

IN THE SUPREME COURT OF OHIO

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

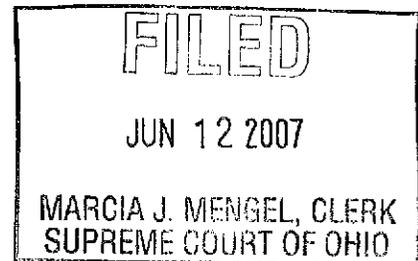
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REPLY BRIEF OF APPELLANTS VANCE H. VAN DRIEST, A MINOR,  
AND DENISE MARLENE VAN DRIEST

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## STATEMENT OF FACTS

Appellees Lucien Pruszynski, and his parents, Robert Pruszynski and Laurel Pruszynski (collectively “the Pruszynskis”), exhaust five (5) full pages of their Merit Brief discussing “facts” that are simply irrelevant for the resolution of the Propositions of the Law before this Court. As it relates to the claims against Appellants Van H. Van Driest and Denise Marlene Van Driest aka Denise Deitz (collectively “the Van Driests”), this Court accepted the following Proposition of Law:

A court of appeals may not make a finding of bad faith on a motion for prejudgment interest and award prejudgment interest when the trial court did not conduct a hearing on the motion

The Pruszynskis’ Statement of Facts fails to set forth any pertinent facts necessary to resolve the stated Proposition of Law. For purposes of resolving this case, the Van Driests concede that:

- an accident occurred;
- Lucien Pruszynski was injured;
- the Pruszynskis won at Trial;
- the Pruszynskis filed a Motion for Prejudgment Interest;
- the Trial Court denied the Motion for Prejudgment Interest without first conducting an evidentiary hearing;
- the Eleventh District Court of Appeals reversed the decision of the Trial Court denying prejudgment interest and found that Farmers Insurance Company (“Farmers”) had acted in bad faith; and
- the Eleventh District Court of Appeals remanded the case to the Trial Court only for a determination of the amount of prejudgment interest.

The real issue before this Court – indeed, the only issue – is whether the Eleventh District Court of Appeals committed reversible error by conducting its own *de novo* review of the limited evidence and awarding prejudgment interest when an evidentiary hearing on the Pruszynskis’ Motion for Prejudgment Interest was not held by the Trial Court. The short answer is yes.

## ARGUMENT

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

The Pruszynskis begin by taking the unique, yet unsuccessful, tactic of arguing that the Van Driests are setting forth a new and contradictory theory on appeal to this Court. (*See Pruszynskis' Merit Brief, pp.8-9*). By making such an argument, however, it is clear that the Pruszynskis fail to comprehend the Van Driests' Proposition of Law as the arguments made by the Van Driests before the Eleventh District Court of Appeals and this Court are completely consistent with each other.

As the appellees before the Eleventh District, the Van Driests properly argued that the Trial Court did not have to hold a hearing before it **denied** the Pruszynskis' Motion for Prejudgment Interest. Following the Eleventh District's reversal of the Trial Court's decision, the Van Driests are now arguing before this Court that the Pruszynskis' Motion for Prejudgment Interest cannot be **granted** unless and until the Trial Court holds an evidentiary hearing. Thus, in a nutshell, while the Pruszynskis' Motion for Prejudgment Interest can properly be **denied** without an evidentiary hearing being held by the Trial Court, the Motion can only be **granted** following an evidentiary hearing by the Trial Court. Therefore, the arguments asserted by the Van Driests throughout this litigation are consistent and complimentary to each other.

Unsuccessful in their first argument, the Pruszynskis thereafter argue that a non-oral, non-evidentiary hearing satisfies the requirements of R.C. §1343.03(C). (*See Pruszynskis' Merit Brief, pp.9-12*). Before the Van Driests address the substance of this argument, it is important to point out that there is absolutely no evidence that the Trial Court conducted a non-oral, non-evidentiary hearing before denying the Pruszynskis' Motion for Prejudgment Interest. In fact, the Trial Court had nothing more

than the Briefs of the parties at the time it denied the Motion. Accordingly, even if the Pruszynskis are correct, their argument still fails because the Trial Court did not conduct a non-oral, non-evidentiary hearing on their Motion for Prejudgment Interest.

As for the argument that a non-oral, non-evidentiary hearing satisfies the requirements of the statute, it is simply incorrect. Interpreting R.C. §1343.03(C), this Court has found that the trial court is required to hold a hearing before making an award of prejudgment interest. *Galmish v. Cicchini* (2000), 90 Ohio St.3d 22, 25 (quoting *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 658); see also *Kmetz v. MedCentral Health Sys.* (Ohio App. 5<sup>th</sup> Dist.), 2003-Ohio-6115, ¶41; *Duvendack v. Hall* (Ohio App. 6<sup>th</sup> Dist.), 2002 WL 471751, \*1; *Augustine v. North Coast Limousine, Inc.* (Ohio App. 8<sup>th</sup> Dist.), 2000 WL 1144970, \*1.

However, the hearing can be dispensed with when the trial court **denies** the motion for prejudgment interest. “We do not believe that the statute clearly mandates such a hearing where it is not anticipated prejudgment interest will be awarded.” *Novak v. Lee* (6<sup>th</sup> Dist. 1991), 74 Ohio App.3d 623, 631; *Werner v. McAbier* (Ohio App. 8<sup>th</sup> Dist.), 2000 WL 23108, \*7. This, in fact, is the exact same argument the Van Driests have made throughout this litigation: if the motion for prejudgment interest is going to be **denied**, the trial court need not hold a hearing.

Indeed, even the cases cited by the Pruszynskis support the Van Driests’ argument that a trial court must hold an evidentiary hearing before **granting** a motion for prejudgment interest but may deny holding a hearing before **denying** such a motion. For example, although not persuaded that an oral hearing is always required, the Court of Appeals in *Wallace v. Warren Bd. of Ed.* (Ohio App. 11<sup>th</sup> Dist.), 1990 WL 199109, approvingly cited *King v. Mohre* (3<sup>rd</sup> Dist. 1986), 32 Ohio App.3d 56, and stated:

As the court in *King* emphasized, 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 [sic].**

(Emphasis added).

Further, in *Laverick v. Children's Hosp. Med. Ctr. of Akron, Inc.* (9<sup>th</sup> Dist. 1988), 43 Ohio App.3d 201, 205, the trial court had **denied** a motion for prejudgment interest without holding a hearing. The *Laverick* Court affirmed the trial court's **denial** of the motion for judgment of interest without the benefit of an oral hearing having been conducted.

Not only must the trial court hold a hearing before **granting** a motion for judgment interest, but that hearing must be evidentiary in nature. "If it appears to the trial court that there may be grounds for awarding prejudgment interest, then the court must hold an evidentiary hearing." *Novak, supra*, at 631. Logic dictates that it must be the trial court, not the appellate court, which conducts the evidentiary hearing. The trial court had the opportunity to review the pleadings, meet with the parties and their counsel and debate the merit of the claims, defenses, and damages, and hear the testimony of fact and expert witnesses at trial. Thus, the trial court is in the best position to render a decision on prejudgment interest. Further, the abuse of discretion afforded a trial court on a motion for prejudgment becomes a nullity where the appellate court conducts a *de novo* review of the evidence. *Kalain v. Smith* (1986), 25 Ohio St.3d 157, 159.

In arguing that a non-oral hearing is acceptable, the Pruszynskis ask this Court to analogize the term "hearing" in Civ.R. 56(C) with the same term in R.C. §1343.03(C). (*See Pruszynskis' Merit Brief*, pp.11-12). Yet, even accepting Civ.R. 56(C) as comparable to R.C. §1343.03(C) supports the necessity for an evidentiary hearing. Civ.R. 56(C) not only contemplates but actually requires the submission of evidence before rendering summary judgment:

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.

Similar to parties submitting evidence to the trial court in support of and in opposition to a motion for summary judgment, parties moving for and opposing prejudgment interest must also be afforded the opportunity to submit evidence to the trial court. An evidentiary hearing held by the trial court prior to **granting** an award of prejudgment interest is, therefore, required. *Novak, supra*.

What this Court cannot overlook is the Pruszynskis' complete failure to address, much less dispute, the Van Driests' argument that once the Eleventh District reached the conclusion that the Pruszynskis established a legitimate claim for prejudgment interest, the Eleventh District became absolutely limited in its recourse: it was required to remand the case to the Trial Court to conduct an evidentiary hearing on the Pruszynskis' Motion for Prejudgment Interest.

As set forth more fully in the Van Driests' Merit Brief, once the determination is made that the trial court erred in denying a motion for prejudgment interest, the appellate court is required to remand the case to the trial court for an evidentiary hearing on the motion. *See e.g., Carden v. Miami Hardware and Appliance Co., Inc.* (2<sup>nd</sup> Dist. 1996), 113 Ohio App.3d 220, 223; *Quick Air Freight, Inc. v. Teamsters Loc. Union No. 413* (10<sup>th</sup> Dist. 1989), 62 Ohio App.3d 446, 466-67; *VanAtta v. Akers* (Ohio App. 8<sup>th</sup> Dist.), 2003-Ohio-6615, ¶53.

Just last week, this Court reaffirmed that it is the trial court, as the judicial fact-finder, which must make the factual determination on a motion for prejudgment interest pursuant to R.C. §1343.03(C).

Prejudgment interest is neither damages nor an easily computed task. **Determining whether to grant prejudgment interest is not a merely ministerial task; it requires the trial court to find that "the party required to pay the judgment failed to make a good faith effort to settle" and that "the party to whom the judgment is to be paid did not fail to make a good faith**

**effort to settle the case.”** *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 658, 635 N.E.2d 331. *See* R.C. 1343.03(C). **Determining whether prejudgment interest should be awarded requires judicial fact-finding and the exercise of judicial discretion.** We conclude that, as between damages and costs, prejudgment interest is more in the nature of damages.

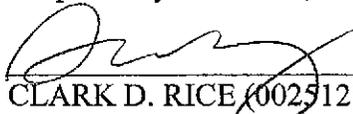
(Emphasis added). *Miller v. First International Fid. & Trust Bldg., Ltd.*, 2007-Ohio-2457, ¶7.

The judicial fact-finder in this case is the Trial Court and, thus, only the Trial Court can hold an appropriate evidentiary hearing on prejudgment interest. Therefore, the Eleventh District Court of Appeals committed reversible error by conducting its own *de novo* review of the limited evidence instead of remanding the case to the Trial Court for an evidentiary hearing.

### CONCLUSION

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

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

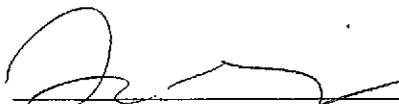
A copy of the foregoing Reply Brief of Appellants Vance H. Van Driest, a Minor, and Marlene Van Driest was sent by regular U.S. Mail on this 17<sup>th</sup> day of June, 2007 to:

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