

CLARK D. RICE (No. 0025128)
Koeth, Rice & Leo Co., L.P.A.
(COUNSEL OF RECORD)
1280 West Third Street
Cleveland, Ohio 44113
Telephone: (216) 696-1433
Fax: (216) 696-1439
E-Mail: crice@krplpa.com
ATTORNEYS FOR APPELLANTS
VAN DRIEST

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	iv
STATEMENT OF FACTS	1
ARGUMENT	4
<u>Reply in Support of Proposition of Law No. I:</u>	4
<u>Reply in Support of Proposition of Law No. II:</u>	8
CERTIFICATE OF SERVICE	10

TABLE OF AUTHORITIES

<u>CASES:</u>	<u>Page</u>
<i>Augustine v. North Coast Limosine, Inc.</i> (Aug. 10, 2000), Cuyahoga App. No. 76742, 76993, unreported	7
<i>Duvendack v. Hall</i> (March 29, 2002), Lucas App. No. L-01-1443, unreported	7
<i>Fazio v. Meridian Ins. Co.</i> (Apr. 9, 1998), Cuyahoga App. No. 73320, unreported	7
<i>Kluss v. Alcan Aluminum Corp.</i> (1995), 106 Ohio App.3d 528	7
<i>Kmetz v. MedCentral Health Sys.</i> (Nov. 12, 2003), Richland App. No. 02CA0050, unreported, 2003-Ohio-6115	7
<i>Miller v. First Int’l Fidelity & Trust Building, Ltd.</i> (2007), 113 Ohio St.3d 474	7
<i>Moskovitz v. Mt. Sinai Med. Ctr.</i> (1994), 69 Ohio St.3d 638	7
<i>Novak v. Lee</i> (1991), 74 Ohio App.3d 623	5, 6, 8
<i>Okocha v. Fehrenbacher</i> (1995), 101 Ohio App.3d 309	5
<i>Physicians Diagnostic Imaging v. Grange Ins. Co.</i> (Sept. 24, 1998), Cuyahoga App. No. 73088, unreported	7
<i>Wallace v. Warren Bd. Of Education</i> (Dec. 7, 1990), 11 th App. No. 89-T-4297, unreported, 1990 WL 199109	6
<i>Werner v. McAbier</i> (Jan. 13, 2000), Cuyahoga App. No. 75197, 75233, unreported	7

STATEMENT OF FACTS

In their brief, Appellees go to great lengths to present a detailed but unfortunately, one-sided version of the facts in this case that are obviously intended to distract the Court from the pressing legal issues actually on appeal. This case is not about whether the facts support an award of prejudgment interest. Instead, this case is about whether the Court of Appeals can engage in an evaluation of the facts without an evidentiary hearing at the trial level and make an award of prejudgment interest. However, the facts as presented by Appellees are incomplete and require supplementation.

Reeves, the driver of the vehicle in which Appellee was a passenger, admitted in her deposition and at trial that at the time of the accident, she was operating her motor vehicle in excess of the posted speed limit in an area where there were no sidewalks and no artificial lighting to assist in detection of hazards at or near the roadway. (T.d. 67) Reeves further admitted that once she detected the bicyclists, she was able to move her vehicle left of center and avoid striking them. At the time she was left of center, there was no oncoming traffic though Reeves still overreacted by jerking her vehicle to the right, entering the right-hand lane and again losing control of her vehicle. (T.d. 67) Reeves' passenger, Appellee, was able to see the bicyclists before Reeves did. (T.d. 67) Reeves further admitted that she did not recall attempting to decelerate her vehicle prior to leaving the roadway. (T.d. 67)

The Kaufman Appellants, based upon the discovery, had a reasonable objective belief that the operation of the bicycles without reflectors adjacent to the roadway, was not a significant contributing factor to the motor vehicle accident. The Kaufmans' position was further supported by lighting expert Walter Kosmatka. Mr. Kosmatka has testified that even assuming the bicyclists

were on the roadway, rather than the berm as was testified to by Kaufman, and even if they were wearing dark clothing, which is contrary to the testimony of Kaufman who indicates he had a white T-shirt on, and there were no lights or reflectors on their bicycles, they still were discernible to Reeves from a distance of approximately 150 feet. (T.d. 67; T.d. 69) Based upon the testimony and opinions of Mr. Kosmatka, a reasonable conclusion to be drawn was that any negligence on the part of the bicyclists was not a proximate cause of the motor vehicle collision.

Charles Kaufman III testified that he and Appellant Van Driest were riding their bicycles off the roadway on the gravel berm at the time of the accident and further, there were marks left in the gravel by the bicycle tires as they stopped abruptly when the Reeves vehicle went flying in front of them into the ditch. He also testified that he was wearing a white shirt at the time of the accident.

The facts in this case set forth a rational basis for Appellants to evaluate the sole proximate cause of the motor vehicle accident being Reeves' negligence in failing to control her vehicle. The facts in this case support Appellant's reasonable objective position that it was a case of no-liability based upon the causation issue.

The documents submitted by the insurance carriers establish a valid liability dispute between the parties. The documents submitted by Nationwide, which included all of the documents except those going to the theory of defense, were voluminous. The Nationwide file establishes that Nationwide's evaluation viewed the majority of the liability resting with Reeves and only a small percentage potentially to Appellants, with the probable range being 5% to 15% on each of the bicyclists. (T.d. 126, Ex. 25)

Farmers Insurance, on behalf of Appellant Van Driest, did an independent rational evaluation that was basically identical to Nationwide's evaluation. Farmers states in their log:

* * * we advise the Judge that our investigation shows that the proximate cause of the accident was the driver of the vehicles inattention and her inability to maintain control of her vehicle and for her speed were all contributing factors and that the near presence of the bicyclists does not make them contributory. * * *

(T.d. 126, Ex. 35)

The evidence submitted by the Appellees' brief to the trial court confirms the trial judge's ruling and a finding that Appellants had a reasonable objective belief that no liability existed and of very limited exposure. Appellants did not have the opportunity to present testimony from any of the insurance adjusters to refute Appellees' claims because no hearing was held. Apparently the trial court felt that no hearing was necessary. The trial court actively participated in the case by conducting various pretrials and presided over the trial. The trial court was uniquely situated to observe and judge the parties respective efforts.

The trial court then denied the motion for prejudgment interest without a hearing.

In reversing the trial court, the Eleventh District Court of Appeals engaged in an impermissible *de novo* examination of the record and awarded prejudgment interest without a hearing. In reaching its decision, the Court of Appeals used as a basis the mediation discussions between the parties. See Opinion of the Geauga County Court of Appeals (September 29, 2006) at ¶¶6 and 30. These mediation discussions were confidential proceedings that should have never entered the equation and further illustrates the inappropriateness of the Court of Appeals' decision.

The above-cited facts demonstrate several reasons for the Appellants to believe they had a defensible case on the basis of a lack of proximate cause. However, the real issue before this Honorable Court is whether the Court of Appeals could award prejudgment interest without a hearing.

ARGUMENT

Reply in Support of Proposition of Law No. 1.

1. This is not a theory directly opposed to the theory advanced in the lower court.

Appellees attempt to mislead this Court into believing the theory advanced by Appellants here is in direct opposition to the theory advanced in the lower court. However, the theories are actually consistent and complimentary.

It is important for this Court to understand the context of the appeal in the lower court. The trial court had **denied** the Appellees' motion for prejudgment interest without a hearing of any kind, oral or non-oral. The issue before the Court of Appeals was whether R.C. 1343.03(C) required a hearing in that context. In other words, could the trial court deny the motion without a hearing? Appellants defended the appeal by arguing that no hearing was necessary because several of Ohio's Appellate Courts have already held that such a motion can be denied without a hearing.

Unfortunately, the Eleventh District Court of Appeals in the instant case took the issue a step further. Instead of deciding whether the trial court abused its discretion in denying the motion without a hearing, the Appellate Court decided to **grant** the motion without a hearing.

So now another issue, consistent and related to the first issue, has arisen: Can a Court of Appeals grant a motion for prejudgment interest without a hearing instead of remanding the case to the trial court to determine whether interest is owed?

This issue does not oppose the issue brought in the Court of Appeals. It compliments it. Appellants' position is that a hearing is **not necessary to deny** a motion for prejudgment interest under certain circumstances, but a hearing **is necessary to grant** such a motion, and that hearing must be conducted by the trial court instead of the Appellate Court. Accordingly, this issue is

appropriately before this Court.

If any party can be accused of arguing opposite theories on this appeal, it is the Appellees. They are the ones who initiated the appellate process by appealing the denial of their motion for prejudgment interest on the basis that no hearing was held. Now the Appellees argue that a non-oral hearing was held, though this is not supported anywhere in the record.

2. **The record shows no evidence that a non-oral hearing was conducted by the trial court when it denied the motion for prejudgment interest.**

Appellees argue that R.C. 1343.03(C) does not require an oral or evidentiary hearing, but need only be a "hearing." Thus, Appellees conclude that a non-oral, non-evidentiary hearing is an acceptable means for granting a motion for prejudgment interest.

First and foremost, this Court should note that the record contains no reference to a non-oral, non-evidentiary hearing taking place.

Second, *Okocha v. Fehrenbacher* (1995), 101 Ohio App.3d 309, is the only case Appellees cite that involves the **grant** of a motion for prejudgment interest without a hearing. This decision is based on an incorrect interpretation of *Novak v. Lee* (1991), 74 Ohio App.3d 623. In *Okocha*, the trial court granted prejudgment interest without an evidentiary hearing. The Eighth District Court of Appeals said an evidentiary hearing is not mandatory for an award of prejudgment interest, based upon *Novak. Id.* at 323.

The *Okocha* court misreads *Novak*, which states in pertinent part as follows:

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.

74 Ohio App.3d at 631-632. Thus, if *Okocha* was properly decided under *Novak, supra*, the trial

court's award of prejudgment interest should have been reversed and remanded for a hearing.

The other cases cited by Appellees all involve motions for prejudgment interest **denied** without a hearing. These cases are distinguishable from the issue presented on this appeal and in fact support a reversal of the lower court and affirmance of the trial court's denial of prejudgment interest. Furthermore, no case cited by the Appellees challenges the discretion of the trial court. In each case, the appellate court defers to the trial court's discretion.

Appellees' argument is therefore based entirely on the supposition that a non-oral, non-evidentiary hearing occurred and on inapplicable and/or distinguishable case law.

Not only is a hearing required for an award of prejudgment interest, that hearing must be **evidentiary** in nature. *Novak, supra*. Although not requiring an **oral** hearing, the Eleventh District Court of Appeals in *Wallace v. Warren Bd. Of Education* (Dec. 7, 1990), 11th App. No. 89-T-4297, unreported, 1990 WL 199109, openly acknowledged that "an oral hearing would be the ideal and preferred way to address the need for evidential input [sic]." *Wallace* at *4. Further, the trial court identified a non-oral hearing in *Wallace*, giving the parties the ability to submit evidentiary materials to the court to consider in the non-oral hearing.

In the present case, there was no designation of a non-oral hearing or any kind of hearing. The only thing of record is the request of Appellees for an oral hearing. (Supplement to brief of Appellees, p. 55). Therefore, Appellants did not submit any evidentiary materials supporting their position since it was anticipated that an evidentiary hearing would be held. The Court of Appeals considered bits and pieces of what the record would have been had an evidentiary hearing been held or if a non-oral hearing had been noticed, giving Appellants the opportunity to submit evidentiary materials. The Court of Appeals' *de novo* review of the evidence which was not complete further

supports the basis for reversal.

A hearing is required at the trial court level for an award of prejudgment interest to be granted. *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 658; *Augustine v. North Coast Limosine, Inc.* (Aug. 10, 2000), Cuyahoga App. No. 76742, 76993, unreported, 2000 WL 1144970, *1; *Duvendack v. Hall* (March 29, 2002), Lucas App. No. L-01-1443, unreported, 2002 WL 471751, *1 ; *Kluss v. Alcan Aluminum Corp.* (1995), 106 Ohio App.3d 528, 541; *Kmetz v. MedCentral Health Sys.* (Nov. 12, 2003), Richland App. No. 02CA0050, unreported, 2003-Ohio-6115, 2003 WL 22715631 at ¶41; *Physicians Diagnostic Imaging v. Grange Ins. Co.* (Sept. 24, 1998), Cuyahoga App. No. 73088, unreported, 1998 WL 655503, *3-4. A trial court can deny a motion for prejudgment interest when it is apparent to the judge that the motion is not well-taken. *Novak v. Lee* (1991), 74 Ohio App.3d 623, 631 ; *Fazio v. Meridian Ins. Co.* (Apr. 9, 1998), Cuyahoga App. No. 73320, unreported, 1998 WL 166124, *2; *Werner v. McAbier* (Jan. 13, 2000), Cuyahoga App. No. 75197, 75233, unreported, 2000 WL 23108, *7.

The trial court, not the Appellate Court, is in the best position to determine whether prejudgment interest should be awarded. If the Court of Appeals in the instant case felt that the trial court abused its discretion, then it should have remanded the case to the trial court for a hearing on whether to award prejudgment interest. The Appellate Court's role is simply to determine whether the trial court abused its discretion in denying the motion for prejudgment interest without a hearing, not to award interest. As this Honorable Court recently stated in *Miller v. First Int'l Fidelity & Trust Building, Ltd.* (2007), 113 Ohio St.3d 474 at ¶7, "Determining whether prejudgment interest should be awarded requires judicial fact-finding and the exercise of judicial discretion." Accordingly, this Honorable Court is urged to follow the sound reasoning in *Novak* and find that an

award of prejudgment interest cannot be made without an evidentiary hearing, and preferably an oral hearing.

Reply in Support of Proposition of Law No. II

In their arguments against this second Proposition of Law, Appellees contend that the record supports the Court of Appeals' decision to award prejudgment interest. This argument misses the point. This appeal is not about weighing the facts and deciding if they support an award of interest. The actual issue before this Honorable Court is whether a Court of Appeals may engage in such an analysis instead of remanding the matter to the trial court for a hearing on whether an award should be made, pursuant to *Novak, supra*.

The Court of Appeals overstepped its authority in making an award of prejudgment interest. That determination must be made by the trial court because no hearing was held. Again, under the procedure described in *Novak, supra*, no hearing is necessary if it appears to the trial court that no award is likely. *Novak* at 631-632. However, if the trial court finds that grounds may exist for awarding prejudgment interest, then the trial court must hold an evidentiary hearing. *Id.* Thus, the Court of Appeals should have refrained from making an award in the instant case and instead remanded the case to the trial court for such a determination. Appellees cite no legal authority to the contrary.

The record shows that no hearing took place. The trial court, apparently finding that an award of prejudgment interest was unlikely, exercised its discretion to decline to hold a hearing. The trial court then denied the motion.

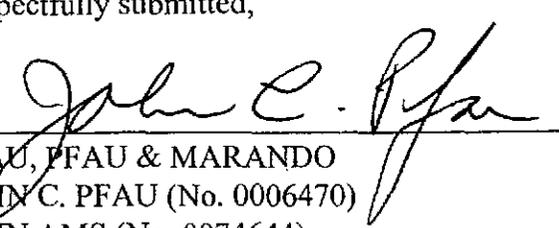
The Court of Appeals ignored the requirement that a hearing must occur for an award of prejudgment interest to be made. Instead, it engaged in its own *de novo* review of the facts and

awarded interest to Appellees without a hearing. At the most, the Court of Appeals was only permitted to find that the trial court abused its discretion in not holding a hearing. The Court of Appeals lacked the authority to go further and award interest without a hearing. Therefore, the Court of Appeals decision is contrary to law and must be reversed.

Rather than address the above arguments, Appellees attempt to shift the focus of this appeal from the issues presented to an argument that the Court of Appeals properly weighed the facts and awarded interest. Appellees' position ignores the fact that the Court of Appeals lacks the statutory and/or legal authority to evaluate the facts without a hearing (which should be conducted by the trial court).

Yet the facts still support a finding that Appellants made a good faith effort to settle the case based upon their evaluation of the liability issue. As indicated in the Statement of Facts, supra, several indicators led Appellants to reasonably believe that the driver of the vehicle, Reeves, contributed the most to Appellees' injuries and that the facts supported a no-liability stance. Appellants engaged in negotiations with this evaluation in mind. The trial court was aware of these negotiations and the positions of the parties and was in the best position to evaluate whether Appellants acted in good faith. Accordingly, the trial court's decision should be upheld and the decision of the Court of Appeals must be reversed.

Respectfully submitted,


PFAU, PFAU & MARANDO
JOHN C. PFAU (No. 0006470)
JOHN AMS (No. 0074644)
P.O. Box 9070
Youngstown, Ohio 44513
Telephone: (330) 702-9700
Fax: (330) 702-9704
E-Mail: ppm@ppmlegal.com
ATTORNEYS FOR APPELLANTS KAUFMAN

CERTIFICATE OF SERVICE

A copy of the foregoing brief has been forwarded by regular mail this 7th day of
June, 2007 to:

STEVEN B. POTTER
5910 Landerbrook Drive, Suite 200
Cleveland, Ohio 44124

Attorney for Appellees

ROGER H. WILLIAMS
2241 Pinnacle Parkway
Twinsburg, Ohio 44087

Attorney for Appellant Reeves

DENISE B. WORKUM
Lakeside Place, Suite 410
323 Lakeside Avenue W
Cleveland, Ohio 44113

Attorney for Appellants Kaufman

CLARK D. RICE
1280 West Third Street
Cleveland, Ohio 44113

Attorney for Appellants Van Driest


PFAU, PFAU & MARANDO
JOHN C. PFAU