[Cite as *Coon v. Technical Constr. Specialities, Inc.*, 2010-Ohio-417.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

ADAM D. COON Appellee v. TECHNICAL CONSTRUCTION SPECIALTIES, INC. Appellant	C. A. No. 24542 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2002-01-0032

DECISION AND JOURNAL ENTRY

Dated: February 10, 2010

Per curiam.

{¶1} Defendant-Appellant, Technical Construction Specialties, Inc. ("TCS"), appeals from the judgment of the Summit County Court of Common Pleas, awarding judgment, damages, prejudgment interest, and attorney fees to Plaintiff-Appellee, Adam Coon. This Court affirms in part and reverses in part.

I

{¶2} On January 3, 2002, Coon brought suit against his former employer, TCS. Coon's complaint set forth two counts: a retaliation claim under R.C. 4123.90 and a claim based upon wrongful discharge in violation of public policy. Each count alleged that TCS wrongfully terminated Coon after he pursued a workers' compensation claim for a work-related injury. Coon indicated in his complaint that TCS terminated him on July 16, 2001. Coon's complaint

further indicated that, on October 14, 2001, Coon "sent [] TCS via certified mail written notice of [its] violation of R.C. §4123.90 and [Coon's] intention to pursue this action."[1]

{¶3} On February 5, 2002, TCS filed a motion to dismiss for lack of subject matter jurisdiction, arguing that Coon's complaint failed to allege that TCS received Coon's written notice of TCS' alleged R.C. 4123.90 violation within ninety days of his termination. In response, Coon amended his complaint to indicate that: (1) he sent TCS' written notice on October 14, 2001; and (2) TCS received his written notice "[o]n October 16, 2001, the very next business day after the 90-day period." After TCS filed a second motion to dismiss, Coon filed a second amended complaint to correct the foregoing date and indicate that TCS received Coon's written notice on October 15, 2001. Coon also filed a response to which he attached a photocopy of a certified mail return receipt addressed to TCS. On April 18, 2002, the trial court denied TCS' motion to dismiss.

{¶4} Subsequently, the matter proceeded to a jury trial. The jury awarded Coon $73,871 in damages and found that he was entitled to attorney fees. The trial court awarded Coon $54,500.50 in attorney fees, and TCS appealed. On appeal, this Court reversed the court's judgment and remanded, concluding that Coon was limited to a statutory claim under R.C. 4123.90 and had no right to a jury trial because Ohio does not recognize a public policy claim for wrongful discharge. *Coon v. Technical Construction Specialties, Inc.*, 9th Dist. No. 22317, 2005-Ohio-4080.

{¶5} Upon remand, the matter proceeded to a bench trial on March 8, 2007. At the conclusion of the trial, TCS made an oral motion to dismiss for lack of subject matter

---

[1] As further discussed infra, R.C. 4123.90 provides that a discharged employee's retaliation/wrongful discharge action may not be "instituted or maintained unless the employer

jurisdiction, once again arguing that Coon never introduced evidence that TCS received written notice of an alleged R.C. 4123.90 violation within ninety days of Coon's discharge. TCS also filed a motion to dismiss on the same grounds. Coon responded in opposition, citing his second amended complaint and the photocopy of the certified mail return receipt addressed to TCS as evidence that he had timely served TCS. TCS replied, arguing that the certified mail return receipt by itself was insufficient to prove notice. In response, Coon filed another copy of the return receipt; a photocopy of a letter dated October 14, 2001, informing TCS of an alleged R.C. 4123.90 violation; and an affidavit, indicating that Coon prepared the letter on October 14, 2001 and sent it to TCS via certified mail as evidenced by the return receipt.

{¶6} On November 30, 2007, the trial court issued an order denying TCS' motion to dismiss and providing that Coon was entitled to judgment. The court's order also awarded Coon prejudgment interest and attorney fees and indicated that the specific amounts of those awards would be determined after further hearings. On December 8, 2007, the trial court issued a judgment entry summarizing its judgment and stating that it would "conduct a hearing relating to prejudgment interest and attorney fees on January 14, 2008[.]" On January 14, 2008, the court held an evidentiary hearing on prejudgment interest and ordered the parties to submit proposed journal entries. On January 22, 2008, TCS filed a motion to dismiss Coon's request for prejudgment interest, arguing that Coon never properly sought prejudgment interest in either his prayer for relief or in a timely motion within fourteen days of the entry of judgment. Subsequently, the parties filed numerous motions, and the trial court held another hearing to receive evidence on the outstanding matter of attorney fees. On November 21, 2008, the trial court issued its final order awarding Coon: (1) $318,599.94 plus prejudgment interest from his

---

has received written notice of a claimed violation of [R.C. 4123.90] within the ninety days

date of termination at a rate of 10% for a total damage award of $433,538.35; (2) reinstatement to his former position; (3) $89,286.00 in attorney fees; and (4) costs.

{¶7} TCS now appeals from the trial court's judgment and raises four assignments of error for our review.

II

Assignment of Error Number One

> "THE TRIAL COURT ERRED WHEN IT DENIED TECHNICAL CONSTRUCTION SPECIALTIES' MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION."

{¶8} In its first assignment of error, TCS argues that the trial court erred in denying its motion to dismiss Coon's complaint for lack of subject matter jurisdiction. Specifically, TCS argues that Coon failed to show that he notified TCS of its alleged R.C. 4123.90 violation within that section's ninety-day jurisdictional window for notification. We disagree.

{¶9} Jurisdiction is a question of law, which this Court reviews de novo. *CommuniCare Health Servs., Inc. v. Murvine*, 9th Dist. No. 23557, 2007-Ohio-4651, at ¶13. "A de novo review requires an independent review of the trial court's decision without any deference to the trial court's determination." *State v. Consilio*, 9th Dist. No. 22761, 2006-Ohio-649, at ¶4.

{¶10} R.C. 4123.90 provides, in relevant part, as follows:

> "No employer shall discharge, demote, reassign, or take any punitive action against any employee because the employee filed a claim or instituted *** any proceedings under the workers' compensation act for an injury *** which occurred in the course of and arising out of his employment with that employer. Any such employee may file an action in the common pleas court of the county of such employment in which the relief which may be granted[.] *** The action shall be forever barred unless filed within one hundred eighty days immediately following the discharge *** or punitive action taken, and no action may be

---

immediately following the discharge."

> instituted or maintained *unless the employer has received written notice* of a claimed violation of this paragraph within the ninety days immediately following the discharge *** or punitive action taken." (Emphasis added.)

This Court has held that compliance with R.C. 4123.90's filing and notice deadlines are "conditions precedent to jurisdiction." *Cross v. Gerstenslager Co.* (1989), 63 Ohio App.3d 827, 829. "A failure to file the written notice of a claimed [R.C. 4123.90] violation *** within ninety days of discharge is a jurisdictional defect. [Such] jurisdictional defects cannot be waived by either party, and when called to the attention of the court, the court shall dismiss the action." Id. at 830.

{¶11} Civ.R. 12(B)(1) provides a mechanism for a defendant to seek the dismissal of a complaint for lack of subject matter jurisdiction. Moreover, "Civ.R. 12(B) gives the trial court authority to consider evidence outside of the pleadings when determining its own jurisdiction under Civ.R. 12(B)(1)." *Kettering v. Akron* (Aug. 5, 1998), 9th Dist. No. 18815, at *1. If the trial court opts to determine its jurisdiction without a hearing, "it must view allegations in the pleadings and documentary evidence in the light most favorable to the non-moving party [and] *** resolve all reasonable competing inferences in favor of such non-moving party." (Internal citations omitted.) *Meyers v. Curt Bullock Builders, Inc.* (Mar. 1, 1989), 9th Dist. No. 13857, at *2, quoting *Giachetti v. Holmes* (1984), 14 Ohio App.3d 306, 307.

{¶12} Two dates are critical to a determination of whether TCS received Coon's written notice within ninety days of Coon's termination: the date of Coon's termination and the date upon which TCS received, if in fact it did receive, Coon's written notice. We examine each issue separately.

Date of Termination

{¶13} TCS argues on appeal that it terminated Coon on July 13, 2001.[2] In support of its argument, TCS points to Coon's trial testimony. At trial, Coon expressed his belief that he had been effectively fired on July 13, 2001 when TCS' president and another manager met with him, accused him of falsifying a workers' compensation claim, and indicated it might be best for he and TCS to "go [their] separate ways." Although Coon testified as to his belief that TCS intended to fire him as of July 13, 2001, Coon premised his entire claim in the trial court upon TCS having actually discharged him on July 16, 2001. Coon's complaint, amended complaints, responses to TCS' motions to dismiss, and other relevant filings all provide that Coon was terminated on July 16, 2001. Moreover, the separation notice that Coon received from TCS indicates that July 16, 2001 was the effective date of his separation. Viewing the pleadings and documentary evidence in a light most favorable to Coon, we must conclude that Coon demonstrated his discharge date was July 16, 2001. *Meyers*, at *2, quoting *Giachetti*, 14 Ohio App.3d at 307.

Written Notice

{¶14} Because TCS discharged Coon on July 16, 2001, Coon had to ensure that TCS received written notice of any alleged R.C. 4123.90 violation within ninety days of that date. As the trial court noted, however, the ninetieth day after July 16, 2001 was Sunday, October 14, 2001. R.C. 1.14 provides, in relevant part, as follows:

> "The time within which an act is required by law to be done shall be computed by excluding the first and including the last day; except that, when the last day falls

[2] Interestingly, TCS' argument on appeal that it terminated Coon on July 13, 2001 wholly contradicts the position to which it adhered throughout the proceedings below. In TCS' trial briefs, trial statements, and post-trial briefs, TCS consistently asserted that Coon's official separation from TCS occurred on July 16, 2001.

> on Sunday ***, the act may be done on the next succeeding day that is not Sunday[.]"

Similarly, Civ.R. 6(A) provides, in relevant part, that:

> "In computing any period of time prescribed or allowed by *** any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a *** Sunday, *** in which event the period runs until the end of the next day which is not a *** Sunday[.]"

Because the last day of Coon's ninety-day written notice period fell on a Sunday, Coon had until Monday, October 15, 2001 to ensure TCS' receipt of his written notice. R.C. 1.14; Civ.R. 6(A).

{¶15} In response to TCS' last motion to dismiss, Coon produced the following items: (1) his second amended complaint, indicating that TCS had received written notice on October 15, 2001; (2) a certified mail return receipt addressed to TCS that is signed by a recipient and that appears to be dated October 15, 2001; (3) a photocopy of a letter dated October 14, 2001, informing TCS of an alleged R.C. 4123.90 violation and Coon's intention to file suit; and (4) an affidavit, indicating that Coon prepared the foregoing letter on October 14, 2001 and sent it to TCS via certified mail as evidenced by the return receipt. Viewed in a light most favorable to Coon, the foregoing items suffice to show that TCS received Coon's written notice on October 15, 2001. To the extent that TCS now challenges the authenticity of the foregoing items, TCS has not appealed from the trial court's decision to rule on its motion to dismiss without first holding a hearing. When a court rules upon a motion to dismiss without first holding a hearing, the pleadings and documentary evidence must be viewed "in the light most favorable to the non-moving party." *Meyers*, at *2, quoting *Giachetti*, 14 Ohio App.3d at 307. In doing so, we must conclude that Coon presented enough evidence to withstand TCS' motion to dismiss. As such, TCS' first assignment of error is overruled.

Assignment of Error Number Two

"THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT AWARDED PREJUDGMENT INTEREST TO MR. COON."

{¶16} In its second assignment of error, TCS argues that the trial court erred by awarding Coon prejudgment interest. Specifically, TCS argues that: (1) Coon was legally barred from seeking prejudgment interest because he failed to properly request it; (2) even if Coon properly requested prejudgment interest, he was not entitled to it because TCS complied with R.C. 1343.03(C); and (3) even if Coon was entitled to prejudgment interest, the trial court miscalculated Coon's award.

{¶17} R.C. 1343.03(C)(1) provides, in relevant part, as follows:

> "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[.]"

"We review a trial court's determination regarding whether a party made a 'good faith effort' to settle for an abuse of discretion." *Kane v. Saverko*, 9th Dist. No. 23908, 2008-Ohio-1382, at ¶9. Abuse of discretion connotes more than simply an error in judgment; the court must act in an unreasonable, arbitrary, or unconscionable manner. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. As a threshold matter, however, we must first examine whether the components of R.C. 1343.03(C) have been satisfied. *Kane* at ¶9. Such a determination constitutes a question of law, which this Court reviews de novo. *Porter v. Porter*, 9th Dist. No. 21040, 2002-Ohio-6038, at ¶5.

{¶18} First, TCS argues that Coon is barred as a matter of law from receiving a prejudgment interest award because he failed to include a request for such interest in his complaint. A party does not waive his right to seek prejudgment interest by failing to pray for prejudgment interest in his complaint. *Zeck v. Sokol*, 9th Dist. No. 07CA0030-M, 2008-Ohio-727, at ¶42. We have explained that a prejudgment interest award is based upon a party's conduct during the litigation. Id. Therefore, a litigant would not know prior to drafting his complaint that the opposing party would fail to engage in good faith during the pendency of the case. Id. Because the complaining party cannot predict the opposing party's future conduct, the party need not pray for prejudgment interest in his complaint. Therefore, TCS' first argument lacks merit.

{¶19} Second, TCS argues that Coon is legally barred from receiving prejudgment interest because he failed to timely file a motion for such interest following the court's verdict. TCS relies upon *Cotterman v. Cleveland Elec. Illuminating Co.* (1987), 34 Ohio St.3d 48, *Ohio Edison Co. v. Welsh* (2001), 144 Ohio App.3d 499, and *Transcontinental Mgmt. Group, Ltd. v. Reliance Union Indem. Co., Ltd.* (Oct. 13, 1992), 10th Dist. No. 92AP-186, for the proposition that a party's failure to file a motion for prejudgment interest within the fourteen day period following a verdict or decision is a jurisdictional bar to a court's consideration of the motion.

{¶20} In *Cotterman*, the Ohio Supreme Court held that "[a]n R.C. 1343.03(C) motion for prejudgment interest must be made to the trial court following the verdict or decision in the case and in no event later than fourteen days beyond the entry of judgment." *Cotterman*, 34 Ohio St.3d at paragraph one of the syllabus. In that case, on November 9, 1982, a jury awarded judgment to Gary Cotterman in his personal injury action. Cleveland Electric appealed and the court of appeals affirmed the judgment. After the Ohio Supreme Court overruled the motion to

certify the record, the trial court finalized the judgment, including post-judgment interest. On February 9, 1984, the judgment was satisfied. On May 4, 1984, Cotterman filed a motion for prejudgment interest. The trial court denied the motion, finding that Cleveland Electric had made a good faith effort to settle. The court of appeals affirmed the trial court's judgment, but based its holding on the ground that Cotterman's motion was fatally untimely. Because the motion for prejudgment interest was filed approximately 18 months after the jury verdict, the Ohio Supreme Court rejected "any suggestion that the facts presented *in the case sub judice* could reasonably come within the statutory term 'subsequent to the verdict or decision in the action.'" (Emphasis added). Id. at 50.

{¶21} The Court further considered "and by necessity, develop[ed], a more precise rule which would be applicable to future cases." Id. The Court noted that it agreed with "the rationale of the court of appeals on this issue that the losing party should have a 'justifiable expectancy of finality,' i.e., a reasonable point in time when he can know that his entire obligation has been discharged." Id. at 49. Accordingly, the Court determined that it "seems most reasonable, and we so hold, that a motion for prejudgment interest, pursuant to R.C. 1343.03(C), must, in accordance with the limits of other similar post-trial motions above, be made to the trial court following the verdict or decision in the case and in no event later than fourteen days beyond the entry of judgment." Id. at 50.

{¶22} TCS does not explain why it believes that *Cotterman's* holding implicates the subject matter jurisdiction of a trial court. Notably, the Court stated that it disposed of Cotterman's claims on the "*procedural issue* of timeliness alone[.]" (Emphasis added.) *Cotterman*, 34 Ohio St.3d at 51. It is clear that, in the absence of a clear mandate in R.C. 1343.03(C), the Court created a procedural rule to aid litigants in future cases. TCS relies solely

upon *Transcontinental Mgmt. Group* for the proposition that the timely filing of a motion for prejudgment interest is jurisdictional. Although *Transcontinental Mgmt. Group* cites to *Cotterman,* it does not support its conclusory statement with any other case law or provide an analysis as to why the holding in *Cotterman* should be viewed as jurisdictional. Regardless, although a decision by the Tenth District might be persuasive, it is not binding upon this Court. Consequently, TCS has not provided this Court with any law or analysis in support of its argument that a motion filed before a decision or verdict is issued by the trial court is jurisdictionally time-barred. See App.R. 16(A)(7). In the absence of such, we conclude that *Cotterman* does not set forth a jurisdictional bar in a case in which a party filed a motion prior to the final verdict. We further note that in examining the language set forth in R.C. 1343.03(C), there is no language that specifies when a request for prejudgment interest must be filed. Thus, the statute itself provides no basis upon which to base a jurisdictional claim. Thus, TCS' contention that the timely filing of a motion for prejudgment interest is jurisdictional is without merit.

{¶23} We further conclude that *Cotterman* is distinguishable from the case at bar. In developing its holding, the *Cotterman* Court clearly stated that it developed a time frame in which a prejudgment interest motion should be made in an effort to aid the losing party's expectation of finality. Id. at 49. The Court referred to the fourteen day time frame as a reasonable amount of time to achieve this result. Id. Accordingly, it does not contemplate the situation, such as the case at bar, in which the motion for prejudgment interest is filed *before* the verdict, thus not hampering the losing party's expectation of finality. In fact, none of the cases upon which TCS relies involved a motion for prejudgment interest that was filed *before* a verdict or decision. See *Cotterman*, 384 Ohio St.3d at 49 (interest sought approximately eighteen

months after verdict); *Ohio Edison Co.*, 144 Ohio App.3d at 500 (interest awarded sua sponte); *Transcontinental Mgmt. Group, Ltd.*, at *4 (interest awarded sua sponte). In fact, *Cotterman* appears to have

> "[A]cknowledged the possibility of filing a prejudgment interest motion prior to trial wherein the court stated '[w]hile there may be considerations which would constrain a party from making a motion for prejudgment interest prior to the rendering of the verdict, there appears to be no reason why the motion could not be made following the verdict.'" *Fairchild v. Curtis* (May 16, 1996), 5th Dist. Nos. 95 CA16, 95 CA 17, 95CA 23, at *2 (concluding that the filing of a prejudgment interest motion prior to trial was not fatal), quoting *Cotterman*, 384 Ohio St.3d at 50.

Because the *Cotterman* Court was focused on the finality of a judgment, it does not follow that the motion for prejudgment interest in the present case, albeit filed prematurely, is necessarily in violation of the holding in *Cotterman*. *Fairchild*, at *2. Further, even if *Cotterman* could be construed to include a premature motion when it set forth its rule for litigants to follow when filing a motion for prejudgment interest, it did not remove the trial court's inherent authority to manage its docket. See *State v. Brown*, 9th Dist. No. 23637, 2008-Ohio-2670, at ¶33, citing, *Mayer v. Bristow* (2000), 91 Ohio St.3d 3, 7 (discussing the trial court's inherent authority to protect its docket); *State v. Hochhausler* (1996), 76 Ohio St.3d 455, 469 (discussing the trial court's inherent authority to control and manage its docket). Thus, the holding in *Cotterman* does not preclude the trial court from considering Coon's motion even if it was premature.

{¶24} Notwithstanding the above analysis, we conclude that TCS has forfeited any argument that, pursuant to *Cotterman*, Coon's request for prejudgment interest was untimely because it was made prior to the verdict. TCS became aware of Coon's request for prejudgment interest when Coon requested that relief in his post-trial brief. The trial court held a hearing on January 14, 2008, at which both parties appeared and participated. TCS did not object to Coon's request during the hearing, nor did it make a motion to dismiss the request on procedural

grounds. Instead, TCS waited over one week after the parties completed the prejudgment interest hearing and then filed its motion to dismiss. Even if, as a matter of procedure, Coon should have filed his motion for prejudgment interest within the fourteen day period following the court's decision, TCS participated fully in the hearing without raising the proposed procedural defect. The Ohio Supreme Court has stated that, other than issues of subject matter jurisdiction, "reviewing courts do not consider questions not presented to the court whose judgment is sought to be reversed." *Goldberg v. Industrial Comm'n. of Ohio* (1936), 131 Ohio St. 399, 404. It is well established that "an appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." *State v. Williams* (1977), 51 Ohio St.2d 112, 117, overruled on other grounds, *State v. Gillard* (1998), 40 Ohio St.3d 266. TCS' second argument lacks merit.

{¶25} The dissent notes that the trial court initially awarded Coon prejudgment interest in its November 30, 2007 order before holding a hearing. However, on December 11, 2007, the trial court issued a second judgment entry, that summarized its judgment and stated that it would "conduct a hearing relating to prejudgment interest and attorney fees on January 14, 2008[.]" The trial court then held an evidentiary hearing. In its judgment entry disposing of this issue, the trial court clearly reviewed the evidence and set forth the testimony it believed evidenced TCS' lack of good faith. Therefore, the trial court corrected any error that it may have made in its November 30, 2007 judgment entry. Further, this issue was not raised below. *Goldberg*, 131 Ohio St. at 404. Accordingly, we decline to address it.

{¶26} Having rejected TCS' arguments that Coon's prejudgment interest award should be reversed as a matter of law, we next consider whether the trial court abused its discretion in awarding Coon prejudgment interest. The Ohio Supreme Court has held that:

> "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 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." *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 658-59, quoting *Kalain v. Smith* (1986), 25 Ohio St.3d 157, syllabus.

"[T]he question of whether [a party] possessed a good faith, objectively reasonable belief that [it] had no liability must focus on the belief as it existed prior to trial." (Emphasis omitted.) *Kohler v. Deel* (1997), 119 Ohio App.3d 710, 714-15.

{¶27} At the prejudgment interest hearing, Coon's attorney testified that he repeatedly made settlement offers to TCS. Specifically, he indicated that the following offers were discussed: (1) approximately three months after the filing of the case, Coon requested $40,000, but TCS indicated it had no interest in settling; (2) after an initial jury verdict in Coon's favor, a reversal on appeal, and a remand from this Court, Coon requested about $80,000 and TCS offered only $7,000; (3) after a final pre-trial, Coon adjusted his request to about $70,000 and TCS increased its offer to $15,000; (4) immediately before trial, Coon requested $65,000 and TCS offered $30,000; and (5) during trial, TCS increased its offer to $45,000. Coon's attorney testified that TCS' attorney informed him TCS' president, Edward Sheeler, "was reticent to settle with someone who he thought was *** stealing from him[.]" Coon's attorney further testified that Coon's damages were readily ascertainable and only increased as time went on because they were based on Coon's back pay and lost benefits. Finally, Coon's attorney testified that the

issues and evidence going into the second trial upon remand were virtually identical to the issues and evidence in the first trial.

{¶28} Sheeler also testified at the prejudgment interest hearing. He testified that he was responsible for authorizing TCS' settlement offers and that he based his initial offers solely upon the cost for TCS to defend the action. Sheeler further testified that his refusal to increase his offers stemmed from his belief that a bench trial would lead to different result than a jury trial. Sheeler admitted that Coon's damages were readily ascertainable and that he knew Coon was going to present the same evidence at the second trial that it had at the first trial, but maintained that he "felt the outcome would be different if it was heard by a judge."

{¶29} The court concluded that TCS did not make a good faith effort to settle because it did not rationally evaluate its risks and delayed the case by unreasonably refusing to settle. Specifically, the court found that Coon's damages were readily ascertainable and only accumulated as time went on. The court concluded that, given Sheeler's knowledge of the evidence (which was virtually identical to the evidence presented at the first trial), it was unreasonable for Sheeler to refuse higher settlement offers simply because he thought a bench trial might possibly lead to a different result.

{¶30} Based on our review of the record, we cannot conclude that the court's decision to award prejudgment interest was unreasonable, arbitrary, or unconscionable. Going into the second trial, TCS had full knowledge of the strength of Coon's case and the exact evidence that he would present. See id. (noting that a party's reasonable belief as to whether it may be liable must be assessed at the point in time prior to trial). TCS refused to make any settlement offers based on the ever-increasing and ascertainable damage award that Coon might receive if he prevailed. Rather, TCS' president admitted that his offers were based upon TCS' cost to defend

and his personal belief that TCS would prevail at a bench trial. As such, TCS' offers were not based on a "rational evaluation of the risk of exposure." *Strasel v. Seven Hills OB-GYN Assoc., Inc.*, 1st Dist. Nos. C-050341 & C-050364, 2007-Ohio-171, at ¶34. Given our limited standard of review in this instance, we must overrule TCS' argument that the court abused its discretion by awarding prejudgment interest.

{¶31} Lastly, TCS argues that the trial court erred in applying a 10% rate of interest to Coon's entire award. The 2002 version of R.C. 1343.03 provided for a 10% rate of interest per annum for awards of prejudgment interest with the interest running from the time the cause of action accrued until the date "on which the money is paid[.]" Former R.C. 1343.03(A), (C). In 2004, the legislature amended R.C. 1343.03. Under the amended version of the statute, a party is entitled to "interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code," rather than a flat rate of 10%. R.C. 1343.03(A). This Court has recognized that, for actions pending on the effective date of revised R.C. 1343.03(A), the 10% interest rate only applies up until the effective date of the statute and the interest rate determined pursuant to R.C. 5703.47 applies on and after the effective date. *Jones v. Progressive Preferred Ins. Co.*, 9th Dist. No. 23107, 2006-Ohio-5420, at ¶20-22. Here, Coon's claim was pending on the effective date of revised R.C. 1343.03(A). Nevertheless, the trial court calculated Coon's prejudgment interest award by applying a 10% rate to each year the award accrued. Because the court erred by doing so, Coon's prejudgment interest award must be vacated and the matter must be remanded for the court to calculate the correct interest rate for each year of Coon's award. TCS' assignment of error is sustained in part.

Assignment of Error Number Three

"THE TRIAL COURT ERRED IN ITS AWARD OF ATTORNEY'S FEES TO ADAM COON."

{¶32} In its third assignment of error, TCS argues that the trial court erred by awarding excessive fees to two of Coon's attorneys: Dennis Thompson and Christy Bishop. Specifically, TCS argues that the trial court should have awarded Thompson and Bishop reduced hourly rates based upon the evidence presented at the attorney fee hearing. We disagree.

{¶33} An employer's violation of R.C. 4123.90 entitles an aggrieved employee to reasonable attorney fees. R.C. 4123.90.

> "The reasonableness of attorney's fees is determined with respect to the factors set forth in Rule 1.5(a) of the Ohio Rules of Professional Conduct, which provides:
>
> "'The factors to be considered in determining the reasonableness of a fee include the following:
>
> "'(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> "'(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> "'(3) the fee customarily charged in the locality for similar legal services;
>
> "'(4) the amount involved and the results obtained;
>
> "'(5) the time limitations imposed by the client or by the circumstances;
>
> "'(6) the nature and length of the professional relationship with the client;
>
> "'(7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
>
> "'(8) whether the fee is fixed or contingent.'" *Cambridge Co., Ltd. v. Telstat, Inc.*, 9th Dist. No. 23935, 2008-Ohio-1056, at ¶19, quoting Prof. Cond. Rule 1.5(a).

"A trial court's determination in regards to an award of attorney fees will not be disturbed on appeal absent an abuse of discretion." *Jarvis v. Stone*, 9th Dist. No. 23904, 2008-Ohio-3313, at ¶33, quoting *Crow v. Fred Martin Motor Co.*, 9th Dist. No. 21128, 2003-Ohio-1293, at ¶38. The phrase "abuse of discretion" connotes more than an error of judgment; rather, it implies that the

trial court's attitude was arbitrary, unreasonable, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶34} After a hearing at which the trial court received evidence, the court determined that an hourly rate of $325 was reasonable as to attorney Dennis Thompson and an hourly rate of $275 was reasonable as to attorney Christy Bishop. TCS does not take issue with the number of hours that Coon's attorneys expended, only with the rates that they received for those hours. TCS argues that the hourly rates the trial court awarded are "outrageous for Summit County." TCS points to the testimony of its own expert, a Summit County practitioner, who opined that Thompson should have been reimbursed at a $250 hourly rate and Bishop should have been reimbursed at a $185 hourly rate. Given our review of the evidence introduced at the hearing and the trial court's rationale for its decision, however, we cannot conclude that Thompson's and Bishop's rate determinations amount to an abuse of discretion.

{¶35} Both Thompson and Bishop testified at the attorney fees hearing about their considerable litigation experience and their status as specialists in employment law. They further testified that their firm represents clients nationally and accepts cases on a contingency fee basis, which entails a large amount of risk. Thompson and Bishop noted the considerable duration of this case and the fact that their firm turned down other cases as a result of handling this one. Finally, they both testified that they based their respective hourly fee estimates on schedules set forth in Ohio State Bar Association publications, as adjusted for their additional status as specialists in employment law. Thompson and Bishop also presented expert testimony. Their expert testified that Thompson and Bishop performed "more trials th[a]n any other plaintiff's employment lawyers that [he was] aware of" and that he considered Thompson to be "among the most preeminent employment lawyers in the State of Ohio." Additionally, he testified that the

verdict Thompson and Bishop secured for Coon was the highest of which he was aware for Coon's type of claim. TCS' own expert confirmed that he was unaware of any comparable verdicts in similar cases.

{¶36} In its written decision, the trial court cited to Thompson's and Bishop's experience, reputation, and ability as well as their certifications as specialists in employment law. The court recognized "the amount of time and energy devoted by both Plaintiff and Defense counsel in this matter." Further, the court noted that Thompson's and Bishop's fee requests were not unreasonable given that the court had "recently awarded attorney fees to a senior partner in an Akron law firm of $325 per hour." Given our review of the record and the trial court's explicit reliance upon the factors set forth in Prof. Cond. Rule 1.5(a) as a basis for its decision, we cannot conclude that the court's hourly rate determination amounted to an abuse of discretion. Consequently, TCS' argument that Thompson and Bishop are not entitled to hourly rates of $325 and $275, respectively, lacks merit.

{¶37} TCS also argues that the court abused its discretion by awarding Thompson and Bishop the same hourly rate for all of their work when the record reflects that their work spanned the years of 2005 through 2008. TCS argues that each year should have been billed at a different rate with rates increasing over time. Yet, TCS has not cited to any law in support of the argument that Thompson and Bishop were required to charge or the trial court was required to award different hourly rates for each billable year. See App.R. 16(A)(7) (providing that it is an appellant's duty to provide this Court with an argument supported by citations to appropriate legal authority). This Court will not address underdeveloped arguments on appeal. TCS' third assignment of error is overruled.

Assignment of Error Number Four

"THE TRIAL COURT ABUSED ITS DISCRETION IN AWARDING BACK PAY TO MR. COON."

{¶38} In its fourth assignment of error, TCS argues that the trial court erred when it awarded back pay to Coon. Specifically, TCS argues that Coon is not entitled to back pay because his receipt of social security disability benefits and his "personal choice" to remain at home with his children while his wife worked show that Coon failed to mitigate his damages. We disagree.

{¶39} R.C. 4123.90 authorizes an award of back pay in conjunction with an aggrieved plaintiff's reinstatement. R.C. 4123.90. "The purpose of a back-pay award is to make the wrongfully terminated employee whole and to place that employee in the position the employee would have been in absent a violation of the employment contract." *State ex rel. Stacy v. Batavia School Dist. Bd. of Edn.*, 105 Ohio St.3d 476, 2005-Ohio-2974, at ¶26. To receive back pay, however, an employee must make reasonable efforts to mitigate his damages. *Cuyahoga Falls Edn. Assn. v. Cuyahoga Falls City School Dist. Bd. of Edn.* (1996), 112 Ohio App.3d 366, 371. "Mitigation is an affirmative defense in Ohio." *Young v. Frank's Nursery & Crafts Inc.* (1991), 58 Ohio St.3d 242, 244. As such, TCS bore the burden of proving any failure to mitigate. Id.

{¶40} TCS argues that Coon is not entitled to any back pay because: 1) he admitted that he was "totally disabled" and "unable to work" in order to receive social security disability insurance; and 2) he testified that he made a personal choice to stay home with his children while his wife worked. TCS argues that Coon's testimony "fulfilled TCS's burden [because] *** [h]e was unable to provide virtually any details of efforts made to secure any employment." We disagree. Coon testified that he started looking for other work immediately after being

terminated from TCS and continued doing so on a regular basis. Coon listed multiple businesses at which he obtained employment for short periods of time, but noted that he was unable to secure full-time employment at any business for an hourly rate and benefits package that compared to the hourly rate and benefits he had received at TCS. Coon acknowledged that he received social security disability insurance, but testified that he would have abandoned the disability insurance for a comparable job if he would have been able to find one. Coon also explained that, while he stayed home with his three children at certain points in lieu of working, he did so because his wife was able to secure higher paying employment during those periods of time.

{¶41} TCS did not present a shred of evidence with regard to comparable employment that Coon could have obtained. TCS' blanket assertion that "[u]nskilled jobs requiring only a high-school education were plentiful during the time that Mr. Coon was required to have mitigated his damages" rings hollow in light of TCS' failure to introduce even a single example of an available job comparable to Coon's position at TCS. It was not Coon's burden to prove that such a job did not exist. Rather, it was TCS' burden to prove that such a job existed, and Coon failed to make reasonable efforts to avail himself of it. Id. Because TCS did not do so, the trial court did not err in awarding Coon back pay. TCS' fourth assignment of error is overruled.

III

{¶42} TCS' second assignment of error is sustained in part, and the trial court's award of prejudgment interest is vacated pursuant to that determination. TCS' remaining assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part, and remanded for further proceedings consistent with the foregoing

opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

CARLA MOORE
FOR THE COURT

MOORE, P. J.
BELFANCE, J.
CONCUR

WHITMORE, J.
DISSENTS IN PART, SAYING:

{¶43} I respectfully dissent as to the majority's resolution of TCS' second assignment of error because I would conclude that Coon is not entitled to prejudgment interest.

{¶44} In *Cotterman v. Cleveland Elec. Illuminating Co.* (1987), 34 Ohio St.3d 48, paragraph one of the syllabus, the Ohio Supreme Court interpreted R.C. 1343.03(C) and specifically held that:

> "An R.C. 1343.03(C) motion for prejudgment interest must be made to the trial court *following the verdict or decision in the case* and in no event later than fourteen days beyond the entry of judgment." (Emphasis added.) Accord *Ohio Edison Co. v. Welsh* (2001), 144 Ohio App.3d 499, 500-01 (reversing prejudgment interest award because litigant failed to file motion *following* the verdict and court failed to hold a hearing).

Moreover, this Court has held that:

> "R.C. 1343.03 requires that 1) the party seeking the prejudgment interest *must petition the court within the proper time frame*, 2) the trial court must hold a hearing on the motion, 3) the trial court must determine that the party required to pay the judgment failed to make a good faith effort to settle, and 4) the trial court must find that the party owed the judgment did not fail to make a good faith effort to settle." *Kane v. Saverko*, 9th Dist. No. 23908, 2008-Ohio-1382, at ¶8.

Accordingly, a prejudgment interest motion must be made *following* a verdict or decision, at which point a trial court must hold a hearing on the motion. Id.

{¶45} Coon requested prejudgment interest in his post-trial brief, which preceded the court's decision. The trial court treated Coon's post-trial brief as a motion for prejudgment interest, considered the "motion" even though it was prematurely filed, and awarded Coon prejudgment interest in its November 30, 2007 order before holding a hearing. Thus, the trial court awarded prejudgment interest without being petitioned within the proper time frame and without first holding a hearing. To affirm the trial court's prejudgment interest award, one must ignore *Cotterman's* plain language and this Court's precedent. While the Supreme Court could have chosen to adopt solely an endpoint deadline for the filing of prejudgment interest motions, it did not. The Supreme Court specifically designated both a starting point *and* an ending point for the filing of prejudgment interest motions. *Cotterman*, 34 Ohio St.3d at paragraph one of the syllabus (holding that prejudgment interest motion must be filed "following the verdict or

decision in the case and in no event later than fourteen days beyond the entry of judgment"). A motion filed before *or* after *Cotterman's* designated timeframe is untimely. Because the trial court had no authority to award prejudgment interest in the absence of a timely filed motion and evidentiary hearing preceding its ruling, *Kane* at ¶8, I would conclude that Coon is not entitled to prejudgment interest. Accordingly, I would sustain TCS' second assignment of error and reverse Coon's prejudgment interest award. As such, I respectfully dissent.

APPEARANCES:

KAREN D. ADINOLFI, Attorney at Law, for Appellant.

DENNIS R. THOMPSON, and CHRISTY B. BISHOP, Attorneys at Law, for Appellee.