

IN THE SUPREME COURT OF OHIO

ANDREA BARNES, EXEC.,

Plaintiff-Appellee,

-vs-

UNIVERSITY HOSPITALS
OF CLEVELAND, et al.

Defendants-Appellants.

: On Appeal from the Cuyahoga County Court
: of Appeals, Eighth Appellate District

07 - 0140

: Court of Appeals Case No. 87247,
: Consolidated with Case Nos. 87285, 87710,
: 87903, and 87946

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANTS MEDLINK OF OHIO AND THE MEDLINK GROUP, INC.

J. Stephen Teetor (0023355)

E-mail: jst@isaacbrant.com

James M. Roper (0037786)

(COUNSEL OF RECORD)

E-mail: jmr@isaacbrant.com

Jessica K. Philemond (0076761)

E-mail: jkp@isaacbrant.com

ISAAC, BRANT, LEDMAN & TEETOR, LLP

250 East Broad Street, Suite 900

Columbus, Ohio 43215-3742

Telephone: (614) 221-2121

Facsimile: (614) 365-9516

Attorneys for Defendants-Appellants

Medlink of Ohio and The Medlink Group, Inc.

Michael F. Becker, Esq.

BECKER & MISHKIND, CO. LPA

134 Middle Avenue

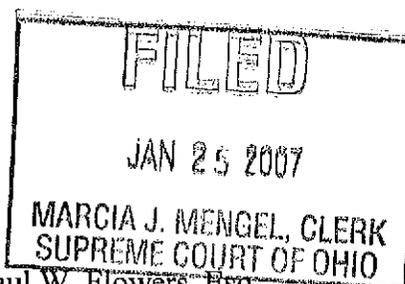
Elyria, Ohio 44035

Telephone: (440) 323-7070

Facsimile: (440) 323-1879

Attorney for Plaintiff-Appellee

Andrea Barnes, Executrix



Paul W. Flowers, Esq.

PAUL W. FLOWERS CO., L.P.A.

Terminal Tower, 35th Floor

50 Public Square

Cleveland, Ohio 44113

Telephone: (216) 344-9393

Facsimile: (216) 344-9395

Attorney for Plaintiff-Appellee

Andrea Barnes, Executrix

W. Craig Bashein (0034591)

(COUNSEL OF RECORD)

BASHEIN & BASHEIN

50 Public Square, 35th Floor

Cleveland, Ohio 44113

Telephone: (216) 771-3239

Facsimile: (216) 781-5876

Attorney for Plaintiff-Appellee

Andrea Barnes, Executrix

Steven G. Janik (0021934)
(COUNSEL OF RECORD)
Andrew J. Dorman (0063410)
JANIK & DORMAN, LLP
9200 South Hills Blvd., Suite 300
Cleveland, Ohio 44147-3521
Telephone: (440) 838-7600
Facsimile: (440) 838-7601
*Attorneys for Intervenor-Appellant Lexington
Insurance Company in Appeal Case No. 87710*

Lori S. Nugent
Maya Hoffman
COZEN O'CONNOR
222 South Riverside Plaza, Suite 1500
Chicago, Illinois 60606
Telephone: (877) 992-6036
Facsimile: (312) 382-8910
*Attorneys for Intervenor-Appellant Lexington
Insurance Company in Appeal Case No. 87710*

TABLE OF CONTENTS

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST 1

STATEMENT OF THE CASE 5

STATEMENT OF THE FACTS 7

ARGUMENT 9

PROPOSITION OF LAW NO. 1: In reviewing an award of punitive damages, the trial court must independently analyze the three guideposts set forth by the United States Supreme Court in *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559..... 9

PROPOSITION OF LAW NO. 2: A ratio of punitive damages to compensatory damages of 30-to-1 is unconstitutionally excessive. 9

PROPOSITION OF LAW NO. 3: One who has never been elected to a judgeship in Ohio may not serve as a private judge under R.C. 2701.10 11

PROPOSITION OF LAW NO. 4: Comments by counsel that an opposing party was charged with attempted aggravated murder, that the government wanted murder charges filed for the civil injury alleged, and that the jury should decide the case with anger are so prejudicial that a new trial must be granted..... 13

PROPOSITION OF LAW NO. 5: Where a trial is held contrary to the requirements of R.C. 2701.10, the proceeding is void and a new trial must be granted 14

CONCLUSION..... 15

PROOF OF SERVICE 16

APPENDIX..... 17

Appendix pg.

Journal Entry and Opinion of the Cuyahoga County Court of Appeals (December 11, 2006)	1
Amended Journal Entry of the Cuyahoga County Court of Common Pleas (March 14, 2006)	34

TABLE OF AUTHORITIES

Cases

<i>Bell v. Northern Ohio Telephone Co.</i> (1948), 149 Ohio St. 157, 158.....	15
<i>BMW of North America, Inc. v. Gore</i> (1996), 517 U.S. 559, 116 S. Ct. 1589	1, 2, 6, 9, 10
<i>Burns v. Prudential Securities, Inc.</i> , 3 rd App. No. 9-03-49, 857 N.E.2d 621, 2006-Ohio-3550	10, 11
<i>Dardinger v. Anthem Blue Cross & Blue Shield</i> , 98 Ohio St. 3d 77, 2002-Ohio-7113	9, 11
<i>McLeod v. Mt. Sinai Medical Center, et al.</i> , Case No. 2006-1247.....	5
<i>Pacific Mutual Life Insurance Co. v. Haslip</i> (1991), 499 U.S. 1, 23-24, 111 S. Ct. 1032.....	10
<i>State ex rel. Russo v. McDonnell</i> , 110 Ohio St. 3d 144, 2006-Ohio-3459.....	15
<i>State Farm Mutual Automobile Insurance Co. v. Campbell</i> (2003), 538 U.S. 408, 418, 123 S. Ct. 1513, 155 L. Ed. 2d 585	1, 6, 9, 10, 11
<i>State v. DeMarco</i> (1987), 31 Ohio St. 3d 191, 509 N.E.2d 1256.....	13
<i>Weinfeld v. Welling</i> , 5 th App. No. 2004CA00340, 2005 WL 2175141, 2005-Ohio-14721	10

Ohio Constitutional Provisions

Article IV, Section 6 of the Ohio Constitution.....	12
---	----

Ohio Rules

Gov.Jud.R.VI(1)(C)(2)	12
-----------------------------	----

Ohio Statutory Provisions

R.C. 2701.10.....	passim
-------------------	--------

**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC
OR GREAT GENERAL INTEREST.**

I. REVIEW OF PUNITIVE DAMAGES AWARDS IN OHIO

This case provides this Court with the opportunity, for the first time since the United States Supreme Court's decision in *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003), 538 U.S. 408, to define how punitive damages awards must be reviewed by courts in Ohio.

In the case of *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559, 116 S. Ct. 1589, the United States Supreme Court articulated three "guideposts" for courts to consider in reviewing an award of punitive damages. In *State Farm*, 538 U.S. 408, 425, the United States Supreme Court held that those three guideposts must be considered by any court reviewing an award for punitive damages. However, this Court has never held that a reviewing court in Ohio must apply the *BMW v. Gore* guideposts in reviewing a punitive damages award and, indeed, the reviewing appellate court in this case refused to consider these guideposts with respect to a punitive damages award that was thirty times the compensatory damages award.

Litigants and appellate courts in Ohio need this Court's direction so that awards of punitive damages are properly reviewed to determine whether the award violates a party's constitutional rights. For example, this Court has never articulated a standard that reviewing courts in Ohio should apply when reviewing a ratio between an award of punitive and compensatory damages. The United States Supreme Court has stated that a 4 to 1 ratio is the norm, and a 10 to 1 ratio is at the outer limits of acceptability. See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003), 538 U.S. 408, 425. In the instant case, a jury awarded punitive damages against Appellants at a ratio of 30 to 1, thirty times the compensatory

damages award. The appellate court below¹ never reviewed, or even mentioned this ratio in affirming a \$3 million punitive damages award against Appellants. As appellate courts in Ohio review awards of punitive damages in the wake of the *State Farm* case, supra, they shall conduct a constitutional analysis based upon the three-guideposts outlined in *BMW v. Gore*, supra. In order for parties in Ohio to be treated fairly under the law, and before punitive damages awards are analyzed differently among the different appellate districts, this Court, consistent with the United States Supreme Court, should state the requirements for a reviewing court in Ohio to determine the constitutionality of a punitive damages award.

II. PRIVATE JUDGING IN OHIO UNDER R.C. 2701.10

This case also raises the question of whether an individual may serve as a private judge under R.C. 2701.10 without ever having been elected to the judiciary. The largest appellate district in Ohio, the Eighth District, has held in the instant case that, contrary to the language of R.C. 2701.10 and the Rules for the Governance of the Judiciary, private judges do not have to have ever been elected in order to both serve as private judges and to create law in this state.

R.C. 2701.10, Ohio's "Private Judge Statute," provides a mechanism for litigants to hire retired judges to oversee bench trials. Under the statute, private judges have the power to decide issues of fact and law for the parties who retain them. The opinions of private judges have the same power and effect as those judges who have been elected to their positions. Private judges draft final appealable orders which the appeals courts in Ohio are required to review upon appeal. As a safeguard to ensure the quality of these individuals, R.C. 2701.10, and the rules that govern private judging in Ohio, provide that only previously elected judges, who have retired without having lost their most recent election, may serve as private judges. Astonishingly,

¹ Court of Appeals Opinion, attached at Appendix.

however, the Eighth Appellate District in this case held that private judges serving under R.C. 2701.10 may not have to have ever been elected. In other words, the Eighth Appellate District has ignored this Court's Rules for the Governance of the Judiciary and has made a ruling that directly conflicts with this Court's own Rules.

The power of private judges in Ohio is so great that the requirements of those who qualify to serve as private judges must be controlled. If private judges are not required to have ever have been elected to the Bench, then any private attorneys will have the power to preside over trials in a public courtroom, hold witnesses and parties in contempt, direct the staff of elected judges, require appearances of jurors, and fulfill the other tasks entrusted by law to elected officials. The powers of elected judges should not, by agreement or otherwise, be delegated to non-elected persons any more than parties can agree on who will serve as their appellate judges or who will serve as their mayor or governor. Allowing this to occur would erode the judiciary and promote "judge shopping."

Pursuant to R.C. 2701.10, the parties in this case agreed to allow Robert Glickman ("Glickman") to preside over a jury trial. Glickman held himself out as being authorized to serve as a private judge under R.C. 2701.10 even though, unbeknownst to Appellants, he had never been elected to the Bench. At the time the parties agreed to retain Glickman as a private judge, Glickman's name was mistakenly listed on this Court's "Private Judge Registration Listing." Since then, this Court has removed him from the list because, as the Director of the Office of Judicial & Court Services explained in a letter, Glickman was not authorized to serve as a judge under R.C. 2701.10 because he had never been elected to the Bench. Judge Glickman has

ignored this Court's notice of his lack of qualifications, as he still holds himself out as being qualified to serve as a private judge under statute.²

The Eighth Appellate District has already held that private judges serving under R.C. 2701.10 do not have to have ever been elected to the Bench. This Court must provide a clear answer to this issue before the appeals court's decision leads to efforts at judge-shopping and inconsistency in the law throughout this state.

III. STATEMENTS BY COUNSEL WHICH REQUIRE A NEW TRIAL

There are certain statements that, when made by opposing counsel to a jury, are so overwhelmingly prejudicial that no admonishment may cure them and a new trial is required. In a wrongful death case, for example, if opposing counsel represents to a jury that the civil defendant was charged with attempted aggravated murder, or that the government wanted murder charges filed against the individual for the civil wrong alleged, the civil defendant has been irreversibly prejudiced. These very comments were represented to the jury in this case, where Medlink was sued for the wrongful death of Plaintiff's decedent, Natalie Barnes. Even before evidence was presented, the jury was told that Medlink's employee had been a murderer in the past and that she was a murderer for killing Natalie Barnes.

In a civil case where a jury must decide whether a defendant is responsible for the death of a party, even a suggestion that criminal charges were considered takes away any chance for the defendant to be given a fair trial. This issue is of significance to plaintiffs and defendants in every wrongful death case and requires consideration by this Court.

² As of the date of this filing, the biography provided by Glickman at his law firm's website states "Pursuant to Ohio statute, former Judge Glickman is also active as a private judge hired by the litigants to preside over jury trials."

Finally, it is well-known that juries may not decide a case with sympathy, and that counsel is certainly not allowed under any circumstances to suggest otherwise to the jury. Likewise, juries should not decide a case based upon their anger, and opposing counsel should never be allowed to tell a jury to decide a case with their anger. However, just that happened in this case. This Court should accept this case to establish a clear rule in Ohio that jurors may not decide cases with their anger, and counsel may not suggest to jurors that they do. Similar issues are being considered presently by this Court in the pending case of *McLeod v. Mt. Sinai Medical Center, et al.*, Case No. 2006-1247.

STATEMENT OF THE CASE

This wrongful death action was filed by Andrea Barnes, Executrix of the Estate of Natalie Barnes, on December 4, 2001 against University Hospitals of Cleveland and Appellants herein, Medlink of Ohio and The Medlink Group, Inc. (“Medlink”). After the trial date was continued due to the trial court’s busy docket, and in order to establish a date-certain for trial, the parties agreed to hire a private judge, Robert Glickman (“Glickman”), to preside over the jury trial. Glickman held himself out to the parties as being qualified to oversee jury trials pursuant to Ohio’s Private Judge Statute, R.C. 2701.10. A two-week jury trial was held in April, 2005 with the jury finding in favor of Plaintiff and against Defendants University Hospitals of Cleveland, Inc. and also against Medlink. As against Medlink, the jury awarded \$100,000 for Plaintiff’s survivorship claim, \$3 million for the wrongful death claim, and \$3 million in punitive damages.

Final judgment was awarded to Plaintiff against Medlink in the amount of \$6,803,460.00 on October 18, 2005, including an award of attorney fees in the amount of

\$1,013,460.00.³ In January, 2006, while Plaintiff's motion for prejudgment interest was pending, counsel for Medlink first learned that Glickman was not qualified to serve as a private judge because Glickman had never been elected to the Bench. Medlink filed a Complaint for a Writ of Prohibition in this Court⁴, and instead of waiting for this Court's decision on the matter, Glickman quickly awarded \$896,381.99 in prejudgment interest to Plaintiff.⁵ As a result, the Writ was voluntarily dismissed since the act Medlink sought to prevent had now already occurred.

Medlink timely appealed the trial court's entry awarding the above damages to Plaintiff. Medlink argued that the punitive damages award was unconstitutional because, among other things, the ratio of punitive damages to compensatory damages, 30-to-1, was unconstitutionally excessive under *BMW v. Gore* and *State Farm*, supra. Medlink also argued that the jury's verdict was a product of passion and prejudice that required a new trial. Finally, Medlink argued that the jury's verdict was void because (1) the jury trial was overseen by Glickman, who was not qualified to serve as a private judge under R.C. 2701.10 as he was never elected to the Bench and (2) R.C. 2701.10 does not permit jury trials.

The Eighth Appellate District affirmed the trial court in its entirety. In its decision, the Eighth District was silent as to Medlink's argument that a punitive-to-compensatory ratio of 30-to-1 was unconstitutionally excessive. The appeals court disagreed that statements by Plaintiff's counsel, such as the fact that Medlink's employee was indicted with attempted aggravated murder in the past, that the government wanted murder charges filed against her for the injury at issue in the case, or that the jury should be angry and should decide the case with

³ Opinion, Appx. p.5.

⁴ Case No. 2006-0478, filed March 7, 2006.

⁵ See Journal Entry Awarding Prejudgment Interest, dated March 14, 2006, in Cuyahoga County Court of Common Pleas Case No. CV-01-455448, Appx. p. 34, 44.

their anger, created reversible prejudice. Finally, the appeals court surprisingly held that R.C. 2701.10 does not require that private judges be elected. The appeals court never even mentioned or analyzed the legal result of a private judge overseeing a jury trial under R.C. 2701.10, which this Court has held is not permitted under the statute. *State ex rel. Russo v. McDonnell*, 110 Ohio St. 3d 144, 2006-Ohio-3459, syllabus 1. The Eighth Appellate District either chose to ignore this Court's recent ruling in *Russo* or chose to create new precedent in direct conflict with this Court's well reasoned decision.

STATEMENT OF THE FACTS

Plaintiff's decedent, Natalie Barnes, went into cardiac arrest while undergoing dialysis at University Hospitals on October 19, 2000. Although resuscitation efforts saved Natalie's life, she suffered a severe brain injury. She died several months later when her family terminated life support. No autopsy was performed to determine exactly why her heart stopped on October 19.

At trial, Plaintiff claimed that Medlink Defendants ("Medlink") were the proximate cause of Natalie's death because Endia Hill, one of Medlink's employees, should have been in the dialysis area with Natalie. It was undisputed at trial that Medlink was contracted by Plaintiff to provide a sitter for Natalie and the sitter, Endia Hill, failed to remain with Natalie during the dialysis procedure. At issue, however, was proximate cause and whether the presence of Endia Hill would have made any difference in the outcome since a qualified medical professional was standing next to Natalie in the hospital when she coded.

In order to shift the focus away from proximate cause, Plaintiff focused at trial on the fact that Medlink hired Endia Hill even though she had a conviction ten years earlier for assault. Under Ohio law, such a conviction disqualifies someone from being a home health care aide. Even before any evidence was introduced, the case was essentially over because of the

prejudicial statements made by Plaintiff's counsel during opening statement. Incredibly, Plaintiff's counsel actually told the jury that Endia Hill was indicted for **aggravated murder** before she was hired by Medlink. (Tx. pp. 397-98.) Perhaps even more astounding was counsel's statement that a Cuyahoga County official wanted **murder** charges filed for what occurred in this case. (Tx. pp. 389-90.) That statement was false. (Tx. p. 776.) Further, these "murder" statements were made during a time wherein a huge mug shot, purported to be of Endia Hill, was shown to the jury. (Prejudgment Interest Hearing Tx. at p. 210-211.) The photograph was never authenticated.

During closing argument, Plaintiff's counsel continued their efforts to incite the passion of the jury. Counsel stated that when [Medlink] hired Endia Hill, it was condemnation to death for Natalie Barnes. (Tx. p. 1490.) Plaintiff's counsel made the statement that in over 30 years of practice, he had never seen a case where the negligence has been so catastrophic. (Tx. p. 1405.) Counsel also stated that Medlink put forth a frivolous defense and chastised Medlink for not apologizing at trial. (Tx. p. 1488.) The jury was actually told they "should be angry" and that they should not set their anger aside during their deliberations. (Tx. pp. 1491-1492.) The jury was further told that they were the conscience of Cuyahoga County and that if they "do the right thing", this kind of tragedy will never happen to people close to the jury. (Tx. p. 1410.) It was no surprise, then, that the jury returned a multi-million dollar verdict and awarded punitive damages that were 30 times the award for the survival claim.

ARGUMENT

PROPOSITION OF LAW NO. 1

In reviewing an award of punitive damages, the trial court must independently analyze the three guideposts set forth by the United States Supreme Court in *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559.

AND

PROPOSITION OF LAW NO. 2

A ratio of punitive damages to compensatory damages of 30-to-1 is unconstitutionally excessive.

Since this Court's decision in *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St. 3d 77, 2002-Ohio-7113, which considered the constitutionality of a punitive damages award, the United States Supreme Court in *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003), 538 U.S. 408, 418, 123 S. Ct. 1513, held that every court reviewing an award of punitive damages for federal constitutionality must independently analyze the three guideposts set forth in *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559, 116 S. Ct. 1589. *BMW v. Gore* articulated the following three guideposts for a review of a punitive damages award:

- (1) The reprehensibility guidepost. (whether the punishable conduct has a nexus to the specific harm which resulted.)
- (2) The ratio guidepost. (whether the ratio between punitive and compensatory damages is constitutionally acceptable.)
- (3) The comparison guidepost. (requires a comparison between the punitive damages award and comparable statutory penalties.)

Although this Court did consider the *BMW v. Gore* guideposts in its *Dardinger* decision, *supra*, this Court has never held that courts reviewing a punitive damages award under the federal constitution must analyze the three *BMW* guideposts. The appeals courts in Ohio do not review awards of punitive damages uniformly. At least two appeals courts have followed the mandate

of *State Farm* and do consider the *BMW* guideposts, See *Burns v. Prudential Securities, Inc.*, 3rd App. No. 9-03-49, 857 N.E.2d 621, 2006-Ohio-3550; *Weinfeld v. Welling*, 5th App. No. 2004CA00340, 2005 WL 2175141, 2005-Ohio-14721. The Eighth Appellate District, however, did not consider the *BMW* guideposts at all, even after Medlink raised the issue on appeal. (See Opinion, Appx. pg. 12-17.)

In order for litigants to receive the same consistent constitutional analysis, regardless of what appeals court reviews their award of punitive damages, this Court must articulate a rule of law in Ohio that any court reviewing an award of punitive damages must review the three guideposts set forth by the United States Supreme Court in *BMW v. Gore*.

The second *BMW* guidepost, mentioned above, requires a reviewing court to analyze the ratio between punitive and compensatory damages in determining whether an award of punitive damages is excessive. While refusing “to impose a bright-line ratio which a punitive damages award cannot exceed,” *State Farm*, 538 U.S. at 425, the United States Supreme Court stated that “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages...will satisfy due process.” *State Farm*, 538 U.S. at 425. The United States Supreme Court has concluded that a punitive award of “more than four times the amount of compensatory damages might be close to the line of constitutional impropriety.” *State Farm*, 538 U.S. at 425, citing *Pacific Mutual Life Insurance Co. v. Haslip* (1991), 499 U.S. 1, 23-24, 111 S. Ct. 1032. Although this ratio is not binding, it is instructive and demonstrates that a single-digit ratio between punitive and compensatory damages is more likely to comport with due process. *State Farm*, 538 U.S. at 425.

The ratio of punitive damages to compensatory damages in this case was 30-to-1. Because Plaintiffs in Ohio may not recover punitive damages on wrongful death claims, the \$3

million punitive damages award is compared to the \$100,000 award on the survival claim, and not the wrongful death award. See *Burns v. Prudential Securities, Inc.*, 857 N.E.2d 621, 2006-Ohio-3550, ¶ 127 (Cupp, J. writing for the court, finding that where an award for punitive damages was issued in a tort and breach of contract case, punitive damages should be measured only as against the tort-portion of the compensatory award to determine the ratio of punitive to compensatory damages, and reversing a punitive damages award ratio of 40-to-1.) The ratio of 30-to-1 here is unconstitutionally excessive under *State Farm*.

Medlink appealed this award on the basis that it was unconstitutionally excessive under *State Farm*. However, the appeals court's opinion is void of any reference at all to the 30-to-1 ratio or analysis of the constitutionality of such an award.

This Court's last decision where a ratio of punitive to compensatory damages was considered was in *Dardinger*, supra, in 2002. In that case, this Court considered a punitive damages award where the ratio to compensatory damages was 20-to-1. *Id.*, at ¶ 171. The punitive award was not reversed on federal law (i.e., an analysis of the 20-to-1 punitive to compensatory damages ratio), but was reversed based on Ohio law. Since then, the Supreme Court has further analyzed the constitutionality of damages ratios and has said that few awards that exceed a single-digit ratio will satisfy due process. *State Farm*, 538 U.S. at 425. In light of the *State Farm* decision, litigants in Ohio require this Court's review of what ratio of punitive to compensatory damages will pass constitutional muster.

PROPOSITION OF LAW NO. 3

One who has never been elected to a judgeship in Ohio may not serve as a private judge under R.C. 2701.10.

Revised Code 2701.10, titled "Registration of retired judges; referral of civil action or submission of issue or question," states:

“[a]ny voluntarily retired judge, or any judge who is retired under Section 6 of Article IV, Ohio Constitution, may register with the clerk of any court of common pleas...for the purpose of receiving referrals for adjudication of civil actions or proceedings, and submissions for determination of specific issues or questions of fact or law in any civil action or proceeding, pending in the court.”

R.C. 2701.10(A). The definition of “voluntarily retired judge,” which is outlined in the Supreme Court Rules for the Governance of the Judiciary, and the definition of retired judges under Article IV, Section 6 of the Ohio Constitution, both make it clear that individuals who serve under R.C. 2701.10 must have previously been elected to a judgeship and be retired from that judgeship. Gov.Jud.R.VI, titled “Reference of civil action pursuant to § 2701.10 of the Revised Code,” defines a “voluntarily retired judge” as “any person who was elected to and served on an Ohio court without being defeated in an election for new or continued service on that court.” Gov.Jud.R.VI(1)(C)(2). Article IV, Section 6 of the Ohio Constitution concerns elected judges who have retired due to age, and provides that judges over the age of 70 are required to retire. The Editor’s Comment to this section of the Ohio Constitution states that “judges are to be elected rather than appointed....” Ohio Const. Art. IV, § 6, Editor’s Comment.

Although the definitions of who would fit the requirements of a “voluntarily retired judge” or a judge retired under Article IV, Section 6 of the Ohio Constitution are clear (only elected judges), R.C. 2701.10 does not specifically state in the statute that private judges “must be elected.” The largest appellate district in Ohio, the Eighth District, held in this case that R.C. 2701.10 does not require private judges to be retired from an elected judgeship. (Opinion, Appx. pg. 24.)

The effect of the Eighth District’s decision, if not corrected by this Court, is sweeping and affects litigants in every appellate district. Private judges have great powers. They decide issues of fact and law and have the same power and effect as those judges who have been elected

to their positions. Private judges draft legal opinions which may be cited by parties in appeals districts throughout the state. There is a need for this Court to articulate the requirement that private judges under R.C. 2701.10 must have been elected to the Bench before the appeals court's decision leads to opportunities at "judge shopping" and inconsistency in the law of this state.

PROPOSITION OF LAW NO. 4

Comments by counsel that an opposing party was charged with attempted aggravated murder, that the government wanted murder charges filed for the civil injury alleged, and that the jury should decide the case with anger are so prejudicial that a new trial must be granted.

This Court has stated that in both a civil and criminal setting, cumulative errors can deprive a defendant of a fair trial. *State v. DeMarco* (1987), 31 Ohio St. 3d 191, 509 N.E.2d 1256, paragraph two of syllabus. The prejudicial statements made by counsel in this case, some of which were untrue, created a "perfect storm" for a Plaintiff's verdict and an award of punitive damages that was thirty times the compensatory award. Just some of the comments made were as follows:

- "This conduct of Medlink, their coverup, you will hear about the coverup. The decisions made to hire this woman and place her demonstrate this is a woman that was originally charged with attempted **aggravated murder**. Endia Hill." Tx. at 397-98.
- "The investigator for the county, his name is Robert Case. You will hear from him. He calls Medlink regarding the neglect. He does his own investigation. He was so upset he wanted **murder** charges filed." Tx. at 389-90.
- "... when they hired Endia Hill, it was condemnation to death. When they put her on the job, it was condemnation to death." Tx. at 1490.
- "I've been doing this a long time. My wife says too long. Almost 30 years. I have never in my career ever, ever had a case where the damages were negligent and willful conduct have been so catastrophic to two people." Tx. at 1405.

- “You don’t have to set aside your anger. You should be angry.” And the law and the Court is not going to give you an instruction that you can’t.” Tx. at 1491-92.
- “If you do the right thing on punitives, they will get the message and this will never happen again. It will never happen again to your neighbors’ family or someone you work with, their family, or someone even closer than that.” Tx. at 1410.
- “You have an opportunity to speak as the conscience of Cuyahoga County to say: we are not going to tolerate this.” Tx. at 1419.

In this wrongful death case, for counsel to tell the jury that Medlink’s employee (1) had been a murderer in the past, (2) murdered Natalie Barnes, and (3) when Medlink hired Endia Hill it was condemnation to death for Natalie Barnes, was uncorrectable prejudice. In a civil case where a jury must decide whether a defendant is responsible for the death of a party, even a suggestion that criminal charges were considered takes away any chance for the defendant to be given a fair trial. This issue is of significance to plaintiffs and defendants in every wrongful death case and litigants require a decision by this Court that comments regarding criminal charges for murder in a wrongful death case may never be spoken.

Further, like a jury may never be permitted to decide a case with its sympathy, it should also be the law in this state that a jury may not decide a case with its anger. Counsel in this case explicitly told the jury they could decide the case with their anger. Jurors should never be permitted to decide a case with their anger, and litigants throughout Ohio would benefit from this Court declaring such a rule.

PROPOSITION OF LAW NO. 5

Where a trial is held contrary to the requirements of R.C. 2701.10, the proceeding is void and a new trial must be granted.

As is explained above, the trial in this case was held contrary to the requirements of R.C. 2701.10 for two reasons. First, the trial was heard by a jury, and this Court has held that this is not permitted under R.C. 2701.10. *State ex rel. Russo v. McDonnell*, 110 Ohio St. 3d 144,

2006-Ohio-3459, syllabus 1. Second, the private judge retained to oversee the case, Robert Glickman, was not qualified to serve as a private judge under R.C. 2701.10 because he had never been elected to the Bench. Therefore, the parties' agreement to retain Glickman as a private judge violated R.C. 2701.10, was unlawful, and was void. *Bell v. Northern Ohio Telephone Co.* (1948), 149 Ohio St. 157, 158.

The Eighth District's Opinion, therefore, affirmed a void judgment and contradicted the law of this Court. As the facts of this case are of first impression for this Court, and the only existing appellate law in Ohio has set precedent that a trial held contrary to the requirements of R.C. 2701.10 may be affirmed and is not void, this Court's clarification of the law is necessary.

CONCLUSION

For all of the foregoing reasons, Appellants ask that this Court accept these propositions of law to correct and clarify the law.

Respectfully submitted,



J. Stephen Teetor (0023355)
E-mail: jst@isaacbrant.com
James M. Ripper (0037786)
E-mail: jmr@isaacbrant.com
Jessica K. Philemond (0076761)
E-mail: jkp@isaacbrant.com
ISAAC, BRANT, LEDMAN & TEETOR, LLP
250 East Broad Street, Suite 900
Columbus, Ohio 43215-3742
Telephone: (614) 221-2121
Facsimile: (614) 365-9516
Attorneys for Defendants-Appellants
Medlink of Ohio and The Medlink Group, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served by ordinary U.S. Mail, postage prepaid, on this 25 day of January, 2007, upon the following:

W. Craig Bashein, Esq.
BASHEIN & BASHEIN
50 Public Square, 35th Floor
Cleveland, Ohio 44113
Telephone: (216) 771-3239
Facsimile: (216) 781-5876
Attorney for Plaintiff-Appellee
Andrea Barnes, Executrix

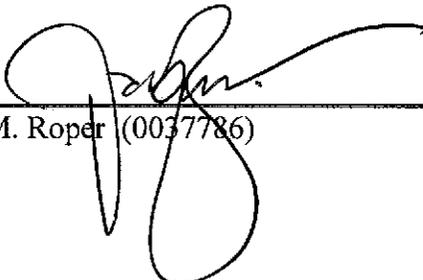
Richard P. Goddard, Esq.
CALFEE, HALTER & GRISWOLD LLP
800 Superior Avenue, Suite 1400
Cleveland, Ohio 44114-2688
Telephone: (216) 622-8200
Facsimile: (216) 241-0816
Attorney for Defendants-Appellants-
Medlink of Ohio and The Medlink Group,
Inc.

Michael F. Becker, Esq.
BECKER & MISHKIND, CO. LPA
134 Middle Avenue
Elyria, Ohio 44035
Telephone: (440) 323-7070
Facsimile: (440) 323-1879
Attorney for Plaintiff-Appellee
Andrea Barnes, Executrix

Paul W. Flowers, Esq.
PAUL W. FLOWERS CO., L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113
Telephone: (216) 344-9393
Facsimile: (216) 344-9395
Attorney for Plaintiff-Appellee
Andrea Barnes, Executrix

Steven G. Janik (0021934)
(COUNSEL OF RECORD)
Andrew J. Dorman (0063410)
JANIK & DORMAN, LLP
9200 South Hills Blvd., Suite 300
Cleveland, Ohio 44147-3521
Telephone: (440) 838-7600
Facsimile: (440) 838-7601
Attorneys for Intervenor-Appellant Lexington
Insurance Company in Appeal Case No. 87710

Lori S. Nugent
Maya Hoffman
COZEN O'CONNOR
222 South Riverside Plaza, Suite 1500
Chicago, Illinois 60606
Telephone: (877) 992-6036
Facsimile: (312) 382-8910
Attorneys for Intervenor-Appellant Lexington
Insurance Company in Appeal Case No. 87710



James M. Roper (0037786)

APPENDIX

- | | | |
|----|--|----|
| 1. | Journal Entry and Opinion of the Cuyahoga County Court of Appeals
(December 11, 2006) | 1 |
| 2. | Amended Journal Entry of the Cuyahoga County Court of Common Pleas
(March 14, 2006) | 34 |

DEC 11 2006

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 87247, 87285, 87710, 87903, 87946

**ANDREA BARNES, EXECUTRIX, OF THE
ESTATE OF NATALIE BARNES, ET AL.**

PLAINTIFFS-APPELLEES/
CROSS-APPELLANTS

vs.

**UNIVERSITY HOSPITALS
OF CLEVELAND, ET AL.**

DEFENDANTS-APPELLANTS/
CROSS-APPELLEES

CA05087247
42813994

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-455448

BEFORE: Celebrezze, P.J., Sweeney, J., and Calabrese, J.

RELEASED: November 30, 2006

JOURNALIZED: DEC 11 2006

VOL 0625 P00760

APPENDIX 00000001

APPEARANCES:

**For Plaintiffs-Appellees/Cross-Appellants
Andrea and Robert Barnes:**

W. Craig Bashein
Bashein & Bashein
Terminal Tower - 35th Floor
50 Public Square
Cleveland, Ohio 44113

Michael F. Becker
Lawrence F. Peskin
Becker & Miskind Co., L.P.A.
134 Middle Avenue
Elyria, Ohio 44035

Paul W. Flowers
Paul W. Flowers Co., L.P.A.
Terminal Tower - 35th Floor
50 Public Square
Cleveland, Ohio 44113

For Defendant-Appellant/Cross-Appellee MedLink of Ohio:

James M. Roper
Jessica K. Walls
Isaac, Brant, Ledman & Teetor, L.L.P.
250 East Broad Street
Suite 900
Columbus, Ohio 43215-3742

Richard P. Goddard
Calfee, Halter & Griswold, L.L.P.
1400 McDonald Investment Center
800 Superior Avenue
Cleveland, Ohio 44114

-CONTINUED-

For Intervenor-Appellant Lexington Insurance Co.:

Steven G. Janik
Andrew J. Dorman
John M. Heffernan
Crystal L. Nicosia
Kelly H. Rogers
Janik & Dorman, L.L.P.
9200 South Hills Boulevard, Suite 300
Cleveland, Ohio 44147

CA05087247 42591879


CA05087285 42591880


Matthew M. Nee
McDonald Hopkins Co., L.P.A.
600 Superior Avenue - Suite 2100
Cleveland, Ohio 44114-2643

CA06087710 42591881


CA06087903 42591882


Lori S. Nugent
Maya Hoffman
Cozen O'Connor, P.C.
222 South Riverside Plaza
Suite 1500
Chicago, Illinois 60606

CA06087946 42591883


For Defendant-Appellee University Hospitals of Cleveland:

Michele Y. Wharton
C. Richard McDonald
Davis & Young
1700 Midland Building
101 Prospect Avenue, West
Cleveland, Ohio 44115-1027

FILED & JOURNALIZED
PER APP. R. 22(E)

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

DEC 11 2006

NOV 30 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY  DEP.

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY  DEP.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

FRANK D. CELEBREZZE, JR., P.J.:

This journal entry and opinion addresses five separate appeals and cross-appeals¹, which have been consolidated for review and disposition. MedLink of Ohio and Lexington Insurance Company each appeal the trial court's decision awarding judgment in favor of Andrea Barnes. Barnes cross-appeals asserting several assignments of error. After a thorough review of all the arguments and for the reasons set forth below, we affirm the judgments of the trial court.

PROCEDURAL HISTORY

On December 4, 2001, appellee, Andrea Barnes, filed a medical malpractice/wrongful death action against University Hospitals of Cleveland ("UH") and MedLink of Ohio ("MedLink"). Barnes sought compensatory damages on behalf of her daughter, Natalie Barnes, who died while undergoing kidney dialysis treatment. The complaint alleged that UH and MedLink violated the applicable standard of care owed to the decedent. UH and MedLink each served answers to Barnes' complaint denying liability. The parties proceeded with discovery.

¹Appellate Case Nos. 87247 and 87946 were filed by defendant MedLink of Ohio; Appellate Case Nos. 87285 and 87903 were filed by plaintiff Andrea Barnes; and Appellate Case No. 87710 was filed by intervenor Lexington Insurance Co.

After conducting discovery, the parties each determined that it would be in their best interest to submit the dispute to a retired judge for the purpose of conducting a jury trial. On April 18, 2005, each of the parties executed a court-approved agreement with respect to conducting the jury trial before a retired judge, and trial commenced on April 25, 2005. Prior to opening arguments, the presiding judge had the parties confirm on the record that they consented to his authority and waived any rights to challenge his jurisdiction on appeal.

The trial concluded on May 3, 2005. After deliberations, the jury awarded judgment in favor of Barnes, finding MedLink ninety percent liable and UH ten percent liable for Natalie's death. The jury awarded Barnes \$100,000 on her survivorship claim and \$3,000,000 on the wrongful death claim. In addition, the jury unanimously concluded that MedLink acted with actual malice and awarded Barnes an additional \$3,000,000 in punitive damages. On October 18, 2005, the trial court assessed attorney fees and litigation expenses in the amount of \$1,013,460 against MedLink and entered a final judgment on the entire case in the amount of \$6,803,460.

On March 7, 2006, MedLink filed an original action in prohibition with the Supreme Court of Ohio, arguing that the presiding judge lacked the proper qualifications to preside over the trial, thus, his involvement was unlawful. Barnes filed a motion to dismiss the prohibition; however, on April 28, 2006,

before the court could rule on the motion, MedLink abandoned the prohibition action.

UNDERLYING FACTS

The incident that gave rise to the present case occurred on October 19, 2000. On that day, decedent, Natalie Barnes, was undergoing routine kidney dialysis treatment at UH. Natalie was 24 years old at the time and suffered from both mental retardation and epilepsy. In 2000, Natalie developed kidney disease and began hemodialysis treatments at UH on a regular basis. During the dialysis treatment, blood was pumped out of her body into a device called an "artificial kidney." The artificial kidney would remove impurities from Natalie's blood, and the blood would be returned to her body.

Many individuals who undergo ongoing kidney dialysis, including Natalie, require a device called a "perma cath," which is a catheter that is surgically implanted into the patient's chest to aid in the dialysis procedure. The perma cath consists of a flexible tube that is threaded through the skin into either the subclavian vein or the internal jugular vein, down to the heart. The patient's skin grows over a small cuff at the end of the perma cath, holding the device in place and preventing infection. Two ports in the perma cath remain open so they can be accessed for dialysis. After each dialysis treatment is completed, the exposed ends are capped to protect the patient.

0625 00765

One of the primary concerns during dialysis treatment utilizing a perma cath is that an air embolism can occur if there is an insecure connection with the catheter or if the catheter is removed from the body. An air embolism would cause air to enter the blood stream and travel into the ventricle of the heart. If this persists, the heart will stop, and the patient will go into cardiac arrest.

Because Barnes was aware of the dangers dialysis posed and her daughter's tendency to pull at her catheter, she requested the services of a medical aide to sit with Natalie while she underwent dialysis treatment. These services were available to her daughter through the Cuyahoga County Board of Mental Retardation and Developmental Disabilities ("MRDD"). MRDD contracted with MedLink to provide home health care services for patients like Natalie who needed individual care.

On September 1, 2000, Cynthia Fribley and Mary Lynn Roberts, both supervisors for MRDD, met to discuss Natalie's request for a medical aide. During the meeting, they were informed that Natalie had previously touched and attempted to pull at her catheter during dialysis. Fribley was instructed that she had to ensure that the MedLink aide would not leave Natalie's side during dialysis.

MedLink aide, Ann Marie Lumpkin Vernon, was originally selected to sit with Natalie during her dialysis treatments. During a meeting at Barnes' home,

VEL0625 PD0766

Lumpkin was informed that Natalie had a tendency to touch and pull at her catheter, and she was instructed not to leave Natalie's side during the dialysis treatments. Lumpkin successfully cared for Natalie as she underwent dialysis. When Natalie would attempt to touch or pull at her catheter, Lumpkin would distract her or gently remove her hand. If Lumpkin had to use the restroom, or otherwise excuse herself from the dialysis unit, she always ensured that a hospital staff member took her place and informed the staff member that Natalie was not to touch her catheter.

Lumpkin successfully accompanied Natalie during several dialysis treatments, but was later replaced by MedLink aide Endia Hill. Hill did not have the proper experience or background to work as a health care aide. She had previously been convicted of a felony and did not have a high school education, a minimum qualification for MedLink employment. Much like Lumpkin, Hill received strict instructions to sit with Natalie and prevent her from touching or attempting to pull at her catheter. She was also advised that Natalie had attempted to pull at her catheter in the past and needed to be closely monitored.

On October 19, 2000, Hill transported Natalie to UH for her dialysis treatment. Once Natalie's catheter was attached to the dialysis equipment, Hill left the dialysis unit, went to the hospital cafeteria and then walked around the

VOLO 625 00767

UH facility for several hours. UH hemodialysis technician, Charles Lagunzad, attended to Natalie once Hill left. During his testimony, Lagunzad stated that he was unaware whether Natalie had a medical aide with her or if she was even supposed to have an aide. At 1:30 p.m., Lagunzad went to lunch, leaving technician Larry Lawrence with Natalie. Although Lawrence was present in the dialysis unit, he had four other patients to attend to and could not give Natalie his full attention.

Lawrence testified that at around 1:34 p.m., he looked away from Natalie for several seconds, and she pulled her catheter out of her chest. Lawrence yelled for help, and Sue Blankschaen, administrative director of the UH dialysis program, reported to the dialysis center. As Blankschaen arrived, she saw the hole in Natalie's chest and, after performing an assessment, determined that Natalie had a weak pulse and shallow breathing. Lawrence initiated CPR, which he performed with the help of another UH staff member. At 2:00 p.m., an emergency code was called, and a number of specialists responded to the dialysis unit to aid Natalie.

Natalie's medical chart indicates that she had suffered an air embolism, which caused cardiac arrest. As a result of the cardiac arrest, she was left severely brain damaged. After this incident, Natalie was unable to eat or breathe without life support. After several months, when Natalie's condition failed to improve, Barnes decided to discontinue life support, and Natalie died.

DISCUSSION

In the five separate appeals consolidated here for review and decision, there are a total of 16 assignments of error,² several of which are similar in nature. We will tailor our discussion accordingly and will address certain assignments of error together where it is appropriate.

JURY'S VERDICT - PASSION AND PREJUDICE

MedLink cites two assignments of error³ dealing with the jury's verdict. Because they are substantially interrelated, we address them together.

MedLink argues that the jury's verdict was the product of passion and prejudice and was overwhelmingly disproportionate on the basis of the evidence. More specifically, it contends that the remarks of plaintiff's counsel inflamed the jury and appealed to the jury's sympathy and anger.

A new trial may be granted where a jury awards damages under the influence of passion and prejudice. *Cox v. Oliver Machinery Co.* (1987), 41 Ohio App.3d 28; *Jones v. Meinking* (1987), 40 Ohio App.3d 45; *Hancock v. Norfolk &*

²All assignments of error are included in Appendix A of this Opinion by case number.

³Case No. 87247-MedLink's appeal:

"I. The jury's verdict was a product of passion and prejudice and was so overwhelmingly disproportionate as to shock reasonable sensibilities."

"V. The judgment is against the weight of the evidence."

Western Ry. Co. (1987), 39 Ohio App.3d 77, 529 N.E.2d 937; *Litchfield v. Morris* (1985), 25 Ohio App.3d 42. In a personal injury suit, a damage award should not be set aside unless the award is so excessive that it appears to be the result of passion and prejudice, or unless the award is so manifestly against the weight of the evidence that it appears that the jury misconceived its duty. *Toledo, C. & O. RR Co. v. Miller* (1923), 108 Ohio St. 388, 140 N.E.2d 617; *Cox*, supra; *Litchfield*, supra.

We do not agree with MedLink's contention that the jury's verdict was a product of passion and prejudice. We accept that plaintiff's counsel discussed the facts of this case in detail and emphasized the heart wrenching nature of the events leading to Natalie's death; however, we cannot ignore that the facts of this case, irrespective of plaintiff's counsel, were incredibly devastating and tragic. MedLink argues that the jury's verdict was swayed by passion and prejudice, but it fails to accept that the reality of the facts involved in this case, no matter how they were relayed to the jury, would insight passion.

The case involves a 24-year-old, mentally disabled and epileptic young woman who needed constant care while undergoing kidney dialysis. Despite the strict warnings her caretaker received, she left Natalie by herself, which resulted in Natalie's cardiac arrest and severe brain damage. After Natalie's

condition failed to improve, her mother was placed in the unenviable position of having to remove her daughter from life support.

Both Barnes and Natalie placed their faith in MedLink to provide attentive and constant care. The record clearly indicates that MedLink failed to provide that care, and its omission resulted in Natalie's death. The jury's three million dollar award was in no way shocking. A young woman lost her life, and a mother lost her daughter. Although MedLink argues that plaintiff's counsel appealed to the jury's sympathy and anger, it is clear that the facts of this case, standing alone, were enough to substantiate the jury's verdict.

Accordingly, we do not find that the judgment awarded to Barnes was a product of passion and prejudice, and these assignments of error are overruled.

REVERSIBLE ERROR - PUNITIVE DAMAGES

We next address MedLink's three assignments of error⁴ dealing with the court's instruction regarding punitive damages.

MedLink argues that the trial court committed reversible error when it instructed the jury regarding punitive damages. It asserts that plaintiff's

⁴Case No. 87247-MedLink's appeal:

"II. The judgment is contrary to the law on punitive damages and violates appellant's constitutional rights."

"III. Reversible errors of law occurred at trial and were not corrected by the trial court."

"IV. The trial court erred in denying appellant's motion to separate plaintiff's claim for punitive damages."

counsel failed to establish a nexus between hiring Hill and Natalie's death. MedLink contends that because this nexus was never established at trial, plaintiff's counsel failed to show actual malice on its part, making an instruction for punitive damages improper. MedLink concedes that it was negligent in hiring Hill, yet maintains it did not act with actual malice, a requirement for an award of punitive damages.

To constitute plain error, the error must be obvious on the record, palpable, and fundamental, so that it should have been apparent to the trial court without objection. See *State v. Tichon* (1995), 102 Ohio App.3d 758, 767, 658 N.E.2d 16. Moreover, plain error does not exist unless the appellant establishes that the outcome of the trial clearly would have been different but for the trial court's allegedly improper actions. *State v. Waddell* (1996), 75 Ohio St.3d 163, 166, 661 N.E.2d 1043. Notice of plain error is to be taken with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Phillips* (1995), 74 Ohio St.3d 72, 83, 656 N.E.2d 643.

In Ohio, an award of punitive damages cannot be awarded based on mere negligence, but requires actual malice as well. Actual malice is (1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other

persons that has a great probability of causing substantial harm. *Preston v. Murty* (1987), 32 Ohio St.3d 334 at 336, 512 N.E.2d 1174. In fact, liability for punitive damages is reserved for particularly egregious cases involving deliberate malice or conscious, blatant wrongdoing, which is nearly certain to cause substantial harm. *Spalding v. Coulson* (Sep. 3, 1998), Cuyahoga App. Nos. 70524, 70538.

We find no merit in MedLink's argument that the jury instruction regarding punitive damages violated its constitutional rights and constituted plain error. The record clearly indicates that plaintiff's counsel established a strong nexus between MedLink's hiring of Hill and Natalie's injuries and subsequent death, establishing actual malice. Hill's felony conviction made her ineligible for employment as a health care aide, and a high school diploma was a prerequisite for employment with MedLink. When MedLink hired Hill, it consciously disregarded the facts that she had a felony conviction and did not have a high school diploma. It is important to note that at no time did Hill conceal her felony conviction or her failure to complete high school from MedLink's administrators. Quite the contrary, Hill disclosed both her criminal history and educational background on her application for employment with MedLink.

history and educational background on her application for employment with MedLink.

MedLink's actions were not only negligent, they also constituted actual malice. MedLink provides a service to patients who need individual medical care. Because of the vital nature of the services MedLink provides, it must hire employees who are highly qualified and responsible. When MedLink hired Hill, who did not even meet the minimum educational requirements and had previously been convicted of a felony, it consciously disregarded patient safety.

MedLink acted with actual malice when it hired Hill. Accordingly, the trial court did not commit plain error when it instructed the jury regarding punitive damages, and these assignments of error are overruled.

MedLink next argues that the trial court abused its discretion when it denied its motion to bifurcate issues regarding compensatory damages and punitive damages. It contends that in failing to separate the issues, the jury's decision making process was tainted, resulting in an excessive award of damages.

To constitute an abuse of discretion, the ruling must be more than legal error; it must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 50 OBR 481, 450 N.E.2d 1140.

Mich. 382, 384-385. In order to have an abuse of that choice, the result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason but instead passion or bias." Id.

This court cannot accept MedLink's assertion that the trial court abused its discretion when it denied the motion to bifurcate. Although MedLink argues that R.C. 2315.21(B) mandates that compensatory and punitive damages be bifurcated upon request, the trial court may exercise its discretion when ruling upon such a motion.

The issues surrounding compensatory damages and punitive damages in this case were closely intertwined. MedLink's request to bifurcate would have resulted in two lengthy proceedings where essentially the same testimony given by the same witnesses would be presented. Knowing that bifurcation would require a tremendous amount of duplicate testimony, the presiding judge determined it was unwarranted.

The trial court's actions were not unreasonable, arbitrary, or unconscionable when it denied MedLink's motion for bifurcation. Accordingly, the trial court did not abuse its discretion, and this assignment of error is overruled.

ATTORNEY FEES

Both MedLink and Barnes cited assignments of error dealing with the issue of attorney fees.⁵ Because they are substantially interrelated, they will be addressed together.

Medlink argues that the trial court abused its discretion when it awarded attorney fees. Specifically, it asserts that the trial court failed to consider the contingency agreement that was entered into by Barnes when it calculated attorney fees. MedLink asserts that the contingency fee agreement executed between Barnes and her counsel should have limited the overall attorney fees.

On the other hand, Barnes argues that the trial court abused its discretion in calculating attorney fees because it failed to consider the original contingency fee agreement and instead based attorney fees on an hourly rate and lodestar multiplier.

⁵Case No. 87247-MedLink's appeal:

"VI. The trial court erred in its award and calculation of attorney's fees."

Case No. 87247-Barnes' cross-appeal; also, Case No. 87285-Barnes' appeal, assignment I:

"VIII. The trial judge abused his discretion by failing to consider and (sic) award attorney fees based upon the contingency agreement that had been entered with the client."

We do not agree with either of these arguments. Barnes submitted documentation supporting attorney fees in the amount of \$4,239,900. The presiding judge conducted an evidentiary hearing, where a substantial amount of evidence was presented regarding the total fees. He carefully evaluated the difficulty of this case, the cost of representation, and the time and diligence exerted by counsel on behalf of the plaintiff. After a thorough evaluation, the presiding judge determined that an award of fees in the amount of \$1,013,460 was fair and appropriate.

Because of the extremely complex nature of this wrongful death/medical malpractice action, it required significant time and resources to litigate. Medical experts and reports were necessary, in addition to extensive research. It is well accepted that the trial court may exercise its discretion in the calculation of attorney fees. When considering the time and resources expended to properly litigate this case, it is clear that the trial court's actions were not unreasonable, arbitrary, or unconscionable when it awarded attorney fees to Barnes in the amount of \$1,013,460.

Accordingly, we do not find that the trial court abused its discretion in calculating attorney fees, and these assignments of error are overruled.

INTERVENTION OF LEXINGTON

Lexington Insurance Company ("Lexington"), MedLink's insurer, cites two assignments of error⁶ dealing with its motion to intervene. Because they are substantially interrelated, they will be addressed together.

Lexington argues that the trial court abused its discretion when it denied its motion for intervention. Specifically, Lexington asserts that pursuant to Civ.R. 24(A), it meets all of the requirements for intervention of right, thus, it is entitled to intervene.

Civ.R. 24 provides in pertinent part:

"(A) Intervention of Right -- Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the appellant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

⁶Case No. 87710-Lexington's appeal:

"I. Lexington Insurance Company ("Lexington") is entitled to intervention of right to oppose the motion for prejudgment interest filed by plaintiff, Andrea Barnes."

"III. Lexington is entitled to de novo review of the denial of its motion to intervene in post trial proceedings."

“(B) Permissive Intervention— Upon timely application anyone may be permitted to intervene in an action:(1) when a statute of this state confers a conditional right to intervene; or (2) when an applicant’s claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

“(C) Procedure—A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Civ.R. 5. The motion and any supporting memorandum shall state the grounds for intervention and shall be accompanied by a pleading, as defined in Civ.R. 7(A), setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of this state gives a right to intervene.”

We find no merit in Lexington’s contention that it was in full compliance with Civ.R. 24 when it submitted its motion for intervention to the court. First, Lexington’s motion was untimely. Lexington waited until one business

day prior to the prejudgment interest hearing to file its motion for intervention. This is clearly untimely considering that the bulk of the litigation had been completed by that time. The presiding judge was fully aware that permitting Lexington to intervene at such a late stage in the litigation would disrupt the proceedings considerably. Lexington received adequate notice of the action at the time it was filed, giving it ample opportunity to intervene. Civ.R. 24(A) requires that for intervention of right, a motion must be timely. The fact that Lexington waited until the prejudgment interest proceedings to intervene evidences its untimeliness.

In addition, Lexington failed to establish that it had a legally recognized interest in the prejudgment interest proceedings. Civ.R. 24(A) requires that for an intervention of right, a party must make a showing that it cannot adequately protect its interest without intervening in the action. Lexington failed to meet this burden.

When comparing the arguments of MedLink in this case to those of Lexington, it is clear that they are closely aligned. Accordingly, Lexington's interests were adequately represented by MedLink, making intervention unnecessary.

Lastly, Lexington failed to submit a proposed pleading with its motion to intervene, in violation of Civ.R. 24(C). Rule 24(C) specifically provides that

a motion for intervention shall be accompanied by a pleading, as defined in Civ.R. 7(A), setting forth the claim or defense for which intervention is sought. When Lexington submitted its motion for intervention to the court, it neglected to include a proposed pleading. Although it later offered to submit the pleading, the trial court ruled that the motion was denied on the basis that it was untimely. Although the motion was denied on valid grounds, it is important to note that Lexington failed to file the appropriate documentation when submitting its motion for intervention to the court.

We do not find that the trial court's decision was unreasonable, arbitrary, or unconscionable when it denied Lexington's motion for intervention. Accordingly, the trial court did not abuse its discretion, and these assignments of error are overruled.

SUBJECT MATTER JURISDICTION OF TRIAL JUDGE

Assignments of error dealing with subject matter jurisdiction of the trial judge were included in three of the five appeals.⁷

⁷Case No. 87247-MedLink's appeal:

"VII. Judge Glickman did not have subject matter jurisdiction to hear this case."

Case No. 87903-MedLink's cross-appeal:

"IV. Judge Glickman did not have subject matter jurisdiction to hear this case."

Case No. 87710-Lexington's appeal:

"II. Judge Robert T. Glickman patently and unambiguously lacked subject matter jurisdiction to adjudicate the underlying case ***."

MedLink argues that the presiding judge did not have subject matter jurisdiction to hear the case. More specifically, it asserts that Judge Glickman did not have jurisdiction because during his original tenure as a judge he was appointed and not elected, as required by R.C. 2701.10. Lexington presents the same argument as that asserted by MedLink.

R.C. 2701.10 provides in pertinent part:

“(A) Any voluntarily retired judge, or any judge who is retired under Section 6 of Article IV, Ohio Constitution, may register with the clerk of any court of common pleas, municipal court, or county court for the purpose of receiving referrals for adjudication of civil actions or proceeding, and submissions for determination of specific issues or questions of fact or law in any civil action or proceeding pending in court. There is no limitation upon the number, type, or location of courts with which a retired judge may register under this division. Upon registration with the clerk of any court under this division, the retired judge is eligible to receive referrals and submissions from that court, in accordance with this section. Each court of common pleas, municipal court, and county court shall maintain an index of all retired judges who have registered with the clerk of that court pursuant to this division and shall make the index available to any person, upon request.”

R.C. 2701.10 clearly does not differentiate between retired judges who were elected and retired judges who were appointed. When evaluating R.C. 2701.10 in its entirety, it is completely void of any language mandating that in order to serve as a retired judge you must have been elected rather than appointed.

MedLink also argues that Article IV, section six, of the Ohio Constitution requires that a judge be elected in order to serve as a retired judge. After a thorough review, this court concludes that the Ohio Constitution does not impose such a restriction.

Furthermore, on April 18, 2005, before the trial commenced, all parties to the litigation signed a court-approved agreement with respect to the presiding judge's jurisdiction over the matter. Similarly, on the day of trial, the presiding judge had each of the parties state on the record that they consented to his authority and waived any rights to contest his jurisdiction on appeal. The fact that MedLink and Lexington now challenge the presiding judge's jurisdiction does not ignore the fact that, at trial, they both effectively waived their right to do so. They cannot now seek to question the presiding judge's authority because they did not receive their desired outcome,

Accordingly, we find that Judge Glickman did have proper jurisdiction to preside over the trial, and these assignments of error are overruled.

PRE-JUDGMENT INTEREST

Assignments of error dealing with pre-judgment interest were included in three of the five appeals.⁸

Barnes first argues that the trial court abused its discretion when it barred her from discovering reports and information that MedLink obtained from a non-testifying expert prior to trial. More specifically, she asserts that the information was necessary to her defense to prejudgment interest. Barnes contends that Civ.R. 26(B)(4)(a) provides that such discovery is permissible.

We do not agree that the trial court abused its discretion when it prevented her from discovering certain reports and information. Civ.R. 26(B)(4)(a) specifically provides:

“Subject to the provisions of subdivision (B)(4)(b) of this rule 35(B), a party may discover facts known or opinions held by an expert retained or

⁸Case No. 87903-Barnes' appeal:

“I. The trial judge misconstrued the applicable privilege and unjustifiably refused to allow plaintiff-appellants to discover reports and information that defendant-appellees had obtained prior to trial that were necessary to contest their defense to pre-judgment interest.”

“II. The trial judge erred, as a matter of law, by calculating the award of pre-judgment interest from the date the complaint was filed, December 4, 2001, instead of the date the case (sic) of action accrued, October 19, 2000.”

“III. The trial judge erred, as a matter of law, in failing to include the award of attorney's fees in the calculation of pre-judgment interest.”

Case No. 97946-MedLink's appeal:

“I. The trial court erred in awarding prejudgment interest to plaintiff.”

especially employed by another party seeking discovery if unable without undue hardship to obtain facts and opinions on the same subject by other means or upon showing other exceptional circumstances indicating that denial of discovery would cause manifest injustice.”

Barnes is correct in her contention that she is entitled to discovery of an expert witness retained or specially employed; however, the information Barnes sought to discover was from a medical expert that was never retained or employed by MedLink. MedLink merely consulted with the medical expert when it was developing its trial strategy. The expert never testified and never even created or submitted a report to MedLink. The expert witness had so little involvement in the preparation of MedLink’s defense that his or her name was never even disclosed during the prejudgment interest hearing.

The trial court’s actions were not unreasonable, arbitrary, or unconscionable when it prevented Barnes from discovering information from the undisclosed medical expert. Accordingly, the trial court did not abuse its discretion, and this assignment of error is overruled.

Barnes next argues that the trial court abused its discretion in calculating prejudgment interest. She asserts that interest was calculated from the date the complaint was filed, rather than from the date the cause of action accrued, in direct violation of R.C. 1343.03(C)(1)(c)(ii) as it existed at the

time the original complaint was filed. She contends that the trial court's application of the current version of R.C. 134.03(C)(1)(c)(ii), which calculates interest from the date the action was filed, constitutes a retroactive application and is thus prohibited.

We do not agree with Barnes' argument that the trial court erred when it calculated prejudgment interest from the date of the original filing rather than from the date that the incident occurred. The current version of R.C. 134.03(C)(1)(c)(ii) specifically provides:

"(C) 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:

"(c) In all other actions for the longer of the following periods:

“(ii) From the date on which the party to whom the money is to be paid filed the pleading on which the judgment, decree, or order was based to the date on which the judgment, decree, or order was rendered.”

The language of the statute clearly supports the trial court’s decision to calculate prejudgment interest from the date the action was filed. Although this statute was enacted after the suit was originally filed, it was in place before the prejudgment interest determination hearing was conducted, thus, it is applicable. The trial court’s actions did not constitute a retroactive application because the current version of the statute was firmly in place before prejudgment interest was evaluated.

We do not find that the trial court’s actions were unreasonable, arbitrary, or unconscionable when it calculated prejudgment interest from the date the action was filed rather than from the date the incident occurred. Accordingly, the trial court did not abuse its discretion, and this assignment of error is overruled.

Barnes next argues that the trial court abused its discretion when it excluded attorney fees from the calculation of prejudgment interest. Specifically, she asserts that such additional compensation is viewed as purely compensatory and should be included in the prejudgment interest calculation.

We do not agree. Attorney fees are future damages and, as such, are not subject to prejudgment interest. R.C. 1343.03(C)(2) states:

"No court shall award interest under division (C)(1) of this section on future damages, as defined in section 2323.56 of the Revised Code that are found by the finder of fact."

R.C. 2323.56 defines future damages as "****any damages that result from an injury to a person that is a subject of a tort action and that will accrue after the verdict or determination of liability by the trier of fact is rendered in that tort action."

It is clear from the mandate of R.C. 1343.03(C)(2) and the definition provided by R.C. 2323.56 that attorney fees constitute future damages and are not subject to prejudgment interest. The trial court's actions were not unreasonable, arbitrary, or unconscionable when it failed to include attorney fees in the calculation of prejudgment interest. Accordingly, the trial court did not abuse its discretion, and this assignment of error is overruled.

In its appeal, MedLink argues that the trial court abused its discretion when it awarded prejudgment interest in favor of Barnes. More specifically, MedLink asserts that Barnes did not satisfy her burden to show that MedLink did not make a good faith effort to settle the case, pursuant to R.C. 1343.03(C).

We find no merit in MedLink's argument that it made a good faith effort to settle the present case. MedLink argues that it made a good faith effort to settle when it offered Barnes \$400,000; however, that offer was only extended after a jury had been selected and the trial was underway. In addition, the \$400,000 MedLink offered Barnes was significantly lower than the jury award. MedLink was fully aware that there was a grave possibility the jury would return a verdict in favor of Barnes. Not only was there strong evidence to sustain the position that MedLink's negligence proximately caused Natalie's death, but there was also evidence supporting an award for punitive damages.

When evaluating the nature of this case and the truly devastating circumstances surrounding Natalie's death, MedLink's offer of \$400,000 did not constitute a good faith effort to settle. The trial court's actions were not unreasonable, arbitrary, or unconscionable when it awarded prejudgment interest to Barnes. Accordingly, the trial court did not abuse its discretion, and this assignment of error is overruled.

CONCLUSION

Following a thorough review of the record, the briefs, and the arguments of all parties, we find no merit in any of the assignments of error and ultimately affirm the judgments of the trial court.

Judgment affirmed.

VOL 625 PG 0789

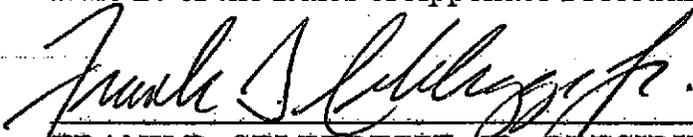
It is ordered that plaintiffs-appellees/cross-appellants recover from defendants-appellants/cross-appellees the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to

Rule 27 of the Rules of Appellate Procedure.


FRANK D. CELEBREZZE, JR., PRESIDING JUDGE

JAMES J. SWEENEY, J., and
ANTHONY O. CALABRESE, JR., J., CONCUR

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

VOLO 625 00790

APPENDIX A

Case Nos. 87247 and 87285:

Appellant MedLink's Assignments of Error:

- I. The jury's verdict was a product of passion and prejudice and was so overwhelmingly disproportionate as to shock reasonable sensibilities.
- II. The judgment is contrary to the law on punitive damages and violates appellants' constitutional rights.
- III. Reversible errors of law occurred at trial and were not corrected by the trial court.
- IV. The trial court erred in denying Appellant's Motion To Separate Plaintiff's Claim For Punitive Damages.
- V. The judgment is against the weight of the evidence.
- VI. The trial court erred in its award and calculation of attorney's fees.
- VII. Judge Glickman Did Not Have Subject Matter Jurisdiction To Hear This Case.

Appellee Barnes' Cross-Assignment of Error:

- VIII. The trial judge abused his discretion by failing to consider and award attorney fees based upon the contingency agreement that had been entered with the client.

Case No. 87903:

Appellant Barnes' Assignments of Error:

- I. The trial judge misconstrued the applicable privilege and unjustifiably refused to allow plaintiff-appellants to discover reports and information that defendant-appellees had obtained prior to trial that were necessary to contest their defense to pre-judgment interest. [Prejudgment interest hearing transcript of January 31, 2006, pp. 328-341.]

II. The trial judge erred, as a matter of law, by calculating the award of pre-judgment interest from the date the complaint was filed, December 4, 2001, instead of the date the case (sic) of action accrued, October 19, 2000. [Final Order of May 17, 2005.]

III. The trial judge erred, as a matter of law, in failing to include the award of attorney's fees in the calculation of pre-judgment interest. [Final Order of May 17, 2005.]

Case No. 87946:

Appellant MedLink's Assignments of Error:

- I. The trial court erred in awarding prejudgment interest to Plaintiff.
- II. Robert T. Glickman did not have subject matter jurisdiction to decide Plaintiff's Motion for Prejudgment Interest.

Case No. 87710:

Appellant Lexington Insurance Co.'s Assignments of Error:

- I. Lexington Insurance Company ("Lexington") is entitled to intervention of right to oppose the motion for prejudgment interest filed by plaintiff, Andrea Barnes.
- II. Judge Robert T. Glickman patently and unambiguously lacked subject matter jurisdiction to adjudicate the underlying case, styled, *Andrea Barnes v. University Hospitals of Cleveland, et al.*, Cuyahoga County Common Pleas Court, Case No. CV 01 455448 (hereinafter, "Barnes"), including the motion of Lexington Insurance Company to intervene (hereinafter, "motion to intervene").
- III. Lexington is entitled to de novo review of the denial of its motion to intervene in post trial proceedings.

69 Ohio St. 3d 638. In order to determine whether a party made a good faith effort to settle a matter the court must consider whether that party:

...(1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) [had] not attempted to unnecessarily delay any of the proceeding, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party.

Kalain v. Smith (1986), 25 Ohio St. 3d 157, 159. The moving party is not required to prove that the non-moving party acted in "bad faith." *Id.* The burden of making a "good faith effort to settle" does not require parties in all cases to make a settlement offer. *Id.* When a party has a "good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer." *Id.*; *Iammarino v. Maguire* (2003), Cuyahoga Cty. App. No. 80827 at 11.

The State of Ohio allows for an award of pre-judgment interest and has enacted R.C. 1343.03(C) to specifically state the law regarding when pre-judgment interest should be awarded. R.C. 1343.03(C) states in pertinent part:

(1) 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 ... for payment of money, the court determines at a hearing held subsequent to the verdict ... 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 ... shall be computed as follows:

...(c) ...for the longer of the following periods:

(i) From the date on which the party to whom the money is to be paid gave the first notice described in division (C)(1)(c)(i) of this section to the date on which the judgment ... 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 made a reasonable attempt to determine if the party required to pay had insurance coverage for liability for the tortious conduct and gave to the party required to pay and to any identified insurer ... written notice in person or by certified mail that the cause of action had accrued.

(ii) From the date on which the party to whom the money is to be

paid filed the pleading on which the judgment ... was based to the date on which the judgment was rendered.

The trial court is charged with making a "finding of fact" as to whether pre-judgment interest should be awarded. *Algood v. Smith* (April 20, 2000), 8th Dist. App. No. 76121. It is believed that the trial court is in the best decision to determine whether the parties engaged in a "good faith" effort to settle a case. *Urban v. Goodyear Tire & Rubber Co.* (Dec. 7, 2000), 8th Dist. App. No. 77162. This Court is aware that the vast majority of any attempts to settle this matter occurred while this matter was on the docket of Judge Ann Mannen. In order to appropriately educate this Court as to what, if any, settlement negotiations occurred while Judge Mannen presided over the matter, the parties conducted an extensive hearing and were permitted to brief this issue without limitation. The Court does recognize that the law permits a review of the evidence presented at trial, the prior rulings of the trial court, the injuries involved, and the defenses available whether or not they were referenced during the pre-judgment interest hearing. *Galvez v. Thomas F. McCafferty Health Ctr.* (May 30, 2002), 8th Dist. App. No. 80260.

FACTUAL HISTORY

This matter was filed before the Court of Common Pleas of Cuyahoga County, Ohio, on December 4, 2001. The matter was filed by the Plaintiff because she posited that the Defendants negligently abandoned Natalie Barnes during her regularly scheduled dialysis treatment. The MedLink Defendants ("MedLink") were included in the action because they had been hired to provide a "sitter," or a person who would maintain constant surveillance on Natalie Barnes during dialysis. The Plaintiff alleged, and the jury concluded, that Natalie Barnes suffered an air embolus due to the removal of her dialysis catheter. The jury further concluded that MedLink was negligent in hiring and assigning an unqualified person to sit with Natalie Barnes. The jury's final conclusion was that the negligence of the Defendants proximately caused the injury

to Natalie Barnes that eventually resulted in her death.

The parties conducted extensive discovery in this matter. Further, the Court determines that MedLink fully cooperated in the pre-trial discovery process. The Plaintiff has argued that the Court should consider MedLink's level of cooperation during discovery that occurred after the verdict to allow the Plaintiff to submit this motion. This Court will not take that discovery process into consideration in deciding whether pre-judgment should be awarded in this matter. However, the information gleaned during the pre-trial discovery process is helpful in determining whether MedLink's settlement posture was taken in "good faith."

At the outset of discovery several aggravating facts came to light that were particularly damaging to MedLink. Some of the factors that shed particular light on the strength of the Plaintiff's case are as follows:

1. MedLink's Supervisor of MRDD, Cindy Fribley, confirmed that MedLink was informed that its employee was to stay with Natalie Barnes at all times in order to avoid injury. Ms. Fribley also confirmed that Endia Hill's (the sitter in question) statement that she was unaware that she had to remain with Natalie Barnes was untrue. Ms. Fribley had personally instructed her of the importance of remaining with Natalie Barnes. Ms. Fribley also testified at deposition that she did not believe MedLink should have accepted the assignment to supervise Natalie Barnes because of her significant medical issues. She questioned whether MedLink could provide for Ms. Barnes safely, but her objection was overruled by her superior.
2. The deposition of MedLink's Administrator, Robert Louche, demonstrated a person who would not make a good witness and also brought other damaging facts to light. Mr. Louche testified that Endia Hill was a liar who could not be trusted. Up to that point, MedLink's counsel relied on Ms. Hill's testimony that she had been instructed to leave Ms. Barnes by a University Hospital employee. Mr. Louche destroyed the credibility of that theory. Mr. Louche also testified that Hill had lied to MedLink about her background, but a simple review of her employment application revealed that Ms. Hill should never have been hired by MedLink in the first place.
3. Endia Hill testified at deposition that she did have a high school diploma

and had been convicted of Felonious Assault. There was a further criminal history involving Passing Bad Checks. Ms. Hill had indicated on her employment application that she had been convicted of a crime and did not allege that she had a high school diploma. Her felony background alone, which was disclosed in her employment application, should have disqualified her from employment with MedLink.

4. The deposition of Anne-Marie Vernon, who had been a sitter employed by MedLink to sit with Natalie Barnes during dialysis, also hurt MedLink's case. Ms. Vernon confirmed that she had been instructed to remain with Ms. Barnes at all times. Ms. Vernon testified that she was instructed that Ms. Barnes would pull on her catheter and she was to prevent this from happening in order to avoid injury. Ms. Vernon was able to prevent Ms. Barnes from pulling on her catheter.

The bad facts of this case left MedLink with only its theory that the removal of the catheter did not lead to Ms. Barnes cardiac arrest and its removal was merely coincidental to her injury. Basically, MedLink's defense was that they were negligent in hiring Endia Hill and Endia Hill was negligent in leaving Ms. Barnes, but said negligence did not proximately cause Ms. Barnes cardiac arrest and eventual death.

MedLink's proximate cause defense was supported by qualified expert testimony at trial, as was the Plaintiff's theory that the catheter removal was the proximate cause of Ms. Barnes' injury and eventual death. However, MedLink's incredibly competent counsel was forced to deal with the fact that Defendant University Hospital's personnel had made an initial diagnosis of cardiac arrest caused by air embolus contemporaneously with the injury. In fact, Dr. Wish, an expert relied upon by the Defendants, made a sworn affirmation of such in the medical record prior to any lawsuit. A further problem was that Ms. Barnes was suffering from the onset of kidney failure and was under the care of a nephrologist. However, only the Plaintiff obtained the testimony of an expert in that field at trial. MedLink called Dr. Steven Nissen, an eminently qualified cardiologist. The absence of an expert in the field of nephrology certainly hurt MedLink with the jury.

MedLink's proximate cause defense was expertly presented by two superb defense counsel who did the absolute best job possible given the evidence and expert opinion available. However, the jury concluded that the MedLink's negligence was the proximate cause of Natalie Barnes' injury and death.

Another problem facing MedLink was the psychiatric diagnosis of Andrea Barnes. Mrs. Barnes was forced to endure her daughter's cardiac arrest and to make the decision to terminate life support. The result was catastrophic to her mental health and allowed the Plaintiff to present the jury with a second victim. This was known prior to trial and should have been taken into consideration in any settlement discussions.

SETTLEMENT HISTORY

The Plaintiff made an initial demand of all Defendants of \$6,000,000.00. MedLink indicated to Plaintiff that only \$2,000,000.00 in liability coverage existed for this matter. In response to that representation, the Plaintiff reduced her demand of MedLink to \$2,000,000.00. MedLink was aware that the Plaintiff was attempting to seek both compensatory and punitive damages at the outset of this matter. MedLink's counsel also informed them that an award of attorneys' fees would be possible in the event that there was an award of punitive damages.

Appropriately, MedLink's counsel moved for summary judgment regarding the Plaintiff's prayer for punitive damages. While that motion was pending, MedLink's employees and representatives contacted their insurance carrier ("AIG") and requested that the matter be resolved within "policy limits." The Court recognized that such requests are routinely made in order to preserve a bad faith claim against the insurance carrier and will give those communications the weight they deserve. It should be noted that MedLink, at any time, could have offered to supplement a monetary offer of its own.

Plaintiff's counsel continued to warn MedLink that it faced a legitimate possibility of a large plaintiff's verdict that could include punitive damages. Plaintiff's counsel informed MedLink of a recent settlement of a wrongful death / medical malpractice case involving dialysis for \$4,750,000.00. Plaintiff's counsel also informed MedLink that they had employed a "mock jury" in this matter that awarded the Plaintiff verdicts ranging from \$8,500,000.00 to \$10,000,000.00.

In early 2004 the parties agreed to mediate this matter. At that time MedLink offered a settlement package with a present day value of \$75,000.00. Appropriately, the Plaintiff left the mediation. This resulted in another correspondence from MedLink personnel requesting that AIG settle the matter within the policy limits.

The Court denied MedLink's Motion for Summary Judgment regarding the punitive damages claim on April 1, 2004. This was a tremendous blow to MedLink and defense counsel stated to AIG in a correspondence that there was a "reasonable threat" that a jury would award punitive damages well into "seven figures." One disturbing aspect of that letter of April 13, 2004, was defense counsel referencing that the Plaintiff had been informed that MedLink had insurance coverage with a policy limit of \$2,000,000.00, but had not been informed of an excess policy with an additional \$10,000,000.00 in coverage. The Court is unsure how long this information was kept from the Plaintiff after it was discovered, but one day was too long. A true injustice would have occurred had a settlement been reached while the Plaintiff remained ignorant of that coverage. The insurance company was informed of the local rule requiring attendance of a representative with settlement authority at the final pre-trial, but AIG elected not to send an adjuster to that hearing.

Qualified defense counsel had communicated to AIG that the chances of a defense

verdict were as low as twenty percent (20%) after the summary judgment ruling and that a punitive damages award of \$3,000,000.00 was "possible." Surprisingly, this resulted in AIG electing to break off settlement negotiations.

By April 19, 2005, just weeks prior to trial, MedLink did make an offer of \$300,000.00 against a demand of \$2,300,000.00. This occurred after a second mediation session. Defense counsel then informed an AIG representative that Andrea Barnes had been confined to a "home for the mentally disturbed" due to depression.

On April 22, 2005, Plaintiffs counsel reduced their demand to \$2,150,000.00 and sent a correspondence detailing the strength of their case. In response, an attorney retained by AIG communicated with MedLink's personal counsel that AIG would fund \$500,000.00 of any settlement. For some reason a \$500,000.00 offer was never communicated to the Plaintiff at any time during this matter. Defense counsel testified at hearing that he was unaware that AIG had agreed to issue \$500,000.00 in authority even though he was charged with negotiating with the Plaintiff in this matter.

After a jury was selected, but prior to opening statements, an offer of \$400,000.00 was communicated by MedLink to the Plaintiff. This was the last offer made by MedLink prior to the verdict. The Court was surprised by the lack of on-going settlement negotiations during the trial of this matter, as the case that went to jury was incredibly damaging to MedLink. At one point, MedLink's representative at the trial, Cindy Fribley, testified that MedLink "put profits over safety" by accepting the Natalie Barnes assignment and employing Endia Hill. Throughout the trial, there were representatives of MedLink and AIG present. AIG employed appellate and punitive damage counsel to monitor the case each day. On various occasions, the Court encouraged those individuals to pursue settlement given how the case was progressing. Similar

advice was communicated by trial counsel to AIG, but to no avail.

LAW & ANALYSIS

The Plaintiff argues that MedLink did not enter into good faith negotiations and pre-judgment interest should be awarded. MedLink argues that its proximate cause defense precludes such an award and that it did negotiate in good faith. The Court agrees that MedLink's only defense to this case was to argue proximate cause. This was especially true given the damning evidence against the company. However, the proximate cause defense did not obviate MedLink's responsibility to negotiate in good faith. *Loder v. Burger* (1996), 113 Ohio App. 3d 669, 675. Even assuming, arguendo, that MedLink rationally believed its proximate cause defense, MedLink did not rationally evaluate the risks and potential liability of the trial. *Urban, supra*, at 9.

MedLink points out that numerous counsel evaluated this matter and placed a settlement value or a verdict estimate at substantially below the jury verdict. However, those estimates were completed prior to the Court's summary judgment ruling. Further, at no time did MedLink make an offer that corresponded with counsels' recommendations. Each offer by MedLink was substantially below those estimates. It was not until approximately one month prior to trial that MedLink made its \$300,000.00 offer and its \$400,000.00 offer was made after the trial had commenced.

MedLink also relies on jury verdict analysis conducted by one of AIG's attorneys. The cases relied on are so factually different from the case at bar that they are not helpful in determining a settlement value to a particular matter. This was obvious to the actual trial counsel in the case who never relied on such information during their settlement conversations with the Court.

The Court scheduled a post-verdict mediation to attempt to resolve this matter shortly after the verdict. AIG was requested to send a representation with settlement authority. AIG did not send anyone and the matter had to be reset and an order issued for AIG to send an appropriate person. AIG did respond to that order and offered \$750,000.00 to settle the case against MedLink despite the jury's award of \$6,100,000.00 along with attorneys' fees. The Court was surprised by AIG's response, but is not taking it into consideration in any way in determining the Plaintiff's Motion for Pre-Judgment Interest.

The Court finds that MedLink failed to make a good faith monetary settlement offer. The offers made by MedLink were substantially below the true settlement value of the case. The Court notes that the case was pending for over two years prior to MedLink making any offer, and that offer was for \$75,000.00 in a wrongful death action. During that two year period MedLink attorneys evaluated this case as being one that would most likely result in a Plaintiff's verdict and every evaluator put the value of the case at substantially over \$75,000.00. While MedLink did raise its offer to \$300,000.00 approximately one month prior to trial, MedLink's exposure had risen significantly by that time. The record reflects a failure on the part of MedLink to enter into good faith settlement negotiations in this matter.

The Court has the responsibility to calculate pre-judgment interest. The Court finds R.C. 1343.03(C)(1)(c)(ii) is applicable and the interest will begin to accrue on the date of the filing of the complaint. The Plaintiff filed her complaint in this matter on December 4, 2001. The Court further finds that pre-judgment interest may only be awarded on the compensatory portion of the jury's verdict against MedLink. MedLink will receive an off-set for the amount of the award attributable to any other Defendant. That amount is \$310,000.00, making the total amount used to calculate pre-judgment interest \$2,790,000.00. The Court will calculate pre-judgment interest

using the statutory rates currently applicable. The applicable statutory rate was ten percent (10%) until June 2, 2004. The statutory rate for the remainder of 2004 was four percent (4%). The applicable statutory rate for 2005 was five percent (5%).

From December 4, 2001 until May 12, 2005, the Plaintiff is awarded \$896,381.99 in pre-judgment interest.

There are no further pending motions before this Court in the above captioned matter. The MedLink Defendants have filed a Notice of Appeal in this matter and there is no just reason why that appeal should not proceed forthwith.

IT IS SO ORDERED.



Judge Robert T. Glickman
sitting pursuant to R.C. 2701.10

Date: March 14, 2006