

IN THE SUPREME COURT OF OHIO

07-0140

Andrea Barnes, as Executrix of the
Estate of Natalie Barnes, Deceased,

Appellee,

v.

University Hospitals of Cleveland, et al.,

Appellants.

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

Court of Appeals Consolidated Case Nos.
87247, 87285, 87710, 87903 and
87946

MEMORANDUM IN SUPPORT OF JURISDICTION OF INTERVENOR-APPELLANT
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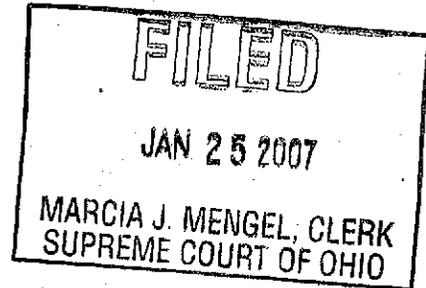


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**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC
OR GREAT GENERAL INTEREST.**

**I. ADJUDICATION OF INTERVENTION AND OTHER SUBSTANTIVE
ISSUES IN A R.C. 2701.10 PROCEEDING WITHOUT THE CONSENT OF
THE ENTITY SEEKING INTERVENTION**

This case provides this Court with the opportunity to define how intervention rights must be determined when the case into which intervention is sought is before a private judge adjudicating pursuant to R.C. 2701.10. Must the entity seeking intervention execute a referral agreement as a condition to adjudication of its rights?

This Court has ruled that adjudication pursuant to R.C. 2701.10 must comply with all statutory requirements, including execution of a referral agreement as a precondition to a private judge's adjudication of an entity's rights. R.C. 2701.10 (B)(1). Clearly, it would violate the statutory and constitutional rights of an entity if its rights were adjudicated by a private judge without the entity's consent. In this case, however, an entity's right to intervene as well as the substantive issues on which it sought to intervene were determined by a presiding judge in proceedings under R.C. 2701.10 to which the entity seeking intervention did not consent.

Specifically, the presiding private judge offered the entity seeking intervention the right to intervene in the private judge proceedings under R.C. 2701.10 if, but only if, the entity seeking intervention would "actually sign a referral indicating that you would -- the case would be heard by me and waive on the record any appeal regarding the validity of the Private Judge Statute." (Motion to Intervene Hearing Tx. at p. 42, lines 15-21). The entity seeking intervention refused to sign such a referral, and the presiding private judge then adjudicated the intervention rights, ruling that the motion to intervene was "untimely" and that the interests of the entity seeking intervention were adequately protected by a party to the private proceedings. (See

Motion to Intervene Hearing Tx. at p. 45, line 50, line 17; Order at Appx. pg. 1-2). This ruling was affirmed on appeal.¹ (See Opinion, p. 16-19, Appx. pg. 42-45).

If this decision stands, then entities seeking intervention in connection with a R.C. 2701.10 proceeding will be confronted with precedent holding that a private judge, to whom the entity seeking intervention has not consented, may deny the entity's right to intervene and rule upon substantive issues on which intervention was sought. Such a result effectively nullifies the statutory requirement of consent to private judge proceedings under R.C. 2701.10, and should not be permitted to stand. Furthermore, permitting private adjudication of an entity's rights without its consent, and denying its right to participate in such proceedings, denies the entity its equal protection and due process rights to equal access to the courts and fair adjudication by the courts. *See generally, Ohio Const. Art. I, § 16; Romer v. Evans*, 517 U.S. 620, 633, 116 S.Ct. 1620, 1628 (U.S. 1996); and *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30, 102 S. Ct. 1148, 1154 (U.S. 1982).

II. ADJUDICATION OF RIGHTS IN A PROCEEDING UNDER R.C. 2701.10 BY A PRESIDING JUDGE NEVER ELECTED TO THE JUDICIARY

This case presents an opportunity for this Court to determine the question whether election to the judiciary is a requirement for service as a private judge in a R.C. 2701.10 proceeding. The Eighth Appellate District held in this case that election to the judiciary is not a

¹ It was asserted that Lexington consented to adjudication pursuant to R.C. 2701.10 because Lexington paid for Medlink's defense counsel, and Medlink's defense counsel signed a referral agreement on behalf of Medlink. To comply with its duty of defense obligations, Lexington paid for Medlink's defense counsel, subject to a reservation of rights. Lexington was never added as a party to the R.C. 2701.10 proceedings, nor did Medlink's defense counsel represent Lexington in those proceedings. In the only proceeding in which Lexington was asked to consent to referral to Glickman, the hearing of Lexington's motion to intervene, Lexington refused its consent to proceed pursuant to R.C. 2701.10.

requirement for service as a private judge under R.C. 2701.10. This holding is contrary to the language of R.C. 2701.10 and the Rules for Governance of the Judiciary, which identify election to the judiciary as a requirement for service as a private judge in a R.C. 2701.10 proceeding. Additionally, the Eighth Appellate District's holding is contrary to action taken by this Court through the Director of the Office of Judicial & Court Services, who explained that this Court has removed Glickman from this Court's "Private Judge Registration Listing" because Glickman is not authorized to serve as a judge under R.C. 2701.10, because he has not been elected to the Bench. This Court needs to clarify this issue before the appellate court's decision results in a proliferation of similar proceedings before former judges never elected to the bench.

III. AN INSURER'S LEGALLY RECOGNIZED INTEREST IN AVOIDING ASSESSMENT OF PREJUDGMENT INTEREST BECAUSE IT NEGOTIATED IN GOOD FAITH CANNOT ADEQUATELY BE REPRESENTED BY ITS POLICYHOLDER, WHEN THE POLICYHOLDER ASSERTS THAT SETTLEMENT WAS NOT ATTAINED BECAUSE OF THE INSURER'S PURPORTED BAD FAITH REFUSAL TO MAKE A REASONABLE SETTLEMENT OFFER.

Even if the rights of Intervenor-Appellant properly could be adjudicated in a R.C. 2701.10 proceeding to which Intervenor-Appellant did not consent, presided over by a former judge never elected to the bench, reversal of the denial of the motion to intervene and the prejudgment interest rulings is required. The presiding private judge and the appellate court both determined that denial of the insurer's motion to intervene was appropriate because the defendant-policyholder adequately protected the insurer's interests. This determination cannot withstand scrutiny, since the defendant-policyholder's position (the insurer refused in bad faith to make a reasonable settlement offer) directly contradicted the insurer's position (the insurer negotiated in good faith and made reasonable settlement offers). When a defendant-policyholder

asserts in prejudgment interest proceedings that its insurer acted in bad faith by refusing to make a reasonable settlement offer, the defendant-policyholder cannot protect the insurer's interest in establishing the reasonableness of the insurer's settlement negotiations. The positions are opposite and cannot be reconciled.

If the appellate decision is permitted to stand, insurers routinely could be denied the right to intervene in prejudgment interest proceedings in which their interests are not adequately protected by policyholder-defendants that assert the insurer failed to settle in bad faith. This result is contrary to the recognized right of an insurer to intervene in order to protect its interests in circumstances where its policyholder has acted contrary to the insurer's interests. *See Yeater v. Bob Betson Enterprises*, 7th App. No. 04-BE-46, 2005 WL 3537684, 2005-Ohio-6943; *Tomcany v. Range Const.*, 11th App. No. 2003-L-071, 2004 WL 2801671, 2004-Ohio-5314; and *Alhamid v. Great American Ins. Companies*, 7th App. No. 02-CA-114, 2003 WL 22071544, 2003-Ohio-4740.

STATEMENT OF THE CASE

This appeal stems from denial of Intervenor-Appellant Lexington Insurance Company's motion to intervene in adjudication of wrongful death and survival action plaintiff's right to prejudgment interest, after wrongful death and survival action defendant Medlink (Lexington's policyholder) asserted on the record of the proceedings that Lexington had refused in bad faith to make a reasonable offer to settle the wrongful death and survival suit. At that juncture, Medlink's position directly contradicted Lexington's position that Lexington negotiated in good faith and made reasonable settlement offers. In this context, Lexington moved to intervene in the

wrongful death and survival action to protect its interests, which now were adverse to a position articulated on the record by Medlink.

The prejudgment interest issue was heard in a proceeding pursuant to R.C. 2701.10 in which a former judge never elected to the bench, presided as a private judge. Lexington did not agree to referral of its issues for adjudication pursuant to R.C. 2701.10, nor did Lexington agree that the presiding private judge could adjudicate Lexington's rights. Nevertheless, the presiding private judge denied Lexington's motion to intervene, finding the motion "untimely" and determining that Medlink adequately represented Lexington's interests. Lexington appealed to the Cuyahoga County Court of Appeals, Eighth District. The Cuyahoga County Court of Appeals, Eighth District upheld the presiding private judge's rulings, and held that the presiding judge had subject matter jurisdiction to preside over Lexington's rights. This ruling was made despite Lexington's objection that it never agreed to have its rights adjudicated in a R.C. 2701.10 proceeding. Nor did Lexington agree that its rights could be adjudicated by the presiding private judge, who was never elected to the judiciary and thus does not qualify to serve as a private judge in a R.C. 2701.01 proceeding. Lexington appeals from these rulings, which violate its constitutional due process and equal protection rights, as well as its rights as a matter of Ohio law.

STATEMENT OF THE FACTS

The death of Natalie Barnes, a mentally impaired 19-year-old adult, has spawned two separate lawsuits by her estate. In one lawsuit, the estate sought wrongful death and survival

damages from the parties that allegedly caused her death, a home health care agency and the hospital where she suffered an adverse medical incident during an outpatient dialysis procedure.²

The second lawsuit is a collection action brought for payment of the personal injury judgment entered in favor of the estate against the home health care agency, which is pending in the Cuyahoga County trial court.³ Lexington was sued in the collection action, and has filed an answer, asserting several affirmative coverage defenses, including a defense that insurance coverage is not provided for the punitive damage award assessed against Medlink in the wrongful death and survival suit.

Lexington was and is not a party to the wrongful death and survival suit. Lexington had no need to intervene in the wrongful death and survival suit until its policyholder, Medlink affirmatively took the position, on the record in the post-verdict proceedings pertaining prejudgment interest, that Lexington refused in bad faith to make a reasonable offer to settle the wrongful death and survival action. This position directly opposed Lexington's position that it negotiated in good faith. Accordingly, on January 27, 2006, Lexington filed a Motion to Intervene in the wrongful death and survival action and to stay the hearing on prejudgment interest. The motion asserted that the testimony of Goddard (who had not entered an appearance as of that date in this case) aligned the interests of Medlink with those of plaintiff, leaving Lexington's interests unrepresented and unprotected. Defense counsel for Medlink could not

² The full caption of the personal injury case is: *Andrea Barnes, Executrix of the Estate of Natalie Barnes v. University Hospitals of Cleveland, Medlink of Ohio, and The Medlink Group, Inc.*, Cuyahoga, C.P. Case No. CV-01-455448, which is the subject of this appeal.

³ The full caption of the collection case is: *Robert Barnes, Administratrix of the Estate of Natalie Barnes v. The Hamister Group, Inc., National Health Care Affiliates, Inc., The Medlink Group, Inc., Medlink of Ohio, Richard Hamister, Mark E. Hamister, Gerald S. Lippes, Sal H. Alfiero, Jack A. Turesky, George E. Hamister, Lisa C. Driscoll, James M. Roper and Isaac Brant Ledman & Teetor v. Lexington Insurance Company*, Cuyahoga C.P. case No. CV-06-589507.

present evidence and documents supporting Lexington's position that it negotiated in good faith while at the same time honoring defense counsel's duty to the party it represents, Medlink. Lexington's position directly contradicts Medlink's assertions through Goddard that Lexington refused in bad faith to make a reasonable settlement offer. Thus, Lexington's interests diverged from that of its policyholder, and no counsel of record in the wrongful death and survival action represented Lexington's interests.

On January 30, 2006, Lexington refused to sign a referral agreement that would permit its rights to be adjudicated pursuant to R.C. 2701.10 by Glickman. Had Lexington executed such an agreement and also agreed on the record to waive any appeal regarding the private judging statute, the presiding private judge would have permitted Lexington to intervene. (See Motion to Intervene Tx. at p. 37, line 20 to p. 42, line 25). Lexington refused, retaining its right to challenge the irregular proceedings before the private judge. The private judge heard oral argument, and then denied Lexington's motion to intervene, ruling that the motion was "untimely" and that Lexington's interests were adequately protected by Medlink. The private judge then proceeded to hear plaintiff's motion for prejudgment interest, without any participation by Lexington or any other entity representing Lexington's interests.

Evidence presented during the prejudgment interest hearing centered on Lexington's purported settlement conduct, based on uncontested testimony elicited from Richard Goddard, alleging that Lexington failed to negotiate in "good faith" despite sufficient coverage. Goddard also testified that plaintiff "absolutely" made a good faith effort to settle. Trial counsel for Medlink did not cross-examine Goddard. No participant in the hearing cross-examined Goddard. No participant in the hearing informed the presiding judge that Goddard knew that Lexington contested coverage for punitive damages. The private judge's prejudgment interest ruling

adopted Goddard's testimony, and awarded \$896,381.99 in prejudgment interest to the Barnes estate, based in part on Lexington's alleged bad faith settlement conduct. (See Journal Entry (March 13, 2006) and Amended Journal Entry (March 14, 2006), Appx. pg. 3-23).

In the March 14, 2006 Amended Journal Entry the private judge stated several purported "facts" that Lexington refutes, such as: (1) Lexington concealed from Medlink an excess policy of an additional \$10 million in coverage; (2) Lexington violated a local rule requiring attendance of a representative with settlement authority at the final pre-trial conference; (3) Lexington ignored communications from Medlink's defense counsel that the chances of a defense verdict in *Barnes* was as low as 20% and that a punitive damages award of \$3 million was possible which surprisingly resulted in Lexington electing to break off settlement negotiations; (4) the private judge and Medlink's defense counsel encouraged Lexington's attorneys to pursue settlement during the *Barnes* trial to no avail; (5) a jury verdict analysis completed by Lexington relied upon cases that were so factually different from the case at bar that they were not helpful in determining a settlement value; (6) Lexington failed to send a representative to post-verdict mediation; and (7) the private judge "was surprised" that Lexington offered \$750,000 post-trial despite the jury's award of \$6.1 million plus attorney fees. On April 21, 2006, Medlink filed a third-party complaint against Lexington for declaratory judgment, breach of contract and bad faith, signed by Richard Goddard.⁴

⁴ The Medlink parties, the home health care agency and its corporate parent, were defendants in the personal injury action; and the Medlink parties, as well as several Medlink officers and directors, were sued by Barnes to collect the judgment. Medlink seeks indemnity from Lexington to pay compensatory damages, punitive damages, costs, attorneys' fees and prejudgment interest owed to Barnes.

Lexington appealed the intervention and prejudgment interest rulings by the private judge, but the Court of Appeals affirmed. (See Opinion, p. 16-19, 22-27, Appx. pg. 42-45, 48-53). Lexington appeals to this Court, seeking reversal of the appellate and trial court decisions on intervention and prejudgment interest, and remand of this case to the trial court for determination of Lexington's right to intervention and its interests in connection with prejudgment interest.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

PROPOSITION OF LAW NO. 1

A private judge presiding over a R.C. 2701.10 proceeding is prohibited from adjudicating intervention rights and other substantive issues without the consent of the entity seeking intervention, and any rulings made without such consent are null and void.

Adjudication by a private judge must be consensual. R.C. 2701.10 provides that “[n]o referral or submission shall be made to a retired judge under this section, unless the parties to the action or proceeding unanimously choose to have the referral or submission made, enter into an agreement of the type described in division (B)(1) of this section with the retired judge, and file the agreement in accordance with this division.” This Court has held, “[w]here the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted.”⁵

The plain and unambiguous language of R.C. 2701.10 does not authorize a private judge to adjudicate an issue absent a written agreement. This Court recently applied the statute in this

⁵ *Sears v. Weimer* (1944), 143 Ohio St. 312, at paragraph five of syllabus.

context. In *State ex rel. Peffer v. Russo* (2006), 110 Ohio St.3d 175, 177-78, this Court held that a trial judge did not patently and unambiguously lack jurisdiction to proceed in a malpractice case after the administrative judge assigned the case to a private judge and removed the trial judge from the case. As part of its reasoning, this Court noted that the defendants in the underlying medical malpractice case withdrew their consent to the referral of the private judge.

In this case, Lexington never entered into an agreement under R.C. 2701.10 to authorize Glickman to adjudicate Lexington's Motion to Intervene or Lexington's protected interests in the prejudgment interest proceedings. Glickman and Plaintiff both acknowledged that such an agreement was necessary in order for Private Judge Glickman to adjudicate these issues. (See Motion to Intervene Tx. at p. 41-42, lines 5-25, 1-23). Glickman and all the parties in the proceedings before him knew that Lexington refused to consent to adjudication of its rights by Glickman in a R.C. 2701.10 proceeding. Nevertheless, Glickman adjudicated and ruled upon issues that Lexington did not refer to him for adjudication. Glickman issued decisions against Lexington's interests, denying Lexington's Motion to Intervene assessing prejudgment interest based upon unchallenged assertions of Medlink in violation of R.C. 2701.10 and Lexington's due process rights.

When the assignment of a judge is made without the necessary statutory authority, "then the assigned trial court lacks jurisdiction to hear the matter, and the judgment of that court is void."⁶ In this case, Glickman was without statutory authority to adjudicate and issue that Lexington did not agree to submit to adjudication by Glickman. In this context, Lexington

⁶ *State ex rel. Kline v. Carroll*, 8th App. No. 79737, 2002 WL 42962, *affirmed by State ex rel. Kline v. Carroll*, 96 Ohio St.3d 404, 2002-Ohio-4849.

submits that Glickman's rulings against Lexington on its Motion to Intervene on January 30, 2006 and against Lexington's interests awarding prejudgment interest on March 14, 2006 should be rendered null and void, because Lexington had not agreed to refer this issue for adjudication in a R.C. 2701.10 proceeding.

PROPOSITION OF LAW NO. 2

A private citizen never elected to the judiciary is prohibited from adjudicating intervention rights and other substantive issues in a R.C. 2701.10 proceeding, and any rulings made by such a person are null and void.

Even if Lexington were to have authorized Glickman to adjudicate Lexington's rights, which Lexington did not, Glickman has never been elected to the judiciary and thus does not meet the statutory requirement to serve as a private judge under R.C. 2701.10.⁷ Therefore, Private Judge Glickman lacked subject matter jurisdiction and his rulings on these issues should be rendered null and void.

R.C. 2701.10 provides eligibility for two kinds of retired judges to adjudicate a proceeding under the statute: (1) voluntarily retired judges (who must be elected); and (2) involuntarily retired judges who are over the age of 70 and were required to retire under Article IV, § 6 of the Ohio Constitution. Rule VI(C)(2) of the Ohio Supreme Court Rules for the Government of the Judiciary states that a "voluntarily retired judge" is 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."⁸ Article IV, Section 6 of the Ohio Constitution provides

⁷ This Court has removed Glickman from its registry of former judges eligible to preside over R.C. 2701.10 proceedings, because Glickman has never been elected to the judiciary and thus does not qualify for such service.

⁸ Gov. Jud. R. VI(C)(2).

guidelines for the compensation of elected judges. This provision of the Ohio Constitution does not extend jurisdiction to retired appointed judges who have not been elected to serve on an Ohio court. The Editor's Comment to this section of the Ohio Constitution states that "judges are to be elected rather than appointed...."⁹

"Judicial power may be conferred upon a person or a court only by authority of law, and in absence of such authority, a judge cannot delegate his or her judicial authority."¹⁰ Glickman is a private attorney who twice served as a Common Pleas Court Judge as a result of appointment by then-Governor Taft. Glickman has never been elected to the Bench. Accordingly, R.C. 2701.10 does not confer subject matter jurisdiction for Glickman to adjudicate preside over R.C. 2701.10 proceedings, and his rulings should be rendered null and void.

The appeals court incorrectly reviewed Glickman's rulings on Lexington's Motion to Intervene and Plaintiff's prejudgment interest motion under an abuse of discretion standard. R.C. 2701.10 extended no judicial discretion to Glickman. In this case, Glickman was no more than a private citizen wrongfully adjudicating Lexington's rights over its objection in violation of Lexington's statutory and constitutional due process rights.

Lexington submits that Glickman lacked subject matter jurisdiction to rule on Lexington's Motion to Intervene, Plaintiff's Motion for Prejudgment Interest, as well as his rulings at trial. Thus, Glickman's rulings on January 30, 2006 and March 14, 2006 should be rendered null and void, as should all other rulings made by Glickman. Otherwise, this case will stand for the proposition that a non-party may be bound by a ruling issued by a private citizen.

⁹ Ohio Const. Art. IV, § 6, Editor's Comment.

¹⁰ *Huffman v. Huffman*, 10th App. Nos. 02AP-101, 02AP-698, 2002-Ohio-603, 2002 WL 31466435.

PROPOSITION OF LAW NO. 3

An insurer's legally recognized interest in avoiding assessment of prejudgment interest because it negotiated in good faith, cannot adequately be represented by its policyholder when the policyholder asserts that settlement was not attained due to the insurer's purported bad faith refusal to make a reasonable settlement offer.

The ruling by Glickman and affirmance on appeal denying Lexington's motion to intervene should be reversed. The ruling and affirmance are grounded in the assertion that Lexington's interests were adequately represented by Medlink. Such a conclusion defies logic, is clearly wrong and must be reversed. Lexington and Medlink's positions are contrary. Medlink asserted on the record in the prejudgment interest proceedings that Lexington refused in bad faith to make a reasonable settlement offer, resulting in failure to settle the wrongful death and survival action before trial by Glickman. Lexington refused to refer adjudication of its rights to Glickman, and further takes the position that it negotiated in good faith. These positions are diametrically opposed. The record, including Glickman's decision establish that Medlink did not represent Lexington's interests, nor did any other participant in the proceedings before Glickman.

If the appellate decision is permitted to stand, insurers routinely could be denied the right to intervene in prejudgment interest proceedings in which their interests are not adequately protected by policyholder-defendants that assert the insurer failed to settle in bad faith. This result is contrary to the recognized right of an insurer to intervene in order to protect its interests in circumstances where its policyholder has acted contrary to the insurer's interests. *See Yeater v. Bob Betson Enterprises*, 7th App. No. 04-BE-46, 2005 WL 3537684, 2005-Ohio-6943; *Tomcany v. Range Const.*, 11th App. No. 2003-L-071, 2004 WL 2801671, 2004-Ohio-5314; and

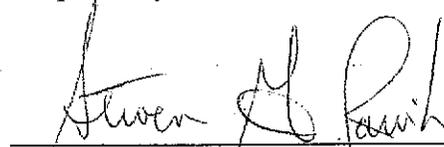
Alhamid v. Great American Ins. Companies, 7th App. No. 02-CA-114, 2003 WL 22071544, 2003-Ohio-4740.

In sum, Lexington's rights and interests were adjudicated without representation, absent Lexington's consent to proceed before Glickman, and determined by a private citizen unqualified to preside over a R.C. 2701.10 proceeding. In this context, the appellate court's holding should be reversed and Glickman's ruling should be rendered null and void. All of Glickman's rulings should be rendered null and void, and the matter should be referred to the trial court for adjudication.

CONCLUSION

For all of the foregoing reasons, Intervenor-Appellant asks that this Court accept these propositions of law to correct and clarify the law.

Respectfully submitted,



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2005. The Plaintiff then filed a Motion for Pre-Judgment Interest. That motion has been pending for over six (6) months. Lexington argues that it learned of a divergence of interests between itself and MedLink during the deposition of attorney Richard Goddard. That deposition was taken on November 15, 2005, over two (2) months ago. Lexington filed its Motion to Intervene on the Friday before a Monday hearing. The parties have had this hearing scheduled for many months. Lexington's application was not timely made.

Further, counsels for MedLink have stated on the record that MedLink will vigorously defend against this motion and will argue that it acted in good faith during settlement negotiations. Lexington's only issue seems to be the testimony of Mr. Goddard who is MedLink's personal counsel and has never filed a notice of appearance in this action. Mr. Goddard will not participate as counsel in the hearing.

For the foregoing reasons and those stated on the record this date, Lexington's Motion to Intervene is denied. Further Lexington's Motion for Continuance is denied as moot.

IT IS SO ORDERED.



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

1/30/06
Date

THE STATE OF OHIO }
Cuyahoga County } SS. I, GERALD E. FUERST, CLERK OF
THE COURT OF COMMON PLEAS
WITHIN AND FOR SAID COUNTY.
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY
TAKEN AND RECEIVED FROM THE ORIGINAL
455978 *Order 1-2-06*
NOW ON FILE IN MY OFFICE.
WITNESS MY HAND AND SEAL OF SAID COURT THIS 30
DAY OF *Jan* A.D. 20 *06*
GERALD E. FUERST, Clerk
By *[Signature]* Deputy

RECEIVED FOR FILING
JAN 30 2006
BY *[Signature]* GERALD E. FUERST, CLERK
DEP.

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 communication 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.

IT IS SO ORDERED.

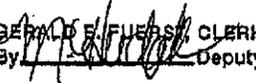


Judge Robert T. Glickman
sitting pursuant to R.C. 2701.10

Date: December 29, 2005

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GERALD E. FUERS, CLERK
By:  Deputy

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.

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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:

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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.

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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.

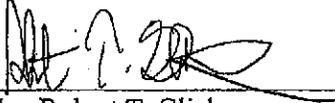
The Court has the responsibility to calculate pre-judgment interest. The Court finds R.C. 1343.03(C)(1)(c)(ii) is applicable and the interest will begin to accrue on the date of the filing of the complaint. The Plaintiff filed her complaint in this matter on December 4, 2001. The Court further finds 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

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



**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

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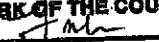

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FILED & JOURNALIZED ANNOUNCEMENT OF DECISION
PER APP. R. 22(E) PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

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.

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,

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

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.”

specially 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:

“***

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“(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.

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

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.