[Cite as *Hanes v. Jones*, 2009-Ohio-2944.]

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

GARY HANES	C. A. No. 08CA009469
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
R. L. JONES	COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
Appellee	CASE No. 05CV144192

DECISION AND JOURNAL ENTRY

Dated: June 22, 2009

MOORE, Presiding Judge

{¶1} Appellant, Gary Hanes, appeals from the judgment of the Lorain County Court of Common Pleas. This Court affirms.

I.

{¶2} Appellant, Gary Hanes, filed a complaint on November 17, 2005 seeking compensation for injuries sustained in a February 29, 2004 motor vehicle collision with Appellee, R.L. Jones. At the time of the accident, Jones was insured by Auto-Owners Insurance Company.

{¶3} The matter ultimately proceeded to a jury trial in April of 2008. Jones admitted negligence and proximate cause, therefore the only issue before the jury was the amount of damages to which Hanes was entitled. The jury returned a verdict in favor of Hanes in the amount of $249,000.00. Thereafter, Hanes filed a motion for pre-judgment and post-judgment interest as well as motions for costs. The trial court held a hearing on the motion for pre-

judgment interest on July 29, 2008, and denied the motion on August 28, 2008. Hanes timely appealed the trial court's order, raising one assignment of error for our review.

II.

ASSIGNMENT OF ERROR

> "THE TRIAL COURT WAS INCORRECT IN RULING AGAINST [HANES] FOR PRE-JUDGMENT INTEREST."

{¶4} In Hanes' sole assignment of error, he argues that the trial court erred in denying his motion for pre-judgment interest. We disagree.

{¶5} An appellate court reviews the trial court's decision to grant or deny prejudgment interest for an abuse of discretion. *Vilagi v. Allstate Indemn. Co.*, 9th Dist. No. 03CA008407, 2004-Ohio-4728, at ¶21, citing *Wagner v. Midwestern Indemnity Co.* (1998), 83 Ohio St.3d 287, 293. An abuse of discretion is more than an error of law or judgment; rather, it is a finding that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Under this standard of review, an appellate court may not merely substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶6} R.C. 1343.03(C) governs awards of prejudgment interest and provides, in relevant part:

> "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 as follows[.]"

{¶7} R.C. 1343.03(C) specifically "requires that the trial court determine the issue of prejudgment interest 'at a hearing held subsequent to the verdict or decision in the action.'" *Galmish v. Cicchini* (2000), 90 Ohio St.3d 22, 32, quoting *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 658. In *Moskovitz*, the Ohio Supreme Court clearly stated the requirements for recovering prejudgment interest under R.C. 1343.03(C):

> "The statute sets forth certain requirements. First, a party seeking interest must petition the court. The decision is one for the court-not any longer a jury. The motion must be filed after judgment and in no event later than fourteen days after entry of judgment. Second, the trial court must hold a hearing on the motion. Third, to award prejudgment interest, the court must find that the party required to pay the judgment failed to make a good faith effort to settle and, fourth, the court must find that the party to whom the judgment is to be paid did not fail to make a good faith effort to settle the case." (Internal citations omitted.) *Moskovitz*, 69 Ohio St.3d at 658.

{¶8} The Supreme Court further explained that because the statute uses the word "shall", "if a party meets the four requirements of the statute, the decision to allow or not allow prejudgment interest is not discretionary." Id.

{¶9} Here, Hanes asserts that he negotiated in good faith but that Jones failed to make a good faith effort to settle the case. Specifically, Hanes argues that Jones did not adequately evaluate the risks and failed to evaluate and consider the lower back injury as a part of the case. Hanes acknowledged at the pre-judgment interest hearing that the liability insurance carrier – Auto Owners – made the ultimate decision as to the settlement offers. Specifically, Hanes' counsel stated that

> "This isn't about Mr. Cubar[1], and we're not --- I think he's a fine lawyer. We aren't out to attack him and we're not attacking his evaluation, but *we are attacking the process and the ultimate decision that was made by the liability insurance carrier in this case* to whom he reported. They gave him authority of $90,000 going into that mediation. Additional information was provided to him

[1] John Cubar represented Jones at trial.

> and passed on to them by Mr. Cubar on behalf of his client, and they only gave him another $10,000 on the case. And *it's Auto Owners, not Mr. Cubar, who did not evaluate this case* on behalf of their insured, R.L. Jones." (Emphasis added.)

{¶10} Hanes points to Auto Owners as the party with settlement authority who did not adequately evaluate this case on behalf of Jones. Hanes asserts, without citation to the record, that (1) "Defendant-Appellee failed to review any jury-verdict research on the issue of a permanent back issue", (2) "[t]here is no question, the Defendant-Appellee failed to consider the report of Dr. Kabarra and evaluate the case properly" and (3) "[i]nsurance [c]ompanies have a duty to evaluate the evidence, even if it conflicts with the opinions and conclusions it has already reached." However, Hanes has presented no evidence to demonstrate Auto Owners' position and evaluation of the case based on the recommendation of Jones' counsel. The only evidence Hanes presented concerned Jones' counsel's evaluations of the case.

{¶11} The record reflects that on June 12, 2008, Hanes noticed the deposition of Auto Owners' claims representative Joseph Huston, who was responsible for Jones' case. However, Hanes has not cited to any portion of Huston's testimony in his brief on appeal.[2] See *Krider v. Price*, 4th Dist. No. 05CA7, 2007-Ohio-5233, at ¶¶20-21 (affirming an award of prejudgment interest where the appellee demonstrated through testimony of the casualty adjuster for the appellant's insurance company, who testified that she had not read two key medical expert depositions, that the insurance company had not rationally evaluated the risks and potential liability of the case and did not make a good faith settlement offer).

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[2] The record reflects that Hanes noticed the deposition of Joseph Huston on June 12, 2008. However, it is not clear from the record whether the deposition was actually taken. There is no indication from the docket that the deposition was filed in the trial court. Further, we do not have the deposition in the record before us on appeal.

{¶12} Hanes has failed to meet his burden by providing evidence to show the deliberations and positions of Auto Owners. Consequently, Hanes has failed to prove that Jones failed to make a good faith effort to settle. *Moskovitz*, 69 Ohio St.3d at 658. Accordingly, we conclude that the trial court did not abuse its discretion in denying Hanes' motion for pre-judgment interest. Hanes' sole assignment of error is overruled.

III.

{¶13} Hanes' sole assignment of error is overruled and the judgment of the Lorain County Court of Common Please is affirmed.

Judgment affirmed.

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 Lorain, 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 to Appellant.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
CONCURS

BELFANCE, J.
DISSENTS, SAYING:

{¶14} I respectfully dissent as I would remand this matter back to the trial court to provide the basis for its decision. The language of R.C. 1343.03(C)(1) specifically requires the trial court to hold a hearing and further allows the trial court to award prejudgment interest if the trial court finds that the party required to pay the interest failed to make a good faith effort to settle *and* the party to whom the money would be paid did not fail to make a good faith effort to settle the matter. These statutory requirements were clarified in *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, where the Supreme Court of Ohio reiterated that "to award prejudgment interest, the court must find that the party required to pay the judgment failed to make a good faith effort to settle and, * * * the court must find that the party to whom the judgment is to be paid did not fail to make a good faith effort to settle the case." Id. at 658.

{¶15} In this matter, the trial court's journal entry states: "After consideration of all evidence and applicable law, [Appellant's] Motion for Prejudgment Interest is denied." Appellant assumes that the trial court denied prejudgment interest because the trial court found that Appellee made a good faith effort to settle. However, it is unclear whether the trial court based its denial of prejudgment interest on that basis. The trial court could have also denied prejudgment interest if it found that Appellant failed to make a good faith effort to settle the case. Thus, it is impossible to determine the basis upon which the trial court denied the award of prejudgment interest. Accordingly, I would remand this matter to the trial court and require the trial court to provide the basis for its decision.

APPEARANCES:

WILLIAM J. PRICE and PETER TRASKA, Attorneys at Law, for Appellant.

JOHN C. CUBAR and BRIAN T. WINCHESTER, Attorneys at Law, for Appellee.