[Cite as Foreman v. Wright, 2003-Ohio-5819.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 82067

WILLIAM FOREMAN	:	
	:	JOURNAL ENTRY
Plaintiff-Appellant	:	
	:	AND
vs.	:	
	:	OPINION
SEIJI WRIGHT	:	
	:	
Defendant-Appellee	:	
	:	
	:	
DATE OF ANNOUNCEMENT OF DECISION	:	OCTOBER 30, 2003
	:	
CHARACTER OF PROCEEDINGS	:	Civil appeal from
	:	Common Pleas Court
	:	Case No. CV-448413
	:	
JUDGMENT	:	AFFIRMED IN PART, REVERSED
	:	IN PART AND REMANDED.
DATE OF JOURNALIZATION	:	

APPEARANCES:

For plaintiff-appellant:

PAUL W. FLOWERS, ESQ.
W. CRAIG BASHEIN, ESQ.
1200 Illuminating Building
55 Public Square
Cleveland, Ohio 44113

For defendant-appellee:

WILLIAM S. DERKIN, ESQ.
113 St. Clair Building
Suite 525
Cleveland, Ohio 44114

JOSEPH G. RITZLER, ESQ.
Ritzler, Coughlin & Swansinger, Ltd.

1001 Lakeside Avenue
1550 North Point Tower
Cleveland, Ohio 44114

FRANK D. CELEBREZZE, JR., J.:

{¶1} The appellant, William Foreman, appeals the decision of the Cuyahoga County Court of Common Pleas, Civil Division, which denied a hearing for prejudgment interest and court costs associated with a videotaped deposition.

{¶2} The instant matter stems from a motor vehicle accident which occurred on September 25, 2000. William Foreman was driving westbound on St. Clair Avenue approaching the Eddy Road intersection. Seiji Wright was driving eastbound on St. Clair Avenue intending to turn left onto Eddy Road. The two vehicles collided in the intersection and a dispute of liability occurred as to which vehicle had the right-of-way.

{¶3} The appellant, Foreman, filed suit against Wright, the appellee, on September 12, 2001. Wright maintained liability coverage through Allstate Insurance Company ("Allstate") in the amount of $12,500. Allstate retained counsel for Wright and submitted an answer denying liability on October 16, 2001. Foreman's settlement demand was for $12,500. Allstate offered to settle the suit for $4,000. The parties were unable to reach a settlement and a jury trial followed.

{¶4} On September 5, 2002, the jury found Wright liable and awarded Foreman $10,000. The trial court's final order directed Foreman, the prevailing party, to pay court costs.

{¶5} On September 18, 2002, Foreman submitted his motion to tax costs. He requested that the trial court revise the final order to reflect that the defendant, not the plaintiff, pay court costs, pursuant to Loc.R. 54(D). Foreman then requested the trial court to award costs for the videotaped deposition of his medical experts in the amount of $422.50. At trial, the videotaped depositions of Stephen R. Bernie, M.D. and Barry R. Jaffe, D.D.S. were presented in lieu of live testimony. Lastly, Foreman filed a motion for prejudgment interest. He argued that Allstate had failed to make a good-faith attempt to resolve this dispute pursuant to R.C. 1343.03.

{¶6} In a nunc pro tunc entry issued by the trial court on September 20, 2002, Foreman's motion to tax costs was granted only in part. The final order was revised to reflect that costs were being charged to the defendant; however, the trial court did not rule upon the request to include the videotaped deposition expenses. In a further order issued on October 18, 2002, the trial court denied Foreman's motion for prejudgment interest without explanation.

{¶7} On November 15, 2002, Foreman filed his timely notice of appeal. For the following reasons, we affirm in part and reverse in part.

{¶8} Appellant presents three assignments of error. The first and second assignments of error are interrelated and will be addressed together.

{¶9} "I. THE TRIAL JUDGE ERRED, AS A MATTER OF LAW, BY REFUSING TO CONDUCT A HEARING UPON PLAINTIFF'S TIMELY MOTION FOR PRE-JUDGMENT INTEREST."

{¶10} "II. THE TRIAL JUDGE ABUSED HIS DISCRETION BY REFUSING TO IMPOSE PRE-JUDGMENT INTEREST AGAINST DEFENDANT IN ACCORDANCE WITH R.C. §1343.03(C)."

{¶11} Appellant claims that the trial court erred as a matter of law and abused its discretion by denying a hearing and award of prejudgment interest. Appellant's first two assignments of error are not well-taken.

{¶12} An abuse of discretion implies more than an error of law or judgment. Rather, abuse of discretion suggests that the trial court acted in an unreasonable, arbitrary, or unconscionable manner. *In re Jane Doe 1* (1991), 57 Ohio St.3d 135; *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

{¶13} R.C. 1343.03(C) provides for prejudgment interest under certain circumstances. The statute states:

{¶14} "Interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct and not settled by agreement of the parties, shall be computed from the date the cause of action accrued to the date on which the money is paid if, upon motion of any party to the action, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to

whom the money is to be paid did not fail to make a good faith effort to settle the case." The general rule is that the trial court must conduct an oral hearing on a motion for prejudgment interest. *Lovewell v. Physicians Ins. Co. of Ohio* (1997), 79 Ohio St.3d 143, 147; *Kluss v. Alcan Aluminum Corp.* (1995), 106 Ohio App.3d 528, 541; *Andrews v. Riser Foods, Inc.* (Oct. 16, 1997), Cuyahoga App. No. 71658. However, if the motion for prejudgment interest is *obviously not well taken*, the trial court can deny the motion without conducting a hearing. *Fazio v. Meridian Ins. Co.* (Apr. 9, 1998), Cuyahoga App. No. 73320. The trial court has the discretion to decline to convene a hearing if it appears no award is likely. *Werner v. McAbier* (Jan. 13, 2000), Cuyahoga App. Nos. 75197, 75233; *Leatherman v. Wingard* (Dec. 4, 1998), Lucas App. No. L-98-1198, citing *Novak v. Lee* (1991), 74 Ohio App.3d 623, 631.

{¶15} The party seeking prejudgment interest must demonstrate both 1) that the opposing party failed to make a good faith effort to settle the case and 2) that the moving party did not fail to make a good faith effort to settle the case. "R.C. 1343.03 (C) requires the party seeking prejudgment interest to demonstrate its aggressive settlement efforts and its adversary's lack of aggressive prejudgment settlement efforts." *Sindel v. Toledo Edison Co.* (1993), 87 Ohio App.3d 525, 533, citing *Black v. Bell* (1984), 20 Ohio App.3d 84, 88. A party's failure to tender a settlement demand has been held to constitute a lack of a good faith effort to settle the case. *LeMaster v. Huntington Natl. Bank*

(1995), 107 Ohio App.3d 639, 644. If the record indicates the defendant made an offer, but does not show whether the plaintiff made a settlement demand or any counteroffer, the plaintiff is not entitled to a hearing. *Physicians Diagnostic Imaging v. Grange Ins. Co.* (Sept. 24, 1998), Cuyahoga App. No. 73088.

{¶16} If a party has a good faith objective and reasonable belief that he has no liability, then he is not compelled to make an offer to settle. *Kalain v. Smith* (1986), 25 Ohio St.3d 157. In evaluating whether a party has made a good faith effort to settle a case, a trial court must consider the following: 1) whether the party has fully cooperated in discovery proceedings, 2) whether the party has rationally evaluated his risk and potential liability, 3) whether the party has attempted to unnecessarily delay any of the proceedings, and 4) whether a good faith monetary offer was made, or responded to in good faith if made by the other party. Id.

{¶17} A determination of whether a party has made a good faith effort to settle, for purposes of awarding prejudgment interest, is within the sound discretion of the trial court. *Huffman v. Hair Surgeons, Inc.* (1985), 19 Ohio St.3d 83; *Felden v. Ashland Chem. Co., Inc.* (1993), 91 Ohio App.3d 48.

{¶18} In the instant matter, appellant initially requested the maximum liability limit of $12,500 from Allstate in order to settle the case. Allstate countered the offer at $4,000. Appellant claims Allstate would not move off this initial counteroffer; however, the record fails to show that the appellant was willing to

move off his initial request of $12,500. The next logical step for the appellant in negotiation was to request something less than his initial demand. Neither party seems to have been aggressively pursuing settlement. There is nothing in the record to indicate that the appellant was willing to lower his demand or that Allstate was willing to increase its offer.

{¶19} Allstate offered $4,000 to settle this case. Allstate's offer took into account disputed facts, the nature of appellant's injuries, and the amount of appellant's medical expenses, which totaled $2,190.75. An initial offer of twice the cost of medical expenses is not outrageous even if the jury returned a verdict for $10,000 in favor of the appellant; it is only a factor to consider in evaluating if the party properly assessed its liability risk. Moreover, Allstate offered the $4,000 settlement while disputing liability for the accident. Both parties disputed the color of the traffic light at the intersection of St. Clair Avenue and Eddy Road. Both parties claimed to have had the right-of-way at the intersection. Thus, Allstate was willing to settle even though it had a possibility of prevailing at trial.

{¶20} Allstate made a good faith offer to settle the case. Allstate did not withdraw its $4,000 settlement offer. Allstate fully cooperated with discovery, did not unnecessarily delay the proceedings, rationally evaluated the risks and potential liabilities of the case before trial, and responded to appellant's initial offer in good faith. Appellant claims Allstate delayed

proceedings by convincing the trial judge to postpone this case so that an independent medical review of the appellant could be conducted. Appellant then claims that a medical review was never conducted. This delay, in conjunction with the jury verdict, is not enough to constitute a failed good faith effort on Allstate's part to settle the case.

{¶21} It is apparent from the record that the trial court properly found appellant's motion for prejudgment interest to be obviously not well taken, and an award of prejudgment interest was not likely. Therefore, an oral hearing for prejudgment interest was not necessary. The trial court did not abuse its discretion or err as a matter of law in denying a hearing and an award of prejudgment interest. Assignments of error I and II are hereby overruled.

{¶22} Appellant's third assignment of error states:

{¶23} "III. THE TRIAL JUDGE ERRED, AS A MATTER OF LAW, BY REFUSING TO INCLUDE PLAINTIFF'S VIDEO-TAPED DEPOSITION EXPENSES AS COSTS UNDER CIV. R. 54(D)."

{¶24} Appellant claims the trial court erred in not including the costs of a videotaped deposition as costs under Civ.R. 54(D). Appellant's third assignment of error is well received.

{¶25} The trial court's journal entry awarding costs is unclear. The entry simply states that court costs are to be paid by defendant, not the plaintiff. The trial court does not address the issue of whether the videotaped depositions were to be awarded

as court costs. This court will assume that the trial court intended to exclude the videotaped deposition as costs to the appellant. Civ.R. 54(D) grants the trial court the discretion to award court costs to the prevailing party. *State ex Rel. Reyna v. Natalucci-Persichetti* (1998), 83 Ohio St.3d 194, 198, citing *Vance v. Roedersheimer* (1992), 64 Ohio St.3d 552, 555. Civ.R. 54(D) states that unless provided by statute or by the civil rules, costs are to be awarded to the prevailing party unless the court decides otherwise. *Bates v. Ricco* (Nov. 18, 1999), Cuyahoga App. No. 74982.

{¶26} Rule 13(D)(2) of the Rules of Superintendence for the Courts of Common Pleas, promulgated by the Supreme Court of Ohio, provides that the reasonable expense of recording testimony on videotape and the expense of playing the videotape at trial shall be allocated as costs under Civ.R. 54. Accordingly, the appellant is entitled to recover costs in the amount of $422.50 for recording the videotaped depositions of its medical experts, which were played in lieu of live testimony at trial.

{¶27} Assignment of error III is sustained and costs should be awarded to the appellant in the amount of $422.50.

{¶28} Judgment affirmed in part, reversed in part and remanded.

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

{¶30} It is ordered that appellant recover of appellee costs herein taxed.

{¶31} The court finds there were reasonable grounds for this appeal. It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

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

FRANK D. CELEBREZZE, JR.
PRESIDING JUDGE

COLLEEN CONWAY COONEY, J., CONCURS.

DIANE KARPINSKI, J., DISSENTS (WITH DISSENTING OPINION ATTACHED.)

KARPINSKI, J., DISSENTING:

{¶33} I respectfully dissent from the majority's opinion concerning the first two assignments of error. The Ohio Supreme Court held in *Lovewell v. Physicians Ins. Co. of Ohio* (1997), 79 Ohio St.3d 143 that prejudgment interest is "an extraordinary award that requires a hearing ***." Id. at 147. The cases from this

court establish that a hearing on prejudgment interest is the general rule,[1] with exceptions.

{¶34} One exception the majority cites occurs when the motion is "obviously not well-taken." *Fazio v. Meridian Ins. Co.* (April 9, 1988), Cuyahoga App. No. 73320. In *Fazio*, this court first reiterated the general presumption that the court will conduct a hearing and then explained the exception: "As a general proposition, the court must first conduct a hearing when considering a motion for prejudgment interest under R.C. 1343.03. *** However, the court need not conduct a hearing when the motion for prejudgment interest is obviously not well-taken."

{¶35} In *Fazio*, the plaintiff had agreed to arbitration and the defendant had tendered the full amount of the arbitration award before the plaintiff raised the issue of prejudgment interest. The court ruled that the plaintiff's motion for prejudgment interest was barred by the express terms of the statute, which does not allow for prejudgment interest if the case has been settled by the parties. Acceptance of an arbitration award constitutes settlement, the court explained, and precludes prejudgment interest. In the case at bar, no such statutory bar occurred; the parties went to trial, not to arbitration. More important is the example the court provided of "obviously not well-taken":

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[1] See *Pecek v.* Carlton (Jan. 10, 1985), Cuyahoga App. No. 37893; *Dalton-Robinson v. Stark* (Dec. 21, 1989), Cuyahoga App. No. 57628; *Smith v. Hadlock* (Nov. 27, 1991), Cuyahoga App. No. 59411.

prejudgment interest was *statutorily barred* because the case was settled through arbitration.

{¶36} The majority also cites the alternative wording of "if it appears no award is likely" from *Werner v. McAbier* (Jan. 13, 2000), Cuyahoga App. Nos. 75197 & 75233. I note first that this case also clearly affirms the presumption that the court will hold a hearing. Then the court goes on to observe an exception. However, again the exception arises from an obvious circumstance: the failure of plaintiff to make any demand. This failure to initiate negotiations was the central fact upon which the *Werner* court based its discussion.[2]

{¶37} The two examples of exceptions provided in the cases the majority cites -- the failure of the plaintiff to make any demand, along with settlement through arbitration -- are in no way similar to the case at bar.

{¶38} Moreover, this court has previously held, that "[t]he *record must demonstrate* that the motion is *obviously not well*

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[2]The majority also cites to a Sixth Appellate District case in Lucas County, in which the court held: "R.C. 1343.03(c) requires that on a motion for prejudgment interest premised on a party's alleged failure to make a good faith settlement effort, '*** the trial court must hold a hearing ***,' *Moskovitz v. Mt. Sinai Med. Ctr.*, supra, at 658; unless, '*** it appears no award is likely *** 'in which case the court, in its discretion, may decline to convene such a hearing. *Novak v. Lee* (1991), 74 Ohio App. 3d 623, 630, 600 N.E.2d 260." The appellate opinion did not explain the basis, however, for believing no award was likely. Moreover, the Sixth Appellate District does not appear to follow the Eighth District's clearly enunciated principle that the record demonstrate a basis for an exception.

taken, or this court must remand for a hearing." *Augustine v. North Coast Limousine* (Aug. 10, 2000), Cuyahoga App. Nos. 76742 & 76993. (Emphasis added.)

{¶39} In the case at bar, no transcript was provided to this court. The record contains a few exhibits documenting deposition costs. Foreman's deposition is also included, as are two pages from Wright's deposition, attached to Plaintiff's Motion in Limine. Neither deposition mentions settlement negotiations. Foreman's deposition stated that in the accident the steering wheel pushed back "a couple of his teeth" and chipped his front tooth and that treatment for these problems was delayed because of a lack of funds, the estimate starting at $5,000. Attached to plaintiff's trial brief is a list of past medical expenses and future dental expenses "per Dr. Jaffe." This attachment also specifies the amount of defendant's last offer, but that statement conflicts with the amount listed in the plaintiff's motion for prejudgment interest. No reply to that motion was filed. The attachments and statements in the briefs recounting settlement negotiations are not evidence, however, because no affidavits to authenticate the facts relied upon were filed with the briefs or motion.

{¶40} The majority in the case at bar argues that "[n]either party *seems* to have been aggressively pursuing a settlement. There is nothing in the record to indicate that the appellant was willing to lower his demand, or that Allstate was willing to increase its

offer." In fact, there is nothing properly in the record of a demand or an offer.

{¶41} With such an incomplete record, there is no way to demonstrate the basis for an exception, that is, whether the motion was obviously not well taken. Without the record, it is not possible to know the exact amount of the demand or offer or, for that matter, the medical bills. Without the record, in other words, this court has no basis to discuss the various factors that *Kalain v. Smith* (1986), 25 Ohio St.3d 157, listed for deciding good faith. Nor was it plaintiff's responsibility to provide the record here. As this court said in *Physicians Diagnostic,* supra, "[o]nce [defendant] learned that [plaintiff] would not make the entire record available to this court, it had the duty to file and serve on [plaintiff] a designation of additional parts to be included if those parts of the record would substantiate its position." Id. at 9. This court added that plaintiff's not filing the complete record was "one of those rare times when the appellant's failure to provide a record actually aids the appeal." This court concluded that, because it could not consider any evidence beyond the record presented, it was unable to find the motion for prejudgment interest was not obviously well taken. This court held, therefore, that the trial court should have conducted a hearing on the motion. Id.[3]

[3]I note, however, that the Sixth Appellate District has suggested a different procedure. It has held that "[s]hould the party requesting prejudgment interest believe there is a compelling

{¶42} The circumstances here, that is, the absence of a transcript, are identical to those in *Physicians Diagnostic,* supra. It is because of this very lack of information that a hearing is necessary to determine whether Allstate did or did not make a good faith effort to negotiate a settlement. We should follow the precedent set by this court in *Physician's Diagnostic* and remand to the trial court for a hearing.

{¶43} Further, the trial court should have permitted plaintiff to discover Interstate's claims file in preparation for that hearing.

{¶44} By having access to the claims file, plaintiff would then be able to find out whether Allstate ordered its representative to hold at its initial offer or to continue to negotiate. The Ohio Supreme Court has affirmed a plaintiff's right to access these files. The Court explained: "Without access to the insurer's claims file[,]" [plaintiff] is unable to effectively show that the defendant, through [his] insurer, failed to make a good faith effort to settle the instant case***." "[W]thout such access plaintiff cannot demonstrate that the plaintiff has shown good cause, pursuant to Civ.R. 26(B)(23), for discovery of the claims file." *Peyko v. Frederick* (1986), 25 Ohio St.3d 164, at 167, fn.

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reason in favor of the motion, that party may by memorandum and affidavit bring the reason to the attention of the court." It concluded that where prejudgment interest was not awarded the statute does not mandate a hearing. *Novak v. Lee*, 74 Ohio App.3d 623, 631.

3. In *Peyko,* the defense counsel offered to settle for $2,000 and subsequently reduced the offer to $1,500; the jury awarded plaintiff $7,500. In its opinion supporting plaintiff's request for discovery, the Supreme Court did not cite to any evidence other than the disparity between the offer and the award.

{¶45} In the case at bar, if plaintiff had been permitted to review the insurance company's claims file, the question of bad faith in its failure to settle could have been clearly decided. By refusing to allow that review, the trial court denied plaintiff any opportunity to make his case for prejudgment interest.

{¶46} It is precisely because of this dependence upon subsequent discovery that the standard for denying prejudgment interest not be confused with the criteria for denying a hearing. In *Kalain* the Court addressed the factors to consider *at a hearing*. Those are not the same factors to decide whether a hearing should be held. Also, in *Peyko* the Court addressed criteria for deciding a request for discovery. Again, that criteria comes into play *after* it is decided whether a hearing should be denied.

{¶47} Because we have no record to justify denying a hearing, I would reverse and remand this case for a hearing on the matter of prejudgment interest.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion

for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).