

IN THE SUPREME COURT OF OHIO

CASE NO. 07-0140

ANDREA BARNES, EXECUTRIX

Plaintiff-Appellee/Cross-Appellant

-vs-

UNIVERSITY HOSPITALS OF CLEVELAND, *et al.*
Defendant -Appellants/Cross-Appellees.

ON APPEAL FROM THE CUYAHOGA COUNTY
COURT OF APPEALS
CASE NO. 87247, 87285, 87710, 87903, and 87946

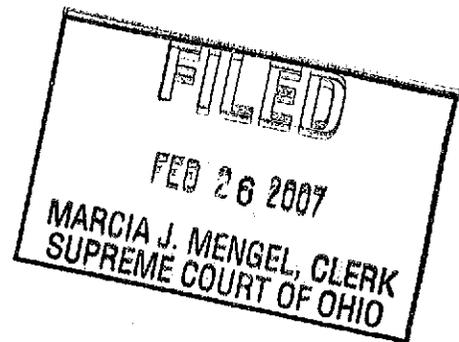
MEMORANDUM OPPOSING JURISDICTION AND
IN SUPPORT OF CROSS-APPEAL OF
PLAINTIFF-APPELLEE/CROSS-APPELLANT, ANDREA BARNES, EXECUTRIX

W. Craig Bashein, Esq. (#0034591)
BASHEIN & BASHEIN CO., L.P.A.
[Counsel of Record]
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113-2216
(216) 771-3239
FAX: (216) 771-5876

Michael F. Becker, Esq. (#0008298)
Lawrence F. Peskin, Esq. (#0059391)
BECKER & MISHKIND CO., L.P.A.
134 Middle Ave.
Elyria, Ohio 44035
(440) 323-7070
FAX: (440) 323-1879

Paul W. Flowers, Esq. (#0046625)
PAUL W. FLOWERS CO. L.P.A.
Terminal Tower, 35th Floor
50 Public Square
Cleveland, Ohio 44113
(216) 344-9393
FAX: (216) 344-9395

Attorneys for Plaintiff-Appellee/Cross-
Appellant



LAW OFFICES
BASHEIN & BASHEIN
CO., L.P.A.
TERMINAL TOWER
35TH FLOOR
50 PUBLIC SQUARE
CLEVELAND, OHIO 44113
(216) 771-3239

James M. Roper, Esq.
Jessica K. Walls, Esq.
Isaac, Brant, Ledman & Teetor LLP
250 East Broad Street, Suite 900
Columbus, Ohio 43215

Richard P. Goddard, Esq.
Calfee, Halter & Griswold LLP
800 Superior Avenue, Suite 1400
Cleveland, Ohio 44114-2688
*Attorneys for Defendant-Appellants/Cross-
Appellees, MedLink of Ohio, Inc., et al.*

Steven G. Janik, Esq.
Janik & Dorman
9200 South Hills Blvd., Suite 300
Cleveland, Ohio 44147-3521

Lori S. Nugent, Esq.
Maya Hoffman, Esq.
Cozen O'Connor
222 South Riverside Plaza, Suite 1500
Chicago, Illinois 60606
*Attorneys for Intervenor-Appellant/Cross-
Appellee, Lexington Ins. Co.*

TABLE OF CONTENTS

TABLE OF CONTENTS ii

STATEMENT OF WHY JURISDICTION SHOULD NOT BE GRANTED 1

STATEMENT OF THE CASE AND FACTS 2

ARGUMENT 12

I. JURISDICTIONAL REQUEST OF DEFENDANT-
APPELLANT/CROSS-APPELLEE MEDLINK 12

 PROPOSITION OF LAW NO. 1: In reviewing an award of punitive damages, the trial court must independently analyze the three guideposts set forth by the United States Supreme Court in *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559 12

 PROPOSITION OF LAW NO. 2: A ratio of punitive damages to compensatory damages of 30-to-1 is unconstitutionally excessive..... 14

 PROPOSITION OF LAW NO. 3: One who has never been elected to a judgeship in Ohio may not serve as a private judge under R.C. §2701.10..... 16

 PROPOSITION OF LAW NO. 4: Comments by counsel that an opposing party was charged with attempted aggravated murder, that the government wanted murder charges filed for the civil injury alleged, and that the jury should decide the case with anger are so prejudicial that a new trial must be granted..... 18

 PROPOSITION OF LAW NO. 5: Where a trial is held contrary to the requirements of R.C. §2701.10, the proceeding is void and a new trial must be granted..... 21

II. JURISDICTIONAL REQUEST OF INTERVENOR-
APPELLANT/CROSS-APPELLEE LEXINGTON..... 23

 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. 23

 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. 24

LAW OFFICES
BASHEIN & BASHEIN
CO., L.P.A.
FEDERAL BUILDING
35TH FLOOR
50 PUBLIC SQUARE
CLEVELAND, OHIO 44113
216/771-3239

PROPOSITION OF LAW NO. 3: An insurer's legally recognized interest in avoiding assessment of pre-judgment interest because it negotiated in good faith, cannot adequately be represented by its policyholder when the policyholder asserts that settlement was not obtained due to the insurer's purported bad faith refusal to make a reasonable settlement offer.25

III. JURISDICTIONAL REQUEST OF PLAINTIFF-APPELLEE/CROSS-APPELLANT26

PROPOSITION OF LAW: The amendments to R.C. §1343.03(C) that were adopted by 2004 H.B. 212 do not apply to causes of action that accrued prior to the enactment's effective date of June 2, 2004.26

CONCLUSION.....29

CERTIFICATE OF SERVICE30

APPENDIX:

A. Eighth Judicial District Court of Appeals Decision of December 11, 2006

B. Cuyahoga County Court of Common Pleas Amended Journal Entry of March 14, 2006

LAW OFFICES
BASHEIN & BASHEIN
CO., L.P.A.
CRIMINAL TOWER
35TH FLOOR
50 PUBLIC SQUARE
CLEVELAND, OHIO 44113
(216) 771-3239

STATEMENT OF WHY JURISDICTION SHOULD NOT BE GRANTED

The Eighth Judicial District Court of Appeals' unanimous decision rendered in the proceedings below on December 11, 2006 should be left intact, save for one discrete legal issue involving the calculation of pre-judgment interest. Further review of the jury's verdict is unwarranted for the simple reason that the positions asserted in the Memoranda in Support of Jurisdiction that were filed by Defendant-Appellants/Cross-Appellees, MedLink of Ohio and the MedLink Group, Inc. (hereinafter collectively "MedLink") and Intervenor-Appellant/Cross-Appellee, Lexington Insurance Company (hereinafter "Lexington"), have little basis in reality.

Private Judge Robert T. Glickman presided over the jury trial in strict compliance with the parties' written referral agreement, which had been approved by Judge Ann T. Mannen. Because of the uncertainty surrounding the Private Judge Act, R.C. §2701.10, Judge Glickman had each of the parties' counsel confirm on the record that they were waiving all appeal rights thereunder at the beginning of the proceeding. It was not for another ten (10) months following the announcement of the jury's verdict that MedLink suddenly decided that Private Judge Glickman had never possessed "subject matter jurisdiction." The issue was raised not just once, but twice, in unsuccessful original actions that were filed by MedLink in this Court. *Sup. Ct. Case Nos. 06-0478 & 0932*. The Court thereafter confirmed in *In re J.J.*, 111 Ohio St.3d 205, 2006-Ohio-5484, 855 N.E.2d 851, paragraph one of the syllabus, that "procedural irregularities in the transfer of a case to a visiting judge" are merely voidable, not void, and timely objections are absolutely required before any judge's authority may be challenged. No reason exists for this Court to revisit this well settled principle.

There were no irregularities during the course of the two-week jury trial that require further examination by this Court. From the one thousand five hundred and nineteen (1,519) page transcript, MedLink has only identified seven (7) supposedly abusive remarks. *Memorandum in Support of Jurisdiction of Appellants MedLink of Ohio and the MedLink Group, Inc. (hereinafter "MedLink's Memorandum"), pp. 13-14*. Only three (3) of them were met with a defense objection, and each of those objections were sustained by Private Judge Glickman.

Given the overwhelming evidence of patient abuse and neglect that was established during the proceeding, the verdict that was rendered against MedLink and Defendant, University Hospitals of Cleveland, for compensatory damages of \$3,100,000.00 was hardly surprising. The punitive damage award against MedLink in the amount of \$3,000,000.00 was also quite predictable since the home health care agency's own designated trial representative, Supervisor Cynthia Fribley (hereinafter "Fribley"), had admitted more than once that profits had been placed over patient safety.

MedLink's and Lexington's Memoranda in Support of Jurisdiction consist of nothing more than contrived arguments that are designed to create the illusion that the trial judge, and all three jurists on the court of appeals, somehow overlooked a multitude of grave injustices that had been suffered by the now defunct home health care agency. As the record confirms, nothing could be further from the truth. The punitive damage award of \$3,000,000.00 was right in line with the compensatory award of \$3,100,000.00 and there was no unacceptable ratio of "30 to 1" as MedLink would now have this Court believe. The reality is that Private Judge Glickman afforded MedLink a full and fair trial only after the defense attorneys agreed, both in writing and on the record, to refer the dispute to him. As four (4) jurists have now concluded, the verdict that was rendered was completely appropriate given the damaging evidence that was presented to the jury. Jurisdiction should be extended in this instance only with respect to the issue of statutory retroactivity that is set forth in the Cross-Appeal.

STATEMENT OF CASE AND FACTS

A. THE REFERRAL AGREEMENT.

This medical malpractice/wrongful death action was originally filed on December 4, 2001. Plaintiff-Appellee/Cross-Appellant, Andrea L. Barnes, Executrix, sought compensatory damages against MedLink and UH, for their violations of the applicable standards of care that they owed to Natalie Barnes, Deceased (hereinafter the "Decedent"), while she was undergoing a kidney dialysis treatment.¹

¹ As a result of the traumatic death of her daughter, Plaintiff Andrea L. Barnes developed severe depression and eventually had to be institutionalized. Plaintiff, Robert Barnes, has succeeded her as the Estate representative.

After conferring together the parties determined that it would be in their respective best interests to submit the dispute to Private Judge Robert T. Glickman for purposes of conducting the jury trial. A court-approved agreement was entered to this effect, which was executed by counsel for each of the litigants and approved by the originally assigned judge. *See Agreement for Referral for Submission to Retired Judge dated April 18, 2005.* The trial commenced on Monday, April 25, 2005. Prior to opening arguments, Judge Glickman had the parties confirm on the record that they were consenting to his authority and waiving any rights to challenge his jurisdiction on appeal. *Vol. I, pp. 146-148.*²

Mr. Becker, Mr. Bashein, it's my understanding on behalf of your client, you waive any appellate argument regarding my presiding over this case or my presiding over this case in front of the jury. Is that accurate?

MR. BASHEIN: Yes.

THE COURT: Mr. McDonald, on behalf of your client?

MR. MCDONALD: Correct.

THE COURT: Mr. Coyne, on behalf of your client?

MR. COYNE: Yes. [emphasis added].

Id., p. 147. James L. Malone, Esq. and John C. Coyne, Esq. of Reminger & Reminger in Cleveland, Ohio represented MedLink at the time. Attorneys from Isaac, Brant, Ledman, & Teetor of Columbus, Ohio and Cozen & O'Connor of Chicago, Illinois were also retained to monitor the proceedings and were presumably present during the foregoing exchange and waiver of appeal rights. *Id.*

B. MEDLINK'S ASSIGNMENT.

The following facts were established during the jury trial. Because of the attendant dangers, mentally disabled patients require special attention during kidney dialysis treatments. *Vol. IV, pp. 812-813, 1068-1069.* This was particularly true for the Decedent, who had been

² The citations to "Vol. ____, p. ____" are to the eight (8) volume transcript of the trial proceedings.

known to pull at her catheter during dialysis. *Vol. VII, p. 1283; Vol. IV, p. 705.* "Sitters" would often accompany the patients during the procedures. *Vol. IV, pp. 820 & 842; Vol. VI, pp. 1089-1090.* In contrast to the rest of the busy hospital staff, these aides are able to devote their undivided time and attention to the patient one-on-one. *Vol. VI, pp. 1083, 1091, 1239.* Their presence serves an important function in protecting the safety of the patient. *Vol. IV, pp. 787, 812, 820, 841-842; Vol. VI, pp. 1083, 1105.*

MedLink had a contract with the Cuyahoga County Board of Mental Retardation and Developmental Disabilities (MRDD) to provide home health care services. *Vol. VII, p. 1269.* The highest-ranking local official was Administrator Robert Louche (hereinafter "Louche"). *Vol. III, p. 660.* He was largely responsible for the company's finances as well as ensuring that the services were performed safely. *Vol. III, pp. 660-662.* The Supervisor for MedLink's MRDD Department was Cynthia M. Fribley (hereinafter "Fribley"). *Vol. III, pp. 488-489.* She had years of experience working with the mentally handicapped. *Id., pp. 489-490; Vol. VII, pp. 1266-1269.*

When Supervisor Fribley reviewed the paperwork she received from the County MRDD, a "red flag" immediately went up in her mind. *Vol. III, p. 494; Vol. VII, p. 1279.* The Decedent had significant disabilities, required constant monitoring during dialysis, and needed a high level of supervision. *Vol. III, p. 495.* Fribley grew concerned that MedLink was not qualified to accept the case. *Id., p. 495.* MedLink's Director of Nursing, Catherine Parker (hereinafter "Parker"), also possessed considerable experience with handicapped patients, but she was not consulted as she should have been. *Vol. III, pp. 495-496, 498-499; Vol. VII, pp. 1280-1281.*

Instead, Supervisor Fribley referred the application to Administrator Louche. *Vol. III, p. 495.* He had no medical training or discernable experience with the handicapped. *Id., p. 662.* Fribley advised him of her safety concerns over whether MedLink could take the assignment. *Vol. III, pp. 495-496.* The Supervisor did not want to take the job, but Administrator Louche ordered her to do so. *Vol. VII, pp. 1279-1280.* Supervisor Fribley candidly acknowledged that:

LAW OFFICES

SASHEIN & SASHEIN
CO., L.P.A.

MINIMAL TOWER

35TH FLOOR

50 PUBLIC SQUARE

CLEVELAND, OHIO 44113

(216) 771-3239

Q. So you understood that when you were ordered to take this job, you were putting Natalie Barnes at risk, correct?

A. At that point in time, yes.

Vol. III, p. 497.

On September 1, 2000, Fribley met with Plaintiff and Mary Lynn Roberts (hereinafter "Roberts"), who was a supervisor at the Cuyahoga County Board of MRDD. *Vol. III, p. 499.* Supervisor Fribley was instructed that she had to make sure that the MedLink aide did not leave the Decedent's side during dialysis. *Vol. VII, p. 1283.* She was warned that the Decedent had attempted to pull, touch, and play with her catheter during the procedure previously. *Vol. III, pp. 504-505.* MedLink's job was to prevent the Decedent from removing the catheter either intentionally or inadvertently. *Id., pp. 1283-1284.*

Supervisor Fribley understood that there could be consequences if these instructions were not followed. *Vol. VII, p. 1283.* The following exchange took place during her cross-examination:

Q. You were also told that if she removed her catheter, if the aide left and she removed her catheter, you understood that it could be dangerous, correct?

A. Yes.

Q. That's what you guys were being hired to protect against, correct?

A. Yes.

Q. You were hired to protect against and MedLink was hired to protect against Natalie Barnes sitting in dialysis and removing her catheter and a horrible event occurring, a catastrophic event occurring, correct?

A. Right.

Q. In fact, as it relates to once you get to dialysis, that was the only job that the aide had, correct?

A. Yes, to be with her.

Q. And MedLink was being paid to do that job?

A. Yes, we were. [emphasis added].

Vol. III, p. 505. By Fribley's own account, MedLink "knew" that the Decedent's health would be jeopardized if they failed to prevent her from pulling out her catheter. *Id., p. 506.* These warnings were, the Supervisor agreed, "[c]ritically important for [the Decedent's] safety and

well being.” *Id.*, pp. 506-507. Death was even a possibility. *Id.*, pp. 507-508.

The MedLink aide initially selected to attend to the Decedent during her dialysis treatment was Ann Marie Lumpkin Vernon (hereinafter “Lumpkin”).³ *Vol. III*, p. 583. When Lumpkin arrived at UH with the Decedent, the hospital staff provided her with similar instructions. *Vol. III*, p. 588. The employees in the dialysis unit warned her that:

*** At no time leave her alone. She’s not allowed to be left alone unattended and she’s not allowed to pull out her tube because it could be tragic; it could be detrimental. [emphasis added].

Vol. III, pp. 589-590.

A UH technician confirmed that the Decedent would be “very lethargic” and “slow” during dialysis. *Vol. VI*, pp. 1090-1091. Just as she had been warned, Lumpkin observed the Decedent attempt to touch and “pull at her catheter.” *Vol. III*, p. 591. Lumpkin responded by distracting the Decedent with a tennis shoe, which was “like a teddy bear” for her. *Id.*, pp. 592-593. Lumpkin was also able to gently remove the Decedent’s hand from the catheter. *Id.*, p. 593. Lumpkin accomplished this every time the Decedent reached for the tube without problem. *Id.*, pp. 593-594.

C. ENDIA HILL.

Lumpkin was only able to accompany the Decedent to her dialysis treatments on a few occasions. *Vol. III*, p. 596. The replacement that MedLink selected was Endia V. Hill (hereinafter “Hill”). Hill dropped out of high school in the eleventh grade. *Deposition of Endia V. Hill taken June 24, 2002*, p. 75.⁴ In 1990, she pled guilty in a plea arrangement to felonious assault. *Id.*, p. 14. Hill knew that her criminal record would preclude her from serving as a home health aide for the disabled. *Id.*, pp. 24-25. Two of her sisters worked for MedLink. *Id.*, p. 76. One of them told her that MedLink “hired felons.” *Id.*, p. 25. After hearing this, Hill applied for a job with MedLink. *Id.*, pp. 26-27.

On her employment application of August 16, 2000, Hill wrote out that she had

³ At the time of the pertinent events in 2000 she was known as Ann Marie Lumpkin.

⁴ Because she did not respond to the subpoenae issued by the court, Hill’s deposition transcript was read to the jurors. *Vol. V*, pp. 956-957.

previously been convicted of assault. *Deposition of Endia Hill taken June 24, 2002, p. 19.* MedLink never questioned her about the felonious assault and probation she disclosed on her application. *Id., p. 20.* Additionally, Hill never hid the fact that she had not secured a high school diploma. Documentation prepared by MedLink required such a degree as a minimum qualification for the job. *Deposition of Endia Hill taken June 24, 2002, p. 88.* Administrator Louche has confirmed this was a prerequisite for employment. *Vol. III, p. 664.* The rule is intended to ensure the patient's safety. *Vol. III, p. 529.*

During his deposition, Administrator Louche testified that Hill told him before she was hired of her felony conviction. *Vol. III, pp. 677-679.* He then claimed at trial that he had meant that Hill's disclosure had been made to "MedLink" as a corporate entity and not him personally. *Id., pp. 678-681.* He nevertheless conceded that she should have never been hired. *Id., pp. 680-681.* The conviction was "blatantly disclosed on her application." *Id., p. 681.* The prohibition against hiring felons was supposed to protect patients and was there for their safety. *Vol. IV, p. 703.*

Hill's brief tenure started with MedLink in September 2000. *Deposition of Endia Hill taken June 24, 2002, p. 7.* One of her first patients was the Decedent. *Id., p. 99.* She had never worked with anyone who needed kidney dialysis treatments before. *Id., pp. 43-44.* Supervisor Fribley supplied the following admission:

Q. So do I understand you have this difficult job, a red flag, one that you didn't want to take, and you take your most unqualified aide and you assign her to it, is that my understanding, Endia Hill?

A. Yes. Yes.

Vol. VII, p. 1284. She further conceded that the laws imposing minimum educational requirements and prohibiting felons from caring for the disabled were intended to protect the patient. *Id., p. 1278.* MedLink "knew" that violating these standards jeopardized the Decedent's safety. *Id., p. 1278.* Administrator Louche acknowledged to the jurors that:

Q. And not only were you aware of these regulations and laws, the company, as a whole, was aware of the existence of the regulations and laws and why they were on the books, correct?

A. I don't know the reason why, but yes, they were very

aware of the conditions that we had to follow.

Q. *** MedLink, as you said, knowingly violated the law by hiring a felon and placing her in the home of Natalie Barnes, that places her at risk, correct?

A. Yes. [emphasis added].

Vol. IV, pp. 704-705.

D. THE EVENTS OF OCTOBER 19, 2000.

On October 19, 2000, Hill transported the Decedent to her dialysis treatment at UH at approximately 1:00 P.M. *Deposition of Endia Hill taken June 24, 2002, p.56.* Once the catheter was attached, Hill promptly left the dialysis unit, went to the cafeteria, and then wandered around the hospital for the next several hours. *Id., 71.*

UH hemodialysis technician Charles Lagunzad attended to the Decedent that afternoon. *Vol. V, p. 1067.* He has confirmed that there was no aide present with her, but he was not sure about whether she was supposed to have one. *Id., pp. 1067-1068.* He then went to lunch at 1:30 P.M. *Id., p. 1074.* That left only Technician Larry Lawrence (hereinafter "Lawrence") in the dialysis pod. *Id., pp. 1074-1075.* Lawrence had to attend to a total of four (4) patients at that point. *Vol. VI, p. 1244.*

While he was engaged in another task, Lawrence turned and saw that the Decedent's catheter was detached and laying on the floor. *Vol. VI, pp. 1098-1099.* He yelled out for help. *Vol. VI, p. 1086.* The Administrative Director of the UH Dialysis Program, Sue Blankschaen (hereinafter "Blankschaen"), was approximately twenty (20) feet away. *Id., pp. 1178 & 1181-1182.* She appreciated that an air embolism was one of known consequences when patients pull out their catheters. *Id., pp. 1235-1236.* She had even trained other nurses in the unit to be aware of this danger. *Id., p. 1236.* Upon her arrival Administrative Director Blankschaen observed the hole in the Decedent's chest. *Id., p. 1243.* Blankschaen assessed the Decedent and determined that she had a weak pulse and shallow respirations. *Id., p. 1227.* A decision was made at that point to initiate CPR, which was performed by Lawrence and another staff member. *Id.* A code was then called at 2:00 P.M., which brought a number of hospital specialists into the pod. *Id., pp. 1109 & 1227-1228.*

E. THE DECEDENT'S DEATH.

Plaintiff's trial expert was Barry J. Sobel, M.D. (hereinafter "Dr. Sobel"), who is Board Certified in internal medicine and nephrology. *Vol. V, pp. 964-968*. His professional opinion was that the Decedent had suffered an air embolism as a result of the removal of her catheter, which prompted her cardiac arrest. *Id., pp. 997-1002*. According to Dr. Sobel, the Decedent suffered substantial brain damage as a result of the cardiac arrest, which left her unable to eat or breathe without life support. *Vol. V, pp. 996 & 1010*. Plaintiff eventually agreed to discontinue her daughter's dialysis treatments and allow her to expire. *Vol. IV, pp. 815-816*.

F. MEDLINK'S RESPONSE TO THE EPISODE.

Supervisor Fribley confronted Hill the next day, which was October 20, 2000. *Vol. III, p. 510*. Director of Nursing Parker and Administrator Louche were also present. *Id., p. 511*. Hill denied that she was ever told to stay with the Decedent. *Id., pp. 513 & 519*. Since she had specifically advised the aide to remain at the Decedent's side because she might pull out her catheter, Fribley knew this was a lie. *Id., pp. 522-523; Vol. VII, pp. 1284-1285*. According to Fribley, Hill also stated during the meeting that "somebody at the hospital told her to leave." *Vol. III, p. 544*. Director Parker acknowledged that this claim was inconsistent with the earlier assertion that she never had been told that she had to stay. *Vol. III, pp. 627-628*.

There was no doubt in Supervisor Fribley's mind following the meeting that Hill had violated their instructions and lied when confronted. *Vol. III, pp. 522-523; Vol. VII, pp. 1284-1286*. Director Parker agreed with this assessment. *Vol. III, pp. 628-629*. Administrator Louche has also found Hill to be dishonest. *Vol. IV, pp. 737 & 746*. He pulled Hill's employment file "right after the meeting" and read it. *Id., p. 739*. He conceded that "we" would have seen that Hill was disqualified from holding the job at that time as a result of the felony conviction. *Id., pp. 739-740*. Administrator Louche – who was the highest ranking MedLink official to appear at the trial – further admitted that he had testified untruthfully the previous day when he had claimed that they did not know of the felony conviction until November 2000. *Id., p. 740*.

Even though Administrator Louche and Supervisor Fribley were convinced that Hill had violated their instructions and lied to them, she was not fired on the spot. *Vol. IV, p. 739*.

To the contrary, she was assigned to other MRDD patients. *Vol. III, p. 521-523; Vol. VII, pp. 1281-1288.*

The Major Unusual Incidents (MUI) Unit Coordinator for the Cuyahoga County Board of MRDD, Robert Case (hereinafter "Case") investigated the events of October 19, 2000. *Vol. IV, pp. 752-753.* Within the next several days (and most likely by October 23, 2000), he had spoken with Supervisor Fribley. *Id., p. 756.* There were no doubts in his mind at trial that Fribley had told him at that time that Hill had been fired. *Id., pp. 756-757.* Fribley maintains that the investigator's sworn testimony in this regard is untrue. *Vol. VII, p. 1290.*

MedLink made it a point to share with the County that Hill had claimed that the UH staff had told her she was free to leave during the dialysis treatment, thereby implicating the hospital in the fatality. *Vol. III, p. 518.* During the entire course of the investigations, however, no one from MedLink ever divulged that Hill had been hired with a disqualifying felony offense. *Vol. IV, p. 764.* Had this been reported, MedLink's contract with the County would have been invalidated and a report would have been made to the Ohio Department of Mental Retardation for further action. *Id., pp. 764-765.*

G THE JURY'S VERDICT.

Following the presentation of approximately twenty (20) witnesses and the introduction of numerous exhibits, the jurors found against both MedLink and UH and apportioned liability between them at, respectively, 90% and 10%. *Vol. VIII, p. 1515-1516.* The jury awarded compensatory damages of \$100,000.00 upon the survivorship claim, and \$3,000,000.00 upon the wrongful death claim. *Id., pp. 1516-1517.* The jurors unanimously concluded that MedLink had acted with actual malice and awarded an additional \$3,000,000.00 in punitive damages. *Id., pp. 1517-1518.* UH promptly paid its share of the verdict. On October 18, 2005 the court assessed attorney fees totaling \$1,013,460.00 against MedLink and entered final judgment in the amount of \$6,803,460.00.

H. POST-VERDICT PROCEEDINGS.

MedLink proceeded to barrage Private Judge Glickman with one motion after another imploring him to undo the verdict. On May 16, 2005, Plaintiff filed a timely Motion for Pre-

LAW OFFICES

JASHEIN & BASHEIN
CO., L.P.A.

CRIMINAL TOWER

35TH FLOOR

50 PUBLIC SQUARE

CLEVELAND, OHIO 44113

TEL: (216) 771-3239

Judgment Interest pursuant to R.C. §1343.03(C). She thereafter proceeded to conduct discovery on this issue, which MedLink's insurance carrier, Lexington, vigorously opposed. The claims file was never furnished and no adjuster was produced for deposition.

The court conducted an evidentiary hearing upon the Motion for Pre-Judgment Interest on Monday, January 30, 2006. On the Friday before the proceeding, Lexington submitted its Motion to Intervene. This carrier had issued liability coverage to MedLink and had been funding and controlling the defense of the litigation from the outset. At the start of the hearing, Lexington's counsel addressed the issue of intervention and advised the Court that he had attempted to contact his client, without success, in order to secure consent to the private judge referral agreement. *Transcript of Proceedings of January 30, 2006 (hereinafter "PJI Tr.")*, p. 45. Intervention was then denied on the grounds that the request was untimely and the able attorneys that the carrier had hired to defend MedLink already protected Lexington's interests.

Lexington's counsel acknowledged during the proceedings that he was aware of the appeals pending in the Supreme Court addressing the validity and scope of the Private Judge Act. *PJI Tr. p. 38*. Neither he, nor any of the attorneys representing MedLink, raised any objection to Private Judge Glickman's continued authority over the proceeding. This issue first surfaced when MedLink commenced an Original Action in Prohibition against Private Judge Glickman in this Court on March 7, 2006. *Case No. 06-0478*. On March 13, 2006, Private Judge Glickman issued an entry resolving the Motion for Pre-Judgment Interest that had been pending since May 16, 2005. Due to a secretarial error, the final portion of the ruling was missing and an Amended Journal Entry was issued the next day. *See Exhibit B, appended hereto*. Finding that MedLink had failed to tender a good-faith settlement offer, pre-judgment interest was awarded in the amount of \$896,381.99.

In the Supreme Court Prohibition Action, a Motion to Dismiss was filed on Private Judge Glickman's behalf on April 13, 2006. Before this Court could rule upon the Motion, MedLink quickly abandoned the action on April 28, 2006. MedLink then filed a second Original Action in this Court on May 11, 2006 against Administrative Judge Nancy R. McDonnell. *Case No. 06-0932*. All of the same "jurisdictional" arguments were asserted

therein that had been raised in the earlier original action. In an Entry dated August 2, 2006, Administrative Judge McDonnell's Motion to Dismiss was summarily granted.

The parties filed multiple appeals in the Eighth Judicial District Court of Appeals. In a decision that was issued on December 11, 2006, the appellate court affirmed Private Judge Glickman in all respects. *See Exhibit A, appended hereto.* MedLink is now seeking further review of some of these issues in this Court. Plaintiff has submitted a cross-appeal only with regard to the issue of whether the 2004 revisions to R.C. §1343.03(C) can be retroactively applied to a cause of action that accrued in 2001.

ARGUMENT

I. JURISDICTIONAL REQUEST OF DEFENDANT-APPELLANT/CROSS-APPELLEE MEDLINK.

PROPOSITION OF LAW NO. 1: IN REVIEWING AN AWARD OF PUNITIVE DAMAGES, THE TRIAL COURT MUST INDEPENDENTLY ANALYZE THE THREE GUIDEPOSTS SET FORTH BY THE UNITED STATES SUPREME COURT IN *BMW OF NORTH AMERICA, INC. V. GORE* (1996), 517 U.S. 559.

MedLink's first proposition of law simply states a legal principle over which no one has ever disagreed in these proceedings. Following the entry of the punitive damage award in the amount of \$3,000,000.00, MedLink filed a lengthy Motion for Due Process Hearing & Review of Punitive Damage Award on August 18, 2005, which specifically identified the requirements of *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809, and *State Farm Mut. Auto Ins. Co. v. Campbell* (2003), 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585. Not once did any of the four (4) judges who thereafter examined the punitive damage award suggest that they were refusing to apply these principles.

Both the trial judge and court of appeals correctly concluded that the three (3) "guideposts" described in *BMW*, 517 U.S. at 574-575, had all been satisfied in this instance. Supervisor Fribley herself (who was MedLink's designated trial representative) has confirmed that the company had decided to place profits over safety when Hill was hired. *Vol. III, pp. 538-539.* Assigning Hill to another patient after the incident involving the Decedent was an intentional decision. *Vol. VII, p. 1288.* According to Hill, she continued to work for MedLink

for another three (3) weeks. *Deposition of Endia Hill taken June 24, 2002, pp. 7-8.* She was not fired until November 2000 which – it was claimed – coincided with the completion of the criminal background check and verification of the disqualifying criminal offense (as if any was needed). *Vol. III, pp. 641-642.* That was the sole reason for her discharge. *Id.* By all accounts, Hill was never disciplined, admonished, or even chastised for her role in the events precipitating the death of the Decedent.

Nor is there any merit to MedLink's dissatisfaction with the amount of the award. Such determinations are left to the collective wisdom and experience of the jury. *Villella v. Waikem Motors, Inc.* (1989), 45 Ohio St.3d 36, 40-41, 543 N.E.2d 464; *Gollihue v. Consolidated Rail Corp.* (3rd Dist. 1997), 120 Ohio App.3d 378, 402, 697 N.E.2d 1109. It has been explained that:

An award of punitive damages is within the prerogative of the jury and will not be overturned unless it bears no rational relationship or is grossly disproportionate to the actual damages awarded. [citation omitted].

Shore, Shirley & Co. v. Kelley (8th Dist. 1988), 40 Ohio App.3d 10,16, 531 N.E.2d 333; *see also Langford v. Danolfo* (May 25, 1989), 8th Dist. No. 55365, 1989 W.L. 56793, p. *1; *Parry Co., Inc. v. Carter* (May 1, 2002), 4th Dist. No. 01CA2617, 2002-Ohio-2197, 2002 W.L. 988610, p. *4.

When all the evidence that was produced for the trial is properly considered, it is apparent that there was nothing "shocking" or even "startling" about the \$3,000,000.00 punitive damage award. During the pre-judgment interest proceedings below, evidence emerged that MedLink's counsel had predicted in a letter dated April 13, 2004 that the jury would be "angered by the aggravating facts" and "**a reasonable threat exists that a jury would make an award of punitive damages well into the seven figures.**" *Plaintiff's Post-Hearing Brief in Support of Motion for Pre-Judgment Interest, Exhibit 2, p. 1 (emphasis in original).* With amazing augury, MedLink's own counsel warned the adjuster handling the claim in a letter dated August 31, 2004 that:

With the above in mind, and in light of the information presently known in this case, a punitive damages award of \$3,000,000 is

certainly possible, and is not likely to be reversed by the Court of Appeals based upon it being "excessive." Please recall that, according to Plaintiff's attorney, when they mock tried this case, the mock jury verdict for punitive damages went as high as \$10,000,000. *** [emphasis added]

Plaintiff's Post-Hearing Brief in Support of Pre-Judgment Interest, Exhibit 1, p. 2. Not only was the resulting \$3,000,000.00 punitive damage award not surprising to a defense lawyer who had been intimately familiar with the facts, but the recovery also matched his earlier prediction to the penny.

PROPOSITION OF LAW NO. 2: A RATIO OF PUNITIVE DAMAGES TO COMPENSATORY DAMAGES OF 30-TO-1 IS UNCONSTITUTIONALLY EXCESSIVE.

Over and over during its appeal, MedLink has asserted that a "30-to-1 ratio between the punitive and compensatory awards violated U.S. Supreme Court edicts. Rather obviously, the actual ratio is slightly less than 1-to-1 since the compensatory damages awarded by the jurors totaled \$3,100,000.00. This figure is well within the range suggested by every case MedLink has cited. Interestingly, the \$3,000,000.00 punitive damage award also complies with the caps recently imposed by R.C. §2315.21(D)(2)(a), which was part of the General Assembly's tort reform effort.⁵

MedLink has produced the convenient "30-to-1" ratio by treating \$3,000,000.00 of the compensatory award as if it was never imposed. This is permissible, in MedLink's view, because "Plaintiffs in Ohio may not recover punitive damages on wrongful death claims." *MedLink's Memorandum, p. 10.* No authorities have been cited in support of this proposition. *Id., pp. 10-11.* This is because juries are indeed entitled to award punitive damages in wrongful death actions where, as here, there is evidence of conscious pain and suffering. *See Sharp v. Norfolk & W. Ry. Co., 72 Ohio St.3d 307, 311, 1995-Ohio-224, 649 N.E.2d 1219, 1223; Case v. Norfolk & W. Ry. Co. (6th Dist. 1988), 59 Ohio App.3d 11, 16, 570 N.E.2d 1132, 1136.*

In its due process analysis, all the U.S. Supreme Court has required is a comparison between the punitive award and "the actual harm inflicted on the plaintiff." *BMW, 517 U.S. at*

⁵ As Plaintiff argued in the proceedings below and no one disputed, this legislation has no application to a case such as this that arose prior to April 7, 2005, which was the effective date of 2004 S.B. 80. *See Plaintiff's Post-Hearing Brief in Support of Pre-Judgment Interest, p. 29.*

580; *State Farm*, 538 U.S. at 425. Quite some time ago the Ohio General Assembly determined that those who tortiously cause the death of another are liable for all the “compensatory damages” that can be demonstrated, including loss of consortium and mental anguish. *R.C. §2125.02(B)*. The compensatory damages awarded by the jury in this case were \$3,100,000.00, not \$100,000.00. Under MedLink’s risible reasoning, a defendant would be better off killing the plaintiff since most of the harm caused could not be considered for purposes of the punitive award.

MedLink has failed to cite a single case from anywhere in the United States actually holding that wrongful death damages should be ignored, and only the survivorship claim considered, when determining whether a punitive award comports with due process. *MedLink’s Memorandum*, pp. 9-11. This preposterous proposition is directly at odds with this Court’s ruling in *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St.3d 77, 2002-Ohio-7113, 781 N.E.2d 1211, which also involved a patient who had been allegedly killed by the defendant’s tortious wrongdoing. This Court carefully considered the guideposts that had been adopted in *BMW*, 517 U.S. 559. *Dardinger*, 98 Ohio St.3d at 98. Compensatory damages had been recovered upon the wrongful death claim slightly in excess of \$2,500,000.00. *Id.*, at 90. Punitive damages were awarded of \$49,000,000.00 but were reduced by this Court to \$30,000,000.00. *Id.*, at 90, 104. The resulting ratio of approximately twelve-to-one is substantially greater than that which was produced in the case *sub judice*. Far from following MedLink’s theory that wrongful death damages are irrelevant in an analysis of the *BMW* guideposts, this Court reasoned that:

In *BMW*, the conduct under review was BMW’s repainting of scratched new cars without notifying buyers. Here, as in *Wightman [v. Consol. Rail Corp.]* (1999), 86 Ohio St.3d 431, 715 N.E.2d 546] (a railroad crossing case involving the death of a teenaged driver and her passenger), we are dealing with human lives, rather than automobiles. But in *Wightman*, the tragedy at the heart of the case unfolded in mere seconds. Here, the tragedy evolved over months, while Anthem and AICI watched. They created hope, then snatched it away. They took a dignified death from Esther Dardinger and filled her last days with frustration, doubt, and desperation. And every minute of additional pain suffered by Esther Dardinger was a natural outgrowth of the

defendants' practiced powerlessness, their active inactivity.

Id., at 98. When a defendant's purposeful misconduct has resulted in a fatality, a punitive damage award should be scrutinized based upon all the harm caused and not just that small portion that is attributable to a survivorship claim.

MedLink's reliance upon *Burns v. Prudential Sec., Inc.* (3rd Dist. 2006), 167 Ohio App.3d 809, 2006-Ohio-3550, 857 N.E.2d 621, is seriously misplaced. *MedLink's Memorandum*, p. 11. That was not a wrongful death action and the Court certainly did not suggest that punitive damage awards may be compared only to that which a decedent's estate recovers upon a survivorship claim. In analyzing the guideposts established in *State Farm*, 538 U.S. at 419, the Third District specifically recognized that in *Burns* "the harm caused was economic and did not involve a disregard for the health or safety of others." *Burns*, 167 Ohio App.3d at 848. At the risk of overstating the obvious, substantially higher awards of punitive damages are justified when a life has been lost.

PROPOSITION OF LAW NO. 3: ONE WHO HAS NEVER BEEN ELECTED TO A JUDGESHIP IN OHIO MAY NOT SERVE AS A PRIVATE JUDGE UNDER R.C. §2701.10.

As the Eighth District properly recognized in the proceedings below, MedLink's attorneys waived the right to challenge Private Judge Glickman's authority over the proceedings both in writing and on the record before the jury trial commenced. *Exhibit A*, p. 21. On April 18, 2005, the parties entered a standard written referral agreement that the originally assigned judge, Ann T. Mannen, approved in an Entry dated April 26, 2005. Prior to opening arguments, the Private Judge reminded Relators and the other parties that the referral had been made under the auspices of *R.C. §2701.10*, which was a relatively new statute that had never been definitively tested (as far as anyone was aware) in a court of law. *Vol. I*, pp. 146-147. The parties' consent to the Private Judge's handling of the jury trial and waiver of appeal rights was then confirmed in open court. *Id.*

For over seven (7) months following the announcement of the jury's verdict on May 4, 2005, neither MedLink nor its attorneys from Isaac Brant, Cozen & O'Connor and Reminger & Reminger ever once suggested that Judge Glickman had been unqualified to preside over the

LAW OFFICES
ASHEIN & BASHEIN
CO., L.P.A.
CRIMINAL TOWER
35TH FLOOR
50 PUBLIC SQUARE
CLEVELAND, OHIO 44113
TEL: (216) 771-3239

proceedings or that the referral agreement of April 18, 2005 was somehow invalid. To the contrary, they regularly peppered him with one filing after another demanding that he exercise his authority to spare the home health care agency from the awards that the jury imposed.

For a variety of reasons, MedLink's belated challenges to the Private Judge's authority were properly rejected in the proceedings below. First, Ohio courts have long recognized that parties' agreement to waive appellate rights is enforceable. *Speeth v. Fields* (8th Dist. 1946), 47 Ohio Law Abs. 47, 71 N.E.2d 149; *Brown v. Brown* (9th Dist. 1930), 35 Ohio App. 182, 172 N.E.2d 416. Even if it were true that MedLink's team of attorneys had failed to appreciate that Private Judge Glickman "had never been elected to the Bench" (which it is not), the agreement that was entered in writing and in open court would be no less binding.⁶ Without question, each of the attorneys who had been hired by Lexington to defend MedLink was obligated to investigate Private Judge Glickman's background and credentials before recommending that the dispute be referred to him under the Private Judge Act.

Second, the attacks on the referral agreement and Judge Glickman's authority were presented for the first time on appeal. Lexington's counsel acknowledged in open court (in the presence of MedLink's counsel) during the pre-judgment interest hearing of January 30, 2006 that he was aware of the challenge to the Private Judge Act pending in the Supreme Court of Ohio yet no objections were raised to Private Judge Glickman's authority before the trial court proceedings concluded on March 14, 2006.⁷ *PJI Tr. 38*. The issue was thus waived. *State ex rel. Zollner v. Industrial Commn. of Ohio*, 66 Ohio St.3d 276, 278, 1993-Ohio-49, 611 N.E.2d 830; *Zakany v. Zakany* (1984), 9 Ohio St.3d 192, 193, 459 N.E.2d 870.

Third, principles of estoppel now preclude MedLink from questioning "subject matter jurisdiction" because the Defendant's silence lead Plaintiff and the Court to devote substantial

⁶ As the absence of a citation to evidentiary authority attests, it was never established in the proceedings below that MedLink and its attorneys had somehow been deceived or misled. It is simply implausible that the Reminger & Reminger attorneys who lived and worked in Cleveland had somehow overlooked the fact that Private Judge Glickman had lost a well-publicized election.

⁷ Indeed, MedLink has openly asserted that it was in "January, 2006" that its attorneys "first learned that Glickman was not qualified to serve as a private judge." *MedLink's Memorandum*, p. 6.

time and effort in trying the case to the jury. *Huffman v. Huffman* (Nov. 5, 2002), 10th Dist. No. 02AP-101, 2002-Ohio-6031, 2002 W.L. 31466435, pp. *5-6. Notably, the well-reasoned *Huffman* decision was cited with approval by this Court in *State ex. rel. Russo v. McDonnell*, 110 Ohio St.3d 144, 148, 2006-Ohio-3459, 852 N.E.2d 1145. Ohio law simply does not allow litigants to question the presiding judge's authority only after an adverse judgment has been rendered.

PROPOSITION OF LAW NO. 4: COMMENTS BY COUNSEL THAT AN OPPOSING PARTY WAS CHARGED WITH ATTEMPTED AGGRAVATED MURDER, THAT THE GOVERNMENT WANTED MURDER CHARGES FILED FOR THE CIVIL INJURY ALLEGED, AND THAT THE JURY SHOULD DECIDE THE CASE WITH ANGER ARE SO PREJUDICIAL THAT A NEW TRIAL MUST BE GRANTED.

MedLink's first criticisms of Private Judge Glickman's handling of the trial are directed to the opening statement of Plaintiff's counsel. *MedLink's Memorandum*, p. 13. Ohio courts recognize that opening statements and closing arguments are not evidence. *State of Ohio v. Herron* (Feb. 20, 2004), 2nd Dist. No. 19894, 2004-Ohio-773, 2004 W.L. 315232; *State of Ohio v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E.2d 637. Accordingly, counsel is afforded wide latitude in opening statements. *Director of Hgwys. v. Bennett* (6th Dist. 1962), 118 Ohio App. 207, 193 N.E.2d 702.

Plaintiff's counsel did remark that Hill had originally been charged with attempted aggravated murder in connection with the prior near-fatal beating in the late 1980s. *Vol. II*, p. 398. This was a true statement and was offered in support of the negligent hiring claim. *Deposition of Endia Hill taken June 24, 2002*, p. 14. Nevertheless, defense counsel's objection was sustained by Judge Glickman and he instructed the jurors to "disregard the comment as to what Endia Hill was charged with." *Vol. II*, p. 398. Ohio law has long recognized that jurors are presumed to have followed such instructions. *Pang v. Minich* (1990), 53 Ohio St.3d 186, 195, 559 N.E.2d 1313, 1322; *Austin v. Kluczarov Constr.* (Feb. 11, 2004), 9th Dist. No. 02CA0103-M, 2004-Ohio-593, 2004 W.L. 239902, p. *3; *Roe v. Shaia Parking, Inc.* (Nov. 25, 1998), 8th Dist. No. 73756, 1998 W.L. 827603, p. *3; *Wallace v. Pitney-Bowes Corp.* (Nov. 20, 1980), 8th Dist. No. 41924, 1980 W.L. 355301, pp. *8-9. MedLink has not presented any

evidence in this instance that Judge Glickman's admonishment was ignored.

The trial judge would have been entirely justified, in his sound exercise and discretion, in allowing Plaintiff to present evidence of Hill's original charges. A claim for negligent hiring was being pursued which, Plaintiff maintained, was so egregious that punitive damages were appropriate. *See, e.g., Stephens v. A-Able Rents Co.* (8th Dist. 1995), 101 Ohio App.3d 20, 654 N.E.2d 1315 (negligent hiring claim may be maintained where facts indicate the employee had a past history of criminal or tortious conduct, in this case, drug abuse, which the employer knew or should have known). Plaintiff also had an obligation to address MedLink's defense, which was that an "innocent mistake" had been made which happens to companies both "big and small" all the time. *Vol. III, pp. 453 & 482.* In the "background screening" that was required by law and promised in the promotional materials that were furnished to Plaintiff, MedLink did not just miss a "felonious assault" conviction. MedLink actually allowed an individual who had been charged with a far more serious offense, attempted aggravated murder, to care for a mentally challenged young woman. Even a cursory investigation would have revealed these public records. The original nature of the indictment was thus independently relevant with regard to the degree of MedLink's misconduct. It was Hill's prior criminal conduct that was at issue, not necessarily her convictions.

MedLink has also taken issue with counsel's comment in opening statement that County Inspector Case "was so upset he wanted murder charges filed." *MedLink's Memorandum, p. 13.* Once again, MedLink's objection to this remark was sustained. *Id.* At the conclusion of the trial, Judge Glickman specifically instructed the jury that opening statements do not constitute evidence. *Vol. VII, p. 1325.* MedLink has pointed to nothing in the proceedings that occurred which could overcome the longstanding presumption that the jury followed this admonishment. *Pang, 53 Ohio St.3d at 195; Austin, 2004 W.L. 239902, p. *3; Roe, 1998 W.L. 827603, p. *3; Wallace, 1980 W.L. 355301, pp. *8-9.*

Contrary to MedLink's assertions, the statement was made in good faith by Plaintiff's counsel based upon his pre-trial investigation. Inspector Case testified in his deposition that he had concluded that Hill's dereliction was so substantial as to justify criminal prosecution.

Deposition of Robert Case taken June 5, 2002, pp. 23-25. He attempted to refer the matter to the Cleveland Police Department but was told it should be handled in "civil" court. *Id.*, p. 24.

The appropriateness and relevance of Case's testimony in this regard was plainly apparent shortly thereafter. Defense counsel advised the jurors in his own opening statement that:

And [in] the final analysis not one government agency, not MRDD, not the State of Ohio, the [County] or anybody has ever taken any formal steps against MedLink to punish them as a company for this unfortunate situation, not one, until today when we have Mr. Becker and Mr. Bashein. They are the only people seeking to inflict financial punishment on this company for the admittedly wrongful conduct of one, two or three, I don't know who they were or I don't know how many were that let this women be hired and put in the field with Natalie Barnes. [emphasis added].

Vol. III, p. 478. Over Plaintiff's objection, MedLink's counsel then elicited testimony from Case just with regard to the favorable findings and results of the County's investigations. *Vol. IV, pp. 776-778.* Case was asked to verify that "no punishment" was meted against MedLink as a result of the investigation. *Id.*, p. 776. On re-cross examination MedLink's counsel even had Case acknowledge, again over Plaintiff's objection, that he "never developed any suspicion that Endia Hill meant any harm or had any malice toward Natalie Barnes." *Id.*, p. 783.

MedLink is now in no position to complain about Plaintiff's attempts in opening statements to refute the claim that the company had been completely vindicated by the County investigators. *Austin*, 2004-Ohio-593, p. *4. The hypocrisy of this proposition of law should be readily apparent. Having devoted substantial time and attention at trial to the findings and results of the County's investigation, MedLink should have fully appreciated that Plaintiff would be forced to demonstrate that Inspector Case had actually decided that criminal charges were appropriate but was precluded from pursuing them.

The remainder of the "prejudicial statements and inaccuracies" that form the basis of this assignment of error occurred seven (7) days later in closing argument. *MedLink's Memorandum, pp. 13-14.* Counsel is similarly afforded latitude in this final stage of the trial. *Jones v. Olcese* (11th Dist. 1991), 75 Ohio App.3d 34, 39, 598 N.E.2d 853, 856.

Of the five (5) statements that have been identified in the closing arguments, only one (1) was viewed as sufficiently “egregious” at the time to spark an objection from defense counsel.⁸ Any “error” that was committed in this regard to the other four (4) has thus been waived. *Shore*, 40 Ohio App.3d at 16; *State of Ohio v. Newton*, 108 Ohio St.3d 13, 31, 2006-Ohio-81, 840 N.E.2d 593, 613; *Toledo v. Bernard Ross Family Ltd. Ptrshp.* (6th Dist. 2006), 165 Ohio App.3d 557, 2006-Ohio-117, 847 N.E.2d 466.

The lone objection was asserted when the jurors were asked to state with their verdict that: “We are not going to tolerate this.” *Vol. VII, p. 1419*. The objection was sustained and Judge Glickman advised the jurors that the comment was to be “stricken.” *Id.* The jurors are presumed to have followed this instruction. *Pang*, 53 Ohio St.3d at 195; *Austin*, 2004 W.L. 239902, p. *3; *Roe*, 1998 W.L. 827603, p. *3; *Wallace*, 1980 W.L. 355301, pp. *8-9.

This remark was entirely appropriate as punitive damages were being sought which are intended, in large part, to deter dangerous misconduct. *Dardinger*, 98 Ohio St.3d at 102; *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 651, 1994-Ohio-324, 635 N.E.2d 331. In his opening statement, MedLink’s counsel argued to the jurors that:

In 2003, [MedLink was] out of the business. That business is now owned by a totally different company – I believe it’s called Almost Family. So they’re out of the business.

And any notion we are going to deter their further processes or failures to process that led to the hiring of Endia Hill is silly because they are not in the business any more at all.

Vol. III, p. 459. Given MedLink’s position at trial, Plaintiff’s counsel had every right to argue that the message still had to be sent to even a defunct company.

PROPOSITION OF LAW NO. 5: WHERE A TRIAL IS HELD CONTRARY TO THE REQUIREMENTS OF R.C. §2701.10, THE PROCEEDING IS VOID AND A NEW TRIAL MUST BE GRANTED.

Contrary to MedLink’s assertions, the issue of whether Private Judge Glickman had authority to preside over the trial has nothing to do with “subject matter jurisdiction.” *See generally Pratts v. Hurley*, 102 Ohio St.3d 81, 83, 2004-Ohio-1980, 806 N.E.2d 992, 996 (“***

⁸ No objection was made to any of the arguments appearing in Volume VII, pp. 1405, 1409-1410, and 1490-1492.

[S]ubject-matter jurisdiction goes to the power of the court to adjudicate the merits of a case ***.”); *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 75, 1998-Ohio-275, 701 N.E.2d 1002, 1007 (“Subject matter jurisdiction is a court’s power to hear and decide a case on the merits.” (citation omitted)). There has never been any dispute that common pleas courts possess authority to adjudicate medical malpractice/wrongful death claims. Because neither MedLink nor even Lexington objected to Private Judge Glickman’s authority before the trial commenced, they are now precluded from doing so notwithstanding their unfounded claims of “subject matter jurisdiction”. *Seaford v. Norfolk S. Ry. Co.* (8th Dist. 2004), 159 Ohio App.3d 374, 2004-Ohio-6849, 824 N.E.2d 94, *rev’d on other grds.*, (opining that “[t]he railroad cannot now for the first time, therefore, attack the jurisdiction of the visiting retired judges on appeal. . . . Clearly, the decision by the [appellants] to proceed without challenge or objection concerning the appointment of [the visiting judge] renders any possible error waived.” (citations omitted)).

Although this Court’s recent decision in *In re J.J.*, 111 Ohio St.3d 205, was specifically raised in the appellate proceedings and discussed at length during oral arguments, MedLink’s Memorandum in Opposition makes no reference to the opinion. This is undoubtedly because there is no escaping the fact that it has now been conclusively determined that “procedural irregularities” in the assignment of judges merely render a judgment voidable, not void. *Id.*, *paragraph one of the syllabus*. A litigant who willingly acquiesces to a referral has no right to later complain only after an adverse judgment has been rendered. *Id.*, *pp. 207-208*.

In the event that this Court possesses any inclination to overturn the unanimous decision that was rendered a few months ago in *In re J.J.*, 111 Ohio St.3d 205, careful consideration should be given to the profound ramifications of this proposition of law. Private Judge Glickman and numerous other private judges, retired judges, and visiting judges have adjudicated countless jury trials during the course of Ohio jurisprudence. MedLink’s ardent position is that anyone who is dissatisfied with such a ruling should be permitted years (and even decades) later to challenge the legality of the referral since “subject matter jurisdiction” can never be waived and may be raised at any time. *MedLink’s Memorandum, pp. 2-4 & 14-*

15. The impact of such a holding upon Ohio's legal system would be catastrophic. In order to ensure that plaintiffs and defendants alike are held to the judgments that have been entered against them, this Court should refuse to broaden the concept of "subject matter jurisdiction" beyond that which was carefully delineated in *In re J.J.*, 111 Ohio St.3d at 207-209.

II. JURISDICTIONAL REQUEST OF INTERVENOR-APPELLANT/CROSS-APPELLEE LEXINGTON.

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.

Lexington did not attempt to make a formal entrance in the protracted proceedings until the Friday before the pre-judgment interest hearing of Monday, January 30, 2006. The insurer had furnished trial counsel to MedLink and had been responsible for conducting settlement negotiations on behalf of the home health care agency. An attorney representing the carrier was permitted to argue Lexington's case for intervention at length. *PJI Tr. at 15-18 & 25-31*. He requested not only an opportunity to participate in the hearing, but also a postponement of two (2) weeks in order to prepare. *Id. at 29-30*.

It was apparent to Plaintiff's counsel that Lexington would seek to substantially delay the proceedings by filing a Notice of Appeal if intervention were denied. *PJI Tr. at 34-38*. He therefore offered to withdraw his opposition to Lexington's intervention if the carrier would waive any appeal rights with regard to Private Judge Glickman's authority to preside over the insurer as a party.⁹ *Id. at 40-42*. As previously observed, both Plaintiff and MedLink had

⁹ In its Statement of the Case, Lexington has represented that it "refused to sign a referral agreement that would permit its rights to be adjudicated by Glickman." *Lexington's Memorandum, p. 7 (emphasis added)*. As the transcript plainly confirms, this is untrue. After the insurer's counsel was unable to reach a suitable representative to secure such permission, he specifically advised the Court that:

I can't get an answer to those two questions. That doesn't mean yes or no. It's going to take time. The person I need to speak to is not available now. [emphasis added].

PJI Tr. at 45. Quite clearly, Lexington's counsel was agreeable to accepting Judge Glickman's authority and was simply unable to secure specific consent from his client.

agreed to enter such a stipulation on the record before Judge Glickman would accept the referral and proceed with the jury trial. *Vol. I, pp. 146-147*. Lexington's consent was thus unnecessary for the Court to proceed with the pre-judgment interest claim against MedLink.

Lexington's counsel appeared to be amenable to the waiver, but was unable to obtain telephone authority from his client to accept the waiver. *PJI Tr. at 44-45*. Judge Glickman then denied the Motion to Intervene as untimely. *Id. at 45-49*. He also noted that Lexington had failed to submit a proposed pleading with the Motion as required by *Civ.R. 25(C)*. *Id. at 49*. The Court then conducted the pre-judgment interest hearing.

Lexington's own counsel had also appreciated the uncertainty surrounding the Private Judge Act when he appeared for the pre-judgment interest hearing.¹⁰ *PJI Tr. at 38*. As MedLink has conceded, it was during this proceeding that the defense attorneys "first learned" that grounds existed (in their view) for challenging his qualifications under the Private Judge Act. *MedLink's Memorandum, p. 6*. Not once during the proceeding did Lexington's counsel express any objections (or even mild concern) with Private Judge Glickman's authority to resolve the Motion to Intervene. To the contrary, Lexington's counsel implored him to grant the application but was ultimately unsuccessful. For the reasons previously stated, the issue has now been waived and principles of estoppel apply.

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.

This Court has never held that private judges, who are referred disputes pursuant to the parties' voluntary agreement, are precluded from resolving motions to intervene. No authorities have been cited by Lexington that actually support this bizarre proposition. *Lexington's Memorandum, pp. 11-12*. This Court's decision in *Russo*, 110 Ohio St.3d 144,

¹⁰ Lexington's counsel remarked at one point that "The other issue here is the Private Judge Act going on, and we have a legislation and a pending case in the Supreme Court." *PJI Tr. at 38*. The only Supreme Court case to which he could have been referring was *State ex rel. Russo v. McMonagle*, Sup. Ct. Case No. 2005-2130, which had been filed on November 14, 2005.

addressed only whether private judges could preside over jury trials and did not preclude referrals for other types of proceedings under R.C. §2701.10 (such as bench trials). The jury trial in the instant action had concluded over eight (8) months before Lexington decided it was time to intervene. Even if Private Judge Glickman had somehow been precluded from resolving the Motion to Intervene that Lexington presented to him and urged him to grant, the issue has been conclusively waived and estoppel now applies for the reasons previously established.

PROPOSITION OF LAW NO. 3: AN INSURER'S LEGALLY RECOGNIZED INTEREST IN AVOIDING ASSESSMENT OF PRE-JUDGMENT INTEREST BECAUSE IT NEGOTIATED IN GOOD FAITH, CANNOT ADEQUATELY BE REPRESENTED BY ITS POLICYHOLDER WHEN THE POLICYHOLDER ASSERTS THAT SETTLEMENT WAS NOT OBTAINED DUE TO THE INSURER'S PURPORTED BAD FAITH REFUSAL TO MAKE A REASONABLE SETTLEMENT OFFER.

The Eighth District correctly concluded that the trial judge had not abused his discretion by denying the eve-of-hearing motion to intervene. In the Memorandum that has been submitted to this Court, the insurer argues strictly that its interests were somehow adverse to that of its insured (MedLink). *Lexington's Memorandum*, pp. 13-14. The court of appeals had determined, however, that "Lexington's Motion was untimely."¹¹ *Exhibit A*, pp. 17-18, *appended hereto*. The panel further noted that the insurer had failed to submit proper evidentiary materials establishing its interest in the litigation.¹² *Id.*, p. 18. Lexington's Memorandum in Support of Jurisdiction offers no response to these holdings, undoubtedly because there is none. *Lexington's Memorandum*, pp. 13-14.

¹¹ Lexington had known at least two (2) years earlier that its insured, MedLink, had concluded that the carrier was not attempting to negotiate a settlement in good faith. MedLink's President and Chief Executive Officer had written a letter on November 17, 2003 threatening to sue Lexington in the event that its violation of its fiduciary duties resulted in an award of punitive damages against the home health care agency. *Plaintiff's Memorandum in Opposition to Motion of Lexington Insurance Company to Intervene*, *Exhibit A*, p. 1.

¹² In the proceedings below, Lexington never produced an authenticated copy of the applicable insurance policy or confirmed (without hedging) that it really would be responsible for paying the pre-judgment interest award.

Allowing Lexington to intervene in the proceedings at this juncture would be pointless. Neither MedLink nor Lexington has submitted a Proposition of Law taking issue with Private Judge Glickman's finding that the home health care agency failed to negotiate in good faith and pre-judgment interest was warranted under R.C. §1343.03(C) in the amount of \$896,381.99. As is now undoubtedly appreciated, it was patently unreasonable for MedLink to tender a morning-of-trial offer of \$400,000.00 when its own trial attorneys had evaluated the top-end of the compensatory value of the case at \$900,000.00. *Deposition of James Malone, Esq. taken December 19, 2005, pp. 37-38.* His co-counsel had further predicted the \$3,000,000.00 punitive award to the penny and warned the adjuster that such a verdict "wouldn't be reversed." *PJI Tr. 257-258.* Lexington's sole purpose for attempting to intervene in the proceedings below was to contest the request for pre-judgment interest but the merits of that motion are no longer an issue in this appeal.

III. JURISDICTIONAL REQUEST OF PLAINTIFF-APPELLEE/CROSS-APPELLANT.

PROPOSITION OF LAW: THE AMENDMENTS TO R.C. §1343.03(C) THAT WERE ADOPTED BY 2004 H.B. 212 DO NOT APPLY TO CAUSES OF ACTION THAT ACCRUED PRIOR TO THE ENACTMENT'S EFFECTIVE DATE OF JUNE 2, 2004.

This cross-appeal is limited to the singular issue of whether the current version of R.C. §1343.03(C) should have been applied to a cause of action that had accrued prior to the amendment's effective date. As previously noted, none of the parties are challenging at this stage that MedLink was properly found to have failed to negotiate in good faith and an award was appropriate under the statute. The only question remaining is the calculation of the amount due.

The award of pre-judgment interest was calculated based upon current R.C. §1343.03(C)(1)(c)(ii), which now specifies that the interest begins to accrue upon the filing of the Complaint. *Exhibit B, p. 19.* This modification was enacted by 2004 S.B. 212, which did not go into effect until June 2, 2004. In the prior version of the statute, subsection (C) had directed that pre-judgment interest would always commence whenever a "good faith effort to

settle” was lacking “from the date the cause of action accrued.” *Cashin v. Cobett* (Jan. 13, 2005), 8th Dist. No. 84475, 2005-Ohio-102, 2005 W.L. 77057, p. *4. This Court has previously held that:

The provision of R.C. 1343.03(C) that a pre-judgment interest award begins to run on the date the cause of action accrued is mandatory; a trial court may not adjust the date the award begins to run for equitable reasons. [emphasis added]

Musisca v. Massillon Comm. Hosp., 69 Ohio St.3d 673, 1994-Ohio-451, 635 N.E.2d 358, syllabus. This was the law of Ohio until the effective date of 2004 H.B. 212.

Plaintiff’s position in the proceedings below was that the statutory amendments imposed by 2004 H.B. 212 could not be applied retroactively. *Plaintiff’s Post-Hearing Brief of February 21, 2006*, pp. 29-30. The torts had been committed, the Decedent had passed away, and this lawsuit had been filed years before the effective date of June 2, 2004. Pursuant to R.C. §1.48, a “statute is presumed to be prospective in its operation unless expressly made retrospective.” This Court has observed that “[i]f there is no clear indication of retroactive application, then the statute may only apply to cases which arise subsequent to its enactment.” *Kiser v. Coleman* (1986), 28 Ohio St.3d 259, 262, 503 N.E.2d 753, 756; *see also Wean, Inc. v. Industrial Comm’n of Ohio* (1990), 52 Ohio St.3d 266, 268, 557 N.E.2d 121, 123; *Shaker Auto Lease, Inc. v. City of Cleveland Heights* (June 19, 1997), 8th Dist. No. 72022, 1997 W.L. 337632, p. *2. As far as the undersigned counsel has been able to determine, the General Assembly has not suggested that 2004 S.B. 212 should be applied to a claim that accrued and was filed before June 2, 2004.¹³

¹³ Section 3 of the uncodified portion of 2004 H.B. 212 does state that:

The interest rate provided for in division (A) of section 1343.03 of the Revised Code, as amended by this act, applies to actions pending on the effective date of this act. In the calculation of interest due under section 1343.03 of the Revised Code, in actions pending on the effective date of this act, the interest rate provided for in section 1343.03 of the Revised Code prior to the amendment of that section by this act shall apply up to the effective date of this act, and the interest rate provided for in section 1343.03 of the Revised Code as amended by this act shall apply on and after that effective date.

Applying the S.B. 212 amendments retroactively would result in an impairment of the substantive right to full and complete compensation and run afoul of Section 28, Article II of the Ohio Constitution. *Perk v. City of Euclid* (1969), 17 Ohio St.2d 4, 6-7, 244 N.E.2d 475, 476-477; *Rubbermaid, Inc. v. Wayne Cty. Aud.*, 95 Ohio St.3d 358, 360, 2002-Ohio-2338, 767 N.E.2d 1159, 1162. Prior to the effective date of June 2, 2004, Plaintiff's lawsuit was pending, MedLink was refusing to negotiate in good faith, and a real and present right existed to pursue pre-judgment interest at a fixed rate of ten percent (10%) per annum as authorized under former R.C. §1343.03(C). The Ohio Constitution simply does not permit the legislature to adopt *ex post facto* laws impairing or limiting such vested interests.

Quite clearly, this instruction applies only to the rate of interest to be imposed. Under a best-case scenario for MedLink, the lower rates cannot be utilized until after the effective date of June 2, 2004. It is safe to assume that if the General Assembly had intended for the substantive portion of the amendments to subsection (C) to apply retroactively (including the requirement to calculate the interest from the date the Complaint was filed), they would have stated so.

CONCLUSION

For the foregoing reasons, this Court should decline to exercise jurisdiction over the propositions of law that have been furnished by Defendant-Appellant/Cross-Appellees and Intervenor-Appellant/Cross-Appellee. Further review should be granted only over the proposition of law that has been presented by Plaintiff-Appellee/Cross-Appellant.

Respectfully submitted,

W. Craig Bashein

W. Craig Bashein, Esq. (#0034591)
BASHEIN & BASHEIN CO., L.P.A.

Paul W. Flowers

Paul W. Flowers, Esq. (#0046625)
PAUL W. FLOWERS CO., L.P.A.

Attorneys for Plaintiff-Appellee/Cross-Appellant

Michael F. Becker (per authority)

Michael F. Becker, Esq. (#0008298)
Lawrence F. Peskin, Esq. (#0059391)
BECKER & MISHKIND CO., L.P.A.

CERTIFICATE OF SERVICE

I hereby certify that the forgoing Memorandum was served via regular U.S. Mail on this 26th day of February, 2007 upon:

James M. Roper, Esq.
Jessica K. Walls, Esq.
Isaac, Brant, Ledman & Teetor LLP
250 East Broad Street, Suite 900
Columbus, Ohio 43215

Richard P. Goddard, Esq.
Calfee, Halter & Griswold LLP
800 Superior Avenue, Suite 1400
Cleveland, Ohio 44114-2688
Attorneys for Defendant-Appellants/Cross-Appellees, MedLink of Ohio, Inc., et al.

Steven G. Janik, Esq.
Janik & Dorman
9200 South Hills Blvd., Suite 300
Cleveland, Ohio 44147-3521

Lori S. Nugent, Esq.
Maya Hoffman, Esq.
Cozen O'Connor
222 South Riverside Plaza, Suite 1500
Chicago, Illinois 60606
Attorneys for Intervenor-Appellant/Cross-Appellee, Lexington Ins. Co.



W. Craig Bashein, Esq. (#0034591)
BASHEIN & BASHEIN CO., L.P.A.
Attorney for Plaintiff-Appellee/Cross-Appellant

LAW OFFICES

BASHEIN & BASHEIN
CO., L.P.A.

CRIMINAL TOWER

35TH FLOOR

50 PUBLIC SQUARE

CLEVELAND, OHIO 44113

TEL: (216) 771-3239

DEC 11 2006

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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

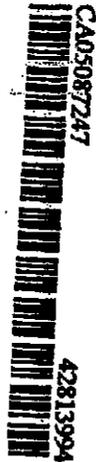
**ANDREA BARNES, EXECUTRIX, OF THE
ESTATE OF NATALIE BARNES, ET AL.**

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

YB0625 PB0760

APPENDIX 00000001

APPEARANCES:

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

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

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

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

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

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

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

-CONTINUED-

For Intervenor-Appellant Lexington Insurance Co.:

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

CA05087247 42591879



CA05087285 42591880



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

CA06087710 42591881



CA06087903 42591882



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

CA06087946 42591883



For Defendant-Appellee University Hospitals of Cleveland:

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

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

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

DEC 11 2006

NOV 30 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY: [Signature] DEP.

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY: [Signature] 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).

VOL 625 PG 0762

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

YAL 625 00767

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

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

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

Y000625 00768

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

W0625 000770

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:

"(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.]

VOL 0625 #0791

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

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

Case No. 87946:

Appellant MedLink's Assignments of Error:

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

Case No. 87710:

Appellant Lexington Insurance Co.'s Assignments of Error:

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

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

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

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

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

(1) If, upon motion of any party to a civil action that is based on tortious conduct, that has not been settled by agreement of the parties, and in which the court has rendered a judgment ... for payment of money, the court determines at a hearing held subsequent to the verdict ... in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case, interest on the judgment ... shall be computed as follows:

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

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

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

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

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

FACTUAL HISTORY

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

to Natalie Barnes that eventually resulted in her death.

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

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

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

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

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

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

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

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

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

SETTLEMENT HISTORY

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

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

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

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

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

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

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

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

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

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

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

LAW & ANALYSIS

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

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

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

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

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

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

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

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

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

IT IS SO ORDERED.



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

Date: March 14, 2006

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

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

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

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

(1) If, upon motion of any party to a civil action that is based on tortious conduct, that has not been settled by agreement of the parties, and in which the court has rendered a judgment ... for payment of money, the court determines at a hearing held subsequent to the verdict ... in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case, interest on the judgment ... shall be computed as follows:

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

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

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

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

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

FACTUAL HISTORY

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

to Natalie Barnes that eventually resulted in her death.

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

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

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

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

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

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

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

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

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

SETTLEMENT HISTORY

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

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

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

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

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

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

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

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

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

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

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

LAW & ANALYSIS

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

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

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

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

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

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

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

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

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

IT IS SO ORDERED.



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

Date: March 14, 2006