAM.

*1 This cause came on to be heard upon the accelerated
calendar pursuant to App. R. 11.1 and Loc. R. 25, the
records from the court of common pleas and the briefs.

The issue in this appeal is whether the court erred by
denying plaintiff Thomas Fazio's motion for
prejudgment interest on a \$160,000 arbitration award
without first conducting a hearing. Defendant
Meridian Insurance Co. argues the court did not err by
denying the motion without a hearing because it
tendered payment of the arbitration award in full before
plaintiff requested prejudgment interest.

As a general proposition, the court must first conduct a
hearing when considering a motion for prejudgment

interest under R.C. 1343.03. See Lovewell v.
Physicians Ins. Co. of Ohio (1997), 79 Ohio St.3d 143,
147, 679 N.E.2d 1119; Kluss v. Alcan Aluminum Corp.
(1995), 106 Ohio App.3d 528, 541, 666 N.E.2d 603;
Andrews v. Riser Foods, Inc. (Oct. 16, 1997),
Cuyahoga App. No. 71658, unreported.

However, the court need not conduct a hearing when
the motion for prejudgment interest is obviously not
well-taken. R.C. 1343.03(C)(1) permits recovery of
prejudgment interest on a judgment in a civil action if
the movant can show the judgment was "based on
tortious conduct and not settled by agreement of the
parties * * *." (emphasis added). The record indicates
defendant tendered payment of the arbitration award in
full before plaintiff filed the motion for prejudgment
interest, and plaintiff did not deny accepting this
payment. Under the express terms of R.C.
1343.03(C)(1), plaintiff was not entitled to prejudgment
interest. See Vanderhoof v. General Accident Ins.
Group (1987), 39 Ohio App.3d 91, 93-94, 529 N.E.2d
953; Buckeye Union Ins. Co. v. Grav (May 11, 1995),
Cuyahoga App. No. 67813, unreported at 3; Barker v.
Lightning Rod Mut. Ins. Co. (Apr. 4, 1991), Franklin
App. No. 90AP-1406, unreported. Therefore, a
hearing would have been futile.

In Woods v. Farmers Ins. of Columbus, Inc. (1995), 106
Ohio App.3d 389, 666 N.E.2d 283, the Franklin County
Court of Appeals held that the parties had not settled a
matter for purposes of R.C. 1343.03(C) when they
settled liability and damages issues before one of the
parties asked for prejudgment interest on those
damages. After receiving a declaration of coverage
under an uninsured motorist provision, the parties in
Woods submitted the issues of liability and damages to
arbitration. One party, the Governors, prevailed in
arbitration, collected the full amount of their award, and
settled with the express reservation of the right to
collect prejudgment interest on the arbitration award.
When the Governors asked the court of common pleas
to confirm the arbitration award and enter judgment for
prejudgment interest, the court of common pleas
refused.

The court of appeals held the Governors had not settled the matter:

After litigating the issue of coverage, the parties submitted the issues of liability and damages to arbitration, and the Governors asked the court of common pleas to confirm their arbitration award and enter judgment thereon. *Id.* at 399, 666 N.E.2d 283.

*2 We assume the court of appeals reached the conclusion that the Governors had not settled the matter for purposes of the prejudgment interest statute because the Governors made an express reservation of the right to seek prejudgment interest. If we correctly understand *Woods*, our conclusion here is not in conflict with that case because we have no reason to believe plaintiff reserved his right to pursue prejudgment interest after settling with defendant. The record does not contain the actual settlement, but defendant did submit proof to the court that it tendered a check for the full amount of the arbitration award seven weeks before plaintiff sought prejudgment interest. At no point did plaintiff dispute accepting this tender, so we have no reason to conclude the settlement had not been final before the court decided to deny the motion for prejudgment interest. Under these facts, we find a hearing on the matter would have been futile, particularly since plaintiff gave no reason for the court to think that he would present any further evidence to justify his claimed entitlement to prejudgment interest. The assigned error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellants its costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 27. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also S.Ct.Prac.R. II, Section 2(A)(1).

Ohio App. 8 Dist., 1998.
Fazio v. Meridian Ins. Co.
Not Reported in N.E.2d, 1998 WL 166124 (Ohio App. 8 Dist.)

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C

Kmetz v. Medcentral Health Systems
Ohio App. 5 Dist.,2003.

CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio,Fifth District, Richland
County.

Andrea KMETZ, Administratrix of the Estate of Jay
Kmetz, Dec., Plaintiff-Appellant Cross-Appellee,
v.

MEDCENTRAL HEALTH SYSTEMS,
Defendant-Appellee Cross-Appellant.
No. 02CA0050.

Decided Nov. 12, 2003.

After administratrix was awarded personal injury damages of \$500,000.00 by a jury in a medical malpractice claim against hospital, administratrix filed a motion for pre-judgment interest and hospital filed a motion for judgment notwithstanding the verdict or for a new trial. The Court of Common Pleas, Richland County, No. 00-824-D, awarded a new trial on damages, found that the motion for pre-judgment interest was moot, and awarded administratrix certain expenses. Administratrix appealed. The Court of Appeals, Richland County, Edwards, J., held that: (1) trial court order granting hospital a new trial on the issue of damages was an abuse of discretion, and (2) the trial court's refusal to award administratrix costs and expenses as a result of hospital's refusal to admit that its nurses and employees deviated from the standard of care in the treatment of decedent was not an abuse of discretion.

Affirmed in part; reversed in part; remanded.

West Headnotes

111 Death 117 ↪ **106**

117 Death

117III Actions for Causing Death

117III(I) Trial

117k106 k. New Trial. Most Cited Cases

Trial court order granting hospital a new trial on the issue of damages was an abuse of discretion, in medical malpractice case brought by estate of decedent; trial court invaded the province of the jury when it reviewed whether the award was reasonable based on a review of the "hourly rate" for decedent's pain and suffering, and the length of time that decedent was in pain and suffering was highly contested by the parties. Rules Civ.Proc., Rule 59(A)(4), (6).

121 Appeal and Error 30 ↪ **1177(6)**

30 Appeal and Error

30XVII Determination and Disposition of Cause

30XVII(D) Reversal

30k1177 Necessity of New Trial

30k1177(6) k. Issues Not Passed on

Below. Most Cited Cases

Remand for a hearing on administratrix's motion for pre-judgment interest was required, in medical malpractice case; trial court ruled that the motion was moot due to the trial court granting a new trial on the issue of damages, and the Court of Appeals reversed the ruling and determined that the award was proper.

131 Pretrial Procedure 307A ↪ **485**

307A Pretrial Procedure

307AII Depositions and Discovery

307AII(G) Requests for Admissions

307Ak485 k. Costs and Expenses Upon

Improper Failure to Admit. Most Cited Cases

The trial court's refusal to award administratrix costs and expenses as a result of hospital's refusal to admit that its nurses and employees deviated from the standard of care in the treatment of decedent was not an abuse of discretion, in medical malpractice case; administratrix's request for admission did not name the nurses or employees it was referring to, it did not specify the treatment or care where there was a deviation from the standard of care, and the issue of the proper standard of care was sharply contested at trial. Rules Civ.Proc., Rule 37(C).

Civil Appeal from Richland County Court of Common Pleas Case 00-824-D.

Jack Landskroner, Paul W. Flowers, Cleveland, OH, for plaintiff-appellant/cross-appellee.

Kenneth R. Beddow, Mansfield, OH, for defendant-appellee/cross-appellant.

EDWARDS, J.

*1 {¶ 1} Plaintiff/appellant/cross-appellee Andrea Kmetz, Administratrix of the Estate of Jay Kmetz, Deceased [hereinafter appellant], appeals from the June 26, 2002, Judgment Entry of the Richland County Court of Common Pleas which declared a new trial as to damages and awarded costs. Defendant/appellee/cross-appellant is MedCentral Health Systems, Inc. [hereinafter MedCentral].

STATEMENT OF THE FACTS AND CASE

{¶ 2} Decedent Jay Kmetz died on March 11, 1998, following surgery. Subsequently, on March 1, 1999, appellant filed a medical malpractice claim in the Richland County Court of Common Pleas against appellee MedCentral and defendant Albert Timperman, M.D. Separate claims were based upon the decedent Jay Kmetz's pain and suffering and his wrongful death. Prior to the date of trial, appellant was required to voluntarily dismiss the action without prejudice, due to a scheduling conflict with one of the experts.

{¶ 3} On October 13, 2000, the instant action was refiled and a jury trial commenced on February 5, 2002. Midway through the trial proceedings, appellant voluntarily dismissed the claims against Dr. Timperman. On February 11, 2002, the jury returned a verdict in favor of appellant and against appellee MedCentral in the amount of \$500,000.00. In their responses to interrogatories, the jury found that 1) MedCentral employees had been negligent, 2) MedCentral employees' negligence had proximately caused injury to the decedent, 3) decedent's death was not caused by suffocation from post-operative swelling, 4) the appropriate personal injury damages were \$500,000.00 and 5) no wrongful death damages were owed. On February 12, 2002, the trial court issued a Judgment Entry memorializing the verdict.

{¶ 4} On February 1, 2002, appellant filed a motion seeking pre-judgment interest pursuant to R.C. 1343.03(C). Appellant based the motion for pre-judgment interest upon an allegation that MedCentral failed to negotiate a settlement in good faith. Simultaneously, appellant submitted a motion to tax costs, pursuant to Civ. R. 54(D) and 37(C). The same day, MedCentral served a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial and/or motion for remitter. In its motion, MedCentral argued that based upon the juror's response to the third interrogatory (decedent's death was not caused by suffocation from post-operative swelling), the jury could not logically have awarded personal injury damages to the decedent since they found the hospital was not liable for his death.

{¶ 5} On February 28, 2002, the trial court issued a briefing Order on post-trial motions. In that Order, the trial court stated that it disagreed that the jury's answer to special interrogatory No. 3 was inconsistent with its verdict. The trial court found that the answers to the special interrogatories were consistent with the verdict for the plaintiff-appellant. The trial court reconciled the responses as follows:

*2 {¶ 6} "1. The jury found a hospital nurse or nurses were negligent in their care of plaintiff (decedent).

{¶ 7} "2. The jury found that nurse negligence was a proximate cause of *injury* to plaintiff.

{¶ 8} "3. The jury found that 'suffocation from obstruction of his airway from post-operative swelling', was not among the injuries caused by plaintiff by the hospital nurses.

{¶ 9} "4. The jury concluded the injury proximately caused to plaintiff by the hospital's nurses entitled his estate to pain and suffering damages for his personal injury prior to his death.

{¶ 10} "5. The jury concluded plaintiff's failure to prove the nurses' negligence caused his death meant plaintiff's estate was entitled to no wrongful death damages." (Orig.Emphasis.)

{¶ 11} The Judge concluded that, in sum, the jury's interrogatories reflected a finding that the nurses negligently injured Mr. Kmetz before he died, but did not cause his death. The jury awarded damages for pain and suffering before his death only.

{¶ 12} In addition, the Order directed appellant to brief the issue of whether the verdict was excessive or influenced by passion or prejudice. In accordance therewith, appellant filed a brief on March 14, 2002.

{¶ 13} On June 26, 2002, the trial court issued a decision on post-trial motions. The trial court again found that the jury's verdict was consistent with the interrogatories. However, the trial court determined that the award of \$500,000.00 for the decedent's pain and suffering was excessive. In the trial court's view, the amount of the recovery alone was so great as to show passion or prejudice. Concluding that the liability determination against MedCentral was appropriate, the trial court ordered a new trial pursuant to Civ. R. 59(A)(4) and (6) on damages. With respect to the motion to tax costs, the trial court permitted appellant to recover certain expenses under Civ. R. 54(D) but did not appear to consider an additional award pursuant to Civ. R. 37(C). The trial court further found that appellant's motion for prejudgment interest was moot.

{¶ 14} On July 23, 2002, appellant filed a timely Notice of Appeal.^{FN1}

^{FN1}. On August 1, 2002, MedCentral served notice of cross-appeal. However, on February 28, 2003, MedCentral's cross appeal was dismissed upon MedCentral's motion to dismiss.

{¶ 15} Upon appeal, appellant presents the following assignments of error:

{¶ 16} "I. THE TRIAL JUDGE ABUSED HIS DISCRETION BY GRANTING A NEW TRIAL UPON DAMAGES.

{¶ 17} "II. THE TRIAL JUDGE ERRED AS A

MATTER OF LAW, BY REFUSING TO HOLD A HEARING AND PROCEEDING TO RULE UPON PLAINTIFF'S MOTION FOR PRE-JUDGMENT INTEREST.

{¶ 18} "III. THE TRIAL JUDGE ABUSED HIS DISCRETION BY REFUSING TO AWARD COSTS AND EXPENSES AS A RESULT OF MEDCENTRAL'S REFUSAL TO ADMIT NEGLIGENCE PURSUANT TO CIV. R. 37(C)."

I

[1] {¶ 19} In the first assignment of error, appellant contends that the trial court abused its discretion when it granted a new trial upon damages. We agree.

{¶ 20} In this case, the jury awarded appellant \$500,000.00 in personal injury damages. Upon motion by appellee MedCentral, the trial court ordered a new trial on damages, pursuant to Civ. R. 59(A)(4) and (6). Civil Rule 59(A) states as follows, in relevant part:

*3 {¶ 21} "A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds: ...

{¶ 22} "(4) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice;

...

{¶ 23} "(6) The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case...."

{¶ 24} Generally, a trial court's decision in regard to a motion for new trial is reviewed under the abuse of discretion standard of review. Highfield v. Liberty Christian Academy (1987), 34 Ohio App.3d 311, 518 N.E.2d 592, paragraph three of the syllabus; Thomas v. Vesper, Ashland App. No. 02 COA 20,

2003-Ohio-1856, 2003 WL 1857137. In order to find an abuse of discretion, this Court must determine that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. Blakemore v. Blakemore (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶ 25} While our standard of review is somewhat deferential to the trial court, we are also cognizant that there is a competing, underlying legal premise that must be kept in mind. "It is the function of the jury to assess the damages, and generally, it is not for a trial or appellate court to substitute its judgment for that of the trier-of fact." Betz v. Tinken Mercy Med. Ctr. (1994), 96 Ohio App.3d 211, 218, 644 N.E.2d 1058. "It has long been held that the assessment of damages is so thoroughly within the province of the jury that a reviewing court is not at liberty to disturb the jury's assessment absent an affirmative finding of passion and prejudice or a finding that the award is manifestly excessive." Moskovitz v. Mt. Sinai Medical Ctr. (1994), 69 Ohio St.3d 638, 635 N.E.2d 331 at syllabus; Kolomichuk v. Grega (Sept. 20, 2001), Cuyahoga App. No. 78870. To support a finding of passion or prejudice, pursuant to Civ.R. 59(A)(4), "it must be demonstrated that the jury's assessment of the damages was so overwhelmingly disproportionate as to shock reasonable sensibilities." Kolomichuk, Id. (citing Jeanne v. Hawkes Hosp. of Mt. Carmel (1991), 74 Ohio App.3d 246, 257, 598 N.E.2d 1174). The mere size of an award, while relevant, is insufficient to establish the existence of passion or prejudice. Jeanne v. Hawkes Hosp. of Mt. Carmel, supra.

{¶ 26} As this court previously stated in Betz, supra, this court must recognize the presumption in favor of sustaining a jury's verdict, while remaining cognizant of our standard of review. Thus, the issue becomes whether with the deference the trial court was required to give to the jury's verdict, did the trial court abuse its discretion in granting the motion for a new trial. With these two standards of review as a guide, we begin by looking at the jury's award.

*4 {¶ 27} The jury awarded \$500,000.00 for "personal injury damages." Included in such an award are subjective matters such as pain and suffering and

mental anguish. Damages awarded for pain and suffering cannot be accurately measured by amounts. Mansfield Ry. L. & P. Co. v. Barr (1914), 2 Ohio App. 367. "The law has, accordingly, in this class of cases, committed the determination of the amount of damages to be awarded to the experience and good sense of jurors. And where the verdict rendered by them, may reasonably be presumed to have resulted from an honest and intelligent exercise of judgment upon their part, the policy of the courts is and necessarily must be, not to interfere with their conclusion." *Id.*

{¶ 28} With that guidance in mind, we will look to the trial court's decision to grant a new trial for damages. The trial court made the following analysis:

{¶ 29} "Defendant moved in the alternative for a new trial pursuant to Civ. R. 59(A)(6) (judgment not sustained by the weight of the evidence) and 59(A)(4) (excessive damages under influence of passion or prejudice). If the jury found that negligence of the hospital nurse(s) caused injury to Mr. Kmetz before he died, is the jury's verdict of \$500,000 for that injury against the manifest weight of the evidence?"

{¶ 30} "The Ohio Supreme Court has explained the standard to apply in making the weight of the evidence determination under Civ. R. 59(A)(6): 'In ruling on a motion for a new trial on the ground that the judgment is not sustained by sufficient evidence, the court must weigh evidence and pass upon the credibility of witnesses, not in the substantially unlimited sense that such weight and credibility are passed on originally by the jury, but in the more restricted sense of whether it appears to the trial court that manifest injustice has been done and that the verdict is against the manifest weight of evidence.' ^{FN2} Damage awards may be reversed under Civ. R. 59(A)(4)-excessive damages-when the amount is so large as to shock reasonable sensibilities. [citation omitted]

^{FN2}. The trial court is quoting from Rohde v. Farmer (1970), 23 Ohio St.2d 82, 262 N.E.2d 685, at paragraph five of the syllabus.

{¶ 31} "Here the defendant argues that the following

evidence makes the \$500,000 award excessive: Plaintiff's expert, Dr. Latanae Parker, conceded that only the complaints made by Mr. Kmetz after 2:00 a.m. could with reasonable medical probability be related to the airway obstruction. From 2:30 a.m. (the time of Mr. Kmetz's respiratory arrest) on, Jay Kmetz never regained consciousness until he was disconnected from life support machines and pronounced dead a few hours later. Mr. Kmetz's roommate, Floyd Miller, testified Mr. Kmetz was talking to him up to the time Mr. Kmetz lost consciousness. The award of \$500,000 for 30 minutes of pain and suffering translates into compensation of one million dollars per hour for Mr. Kmetz's suffering.

{¶ 32} "In response to the court's invitation to identify the evidence supporting the damage award. [sic] Plaintiff conceded the relatively short time period at issue. [citation omitted]

*5 {¶ 33} "What is certain is that the last conscious 35 minutes of the decedent's life were wrought with pain, anxiety, fear, and a realization that, despite the fact that he was pleading for help, no help was coming.

{¶ 34} "The court concludes pursuant to Civ. R. 59(A)(6) that it appears from a comparison of the damage evidence to the size of the verdict that manifest injustice has been done and that the \$500,000 verdict is against the manifest weight of the evidence. The court alternatively concludes pursuant to Civ. R. 59(A)(4) that the amount of damages is so excessive as to show passion or prejudice. The court is not prepared to say that plaintiff's statements about sending a message to MedCentral or about government estimates that a life was worth at least a million dollars-both objected to by the defendant and instructed on by the court-were the reason for that passion. Perhaps it was sympathy for the [sic] Jay Kmetz and his family. But a compensation rate of \$1,000,000 per hour for his pain and suffering shocks reasonable sensibilities.

{¶ 35} "While the jury's underlying liability determination is not contrary to the evidence, a new trial should be awarded on the amount of damages pursuant alternatively to Civ. R. 59(A)(4) and (6)." June 26, 2002, Decision on Post-Trial Motions, pg. 3-4.

(Citations omitted.)

{¶ 36} First, we note that the trial court does not mention the deference to be paid to an award by a jury. Further, this court has previously found that basing a decision on whether a jury's award is reasonable upon a review of the "hourly rate" awarded is questionable. *Betz*, supra. As stated by this court in *Betz*, supra, "[p]ain and suffering are personal and subjective by nature. Each individual's case presents unique facts for the jury's determination."

{¶ 37} Further, we disagree that plaintiff-appellant conceded the relatively short time period at issue. The trial court correctly quotes appellant's Brief in Opposition to MedCentral's Motion for Judgment Notwithstanding the Verdict/Motion for New Trial/Motion for Remitter. However, we disagree that a statement that it is certain that the last conscious 35 minutes of decedent's life was wrought with pain, anxiety, fear and realization that he would receive no help concedes that decedent suffered during those 35 minutes only. We believe appellant's statement was made more as a statement that no one can contest what happened in those last 35 minutes. Whether and to what degree the decedent may have suffered prior to those last 35 minutes was hotly contested. In their Opposition Brief, appellant argues that the evidence showed the decedent was required to endure considerable suffering during his last few hours. In fact, the decedent's hospital roommate testified that decedent had been complaining all night and just kept getting worse.

{¶ 38} Upon review, we find that the trial court invaded the province of the jury. There is no question that both the jury and the trial court believed that Jay Kmetz, the decedent, suffered personal injury damages, including pain and suffering. A review of the trial court's findings leads us to conclude that the trial court simply disagreed with the size of the verdict. We conclude that the trial court abused its discretion when it concluded that the jury's award was against the manifest weight of the evidence or excessive.

*6 {¶ 39} Accordingly, appellant's first assignment of error is sustained.

II

[2] {¶ 40} In the second assignment of error, appellant contends that the trial court erred when it refused to hold a hearing and proceeded to rule on appellant's motion for pre-judgment interest. Specifically, the trial court ruled that the motion for pre-judgment interest was moot pursuant to its ordering of a new trial.

{¶ 41} In light of our holding in the first assignment of error, we remand this matter to the trial court for consideration of appellant's motion for pre-judgment interest.

{¶ 42} Appellant's second assignment of error is sustained.

III

[3] {¶ 43} In the third assignment of error, appellant argues that the trial court abused its discretion when it refused to award costs and expenses as a result of MedCentral's refusal to admit negligence, pursuant to Civ. R. 37(C). We disagree.

{¶ 44} Civil Rule 37(C) provides as follows:

{¶ 45} "If a party, after being served with a request for admission under Rule 36,^{FN3} fails to admit the genuineness of any documents or the truth of any matter as requested, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. Unless the request had been held objectionable under Rule 36(A) or the court finds that there was good reason for the failure to admit or that the admission sought was of no substantial importance, the order shall be made."

FN3. Civil Rule 36(A) states as follows:

"A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any

matters within the scope of Rule 26(B) set forth in the request that relate to statements or opinions of fact or of the application of law to fact, including the genuineness of any documents described in the request.... The matter is admitted unless, within a period designated in the request, not less than twenty-eight days after service thereof or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney. If objection is made, the reasons therefore shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify his answer or deny only a part of the matter of which an admission is requested, he shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless he states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; he may, subject to the provisions of Rule 37(C), deny the matter or set forth reasons why he cannot admit or deny it."

{¶ 46} Appellant submits that it made the following request for admission: "75. MedCentral (Mansfield General Hospital) nurses/employees deviated from acceptable standards of care in the treatment and care of Jay Kmetz on March 11, 1998." MedCentral responded to the request for admission with a simple "deny." Appellant claims that as a result of appellee's denial of the admission, appellant incurred expenses totaling \$8,178.90 in order to establish the hospital's clear

liability at trial.

Not Reported in N.E.2d, 2003 WL 22715631 (Ohio App. 5 Dist.), 2003 -Ohio- 6115

{¶ 47} In this case, while the trial court ruled upon appellant's motion for expenses pursuant to Civ. R. 54(D), the trial court did not expressly rule upon appellant's motion made pursuant to Civ. R. 37(C). We will, therefore, proceed upon the presumption that the trial court implicitly denied appellant Civ. R. 37(C) motion. Gosden v. Louis (1996), 116 Ohio App.3d 195, 222, 687 N.E.2d 481.

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{¶ 48} The determination of whether to award expenses and the amount thereof, pursuant to Civ.R. 37(C), necessarily involves a matter of discretion and, thus, is a matter lying within the sound discretion of the trial court. Whatever that court's determination, the party complaining must demonstrate that the trial court abused its discretion in order for a reviewing court to reach a different conclusion.

*7 {¶ 49} In the case sub judice, we find no abuse of discretion. First, we note that the request for admission is ambiguous as to whom was negligent. It refers to unnamed nurses and "employees" and does not specify when and in regard to what treatment or care was there a deviation from acceptable standards of care. Further, the issue of whether the care was within acceptable standards of care was sharply contested. Expert testimony was presented which criticized the nurses as well as expert testimony that evidenced that the nurses and other employees performed their duties competently and within the appropriate standard of care. Under such circumstances, we find that the trial court did not abuse its discretion when it implicitly denied appellant's Civ. R. 37(C) motion.

{¶ 50} Appellant's third assignment of error is overruled.

{¶ 51} The judgment of the Richland County Court of Common Pleas is affirmed, in part, and reversed, in part. The matter is remanded for further proceedings consistent with this opinion.

EDWARDS, J., GWIN, P.J., and FARMER, J., concur.
Ohio App. 5 Dist., 2003.
Kmetz v. Medcentral Health Systems

C

Physicians Diagnostic Imaging v. Grange Ins. Co.
Ohio App. 8 Dist., 1998.

Only the Westlaw citation is currently available.
CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District, Cuyahoga
County.

PHYSICIANS DIAGNOSTIC IMAGING, et al.
Plaintiff-appellants

v.

GRANGE INSURANCE COMPANY
Defendant-appellee

No. 73088.

Sept. 24, 1998.

Civil appeal from Court of Common Pleas Case No.
CV-291950. Affirmed in Part, Reversed in Part and
Remanded.

Jay Milano, Esq., Gwendolyn Ciolek, Esq., Rocky
River, for plaintiff-appellants.

Donald A. Powell, Esq., Robert L. Tucker, Esq.,
Buckingham, Doolittle & Burroughs, Akron, for
defendant-appellee.

JOURNAL ENTRY AND OPINION

PATTON, J.

*1 Plaintiff Physicians Diagnostic Imaging, Inc.
("PDI") brought this breach of contract and bad faith
refusal to pay action against defendant Grange Mutual
Casualty Co. alleging that Grange wrongfully failed to
pay the proceeds of an insurance policy after a fire
damaged portions of the PDI offices. At trial, PDI
presented evidence to show that Grange falsified its
claim file in order to avoid paying the claim. A jury
found for PDI and awarded compensatory damages on
both counts in an amount totaling \$361,000, as well as
punitive damages in the amount of \$1,000,000. The day
after the court journalized the verdict, plaintiff filed
motions for prejudgment interest and attorney fees.

Seven days later, Grange filed a notice of satisfaction of
verdict and judgment in the amount of \$1,361,000. That
same day, the court denied the motions for prejudgment
interest and attorney fees without a hearing. PDI's two
assigned errors challenge the court's ruling.

I

Before addressing the assigned errors, we must consider
the impact, if any, that Grange's satisfaction of
judgment had on the viability of this appeal.

Ordinarily, a satisfaction of judgment renders an appeal
from that judgment moot. See *Blodgett v. Blodgett*
(1990), 49 Ohio St.3d 243, 245, 551 N.E.2d 1249.
PDI's appeal does not challenge any substantive aspect
of the jury verdict, but instead concentrates on the
court's refusal to grant prejudgment interest.
Prejudgment interest is distinctly separate from the
judgment. For this reason, the courts have generally
been permitted to consider requests for prejudgment
interest filed before a satisfaction of judgment. See
Woods v. Farmers Ins. of Columbus, Inc. (1995), 106
Ohio App.3d 389, 666 N.E.2d 283; *Fazio v. Meridian*
Ins. Co. (Apr. 9, 1998), *Cuyahoga App. No. 73320*,
unreported (no right to prejudgment interest when party
gave uncontradicted evidence of tender of payment in
full satisfaction of arbitration award prior to plaintiff
requesting prejudgment interest). Because the parties
did not specify that the satisfaction of judgment
encompassed the motion for prejudgment interest, we
find that motion to be viable.

II

The first assignment of error is that the court erred by
summarily denying PDI's motion for attorney fees. PDI
claimed \$912,639 in attorney fees and costs as part of
the punitive damages award, citing Grange's bad faith
as grounds for the fees. PDI did not ask the court to
submit the issue of entitlement to fees to the jury,
instead choosing to have the court make that
determination. Grange maintains that PDI's failure to

ask the court to have the jury determine PDI's entitlement to attorney fees and costs constituted a waiver of those fees.

In Digital & Analog Design Corp. v. North Supply Co. (1992), 63 Ohio St.3d 657, 590 N.E.2d 737, paragraph three of the syllabus states:

"In view of the public policy of this state that favors jury determination of issues of liability, as evidenced by the General Assembly's passage of R.C. 2315.21 and its amendment to R.C. 2315.18, a trial court *must* submit to a jury the issue of whether attorney fees should be awarded in a tort action. The amount of those fees, however, shall be determined by the trial judge, who may, in his or her discretion, submit the question of the amount of the fees to the jury." (emphasis added)

*2 The court did not instruct the jury to consider whether PDI could recover its attorney fees. Although the limited record on appeal does not show whether PDI asked the court for an instruction on attorney fees, Grange maintains it raised the issue at trial and PDI, with full knowledge of the situation, made no attempt to have the court give an instruction on attorney fees. PDI does not challenge Grange on this point, but instead relies on Davis v. Owen (1986), 26 Ohio App.3d 62, 498 N.E.2d 202, for the proposition that a court should not allow evidence of attorney fees during a party's presentation of the case-in-chief.

PDI's reliance on Davis is woefully misplaced. In Digital & Analog, the Supreme Court specifically rejected the approach used in Davis. The Supreme Court did uphold the Davis approach under the specific facts of the case, but only because both parties agreed that Davis set forth the applicable procedure. *Id.* at 664. The Supreme Court's syllabus leaves no room for doubt that the proper procedure is to submit the issue of entitlement to attorney fees to the jury.

PDI also cites to two cases issued by this court, Anderle v. Ideal Mobile Home Park, Inc. (1995), 101 Ohio App.3d 122, 655 N.E.2d 203 and Mlinarcik v. E.E. Wehrung Parking, Inc. (1993), 86 Ohio App.3d 134, 620 N.E.2d 181, for the proposition that a court may submit attorney fees issues to the jury after liability has

been determined. Neither citation is on point because both were tried to the court. Anderle dealt with an express authorization of attorney fees under R.C. 3733.09(B) that had been tried to the housing court. No jury had been empaneled, so the court obviously could not defer the question of entitlement of fees to the jury. Mlinarcik concerned a derivative suit against corporation directors that was likewise tried to the court. Again, the absence of a jury necessarily foreclosed any option of having a jury consider punitive damages. Any discussion to that effect in Mlinarcik was obvious dicta, particularly since this court found no evidence to show that the shareholder suit benefitted the corporation in a way that would permit an award of attorney fees in the first instance. Mlinarcik, 86 Ohio App.3d at 147, 620 N.E.2d 181.

Moreover, even had those cases involved jury trials, the Supreme Court's decision in Digital & Analog would necessarily dictate the outcome of the issue. We have no authority to disregard the law set forth by the Supreme Court. Because the record fails to show that PDI asked the court to submit the issue of its entitlement to attorney fees to the jury, we find it waived the opportunity to present the issue on appeal. The first assignment of error is overruled.

III

In its second assignment of error, PDI complains the court erred by denying the motion for prejudgment interest without first conducting a hearing. PDI based its motion for prejudgment interest entirely on the argument that Grange's falsification of its claims file during discovery amounted to a failure to cooperate with discovery.

*3 The availability of prejudgment interest is designed to encourage litigants to make a good faith effort to settle disputes, thus conserving judicial resources. Peyko v. Frederick (1986), 25 Ohio St.3d 164, 167, 495 N.E.2d 918. Aside from its procedural aspects, at its core, the prejudgment interest statute focuses on whether a party made a good faith effort to settle the case. In Kalain v. Smith (1986), 25 Ohio St.3d 157, 495 N.E.2d 572, the syllabus states:

"A party has not 'failed to make a good faith effort to settle' under R.C. 1343.03(C) if he has (1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party. If a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer."

The decision to grant prejudgment interest is discretionary with the court. Ziegler v. Wendel Poultry Serv., Inc. (1993), 67 Ohio St.3d 10, 20, 615 N.E.2d 1022.

As a general proposition, the court must conduct a hearing when considering a motion for prejudgment interest under R.C. 1343.03(C)(1). See Lovewell v. Physicians Ins. Co. of Ohio (1997), 79 Ohio St.3d 143, 147, 679 N.E.2d 1119; Kluss v. Alcan Aluminium Corp. (1995), 106 Ohio App.3d 528, 541, 666 N.E.2d 603; Andrews v. Riser Foods, Inc. (Oct. 16, 1997), Cuyahoga App. No. 71658, unreported. The requirement for a hearing may be dispensed when the motion for prejudgment interest is obviously not well-taken. See Fazio v. Meridian Ins. Co. (Apr. 9, 1998), Cuyahoga App. No. 73320, unreported.

Grange maintains it made a good faith offer to settle on the day trial began when it offered PDI \$1.6 million to settle, on top of \$600,000 that it paid to PDI prior to trial. PDI allegedly refused the offer, standing firm on its "non-negotiable" \$5 million settlement demand. Grange claims its trial offer constituted a good faith effort to settle, particularly since the jury awarded PDI \$239,000 less than Grange's offer. Grange urges us to find no hearing was necessary since the court not only knew about the settlement offer on the day of trial, but actively asked the parties if Grange's offer fully satisfied the amount of compensatory damages claimed by PDI.

We have no way of knowing if Grange's assertions are true because they do not appear in the record. We have two limited excerpts of trial transcript-the testimony of

PDI's hand writing expert and the court's jury instructions. Ordinarily, the appellant has the duty to provide the record. See App.R. 9(B). This duty only extends to demonstrating the claimed error in the record, and we may disregard an assignment of error presented for review if the party presenting it fails to identify in the record the error on which the assignment of error is based. See App.R. 12(A)(2). Since PDI simply argues that the court erred by failing to conduct a hearing, it had no need to offer more. Once Grange learned that PDI would not make the entire record available to this court, it had the duty to file and serve on PDI a designation of additional parts to be included if those parts of the record would substantiate its position. *Id.*

*4 We recognize that PDI does not exactly dispute Grange's factual assertions about the settlement, instead somewhat coyly referring to the offer, "if it did exist." This is one of those rare times when the appellant's failure to provide a record actually aids the appeal. Because we cannot consider any evidence beyond the record presented to us, we are unable to find the motion for prejudgment interest was obviously not well-taken; therefore, the court should have conducted a hearing on the motion. The second assignment of error is sustained.

Judgment affirmed in part, reversed in part and remanded.

This cause is affirmed in part, reversed in part and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellants recover of said appellee their costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

TERRENCE O'DONNELL, P.J. and KENNETH A. ROCCO, J., concur.

Not Reported in N.E.2d
Not Reported in N.E.2d, 1998 WL 655503 (Ohio App. 8 Dist.)
(Cite as: Not Reported in N.E.2d)

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 27. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also S.Ct.Prac.R. II, Section 2(A)(1).

Ohio App. 8 Dist.,1998.
Physicians Diagnostic Imaging v. Grange Ins. Co.
Not Reported in N.E.2d, 1998 WL 655503 (Ohio App. 8 Dist.)

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Werner v. McAbier
Ohio App. 8 Dist., 2000.

Only the Westlaw citation is currently available.
CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio, Eighth District, Cuyahoga
County.

Jerome W. WERNER Plaintiff-Appellant
v.

Scott W. MCABIER Defendant-Appellee
No. 75197, 75233.

Jan. 13, 2000.

Character of Proceeding: Civil appeal from Common
Pleas Court Case Nos. CV-330494 CV-320742.
Affirmed in part, Reversed in part and Remanded.

Joseph L. Coticchia, Esq., Cleveland, for
Plaintiff-Appellant, Jerome W. Werner.
R. Jack Clapp, Esq., Kyle L. Crane, Esq., Cleveland,
for Plaintiff-Appellant, Keri C. McKinnon, et al.
Nicholas J. Fillo, Esq., Fillo & Siskovic, Cleveland, for
Defendant-Appellee, Scott W. McAbier.

JOURNAL ENTRY and OPINION
CORRIGAN, J.

*1 Jerome Werner, plaintiff-appellant, appeals from the
judgment of the Cuyahoga County Court of Common
Pleas, General Division, Case No. CV-330494, in
which a jury awarded him \$2,074.30 in damages for
injuries sustained in a motor vehicle accident involving
a car driven by defendant-appellee Scott McAbier.
Werner assigns two errors for this court's review. Keri
McKinnon has filed a separate appeal from the jury's
\$3,429.30 damage award to her for injuries sustained in
the same accident. McKinnon assigns eight errors for
our review.

Jerome Werner's appeal is not well-taken. Keri
McKinnon's is well-taken with respect to the trial

court's erroneous failure to award her the expenses
incurred in the videotaping and playback of the
deposition of Dr. Albainy and the court's erroneous
failure to submit her proposed interrogatory to the jury.
In all other respects, McKinnon's appeal is not
well-taken.

On July 23, 1995, a car driven by McAbier
hydroplaned on a rain-covered roadway and rear-ended
a stopped car driven by Bonnie Pascuta. Jerome Werner
and Keri McKinnon were both passengers in Pascuta's
car. As a result of the collision, Werner sustained
injuries to his neck and back. McKinnon suffered an
acute cervical strain and an acute lumbar strain.

On December 16, 1996, Keri McKinnon and another
passenger in the car, Mark Whitley, filed a negligence
action (CV-320742) against McAbier, Pascuta's
insurance company (Grange Insurance) and McAbier's
insurance company (Allstate Insurance) seeking
damages for injuries sustained in the accident.
McKinnon and Whitley also brought underinsured
motorist claims against Grange and Allstate. Grange
Insurance filed a cross claim against Allstate and
McAbier for indemnification.

On February 13, 1997, Werner filed a separate action
(CV-330494) against McAbier for his injuries. On May
23, 1997, the two cases were consolidated. On July 31,
1997, the plaintiffs voluntarily dismissed their claims
against Grange Insurance Company.

On November 24, 1997, the trial court referred the case
to arbitration. The arbitrator found in favor of Keri
McKinnon in the amount of \$6,000, in favor of Mark
Whitley in the amount of \$2,250, and in favor of
Jerome Werner in the amount of \$12,500. The arbitrator
also found in favor of Allstate on McKinnon's
underinsured motorist claim.

On February 26, 1998, McAbier appealed the
arbitration decision to the common pleas court and
requested a trial *de novo*. On July 14, 1998, McKinnon,
Whitley, and Werner filed a notice of voluntarily
dismissal of their claims against Allstate without

prejudice. The case went to trial on July 23, 1998. On July 27, 1998, the jury returned a verdict of \$2,074 in favor of Werner and \$3,429.30 in favor of McKinnon.

Werner and McKinnon both filed motions under Civ.R. 59 for a new trial, or in the alternative, for judgment notwithstanding the verdict. McKinnon also filed a motion for prejudgment interest and a motion to tax additional costs. On August 26, 1998, the trial court denied all of the motions.

*2 On September 10, 1998, Werner filed a timely notice of appeal from the jury verdict and the denial of his motion for a new trial. On September 17, 1998, McKinnon filed a timely notice of appeal from the jury verdict and the denial of her post-judgment motions.^{FN1}

FN1. On September 8, 1999, Mark Whitely dismissed his claims against all defendants with prejudice. On the same date, the case was dismissed with prejudice as to Allstate Insurance Company.

Jerome Werner's first and second assignments of error along with Keri McKinnon's first and third assignments of error all share a common basis in law and fact and shall be considered simultaneously.

Jerome Werner's first assignment of error states:

I. THE TRIAL COURT ERRED IN DENYING PLAINTIFF-APPELLANT'S MOTION FOR A NEW TRIAL.

Jerome Werner's second assignment of error states:

II. THE TRIAL COURT ERRED IN DENYING PLAINTIFF/APPELLANT'S MOTION FOR A DIRECTED VERDICT AND MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

Keri McKinnon's first assignment of error states:

THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DENIED PLAINTIFF-APPELLANT KERI MCKINNON'S MOTION FOR A DIRECTED VERDICT ON THE

MEDICAL BILLS AND PROXIMATE CAUSE.

Keri McKinnon's third assignment of error states: THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT DENIED PLAINTIFF-APPELLANT KERI MCKINNON'S RULE 59 MOTION FOR A NEW TRIAL OR IN THE ALTERNATIVE FOR JUDGMENT NOTWITHSTANDING THE VERDICT ON THE GROUNDS THAT THE JURY VERDICT AND JUDGMENT THEREON WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

The standard for granting a motion for judgment notwithstanding the verdict or a motion for a new trial pursuant to Civ.R. 50(B) is the same as that for granting a Civ.R. 50(A) motion for a directed verdict. Texler v. D.O. Summers Cleaners & Shirt Laundry Co. (1998), 81 Ohio St.3d 677, 679, citing Wagner v. Roche Laboratories (1996), 77 Ohio St.3d 116, 121, 671 N.E.2d 252, 256, fn. 2, citing Gladon v. Greater Cleveland Regional Transit Auth. (1996), 75 Ohio St.3d 312, 318-319, 662 N.E.2d 287, 294; and Posin v. A.B.C. Motor Court Hotel, Inc. (1976), 45 Ohio St.2d 271, 275, 74 Ohio Op.2d 427, 430, 344 N.E.2d 334, 338. See, also, Baughman v. Krebs (Dec. 10, 1998), Cuyahoga App. No. 73832, unreported.

Under Civ.R. 50(A)(4), a motion for a directed verdict should be granted when, after construing the evidence most strongly in favor of the party against whom the motion is directed, the reviewing court finds that reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to the non-moving party. Wagner v. Midwestern Indemnity (1998), 83 Ohio St.3d 287, 294 600 N.E.2d 507, 513.

A motion for a directed verdict raises the legal question of whether the evidence presented was legally sufficient to take the case to the jury. Id., citing Wagner v. Roche Laboratories (1996), 77 Ohio St.3d 116, 119, 671 N.E.2d 252, 255. See, also, Malone v. Courtyard by Marriott L.P. (1996), 74 Ohio St.3d 440, 445 659 N.E.2d 1242, 1247. When ruling on a motion for a

directed verdict, the court must not consider the weight of the evidence or the credibility of the witnesses. *Texler* at 679. "If there is substantial competent evidence to support the party against whom the motion is made, upon which evidence reasonable minds might reach different conclusions, the motion must be denied." *Id.* (Citations omitted.)

*3 Jerome Werner argues that his motion for a new trial should have been granted because the jury's award of damages was inadequate. He argues that, because he presented uncontraverted evidence of \$4,415.00 in special damages, the jury's award of \$2,074.30 was erroneous. However, a review of the record reveals that McAbier agreed that Werner incurred medical bills totaling \$1,298.30, but challenged the rest of the medical expenses as being unrelated to the automobile accident. McAbier elicited testimony that, at the time of the accident, Werner was still seeing Dr. Fiorini for treatment of injuries sustained in a 1993 workplace fall and had already scheduled future appointments with Dr. Fiorini. After considering this testimony, we conclude that reasonable minds could reach different conclusions as to whether the Fiorini charges were for treatment of injuries caused by the automobile accident. Accordingly, the trial court properly denied Werner's motions for a new trial, directed verdict or judgment notwithstanding the verdict.

We also reject Werner's argument that, because McAbier failed to produce expert testimony to contradict Dr. Fiorini's testimony, the jury was not permitted to award a damage amount less than that established by Dr. Fiorini's testimony. Once a plaintiff establishes a prima facie case of negligence, the opposing party may counter by either cross-examining the plaintiff's expert, producing contradictory testimony from another expert, or presenting expert testimony which "sets forth an alternative explanation for the circumstances at issue." *Rechenbach v. Haftkowycz* (1995), 100 Ohio App.3d 484, 492, 654 N.E.2d 374, 379, discretionary appeal not allowed (1995), 72 Ohio St.3d 1530, 649 N.E.2d 839, citing *Stinson v. England* (1994), 69 Ohio St.3d 451, 455-456, 633 N.E.2d 532, 537. In this case, McAbier contested Dr. Fiorini's testimony through his cross-examination, thereby creating a jury question as to whether Dr. Fiorini's

charges were for treatment of injuries sustained by Werner in the auto accident. Werner's first and second assignments of error are not well taken.

We turn next to McKinnon's argument that the trial court should have directed a verdict in her favor as to the stipulated amount of medical bills she incurred as a result of the accident. We agree with McKinnon that there was no dispute between the parties as to the amount of her medical bills. However, the jury ultimately awarded her the total amount of the stipulated medical bills. Consequently, she has not demonstrated any prejudice resulting from the court's failure to grant a directed verdict in her favor.

Keri McKinnon's second assignment of error states:
THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT FAILED TO GIVE THE SPECIAL INTERROGATORY LISTING PAST PAIN AND SUFFERING AND MEDICAL BILLS.

McKinnon sought to submit the following interrogatory to the jury:

What are the amounts of damages, if any, you find by a preponderance of the evidence were incurred by the plaintiff, Keri C. McKinnon as a proximate result of this collision?

*4 Civ.R. 49(B) provides "the court shall submit written interrogatories to the jury, together with appropriate forms for a general verdict, upon request of any party prior to the commencement of argument." Interrogatories test the correctness of the jury's verdict by ascertaining the jury's assessment of the evidence presented at trial. *Srail v. RJF Int'l Corp.* (1998), 126 Ohio App.3d 689, 700, 711 N.E.2d 264, 272, citing *Cincinnati Riverfront Coliseum, Inc. v. McNulty Co.* (1986), 28 Ohio St.3d 333, 337, 504 N.E.2d 415, 418. Interrogatories are proper if they raise determinative issues—those "which when decided will definitely settle the entire controversy between or among the parties, so as to leave nothing for the court to do but to enter judgment for the party or parties in whose favor such determinative issues have been resolved by the jury." *Costa v. Hardee's Food Sys.* (1998), Warren App. No.

CA97-03-022, unreported, certiorari denied (1998), 82 Ohio St.3d 1415, 694 N.E.2d 77, citing Ziegler v. Wendel Poultry, Inc. (1993), 67 Ohio St.3d 10, 15, 615 N.E.2d 1022,1028, overruled on other grounds by Fidelholtz v. Peller (1998), 81 Ohio St.3d 197, 690 N.E.2d 502 and quoting Miller v. McAllister (1959), 169 Ohio St. 487, 494, 160 N.E.2d 231, 237.

The proposed interrogatory called for the jury to separately state the dollar amount of damages awarded for past medical expenses, past pain and suffering, and past loss of pleasure due to McKinnon's inability to fully perform her usual duties. In Fantozzi v. Sandusky Cement Prod. Co. (1992), 64 Ohio St.3d 601, 618, 597 N.E.2d 474, 486, the Ohio Supreme Court stated that setting forth "loss of enjoyment of life" as a separate element of damages may result in a duplication of damages where the jury has included "loss of enjoyment of life" within the category of pain and suffering or the permanency of the disability. To avoid such a result, the Fantozzi court held that, in such cases, the jury should be instructed that "if it awards damages for loss of ability to perform usual activities (which will also encompass the permanency of the disability suffered), the jury must not award additional damages for that same loss when considering any other element of damages, such as physical and mental pain and suffering, as such additional award would be duplicative." *Id.*

Fantozzi is distinguishable from the case before us in that McKinnon made no claim of permanent disability resulting from her injuries. Accordingly, the absence of the Fantozzi language did not render the proposed interrogatory legally objectionable. Furthermore, the proposed interrogatory involved a determinative issue-the amount of damages to be awarded-and was therefore a proper interrogatory. As such, it should have been submitted to the jury. The trial court's failure to submit the proposed interrogatory was prejudicial to the appellant because, without such a damage allocation, it is impossible to determine whether the jury's award included any damages for pain and suffering. Accordingly, we find McKinnon's second assignment of error to be well-taken and hereby remand the case to the trial court for a redetermination of the amount of damages to be awarded to McKinnon.

*5 Keri McKinnon's fourth assignment of error states: THE JURY'S VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence. Chegan v. AAAA Continental Heating (Nov. 24, 1999), Cuyahoga App. No. 75190, unreported, citing C.E. Morris Co. v. Foley Construction Co. (1978), 54 Ohio St.2d 279, 376 N.E.2d 578. In determining whether the trial court's judgment is against the manifest weight of the evidence, a reviewing court must presume that the findings of the trier-of-fact are correct because the trial court is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony. Chegan; Wolfson v. Euclid Ave. Assocs (Nov. 10, 1999), Cuyahoga App. No. 75195, unreported, citing Seasons Coal Co. v. Cleveland (1984), 10 Ohio St.3d 77, 461 N.E.2d 1273. If the evidence is susceptible to more than one interpretation, this court must give it the interpretation consistent with the trial court's judgment. Nelson v. Tipton (Nov. 18, 1999), Franklin App. No. 99AP-277, unreported, citing Cent. Motors Corp. v. Pepper Pike (1995), 73 Ohio St.3d 581, 584, 653 N.E.2d 639, 642, reconsideration denied (1995), 74 Ohio St.3d 1423.

McKinnon argues the jury's verdict was against the manifest weight of the evidence because it failed to include damages for pain and suffering. Damage awards for the exact amount of medical bills for injuries involving pain and suffering, without any award for pain and suffering, have been held to be against the manifest weight of the evidence. Vieira v. Addison (Aug. 27, 1999), Lake App. No. 98-L-054, unreported, citing Farkas v. Detar (1998), 126 Ohio App.3d 795, 711 N.E.2d 703; Boldt v. Kramer, 1999 Ohio App. LEXIS 2140 (May 14, 1999), Hamilton App. No. C-980235, unreported; James v. Murphv (1995), 106 Ohio App.3d 627, 666 N.E.2d 1147; Slivka v. C.W. Transport, Inc. (1988), 49 Ohio App.3d 79, 550 N.E.2d 196. McKinnon cites Sutherin v. Dimora (Feb. 26, 1998), Cuyahoga App. No. 72351, unreported in which

this court reversed a jury verdict which awarded medical expenses to an injured plaintiff without an accompanying award of damages for pain and suffering. However, in Baughman v. Krebs (Dec. 10, 1998), Cuyahoga App. No. 73832, unreported, this court held that “[i]t does not follow that in a matter wherein a jury awards damages for medicals and lost wages that automatically an award for pain and suffering must follow. Evidence relative to pain and suffering in damage evaluations is within the province of the fact-finder.”

In Neal v. Blair (June 10, 1999), Lawrence App. No. 98CA37, unreported, the court upheld a jury verdict which equaled the exact sum of the plaintiff's medical expenses.

*6 Indeed, the jury's verdict awarded the appellants almost the exact sum of medical and chiropractic expenses, but no more. However, we do not view the award as conclusive evidence that the jury failed to consider pain and suffering and cannot conclude that the jury's award is unsupported by the record. Through presentation of its own expert testimony and cross-examination of the appellants' doctors and chiropractors, the appellee disputed the severity of the appellants' injuries and whether the accident in question proximately caused all of the appellants' medical and psychological problems. Indeed, many of the treatments administered by the various doctors and chiropractors depended upon the appellants' subjective complaints of pain. The jury may have chosen to disbelieve the appellants, as well as their doctors and chiropractors, concerning the extent of their injuries. See Leslie v. Briceley, 1997 Ohio App. LEXIS 6057 (Dec. 31, 1997), Washington App. No. 97CA10, unreported; Evans v. Moore, 1993 Ohio App. LEXIS 5580 (Nov. 15, 1993), Scioto App. No. 2103, unreported; Armbrister v. Thomas, 1991 Ohio App. LEXIS 5781 (Nov. 21, 1991), Scioto App. No. 90CA1958, unreported.

In this case, the jury may well have disbelieved McKinnon's testimony about the extent of her injuries. Although she described the impact of the crash as severe, photographs of McAbier's car show little damage. McAbier testified that, at the time of the collision, he was traveling approximately five miles per

hour and that no one in his car was injured. McKinnon also admitted that she continued to work full-time after the crash and missed only a “minimal” amount of work.

A damage award may not be set aside as inadequate and against the manifest weight of the evidence unless a reviewing court determines that the verdict is “so gross as to shock the sense of justice and fairness, cannot be reconciled with the undisputed evidence in the case, or is the result of an apparent failure by the jury to include all the items of damage making up the plaintiff's claim.” Warwick v. Mills (Apr. 24, 1998), Montgomery App. No. 16609, unreported, citing Bailey v. Allberry (1993), 88 Ohio App.3d 432, 435, 624 N. E.2d 279. Under the circumstance of this case, we are unable to conclude that the jury's damage award was against the manifest weight of the evidence. McKinnon's fourth assignment of error is not well taken.

Keri McKinnon's fifth assignment of error states:
THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN GRANTING DEFENDANT-APPELLEE'S POST TRIAL MOTION FOR A PROTECTIVE ORDER THEREBY DENYING APPELLANT AN OPPORTUNITY TO DEPOSE DEFENDANT'S INSURER'S ADJUSTER AND REVIEW THE CLAIMS FILE.

Civ.R. 26(C) authorizes the trial court to issue a protective order where necessary “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” In deciding whether to grant a protective order, the trial court must “balance the competing interests to be served by allowing discovery to proceed against the harm which may result.” Alpha Bens. Agency, Inc. v. King Ins. Agency (Sept. 2, 1999), Cuyahoga App. No. 74623, unreported, citing Arnold v. Am. Natl. Red Cross (1994), 93 Ohio App.3d 564, 576, 639 N.E.2d 484, 491. The trial court's decision about whether to grant a motion for a protective order must be affirmed unless the trial court is determined to have abused its discretion. *Id.*, citing State ex rel. The v. Cos. v. Marshall (1998), 81 Ohio St.3d 467, 469, 692 N.E.2d 198, 201.

*7 Citing Moskovitz v. Mt. Sinai Medical Center

(1994), 69 Ohio St.3d 638, 635 N.E.2d 331, McKinnon argues that neither the attorney-client privilege nor the work-product exception precludes discovery of the contents of an insurer's claims file. However, in his request for a protective order, McAbier did not argue that the file was privileged, rather that disclosure of the file was unnecessary and would unduly burden and harass claims adjuster Ann Simpson. We find no evidence that the trial court abused its discretion in granting the protective order. McKinnon's fifth assignment of error is not well taken.

Keri McKinnon's sixth assignment of error states:
THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN RULING ON MOTION FOR PREJUDGMENT INTEREST BEFORE THE CLAIMS FILE WAS RECEIVED BY APPELLANT.

On August 4, 1998, McKinnon filed her Motion for Award of Prejudgment Interest and Request for Hearing and Discovery. On that same date, she filed a Notice of Post-Trial Deposition of Allstate Insurance Adjuster Ann Simpson in which she stated that "Ms. Simpson is directed to bring with her the Allstate Insurance Company file in its entirety." However, at no time during the pendency of the motion for prejudgment interest did McKinnon file a formal discovery request for the claims file. This case differs from *Shaw v. Toyotomi America, Inc.* (Sept. 26, 1996), Marion App. No. 9-96-17, unreported, the case cited by McKinnon in support of this assignment of error. In *Shaw*, the appellant served a discovery request for production of the claims file along with the motion for prejudgment interest.

A party seeking access to the insurer's claims file must make a request for the file under the discovery provisions of the civil rules. *Cotterman v. Cleveland Elec. Illum. Co.* (1987), 34 Ohio St.3d 48, 517 N.E.2d 536, paragraph three of the syllabus. See, also, *State Farm Mut. Auto. Ins. Co. v. Reinhart* (April 12, 1995), Seneca App. Nos. 13-94-38, 13-94-39, unreported.

Because McKinnon did not file a formal discovery request, Allstate was under no obligation to produce its claims file and the trial court did not err in proceeding

to rule on the motion for prejudgment interest. McKinnon's sixth assignment of error is not well-taken.

Keri McKinnon's seventh assignment of error states:
THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN DENYING PLAINTIFF-APPELLANT KERI MCKINNON'S MOTION FOR AN AWARD OF PREJUDGMENT INTEREST AGAINST DEFENDANT-APPELLEE SCOTT MCABIER AND REQUEST FOR HEARING AND DISCOVERY.

R.C. 1343.03(C) provides for an award of prejudgment interest where "the court determines at a hearing held subsequent to the verdict or decision in the civil 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."

McKinnon argues the trial court erred in failing to hold an evidentiary hearing on her motion for prejudgment interest. While R.C. 1343.03(C) does require the trial court to hold a hearing on a motion for prejudgment interest based upon a party's alleged failure to make a good faith settlement offer, the trial court has the discretion to decline to convene a hearing if it appears no award is likely. *Leatherman v. Wingard* (Dec. 4, 1998), Lucas App. No. L-98-1198, unreported, citing *Novak v. Lee* (1991), 74 Ohio App.3d 623, 631, 600 N.E.2d 260, 266. See, also, *Physicians Diagnostic Imaging v. Grange Ins. Co.* (Sept. 24, 1998), Cuyahoga App. No. 73088, citing *Fazio v. Meridian Ins. Co.*, (Apr. 9, 1998), Cuyahoga App. No. 73320, unreported ("The requirement for a hearing may be dispensed when the motion for prejudgment interest is obviously not well-taken"); *Anderson Transp. Co. v. Keffler Constr. Co.* (June 3, 1998), Summit App. No. 18524, unreported.

*8 In support of her motion for prejudgment interest, McKinnon argued that Allstate failed to make a good faith effort to settle the case. McKinnon attached an affidavit from her attorney, Kyle Crane, who averred that Allstate Claims Adjuster Ann Simpson offered \$2500 to settle the case and that the same amount was

offered on the day of trial by McAbier's attorney Nicholas Fillo. Crane averred that "Defendant refused to even offer the total specials which Defendant himself agreed were incurred as a result of his negligence ."

However, when seeking prejudgment interest, the movant must demonstrate both that the opposing party failed to make a good faith effort to settle and that the movant did not fail to make a good faith effort to settle the case. R.C. 1343.03(C). McKinnon makes no mention of any settlement demand or any counteroffer made by McKinnon in response to Allstate's settlement offer. A party's failure to tender a settlement demand has been held to constitute a failure to make a good faith effort to settle the case. LeMaster v. Huntington Nat'l Bank (1995), 107 Ohio App.3d 639, 644, 699 N.E.2d 295, 298, discretionary appeal not allowed (1996), 75 Ohio St.3d 1497. See, also, Black v. Bell (1984), 20 Ohio App.3d 84, 88, 484 N.E.2d 739, 742-743 ("R.C.1343.03(C) requires the party seeking prejudgment interest to demonstrate its aggressive prejudgment settlement efforts and its adversary's lack of aggressive prejudgment settlement efforts.") Because McKinnon failed to establish that she made good faith efforts to settle the case, the trial court could reasonably have determined that she was apparently not entitled to an award of prejudgment interest, thereby rendering a hearing unnecessary. McKinnon's seventh assignment of error is not well-taken.

Keri McKinnon's eighth assignment of error states:
THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN NOT AWARDING COSTS TO APPELLANT.

Civ.R. 54(D) grants trial courts discretion to order that the prevailing party bear all or part of his or her own costs. State ex Rel. Reyna v. Natalucci-Persichetti (1998), 83 Ohio St.3d 194, 198, 699 N.E.2d 76, 79, citing Vance v. Roedersheimer (1992), 64 Ohio St.3d 552, 555, 597 N.E.2d 153, 156. A trial court is authorized to award costs under Civ.R. 54(D) which provides that unless provided by a statute or by the civil rules, costs are to be awarded to the prevailing party unless the court decides otherwise. Bates v. Ricco (Nov. 18, 1999), Cuyahoga App. No. 74982,

unreported.

The assessment of costs is a matter within the discretion of the trial court and, absent an abuse of discretion, the trial court's decision must be upheld. Keaton v. Pike Community Hosp. (1997), 124 Ohio App.3d 153, 156, 705 N.E.2d 734, 736, citing Vance v. Roedersheimer (1992), 64 Ohio St.3d 552, 555, 597 N.E.2d 153, 156; Gnepper v. Beegle (1992), 84 Ohio App.3d 259, 263, 616 N.E.2d 960, 962-963.

McKinnon sought to recover the following expenses as costs: the filing fee for the complaint, the expenses of the court reporter (for attending and transcribing the deposition of McAbier; transcribing the deposition of McKinnon; attending, transcribing, videotaping, and duplicating the videotape of Dr. Albainy's deposition; playing back the videotaped deposition of Dr. Albainy at trial) and the expense of preparing a blow-up exhibit.

*9 Under C.P.Supp.R. 13(D)(2), the reasonable expense of recording testimony on videotape and the expense of playing the videotape recording at trial shall be allocated as costs under Civ.R. 54. See Bates v. Ricco (Nov. 18, 1999), Cuyahoga App. No. 74982, unreported. Accordingly, McKinnon was entitled to recover the costs of recording deposition of Dr. Albainy and playing the videotape at trial. Under C.P.Supp.R. 13(A)(6), the cost of copying a videotaped deposition (either in the form of a videotape or a written transcript) shall be borne by the party requesting the copy. Consequently, McKinnon is not entitled to recover the costs of duplicating the videotaped deposition of Dr. Albainy. There is no statutory basis for taxing the services of a court reporter as costs under Civ.R. 54(B). Baughman v. Krebs (Dec. 10, 1998), Cuyahoga App. No. 73832, unreported. See, also, Williamson v. Ameritech Corp. (1998), 81 Ohio St.3d 342, 691 N.E.2d 288. Accordingly, McKinnon is not entitled to recover court reporter expenses for attending and transcribing the depositions of McAbier and McKinnon.

The fee for filing the complaint has been held not to be totally recoverable as additional costs. Bates v. Ricco (Nov. 18, 1999), Cuyahoga App. No. 74982, unreported, citing Szarka v. State Auto. Ins. Cos. (Nov.

14, 1996). Cuyahoga App. No. 70469, unreported. Pursuant to R.C. 2303.20, the clerk of the common pleas court may charge certain fees associated with the filing of a lawsuit. Where these fees have already been taxed as costs in the court's final order, any attempt to recover those charges over and above the sums charged by the clerk of courts is impermissible.

Id.

In this case, the trial court assessed costs against the defendants in its final journal entry. Pursuant to *Bates* and *Szarka*, McKinnon is not entitled to any additional recovery of the filing fee.

Also, McKinnon has presented us with no statutory authority for recovering the expense of preparing a blow-up exhibit as costs. We are unpersuaded by her reliance on *State ex rel. Schoener v. Bd. of Cty. Commrs. of Hamilton Cty.* (1992), 84 Ohio App.3d 794, 619 N.E.2d 2, appeal dismissed (1993), 66 Ohio St.3d 1502, 613 N.E.2d 1502. In *Schoener*, the court outlined the two factors to be considered upon when ruling on a motion to tax an expense as a cost—whether the item is a litigating expense or a personal expense and whether the litigating expense was necessary and vital to the litigation. *Id.* at 803, 619 N.E.2d at 18. The *Schoener* court determined that the exhibit fees sought to be recovered in that case were necessary and vital litigation expenses. In this case, we are unconvinced that preparing a blow-up exhibit was necessary or vital to McKinnon's case. Accordingly, the trial court properly denied her request to tax the cost of preparing the exhibit as an additional cost.

McKinnon's eighth assignment of error is well-taken only as it pertains to expenses for the costs of videotaping the deposition of Dr. Albainy and playing the videotape at trial. Accordingly, the trial court's denial of the motion to tax additional costs is reversed in part and additional costs are hereby awarded to McKinnon in the amount of \$495.00, representing the total of the following expenses incurred in connection with the Albainy deposition: \$82.50 for the attendance of the court reporter at the Albainy deposition + \$262.50 for the videotape recording of the deposition + \$150.00 for the videotape playback of the deposition.

*10 The judgment of the trial court is affirmed in all other respects.

Judgment affirmed in part, reversed in part and remanded for jury determination as to damages only.

It is ordered that appellee and appellants share the costs herein taxed.

The Court finds there were reasonable grounds for these appeals.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANNE L. KILBANE, J., concur.

TIMOTHY E. MCMONAGLE, P.J., concurs in Judgment Only.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

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Not Reported in N.E.2d, 2000 WL 23108 (Ohio App. 8 Dist.)

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R.C. § 1343.03



BALDWIN'S OHIO REVISED CODE ANNOTATED
TITLE XIII. COMMERCIAL TRANSACTIONS
CHAPTER 1343. INTEREST

➔**1343.03 Rate of interest on contracts, book accounts and judgments; commencement of interest on judgments**

(A) In cases other than those provided for in sections 1343.01 and 1343.02 of the Revised Code, when money becomes due and payable upon any bond, bill, note, or other instrument of writing, upon any book account, upon any settlement between parties, upon all verbal contracts entered into, and upon all judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of tortious conduct or a contract or other transaction, the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code, unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract. Notification of the interest rate per annum shall be provided pursuant to sections 319.19, 1901.313, 1907.202, 2303.25, and 5703.47 of the Revised Code.

(B) Except as provided in divisions (C) and (D) of this section and subject to section 2325.18 of the Revised Code, interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct or a contract or other transaction, including, but not limited to a civil action based on tortious conduct or a contract or other transaction that has been settled by agreement of the parties, shall be computed from the date the judgment, decree, or order is rendered to the date on which the money is paid and shall be at the rate determined pursuant to section 5703.47 of the Revised Code that is in effect on the date the judgment, decree, or order is rendered. That rate shall remain in effect until the judgment, decree, or order is satisfied.

(C)(1) If, upon motion of any party to a civil action that is based on tortious conduct, that has not been settled by agreement of the parties, and in which the court has rendered a judgment, decree, or order for the payment of money, 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, interest on the judgment, decree, or order shall be computed as follows:

(a) In an action in which the party required to pay the money has admitted liability in a pleading, from the date the cause of action accrued to the date on which the order, judgment, or decree was rendered;

(b) In an action in which the party required to pay the money engaged in the conduct resulting in liability with the deliberate purpose of causing harm to the party to whom the money is to be paid, from the date the cause of action accrued to the date on which the order, judgment, or decree was rendered;

(c) In all other actions, for the longer of the following periods:

(i) From the date on which the party to whom the money is to be paid gave the first notice described in division (C)(1)(c)(i) of this section to the date on which the judgment, order, or decree was rendered. The period described in division (C)(1)(c)(i) of this section shall apply only if the party to whom the money is to be paid made a reasonable

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attempt to determine if the party required to pay had insurance coverage for liability for the tortious conduct and gave to the party required to pay and to any identified insurer, as nearly simultaneously as practicable, written notice in person or by certified mail that the cause of action had accrued.

(ii) From the date on which the party to whom the money is to be paid filed the pleading on which the judgment, decree, or order was based to the date on which the judgment, decree, or order was rendered.

(2) No court shall award interest under division (C)(1) of this section on future damages, as defined in section 2323.56 of the Revised Code, that are found by the trier of fact.

(D) Division (B) of this section does not apply to a judgment, decree, or order rendered in a civil action based on tortious conduct or a contract or other transaction, and division (C) of this section does not apply to a judgment, decree, or order rendered in a civil action based on tortious conduct, if a different period for computing interest on it is specified by law, or if it is rendered in an action against the state in the court of claims, or in an action under Chapter 4123. of the Revised Code.

[FN1] See Notes of Decisions, State ex rel. Ohio Academy of Trial Lawyers v. Sheward (Ohio 1999), 86 Ohio St.3d 451, 715 N.E.2d 1062.

Current through 2007 File 1 of the 127th GA (2007-2008), apv. by 4/20/07, and filed with the Secretary of State by 4/20/07.

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