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Expect the Worst:
Planning For And Securing An Award Of Prejudgment Interest Under R.C. 1343.03(C)

by Kathleen J. St. John

For many lawyers, the first serious thoughts about prejudgment interest occur only after a bell-ringer verdict in a hard-fought case.

Yet, to secure prejudgment interest in a tort action, the cautious lawyer should be thinking about it from the moment the case is signed-up.

This is so because the standard for granting prejudgment interest in a tort action requires you to expect the worst from the opposition: that they will fail to engage in good faith settlement efforts, while you yourself will not do so. And in establishing both entitlement to and amount of prejudgment interest, certain aspects of the statute and case law make advance planning advisable.

What follows are suggestions for dealing with some of the common obstacles in pursuing prejudgment interest under Ohio Revised Code Section 1343.03(C). But, first, a word about the governing standards.

A. The *Kalain* Standard.

Unlike contract actions, in which prejudgment interest is (for the most part) automatically awarded to the prevailing party,[1] in civil actions based on tortious conduct there is no such automatic right. Instead, to recover prejudgment interest in a tort action, the prevailing party must establish that the losing party "failed to make a good faith effort to settle the case" but that the prevailing party "did not fail to make a good faith effort to settle the case." R.C. 1343.03(C)(1). This statutory provision is designed to promote settlement efforts, "thereby conserving legal resources and promoting judicial economy."[2] It also "serves the... purpose of compensating a plaintiff for a defendant's use of money which rightfully belongs to the plaintiff."[3]

The standard for determining whether a party's settlement efforts evinced "good faith" was set forth by the Ohio Supreme Court three decades ago. In *Kalain v. Smith*,[4] the Court held that for parties to have made a good faith effort to settle, they must have done all of the following:

1. Fully cooperated in discovery proceedings;
2. Rationally evaluated their risks and potential liability;
3. Not unnecessarily delayed any of the proceedings; and,
4. Made a good faith monetary offer or responded in good faith to an offer from the opposing party.[5]

The Court in *Kalain* added a caveat that typically becomes the centerpiece of the defendant's opposition to an award of prejudgment interest. The caveat holds that "[i]f a party has a good faith objectively reasonable believe that he has no liability, he need not make a monetary settlement offer."[6]

This caveat, however, must be "strictly construed so as to carry out the purposes of R.C. 1343.03(C)."[7] In other words, the exception cannot be so broadly construed as to swallow

the rule. Moreover, a defendant may have failed to make a good faith effort to settle even though it has not acted in "bad faith." This point was clarified in *Moskovitz v. Mt. Sinai Med. Ctr.*, in which the Ohio Supreme Court expressly overruled language from an earlier decision that equated "a lack of good faith" under R.C. 1343.03(C) with "a dishonest purpose, conscious wrongdoing or ill will in the nature of fraud."[8]

The burden of establishing entitlement to prejudgment interest is on the moving party.[9] But whether a party did or did not engage in good faith settlement efforts is a discretionary decision for the trial judge that will only be reversed for an abuse of discretion.[10]

B. Rules For Pursuing Prejudgment Interest.

1. *Rule No.1: Pay attention to your own settlement efforts.*

When we, as plaintiffs' lawyers, think of good faith settlement efforts, we tend to focus on what the defense did wrong. While it may be true that obstinacy on the part of the defendant and its insurance company is the reason a settlement didn't happen, you still need to make sure your own efforts are sufficient, and, preferably, that they are documented.

Beware of appellate decisions finding plaintiffs' settlement efforts inadequate because they were not sufficiently "aggressive." This language surfaces in decisions as far back as the 1980s,[11] but is it justified? It does not appear to be consistent with either the statutory language or *Kalain*, as "good faith" and "aggression"[12] are hardly synonymous. Notably, however, the "aggressive settlement efforts" language has almost always appeared in decisions where the appellate court is *affirming* a trial court's discretionary decision denying prejudgment interest[13], and has rarely been a basis for *reversing* an award of prejudgment interest.[14] In that sense, this language should be seen as explaining the outcome of certain discretionary decisions as opposed to increasing the plaintiff's burden.[15]

The "aggressive settlement efforts" language, moreover, is inapposite as it disregards the delicate balance between the parties. The injured plaintiff has a built-in incentive to settle, as the reason for filing the lawsuit is to seek compensation for her injuries. But to appear over-eager to settle weakens the plaintiff's ability to command a fair deal. The defendant and his insurer are not similarly incentivized: it is in their interest to delay settlement to retain the use of the funds for as long as possible. Thus, to demand "aggressive" settlement efforts from the plaintiff will always tilt the balance in favor of the defense. This is why the *Kalain* test's focus on the objective reasonableness of the parties' risk assessment is the sounder way to achieve the statute's goals. For it places the parties on equal footing without giving an edge to the party who has no incentive to make the effort otherwise.

Still, in light of this language, it is best for the plaintiff to document her settlement efforts in correspondence to the defendant as early and often as possible. Although negotiations just prior to, or even during, trial have been recognized as probative of a party's good faith settlement efforts,[16] some courts have found last minute demands or counter-offers do not justify an award of prejudgment interest.[17]

2. *Rule No.2: Don't let the Kalain exception swallow the rule.*

In most prejudgment interest disputes, the battle focuses on the second and fourth *Kalain* factors and the *Kalain* caveat. Although each presents a distinct issue, they ultimately boil down to a single question: Was the defendant, who failed to make a serious offer (or an offer anywhere near the jury's award of damages), justified in not doing so by an objectively reasonable good faith belief that it had no liability?

The key phrase here is "objectively reasonable." But to imbue that phrase with meaning, it is necessary to look back at the second and fourth criteria. That is, the defendant cannot be said to have had an ***objectively reasonable*** good faith belief that it had no liability if it did not ***rationally evaluate*** its risks and potential liability[18] or tailor its monetary offers to that rational evaluation.[19]

Why do I say this? Think back to the *Moskovitz* clarification of the *Kalain* caveat. The *Kalain* caveat must be strictly construed to carry out the statutory goal of promoting settlement efforts. If the defense can sit pretty on its belief it will prevail at trial, without giving serious thought to its chances of losing or the size of the verdict should plaintiff win, then either the plaintiff will be forced to bargain against herself [20] and accept an unreasonably low settlement offer, or settlement efforts will grind to a halt thus defeating the statute's purpose.

This is the wisdom reflected in the Supreme Court's decision in *Galayda v. Lake Hosp. Systems, Inc.*[21] In *Galayda*, the Court rejected the argument that the *Kalain* caveat relieves the defense of its obligation to make an offer whenever summary judgment or a directed verdict for the plaintiff would not be warranted. The Court stated:

> We decline to impose summary judgment or directed verdict analytical criteria on prejudgment interest proceedings. Existence of a good faith, objectively reasonable belief of nonliability does not excuse a defendant from the remaining *Kalain* obligations[.]***

> A defendant may well have fallen short of the good faith requirement of R.C. 1343.03 even where a trial court would have been justified in overruling a motion for summary judgment prior to trial or a motion for directed verdict made during trial.[22]

In other words, a defendant does not have an objectively reasonable belief it has no liability simply because there are factual issues for the jury to determine. In an oft-repeated passage, the *Galayda* court concluded, "[a] trial court does not abuse its discretion in awarding prejudgment interest… when a defendant 'just says no' [to settlement] despite a plaintiff's presentation of credible… evidence that the defendant [was negligent]… when it is clear that the plaintiff has suffered injuries, and when the causation of those injuries is arguably attributable to the defendant's conduct."[23]

What, then, goes into a rational evaluation of a party's risks and potential liability? Here, a variation on the old Learned Hand formula comes into play.[24] The evaluation should include an assessment of

> both the likelihood of the event occurring, i.e., its probability, and its impact if it should happen, i.e. its magnitude. Events that have a low probability of occurring, yet will be accompanied by an impact of great magnitude if they do happen, should properly be treated differently than those where the probability and the magnitude of the event are both low.[25]

Put otherwise, the evaluation should take into account the strengths and weaknesses of both sides' evidence, and the "size of an award should a jury discount the defense's evidence."[26]

Applying these tests, courts have awarded prejudgment interest to the prevailing plaintiff where the defendant's attorney and its insurer believed they had a 50-60% chance of prevailing at trial[27]; where the defense counsel believed the defendant had only a 30% chance of losing[28]; and where the defendant's evaluation "considered only the probability of liability and not its magnitude."[29]

Moreover, in considering the "magnitude of the event" – that is, the size of the award should the plaintiff prevail – the court may consider the disparity between the defendant's last offer and the jury's verdict (although this factor, by itself, is not dispositive).[30]

In short, strict construction of the *Kalain* caveat shifts the emphasis back to the four *Kalain* factors that are designed to promote good faith settlement efforts. Although the defendant is not ***required*** to make an offer if it has an objectively reasonable good faith belief that it has no liability, this caveat is not a "get out of jail free" card. The defendant and its insurer must treat settlement negotiations seriously, taking into account the real risk of the plaintiff prevailing. The consequences of not doing so are, and properly should be, an award of prejudgment interest.

3. Rule No.3: Beware the "future damages" trap.

Once an award of prejudgment interest is secured, there are still potential traps to be dealt with that early planning can avoid.

The first of these concerns the statutory provision that "[n]o court shall award interest under division (C)(1) of this section on future damages… that are found by the trier of fact." R.C. 1343.03(C)(2). This provision, which became effective June 2, 2004, was added to the statute during a wave of tort reform.[31] Prior to this amendment, prejudgment interest awarded to a tort plaintiff was calculated on the full amount of compensatory damages.

The future damages provision creates problems when the jury's award does not distinguish between past and future damages. This raises the question: who has the burden of requesting jury interrogatories segregating past and future damages? And, if none are requested how does this affect the prejudgment interest award?

The only Ohio appellate decision to address this precise issue places the burden of requesting such jury interrogatories squarely on the defendants. In *Luri v. Republic Services, Inc.*,[32] the trial court awarded prejudgment interest to the prevailing plaintiff on the full amount of compensatory damages. On appeal, the defendant contended this award was improper because the jury verdict included amounts for the plaintiff's lost future income.[33] In rejecting this argument, the Eighth District held that, by not requesting a jury interrogatory separating past and future damages, the defendant effectively waived its argument. The court stated:

> Appellants did not request that the jury parse the amount of compensatory damages into any categories. As with the application of the provisions of Ohio's Tort Reform statutes, appellants invited this error by submitting instructions and interrogatories that did not separate out future damages. Appellants' error will not induce this court 'to speculate concerning the specifics of the jury's award.'*** This assignment of error is overruled.[34]

Although the Eighth District's decision in *Luri* was reversed by the Ohio Supreme Court, the reversal was based solely on the trial court's failure to bifurcate the punitive damages claim.[35]

(This issue had recently been settled in *Havel v. Villa St. Joseph*[36] that was decided after the Eighth District's decision in *Luri*). Thus, the aspect of *Luri* dealing with who has the burden of seeking jury interrogatories on future damages remains the only Ohio appellate authority on this issue.

The Eighth District's decision in *Luri* is consistent with other Ohio cases holding that the proponent of an issue to be tested by a jury interrogatory bears the burden of requesting the interrogatory.[37] Chief among this line of authority is *Buchman v. Wayne Trace Loc. Sch. Dist.*[38] In *Buchman*, the jury returned a verdict in favor of the injured plaintiff against the defendant political subdivision in an amount in excess of five million dollars. In post-trial proceedings, the trial court, pursuant to the political subdivision set-off statute, applied set-offs against the verdict for various collateral benefits received or anticipated to be received by the plaintiff. The Supreme Court, however, reversed many of these set-offs, reasoning:

> A political subdivision is entitled to an offset for collateral benefits only to the extent that such benefits are actually included in the jury's award, and is entitled to an offset for future collateral benefits only to the extent that they can be determined with a reasonable degree of certainty. Thus, it is the defendant's burden to prove the extent to which it is entitled to an offset under R.C. 2744.05(B).[39]

The Court further explained:

> Although R.C. 2744.05(B) does not require the submission of jury interrogatories to quantify the categories of damages that make up the general verdict, as a practical matter, such interrogatories are the most efficient and effective method, if not the only method, by which to determine whether the collateral benefits to be deducted are within the damages actually found by the jury.*** ***To the extent that the failure to propose such interrogatories caused the trial court to speculate as to the amount of benefits to be deducted from the jury's verdict, [the defendant] simply failed in its burden of proof.***[40]

In prejudgment interest briefing, defendants tend to argue that the *Buchman* analysis requires the plaintiff, as the party seeking prejudgment interest, to request jury interrogatories on future damages. This argument misses the mark as it is the defendant who benefits from the future damages provision. Prior to the 2004 amendment to R.C. 1343.03(C), the plaintiff was entitled to prejudgment interest on the entire award. The future damages provision is designed to minimize the amount of interest the plaintiff can recover. As such, the defendant, as the beneficiary of this provision, as well as the proponent of the argument that the jury's award contains future damages, must be the one to request the jury interrogatory, failing which the argument is waived.

Nevertheless, at least one Ohio trial court refused to award prejudgment interest because the plaintiff failed to request a jury interrogatory segregating past and future damages.[41] Moreover, in the absence of such a jury interrogatory, courts have sometimes dealt with this issue by making their own determinations as to what portion of the jury's award is attributable to future damages.[42]

For these reasons, the plaintiff's lawyer who anticipates seeking prejudgment interest if successful at trial should consider requesting a jury interrogatory segregating past and future damages. Although the burden of seeking such an interrogatory *should* be on the defendant, by taking the initiative to seek the interrogatory herself the plaintiff's lawyer avoids unnecessary briefing and the potential of an adverse ruling.

4. *Rule No. 4: Beware the "notice" trap.*

Prior to the 2004 amendment, R.C. 1343.03(C) provided that prejudgment interest in a tort action was to be computed "from the date the cause of action accrued to the date on which the money is paid[.]" Under this former version of the statute, interest began to accrue "when the event giving rise to plaintiff's right to the wrongdoer's money occurred."[43]

The 2004 amendment shortened the accrual time to the earlier of two dates: either the date the defendant and its insurer were first given notice of the plaintiff's claim, or the date the complaint was first filed.[44]

The potential trap here occurs due to the wording of the "notice" provision. Under this provision, prejudgment interest begins to run

> [f]rom the date on which the party to whom the money is paid gave the first notice described in division (C)(1)(c)(i) of this section to the date on which the judgment, order, or decree was rendered. The period described in division (C)(1)(c)(i) of this section shall apply only if the party to whom the money is to be paid*** ***gave to the party required to pay and to any identified insurer,*** as nearly simultaneously as practicable, ***written notice in person or by certified mail that the cause of action had accrued.***[45]

As of this writing, the curious wording of the notice provision has not been analyzed by any Ohio appellate court.

The provision is obviously intended to ensure that the defendant and its insurer receive actual notice. But does the foregoing language mean the written notice must be served "in person" or by "certified mail"? This would seem odd, particularly when it comes to the defendant's insurer. When was the last time you served an insurance company "in person"? Moreover, in cases where it is undisputed that the insurer received actual written notice, but not by certified mail, is the plaintiff deprived of the earlier accrual date simply because the notice was not delivered "in person" or "by certified mail"?

One possible interpretation of this language is that a comma was omitted between the words "notice" and "in person", making other forms of written notice permissible, such as ordinary mail, email, or fax. Alternatively, the notice provision is ambiguous, making it appropriate to examine the legislature's intent.[46] Moreover, any attempt to construe the statutory language "strictly" should be subordinated to the "rule of reasonable, sensible, and fair construction"[47], which imposes on the court "a duty to construe [the] statute[] in such a manner as to avoid ridiculous or absurd results."[48]

In other words, if the defendant and its insurer admittedly received actual written notice long before the complaint was filed, the only reasonable construction of the legislature's intent is that prejudgment interest should be computed from the date notice was actually received – even if it was served by means other than hand-delivery or certified mail.

Yet, because the meaning of this notice provision remains unresolved, it might be wise to send one's letter of representation by certified mail. Clearly, this is a costly option, particularly in a high volume practice. And choosing to serve by certified mail solely to preserve the earliest possible accrual date for prejudgment interest may constitute overkill in the vast majority of cases. But, particularly in cases that are not filed soon after being signed-up, it might behoove the cautious attorney to serve notice on the defendant and its insurer by certified mail. Depending on the size of the verdict, it could mean a substantial difference in the value of the prejudgment interest award.

5. *Rule No.5: Take time to calculate the amount of prejudgment interest.*

Litigating a motion for prejudgment interest can be time and labor intensive. Discovery typically includes both written discovery and depositions. The seminal decision of *Moskovitz v. Mt. Sinai Med. Ctr.*[49] permits the plaintiff to discover the insurer's entire claims file, except for "those attorney-client communications that go directly to the theory of the defense."[50] Typically, depositions are taken of the insurer's decision-making claims personnel and both sides' attorneys. Expert testimony might also be used. The court is required to set an evidentiary hearing on the motion[51], which is typically preceded or followed by briefing of the issues.

In all this activity, it is easy to overlook the need to compute the amount of prejudgment interest, should it be awarded. The formula is relatively simple to apply once you know your time parameters. As noted previously, prejudgment interest is computed from either the date of first notice or the date the complaint was filed until the "date on which the judgment, order, or decree was rendered."[52] In cases where the court defers entering judgment on the verdict until after it rules on the prejudgment interest motion, the amount cannot be calculated until after that judgment is entered. But even in this instance, it is helpful to provide the court with the formula or to request to file a supplemental brief calculating interest after the court rules on the motion but before final judgment is entered.

Interest is calculated for each pertinent year at the annual rate determined by the Ohio Tax Commissioner.[53] The formula requires one to know: (1) the date prejudgment interest begins to run; (2) the date judgment is entered on the verdict; (3) the principal amount on which the interest accrues; and (4) the interest rate for each year interest accrues. Once these are known, the following calculation is made for each applicable year:

(*Principal*) x (*interest rate*) x (*number of days interest accrued that year*) ÷ 365 = *interest for that year* [54]

The amounts for each year are then added to arrive at the total award of prejudgment interest. Notably, prejudgment interest is simple interest, not compounded.[55]

C. Conclusion

In addition to encouraging settlement efforts, prejudgment interest in tort actions is designed to compensate the plaintiff for the lost use of money to which she is entitled by the defendants' wrongdoing.[56] But to achieve an award of prejudgment interest in the greatest amount possible, much effort and advance planning are involved. All areas of litigation require us to embrace the adversarial nature of our role, but prejudgment interest in the tort context forces us to expect the worst of our adversaries in order to protect our clients' best interests. ■

End Notes

1. Prejudgment interest in contract actions is governed by R.C. 1343.03(A). *Textiles, Inc. v. Design Wise, Inc.*, 12th Dist. Madison Nos. CA2009-08-015, CA2009-08-018, 2010-Ohio-1524, ¶49. "'Once a plaintiff receives

judgment on a contract claim, the trial court has no discretion but to award prejudgment interest under R.C. 1343.03(A).'" *Id., quoting Zeck v. Sokol*, 9th Dist. Medina No. 07CA0030-M, 2008-Ohio-727, ¶44. The trial court, however, has discretion in contract cases to determine when the interest becomes due and payable. *Textiles, Inc.*, at ¶50. And if the prevailing party in a contract action fails to present evidence to show when the right to interest accrued, the court may decline to award prejudgment interest. *See, e.g., Nelson Jewellery Arts Co. v. Fein Designs Co., LLC*, 9th Dist. Summit No. 23655, 2007-Ohio-7042, ¶52.

2. *Peyko v. Frederick*, 25 Ohio St.3d 167, 495 N.E.2d 918 (1986).

3. *Condello v. Raiffe*, 8th Dist. Cuyahoga Nos. 83076, 83556, 2004-Ohio-2554, ¶47, citing *Musica v. Massillon Community Hosp.*, 69 Ohio St.3d 673, 676, 635 N.E.2d 358 (1994).

4. 25 Ohio St.3d 157 (1986).

5. *Kalain*, at paragraph one of the syllabus. To have satisfied its good faith settlement efforts obligation, a party must satisfy all four of the *Kalain* requirements. *Oyer v. Adler*, 4th Dist. Ross No. 13CA3405, 2015-Ohio-1722, ¶39. "[N]oncompliance with even one factor indicates that the party has failed to make a good faith effort to settle." *Id.*

6. *Kalain*, at paragraph one of the syllabus.

7. *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 659, 635 N.E.2d 331 (1994).

8. *Id.*, 69 Ohio St.3d at 659, expressly modifying the law stated in *Villella v. Waikem Motors, Inc.*, 45 Ohio St.3d 36, 42 (1989). *Villella* had found that, for purposes of R.C. 1343.03(C), "a lack of good faith means more than poor judgment or negligence; rather, it imports a dishonest purpose, conscious wrongdoing or ill will in the nature of fraud." *Villella* at 42. The Court in *Moskovitz* stated: "We now find that statement, as it relates to the lack of good faith effort to settle, does not represent the law as set forth in *Kalain*. Therefore, we now specifically modify the law stated in *Villella* by disapproving the above-quoted language. We hold that in prejudgment interest determinations... the phrase 'failed to make a good faith effort to settle' does not mean the same as 'bad faith.'" *Moskovitz*, at 659.

9. *Moskovitz*, at 659.

10. *Id.* at 658; *see also, Clark v. Grant Med. Ctr.*, 10th Dist. Franklin No. 14AP-833, 2015-Ohio-4958, ¶57.

11. The "aggressive settlement efforts" language originated in *Black v. Bell*, 20 Ohio App.3d 84, 88, 484 N.E.2d 739(8th Dist. 1984), a pre-*Kalain* decision, with one judge dissenting. In that R.C. 1343.03(C) had recently been amended to allow recovery for prejudgment interest on tort claims, *id.* at 87, *Black* represents an early effort to interpret the good faith standard. However, in light of the Supreme Court's decision in *Kalain*, the "aggressive settlement efforts" verbiage should not be seen as controlling the analysis.

12. *Webster's II New Riverside University Dictionary* (1988) defines "aggression" as: "1. Initiation of forceful, usu. hostile action against another: ATTACK. 2. The practice of attacking or encroaching, esp. in violation of territorial rights: INVASION. 3. *Psycho-anal.* Hostile action or behavior."

13. *See, e.g., Foreman v. Wright*, 8th Dist. Cuyahoga No. 82067, 2003-Ohio-5819, ¶15; *Pierce v. Pridemark Homes,Inc.*, 8th Dist. Cuyahoga No. 84841, 2005-Ohio-1191, ¶24; *Miller v. VanFleet*, 7th Dist. Mahoning No. 03 MA 200, 2004-Ohio-7214, ¶17.

14. In *Sindel v. Toledo Edison Co.*, 87 Ohio App.3d 525, 622 N.E.2d 706 (3d Dist. 1993), the court reversed an award of prejudgment interest because the plaintiffs' "sole offer of settlement one week prior to trial does not demonstrate an aggressive effort at prejudgment settlement." *Id.* at 533. This is one of the rare instances where a court *reversed* an award of prejudgment interest due to a plaintiff's lack of aggressive settlement efforts.

15. Indeed, the aggressive settlement efforts language is absent from all Ohio Supreme Court decisions and from numerous appellate decisions affirming awards of prejudgment interest to plaintiffs. *See, e.g., Galayda v. Lake Hosp. Sys., Inc.*, 71 Ohio St.3d 421, 644 N.E.2d 298 (1994); *Galmish v. Cicchini*, 90 Ohio St.3d 22, 734 N.E.2d 782 (2000); *Burton v. Slusher*, 7th Dist. Mahoning No. 07-MA-143, 2008-Ohio-4812; *Andre v. Case Design, Inc.*, 154 Ohio App.3d 323, 2003-Ohio-4960 (1st Dist.); *Clark v. Grant Med. Ctr.*, 10th Dist. Franklin No. 14AP-833, 2015-Ohio-4958; *Weaver v. Kraft,* 5th Dist. Delaware Nos. 15CAE060046, 15CAE090073, 2016-Ohio-3300; *Bach v. DiCenzo*, 8th Dist. Cuyahoga No. 84396, 2005-Ohio-2611; *Wagner v. Marietta Area Health Care*, 4th Dist. Washington No. 00CA17, 2001 Ohio App. LEXIS 1362, 2001-Ohio-2424; *Ross v. St. Elizabeth Health Ctr.*, 181 Ohio App.3d 710, 2009-Ohio-1506 (7th Dist.); *Bush v. W.C. Cardinal Co.,* 7th Dist. Harrison Nos. 02 539 CA, 02 HA 546, 2003-Ohio-5443; *Strasel v. Seven Hills OB-GYN Associates, Inc.,* 170 Ohio App.3d 98, 2007-Ohio-171 (1st Dist.).

16. *See, e.g., Burton, supra*, 2008-Ohio-4812, ¶¶98-99 (affirming prejudgment interest award where negotiations began about one month prior to trial and included discussions during trial); *Andre v. Case Design, Inc.*, 154 Ohio App.3d 323, 2003-Ohio-4960, 797 N.E.2d 132 (1st Dist.) (holding that the trial court abused its discretion in overruling plaintiff' motion for prejudgment interest where negotiations began 17 months prior to trial, and continued through the second day of trial); *Pruszynski v. Reeves*, 11th Dist. Geauga No. 2005-G-2612, 2006-Ohio-5190, *rev'd on other grounds*, 117 Ohio St.3d 92, 2008-Ohio-510, 881 N.E.2d 1230 (granting prejudgment interest where negotiations began at the outset of the case and included discussions on the day of trial).

17. *Sindel, supra*, 87 Ohio App.3d at 533.

18. *See, e.g., Maxwell v. The Columbus Maennerchor*, 10th Dist. Franklin No. 16AP-41, 2016-Ohio-7133, ¶15 ("We have previously found in the analysis of awarding pre-judgment interest that determining whether a defendant has a good faith, objectively reasonable belief that they have no liability necessitates reviewing whether the defendant rationally evaluated his risks and potential liability.*** 'A defendant who does not rationally evaluate his risks and potential liability cannot hold a good faith, objectively reasonable belief of no liability. Thus, our consideration of the two requirements merges into one analysis.'"), *quoting Whitmer v. Zochowski,* 10th Dist. Franklin No. 15AP-52, 2016-Ohio-4764, ¶118, 69 N.E.3d 17.

19. *See, e.g., Andre v. Case Design, Inc.*, 154 Ohio App.3d 323, 2003-Ohio-4960, ¶18, 797 N.E.2d 132 ("The question of whether a good-faith effort to settle a case has been made depends on whether the amount of the offer was based on an objectively reasonable belief.*** A substantial six-figure offer is not a rational evaluation if it fails to take into account the strengths and weaknesses of the evidence in assessing the size of the award should a jury discount the defense's evidence.").

20. Plaintiffs are not required to negotiate against themselves by unilaterally reducing their offer to settle. *Galmish v. Cicchini,* 90 Ohio St.3d 22, 34-35, 734 N.E.2d 782 (2000), *citing Galayda v. Lake Hosp. Sys., Inc.*, 71 Ohio St.3d 421, 429, 644 N.E.2d 298, 304 (1994).

21. 71 Ohio St.3d 421, 644 N.E.2d 298 (1994).

22. *Galayda*, 71 Ohio St.3d at 429; *see also, Conte v. General Housewares Corp.*, 215 F.3d 628, 634-635 (6th Cir. 2000) (no abuse of discretion in awarding prejudgment interest under Ohio law even though factual issues were strongly disputed).

23. *Id.* at 428-429; *see also, Whitmer v. Zochowski*, 10th Dist. Franklin Nos. 15AP-52, 15AP-60, 2016-Ohio-4764, ¶122; *Wagner v. Marietta Area Health Care,* 4th Dist.

Washington No. 00CA17, 2001 Ohio App. LEXIS 1362, *15; *Clark v. Grant Med. Ctr.*, 10th Dist. Franklin No. 14AP-833, 2015-Ohio-4958, ¶61, 47 N.E.3d 526; *Strasel v. Seven Hills Ob-Gyn Assocs.,* 170 Ohio App.3d 98, 2007-Ohio-171, ¶36.

24. Learned Hand's classic formula for balancing the probability a risk will occur, the gravity of the harm if it does, and the burden of taking precautions against it was set forth in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

25. *Wagner, supra*, 2001 Ohio App. LEXIS 1362, *16-17.

26. *Andre, supra*, 2003-Ohio-4960, ¶18.

27. *Bach v. Dicenzo*, 8th Dist. Cuyahoga No. 84396, 2005-Ohio-2611, ¶¶54-55.

28. *Clark, supra,* 2015-Ohio-4958, ¶62.

29. *Wagner, supra*, at *16-17.

30. *See, e.g., Ross v. St. Elizabeth Health Ctr.*, 181 Ohio App.3d 710, 2009-Ohio-1506, ¶64; *Andre, supra*, ¶15; *Strasel, supra*, ¶135.

31. R.C. 1343.03(C)(2) was added to the statute by virtue of 2003 Ohio HB 212, enacted March 3, 2004, with an effective date of June 2, 2004.

32. 193 Ohio App.3d 682, 2011-Ohio-2389, 953 N.E.2d 859 (8th Dist.), *rev'd and remanded on other grounds at* 132 Ohio St.3d 316, 2012-Ohio-2914, 971 N.E.2d 944.

33. *Luri,* 2011-Ohio-2389, at ¶39.

34. *Id.* at ¶42.

35. *Luri v. Republic Services, Inc.*, 132 Ohio St.3d 316, 2012-Ohio-2914, 971 N.E.2d 944.

36. 131 Ohio St.3d 235, 2012-Ohio-552, 963 N.E.2d 1270.

37. *See, e.g., Kronenberg v. Whale*, 21 Ohio App. 322, 336-337 (1925) (the burden was on "counsel for the defendant to submit interrogatories to the jury [on the matter it was complaining of], and, in the absence of such interrogatories to the jury,... the error complained of was not prejudicial... and no reversal could be based on that ground"); *Antonoff v. Allstate Ins. Co.*, 7th Dist. Mahoning No. 03MA105, 2004-Ohio-5681, ¶11 (rejecting Allstate's argument that the damages awarded against it were not supported by the evidence because "Allstate never requested jury interrogatories explaining how the damages which [the jury] awarded were divided between the physical and mental injury claims"); *Kritzwiser v. Bonetzky*, 3d Dist. Logan No. 8-07-24, 2008-Ohio-4952 (defendant not entitled to statutory set-off for liability of non-parties because he "failed to submit proposed jury... interrogatories to the trial court regarding liability of others").

38. 73 Ohio St.3d 260, 652 N.E.2d 952 (1995).

39. *Buchman*, 73 Ohio St.3d at 270.

40. *Id.* (emphasis added).

41. *Cobb v. Shipman*, Trumbull Cty. C.P. No. 2006 CV 2992 (Nov. 12, 2003).

42. *See, e.g., Chapman v. Milford Towing & Serv.*, 499 Fed. Appx. 437, 2012 U.S. App. LEXIS 18897, 2012 WL 3871868 (6th Cir. Sept. 7, 2012) (affirming trial court's award of prejudgment interest on economic damages alone where, in the absence of jury interrogatories, the trial court determined the economic damages awarded were past damages but the noneconomic damages were future damages). The *Chapman* court agreed with the plaintiff, however, that, by not submitting jury interrogatories, the defendant waived its contention that plaintiff was not entitled to any award of prejudgment interest. *See id.*, 2012 U.S. App. LEXIS 18897 at **30-31.

43. *Fairchild v. Curtis*, 5th Dist. Guernsey Nos. 95 CA 16, 95 CA 17, 95 CA 23, 1996 Ohio App. LEXIS 2919, *17, *quoting Musisca v. Massillon Community Hosp.*, 69 Ohio St.3d 673, 676, 635 N.E.2d 358 (1994).

44. R.C. 1343.03(C)(1)(c)(i-ii). However, if the defendant admitted liability in a pleading or engaged in conduct with the deliberate purpose of causing harm to the prevailing plaintiff, prejudgment interest begins to run the date the cause of action accrued. R.C. 1343.03(C)(1)(a)-(b).

45. R.C. 1343.03(C)(1)(c)(i)(emphasis added).

46. *Tomasik v. Tomasik*, 111 Ohio St.3d 481, 2006-Ohio-6109, ¶15 (if statutory language is ambiguous, court must construe it to determine the legislative intent).

47. *State v. Brown*, 170 N.E.2d 854, 1960 Ohio App. LEXIS 812, *7-8 (8th Dist. 1960).

48. *Soplata v. Endres*, 11th Dist. Geauga No. 2012-G-3116, 2013-Ohio-4424, ¶22.

49. 69 Ohio St.3d 638, 635 N.E.2d 331 (1994).

50. *Id.*, 69 Ohio St.3d at 662.

51. *Pruszynski v. Reeves*, 117 Ohio St.3d 92, 2008-Ohio-510, 881 N.E.2d 1230, paragraph one of the syllabus.

52. R.C. 1343.03(C)(1)(c)(i-ii).

53. *See* R.C. 5703.47.

54. The interest rates and formula can be found at https://www.tax.ohio.gov/ohio_individual/individual/interest_rates.aspx (last visited April 10, 2018).

55. *Mayer v. Medancic*, 124 Ohio St.3d 101, 2009-Ohio-6190, ¶14.

56. *Condello v. Raiffe*, 8th Dist. Cuyahoga Nos. 83076, 83556, 2004-Ohio-2554, ¶47 (citing *Musica, supra*, 69 Ohio St.3d at 676).

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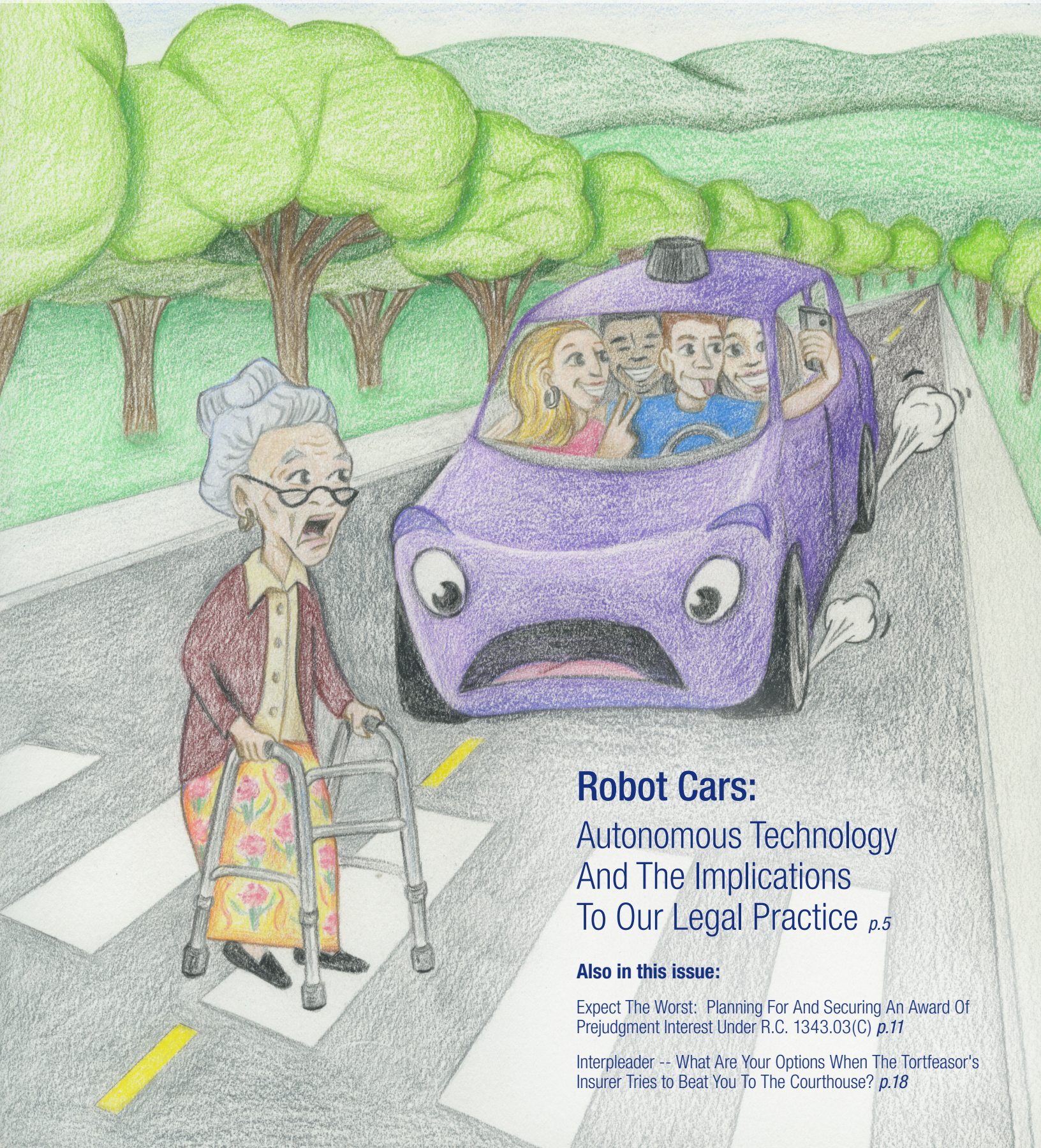

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