Court of Appeals of Ohio, Fourth District, Scioto County.
Roy L. GABLE, Administrator, Plaintiff-Appellee, Cross-Appellant,
v.
CITY OF PORTSMOUTH, et al., Defendants-Appellants, Cross-Appellees.
No. 1841.
Jan. 17, 1991.

Richard T. Schisler, City Solicitor, Portsmouth, for appellant.
Keith M. Karr, Columbus, Marvin W. Masters, Charleston, W.Va., for appellee.

OPINION & JUDGMENT ENTRY

ABELE, Presiding Judge:
***1** This is an appeal from a $55,000.00 Scioto County Common Pleas Court judgment in a wrongful death action.
On March 13, 1982, Kelly Ann Gable Foster was killed in an accident involving a motorcycle on which she was a passenger. At the time of the accident, the motorcycle, which was being driven by Paul Stanley, was being pursued by Officer David Bennett, of the Portsmouth Police Department.
On March 6, 1984, appellee Roy Gable, administrator of Foster's estate, filed a wrongful death action. On March 18, 1987, a jury held David Bennett was negligent in the pursuit of Stanley and that the negligence was the proximate cause of Foster's death. The jury found liability on the part of the City of Portsmouth, the Portsmouth Police Department and David Bennett. The jury awarded appellee $55,000.00 in damages.
On May 11, 1987, Appellant City of Portsmouth filed a motion for a new trial pursuant to Civ.R. 59. On May 26, 1987, appellant filed a notice of appeal. On June 3, 1987, appellee filed a notice of cross-appeal on the issue of prejudgment interest. In *Gable v. Portsmouth* (July 24, 1989), Scioto App. No. 1686, unreported, we dismissed appellant's notice of appeal and appellee's notice of cross-appeal because the court had not yet ruled on the motion for a new trial.
On August 17, 1989, the court overruled appellant's motion for a new trial. Appellant again filed a notice of appeal and appellee filed a notice of cross-appeal.
We reverse in part.
ASSIGNMENT OF ERROR I
"THE COURT ERRED IN ADMITTING INTO EVIDENCE EXHIBIT # 29, WHICH WAS A PHOTO ALBUM DEPICTING THE LIFE OF THE DECEDENT."
ASSIGNMENT OF ERROR II
"THE COURT ERRED IN ADMITTING INTO EVIDENCE EXHIBIT # 9, WHICH WAS A COPY OF A PAGE FROM A CLASS MEMORY BOOK WHICH WAS WRITTEN BY THE DECEDENT."
During the presentation of appellee's case, the father of the decedent testified concerning a photo album which contained photographs and newspaper articles about his daughter. One of the decedent's high school teachers testified concerning a page from a class memory book on which the decedent had written the teacher a personal note. Both exhibits were admitted into evidence over appellant's objection.
Appellant contends both exhibits had limited probative value and were admitted solely to appeal to the sympathies of the jury. Appellant contends the admission of the exhibits constituted prejudicial error and warrants reversal. We disagree.
In *O'Brien v. Angley* (1980), 63 Ohio St.2d 159, the court stated at 163:
"... When the trial court determines that certain evidence will be admitted or excluded from trial, it is well established that the order or ruling of the court will not be reversed unless there has been a clear and prejudicial abuse of discretion."
In *Sandusky Properties v. Aveni* (1984), 15 Ohio St.3d 273, the court stated at 275:
" * * * the term "abuse of discretion" has been defined by this court as a decision which is "arbitrary, unreasonable, or unconscionable." * * * "

We have reviewed the record and do not find the court's decision to admit the two exhibits constituted an abuse of the court's discretion. Although we agree with appellant that both exhibits had limited probative value, we find no evidence that the jury's verdict was a result of passion or prejudice. The record contains sufficient evidence without these two exhibits to support the jury's verdict. Appellant's first and second assignments of error are overruled.

***2** Although not separately briefed by the parties, we have reviewed the record with regard to the issues raised by appellant's Rule 59 motion. In addition to the evidentiary grounds raised in the two previous assignments of error, appellant alleged in his motion: 1.) the court caused the jury to feel obligated to "hurriedly reach a verdict;" and 2.) appellant has newly discovered evidence in the form of testimony from Alan Lewis whose whereabouts could not have been determined prior to trial.

In *Klever v. Reid Bros Express, Inc.* (1951), 154 Ohio St. 491, the court stated at paragraph two the syllabus:

"The term, "abuse of discretion," as it relates to an order granting a motion for new trial, connotes more than an error of law or judgment; it implies an unreasonable, arbitrary or unconscionable attitude on the part of the court in granting such motion."

After a review of the record, we do not find the court abused its discretion in denying appellant's motion for a new trial. The record does not support the granting of a new trial on any of the grounds raised by appellant.

CROSS-APPELLANT'S ASSIGNMENT OF ERROR I

"THE TRIAL COURT COMMITTED PREJUDICIAL ERROR WHEN IT DENIED PLAINTIFF-APPELLEE, CROSS-APPELLANT AN ORAL HEARING TO PRESENT EVIDENCE IN SUPPORT OF PLAINTIFF'S MOTION FOR PRE-JUDGMENT INTEREST."

Subsequent to the trial, cross-appellant moved for pre-judgment interest and requested an oral hearing on the motion. The court denied both the request for an oral hearing and the motion.

R.C. 1343.03(C) states:

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

In his motion for pre-judgment interest, cross-appellant claimed cross-appellee failed to make a good faith effort to settle the case. In *King v. Mohre* (1986), 32 Ohio App.3d 56, the court stated at 57, in discussing R.C. 1343.03(C):

"In order to prevail on a motion for pre-judgment interest, the moving party has the burden to prove that it did make a good faith effort to settle and that the party who is to pay the money failed to make a good faith effort. *Mills v. Dayton* (1985), 21 Ohio App.3d 208, 21 OBR 222, 486 N.E.2d 1209. The settlement efforts of the parties involve a consideration of factual matters which are not normally the subject of the trial of the underlying cause of action in tort. Thus, the legislature required that a hearing be conducted, subsequent to the trial verdict, at which time the court must determine the factual issues as to the bona fides of the respective efforts of the parties to settle the case."

***3** See, also, *Cotterman v. Cleveland Elec. Illum. Co.* (1987), 34 Ohio St.3d 48.

We believe cross-appellant's allegations that cross-appellee would not attempt to settle the case and repeatedly failed to comply with discovery orders were sufficient to require the court to conduct a hearing concerning these allegations. The court's failure to conduct a hearing was an abuse of the court's discretion. Cross-Appellant's first assignment of error is sustained.

CROSS-APPELLANT'S SECOND ASSIGNMENT OF ERROR II

"THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY FAILING TO ALLOW PRE-JUDGMENT INTEREST PURSUANT TO AND IN ACCORDANCE WITH OHIO LAW."

As discussed in the previous assignment of error, we believe the court must conduct a hearing to determine whether pre-judgment interest is appropriate. We will not, however, order that pre-judgment interest be paid without benefit of such a hearing. Rather, we remand the case for the court to conduct the hearing. Cross-Appellant's second assignment of error is overruled.
JUDGMENT AFFIRMED IN PART & REVERSED IN PART. CAUSE REMANDED FOR FURTHER PROCEEDINGS.

GREY and HARSHA, JJ., concur with attached concurring opinions.

HARSHA, Judge, concurring:
I concur in the judgment and opinion of the principal opinion except for that portion which considers appellant's motion for a new trial.

GREY, Judge, concurring:
I concur in the overruling of the City of Portsmouth's assignment of error and in the affirmance of the judgment of the court below.
I also concur in the sustaining of the cross assignment of error and remanding this case for a hearing on the issue of prejudgment interest. However, I wish to add a comment on the issue of the necessity for a hearing on a motion for prejudgment interest.
We must hold that a hearing is always required on a motion for prejudgment interest. The language of R.C. 1343.03(C) says that a judge must reach a determination at a hearing on the issue. In *Cotterman, supra,* the Supreme Court held, at page 50, "On its face, R.C. 1343.03(C) creates a special statutory proceeding, i.e. a post-trial hearing."
In light of the language of the statute and the holding in *Cotterman, supra,* a hearing on a motion for prejudgment interest is mandatory.
There are cases where the trial judge knows the issue of liability was a close one and the defendant's refusal to settle was made in good faith. Conducting a hearing on the issue of good faith may be nothing more than a pro forma ritual. Nonetheless, it is mandatory, so I concur in remanding this case for hearing on the issue of prejudgment interest.
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Not Reported in N.E.2d, 1991 WL 13796 (Ohio App. 4 Dist.)
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