

IN THE SUPREME COURT OF OHIO

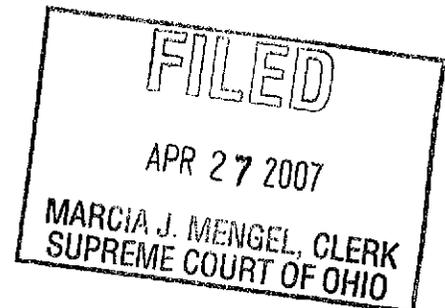
LUCIEN PRUSZYNSKI, et al.,)
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 Appellees,)
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 SARAH REEVES, et al.,)
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 Appellants.)
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CASE NO. 2006-2072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

MERIT BRIEF OF APPELLANTS VANCE H. VAN DRIEST, A MINOR,
AND DENISE MARLENE VAN DRIEST

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STATEMENT OF FACTS

On March 24, 2000, Appellee Lucien Pruszyński ("Lucien") was a passenger in a vehicle operated by Appellee Sarah Reeves ("Reeves") on Woodin Road in Geauga County. At the same time, minors Van H. Van Driest ("Vance") and Charles Kaufman ("Charles") were operating their bicycles adjacent to Woodin Road but without appropriate reflectors or reflective clothing. Reeves, who was operating her vehicle in excess of the posted speed limit in an area without sidewalks or artificial lighting, successfully avoided striking the bicyclists by entering the other lane of traffic. However, Reeves lost control of her vehicle when she attempted to reenter her lane and, as a result, Reeves' vehicle ended up in a culvert off the roadway. Lucien claimed that he was injured as a result of the accident.

On November 25, 2002, Lucien and his parents, Robert Pruszyński and Laurel Pruszyński (collectively "the Pruszyńskis"), filed suit in the Geauga County Court of Common Pleas against Vance and his mother, Denise Marlene Van Driest aka Denise Deitz (collectively "the Van Driests"), Charles and his parents, Charles Kaufman, Jr. and Dinah Kaufman (collectively "the Kaufmans"), and Reeves.

Based upon the facts of the case, which more fully developed during pretrial discovery, the Van Driests disputed liability for the accident. Further, Walter Kosmatka, a lighting expert, determined that even assuming the bicyclists were on the roadway and were wearing dark clothing – which facts were disputed at Trial – the bicyclists were still discernable to Reeves from a distance of approximately 150 feet. For these reasons, and more, the Van Driests reached a reasonable and objective belief that the operation of the bicycles without reflectors adjacent to the roadway was not a significant fact in causing the accident. Farmers Insurance Company ("Farmers"), the insurer of the Van Driests, conducted an independent, rational evaluation of the pretrial discovery, which ultimately supported the dispute in liability.

On October 14, 2003, at a Pretrial Conference, the Van Driests conveyed their dispute in liability to the Trial Court. Thereafter, on June 10, 2004, the parties engaged in an unsuccessful private mediation, whereby the Van Driests continued to dispute liability in causing the accident. The case proceed to a Trial by jury on October 19, 2004. On October 22, 2004, the jury entered a verdict in favor of the Pruszynskis against the Van Driests, the Kaufmans, and Reeves.

On October 29, 2004, the Pruszynskis filed their Motion for Prejudgment Interest, and requested that the claims files of Farmers and the insurance companies for the other Defendants be produced. Although certain objections were placed, the Van Driests complied with part of the request, and produced the relevant portions of Farmers' claims file. Following an extension of time, on December 8, 2004, the Van Driests filed their Brief in Opposition to the Motion for Prejudgment Interest.

Acting within its discretion, the Trial Court did not conduct an evidentiary hearing on the Pruszynskis' Motion for Prejudgment Interest. Instead, on December 21, 2004, the Trial Court, after having presided over the Pretrial and Trial negotiations and the Trial itself, denied the Pruszynskis' Motion for Prejudgment Interest. (Appx. P. 1).

Based upon the denial of their Motion for Prejudgment Interest, on January 14, 2005, the Pruszynskis filed their Notice of Appeal to the Eleventh District Court of Appeals.¹ Because the appeal was limited to the denial of the Pruszynskis' Motion for Prejudgment Interest, they did not include the Trial transcript as part of the record on appeal.

On appeal, the Pruszynskis asserted the following two (2) assignments of error:

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).

¹ Initially, on November 22, 2004, the Van Driests timely filed a Notice of Appeal to the Eleventh District Court of Appeals, which was assigned Case No. 04G002603. However, on February 22, 2005, upon the Van Driests' Motion to Dismiss, that appeal was dismissed.

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 1323.03(C) for granting prejudgment interest (T.d. 1128).

On September 29, 2006, the Eleventh District Court of Appeals issued its opinion. (Appx. P. 5). The Court of Appeals never addressed the Pruszynskis' first assignment of error. In fact, the Court of Appeals determined the second assignment of error to be dispositive of the appeal and, therefore, focused all of its attention on the second assignment of error. (Appx. P. 9).

Finding merit in the Pruszynskis' second assignment of error, the Court of Appeals identified the four-part test to determine whether a party had made a good faith effort to settle under R.C. §1343.03(C) pursuant to this Court's decision in *Kalain v. Smith* (1986), 25 Ohio St.3d 157. (Appx. P. 10). Because the Trial Court had not conducted an evidentiary hearing on the Motion for Prejudgment Interest, the Court of Appeals had nothing more than a mere snapshot of the evidence and testimony necessary to perform the four-part test. This fact, however, did not impede the Court of Appeals from applying the four-part test to the limited evidence and testimony available to it. Ultimately, the Court of Appeals concluded:

We conclude the trial court abused its discretion when it denied the Pruszynskis claim for prejudgment interest against Nationwide² and Farmers. Accordingly, we affirm in part,³ 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).

(Appx. PP. 17-18).

² Nationwide Mutual Fire Insurance Company was the insurer of the Kaufmans.

³ The Court of Appeals determined that State Farm Mutual Automobile Insurance Company, the insurer of Reeves, had acted in good faith and, therefore, affirmed the Trial Court's decision denying the Pruszynskis' claim for prejudgment interest against Reeves. (Appx. P. 13).

On October 10, 2006, the Kaufmans and the Van Driests jointly filed an Application for Reconsideration, arguing that the Eleventh District Court of Appeals' sole option was to remand the case to the Trial Court for an evidentiary hearing. At the same time, the Kaufmans and the Van Driests jointly filed a Motion to Certify a Conflict, arguing that the decision to grant prejudgment interest without the Trial Court conducting a hearing was in direct conflict with Ohio case law, including *Physicians Diagnostic Imaging v. Grange Ins. Co.* (Ohio App. 8th Dist.), 1998 WL 655503. On November 20, 2006, in separate Judgment Entries, the Court of Appeals overruled both Motions.

In the interim, on November 9, 2006, the Van Driests timely filed their Notice of Appeal to this Court. (Appx. P. 1).

ARGUMENT

Proposition of Law No. 1: A court of appeals may not make a finding of bad faith on a motion for prejudgment interest and award prejudgment interest when the trial court did not conduct a hearing on the motion

This Court need look no further than the text of R.C. §1343.03(C), and the cases interpreting that statute, to reverse the decision of the Eleventh District Court of Appeals. The Van Driests acknowledge that R.C. §1343.03(C) underwent significant changes in 2004. At this stage of the litigation, however, the substantive changes made to R.C. §1343.03(C) have no bearing on the outcome of this appeal since both the previous version of the statute and the current version of the statute contain the exact same language that is dispositive of this appeal.

The previous version of R.C. §1343.03(C), enacted on July 6, 2001, provided that:

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 current version of R.C. §1343.03(C)(1), effective June 2, 2004, provides, in pertinent part, that:

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 * * *.

(Emphasis added).⁴

Revised Code §1343.03(C) unambiguously requires that prior to an award of prejudgment interest being made, the trial court must hold a hearing. This Court, in interpreting the text of the statute, held that R.C. §1343.03(C) “requires that the **trial court** determine the issue of prejudgment interest ‘at a hearing held subsequent to the verdict or decision in the action.’” (Emphasis added).

⁴ Although the revisions to the statute were not addressed in its opinion, the Eleventh District Court of Appeals cited to and relied upon the previous version of R.C. §1343.03(C).

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.”

(Appx. P. 9).

Galmish v. Cicchini (2000), 90 Ohio St.3d 22, 25 (quoting *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 658); *Lovewell v. Physicians Ins. Co. of Ohio* (1997), 79 Ohio St.3d 143, 147.

Because it never reached the merits of the Pruszynskis' first assignment of error, the Eleventh District Court of Appeals ignored the evidentiary hearing requirement set forth in R.C. §1343.03(C). (Appx. P. 9). Strict adherence to the statutory language of R.C. §1343.03(C) and the precedent from this Court necessitates an evidentiary hearing held by the Trial Court before granting a motion for prejudgment interest. For this reason, allowing the Court of Appeals' decision to remain in place dissolves the hearing requirement of R.C. §1343.03(C).

The Pruszynskis are not the first party to be successful at trial only to later appeal the trial court's denial of their claim for prejudgment interest. Indeed, Ohio courts of appeals are often asked to review a trial court's decision on prejudgment interest. Nonetheless, upon reaching the conclusion that the appealing party has established a legitimate claim for prejudgment interest, the court of appeals becomes absolutely limited in its recourse: it must remand the case to the trial court to conduct an evidentiary hearing on the claim for prejudgment interest.

Numerous decisions from courts of appeals reaffirm this position. For example, in *Gable v. City of Portsmouth* (Ohio App. 4th Dist.), 1991 WL 13796, the Court of Appeals found the trial court committed reversible error by failing to hold a hearing on the motion for prejudgment interest. The Court of Appeals, nevertheless, acknowledged its own inability to determine prejudgment interest without the benefit of such a hearing and, therefore, remanded the case to the trial court to conduct the hearing. *Id.* at *3.

A similar result was reached in *Hopper v. Boilermakers Loc. Union 105* (Ohio App. 4th Dist.), 1987 WL 16080, *2-3, wherein the Court of Appeals found:

Prejudgment interest is not available to every successful tort plaintiff. The court must first determine, at a hearing subsequent to its decision, that the losing party failed to make a good faith effort to settle the case. The court may then award pre-judgment interest, provided the successful plaintiff did not fail to make a good faith effort to settle. **This determination was not made by the trial court.**

On the record before us, we cannot rule on the propriety of such an award. We must remand to the trial court for a hearing on pre-judgment interest held in conformance with R.C. 1343.03(C).

(Emphasis added).

Along the same lines, the decision rendered by the Tenth District Court of Appeals in *Quick Air Freight, Inc. v. Teamsters Loc. Union No. 413* (10th Dist. 1989), 62 Ohio App.3d 446 – although now nearly two (2) decades old – presents the proper course of conduct that should have been followed by the Eleventh District Court of Appeals in this case. After an award in their favor, the plaintiffs in *Quick Air Freight* filed a motion for prejudgment interest.⁵ The trial court denied the motion without first conducting a hearing. On appeal, the Tenth District determined that the trial court had erred in denying the motion. The Court of Appeals immediately concluded, however, that it lacked the evidence and testimony necessary to render a decision on the motion for prejudgment interest.

The trial court erred by not conducting a post-verdict hearing to determine, pursuant to R.C. 1343.03, whether defendants failed to make a good faith effort to settle the case. Exhibit A to plaintiff's motion for prejudgment interest indicates that plaintiff wrote to defendants' counsel one month prior to trial in an attempt to settle the case for \$210,000. Also, Exhibit B to plaintiff's motion for prejudgment interest indicates that defendants offered to settle for \$6,000 before the issuance of the referee's report.

There is no indication of the basis upon which the trial court denied plaintiff's motion for prejudgment interest. There was no finding made concerning the parties' effort to settle. As stated in *King v. Mohre* (1986), 32 Ohio App.3d 56, 57, 513 N.E.2d 1366, 1368, pursuant to R.C. 1343.03(C), the legislature has " * *

⁵ The defendants in *Quick Air Freight* initially challenged the timeliness of plaintiffs' motion for prejudgment interest. The Court of Appeals found that while the motion was filed after the referee's recommendation, but prior to the trial court's decision, the motion did not prejudice the defendants and was timely. *Id.* at 465.

* required that a hearing be conducted, subsequent to the trial verdict, at which time the court must determine the factual issues as to the bona fides of the respective efforts of the parties to settle the case.” The court in *King* further noted that: “* * * [A] hearing on a motion for prejudgment interest must be evidentiary in nature so as to permit a documented basis for the trial court’s decision as well as to provide a meaningful record for appellate review.” *Id.* at 58, 513 N.E.2d at 1369. See, also, *Ott v. Marion Plaza, Inc.* (Aug. 31, 1987), Marion App. No. 9-85-27, unreported, 1987 WL 16265; *G.F. Trucking Co. v. Midwestern Indemn. Co.* (Aug. 10, 1987), Mahoning App. No. 86 C.A. 120, unreported, 1987 WL 15449.

Since the trial court did not make any finding concerning the parties’ efforts to settle the case, the case is remanded for a hearing pursuant to R.C. 1343.03(C) on the motion for that purpose.

(Emphasis added). *Id.* at 466-67.

A sampling of decisions from other courts of appeals commands the same result: once it determined the Trial Court erred, the Eleventh District Court of Appeals was required to remand the case to the Trial Court for an evidentiary hearing on the Pruszynskis’ Motion for Prejudgment Interest. See e.g., *Carden v. Miami Hardware and Appliance Co., Inc.* (2nd Dist. 1996), 113 Ohio App.3d 220, 223 (“We agree with the plaintiffs that the trial court should have set a prejudgment interest hearing. We reverse and remand for further proceedings consistent with this opinion.”); *VanAtta v. Akers* (Ohio App. 8th Dist.), 2003-Ohio-6615, ¶53 (“We therefore reverse and remand the trial court’s denial of prejudgment interest in order for the trial court to conduct a hearing on the matter.”); *Duvendack v. Hall* (Ohio App. 6th Dist.), 2002-Ohio-1512, *1 (“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)” [and] “the court’s order must be vacated and remanded for an evidentiary hearing. . . .”); *Smith v. Hadlock* (Ohio App. 8th Dist.), 1991 WL 251680, *2 (“the decision of the trial court is reversed and this case is remanded for a R.C. 1343.03 hearing.”)

The Eleventh District Court of Appeals committed reversible error by conducting its own evaluation of the available evidence in lieu of the Trial Court's evidentiary hearing on the Motion. The Van Driests and Farmers firmly believe that they rationally evaluated the Pruszynskis' claim, and that the Trial Court properly declined to hold a hearing on the Pruszynskis' Motion for Prejudgment Interest. Nevertheless, they also recognize the ability of the Eleventh District Court of Appeals – if acting pursuant to the abuse of discretion standard – to reverse the Trial Court's decision to not hold a hearing on the Motion. At that point, however, the Van Driests and Farmers rationally expected a single solution, namely, a remand by the Court of Appeals to the Trial Court for an evidentiary hearing on the Motion. The outright award of prejudgment interest – save the exact dollar amount of the award – by the Court of Appeals was neither contemplated nor warranted.

Furthermore, permitting the Eleventh District's decision to stand would not merely chip away the Trial Court's discretion on prejudgment interest but would, in fact, annihilate such discretion altogether. A trial court's determination on a motion for prejudgment interest will be upheld absent an abuse of discretion. *Kalain, supra*, at 159. As set forth by this Court, the abuse of discretion standard implies more than error of law or judgment and, instead, suggests that the trial court acted in an unreasonable, arbitrary, or unconscionable manner. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

The Eleventh District Court of Appeals set forth the proper abuse of discretion standard in its decision. (Appx. PP. 9-10). From there, however, the Court of Appeals failed to adhere to the standard in rendering its decision. By refusing to remand the case to the Trial Court for an evidentiary hearing on the Pruszynskis' Motion for Prejudgment Interest, the Eleventh District Court of Appeals laid waste to the discretion afforded the Trial Court in denying said Motion. In its place, the Court of Appeals conducted its own *de novo* review of the limited evidence placed before it. Unlike the abuse of discretion standard, a *de novo* review requires an independent review of the trial court's decision without

any deference to the trial court's determination. *Brown v. Scioto Cty. Bd. of Commrs.* (4th Dist. 1993), 87 Ohio App.3d 704, 711. The decision of the Court of Appeals is, therefore, contrary to the applicable standard on appeal.

In as much as the Eleventh District Court of Appeals' decision improperly suggests a *de novo* review, the decision must also be reversed in order to preserve the integrity of appellate review. The Trial Court had reviewed the pleadings, engaged in pretrial settlement negotiations, heard the testimony of the fact and expert witnesses, and examined the issues and evidence before, during, and after the Trial. Accordingly, there can be little doubt that the Trial Court sat in the best position to render a decision on the Pruszynskis' Motion for Prejudgment Interest.

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.

(Emphasis added). *Novak v. Lee* (6th Dist. 1991), 74 Ohio App.3d 623, 631-32; *see also Anderson Transportation Co. v. Keffler Construction Co.* (Ohio App. 9th Dist.), 1998 WL 289381, *3.

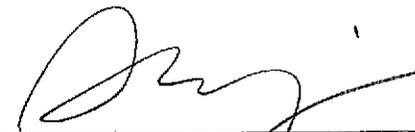
The Eleventh District Court of Appeals, on the other hand, had no such direct interaction with either the parties or the evidence. This is especially true since the Trial transcript was not made part of the record on appeal and, instead, the record consisted only of the pleadings, motions, and briefs of the parties. And, because certain parts of the claims file were not produced by the insurance companies and there was no testimony provided by their claims adjusters at an evidentiary hearing, the Court of Appeals all but conceded that it had only a portion of the evidence necessary for making a factual

determination on the issue of prejudgment interest. The Court of Appeals, nevertheless, performed its own independent analysis of this limited evidence and, thereafter, determined an award of prejudgment interest was in order. In order to avoid placing the issue of prejudgment interest in the hands of the tribunal less capable and qualified to not only analyze the evidence but then render an award of prejudgment interest, the Court of Appeals' decision must be reversed.

CONCLUSION

The Eleventh District Court of Appeals committed reversible error by determining that the Pruszynskis were entitled to an award of prejudgment interest pursuant to R.C. §1343.03(C) when the Trial Court did not conduct a hearing on the Pruszynskis' Motion for Prejudgment Interest. Accordingly, this Court should reverse the decision of the Eleventh District Court of Appeals and affirm the decision of the Trial Court. Alternatively, this Court should remand this matter to the Trial Court to conduct an evidentiary hearing on the Pruszynskis' Motion for Prejudgment Interest.

Respectfully submitted,



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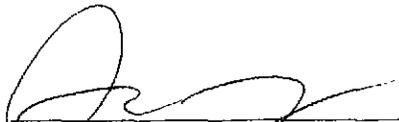
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APPENDIX

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Notice of Appeal of Appellants Vance H. Van Driest, a Minor, and Marlene Van Driest

Appellants Vance H. Van Driest, a Minor, and Marlene Van Driest 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 involves a question of public and great general interest.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Notice of Appeal of Appellants Vance H. Van Driest, a Minor, and Marlene Van Driest was sent by regular U.S. Mail on this 8TH day of November, 2006 to:

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FILED
IN COURT OF APPEALS

SEP 29 2006

DENISE M. KAMINSKI
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.

Steven B. Potter, Dinn, Hochman, Potter & Levy, L.L.C., 5910 Landerbrook Drive, #200, Cleveland, OH 44124 (For Plaintiffs-Appellants).

Roger H. Williams and Phillip C. Kosla, Williams, Sennett & Scully Co., L.P.A., 2241 Pinnacle Parkway, Twinsburg, OH 44087-2367 (For Defendant-Appellee, Sarah Reeves).

John C. Pfau, Pfau, Pfau & Marando, P.O. Box 9070, Youngstown, OH 44513 and *Denise B. Workum*, Lakeside Place, #410, 323 Lakeside Avenue, West, Cleveland, OH 44113 (For Defendants-Appellees, Charles Kaufman, a minor, Charles Kaufman and Dinah Kaufman).

Clark D. Rice, Koeth, Rice & Leo Co., L.P.A., 1280 West Third Street, Cleveland, OH 44113 (For Defendant-Appellee, Vance H. Van Driest, a minor, and Denise Marlene Van Driest).

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 Hergenrodere, 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 Pruszynskis. 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**
) IN COURT OF APPEALS ELEVENTH DISTRICT

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

APPX P19

R.C. § 1343.03

(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 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.