

IN THE SUPREME COURT OF OHIO

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

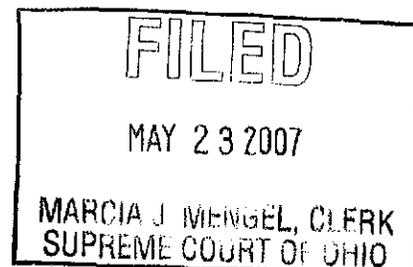
---

**MERIT BRIEF OF APPELLEES, LUCIEN PRUSZYNSKI,  
ROBERT PRUSZYNSKI AND LAUREL PRUSZYNSKI**

---

STEVEN B. POTTER (0001513) (COUNSEL OF RECORD)  
Dinn, Hochman & Potter, LLC  
5910 Landerbrook Drive, Suite 200  
Cleveland, OH 44124  
Telephone: (440) 446-1100  
Facsimile: (440) 446-1240  
E-Mail: [spotter@dhplaw.com](mailto:spotter@dhplaw.com)  
Attorneys for Appellees, Lucien  
Pruszyński, Robert Pruszyński and  
Laurel Pruszyński

CLARK D. RICE (0025128) (COUNSEL OF RECORD)  
Koeth, Rice & Leo Co., L.P.A.  
1280 West Third Street  
Cleveland, OH 44113-1514  
Telephone: (216) 696-1433  
Facsimile: (216) 696-1439  
E-Mail: [crice@krplpa.com](mailto:crice@krplpa.com)  
Attorney for Appellants, Vance H. Van  
Driest and Denise Marlene Van Driest



JOHN C. PFAU (0006470) (COUNSEL OF RECORD)

Pfau, Pfau & Marando

P.O. Box 9070

Youngstown, OH 44513

Telephone: (330) 702-9700

Facsimile: (330) 702-9704

E-Mail: ppm@ppmlegal.com

Attorneys for Appellants, Charles Kaufman, III,

Charles Kaufman, Jr., and Dinah Kaufman nka Dinah Zirkle

DENISE B. WORKUM (0066252)

Lakeside Place, Suite 410

323 Lakeside Avenue, W.

Cleveland, OH 44113

Telephone: (216) 623-1155

Facsimile: (216) 623-1176

E-Mail: workumd@nationwide.com

Attorney for Appellants, Charles Kaufman, III,

Charles Kaufman, Jr. and Dinah Kaufman

ROGER H. WILLIAMS (0016430) (COUNSEL OF RECORD)

Williams, Sennett & Scully Co., PA

2241 Pinnacle Parkway

Twinsburg, OH 44087-2367

Telephone: (330) 405-5061

Facsimile: (330) 405-5586

E-Mail: rwilliams@wsslaw.com

Attorneys for Sarah Reeves

TABLE OF CONTENTS

	<u>PAGE</u>
I. <u>STATEMENT OF FACTS</u> .....	1
II. <u>ARGUMENT AND LAW</u> .....	8
<u>RESPONSE TO PROPOSITION OF LAW NO. 1</u> .....	8
A. <u>THE HEARING DESCRIBED IN OHIO REV. CODE §1343.03 MAY BE ORAL OR NON-ORAL PARTICULARLY WHEN THE RECORD ESTABLISHES ONLY ONE REASONABLE CONCLUSION AS TO THE MERITS OF THE MOTION FOR PREJUDGMENT INTEREST</u> .....	8
1. <u>A Party May Not Advance Theories On Appeal Directly Opposed To Theories Argued Or Advanced In A Lower Court</u> .....	8
2. <u>A Non-Oral Hearing Satisfies The Requirements Of Ohio Rev. Code §1343.03(C)</u> .....	9
<u>RESPONSE TO PROPOSITION OF LAW NO. II</u> .....	12
A. <u>AN APPELLATE COURT MAY CONCLUDE THAT THE TRIAL COURT, AFTER A NON-ORAL HEARING, ABUSED ITS DISCRETION IN DENYING PREJUDGMENT INTEREST BASED UPON THE RECORD SUBMITTED BY THE PARTIES WHEN THE PARTIES DID NOT SEEK TO SUPPLEMENT THE REORD AND THE OVERWHELMING EVIDENCE JUSTIFIES AN AWARD OF PREJUDGMENT INTERST UNDER THE FACTORS SET FORTH IN <i>KALAIN v. SMITH</i>, 25 Ohio St.3d 157 (1986)</u> .....	12
III. <u>CONCLUSION</u> .....	17
IV. <u>CERTIFICATE OF SERVICE</u> .....	18

V. <b><u>APPENDIX</u></b> .....	19
Judgment Entry of the Eleventh District Court of Appeals (November 20, 2006).....	APP. 001
<i>Wallace v. Warren Bd. of Educ., 1990 Ohio App. LEXIS 5401</i> <i>(Case No. 89-T-4297, 11th Dist.)</i> .....	APP. 005
Ohio Rev. Code §4511.56.....	APP. 012
Ohio Rev. Code §4513.03.....	APP. 013
Ohio R. Civ. P. 56.....	APP. 014

## TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<i>Andre v. Case Design, Inc.</i> , 154 Ohio App.3d 323 (Hamilton 2003)....	14, 15
<i>Bitzer v. Lincoln Elec. Co.</i> , 67 Ohio App.3d 53 (8th Dist. 1999); 53 Ohio St.3d 710 (1990).....	11
<i>Champ v. Wal-Mart Stores, Inc.</i> , 2002 Ohio 1615 (Hamilton 2002).....	15
<i>Galmish v. Cicchini</i> , 90 Ohio St.3d 22, 25 (2000).....	16
<i>Gary Guerrieri v. Allstate Ins. Co.</i> , 1999 Ohio App. LEXIS 4049, at 23 (8th Dist. No. 73869, 73870, 75132, 75133).....	13
<i>Home v. American Ship Building Co.</i> , 276 F.2d. 201 (6th Cir. 1960)....	8
<i>Hooten v. Safe Auto Ins. Co.</i> , 2003 Ohio 4821 ¶14 (2003).....	11, 12
<i>Kalain v. Smith</i> , 25 Ohio St.3d 157 (1986).....	12, 14
<i>Laverick v. Children’s Hosp.</i> , 43 Ohio App.3d 201 (9th Dist. 1988).....	10
<i>Loder v. Burger</i> , 113 Ohio App.3d 669, 676 (11th Dist.1996).....	13
<i>Moskovitz v. Mt. Sinai Med. Ctr.</i> , 69 Ohio St.3d 638 (1994).....	9
<i>Okocha v. Fehrenbacher</i> , 101 Ohio App.3d 309 (8th Dist.).....	10
<i>Potter v. City of Troy</i> , 78 Ohio App.3d 372 (Miami Cty. 1992).....	11
<i>Wallace v. Warren Bd. of Educ.</i> , 1990 Ohio App. LEXIS 5401 (Case No. 89-T-4297, 11th Dist.).....	10, 11
 <u>RULES AND STATUTES</u>	
Ohio Rev. Code §1343.03(C).....	7, 8, 9, 10, 11, 12, 13, 14
Ohio Rev. Code §4511.56.....	13
Ohio Rev. Code §4513.03.....	13
Ohio R. Civ. P. 56.....	11

## **I. STATEMENT OF FACTS**

On March 24, 2000, Appellee, Lucien Pruszynski,<sup>1</sup> was seriously and permanently injured in an automobile accident. Lucien Pruszynski was a passenger in a car driven by Sarah Reeves.<sup>2</sup> Reeves lost control of her car. The car crashed into a ditch and rolled several times. Reeves was swerving to avoid bicycles ridden by Appellants, Charles Kaufman, III and Vance Van Driest. Neither Kaufman nor Van Driest had lighting or reflectors as required by Ohio law.

At trial, the Appellees alleged that Appellants, Dinah Zirkle, Charles Kaufman, Jr. and Denise Deitz, the parents of Appellants, Charles Kaufman, III and Vance Van Driest, failed to supervise properly their children (who were minors at the time of the crash). The parents permitted their children to ride their bicycles after dusk on the roadway without proper lighting or reflectors. In October, 2004, a jury returned a verdict in favor of Appellees and against Appellants, jointly and severally, in the amount of \$231,540.26.

At trial, the court rejected any purported basis for disputing liability. At the close Appellees' case, the trial court granted Appellees' Motion to Direct a Verdict as to the negligence of Appellants, Kaufman, III and Van Driest. The trial court instructed the jury that the Appellants, Kaufman, III and Van Driest, were negligent as a matter of law. These rulings destroyed any claim that there was a legitimate dispute as to Appellants' liability.

---

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

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

Although Appellants each attempt to persuade this Court otherwise, they failed to offer any evidence with respect to proximate cause issues. Only Appellees offered expert testimony on proximate cause. A certified accident reconstruction expert, James Crawford, testified as to these issues. Appellants' claim that they disputed liability because "a lighting expert opined that Reeves should have seen the bicyclists from 150 feet away" (Kaufman Merit Brief p. 1) and that their lighting expert determined "that even assuming the bicyclists were on the roadway and wearing dark clothing... the bicyclists were still discernable to Reeves from a distance of approximately 150 feet." (Van Driest Merit Brief p. 3). The lighting expert specifically did not testify as to any proximate cause issues. Appellants offered no expert evidence as to the cause of the accident. The expert's opinions were substantially discredited, particularly in light of the trial court's determination that Appellants were negligent, as a matter of law.

In the accident, Appellee, Lucien Pruszynski, 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 articular cartilage damage to his left knee. Lucien Pruszynski's parents, Appellees, Robert Pruszynski and Laurel Pruszynski, incurred bills in the amount of \$51,540.26 as a result of the injuries their son, Lucien Pruszynski, sustained in the March 24, 2000 accident. The jury was instructed that if it determined that one or more of the Appellants' negligence proximately caused the crash, the jury had to award Appellees, Robert Pruszynski and Lucien Pruszynski, no less than \$51,540.26.

Not only did Appellants fail to offer any expert evidence as to any causation issues, but also, none of the Appellants offered any expert medical evidence at trial. An

orthopedic surgeon, Patrick Hergenroeder, M.D., testified that as a result of the March 24, 2000 accident, Lucien Pruszynski sustained permanent and serious injuries which necessitated surgery and [would] require additional future treatment. Dr. Hergenroeder's testimony was uncontroverted.

Appellants required the Lucien Pruszynski be examined by another orthopedic surgeon, Robert Fumich, M.D. (Supplement ("Supp") p. 16). Appellants did not offer any testimony or evidence from Dr. Fumich (or any other medical expert) at trial regarding the cause, nature, extent and permanency of Lucien Pruszynski's injuries. (Supp. p. 16) They did not even provide Appellees with a written report from Dr. Fumich. When Appellees obtained copies of Appellants' insurers' files, post-verdict, Appellees learned the reason why no such testimony was offered. Dr. Fumich concurred with, and even believed more strongly than Appellees' own surgeon, that Lucien Pruszynski's injuries were permanent and that he would need additional treatment in the future. (Supp. pp. 102-107).

Three insurance companies provided a defense and various level of coverage to Reeves and Appellants. State Farm Mutual Automobile Insurance Company insures Reeves. Farmers Insurance Company ("Farmers") insures Appellants, Vance Van Driest and Denise Dietz (the 'Van Driest Appellants"). Nationwide Mutual Fire Insurance Company ("Nationwide") provides for insurance Appellants, Charles Kaufman, III, Zirkle and Kaufman, Jr. (the "Kaufman Appellants").

Throughout the pendency of the litigation, Appellants made little or no settlement offers. Neither Nationwide nor Farmers on behalf of their insureds made any monetary offer to settle this case until September, 2004. (Supp. p. 18). At an October 14, 2003

settlement conference, the Kaufman and Van Driest Appellants asserted that they were not liable, even in the face of admitted and uncontroverted evidence that Kaufman, III and Van Driest were riding bicycles that were not equipped as required by Ohio Rev. Code §§4513.03 and 4511.56. (Supp. p. 16).

The case was originally scheduled for trial on June 8, 2004. When the trial date approached, mediation was suggested as a vehicle through which settlement might be reached. As a result, the parties sought and obtained a continuance of the trial. A private mediator, Jeffrey S. Wilkof, was hired. (Supp. pp. 17, 24). Appellees, Lucien Pruszynski and Robert Pruszynski, attended the mediation. Adjusters for each of the three insurers were present. Appellees, in an effort to facilitate negotiations, unilaterally reduced their demand from \$500,000.00 to \$425,000.00. During the five hours of mediation, Appellants never presented an offer. (Supp. pp. 17, 93-95).

On June 11, 2004, Appellees' counsel wrote each of the attorneys for Appellants expressing disappointment and displeasure with the failure of the Appellants to present any type of settlement offer. (Supp. pp. 17, 27-28). Appellants did not respond to the correspondence with any type of settlement offer.

Appellees continued to attempt to engage Appellants in settlement. They urged Appellants and their insurers to set forth an offer in order to facilitate settlement discussions. The Appellants continued to refuse to make any type of offer.

The Van Driest and Kaufman Appellants did not make any offer until September 27, 2004, four and one-half years after the accident and nearly two years and 22 months after suit was filed. The joint offer all of the defendants, including Appellants, was \$24,000.00. (Supp. p. 18).

On October 1, 2004, Appellees' attorney wrote counsel for Appellants expressing his continued displeasure over the failure of Farmers and Nationwide to attempt good faith settlement negotiations. In response, Appellants and Defendant Reeves increased their joint offer to \$40,000.00. (Supp. pp. 18, 32-33). Additional negotiations did not take place until the morning of trial, at which time, Farmers and Nationwide, on behalf of their insureds, increased their offer to \$35,000.00 per Appellant group. (Supp. p. 19). None of the Appellants were willing to increase their offers despite the clear indication that Appellees would be willing to settle the case for \$200,000.00. No additional offers were made during trial, even after the trial court granted Appellees' Motion for a Directed Verdict as to the negligence of Appellants, Kaufman, III and Van Driest. (Supp. p. 19).

Although Appellants claim they disputed liability, their insurers' files reveal a valuation of the claim consistent with the jury's verdict. For instance, the Farmers' adjuster acknowledged that the verdict for this case [would] be in the \$200,000 to \$250,000.00 range. (Supp. pp. 52, 132-136). In spite of this evaluation, Farmers decided to "proceed with nuisance value..."

Counsel for the driver of the vehicle also valued the case consistent with the ultimate jury verdict. He believed that the case had a value in an area of between \$175,000.00 to \$225,000.00. (Supp. p. 89).

State Farm, Reeves' insurer, acknowledged the unreasonableness of Farmers and Nationwide's position:

Counsel for both sets of Defendants (Appellants) has now placed upon the record the fact that they allegedly never

agreed to make any type of settlement offer in this matter up to this point in time [December 30, 2003].

(Supp. pp. 100-101).

In March, 2004, Nationwide acknowledged its exposure:

The fact that they did not have lights on their bikes pursuant to Ohio Revised Code does not help our case. Therefore, we feel probable that the jury could find anywhere from 5-15% liability on each of the boys. This poses a problem for us in that we have \$300,000 policy while the other 2 defendants have \$100,000 each. Since this case falls under the old joint and several liability statute, if we are found to be even 1% at fault, we could be forced to pay the entire verdict.

(Supp. pp. 117-118).

When the jury returned a verdict in the amount of \$231,540.26, Appellees timely filed a Motion for Prejudgment Interest. Briefs in Support, an Affidavit and various documents were submitted with the Motion. (Supp. pp. 1-40). In accordance with applicable law, Appellees sought discovery to support the Motion for Prejudgment Interest. Subpoenas were served directly upon the insurance carriers which provided coverage in defense of this matter. Upon receiving partial responses to the subpoenas, Appellees filed a Supplement Brief in Support of the Motion for Prejudgment Interest attaching numerous documents from the claims files of the insurance companies.<sup>3</sup> (Supp. pp. 41-140). Each of the Appellants were afforded the opportunity to respond fully to the Motion and include whatever evidentiary (and other) materials they deemed

---

<sup>3</sup> Nationwide, Appellant Kaufman's insurer, filed a Motion for Protective Order seeking an in-camera inspection of certain documents prior to producing the documents for Appellees' inspection and possible use in support of their Motion for Prejudgment Interest. Nationwide claimed some documents were privileged. That Motion was never ruled on.

appropriate. In fact, the Kaufman and Van Driest Appellants submitted whatever arguments and other evidence they deemed appropriate in responding to the Motion. The trial court did not limit the extent of Appellants' responses.

On December 21, 2004, the trial court denied the Motion for Prejudgment Interest. The Pruszynskis' filed their Notice of Appeal asserting two assignments of error:

- A. Whether the trial court erred by denying [the motion for prejudgment interest] without conducting a hearing or providing any reason(s) for its ruling; and
- B. Whether the trial court erred by denying the motion for prejudgment interest when the record reveals that [Appellees] satisfied all of the requirements under Ohio Rev. Code §1343.03(c) for granting prejudgment interest.

The Court of Appeals, after an exhaustive analysis of the record, determined that the Pruszynskis' Second Assignment of Error as to the Kaufman (Nationwide) and Van Driest (Farmers) Appellants was "with merit." The Court further held that because of its determination of the Second Assignment of Error, that Pruszynskis' First Assignment of Error was "rendered moot." Consequently, the Court reversed the judgment of the trial court denying prejudgment interest and remanded the matter for the determination of the amount of prejudgment interest against the Kaufman and Van Driest Appellants, pursuant to Rev. Code §1343.03(C).

The Kaufman and Van Driest Appellants filed joint motions for reconsideration and to certify the case to this Court. Each of the Motions was denied. In the Court of Appeals decision denying the motion for reconsideration, it determined that "[the Pruszynskis'] second assignment of error needed to be discussed first as it was

dispositive of the appeal.” (Appendix pp. 001-004). Based upon “a review of the record upon appeal,” the court issued its decision and then subsequently denied the motion for reconsideration.

## II. ARGUMENT AND LAW

### RESPONSE TO PROPOSITION OF LAW NO. 1

#### A. THE HEARING DESCRIBED IN OHIO REV. CODE §1343.03 MAY BE ORAL OR NON-ORAL PARTICULARLY WHEN THE RECORD ESTABLISHES ONLY ONE REASONABLE CONCLUSION AS TO THE MERITS OF THE MOTION FOR PREJUDGMENT INTEREST.

##### 1. A Party May Not Advance Theories On Appeal Directly Opposed To Theories Argued Or Advanced In A Lower Court.

Appellants claim that the Court of Appeals decision should be reversed because prejudgment interest was awarded without a hearing directly contradicts arguments Appellants made in the Court of Appeals. The theory upon which the case was submitted and argued cannot, when an adverse judgment results, be discarded and a new, contradictory, theory be substituted and successfully invoked on appeal. *Home v. American Ship Building Co.*, 276 F.2d. 201 (6th Cir. 1960)(citations omitted). Here, Appellants urge this Court to adopt a position that is directly opposed to the theories and arguments advanced in the Court of Appeals.

Each of the Appellants on appeal to the Eleventh Appellate District raised the following issue:

It is not error for the trial court not to hold a hearing since the hearing contemplated in R.C. 1343.03(C) is not mandatory, but rather, discretionary.

(Ct. of Appeals Brief, Van Driest, et al., p. 6; Ct. of Appeals Brief, Kaufman, et al., p. 6) (Emphasis added).

The Van Driest Appellants further argued, “The discretion to grant a hearing is in the discretion of the trial court.” (Ct. of Appeals Brief, Van Driest, p. 7)(citation omitted).

The Kaufman Appellants made nearly an identical argument claiming, “The trial court has discretion to decline to hold a hearing.” (Ct. of Appeals Brief, Kaufman, p. 7).

Now, Appellants urge this Court to take a contradictory position. The Kaufman Appellants argue in their Merit Brief:

R.C. 1343.03(C) requires an oral hearing before a court may grant an award of prejudgment interest.

(Kaufman Merit Brief p. 2). They claimed that the statute and *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638 (1994), clearly state that a hearing is required before a court may grant a motion for prejudgment interest. The Kaufman and Van Driest Appellants are now arguing a theory directly opposed to the theories they argued in the Court of Appeals. They should not be permitted to advance such an argument and therefore, on this basis alone, the Court of Appeals’ decision should be affirmed.

2. **A Non-Oral Hearing Satisfies The Requirements Of Ohio Rev. Code §1343.03(C).**

The obligation to conduct an oral, evidentiary hearing does not exist. Although Ohio Rev. Code §1343.03(C) was amended during the pendency of the claims involved in this case, each contains similar language. The previous version of Ohio Rev. Code §1343.03(C) provided:

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 paid did not fail to make a good faith effort to settle the case.

Likewise, the current version of Ohio Rev. Code §1343.03(C)(1) states:

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...

The nature of the hearing called for by the statute is not described. However, the statute never specifies that the hearing be evidentiary or oral. An evidentiary hearing is not mandatory for an award of prejudgment interest when reviewing the court's ruling on a motion for prejudgment interest. *Okocha v. Fehrenbacher*, 101 Ohio App.3d 309 (8th Dist.). Nor does the court have to hold an oral hearing. Instead, it may hold a non-oral hearing in resolving a motion for prejudgment interest. *Wallace v. Warren Bd. of Educ.*, 1990 Ohio App. LEXIS 5401 (Case No. 89-T-4297, 11th Dist.); *Laverick v. Children's Hosp.*, 43 Ohio App.3d 201 (9th Dist. 1988). Thus, courts interpreting the statute have not required the hearing to be evidentiary or oral in nature.

This Court has had the opportunity to address whether interpretations of the "hearing" requirement demands an oral, evidentiary hearing. This Court has declined to address whether court of appeals decisions inaccurately interpreted the prejudgment

statute hearing requirement. See, *Wallace v. Warren Bd. of Educ.*, *supra*, 60 Ohio St.3d 720, jurisdictional motion overruled; *Bitzer v. Lincoln Elec. Co.*, 67 Ohio App.3d 53 (8th Dist. 1999); 53 Ohio St.3d 710 (1990) jurisdictional motion overruled. Thus, the statute does not mandate an oral hearing.

No dispute exists that holding an oral hearing would also have been proper under the statute. Those precise facts do not exist in the record of this case. The determination remains that a non-oral hearing satisfied the requirement of the statute in this case. Where the challenging party was satisfied that the record contained ample evidence from which the Court of Appeals could draw its conclusions, it is not error for the Court of Appeals to determine whether the trial court abused its discretion in determining if prejudgment interest should be granted based upon the evidence submitted by the parties.

The statute's requirement that a court hold a hearing upon the filing of a motion for prejudgment interest does not mandate that the hearing be oral. Comparable rules have similar hearing requirements. For instance, Ohio R. Civ. P. 56(C) requires a court to conduct a hearing on a motion for summary judgment. This Court has determined that, "The 'hearing' contemplated by Civ. R. 56(C) may be either a formal, oral hearing (in which the trial court entertains oral arguments from counsel on a scheduled date preceded by the parties' filings a Memoranda and Civ. R. 56 evidentiary materials) or a 'nonoral,' informal one." *Hooten v. Safe Auto Ins. Co.*, 2003 Ohio 4821 ¶14 (2003)(citations omitted). Thus, Civ. R. 56(C) does not mandate that a trial court hold an oral hearing upon every motion for summary judgment filed with the trial court, even if one is requested. *Potter v. City of Troy*, 78 Ohio App.3d 372 (Miami Cty. 1992).

Just as Civ. R. 56 requires that a hearing be conducted, Ohio Rev. Code §1343.03(C) requires that the court conduct a hearing on a motion for prejudgment interest. The mandate that a trial court hold an oral hearing upon every motion for prejudgment interest filed does not exist. Instead, whether to grant a party's request for an oral hearing is a decision within the court's discretion. *Hooten v. Safe Auto Ins. Co.*, *supra*. The parties' submission of briefs and evidentiary materials in support of their positions on Pruszynskis' Motion for Prejudgment interest satisfied the requirement of Ohio Rev. Code §1343.03(C). Based upon the record, the Court of Appeals determined that the trial court abused its discretion in denying the motion for prejudgment interest. The Court of Appeals decision should be affirmed.

#### **RESPONSE TO PROPOSITION OF LAW NO. II**

- A. **AN APPELLATE COURT MAY CONCLUDE THAT THE TRIAL COURT, AFTER A NON-ORAL HEARING, ABUSED ITS DISCRETION IN DENYING PREJUDGMENT INTEREST BASED UPON THE RECORD SUBMITTED BY THE PARTIES WHEN THE PARTIES DID NOT SEEK TO SUPPLEMENT THE REORD AND THE OVERWHELMING EVIDENCE JUSTIFIES AN AWARD OF PREJUDGMENT INTERST UNDER THE FACTORS SET FORTH IN *KALAIN v. SMITH*, 25 Ohio St.3d 157 (1986).**

Although the Kaufman Appellants argued fervently in the Court of Appeals that no hearing was required when the issue of whether prejudgment interest was, based upon the record before the Court of Appeals, clear and capable of resolution as a matter of law, they now take the contrary position that such an oral hearing must be held. Appellants are not entitled to an oral hearing where the failure to conduct an oral hearing has not been challenged. The Court of Appeals, as requested by the Kaufman Appellants, conducted a review of the trial court's decision to deny prejudgment interest.

The analysis of the record on appeal<sup>4</sup> revealed that the trial court abused its discretion in denying the motion.

Appellants' obligations to negotiate in good faith are absolute when liability exists as a matter of law. When liability is clear, Ohio Rev. Code §1343.03(C) requires that an insurer make a determined effort to settle a claim prior to trial. *Loder v. Berger*, 113 Ohio App.3d 669, 676 (11th Dist. 1996); *Gary Guerrieri v. Allstate Ins. Co.*, 1999 Ohio App. LEXIS 4049, at 23 (8th Dist. No. 73869, 73870, 75132, 75133). This case's record demonstrates that Nationwide and Farmers knew that Kaufman, III and Van Driest were negligent as a matter of law because the young men failed to comply with Ohio Rev. Code §§4513.03 and 4511.56. The acknowledgement of liability by the insurers (as based upon the contents of their files) created an unquestionable requirement to engage in good faith settlement negotiations). Appellants were comfortable and put their fates before the Court of Appeals solely based upon the record submitted. That record leads to the inescapable conclusion that the Appellants failed to engage in good faith settlement negotiations.

The trial court's abuse of discretion in denying the motion for prejudgment interest is underscored by the court's rulings at trial. The trial court directed a verdict in favor of the Pruszynskis at the close of their case with respect to the negligence of Nationwide and Farmers' insureds. The trial court instructed the jury that Kaufman, III and Van Driest were negligent as a matter of law. The instructions further informed the jury that it should determine the negligence was a proximate cause of the injuries.

---

<sup>4</sup> Neither the Kaufman nor Van Driest Appellants argue that they possessed additional evidence which would bolster their positions.

Appellants were satisfied with, and did not seek to supplement, the record before the Court of Appeals. This record rendered only one possible conclusion in this case: that the Kaufman and Van Driest Appellants failed to make a good faith effort to settle this case. Consequently, the Court of Appeals rationally and logically determined that the trial court had abused its discretion.

The record upon which the Kaufman and Van Driest Appellants wanted the trial court and the Court of Appeals to review in determining Appellants' responsibilities to pay prejudgment interest makes only one conclusion plausible: that Appellees failed to make a good faith effort to settle this case. This Court requires consideration of several factors in the exercise of a trial court's discretion. *Kalain v. Smith*, 25 Ohio St.3d 157 (1986). A party has failed to make a good faith effort to settle under Ohio Rev. Code §1343.03(C) if it has not rationally evaluated its risk and potential liability and failed to make a good faith monetary settlement offer or respond in good faith to an offer from the other party. *Id. at Syllabus*. The statute requires all parties to make an honest effort to settle the case. Thus, parties may have failed to make a good faith effort to settle even when it has not acted in bad faith. *Id.* (citations omitted).

In this case, a substantial disparity between an offer and verdict existed. Such a disparity is one factor in determining 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 (Hamilton 2003). Here, the last offer of all of the defendants (when combined) totaled \$120,000.00. The jury entered a verdict of nearly twice that amount, \$231,540.26.

Likewise, the Court of Appeals correctly concluded that the trial court ignored the substantial evidence establishing that the Kaufman and Van Driest Appellants did not

conduct a rational valuation of their risk exposure or act upon that valuation. The value of a case for settlement depends on a realistic assessment of defense strategy, intangibles, such as the credibility and opinions of medical experts as to causation, evidence of permanency, the effect of the injury on the quality of life, and the plaintiffs (Appellees) credibility and sincerity as a witness. *Andre v. Case Design, Inc.*, 154 Ohio App.3d at 320. An offer is not a rational evaluation if it fails to take into account the strengths and weaknesses of the evidence in assessing the size of an award should the jury discount the defense's evidence. *Id.* The court also may consider the injuries involved, applicable law, defenses available, and the nature, scope and frequency of efforts to settle. *Champ v. Wal-Mart Stores, Inc.*, 2002 Ohio 1615 (Hamilton 2002).

Uncontroverted evidence established that the Kaufman and Van Driest Appellants failed to conduct a rational evaluation of the risk exposure. They ignored the report of their own medical expert who determined that Lucien Pruszynski's injuries were serious, that a short term prognosis was fair and that his long term prognosis was poor. The Kaufman and Van Driest Appellants did not offer any medical evidence at trial, let alone proof which contradicted the Pruszynskis' evidence.

Unchallenged evidence establishes that the Appellants did not make any offer which was consistent with the rational valuation of their liability exposure. Although the Nationwide and Farmers insurers violated the Ohio Rev. Code, as a matter of law, and under the joint and several statute (then applicable), each could be held liable for the full amount of the verdict, Nationwide and Farmers continued to assert a position of no or limited liability. The position was directly contradicted by legal rulings. Kaufman, III and Van Driest were negligent *per se*. The Kaufman and Van Driest Appellants each valued

the case between \$175,000.00 and \$250,000.00. Yet, they refused to make legitimate settlement offers. Even though the Farmers insurance adjuster in his claims file writes that he concurred that the verdict for this case would be in the \$200,000 - \$250,000 range, no offer ever exceeded \$35,000.00 from Farmers; that amount being the settlement offer made during the first day of trial. Incredible evidence establishes a substantial basis for an award of prejudgment interest; evidence which the Court of Appeals recognized was before the trial court. The Court of Appeals correctly ruled, as a matter of law, that the trial court abused its discretion, on the record before it, in denying the motion for prejudgment interest.

Still, this case's record produced an even stronger foundation for an award of prejudgment interest and demonstrated why the Court of Appeals found that the trial court abused its discretion. Prior rulings and jury instructions, the injuries involved, applicable law, and available defense may be reviewed in determining whether to award prejudgment interest. *Galmish v. Cicchini*, 90 Ohio St.3d 22, 25 (2000). Here, the trial court directed a verdict in the Pruszynskis' favor at the close of the Pruszynski case with respect to the negligence of the Kaufman and Van Driest Appellants. The trial court further instructed the jury that Kaufman, III and Vance Van Driest were negligent as a matter of law and that the jury should determined that the negligence was a proximate cause of the injuries.

All of the requirements for establishing prejudgment interest were satisfied based upon the record submitted by all parties, a record the Kaufman and Van Driest Appellants were satisfied with in the Court of Appeals. The Court of Appeals properly

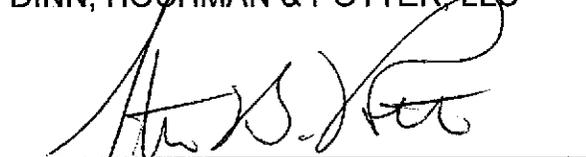
concluded, and based upon the record submitted by the parties, that the trial court abused its discretion.

III. **CONCLUSION**

For the reasons set forth above, Appellees, Lucien Pruszynski, Robert Pruszynski and Laurel Pruszynski, request that this Court affirm the decision of the Court of Appeals.

Respectfully submitted,

DINN, HOCHMAN & POTTER, LLC



---

STEVEN B. POTTER (0001513)  
(COUNSEL OF RECORD)  
5910 Landerbrook Drive, Suite 200  
Cleveland, Ohio 44124  
Telephone: (440) 446-1100  
Facsimile: (440) 446-1240  
E-Mail: [spotter@dhplaw.com](mailto:spotter@dhplaw.com)  
Attorneys for Appellees

**IV. CERTIFICATE OF SERVICE**

A true copy of the foregoing Merit Brief of Appellees, Lucien Pruszynski, Robert Pruszynski And Laurel Pruszynski, was mailed this 18 day of May, 2007, by regular U.S. Mail, postage prepaid, to:

**Clark D. Rice, Esq.**, Koeth, Rice & Leo Co., L.P.A., 1280 West Third Street, Cleveland, OH 44113-1514, Attorney for Defendants, Vance H. Van Driest and Denise Marlene Van Driest;

**John C. Pfau, Esq.**, Pfau, Pfau & Marando, P.O. Box 9070, Youngstown, OH 44513, Attorneys for Defendants Kaufmans;

**Denise B. Workum, Esq.**, Lakeside Place, Suite 410, 323 Lakeside Avenue, W., Cleveland, OH 44113, Attorney for Defendants, Charles Kaufman, a minor, Charles Kaufman and Dinah Kaufman; and,

**Roger H. Williams, Esq.**, Williams, Sennett & Scully Co., L.P.A., 2241 Pinnacle Parkway, Twinsburg, OH 44087-2367, Attorneys Sarah Reeves.

DINN, HOCHMAN & POTTER, LLC



---

STEVEN B. POTTER (0001513)  
Attorneys for Appellees

V. **APPENDIX**

Judgment Entry of the Eleventh District Court of Appeals (November 20, 2006).....	APP. 001
<i>Wallace v. Warren Bd. of Educ., 1990 Ohio App. LEXIS 5401</i> (Case No. 89-T-4297, 11th Dist.).....	APP. 005
Ohio Rev. Code §4511.56.....	APP. 012
Ohio Rev. Code §4513.03.....	APP. 013
Ohio R. Civ. P. 56.....	APP. 014

**FILED**  
IN COURT OF APPEALS

NOV 20 2006

STATE OF OHIO )  
DENISE M. KAMINSKI )  
CLERK OF COURTS )  
GEAUGA COUNTY ) SS.  
COUNTY OF GEAUGA )

THE COURT OF APPEALS  
ELEVENTH DISTRICT

LUCIEN PRUSZYNSKI, et al.,

Plaintiffs-Appellants,

- vs -

SARAH REEVES, et al.,

Defendants-Appellees.

JUDGMENT ENTRY

CASE NO. 2005-G-2612

On October 10, 2006, appellees, Charles and Dinah Kaufman, Charles Kaufman, a minor, Vance H. and Denise Marlene Van Driest, filed a joint motion requesting this court to reconsider our decision in *Pruszyński v. Reeves*, 11th Dist. No. 2005-G-2612, 2006-Ohio-5190. Appellants, Lucien, Robert, and Laurel Pruszyński, filed a brief in opposition to appellees' application for reconsideration on October 20, 2006. Appellees contend that this court's decision was in error and that we should, therefore, reconsider the opinion pursuant to App.R. 26(A).

App.R. 26 does not provide specific guidelines to be used by an appellate court when determining whether a prior decision should be reconsidered or modified. *State v. Black* (1991), 78 Ohio App.3d 130, 132. However, the standard that has been generally accepted for addressing an App.R. 26(A)

12/044

APP. 001

motion was stated in *Matthews v. Matthews* (1981), 5 Ohio App.3d 140. In *Matthews*, the court observed: "The test generally applied \*\*\* is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for consideration that was either not considered at all or was not fully considered by the court when it should have been." *Id.* at paragraph two of the syllabus.

In their application, appellees seek reconsideration of this court's opinion in which we affirmed in part, reversed in part, and remanded the matter to the trial court. According to appellees, this court erred by holding that appellants' first assignment of error was moot. Appellees stress that this court should have determined that appellants' second assignment of error was moot, and remanded the matter to the trial court for a full evidentiary hearing on appellants' motion for prejudgment interest. We disagree.

Upon review of the App.R. 26(A) motion filed in the present matter, it is apparent that appellees have not demonstrated any obvious errors or raised any issues that were not adequately addressed in our previous opinion. We are not persuaded that we erred as a matter of law.

This court is not bound to address an appellant's assignments of error in any particular order. We determined that appellants' second assignment of error needed to be discussed first as it was dispositive of this appeal.

In their second assignment of error, appellants argued that the trial court erred by denying the motion for prejudgment interest because the record

revealed that they satisfied all of the requirements under R.C. 1343.03(C) for granting prejudgment interest.

We stated in *Pruszynski*, supra, at ¶15:

"[i]n *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.'" (Parallel citation omitted.)

After reviewing the entire record, including depositions, exhibits, and activity logs, we determined that all four prongs of the *Kalain* test were met.

Since appellees raise the issue of a hearing in this motion for reconsideration, which we note was an assignment of error raised by appellants in our earlier decision and which appellees argued strenuously against, we shall briefly address the matter. Appellees cite the following two cases for the proposition that an oral hearing is required upon a motion for prejudgment interest unless the court finds the motion is not well-taken. *Lovewell v. Physicians Ins. Co. of Ohio* (1997), 79 Ohio St.3d 143; *Physicians Diagnostic Imaging v. Grange Ins. Co.*, 8th Dist No. 73088, 1998 Ohio App. LEXIS 4442. However, *Lovewell* and *Physicians* do not stand for the proposition that an oral hearing is required pursuant to R.C. 1343.03(C)(1), as here, where in an

assignment of error, the failure to conduct an oral hearing is not being challenged. Further, it is clear from a review of the record upon appeal, that the trial court conducted a through review of the evidence based upon the extensive post judgment discovery material and briefs submitted in this matter.

An application for reconsideration is not designed to be used in situations wherein a party simply disagrees with the logic employed or the conclusions reached by an appellate court. *State v. Owens* (1997), 112 Ohio App.3d 334, 336. App.R. 26(A) is meant to provide a mechanism by which a party may prevent a miscarriage of justice that could arise when an appellate court makes an obvious error or renders a decision that is not supported by the law. *Id.* Appellees have made no such demonstration.

Accordingly, appellees' application for reconsideration is hereby overruled.

  
\_\_\_\_\_  
JUDGE COLLEEN MARY O'TOOLE

WILLIAM M. O'NEILL, J.,

DIANE V. GRENDALL, J.,

concur.

Source: [Legal](#) > /.../> **OH State Cases, Combined** 

Terms: **name(wallace and warren)** ([Edit Search](#) | [Suggest Terms for My Search](#))

 Select for FOCUS™ or Delivery



*1990 Ohio App. LEXIS 5401, \**

**JAMES WALLACE**, As Father and Natural Guardian of the Person and Estate of **CHRISTINA WALLACE**, A Minor, Plaintiff-Appellant, v. **WARREN** BOARD OF EDUCATION, Defendant-Appellee

Case No. 89-T-4297

Court of Appeals of Ohio, Eleventh Appellate District, Trumbull County

1990 Ohio App. LEXIS 5401

December 7, 1990

**PRIOR HISTORY:** [\*1] Character of Proceedings: Civil Appeal from Common Pleas Court; Case No. 88 CV 136.

**DISPOSITION:** JUDGMENT: Affirmed.

#### **CASE SUMMARY**

**PROCEDURAL POSTURE:** Appellant, the father of an injured student, sought review of decisions by the Common Pleas Court (Ohio), which awarded judgment to the father on his claim against appellee board of education for negligent supervision of his child and which, without a hearing, denied the father's request for prejudgment interest pursuant to Ohio Rev. Code Ann. § 1343.03(C). The father alleged that the board failed to make a good faith effort to settle the case.

**OVERVIEW:** The student was playing at the school's playground when a swing was hurled at her suddenly and without warning. The father of the student brought an action against the board for negligent supervision of the student. The trial court awarded the father judgment and damages on the claim. After the entry of judgment, the father sought prejudgment interest pursuant to Ohio Rev. Code Ann. § 1343.03(C) for the board's failure to make a settlement offer. The trial court denied the request. The board had alleged that it did not make a settlement offer because, based on the student's testimony, the accident was unavoidable. The court affirmed the trial court's denial of the father's motion. The court held that an award of prejudgment interest was appropriate only where the party who was found liable failed to make a good faith effort to settle the case. However, if that party had a good faith, objectively reasonable belief that it was not liable, it was not required to make an offer. Because the board reasonably believed that the accident was unavoidable and unforeseeable and the father presented no evidence of his settlement offer, the board was not liable for prejudgment interest.

**OUTCOME:** The court affirmed the trial court's denial of the father's motion for prejudgment interest on the judgment awarded him against the board for negligent supervision of his child.

**CORE TERMS:** supervisor's, deposition, settlement offer, prejudgment interest, swing, settle,

APP. 005

playground, good faith effort, horseplay, evidential, monetary, hurled, good faith, reasonable belief, foreseeable, suddenly, imput, potential liability, assignments of error, moving party, rationally, discovery, evaluated, criterion, mandatory, premised, direct result, deposition testimony, unavoidable, schoolmate

**LexisNexis(R) Headnotes** ♦ [Hide Headnotes](#)

[Civil Procedure](#) > [Remedies](#) > [Judgment Interest](#) > [Prejudgment Interest](#) 

[Torts](#) > [Damages](#) > [Interest](#) > [Prejudgment Interest](#) 

**HN1** ↓ [Ohio Rev. Code Ann. § 1343.03\(C\)](#) provides for the payment of interest on a money judgment which was rendered in a civil action based on tortious conduct. Under this provision, prejudgment interest will not be awarded unless the moving party can demonstrate the following: 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. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

[Civil Procedure](#) > [Settlements](#) > [General Overview](#) 

[Civil Procedure](#) > [Remedies](#) > [Judgment Interest](#) > [General Overview](#) 

**HN2** ↓ The Supreme Court of Ohio has specifically held that [Ohio Rev. Code Ann. § 1343.03 \(C\)](#) requires each party to make a honest effort to settle the case. The Court has delineated the following test for determining when a party has satisfied the first criterion: A party has not failed to make a good faith effort to settle under [Ohio Rev. Code Ann. § 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. [More Like This Headnote](#)

[Civil Procedure](#) > [Settlements](#) > [General Overview](#) 

[Civil Procedure](#) > [Remedies](#) > [Judgment Interest](#) > [General Overview](#) 

**HN3** ↓ When the record contains conflicting evidence as to liability, the non-moving party had a reasonably objective belief that he was not liable and thus was not required to make a settlement offer under [Ohio Rev. Code Ann. § 1343.03 \(C\)](#). [More Like This Headnote](#)

[Civil Procedure](#) > [Remedies](#) > [Judgment Interest](#) > [Prejudgment Interest](#) 

[Civil Procedure](#) > [Appeals](#) > [Standards of Review](#) > [General Overview](#) 

**HN4** ↓ In ruling on cases concerning [Ohio Rev. Code Ann. § 1343.03\(C\)](#), the Supreme Court of Ohio has consistently held that the granting of a motion for prejudgment interest is a matter within the sound discretion of the trial court. [More Like This Headnote](#)

[Civil Procedure](#) > [Remedies](#) > [Judgment Interest](#) > [General Overview](#) 

**HN5** ↓ [Ohio Rev. Code Ann. § 1343.03\(C\)](#) provides that a court's determination on prejudgment interest is to be made at a hearing held subsequent to the verdict or decision in the action. [More Like This Headnote](#)

[Civil Procedure](#) > [Pleading & Practice](#) > [Motion Practice](#) > [Content & Form](#) 

[Civil Procedure](#) > [Remedies](#) > [Judgment Interest](#) > [Prejudgment Interest](#) 

**HN6** ↓ In ruling upon a motion for prejudgment interest, the trial court is usually required to determine some factual issues which are not of record. Specifically, it is not likely that all necessary evidence concerning the parties' settlement negotiations would have been properly submitted to the court during the trial or at any prior time. Thus,

APP. 006

an oral hearing would be the ideal and preferred way to address the need for evidential impute. Nevertheless, many jurisdictions have local rules regarding the necessity for making a "proper showing" in order to obtain an oral hearing. [More Like This Headnote](#)

[Civil Procedure](#) > [Pleading & Practice](#) > [Motion Practice](#) > [Content & Form](#) 

[Evidence](#) > [Documentary Evidence](#) > [General Overview](#) 

**HN7**  Trumbull County, Ohio, Ct. C. P. R. 10.01 provides that motions, in general, shall be submitted and determined upon the motion papers hereinafter referred to. Oral arguments of motions may be permitted on application and proper showing. Trumbull County, Ohio, Ct. C. P. R. 10.02 provides that the moving party shall serve and file with his motion a brief written statement of reasons in support of the motion and a list of citations of the authorities on which he relies. If the motion requires the consideration of facts not appearing of record, he shall also serve and file copies of all affidavits, depositions, photographs or documentary evidence he desires to present in support of the motion. [More Like This Headnote](#)

**COUNSEL:** ATTY. ILAN WEXLER, ATTY. DONALD C. HEPFNER, Youngstown, Ohio, For Plaintiff-Appellant.

ATTY. THOMAS CAREY, Warren, Ohio, For Defendant-Appellee.

**JUDGES:** Judith A. Christley, Presiding Judge. Edward J. Mahoney, J., Ret. Ninth Appellate District, sitting by assignment, Daniel B. Quillin, J., Ninth Appellate District, sitting by assignment, concur.

**OPINION BY:** CHRISTLEY

## **OPINION**

### *OPINION*

Appellant, James Wallace, is the father and natural guardian of Christina Wallace. In January 1988, appellant, on behalf of himself and Christina, initiated an action in the Trumbull County Court of Common Pleas against appellee, the Warren Board of Education. Appellant's complaint for money damages was essentially based upon two allegations: 1) that Christina, as a student at a Warren City School, had suffered a serious injury to her left leg when she was hit by a swing on a playground; and 2) that Christina's injury was the direct result of the negligence of the supervisor, who was not on the playground when the accident [**\*2**] occurred.

After appellee had answered and the parties had proceeded with discovery, a two-day jury trial was held. At the conclusion of this proceeding, the jury returned a verdict against appellee and awarded appellant \$ 5,000 in damages. Neither party filed an appeal from this judgment.

Approximately two weeks following the entry of this Judgment, appellant moved the trial court for an award of prejudgment interest, pursuant to [R.C. 1343.03\(C\)](#). Under this motion, appellant argued that appellee had failed to make a good faith effort to settle the case before it went to trial. This argument was primarily premised upon the contention that in deciding not to make a settlement offer, appellee had not rationally evaluated its risks and potential liability.

APP. 007

In response to appellant's motion, appellee filed a memorandum in opposition. In this memorandum, appellee maintained that it had not made a monetary settlement offer because its counsel had reasonably concluded that it was not liable under the facts of this case. As to the liability question, appellee specifically argued that based upon the deposition testimony of Christina, its counsel had concluded that the child's injury had been [\*3] the result of an unavoidable accident.

In support of this argument, appellee attached an affidavit of its trial counsel to its memorandum. In this affidavit, counsel stated that during the course of her pretrial deposition, Christina testified that the injury had occurred when a schoolmate had suddenly hurled a swing at her. Counsel also averred that based upon this testimony, he had determined that negligence could not be established.

Following the filing of appellee's response, appellant submitted a memorandum in support of his motion. In this memorandum, appellant contended that appellee had been required to make a settlement offer because its liability was clear under the facts of the case.

In support of his position, appellant attached to his memorandum an unsworn copy of one page of the playground supervisor's deposition. On this page, the supervisor testified that if she had been on the playground when the accident occurred, she would have stopped Christina from climbing up the swing set. Neither the supervisor's deposition nor Christina's deposition was of record with the trial court.

No oral hearing was held on appellant's motion, although appellant had specifically requested [\*4] one. After appellant filed his memorandum in response, the trial court issued a judgment denying the motion. Appellant filed a notice of appeal with this court, and now advances the following assignments of error:

"1. The trial court abused its discretion when it denied Plaintiff-Appellant's Motion for Prejudgment Interest."

"2. The Trial Court committed error by refusing to grant Plaintiff-Appellant's Motion for Prejudgment Interest without a hearing."

Under his first assignment, appellant challenges the merits of the trial court's decision on his motion. As in his memorandum in support, appellant asserts that an award of prejudgment interest was warranted in the case because appellee failed to make a monetary settlement offer when its liability was clear under the facts. This argument is without merit.

R.C. 1343.03(C) <sup>HN1</sup> provides for the payment of interest on a money judgment which was rendered in a civil action based on tortious conduct. Under this provision, prejudgment interest will not be awarded unless the moving party can demonstrate the following:

"\* \* \* that the party required to pay the money failed to make a good faith effort to settle the case and that the party to [\*5] whom the money is to be paid did not fail to make a good faith effort to settle the case."

Before 1986, numerous appellate districts held that under the first criterion, the opposing party was only required to show that it had not acted in bad faith. See, Ware v. Richey (1983), 14 Ohio App. 3d 3. However, in Kalain v. Smith (1986), 25 Ohio St. 3d 157, <sup>HN2</sup> the Supreme Court specifically held that the statute requires each party to make a honest effort to settle the case. The court then delineated the following test for determining when a party has satisfied the first criterion:

"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

APP. 008

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." *Id.* at 159.

In responding to appellant's motion, appellee did not dispute the fact that [\*6] it had not made a settlement offer, as is required under the fourth part of the *Kalain* test for a good faith effort. Instead, relying upon the last sentence of the foregoing quote, appellee maintained that it had not made a settlement offer because it had a reasonable belief that it was not liable under the facts of the case.

In challenging this argument, appellant first refers to the two defenses which appellee raised in its answer; namely, sovereign immunity and contributory negligence. However, a review of appellee's memorandum in opposition shows that appellee did not rely upon these defenses in contending that it had had a reasonable belief of no liability. Instead, appellee argued that its belief was based upon the position that the playground supervisor had not been negligent because the accident in question had been unavoidable. As noted earlier, this position, in turn, had been premised upon counsel's sworn recollection of the deposition testimony of the victim. Counsel recalled Christina stated in her deposition that the injury had occurred when a schoolmate suddenly hurled a swing at her without warning.

As to this particular point, appellant asserts that this argument [\*7] is simply invalid because the accident was foreseeable. In support of this assertion, appellant cited the deposition of the playground supervisor. According to appellant, the supervisor testified that it was her duty to stop any "horseplay" on the playground, and that she would have stopped the horseplay in the area of the swings if she had been present when the accident in question occurred.

In relation to the supervisor's deposition, this court would first note that even if the one page which was attached to appellant's memorandum was of proper evidentiary quality, that page did not contain the statements which appellant attributed to her. On the attached page, the supervisor stated that if she had seen Christina *climbing* on the swing set, she would have stopped her. At least in this small part of her deposition, the supervisor did not refer to a swing being hurled at Christina or to "horseplay."

Moreover, even if the statements which appellant attributed to the supervisor were in the record before this court or had been sworn to by appellant in affidavit form, this testimony would not be sufficient to show that the accident was foreseeable. According to appellant, the supervisor [\*8] stated that if she had seen horseplay, she would have stopped it. However, according to appellee's counsel's affidavit, Christina stated at her deposition that the swing had been hurled suddenly and without warning. Under those circumstances, the accident (or "horseplay") was not foreseeable.

In this case, the record before this court is extremely limited. Since appellant did not file a transcript of the trial proceedings, this court is unable to review the actual evidence upon which the jury based its verdict. The only "evidence" before this court are those items which the parties attached to their memoranda. Appellant's attachments consisted of the uncertified excerpt from the supervisor's deposition and a copy of a letter from appellee's counsel, while appellee merely attached to counsel's affidavit. As our previous discussion shows, that evidence is, at best, conflicting as to whether Christina's injury was the direct result of some type of negligence on the part of the supervisor.

*HN3* When the record contains conflicting evidence as to liability, other appellate districts have held that the non-moving party had a reasonably objective belief that he was not liable. See, *Hastings* [\*9] v. *Greene Cty. Agricultural Society* (Mar. 30, 1989), *Greene App. No. 88 CA 49*, unreported; *Holman v. Grandview Hospital & Medical Center* (Mar. 12, 1987),

APP. 009

Montgomery App. No. 9961 & 10147, unreported. Thus, since the evidence before this court supports the conclusion that appellee had a reasonable belief that it was not liable, it was not required under *Kalain* to make a settlement offer.

In addition, this court notes that appellant failed to submit any evidence concerning his own effort to settle the case. Besides the excerpt from the supervisor's deposition, the only other piece of evidence appellant presented was an unsworn copy of a letter from appellee's counsel. In this letter, counsel revoked the prior offer of appellee's insurer to pay the medical expenses which appellant incurred. As to the question of appellant's own effort to settle the case, the letter is irrelevant.

While appellant's memorandum contains some allegations on this point, this clearly cannot be considered evidence on this point. Thus, appellant failed to satisfy either of the two criteria for obtaining an award of prejudgment interest.

**HN4** In ruling on cases concerning R.C. 1343.03(C), the Supreme **[\*10]** Court has consistently held that the granting of a motion for prejudgment interest is a matter within the sound discretion of the trial court. Huffman v. Hair Surgeon, Inc. (1985), 19 Ohio St. 3d 83. Pursuant to the foregoing analysis, it follows that the trial court in this case did not abuse its discretion in denying appellant's motion. Thus, appellant's first assignment is without merit.

Part of the reason that the evidence before this court is so limited is that an oral hearing was not held on appellant's motion. In his second assignment of error, appellant submits that the trial court erred in not holding such a hearing before ruling upon his motion. In support of his position that an oral hearing is mandatory, appellant refers to the specific language of R.C. 1343.03(C), **HN5** in which it provides that a court's determination is to be made "at a hearing held subsequent to the verdict or decision in the action \* \* \*."

As appellant notes, some appellate districts have interpreted the foregoing language to make the holding of an evidential hearing mandatory. See, e.g., King v. Mohre (1986), 32 Ohio App. 3d 56. In contrast, other courts have held that the decision **[\*11]** to hold a formal hearing is also a matter within the discretion of the trial court. See, e.g., Christopher v. Cleveland Building Supply Co. (Mar. 2, 1989), Cuyahoga App. No. 55069, unreported.

After reviewing this authority, this court finds that the former view requiring the provision of a forum for evidential input is the more persuasive. However, we are not persuaded that this always requires an oral hearing. As the court in *King* emphasized, **HN6** in ruling upon a motion for prejudgment interest, the trial court is usually required to determine some factual issues which are not of record. Specifically, it is not likely that all necessary evidence concerning the parties' settlement negotiations would have been properly submitted to the court during the trial or at any prior time. Thus, an oral hearing would be the ideal and preferred way to address the need for evidential input.

Nevertheless, many jurisdictions have local rules similar to the ones in effect in Trumbull County regarding the necessity for making a "proper showing" in order to obtain an oral hearing.

**HN7** "10.01 Motions, in general, shall be submitted and determined upon the motion papers hereinafter referred to. **[\*12]** Oral arguments of motions may be permitted on application and proper showing.

"10.02 The moving party shall serve and file with his motion a brief written statement of reasons in support of the motion and a list of citations of the authorities on which he relies. If the motion requires the consideration of facts not appearing of record, he shall also serve and file copies of all affidavits, depositions, photographs or documentary evidence he desires

to present in support of the motion."

That was not done in this instance and appellant cannot now complain that he did not make the necessary showing for an oral hearing, or provide sufficient documentation for a non-oral hearing. In the instant case, the trial judge did not foreclose evidential imput, rather appellant failed to provide any.

The judgment of the trial court is affirmed.

Source: [Legal > / . . . / > OH State Cases, Combined](#) 

Terms: **name(wallace and warren)** ([Edit Search](#) | [Suggest Terms for My Search](#))

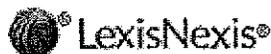
View: Full

Date/Time: Tuesday, May 15, 2007 - 2:24 PM EDT

\* Signal Legend:

-  - Warning: Negative treatment is indicated
-  - Questioned: Validity questioned by citing refs
-  - Caution: Possible negative treatment
-  - Positive treatment is indicated
-  - Citing Refs. With Analysis Available
-  - Citation information available

\* Click on any *Shepard's* signal to *Shepardize*® that case



[About LexisNexis](#) | [Terms & Conditions](#)

[Copyright ©](#) 2007 LexisNexis, a division of Reed Elsevier Inc. All rights reserved.

## LEXSTAT OHIO REV CODE 4511.56

PAGE'S OHIO REVISED CODE ANNOTATED  
 Copyright (c) 2007 by Matthew Bender & Company, Inc  
 a member of the LexisNexis Group  
 All rights reserved.

\*\*\* CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED  
 WITH THE SECRETARY OF STATE THROUGH MAY 14, 2007 \*\*\*

\*\*\* ANNOTATIONS CURRENT THROUGH APRIL 1, 2007 \*\*\*

\*\*\* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH APRIL 18, 2007 \*\*\*

TITLE 45. MOTOR VEHICLES -- AERONAUTICS -- WATERCRAFT  
 CHAPTER 4511. TRAFFIC LAWS -- OPERATION OF MOTOR VEHICLES  
 BICYCLES, MOTORCYCLES AND SNOWMOBILES

**GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

*ORC Ann. 4511.56 (2007)*

§ 4511.56. Signal devices on bicycle; brake

(A) Every bicycle when in use at the times specified in *section 4513.03 of the Revised Code*, shall be equipped with the following:

(1) A lamp mounted on the front of either the bicycle or the operator that shall emit a white light visible from a distance of at least five hundred feet to the front and three hundred feet to the sides. A generator-powered lamp that emits light only when the bicycle is moving may be used to meet this requirement.

(2) A red reflector on the rear that shall be visible from all distances from one hundred feet to six hundred feet to the rear when directly in front of lawful lower beams of head lamps on a motor vehicle;

(3) A lamp emitting either flashing or steady red light visible from a distance of five hundred feet to the rear shall be used in addition to the red reflector. If the red lamp performs as a reflector in that it is visible as specified in division (A)(2) of this section, the red lamp may serve as the reflector and a separate reflector is not required.

(B) Additional lamps and reflectors may be used in addition to those required under division (A) of this section, except that red lamps and red reflectors shall not be used on the front of the bicycle and white lamps and white reflectors shall not be used on the rear of the bicycle.

(C) A bicycle may be equipped with a device capable of giving an audible signal, except that a bicycle shall not be equipped with nor shall any person use upon a bicycle any siren or whistle.

(D) Every bicycle shall be equipped with an adequate brake when used on a street or highway.

(E) Except as otherwise provided in this division, whoever violates this section is guilty of a minor misdemeanor. If, within one year of the offense, the offender previously has been convicted of or pleaded guilty to one predicate motor vehicle or traffic offense, whoever violates this section is guilty of a misdemeanor of the fourth degree. If, within one year of the offense, the offender previously has been convicted of two or more predicate motor vehicle or traffic offenses, whoever violates this section is guilty of a misdemeanor of the third degree.

**HISTORY:**

135 v H 995 (Eff 1-1-75); 142 v H 412 (Eff 3-10-88); 144 v S 98. Eff 11-12-92; 149 v S 123, § 1, eff. 1-1-04; 151 v H 389, § 1, eff. 9-21-06.

LEXSTAT OHIO REV CODE 4513.03

PAGE'S OHIO REVISED CODE ANNOTATED  
Copyright (c) 2007 by Matthew Bender & Company, Inc  
a member of the LexisNexis Group  
All rights reserved.

\*\*\* CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED  
WITH THE SECRETARY OF STATE THROUGH MAY 14, 2007 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH APRIL 1, 2007 \*\*\*  
\*\*\* OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH APRIL 18, 2007 \*\*\*

TITLE 45. MOTOR VEHICLES -- AERONAUTICS -- WATERCRAFT  
CHAPTER 4513. TRAFFIC LAWS -- EQUIPMENT; LOADS  
EQUIPMENT

**GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION**

*ORC Ann. 4513.03 (2007)*

§ 4513.03. Lighted lights and illuminating devices required

(A) Every vehicle upon a street or highway within this state during the time from sunset to sunrise, and at any other time when there are unfavorable atmospheric conditions or when there is not sufficient natural light to render discernible persons, vehicles, and substantial objects on the highway at a distance of one thousand feet ahead, shall display lighted lights and illuminating devices as required by *sections 4513.04 to 4513.37 of the Revised Code*, for different classes of vehicles; except that every motorized bicycle shall display at such times lighted lights meeting the rules adopted by the director of public safety under *section 4511.521 of the Revised Code*. No motor vehicle, during such times, shall be operated upon a street or highway within this state using only parking lights as illumination.

Whenever in such sections a requirement is declared as to the distance from which certain lamps and devices shall render objects visible, or within which such lamps or devices shall be visible, such distance shall be measured upon a straight level unlighted highway under normal atmospheric conditions unless a different condition is expressly stated.

Whenever in such sections a requirement is declared as to the mounted height of lights or devices, it shall mean from the center of such light or device to the level ground upon which the vehicle stands.

(B) Whoever violates this section shall be punished as provided in *section 4513.99 of the Revised Code*.

**HISTORY:**

GC § 6307-76; 119 v 766(791), § 76; Bureau of Code Revision, 10-1-53; 129 v 232 (Eff 9-21-61); 135 v H 272 (Eff 11-21-73); 137 v S 100 (Eff 4-1-78); 144 v S 98 (Eff 11-12-92); 148 v H 484. Eff 10-5-2000; 149 v S 123, § 1, eff. 1-1-04.

1 of 1 DOCUMENT

OHIO RULES OF COURT SERVICE  
Copyright; 2006 by Matthew Bender & Company, Inc.  
a member of the LexisNexis Group.  
All rights reserved.

\*\*\* RULES CURRENT THROUGH UPDATES RECEIVED NOVEMBER 28, 2006 \*\*\*  
\*\*\* ANNOTATIONS CURRENT THROUGH OCTOBER 1, 2006 \*\*\*

OHIO RULES OF CIVIL PROCEDURE  
TITLE VII. JUDGMENT

*Ohio Civ. R. 56 (2006)*

Rule 56. SUMMARY JUDGMENT

(A) *For party seeking affirmative relief.* --A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action. A party may move for summary judgment at any time after the expiration of the time permitted under these rules for a responsive motion for pleading by the adverse party, or after service of a motion for summary judgment by the adverse party. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(B) *For defending party.* --A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part of the claim, counterclaim, cross-claim, or declaratory judgment action. If the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court.

(C) *Motion and proceedings.* --The motion shall be served at least fourteen days before the time fixed for hearing. The adverse party prior to the day of hearing may serve and file opposing affidavits. Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. No evidence or stipulation may be considered except as stated in this rule. A summary judgment shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(D) *Case not fully adjudicated upon motion.* --If on motion under this rule summary judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court in deciding the motion, shall examine the evidence or stipulation properly before it, and shall if practicable, ascertain what material facts exist without controversy and what material facts are actually and in good faith controverted. The court shall thereupon make an order on its journal specifying the facts that are without controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established and the trial shall be conducted accordingly.

(E) *Form of affidavits; further testimony; defense required.* --Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavit. Sworn or certified copies of all papers or parts of papers referred to in an affidavit shall be attached to or served with the affidavit. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the party's

pleadings, but the party's response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the party does not so respond, summary judgment, if appropriate, shall be entered against the party.

(F) *When affidavits unavailable.* --Should it appear from the affidavits of a party opposing the motion for summary judgment that the party cannot for sufficient reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or discovery to be had or may make such other order as is just.

(G) *Affidavits made in bad faith.* --Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

**HISTORY:** Amended, eff 7-1-76; 7-1-97; 7-1-99