

IN THE SUPREME COURT OF OHIO

ANDREA BARNES, EXEC.,

*Plaintiff-Appellee,*

-vs-

UNIVERSITY HOSPITALS  
OF CLEVELAND, et al.

*Defendants-Appellants.*

CASE NO. 2007-0140

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

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

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MERIT BRIEF OF APPELLANTS MEDLINK OF OHIO  
AND THE MEDLINK GROUP, INC.

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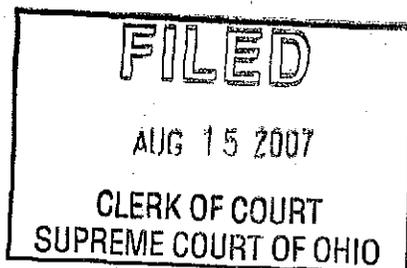
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## INTRODUCTION

This lawsuit was filed by the estate of Natalie Barnes, seeking wrongful death and survival damages from various parties that allegedly caused Barnes' death. The estate sued University Hospitals of Cleveland (UHC), which provided out-patient dialysis services to Barnes. The estate also sued the Medlink entities, who had contracted with Barnes' mother to provide home health care assistance to Barnes, a 19-year-old mentally impaired adult, who used a wheelchair and was not communicative.

Medlink's employee, Endia Hill, was assigned to drive Barnes to her regularly scheduled dialysis appointment at UHC. Hill, a non-medically trained aide, helped Barnes with activities of daily living. Although the parties disputed whether Hill was required to stay with Barnes throughout her dialysis treatment, Hill admitted that she went to the hospital cafeteria for lunch while UHC medical personnel were caring for Barnes during her dialysis.

Barnes suffered an adverse event while undergoing out-patient dialysis at UHC. Although life saving measures were performed by the hospital staff who were with Barnes in the dialysis unit, Barnes was placed on life support. After her family decided to remove her from life support, Barnes died.

In part, the estate alleged that Endia Hill caused Barnes death by her failure to remain with Barnes while she underwent dialysis at UHC. Medlink disputed liability, asserting that the acts and omissions of Hill, a non-medically trained "sitter," did not proximately cause the wrongful death of Barnes while she was in the care, custody and control of medical professionals in the dialysis unit of UHC. The jury found both the home health care agency and the hospital liable.

On May 5, 2005, the Journal Entry entered in this action specified that:

This matter proceeded to a trial by jury from April 25, 2005, until May 4, 2005. The jury reached a verdict on May 4, 2005. After deliberating the Jury found in favor of the Plaintiff against both Defendants.

The Jury found that Defendant University Hospitals of Cleveland, Inc. was ten percent (10%) responsible for the damages awarded in the survivorship claim and the wrongful death claim. The jury found that Defendant MedLink was responsible for ninety percent of the damages awarded in the survivorship claim and the wrongful death claim.

The jury found that the total amount of damages the estate of Natalie Barnes is entitled to for its survivorship claim is \$100,000.00. The jury found the total amount of damages the estate of Natalie Barnes is entitled to for its wrongful death action is \$3,000,000.00. The jury awarded a total amount of damages of \$3,100,000.00 to the estate of Natalie Barnes.

The jury found in favor of Plaintiff and found that punitive damages should be assessed against Defendant MedLink. The jury awarded the estate of Natalie Barnes an additional \$3,000,000 in punitive damages against Defendant MedLink. Further, the jury found that Defendant MedLink should be liable for the attorney fees of counsel employed by the Plaintiff in the prosecution of this action.

Counsel for Plaintiff and Defendant MedLink are ordered to agree on a date to conduct a hearing where the Court will determine a reasonable amount of money to award the Plaintiff for attorneys fees in the matter. Counsel are ordered to inform the Court of said agreed date and an agreed briefing schedule no later than May 21, 2005. A final judgment will be entered in favor of the Plaintiff against Defendant MedLink of Ohio after the conclusion of said hearing.

Judgment is entered in favor of the Plaintiff against Defendant University Hospitals of Cleveland, Inc., in the amount of \$310,000.00

The Court accepts the jury's verdicts and orders that costs of this action are to be paid by Defendants.

IT IS SO ORDERED.

/s/ Robert T. Glickman

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

UHC paid its portion of the Final Judgment and did not appeal the jury verdict or participate in post-trial proceedings, which continued against just the Medlink parties. The Barnes estate filed motions for attorney fees, costs and pre-judgment interest, all of which were

awarded by the private judge after evidentiary hearings. Medlink asked the trial court to review the award of punitive damages, under the standard articulated by the Supreme Court of the United States. That review never occurred.

During the pendency of post-trial motions, Medlink first learned that Private Judge Glickman lacked the qualifications to hold himself out and act as a "private judge." Medlink petitioned this Court in an effort to preclude further rulings in this case by Private Judge Glickman. Private Judge Glickman did not stay proceedings pending this Court's review, but instead quickly issued final judgment in the case, to divest the trial court of jurisdiction and render moot Medlink's effort to obtain this Court's review at that juncture.

Medlink appealed, asserting that Private Judge Glickman lacked subject matter jurisdiction to preside over a jury trial as a "retired judge" as required by R.C. 2701.10. The Cuyahoga County Court of Appeals affirmed the jury's verdict without addressing whether Robert Glickman had subject matter jurisdiction to adjudicate this lawsuit under R.C. 2701.10, and held that R.C. 2701.10 does not require private judges to have ever been elected to the Bench. The Court of Appeals refused Medlink's request for analysis by the trial court of the award of punitive damages under the standard articulated by the Supreme Court of the United States. Medlink appealed to this Court, which agreed to review both issues.

In this appeal, Medlink seeks a new trial, before a duly qualified Ohio trial judge, who has subject matter jurisdiction to adjudicate the claims of the Barnes estate in a jury trial. In the event that a punitive damage award is made, Medlink also seeks trial court review of the constitutionally-mandated factors, articulated by the United States Supreme Court, of any punitive damages award by the jury. As noted by the Supreme Court of the United States, trial courts have "a somewhat superior vantage over courts of appeals" in evaluating the

constitutionality of a jury's punitive damage award "primarily with respect to issues turning on witness credibility and demeanor." *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001), 532 U.S. 424, 440, 121 S. Ct. 1678, 1687-88 (footnote omitted). The trial court is in the best position to conduct the constitutional review, given the need to evaluate the admissible evidence and credibility of witnesses presented during the jury trial.

### **STATEMENT OF FACTS**

This action was filed by Andrea Barnes, Executrix of the Estate of Natalie Barnes, on December 4, 2001 against University Hospitals of Cleveland and Appellants herein, Medlink of Ohio and The Medlink Group, Inc. ("Medlink"). Plaintiff's decedent, Natalie Barnes, went into cardiac arrest while undergoing dialysis at University Hospitals on October 19, 2000. Although resuscitation efforts saved Natalie's life, she suffered a severe brain injury. She died several months later when her family terminated life support. The plaintiff declined an autopsy to determine the precise cause of death.

After the trial date was continued due to the trial court's busy docket, and in order to establish a date-certain for trial, the parties agreed to hire a private judge to preside over the trial. Robert Glickman had filed a Registration to hold the position of private judge pursuant to R.C. 2701.10 with this Court and was maintained on this Court's Registration of Private Judges. (See Supp. p. 4 and 6, respectively)<sup>1</sup>. On April 18, 2005, Robert Glickman and the parties in the *Barnes* case, including Medlink, entered into a contract entitled, "Agreement for Referral for Submission to Retired Judge Pursuant to R.C. 2701.10." The agreement provided that:

Plaintiff(s) Andrea L. Barnes and the E/O Natalie Barnes,  
defendant(s) Medlink and University Hospitals of Cleveland do

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<sup>1</sup> In accordance with Sup. Ct. Prac. R. VII, a Supplement is being filed concurrently with the Court. Portions of the record will be cited herein by both their location in the Record and their page within the Supplement, as "Supp. p. \_\_\_\_."

heereby [sic] agree that this case shall be transferred to Robert T. Glickman, a Retired Judge, who shall...[h]ear and determine all issues of law and fact which may hereafter arise in this case, preside over a jury which will receive evidence, and render a judgment adjudicating the action or proceeding in its entirety, including all post-trial proceedings, if any.

(Agreement, Supp. p. 1).

Rule VI of the Ohio Supreme Court Rules for the Government of the Judiciary provides an appendix of forms for transfer of a case under R.C. 2701.10. (Appx. p. 92). The rule states, “[s]ubstantial compliance with the prescribed forms is sufficient. Minor departures that do not negate substantial compliance shall not render void forms that are otherwise sufficient....” Gov. Jud. R. VI, § 5. (Appx. p. 93). Form 3 under Gov. Jud. R. VI provides that, upon agreement of the parties, the assigned retired judge shall “[h]ear and determine all issues of law and fact which may hereafter arise in this case, receive evidence, and render a judgment adjudicating the action or proceeding in its entirety, including all post-trial proceedings, if any.” (Appx. p. 98). Accordingly, the April 18, 2005 agreement is nearly identical to the Gov. Jud. R. VI form agreement, except for one major departure that negates substantial compliance with R.C. 2701.10, namely, the inclusion of language in the April 18, 2005 agreement allowing the retired judge to “preside over a jury.”

A document identifier with the initials, “RTG,” (Glickman’s initials) appears at the bottom of the second page of the agreement signed in this case. (See Agreement, Supp. p. 2). Medlink was not aware at the time it executed the agreement that the form of agreement did not comply with R.C. 2701.10, nor was Medlink aware that Glickman did not meet the statutory requirements to serve as a private judge under R.C. 2701.10. Glickman held himself out to the parties and to this Court as being qualified to oversee jury trials pursuant to Ohio’s Private Judge Statute and Glickman’s name was on this Court’s List of Registered Private Judges. The

April 18, 2005 agreement was filed in the Cuyahoga County Court of Common Pleas pursuant to R.C. 2701.10(B)(2) and referred to Glickman by Journal Entry dated April 25, 2005. (Journal Entry, Supp. p. 3).

A two-week jury trial began on April 24, 2005. At trial, Plaintiff claimed that Medlink Defendants ("Medlink") were the proximate cause of Natalie's death because Endia Hill, one of Medlink's employees, should have been in the dialysis area at the hospital with Natalie, even though Natalie was under the care of medical professionals during the entirety of this medical procedure. It was undisputed at trial that Medlink was contracted by Plaintiff to provide a sitter for Natalie and the sitter, Endia Hill, failed to remain with Natalie during the dialysis procedure. At issue, however, was proximate cause and whether the presence of a sitter would have made any difference in the outcome, since a qualified medical professional was standing immediately next to Natalie in the hospital when her catheter became dislodged and she went into cardiac arrest. (Lawrence Testimony, Tx. p. 1087, Supp. p. 66).

The undisputed testimony at trial was that Natalie Barnes went into cardiac arrest during dialysis. Cardiac arrest is something that happens frequently during dialysis. (Chambers Testimony, Tx. p. 1064, Supp. p. 63). One theory as to what occurred on the day in question is that Natalie Barnes went into cardiac arrest during dialysis and she reacted by pulling out her heart catheter. Plaintiff argued that it happened in the opposite order – that Natalie Barnes pulled out her heart catheter and then went into cardiac arrest. If that indeed occurred, it would be a noteworthy medical event, as numerous medical professionals all testified that, if that happened, it would be the first time ever. (Gallagher Testimony, Tx. p. 885-886, Supp. p. 60; Chambers Testimony, Tx. p. 1064, Supp. p. 63; Blankschaen Testimony, Tx. p. 1248, Supp. p. 68). Natalie Barnes' family declined an autopsy to determine the precise cause of death.

In order to shift the focus away from proximate cause, Plaintiff focused at trial on the fact that Medlink hired Endia Hill even though she had a conviction ten years earlier for assault. Since Hill did not assault Plaintiff, the connection between Medlink's hiring of Hill despite her decade-old conviction and any injury to Plaintiff caused by Hill's failure to remain with Plaintiff while she was undergoing a medical procedure and under the care of medical professionals is unclear. *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003), 538 U.S. 408, 423, 123 S. Ct. 1513 (a defendant should be punished for the conduct that actually caused harm to the plaintiff, not for being a supposedly unsavory individual or business). Incredibly, Plaintiff's counsel actually told the jury that Endia Hill was indicted for **aggravated murder** before she was hired by Medlink. (Tx. pp. 397-98, Supp. p. 57). Perhaps even more astounding was counsel's statement that a Cuyahoga County official wanted **murder** charges filed based on what occurred in this case. (Tx. pp. 389-90, Supp. p. 56). That statement was completely false. (Tx. p. 776, Supp. p. 58). Further, these "murder" statements were made during a time wherein a huge mug shot, purported to be of Endia Hill, was being shown to the jury on a large screen projector. (Prejudgment Interest Hearing Tx. at p. 210-211, Supp. p. 76). The photograph was never authenticated. Stated frankly, Plaintiff's counsel told the jury that Endia Hill was a murderer before she was hired, and she was a murderer after.

During closing argument, Plaintiff's counsel continued the efforts to incite the passion of the jury. Counsel stated that when Medlink hired Endia Hill, it was "condemnation to death" for Natalie Barnes. (Tx. p. 1490, Supp. p. 71). Plaintiff's counsel made the statement that in over 30 years of practice, he had never seen a case where the negligence has been so catastrophic. (Tx. p. 1405, Supp. p. 69). Counsel also stated that Medlink put forth a "frivolous" defense, and then chastised Medlink at trial for not apologizing. (Tx. p. 1488, Supp. p. 71). The jury was

actually told they “should be angry” and that they should not set their anger aside during their deliberations. (Tx. pp. 1491-1492, Supp. p. 72). The jury was further told that they were the “conscience of Cuyahoga County” and that if they “do the right thing,” this kind of tragedy will never happen to those people close to the jury. (Tx. p. 1410, Supp. p. 70). It was no surprise, then, that the jury returned a multi-million dollar runaway verdict and awarded punitive damages that were 30 times the award for the survival claim. The jury found in favor of Plaintiff and against both University Hospitals of Cleveland, Inc. and Medlink. (Tx. p. 1516, Supp. p. 73). As against Medlink, the jury awarded \$100,000 for Plaintiff’s survivorship claim, \$3 million for the wrongful death claim, and \$3 million in punitive damages. (See Journal Entry, Appx. p. 46; Tx. pp. 1516-1517, Supp. pp. 73-74).

Following trial, Glickman refused to conduct a proper analysis to determine whether the jury’s award of punitive damages was constitutional, even though the United States Supreme Court has held that it is required to do so. *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003), 538 U.S. 408, 425, 123 S.Ct. 1513. Although it is not a defendant’s obligation to ask the trial court to perform its duty, Medlink nevertheless filed a *Motion for Due Process Hearing and Review of Punitive Damages Award Prior to Entry of Final Judgment* on August 18, 2005 asking Glickman to conduct an analysis of the punitive damages award in this case following the guideposts set forth in *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559, 116 S.Ct. 1589. (Supp. p. 47). Glickman denied Medlink’s Motion on October 26, 2005 without analysis, after final judgment was entered. (See Cuyahoga County Docket Entry for August 18, 2005, noting denial of Motion on October 26, 2005). Final judgment was awarded to Plaintiff against Medlink in the amount of \$6,803,460.00 on October 18, 2005, along with an award of attorney fees in the amount of \$1,013,460.00. (Journal Entry, Appx. p. 57).

While Plaintiff's motion for prejudgment interest was pending, counsel for Medlink first learned that Glickman was not qualified to serve as a private judge because Glickman had never been elected to the Bench. This issue first came to Medlink's attention during the January 30, 2006 hearing on prejudgment interest at which counsel for Lexington Insurance Company (Medlink's insurer) attempted to intervene, and an effort was made by Glickman and counsel for Plaintiff to obtain Lexington's agreement to "sign a referral indicating that you would – the case would be heard by me [Glickman] and waive on the record any appeal regarding the validity of the Private Judge Statute." (Transcript, January 30, 2006 Prejudgment Interest Hearing, at page 42, lines 15-23, Supp. p. 75). In February 2006, and subsequent to the curious request by Glickman at the hearing, Medlink first learned of Glickman's lack of qualifications. Up until that time, Medlink trusted that Glickman was qualified to serve as a private judge for likely the same reasons this Court maintained Glickman on its Registration of Private Judges. (See, Private Judge Registration Listings, Supp. pp. 6, 8).

Medlink promptly filed a Complaint for a Writ of Prohibition in this Court on March 7, 2006.<sup>2</sup> Instead of waiting for this Court's decision on the matter, Glickman immediately awarded \$896,381.99 in prejudgment interest to Plaintiff within days in order to moot the motion and end his "jurisdiction" in the case. (Journal Entry and Amended Journal Entry, Appx. pp. 68, 78). As a result, the Writ was voluntarily dismissed since the act Medlink sought to prevent had now already occurred.

On March 14, 2006, The Supreme Court of Ohio Office of Judicial & Court Services, after also investigating Glickman, promptly sent correspondence to Glickman indicating that a determination was made that Glickman's name should not appear on the listing of appropriately

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<sup>2</sup> Case No. 2006-0478, filed March 7, 2006.

registered private judges kept by the Supreme Court of Ohio. (Supp. p. 7). A copy of the Supreme Court's Private Judge Registration Listing dated June 29, 2006 indicates that Glickman is no longer on the list. (Supp. p. 8).

Medlink timely appealed the trial court's entry awarding the above damages to Plaintiff. Medlink argued that the punitive damages award was unconstitutionally excessive under *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559 and *State Farm v. Campbell* (2003), 538 U.S. 408. Medlink also argued that the jury's verdict was void because (1) the jury trial was overseen by Glickman, who was not qualified to serve as a private judge under R.C. 2701.10 because he was never elected to the Bench, and (2) because R.C. 2701.10 does not permit jury trials before private judges.

The Eighth Appellate District nonetheless affirmed the trial court in its entirety. (Opinion, Appx. p. 5). In its decision, the Eighth District failed to conduct a *BMW* analysis of the jury's \$3 million punitive damage award as required under *State Farm*, supra. The appeals court also was silent as to Medlink's argument that a punitive-to-compensatory ratio of 30-to-1 was unconstitutionally excessive. Finally, the appeals court surprisingly held that R.C. 2701.10 does not require that private judges be elected. (Opinion p. 21, Appx. p. 27). The appeals court never analyzed or even mentioned the legal consequence of a private judge overseeing a jury trial under R.C. 2701.10, which this Court has held is not permitted under the statute. *State ex rel. Russo v. McDonnell*, 110 Ohio St. 3d 144, 2006-Ohio-3459, 852 N.E.2d 145, syllabus 1.

Both parties appealed, and this Court accepted Medlink's appeal on Proposition of Law Nos. 1 and 3:

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.

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.

The error in this case began the moment the parties signed an unlawful Agreement referring this case to an unqualified private judge to unlawfully oversee a jury trial (as opposed to a bench trial, which is permitted under R.C. 2701.10) on April 18, 2005. From that point forward, irreversible errors occurred at trial prejudicing the jury and inciting passion and anger. Post-trial proceedings were no different, with Glickman failed to conduct a due process review of the punitive damages award required by the United States Supreme Court in *State Farm*, supra, and continuing to rule on post-trial motions even after Medlink filed a Writ of Prohibition in this Court.

The only fair remedy in this case is for the parties to be placed where they were before the April 18, 2005 Agreement and for the parties to be given a fair trial before a qualified judge. Anything less than a new trial ratifies in whole or in part the actions and decisions of an unqualified judge who continues to this day to hold himself out as qualified to oversee jury trials under Ohio statute.

## I. ARGUMENT

**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.**

The largest appellate district in Ohio, the Eighth District, has now held that private judges need not have been elected by the people in order to conduct jury trials and to create law in this state. That decision ignores R.C. 2701.10 and ignores this Court's Rules for the Governance of the Judiciary.

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

### A. **Public Policy and Due Process Considerations.**

R.C. 2701.10 clearly provides that only previously elected judges may serve as private judges, and that elected judges must voluntarily retire in order to serve. If a judge is voted out of office (or never voted into office), then the people have spoken and that person is not permitted to adjudicate under the Private Judge Statute.

Obviously, the Ohio Legislature recognizes the importance of public scrutiny and the electoral process, which are cornerstones of our democracy. Private attorneys who have never been elected to the bench should not be permitted to preside over trials in a public courtroom

while wearing judicial robes. Nor are they authorized to empanel a jury and make precedential rulings of law, all of which are then subject to mandatory and then discretionary appellate review. Allowing non-elected, private judges to rule over public cases, hold witnesses and parties in contempt, direct the staff of elected judges, and fulfill the other tasks entrusted by law to elected officials cannot, by agreement or otherwise, be delegated to non-elected persons any more than parties can agree on who will serve as their appellate judges or who will serve as their mayor or governor. Allowing this to occur would eventually erode the judiciary to the point where parties can simply agree on anyone to act as a judge in a court of law.

The *Barnes* case was adjudicated through jury trial by Glickman even though he had no authority to do so. Glickman was not qualified to serve as a private judge because, although he had been twice-appointed to the Bench, he was never elected. To date, Glickman has ruled on pretrial motions, empaneled a jury, conducted trial during which he made numerous rulings of law, entered final judgment on the \$6.1 million jury verdict rendered on May 4, 2005, and made findings of fact and rulings of law in awarding \$1,013,460 in attorney fees to Plaintiff. Glickman also made findings of fact and rulings of law in awarding \$896,381.99 in prejudgment interest to Plaintiff after Medlink filed a Complaint for a Writ of Prohibition in this Court. Certainly Ohio's Private Judge Statute was not intended to make private attorneys "judges for life" simply because they received a political appointment at some point in the past.

The ideal of the legal system in this country and in the State of Ohio is that the judicial branch of government should be equated with just. The public is entitled to trust our legal system. Such an ideal, however, cannot be achieved if a private citizen clothed with judicial power may ignore with impunity the legislatively-authorized qualifications to serve as a private judge in this State. Glickman continues to this day to hold himself out as qualified to serve as a

private judge and to oversee jury trials under Ohio statute.<sup>3</sup> Glickman did not disclose his lack of qualifications at any time during the *Barnes* trial or during post-trial proceedings nor does he do so today, despite the fact that this Court's Office of Judicial & Court Services put him on notice on March 14, 2006 that he was not qualified to serve as a private judge. (Supp. p. 7).

Ohio jurisprudence simply cannot let stand a trial that amounted to a sham proceeding. As a matter of due process, Medlink is entitled to a fundamentally fair jury trial that is conducted within the confines of jurisdiction conferred by statute and constitutional authority.

The appropriate remedy under these circumstances is to vacate all proceedings in *Barnes* before Glickman and to return the *Barnes* matter to the trial court for further proceedings.

**B. Qualifications for Retired Judges Under R.C. 2701.10.**

R.C. 2701.10, titled "Registration of retired judges; referral of civil action or submission of issue or question," states:

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

(R.C. 2701.10(A), Appx. p. 90). The statute provides eligibility for two kinds of retired judges to adjudicate a proceeding under the statute: (1) voluntarily retired judges and (2) involuntarily retired judges who are over the age of 70 and were required to retire under Article IV, § 6 of the Ohio Constitution. Although the definitions of who would fit the requirements of a "voluntarily retired judge" or a judge retired under Article IV, Section 6 of the Ohio Constitution are clear (only elected judges), R.C. 2701.10 does not specifically state in the statute that private

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<sup>3</sup> See, Website Bio for Robert T. Glickman at McCarty, Lebit, Crystal & Liffman Co., L.P.A., stating that "[p]ursuant to Ohio statute, former Judge Glickman is also active as a private judge hired by the litigants to preside over jury trials."

judges “must be elected.” The applicable Supreme Court Rules provide the operative definitions.

The meaning of “voluntarily retired judges” is defined under Rule VI(C)(2) of the Ohio Supreme Court Rules for the Government of the Judiciary. (Appx. p. 92). Gov.Jud.R.VI, titled “Reference of civil action pursuant to section 2701.10 of the Revised Code,” defines a “voluntarily retired judge” as “any person who was elected to and served on an Ohio court without being defeated in an election for new or continued service on that court.” Gov.Jud.R.VI(1)(C)(2). (Appx. p. 92).

Article IV, Section 6 of the Ohio Constitution provides guidelines for the compensation of elected judges. (Appx. p. 100). This provision of the Ohio Constitution also does not extend jurisdiction to retired appointed judges who have not been elected to serve on an Ohio court. The Editor’s Comment to this section of the Ohio Constitution states that “judges are to be elected rather than appointed....” Ohio Const. Art. IV, § 6, Editor’s Comment. (Appx. p. 101).

The law in Ohio is clear that private judges serving under R.C. 2701.10 must be elected, and the Eighth Appellate District erred in ruling otherwise.

**C. Glickman Is Not Qualified To Serve As A Private Judge Under R.C. 2701.10.**

R.C. 2701.10 confers jurisdiction solely on the category of voluntarily retired judges who were elected to serve on an Ohio court. A history of Glickman’s career as an appointed judge confirms that he is not a member of the category of voluntarily retired judges to whom jurisdiction may be conferred under R.C. 2701.10, because he was never an elected judge:

June 26, 2001: Glickman is appointed by Governor Bob Taft to the office of Judge, Cuyahoga County Court of Common Pleas.<sup>4</sup> (Supp. p. 9).

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<sup>4</sup> Documentation of the following events is found in public records which Medlink has asked this Court to supplement as part of the Record for review. (See, Motion to Supplement the Record, filed August 1, 2007).

- November 5, 2002: Glickman runs for position of Judge for the Common Pleas Court of Cuyahoga County and loses to John P. O'Donnell. (Supp. p. 10, 12).
- April 2, 2003: Glickman is again appointed by Governor Bob Taft to the office of Cuyahoga County Common Pleas Court. (Supp. p. 22).
- March 2, 2004: Glickman wins the Republican primary, unopposed, for a Full Term for Judge of the Cuyahoga County Common Pleas Court commencing 01-09-2005. (Supp. p. 23, 37).
- April 30, 2004: Glickman withdraws his candidacy for Judge of the Cuyahoga County Common Pleas Court. (Supp. p. 42).
- July 6, 2004: Glickman submits his "Registration Of Retired Judge" to the Supreme Court of Ohio, indicating his "Date of retirement from judicial service" as June 1, 2004. (Supp. p. 4).

Judges who were defeated in an election for new service, and judges who were never elected in an Ohio court, are expressly excluded from the definition of a "voluntarily retired judge." Gov. Jud. R. VI(C)(2). (Appx. p. 92). As Glickman was never elected as a judge, he does not qualify for the definition of a "voluntarily retired judge." Indeed, Glickman was removed from this Court's Registration of Private Judges on or around March 14, 2006 when he received correspondence from the Supreme Court of Ohio Office of Judicial & Court Services indicating that Glickman's name should not appear on the list.<sup>5</sup> (Supp. p. 7). Nevertheless, Glickman continues to this day to hold himself out as qualified to serve as not only a private judge, but also over jury trials pursuant to Ohio statute.

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<sup>5</sup> That correspondence did not exist while this case was pending in the trial court and necessarily, then, was not part of the Record. Medlink filed a Motion to Supplement the Record on August 1, 2007 seeking to add this letter and other documents to the Record on review.

**D. Glickman Patently and Unambiguously Lacked Subject Matter Jurisdiction Over The Underlying *Barnes* Litigation And The Case Must Be Remanded For a New Trial.**

As Glickman was ineligible to adjudicate the *Barnes* case, any exercise of judicial authority on his part was unauthorized by law. See *Cangemi v. Cangemi*, 8<sup>th</sup> Dist. No. 84678, 2005-Ohio-772, 2005 WL 433529. (holding that, where an individual was retained by the parties' agreement pursuant to R.C. 2701.10, but without color of authority, the appointment was void.) The Ohio Constitution grants the Common Pleas Court "original jurisdiction over all justiciable matters...as may be provided by law." Ohio Const. Art. IV, § 4(B). Accordingly, "the power to define the jurisdiction of the courts of common pleas rests in the General Assembly and...such courts may exercise only such jurisdiction as is expressly granted to them by the legislature." *Seventh Urban, Inc. v. University Circle* (1981), 67 Ohio St.2d 19, 22, 423 N.E.2d 1070; see also *Central Ohio Transit Authority v. Transport Workers Union of America, Local 208* (1988), 37 Ohio St.3d 56, 60, 524 N.E.2d 151 (stating that "the jurisdiction of the common pleas courts is limited to whatever the legislature may choose to bestow").

This Court has confirmed that "challenging improper assignment and transfer of a case is an attack on the subject-matter jurisdiction of the transferee court." *State ex rel. Kline v. Carroll* (2002), 96 Ohio St.3d 404, 409-10, 775 N.E.2d 517 (citing *Davis v. Wolfe* (2001), 92 Ohio St. 3d 549, 552, 751 N.E.2d 1051.)

In *Kline*, this Court affirmed the Eighth Appellate District's issuance of a writ of prohibition finding that no subject matter jurisdiction was conferred because of a failure to meet statutory requirements in the transfer of the case, just like in the *Barnes* litigation. There the relator, Cynthia Kline, sought the issuance of a writ of prohibition against the respondents, Judge Patrick Carroll and the Lakewood Municipal Court, to prohibit them from enforcing a sentence

in the underlying case and to vacate Kline's conviction in that case for lack of jurisdiction. She argued that because the transfer from the Parma Municipal Court to the Lakewood Municipal Court was improper, the respondents never obtained jurisdiction over the underlying cases and, therefore, the conviction was void. The underlying case was transferred from one municipal court to the other pursuant to statute. The provisions of the statute required the filing of an affidavit of prejudice and notice from the municipal court clerk to the presiding judge of the court of common pleas. In addition, the statute did not permit the presiding judge of the relevant common pleas court to appoint a judge when municipal court judges voluntarily recuse themselves. Rather, the Chief Justice of the Ohio Supreme Court must assign the replacement judge.

The Eighth Appellate District noted that when the assignment of a judge is made without the necessary statutory authority, "then the assigned trial court lacks jurisdiction to hear the matter, and the judgment of that court is void." *State ex rel. Kline v. Carroll* (Jan. 4, 2002), 8<sup>th</sup> Dist. No. 79737, 2002 WL 42962 [emphasis added]. The City of Parma sought to intervene in the case, arguing that a party cannot take advantage of an error he invited or induced. That court noted that the issue of subject matter jurisdiction cannot be waived and, thus, can be raised at any time.

In issuing the writ of prohibition, the court held that:

Given the repeated rulings in this district that the presiding judge of the Court of Common Pleas may not assign a judge to hear a municipal court case on a trial judge's voluntary recusal or disqualification and that the judgment of such an assigned judge is void, this court rules that the respondents were patently and unambiguously without jurisdiction and that the judgments are void.

*State ex rel. Kline v. Carroll*, 2002 WL 42962.

Glickman presided over the *Barnes* case, but no jurisdiction was conferred by statute on Glickman's proceedings. See *State ex rel Mason v. Griffin*, 104 Ohio St.3d 279, 282, 2004-Ohio-6384, 819 N.E.2d 644; see also *State ex rel. Stern v. Mascio* (1996), 75 Ohio St.3d 422, 425, 662 N.E.2d 370 (holding that "where a lower court is without jurisdiction whatsoever to act, the availability or adequacy of an appellate remedy is immaterial.") In this case, jurisdiction has not existed since the April 18, 2005 Referral Agreement that allegedly authorized the transfer of this case to Glickman because R.C. 2701.10 did not confer subject matter jurisdiction. Absent statutory authority, no subject matter jurisdiction extends to the proceedings in *Barnes* before Glickman, and thus all such proceedings must be rendered void as a matter of law.

**E. The April 18, 2005 Agreement Is Void As a Matter of Law.**

In Ohio, "[p]arties are free to enter into any contract the subject of which is not prohibited by law." *Motorists Insurance Cos. v. BFI Waste Management* (April 23, 1999), 2d Dist. No. 17495, 133 Ohio App. 3d 368, 377, 728 N.E.2d 31. A contract that violates a statute is unlawful and void (*Bell v. Northern Ohio Telephone Co.* (1948), 149 Ohio St. 157, 158, 78 N.E.2d 42) and, therefore, unenforceable (*Massilon Savings & Loan Co. v. Imperial Finance Co.* (1926), 114 Ohio St. 523, 527, 151 N.E. 645). See also *CommuniCare, Inc. v. Wood County Board of Commissioners*, 6<sup>th</sup> Dist. No. WD-04-057, 2005-Ohio-2348, 161 Ohio App. 3d 84, 93, 829 N.E.2d 706 ("Contracts made in violation of state statute or in disregard of such statutes are void, not merely voidable, and courts will not lend their aid to enforce such contracts directly or indirectly but will leave the parties where they have placed themselves.").

A private contract cannot be used to circumvent actions prohibited by statute. See *Office of Disciplinary Counsel v. Coleman* (2000), 88 Ohio St. 3d 155, 158, 724 N.E.2d 402. In an Eighth District case on point, *Cangemi v. Cangemi*, 8<sup>th</sup> Dist. No. 84678, 2005-Ohio-772, 2005

WL 433529, the court rendered a proceeding void where the appointment of a private “judge” was made without the color of authority. In *Cangemi*, the parties agreed to a dispute resolution process whereby they used an individual to arbitrate their matter who was not registered as a private judge with the Cuyahoga County Court of Common Pleas. The trial court entered an order that, among other things, the arbitrator “shall make findings of fact and conclusions of law” and that “upon receipt of the arbitrator’s award, the trial court shall journalize same as its judgment.” *Id.* at ¶¶ 5, 6, 11 of decision. The parties in that case apparently understood that the individual did not have authority to enter judgment himself, as a retired judge acting under R.C. 2701.10 would, and therefore agreed that the common pleas court would enter judgment on his decision. *Id.* at ¶ 23. Because of plain error in using an individual without authority under R.C. 2701.10 to hear their case, the appeals court rendered the appointment of the individual void, vacated the court’s decision, and remanded for further proceedings:

“We are unable to reach the merits of appellant’s assignments of error because of a plain error in the proceedings before the trial court. The parties’ attempt to tailor the proceedings – to choose their decision-maker and define the process by which his decision would be reviewed – is not authorized by the Ohio Revised Code or court rules.” *Id.* at ¶ 17.

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“Finally, the dispute resolution process to which the parties agreed here did not comply with R.C. 2701.10. Most important, Mr. Heutsche [the appointed arbitrator] is not a retired judge registered with the clerk of courts for the purpose of receiving referrals of cases for adjudication...” *Id.* at ¶ 23.

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“Here...the appointment of Mr. Heutsche was made without color of authority, and was therefore void...We find Mr. Heutsche had no jurisdiction to hear and decide the parties’ case...The parties’ agreement to this procedure did not eliminate the court’s ethical obligation to exercise its independent judgment. Accordingly, we vacate the court’s decision and remand for further proceedings.” *Id.* at ¶¶ 25, 26.

The April 18, 2005 private contract executed by the parties to engage a private judge to adjudicate the *Barnes* case violated R.C. 2701.10. Accordingly, the contract is void and unenforceable as a matter of law. *Cangemi*, supra, *Coleman*, 88 Ohio St. 3d at 158; *Martin v. Midwestern Group Insurance Co.* (1994), 70 Ohio St.3d 478, 480, 639 N.E.2d 438; *Buchanan Bridge Co. v. Campbell* (1899), 60 Ohio St. 406, 425, 54 N.E. 372. Because the contract is void as a matter of law, the appropriate court “will leave the parties where they have placed themselves.” *CommuniCare, Inc. v. Wood County Board of Commissioners* (6<sup>th</sup> Dist. 2005), 161 Ohio App. 3d 84, 93; see also *Buchanan Bridge Co.*, 60 Ohio St. at 426. Thus, Medlink must be placed in the same position they were in at the time the contract was executed on April 18, 2005. No jurisdiction ever existed for the *Barnes* proceedings before Glickman, and thus any rulings made or journal entries filed in the *Barnes* case on or after April 18, 2005 must be vacated. “[S]ubject-matter jurisdiction cannot be waived [and] cannot be conferred upon a court by agreement of the parties.”<sup>6</sup> *Nord Community Mental Health Center v. Lorain County* (March 2, 1994), 9<sup>th</sup> Dist. No. 93CA005680, 93 Ohio App.3d 363, 365, 638 N.E.2d 623.

Accordingly, Medlink is entitled to have the underlying final judgment vacated and receive an assignment of a statutorily authorized judge to the *Barnes* case for proceedings not adjudicated before the April 18, 2005 transfer of the *Barnes* case to Glickman.

If final judgment is not vacated in this case, the Court will ratify the errors committed by an unqualified judge who continues with impunity to hold himself out as qualified to oversee jury trials under R.C. 2701.10. The consequences of what can occur are obvious here, as

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<sup>6</sup> “Subject matter jurisdiction defines the power of the court over classes of cases it may or may not hear.” *State ex rel. Wright v. Griffin* (July 1, 1999), Cuyahoga App. No. 76299, 1999 WL 462338. In this case, Glickman lacked subject matter jurisdiction as he had no power, as he was not in the category of retired judges (elected) that are authorized under R.C. 2701.10 to hear the class of case (trial by jury) required in *Barnes*.

Glickman refused to conduct a constitutional review of the jury's punitive damages award under the guideposts articulated in *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559 and required to be analyzed in accordance with *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003), 538 U.S. 408 even after Medlink filed a Motion seeking a review. Glickman's decision to ignore the *BMW* guideposts and affirm the jury's \$3 million punitive damages award became Ohio law, affirmed by the Eighth District, and may now be cited by litigants throughout this State until it is overturned by this Court. The magnitude of this error, and the need for these proceedings to be remanded before a qualified judge, is further detailed below.

**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.**

**A. The Need for a State Standard of Review.**

In the case of *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559, 116 S. Ct. 1589, the United States Supreme Court articulated three "guideposts" for courts to consider in reviewing an award of punitive damages. In *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003), 538 U.S. 408, 425, the United States Supreme Court held that those three guideposts must be considered by any court reviewing an award of punitive damages. This Court has not held that a reviewing court in Ohio must apply the *BMW v. Gore* guideposts in reviewing a punitive damages award and, indeed, the trial court and reviewing appellate court in this case both refused to consider these guideposts with respect to a punitive damages award that was thirty times the compensatory damages award.

This case provides this Court with the opportunity, for the first time since *State Farm*, to define how punitive damages awards must be reviewed by courts in Ohio.

The United States Supreme Court holds that the fairness of a State's punitive damages procedure is subject to the scrutiny of the Due Process Clause of the Fourteenth Amendment. Due process "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003), 538 U.S. 408, 416, 123 S. Ct. 1513, citing *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001), 532 U.S. 424, 433, 121 S. Ct. 1678, 149 L. Ed. 2d 674. A punitive damage award that is grossly out of proportion to the compensatory award "furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *State Farm*, 538 U.S. at 417, citing *Pacific Mutual Life Insurance Co. v. Haslip* (1991), 499 U.S. 1, 42, 111 S. Ct. 1032.

The imprecise manner in which punitive damages are rendered has heightened the concern of the U.S. Supreme Court, most notably when a jury is presented "with evidence that has little bearing as to the amount of punitive damages that should be awarded." *State Farm*, 538 U.S. at 418. Indeed, the Court has "emphasized the need to avoid an arbitrary determination of an award's amount" and has indicated that States must insist on "proper standards that will cabin the jury's discretionary authority" so that a State's punitive damages system does not deprive a defendant of fair notice of the severity of the penalty that a State might impose or threaten arbitrary punishments that do not reflect an application of law but reflect instead a decisionmaker's whim. *Philip Morris USA v. Williams* (2007), \_\_U.S. \_\_, 127 S. Ct. 1057, 1062 (quotations and citations omitted.) Furthermore, the focus at trial on the decade old conviction of Hill for assault and indictment for attempted murder that had no causal connection to the conduct that actually caused harm to the plaintiff (failing to sit with plaintiff during a medical procedure under the care of medical professionals) violated Medlink's due process rights. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423, 123 S. Ct. 1513, 1523 (2003) (a

defendant should be punished for the conduct that actually caused harm to the plaintiff, not for being a supposedly unsavory individual or business).

Accordingly, the U.S. Supreme Court has held that constitutional review of the punitive damages award by both the trial and appellate courts ensures that the award (1) is not grossly excessive; and (2) procedurally and substantively comports with due process. *See, State Farm*, 538 U.S. at 418; *Cooper Industries*, 532 U.S. at 424; *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559, 574-75, 116 S. Ct. 1589. The importance of a fair and meaningful review by the trial court, particularly of the reprehensibility guidepost, cannot be overstated, as the trial court alone views the testimony and the argument as it is presented to the jury, and the trial court alone is aware of the atmosphere in the court room generated by evidence and argument that impacts a jury's ability to render judgment in accordance with the law rather than by reference to anger, prejudice and emotion. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 440, 121 S.Ct. 1678, 1687-88 (2001).

The Due Process Clause of the Fourteenth Amendment requires that "meaningful and adequate" post-verdict review of the punitive damages award be available in the trial court. *See, Honda Motor Co. v. Oberg* (1994), 512 U.S. 415, 420, 114 S. Ct. 2331. Given the risks of unfairness, it is constitutionally important for a court to provide assurance that a jury will ask – or has asked – the right questions, not the wrong ones. *Philip Morris*, 127 S. Ct. at 1064. At least some Ohio courts recognize that "both trial courts and courts of appeals are free to conduct meaningful posttrial review of [punitive damage] awards." *Gollihue v. Consolidated Rail Corp.* (July 7, 1997), 3<sup>rd</sup> Dist. No. 14-96-23, 14-96-24, 120 Ohio App. 3d 378, 405, 697 N.E.2d 1109, *dismissed, appeal not allowed* by 80 Ohio St.3d 1444; see also *Blust v. Lamar Advertising Co.*, 2d Dist. No. 19942, 2004-Ohio-2433, 157 Ohio App. 3d 787, 805-06, 813 N.E.2d 902, *appeal*

not allowed by 103 Ohio St.3d 1478 (affirming trial court's finding that punitive damages award was excessive). "Meaningful and adequate" post-verdict review of a punitive damages award now requires analysis of the jury's punitive damages award using three guideposts which assist courts in identifying unconstitutionally excessive punitive damages awards, as set forth in *BMW* and revisited in *State Farm*. See, *BMW*, 517 U.S. at 575; *State Farm*, 538 U.S. at 418.

This case serves as an unfortunate example of what happens without a review of a punitive damages award. Here, a \$3 million punitive damages award was given in comparison to a \$100,000 compensatory award (a ratio of 30 to 1). (Tx. pp. 1516-1517, Supp. pp. 73-74). The United States Supreme Court has stated that a 4 to 1 ratio is the norm, and a 10 to 1 ratio is at the outer limits of acceptability. See *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003), 538 U.S. 408, 425. Significantly, there was no direct evidence at trial that Natalie Barnes had experienced any conscious pain or suffering to even support the \$100,000 compensatory award, nor was there evidence of any nexus between the punishable conduct (Medlink hiring an individual with a ten-year old assault conviction) and the specific harm alleged (that employee leaving Natalie Barnes with professionals in the dialysis unit at University Hospitals).

Without a constitutional review of a punitive damages award, there is no check or balance on the anger and sympathy that may have unfairly magnified such an award. The reviewing guideposts articulated in *BMW v. Gore* provide a simple and practical method to review punitive damages awards in a rational and unemotional way and guarantee constitutional fairness to a defendant.

**B. United States Supreme Court Law On Punitive Damages Awards Post *Dardinger*.**

After this Court's decision in *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St. 3d 77, 2002-Ohio-7113, 781 N.E.2d 121, which considered the constitutionality of a punitive

damages award, the United States Supreme Court in *State Farm Mutual Automobile Insurance Co. v. Campbell* (2003), 538 U.S. 408, 418, held that every court reviewing an award of punitive damages for federal constitutionality must independently analyze the three guideposts set forth in *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559, 116 S. Ct. 1589.

*BMW v. Gore* articulated the following three guideposts for a review of a punitive damages award:

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

Although this Court did consider the *BMW v. Gore* guideposts in its *Dardinger* decision, supra, this Court did not hold that courts reviewing a punitive damages award under the federal constitution must analyze the three *BMW* guideposts. In *Dardinger*, this Court considered and reversed a punitive damages award where the ratio to compensatory damages was 20-to-1. *Id.*, at ¶ 171.

In light of the *State Farm* decision, litigants in Ohio are in need of this Court's orders as to how and when courts in Ohio must conduct a constitutional analysis of an award of punitive damages.

**C. The *BMW* and *State Farm* Analyses: The Judgment Below Is Contrary To The Law On Punitive Damages.**

As an initial matter, it is Medlink's position that Plaintiff was never entitled to punitive damages in this case because her claim arose out of contract. Plaintiff claimed at trial that Medlink should be liable for punitive damages because Endia Hill "abandoned" Natalie at the

dialysis center at University Hospitals. While Medlink admitted that Ms. Hill left the dialysis area, that conduct or act cannot support a claim for punitive damages under Ohio law. Endia Hill's duty to remain with Natalie during dialysis was created solely by the contract between Plaintiff and Medlink. Ms. Hill breached the contract when she left. Punitive damages are not permitted in Ohio for breach of contract claims. *Corsaro v. ARC Westlake Village, Inc.*, 8<sup>th</sup> Dist. No. 84858, 2005-Ohio-1983, 2005 WL 984502.

Nevertheless, a review of the *BMW* guideposts indicates that the punitive damages award here is unconstitutionally excessive because:

- Medlink's alleged conduct (hiring Endia Hill) had no nexus to the *specific harm* suffered by Natalie Barnes (Natalie Barnes' alleged air embolism). This conduct, which was dissimilar and independent from the acts upon which liability was premised, cannot serve as the basis for punitive damages. The presence of Endia Hill, like her prior felony conviction, made no difference here since Natalie Barnes was in the hospital with professionals when her medical condition began. *See, State Farm*, 538 U.S. at 422-23.
- The disparity between the actual harm suffered by Natalie Barnes in her survivorship claim and the punitive damages award equals a 30-to-1 ratio, considerably in excess of a constitutionally acceptable ratio. *See, State Farm*, 538 U.S. at 425-26.
- The most comparable legislative penalty, a violation of the patient endangerment statute (*see*, R.C. 2903.341), limits the extent to which an offender may be penalized to \$10,000 (*see*, R.C. 2929.18(A)(3)(c)), which is 300 times less than the punitive damages award.

The failure of this Judgment to comply with the guideposts as articulated by the Supreme Court of the United States indicates that this verdict is unconstitutionally excessive, thus requiring a new trial. Reconsideration of the punitive damages award using the three guideposts requires this result. Each guidepost as outlined in *BMW* is addressed in the following paragraphs.

1. The Reprehensibility Guidepost:  
Negligence, Rather than Intentionally Malicious Conduct, Does Not Support Punitive Damages

The first *BMW* guidepost has received considerable emphasis in constitutional jurisprudence, as “[p]erhaps the most important indicum of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.” 517 U.S. at 575. Under this guidepost, the United States Supreme Court has instructed that a review of reprehensibility includes consideration of whether: (1) “the harm caused was physical as opposed to economic”; (2) “the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others”; (3) “the target of the conduct had financial vulnerability”; (4) “the conduct involved repeated actions or was an isolated incident”; and (5) “the harm was the result of intentional malice, trickery, deceit, or mere accident.” *State Farm*, 538 U.S. at 419. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award, and the absence of all of them renders any award suspect. *State Farm*, 538 U.S. at 419.

In its reprehensibility analysis, the *State Farm* Court emphasized that the punishable conduct “must have a nexus to the specific harm suffered by the plaintiff.” 538 U.S. at 422 [emphasis added]. The *State Farm* Court warned, “[t]he reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance....” 538 U.S. at 424.

In this case, Plaintiff argued that the specific harm suffered by Natalie Barnes was an air embolism following the removal of her dialysis catheter. (Tx. p. 387, Supp. p. 55). Medlink does not dispute that the harm Natalie Barnes suffered was physical. Medlink conceded at trial

that it had hired a convicted felon, Endia Hill, who was supposed to remain with Natalie Barnes during dialysis in case she pulled her catheter out. Plaintiff, however, failed to present evidence at trial establishing that the act of hiring a convicted felon had a nexus to the specific harm to Natalie Barnes. *See, State Farm*, 538 U.S. at 423 (punitive damage awards must be related to the conduct causing harm to the plaintiff). The only specific harm that would be related to the negligent conduct of hiring Endia Hill would have been if Endia Hill had assaulted Natalie Barnes. Endia Hill's failure to remain with Natalie Barnes during dialysis had no correlation to the fact that she was convicted ten years earlier for assault, and Plaintiff presented no evidence at trial demonstrating any such connection. The most Endia Hill could have done was summons the health professional who was already there. Plaintiff's failure to connect the hiring of Endia Hill to the specific harm alleged was a failure to establish a nexus and a failure of Plaintiff to meet her burden under *State Farm*. Just as there would be no nexus between hiring a person convicted of assault and that person later causing an accident while driving Natalie Barnes to dialysis, there is also no nexus between the hiring of Endia Hill and Hill's decision to leave Natalie Barnes in the hands of competent professionals at the University Hospitals dialysis unit.

The reprehensibility guidepost requires a *de novo* review (*Cooper Industries*, 532 U.S. at 431) of this conduct to determine scienter and will not permit deference to the jury. The question for review is whether Endia Hill's omission on October 19, 2000 evinced intentionally malicious or deliberately injurious conduct. No evidence was presented by Plaintiff at trial that supports the conclusion that Endia Hill intentionally or deliberately caused harm to Natalie Barnes. Endia Hill's failure to remain with Natalie Barnes while Natalie was in the hands of competent medical providers during her dialysis procedure does not demonstrate intentional or deliberate conduct with the purpose of causing harm. It would be unreasonable to find that a home health aide such

as Endia Hill, with minimal medical training, could know that by leaving Natalie Barnes' side while she was undergoing a medical procedure in one of the finest hospitals in the country, that such harm could result. In addition, Endia Hill's failure to remain with Natalie Barnes during dialysis was not the result of trickery or deceit; she simply failed to follow the instructions that were given to her.

Further, no evidence was presented to show whether Endia Hill knew that the removal of Natalie Barnes' catheter had a substantial probability of causing harm. In this case, Plaintiff was required to show that Medlink had knowledge that removal of the catheter had a substantial probability of causing the specific harm suffered by Natalie Barnes – an air embolism. *See, State Farm*, 538 U.S. at 422 (as to proof of the specific harm); *Preston v. Murty* (1987), 32 Ohio St.3d 334, 336, 512 N.E.2d 1174 (as to proof of actual malice).

Here, with the exception of Plaintiff's paid liability expert, all other doctors and virtually every single nurse or medical technician who testified at trial agreed they never witnessed or even heard of a displaced catheter causing a fatal air embolism. (Chambers Testimony, Tx. p. 1065, Supp. p. 63; Blankschaen Testimony, Tx. p. 1250, Supp. p. 68). This is true despite the fact that it is not at all uncommon for a catheter to become displaced or fall out of a patient without air embolism occurring as a result. (Chambers Testimony, Tx. pp. 1063-1064, Supp. pp. 62-63; Lagunzad Testimony, Tx. pp. 1071-1072, Supp. pp. 64-65; Blankschaen Testimony, Tx. p. 1223-1224, Supp. p. 67). Nurse Nancy Gallagher testified that, in her thirty-eight years of experience and in the over one million dialysis treatments occurring in the institutions she supervises every year, she knows of not one single occurrence where an air embolus was caused by a patient pulling out their catheter or by catheter removal. (Gallagher Testimony, Tx. p. 881-882, 889-890, Supp. pp. 59, 61). The testimony was that, of all the instances in which patients

pulled their catheters out, none had suffered cardiac arrest. (Gallagher Testimony, Tx. p. 885-886, Supp. p. 60; Chambers Testimony, Tx. p. 1064, Supp. p. 63; Blankschaen Testimony, Tx. p. 1248, Supp. p. 68). Thus, the air embolism allegedly suffered by Natalie Barnes was neither “probable” nor “likely” when considering the evidence presented in this case. An air embolism was not a foreseeable result that one would reasonably expect to occur. It would be unreasonable to find that Medlink or Endia Hill was aware that removal of Natalie Barnes’ catheter had a great probability of resulting in an air embolism.

Negligent conduct impacting a person’s health or safety is less reprehensible than intentional malice. *See, Jones v. Swanson* (8<sup>th</sup> Cir. 2003), 341 F.3d 723, 737. Poor judgment, accident, or even incompetence are not malice. In this case, Plaintiff failed to present evidence that Endia Hill’s failure to remain with Natalie Barnes during dialysis demonstrated a malicious and deliberate intent to harm Natalie Barnes.

In the absence of malice or other evidence of deliberate intent to harm Natalie Barnes, the reprehensibility of the negligent conduct at issue does not support a punitive damages award that is *thirty* times greater than the damages for pain and suffering and thus, under the reprehensibility guidepost, the punitive damage award is excessive.

2. The Ratio Guidepost:  
The 30-to-1 Ratio of Punitive Damages to Damages for Pain and Suffering is Excessive

Reference to the second *BMW* guidepost, the ratio between punitive and compensatory damages, also shows that the punitive damages awarded in this case are excessive. The ratio guidepost, “[t]he second and perhaps most commonly cited indicum of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff.” *BMW*, 517 U.S. at 580. While refusing “to impose a bright-line ratio which a punitive damages award

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

The Ohio Supreme Court has held that punitive damages are not recoverable in wrongful death actions. *Rubeck v. Huffman* (1978), 54 Ohio St.2d 20, 22-23, 374 N.E.2d 411. However, a plaintiff may obtain punitive damages under a survivorship claim if there is evidence that the decedent suffered personal injury before death. R.C. 2125.02; R.C. 2315.21; see also *Rubeck*, 54 Ohio St.2d at 23; *Gollihue v. Consolidated Rail Corp.* (3<sup>rd</sup> Dist. 1997), 120 Ohio App. 3d 378, 406. Accordingly, under Ohio law, personal injury damages based on the survivorship claim, not the wrongful death claim, serve as the measure of disparity between actual and punitive damages. See, *Wightman v. Consolidated Rail Corp.* (1999), 86 Ohio St.3d 431, 438-39, 715 N.E.2d 546.

Therefore, in the instant case, the entire \$3.1 million compensatory award does not serve as the measure of disparity between actual and punitive damages. The disparity is measured by the difference between the personal injury damages of \$100,000 against the \$3,000,000 in punitive damages, a 30-to-1 ratio. Significantly, there was no direct evidence at trial that Natalie Barnes suffered any conscious pain before she went into cardiac arrest and coded. (Lawrence

Testimony, Tx. p. 1087, Supp. p. 66). If she had, the pain would have been limited to the momentary discomfort associated with pulling out her catheter before she became unconscious and coded. Medical professionals testified at trial that it is common for patients to remove their catheters, that it happens all the time, and that it is "not a big deal." (Chambers Testimony, Tx. pp. 1063-1064, Supp. pp. 62-63; Lagunzad Testimony, Tx. pp. 1071-1072, Supp. pp. 64-65; Blankschaen Testimony, Tx. p. 1223-1224, Supp. p. 67). That momentary discomfort, then, if it even existed, provided the entire support for a \$100,000 survivorship claim, a \$3 million punitive damages award, and an award of attorney fees in the amount of \$1,013,460.00.

A ratio of a punitive damages award that is *thirty* times greater than the damages for pain and suffering shocks the conscience and is inconsistent with the legal principles on which punitive damages are grounded. In addition, since the conduct at issue in this case is not intentionally malicious or deliberately injurious, this case is not among the most egregious cases and, thus, the ratio between punitive damages and damages for pain and suffering should be no greater than 4-to-1. As such, a constitutional reduction of the punitive damages award by the lower courts to an acceptable range was required here, at a minimum.

3. The Comparison Guidepost:  
Punitive Damages 300 Times Greater than Statutory Criminal Penalties  
for Patient Endangerment are Excessive

The third guidepost requires a comparison between the punitive damages award and comparable statutory penalties. While it may be tempting to conclude that a particular punitive damages award is not shockingly large and thus is appropriate, the comparison guidepost reminds reviewing courts that legislative decisions made when all conflicting interests are heard and represented deserve careful consideration, especially when a punitive damages award has

been assessed against an entity in a highly regulated area. In announcing this guidepost, the United States Supreme Court stated:

Comparing the punitive damages award and the civil...penalties that could be imposed for comparable misconduct provides a third indicum of excessiveness. *[A reviewing Court engaged in determining whether an award of punitive damages is excessive should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue.*

*BMW*, 517 U.S. at 575 [emphasis added]. The United States Supreme Court, when applying the third guidepost, has always focused on the available *legislative* penalties, and has never used civil jury awards or judicial opinions for comparison. *See, BMW*, 517 U.S. at 583-85 (focusing on Alabama Deceptive Trade Practices Act); *Cooper Industries*, 532 U.S. at 442-43 (noting Oregon's Unlawful Trade Practices Act); *State Farm*, 538 U.S. at 428.

Ohio regulates home and community-based services for those persons with mental retardation or developmental disabilities. *See*, R.C. 5123, 5126, *et seq.* While none of these regulations provide civil or criminal penalties for violations, the Ohio legislature recently enacted a statute involving patient endangerment. *See*, R.C. 2903.341 (enacted by 2004 S 178, eff. 1-30-04). R.C. 2903.341(B) provides that “[n]o MR/DD caretaker shall create a substantial risk to the health or safety of a mentally retarded person or a developmentally disabled person.” A violation of this provision which “results in serious physical harm to the person with mental retardation or a developmental disability,” is a felony of the third degree. R.C. 2903.341(E)(3). R.C. 2929.18 provides that “the Court imposing a sentence upon an offender for a felony may sentence the offender to any financial sanction or combination of financial sanction authorized under this section...” For a felony of the third degree, the Court may impose a fine payable by the offender to the State of “not more than ten thousand dollars.” R.C. 2929.18(A)(3)(c). R.C.

2929.19(B)(6) states that, “[b]efore imposing a financial sanction under section 2929.18 of the Revised Code...the Court shall consider the offender’s present and future ability to pay the amount of the sanction or fine.” Thus, Ohio legislatively has limited the extent to which an offender guilty of patient endangerment may be penalized for any criminal liability and has enacted procedural measures to ensure that any fine is not confiscatory.

Furthermore, confiscatory punitive damages violate a defendant’s due process rights, and Medlink’s negative net worth at the time of trial makes clear that the punitive damages award here was unconstitutional:

A [punitive damages] award should not be so high as to result in the financial ruin of the defendant. Nor should it constitute a disproportionately large percentage of a defendant’s net worth. Thus, while a defendant’s conduct is obviously germane to the damages issue, even outrageous conduct will not support an oppressive or patently excessive award of damages.

*Vasbinder v. Scott* (2d Cir. 1992), 976 F.2d 118, 121 (finding \$150,000 award as fifty percent of net worth to be excessive, also \$150,000 award as approximately thirty percent of net worth to be excessive). “The function of punitive damages is not to destroy the economic viability of the defendant. In fact, insofar as one of the purposes is to deter similar conduct in the future by the defendant, the award implicitly should not be such as to result in confiscation of it in the destruction of the defendant’s ability to continue as a viable enterprise.” *Dees v. Allied Fidelity Ins. Co.* (E.D. Ark. 1985), 655 F.Supp. 10, 15 (finding \$1,600,000 award compared to net worth of \$3,300,000 excessive). Accordingly, a punitive damages award that results in the defendant’s financial ruin or constitutes a disproportionately large percentage of the defendant’s net worth exceeds the State’s legitimate interest in punishment and deterrence, violating due process.

The jury’s punitive damages award is excessive here because of Medlink’s weak financial condition. Medlink had a negative net worth at the time of trial. (Affidavit of Rod

Layton, Exhibit B to Medlink's Motion for New Trial, Supp. p. 53). In this context, assessing punitive damages of \$3,000,000 against a company with a negative net worth is absolutely oppressive, exceeds the State's legitimate interest in punishment and deterrence, and violates Medlink's due process rights.

Furthermore, by statute, if Medlink were found guilty of patient endangerment, the State of Ohio could not recover more than a \$10,000 penalty. The \$3,000,000 punitive damage award in this case is 300 times more than the legislatively authorized criminal penalty that could be assessed under criminal procedural rules requiring proof beyond a reasonable doubt of criminal intent. It is shocking that the jury in this case, where there is no suggestion of criminal intent, awarded punitive damages so vastly in excess of the legislatively-authorized criminal fine. Careful consideration must be given to Ohio's legislative judgment that punishment of patient endangerment offenders should not be confiscatory, balancing the State's legitimate need to punish wrongdoing with the competing need for contractual care providers serving mentally retarded or developmentally disabled persons. Under the third guidepost, the jury's punitive damages award is confiscatory and unconstitutionally excessive.

**D. A New Trial Is Required.**

Medlink was denied its due process when the trial court and appellate court both refused to review the punitive damages award as required by the U.S. Supreme Court. For obvious reasons, the Supreme Court requires that the trial court conduct a comprehensive review of any award of punitive damages. The trial court is in the best position to conduct such a review. The trial court has the opportunity to observe the credibility of witnesses, hear all of the evidence at trial, view all exhibits as they are shown to the jury, and note the atmosphere generated in the court room as evidence and argument is presented to the jury, permitting the trial court to

determine whether jurors are likely to have unconstitutionally acted based on anger, passion and prejudice. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001), 532 U.S. 424, 440, 121 S. Ct. 1678.

There is no trial judge for the Court to order a return of the parties and this case for review. This case was improperly tried to a jury before an unqualified private judge, all in violation of R.C. 2701.10. The entire proceeding is void from the moment the parties entered into an unlawful Agreement on April 18, 2005.

The *Barnes* trial lasted two weeks, with multiple objections to improper evidence, dozens of witnesses, and improper exhibits shown to the jury during opening statement that were never even marked into evidence, so no reviewing court may now appreciate or observe the error. In order for a reviewing court to conduct a due process analysis of the punitive damage award here, the reviewing court is required to consider the evidence presented at trial and evaluate the case as presented. Because Glickman is not qualified to serve as a private judge, the parties are left without any trial court to conduct a punitive damages review. Moreover, the jury was exhorted to act on its anger through the passion and prejudice that was incited at trial. This, coupled with the fact that the trial itself was unlawful and void, render the entire proceeding tainted. A reviewing court should not be required to consider the constitutionality of a punitive damages award that is based upon a void verdict. Justice requires that a new trial be granted to Medlink.

This Court has articulated due process as “an exercise of the powers of government as the settled maxims of the law permit and sanction, and under such safeguards of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.” *Board of Commissioners of Hamilton County v. State* (1893), 50 Ohio St. 563, 662. Due process also consists of fundamental principles that “protect the citizen in his private rights, and guard him

against the arbitrary action of the government.” *Barnhardt v. Linzell* (9<sup>th</sup> Dist., April 17, 1957), 104 Ohio App. 243, 246, 148 N.E.2d 242. Here, under color of state authority, Glickman conducted a jury trial, issued rulings, and entered judgment in the *Barnes* case, even though he lacked jurisdiction. Accordingly, Medlink was denied due process as a matter of law because this case improperly proceeded to a jury trial before an appointed judge who never was elected to serve on an Ohio court. Medlink is entitled to a fundamentally fair jury trial that is conducted within the confines of jurisdiction conferred by statute and constitutional authority. Medlink believes that the Eighth Appellate District applied the wrong constitutional standards – or failed to follow any constitutional standards at all – when considering Medlink’s appeal; application of constitutional standards leads inescapably to the conclusion that a new trial is required. See, *Philip Morris*, 127 U.S. at 1065.

The appropriate remedy under these circumstances is to vacate the final judgment in the *Barnes* case, to void all proceedings held in *Barnes* before Glickman, and to return the *Barnes* litigation to the trial court for further proceedings.

## II. CONCLUSION

Assignment of the *Barnes* litigation to Glickman was in violation of R.C. 2701.10 and is void as a matter of law. The agreement to allow Glickman to oversee the proceeding, dated April 18, 2005 was unlawful because it permitted an unqualified judge to oversee the trial and because it allowed a jury trial contrary to the limits of R.C. 2701.10. Because the agreement was never valid, and the proceedings were void, Medlink submits that the entire proceeding must be vacated and a new trial granted.

Notwithstanding the fact that the proceedings are void, the trial court’s judgment, affirmed by the appeals court, denied Medlink its right to due process by failing to review the \$3

million punitive damages award under the guideposts articulated by the Supreme Court of the United States in *BMW v. Gore*. A constitutional review proves that the verdict is unconstitutionally excessive.

Accordingly, Medlink respectfully requests that this Court return the *Barnes* case to the Court of Common Pleas for proceedings not adjudicated before the April 18, 2005 transfer to Glickman.

Respectfully submitted,



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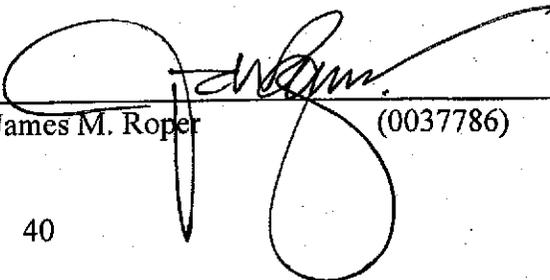
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# APPENDIX

IN THE SUPREME COURT OF OHIO

ANDREA BARNES, EXEC.,

*Plaintiff-Appellee,*

-vs-

UNIVERSITY HOSPITALS  
OF CLEVELAND, et al.

*Defendants-Appellants.*

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

**07 - 0140**

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

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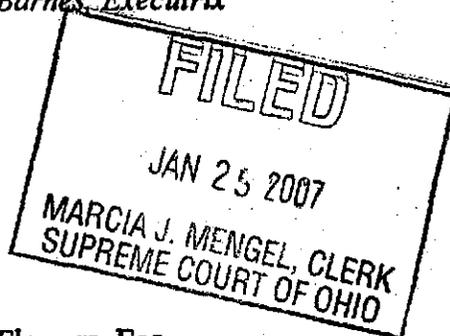
NOTICE OF APPEAL OF APPELLANTS MEDLINK OF OHIO AND THE MEDLINK  
GROUP, INC.

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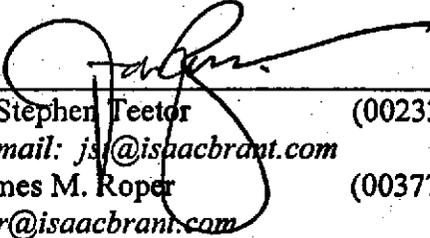
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Notice of Appeal of Appellants Medlink of Ohio and The Medlink Group, Inc.

Appellants Medlink of Ohio and The Medlink Group, Inc. hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals Case No. 87247, consolidated with Case Nos. 87285, 87710, 87903, and 87946 on December 11, 2006.

This case raises a substantial constitutional question and is one of public and great general interest.

Respectfully submitted,

  
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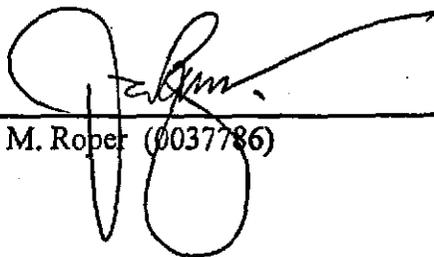
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DEC 11 2006

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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

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

PLAINTIFFS-APPELLEES/  
CROSS-APPELLANTS

vs.

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

DEFENDANTS-APPELLANTS/  
CROSS-APPELLEES

CA05087247  
42813994

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**JUDGMENT:  
AFFIRMED**

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

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

**RELEASED:** November 30, 2006

**JOURNALIZED:** DEC 11 2006

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Appx. P. 0005

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FILED IN 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]

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).

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

This journal entry and opinion addresses five separate appeals and cross-appeals<sup>1</sup>, 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.

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

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

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

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

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

### UNDERLYING FACTS

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

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

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

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

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

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

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

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

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

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

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

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

## DISCUSSION

In the five separate appeals consolidated here for review and decision, there are a total of 16 assignments of error,<sup>2</sup> 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 error<sup>3</sup> 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 &*

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

<sup>3</sup>Case No. 87247-MedLink's appeal:

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

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

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

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

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

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

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

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

### REVERSIBLE ERROR - PUNITIVE DAMAGES

We next address MedLink's three assignments of error<sup>4</sup> 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

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<sup>4</sup>Case 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.<sup>5</sup> 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.

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<sup>5</sup>Case 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 error<sup>6</sup> 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.

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<sup>6</sup>Case 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.<sup>7</sup>

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<sup>7</sup>Case 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.<sup>8</sup>

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

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<sup>8</sup>Case No. 87903-Barnes' appeal:

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

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

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

Case No. 97946-MedLink's appeal:

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

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

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

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

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

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

We do not agree with Barnes' argument that the trial court erred when it calculated prejudgment interest from the date of the original filing rather than from the date that the incident occurred. The current version of R.C. 1343.03(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.



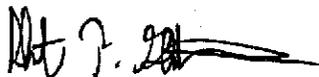
award of punitive damages was based on the incident that led to the death of Natalie Barnes. The plaintiff did not introduce evidence of MedLink conduct that did not directly relate to the tragic death of Ms. Barnes.

The jury determined that an appropriate compensatory award was \$3,100,000.00. They then determined that a similar amount, \$3,000,000.00, was appropriate as punitive damages. The Court has considered whether the amount awarded was warranted by the Defendants' conduct, whether the amount was disparate from the actual damages caused by that conduct, and whether such an award is consistent with comparable cases. The Court does not require any further material to determine whether the jury's award of punitive damages was appropriate in this matter.

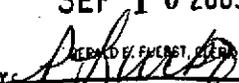
This Court agrees that punitive damage awards pose a danger of "arbitrary deprivations of property," but the trial court is intended as a safeguard against that danger. This Court heard all of evidence presented by all parties. The \$3,000,000.00 award of punitive damages against MedLink does not shock the conscience. Nor is it inconsistent with the legal principle on which punitive damages is sounded. Therefore, after appropriate consideration, this Court finds no basis to disturb the jury's verdict in this matter.

MedLink also moves for a stay of execution of final judgment of the punitive damages award without the posting of a bond. MedLink wishes to appeal this verdict without posting a bond. Such a stay is inconsistent with Civ. R. 62(B) and with R.C. 2505.09. MedLink may obtain a stay of execution by posting a supersedeas bond in the amount of \$5,700,000.00.

IT IS SO ORDERED.

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

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this matter was \$6,100,000.00 and Plaintiff's counsel were working pursuant to a contingency fee agreement that called for a fee equal to forty percent (40%) of that award. Pursuant to that contract, they are entitled to a fee of \$2,440,000.00. Alternatively, Plaintiff's counsel have argued that they should be paid a reasonable hourly rate and that their fee should be increased using a multiplier, or "lodestar", due to the risk involved in taking a contingency fee matter. MedLink argues that it is inappropriate to use the amount due pursuant to a contingency fee agreement as a reasonable attorneys' fee award and that a reasonable hourly rate should be applied without any multiplier. The Court does not find either argument completely persuasive.

In Ohio, the amount of an attorney fee award is left to the discretion of the trial court. See *Brookover v. Flexmag Industries, Inc.* (2002, 4th Dist.), 2002 WL 1189156, \*32 (citing *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St.3d 143, 146; *Freeman v. Crown City Mining, Inc.* (1993), 90 Ohio App.3d 546, 552; *Nielson v. Bob Schmidt Homes, Inc.* (1990), 69 Ohio App.3d 395, 399). "Unless the amount of fees determined is so high or so low as to shock the conscience, an appellate court will not interfere." *Bittner*, 58 Ohio St.3d at 146. Thus, the amount of attorney fees awarded by the trial court is only reversible upon showing that the court abused its discretion when determining the amount.

The Ohio Supreme Court held that it is an abuse of discretion for a trial court to require a defendant to pay attorney fees pursuant to a contingency fee agreement. See *Landis v. Grange Mut. Ins. Co.* (1998), 82 Ohio St.3d 339, 343. The Supreme Court reasoned that because a contingency fee agreement is a private contract, it is unreasonable to hold a third party, who did not participate in its negotiation nor received its benefit of risk transfer, liable under such agreement. See *Landis*, 82 Ohio St.3d at 343; see also *Blancett v. Nationwide Care, Inc.* (1998, 5th Dist.), 1999 WL 3958, \*7. Despite this reasoning, it does appear reasonable to consider the

contingency agreement as a factor when determining the amount of fees to be awarded. *See Brookover*, 2002 WL 1189156, \*34-35. However, Ohio courts have held that a contingency fee agreement cannot be the sole factor when determining the amount of fees to award. *See Landis*, 82 Ohio St.3d at 342-43; *Blancett*, 1999 WL 3958, \*7; *Brookover*, 2002 WL 1189156, \*35.

The Ohio Supreme Court has listed a set of factors to consider when determining the reasonable amount of attorney fees a plaintiff is entitled to following a jury verdict awarding payment of those fees. *See Villella v. Waikem Motors, Inc.* (1989), 45 Ohio St.3d 36, 41.

In determining the amount of attorney fees, a court should consider the following factors: (1) the time and labor involved in maintaining the litigation; (2) the novelty, complexity and difficulty of the questions involved; (3) the professional skill required to perform the necessary legal services; (4) the experience, reputation and ability of the attorneys; (5) the miscellaneous expenses of the litigation; (6) the fee customarily charged in the locality for similar legal services; and (7) the amount involved and the results obtained. *See Villella v. Waikem Motors, Inc.* (1989), 45 Ohio St.3d 36, 41, 543 N.E.2d 464, 470; *Hutchinson v. J.C. Penney Cas. Ins. Co.* (1985), 17 Ohio St.3d 195, 200, 478 N.E.2d 1000, 1005; see also, *Summa Health Systems v. Viningre* (2000), 140 Ohio App.3d 780, 792, 794 N.E.2d 344, 353; *Furr v. State Farm Mut. Auto. Ins. Co.* (1998), 128 Ohio App.3d 607, 627-28, 716 N.E.2d 250, 265.

*Brookover*, 2002 WL 1189156, \*33.

For further guidance on this matter, courts have looked to the Code of Professional Responsibility section DR 2-106(B) (the "Code") for factors to consider when calculating the amount of attorney fees to award. *See Code of Prof.Resp.*, DR 2-106(B); *Bittner*, 58 Ohio St.3d at 145-46; *Galmish v. Cicchini* (2000), 90 Ohio St.3d 22, 35; *Brookover*, 2002 WL 1189156, \*31. The Code has listed a set of factors to consider when determining the reasonableness of attorney fees. *See Code of Prof.Resp.*, DR 2-106(B). The factors listed in the Code include:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.
- (2) The likelihood, if apparent to the client, that

the acceptance of the particular employment will preclude other employment by the lawyer. (3) The fee customarily charged in the locality for similar legal services. (4) The amount involved and the result obtained. (5) The time limitations imposed by the client of the circumstances. (6) The nature and length of the professional relationship with the client. (7) The experience, reputation, and ability of the lawyer or lawyers performing the services. (8) Whether the fee is fixed or contingent.

*See* Code of Prof.Resp., DR 2-106(B). The existence of a contingency fee agreement is listed in the Code, and the Code is cited in many cases as a guide to determine a reasonable amount of attorney fees to award a plaintiff. However, it is important to note that the Ohio Supreme Court has not expressly held that the existence of a contingency agreement is to be considered when determining the amount of an attorney fee award. *See Brookover*, 2002 WL 1189156, \*34.

Ohio courts have applied these principles in a variety of ways. In *Brookover*, the Fourth District affirmed an attorney fee award where the trial court used a reasonable fee method to determine the amount of the award despite the existence of a contingency fee agreement. *See id.* Under the forty percent (40%) contingency agreement, Plaintiff's attorneys stood to collect over two million dollars in fees. However, the trial court awarded attorney fees just over four hundred thousand dollars (\$400,000). There, the trial court relied on expert witnesses and the factors in the Code to determine a reasonable hourly rate. Then, the court relied on the testimony of expert witnesses to determine a reasonable amount of hours expended in the case because Plaintiff's attorneys did not keep any time records while working on the case. After considering that information, "[t]he trial court concluded [the attorneys] expended 1,075.1 hours between them and that \$375 per hour constituted a reasonable fee." That award was affirmed on appeal.

In *Galmish*, the Defendant appealed an attorney fee award "equal to one-third of the total award." *Galmish*, 90 Ohio St.3d at 25. On appeal, the defendant asserted that the trial court erred

by awarding fees pursuant to the contingency agreement. *See id.* at 35-36. However, the Ohio Supreme Court affirmed the award. The Supreme Court found that the trial court did not award fees pursuant to the contingency agreement and referred to the trial court's opinion to support its conclusion. Specifically, when determining the amount of the award, the trial court discussed several factors, including those found in the Code. For this reason, the award of fees equal to one-third of the total recovery was found not to be an abuse of discretion. Accordingly, the Court affirmed the award.

In *Blancett*, the Fifth District remanded an attorney fee award where there was no evidence the trial court considered any of the Code factors when awarding attorney fees based on the contingency agreement. *See Blancett*, 1999 WL 3958, \*7. Therefore, the appellate court remanded the issue, and instructed the trial court to make findings of fact consistent with DR 2-106.

This Court is guided by the DR 2-106(B) and Ohio Supreme Court precedent in determining a reasonable fee to award in this matter. As such, the Court makes the following findings:

1. This was a significant wrongful death trial that required a significant amount of time and attention from counsel. The Plaintiff presented evidence that her counsel did not keep contemporaneous time records and prepared an estimate of time spent using the records of Defense Counsel. She claimed that 2,120 total hours were spent by Plaintiff's counsel in this matter. The Court agrees with Mr. Lansdowne that this is a reasonable amount of time spent in the investigation, preparation and presentation of this matter. In fact, the Court further agrees that this is most likely a significant underestimation of time spent, as it is very difficult to recapture every hour when one attempts to estimate time spent in this fashion.
2. The Court agrees with the Plaintiff that this case presented novel issues, but agrees with MedLink that those issues did not rise to the level of those found in the significantly complex litigation cited by both parties in their briefs. However, in this matter, Plaintiff was confronted with a difficult medical issue and faced with the expert opinion of a highly credentialed cardiologist retained by MedLink. This was neither the most complex nor the least complex of medically related cases.

3. The skill required to adequately present this case severely limited the number of attorneys in this community who could have competently prosecuted this litigation. Both Mr. Becker and Mr. Bashein are among this community's most talented and experienced trial attorneys. It should be noted, that Mr. Malone and Mr. McDonald are similarly experienced and skilled and that each party was represented admirably. MedLink did stipulate to negligence in this matter, but vigorously argued that Plaintiff's injury was not caused by said negligence. Plaintiff's counsel needed to prove to the jury that the injury to Natalie Barnes was caused by an air embolism created by the displacement of her catheter. This was not a simple "cause and effect" to demonstrate to a jury, and was made more difficult by the skill in which defense counsel defended this action.
4. This case was prosecuted by Plaintiff's counsel for more than four (4) years. From the start, it was apparent to everyone that this would be a long, complex and hard fought battle. All of the attorneys in this case were forced to spend an inordinate amount of time educating themselves on the law, the medicine, and the duties associated with being a health care aid.
5. The fee similarly charged in a comparable case in this community would be a contingency fee agreement which calls for the recovery of forty percent (40%) of any recovery after the filing of a lawsuit. This Court is unaware of any competent attorney in this community, or any community, who would accept such a plaintiff's case on any other basis.
6. There was no significant time limitation imposed by the client in this matter other than counsels' obvious desire to bring closure and comfort to Mrs. Barnes and her family.
7. The professional relationship between Plaintiff and counsel began with this matter, but that relationship was obviously significant. The evidence showed that Mrs. Barnes' future was going to be significantly effected by the result of this case. That weight was apparent to the Court in how Plaintiff's counsel prosecuted this action.
8. Once again, the experience and ability of Plaintiff's counsel put them among the best prepared and most persuasive this Court has ever witnessed. Mr. Becker's reputation as one of the foremost plaintiff's medical negligence attorneys in this country is well deserved. Mr. Bashein has tried over two hundred cases to a jury verdict and is one of this community's most experienced and skilled trial attorneys.
9. Plaintiff's counsel accepted this case on a contingent basis. In determining an reasonable fee, this Court will take into consideration that they would only be compensated if they prevailed on the merits. Had MedLink's arguments carried the day, Mr. Bashein and Mr. Becker would have received nothing, having already spent over \$200,000.00 in the prosecution of this case.

MedLink argues that the number of hours spent by counsel in this matter would have been significantly reduced absent the involvement of Defendant University Hospitals of Cleveland. The Court agrees that time spent solely on prosecuting a case against University Hospitals should not be used in connection with a fee calculation against MedLink. However, in this matter, the Plaintiff's case against all Defendants was interrelated. The Court finds that almost all of the work performed by Plaintiff's counsel would have been necessary even if the case had only been prosecuted against MedLink. The injury to Natalie Barnes occurred at University Hospital and would have required almost the same preparation had University Hospital not been included as a Defendant. After having reviewed all of the time records provided by the parties, the Court does find that the total number of hours claimed by Plaintiff's counsel should be reduced by seven percent to off-set time spent working solely on the prosecution of Defendant University Hospital.

The parties also cannot agree on what a reasonable hourly rate would be for the attorneys in this matter. Plaintiff's counsel asks the Court to blindly adopt the opinion of Judge O'Malley in *In re Sulzer Hip Prosthesis and Knee Prosthesis Liability Litigation* (2003, N.D. Ohio), 268 F. Supp. 2d 907, 926. Defense counsel asks the Court to apply a rate using the average hourly rates of all attorneys in the area. Neither formula would be appropriate. The Court has reviewed the expert reports submitted by the parties, the testimony of the relevant witnesses, and the briefs submitted. The Court finds a reasonable hourly rate for Mr. Bashein and Mr. Becker to be \$375.00 per hour. This rate is appropriate given their experience, skill, and reputation in the community. The Court adopts the rate of \$250.00 per hour for Mr. Flowers and Mr. Peskin given their respective experience, skill and reputation. Each has been lead counsel in a number of complex cases.

Attorney Michael Becker has been able to provide the Court with time records showing 844.5 hours of work. Debiting that amount by seven percent (7%) leaves Mr. Becker with 784.4 hours. At a rate of \$375.00 per hour, this results in a \$294,150.00 fee. Counsel from Mr. Becker's firm assisted him in this matter. Attorney Larry Peskin has provided the Court with records showing 105.5 hours of time spent on this case. Debiting that amount by seven percent (7%) leaves Mr. Peskin with 98.1 hours. At a rate of \$250.00 per hour, this results in a fee of \$26,375.00. Attorney John Burnett and Attorney David Kulwicki also assisted Mr. Becker. The Court was not presented outside evidence regarding their experience; however, the Court has dealt with these attorneys in the past and has presided over a medical negligence wrongful death case prosecuted by Mr. Burnett. The Court finds that a reasonable hourly rate for both Mr. Kulwicki and Mr. Burnett to be \$250.00 per hour. Mr. Burnett has provided the Court with records showing 10 hours spent on this case. Debiting that amount by seven percent (7%) leaves Mr. Burnett with 7 hours spent attributable to MedLink. At a rate of \$250.00 per hour, this results in a total amount of \$1,750.00. Mr. Kulwicki has provided the Court with records showing 21 hours spent on this case. Debiting that amount by seven percent (7%) leaves Mr. Kulwicki with 19.5 hours spent attributable to MedLink. At a rate of \$250.00 per hour, this results in a total amount of \$4,875.00. Using these hourly rates, the total amount of hourly fees accumulated by the firm of Becker & Mishkind Co., LPA is \$327,150.00.

Attorney Craig Bashein has provided the Court with records documenting 1018.25 hours spent on this case. Debiting that amount by seven percent (7%) leaves 947 hours. At a rate of \$375.00 per hour, this results in a fee of \$355,125.00. Paul Flowers, an attorney working with Mr. Bashein, has provided the Court with records documenting 179 hours spent on this matter. Debiting that amount by seven percent (7%) leaves 166.5 hours. The Court is familiar with Mr.

Flowers and heard his testimony at hearing. A reasonable hourly rate to attribute to Mr. Flowers is \$250.00 per hour. At a rate of \$250.00 per hour, this results in a fee of \$41,625.00. Using these hourly rates, the total amount of hourly fee accumulated by the firm of Bashein & Bashein Co., LPA is \$396,750.00.\

The Plaintiff's attorneys were forced to create these hourly billings because they do not keep contemporaneous time records in cases that they have accepted pursuant to a contingency fee contract. The Court has reviewed those records along with the contemporaneous records kept by defense counsel. The Court finds that the hours claimed by each of Plaintiff's attorneys is reasonable give the length and complexity of the case.

The total amount of hourly fees accumulated by counsel for the Plaintiff is \$723,900.00. The Plaintiff argues that a multiplier should be applied to that figure to appropriately compensate the Plaintiff given the legal complexities and uncertainty of recovery in this matter. This matter involved a complex medical theory that was vigorously defended. The Plaintiff's attorneys prosecuted the matter with great skill on a contingency basis. The Court must weigh the factors in DR 2-106(B) in deciding an appropriate fee. The Court gives weight to all of the factors, but gives great weight to the following:

1. This case presented a complex proximate cause issue that was vigorously defended. In fact, MedLink spent a large part of their case attempting to prove that the displaced catheter could not have been the cause of injury to Natalie Barnes;
2. The fee customarily charged in the community is a forty percent (40%) contingency fee. Based on the award in this matter, that fee would be \$2,440,000.00; and
3. The fact that this case was accepted on a contingency fee basis. Had MedLink prevailed on its proximate cause theory, there would have been no fee paid to Plaintiff's counsel and it is unlikely that they would have recovered any of their expenses.

Based on the factors in DR 2-106(B), it is not reasonable to merely find a fee based on a reasonable hourly rate multiplied by the hours worked. The Court agrees with Mr. Lansdowne that a multiplier, or "lodestar", is appropriate. The Court notes that the use of a multiplier is permissible in order to arrive at a reasonable fee. *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St. 3d 143, 145. Counsel for the Plaintiff requests the Court use a multiplier similar to that used in complex class action and multiple defendant litigation. The Court does not believe such a multiplier is appropriate in this action. However, the Court finds that a multiplier of 1.4 allows for a reasonable fee in this matter. The Court finds that \$1,013,460.00 is a reasonable amount to award to the Plaintiff to compensate her for the attorney fees in this matter.

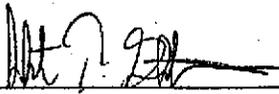
Plaintiff has also requested that this Court award her \$209,848.53 in litigation expenses. Evidence was given regarding those expenses at hearing, but they were not itemized in Plaintiff's brief to the Court. The Defendant argues that these expenses are not reasonable, as a large portion is attributable to the costs of power point presentations during trial. This was a lengthy litigation that resulted in a trial of over seven (7) full days. The Plaintiff is entitled to recover the "costs" of this action. A trial court is authorized to award costs under Civ. R. 54(D). However, the categories of litigation expenses included in "costs" are limited. *Estate of Nicolas Fite v. University Hospital* (2004, 1<sup>st</sup> Dist. App.), 2004 WL 535751; citing, *Williamson v. Ameritech Corp.* (1998), 81 Ohio St. 3d 342, 343; *Centennial v. Liberty Mutual Ins. Co.* (1982), 69 Ohio St. 2d 50, 50. Courts have held that expenses for photocopies, long distance telephone communication, exhibits and expert witness fees do not constitute costs. However, a trial court may tax as costs expenses for depositions, including videotape depositions, actually introduced at trial. *Estate of Fite*, 2004 WL 535751 at 4.

Both parties had the opportunity to present evidence on the issue of expenses at hearing.

The Court does not have appropriate evidence to determine what part, if any, of the alleged \$209,848.53 constitutes "costs" under the applicable law. As such, the Court orders that the costs of this action are to be paid by the Defendants, but will not award the expenses requested by the Plaintiff be awarded against MedLink.

The Jury in this matter found against MedLink and Defendant University Hospital. Pursuant to the Jury's verdict, the Plaintiff is awarded \$100,000.00 for its survivorship claim, \$3,000,000.00 for its wrongful death claim, and \$3,000,000.00 for its punitive damages claim. Defendant University Hospital is responsible, per the Jury's verdict, for ten percent (10%) of the survivorship claim and the wrongful death claim. MedLink is responsible for the remainder of the survivorship claim and the wrongful death claim (\$2,790,000.00), as well as the full amount of the punitive damages claim (\$3,000,000.00). The Plaintiff is further awarded \$1,013,460.00 against MedLink for reasonable attorneys' fees in the prosecution of this action.

IT IS SO ORDERED. FINAL.

 10/5/05  
\_\_\_\_\_  
Judge Robert T. Glickman  
sitting pursuant to R.C. 2701.10



of Attorney Fees and supporting materials including Medlink's Proposed Calculation Regarding Attorney Fees.

6. Attached to this Affidavit as Exhibit A are Pages 87, 106 and 130 of the Altman Weil Survey of Law Firm Economics, 2004 Edition. The Altman Weil Survey of Law Firm Economics is widely used by law firms to determine, among other things, the hourly rates that can be competitively charged for lawyers. It is instructive to note that Page 87 of the Altman Weil Survey of the East North Central Region (which includes Cleveland, Ohio), the average hourly rate for lawyers with 16-20 years of experience was \$262 an hour and that the range of hourly rates for such lawyers from lower quartile to ninth decile was \$210 to \$345 an hour. Similarly, at Page 106 of the Altman Weil Survey on Firms of less than nine lawyers the average hourly rate of lawyers with 16 to 20 years of experience was \$184 and that the median hourly rates for such lawyers was \$165 an hour. Finally, at Page 130 of the Altman and Weil Survey, the average hourly rate for lawyers practicing as personal injury specialist with 16-20 years experience was \$226 an hour and that the range of hourly rates for such lawyers from lower quartile to ninth decile was \$171 to \$325 an hour. These rates are consistent with my understanding of the range of hourly rates applicable in Cleveland, Ohio in 2004. Based upon my experience, the Altman Weil Survey, and my own hourly rate, it is my professional opinion that a reasonable range of hourly rates for Plaintiff's attorneys in a case such as this would be from \$200 an hour to \$310 an hour.

7. There are a large number of daily and contemporaneous time recording systems, both manual and computer based, used by lawyers throughout the state to keep track of their time and expenses. Such systems help the lawyers and firms judge the efficiency and profitability of the work in addition to allowing the lawyer to know the actual time spent on a matter. Even those lawyers who work on a contingency matters benefit from using such systems.

8. The fee request in this case is supported by time narratives itemized in quarter hour units. It has been the practice for at least the last fifteen years to record time in units of tenths of an hour. The use of systems which only accept time in quarter hour units for litigation work remains in use only where the hourly rates themselves are lower than customary. The reason being that routine activities, such as reviewing simple correspondence, handling simple phone calls can be handled in less than 15 minutes of time. Where tenths of an hour are used some of those activities are appropriately charged at one or two tenths of an hour. For example, two tenths of an hour is valued at \$ 30 where the hourly rate is \$150 and a quarter hour is valued at \$37.50. Where there are four quarter hour charges that could have been charged at two tenths of an hour each the fee for those services is \$30 higher than otherwise would be the case. It appears that all of the time entries that were submitted as part of the fee application at issue, whether reconstructed or actual, have been rounded up to at least a quarter of an hour regardless of the actual time it took to perform the task. Had this time been recorded in tenths of an hour, the resulting hours would have been reduced substantially.

9. It is my understanding of the law in Ohio and in the Federal system, that the fee agreement entered into at the outset of the matter by the party with counsel does not govern the fee to be paid by the opposing side where a party is entitled to have an award of attorneys fees from its opponent.

10. If a contingency fee of 40% were the basis of the reasonable fee to be awarded here, as requested by Plaintiff's counsel, that would provide a fee award of \$2,440,000.00 for 2,178 hours of work which would equate to an hourly fee of \$1,120.00. Such hourly rates are unheard of in civil tort actions.

11. The opinions stated here are based upon my knowledge, experience, training and education regarding these subjects and a review of the materials and information submitted to me for review.

*E. J. Brzytwa*  
 \_\_\_\_\_  
 E. JOHN BRZYTWA

STATE OF OHIO            )  
                                   ) SS:  
 COUNTY OF CUYAHOGA )

SWORN TO BEFORE me and subscribed in my presence this 17<sup>th</sup> day of August, 2005.

*Carleane Malachin*  
 \_\_\_\_\_  
 NOTARY PUBLIC

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EXHIBIT A

Appx. P. 0050

08-14-05 10:13am From: Isaac, Brent, Lehman & Teator 6143658516 T-7/1 P. 005/008 F-827

**REGION BY YEARS OF LEGAL EXPERIENCE  
STANDARD HOURLY BILLING RATES  
As of January 1, 2004**

Region/Years of Experience		Number of Offices	Number of Lawyers	RATE				
				Average \$	Lower Quartile \$	Median \$	Upper Quartile \$	Ninth Decile \$
East South Central	Under 2 Years	28	89	139	130	140	150	160
	2 or 3 Years	25	103	154	140	150	165	175
	4 or 5 Years	24	88	172	155	175	180	210
	6 or 7 Years	26	76	180	161	180	200	207
	8 to 10 Years	28	94	203	180	200	225	250
	11 to 15 Years	30	120	218	191	220	240	270
	16 to 20 Years	28	119	245	225	250	275	300
	21 or More Years	33	293	270	245	275	300	327
West South Central	Under 2 Years	36	153	144	125	140	155	180
	2 or 3 Years	39	149	162	140	160	183	200
	4 or 5 Years	34	132	178	150	170	210	240
	6 or 7 Years	37	118	199	160	185	240	275
	8 to 10 Years	35	122	210	175	190	250	300
	11 to 15 Years	45	185	218	180	200	245	315
	16 to 20 Years	44	204	234	195	225	280	340
	21 or More Years	55	416	264	220	250	300	380
East North Central	Under 2 Years	78	372	155	129	150	184	210
	2 or 3 Years	81	403	172	140	165	190	250
	4 or 5 Years	87	358	192	158	180	205	310
	6 or 7 Years	83	333	200	165	195	220	250
	8 to 10 Years	85	353	218	170	205	250	303
	11 to 15 Years	93	497	240	190	235	275	321
	16 to 20 Years	86	450	262	210	260	300	345
	21 or More Years	114	1,218	281	225	275	325	365

(continued on next page)

**FIRM SIZE BY YEARS OF LEGAL EXPERIENCE  
STANDARD HOURLY BILLING RATES  
As of January 1, 2004**

Firm Size/Years of Experience		Number of Offices	RATE					
			Number of Lawyers	Average \$	Lower Quartile \$	Median \$	Upper Quartile \$	Fifth Decile \$
Under 8 Lawyers	Under 2 Years	9	12	153	--	135	--	--
	2 or 3 Years	12	14	140	--	120	--	--
	4 or 5 Years	7	9	143	--	--	--	--
	6 or 7 Years	14	15	174	--	170	--	--
	8 to 10 Years	11	12	177	--	160	--	--
	11 to 15 Years	13	13	195	--	185	--	--
	16 to 20 Years	10	13	184	--	165	--	--
	21 or More Years	36	71	235	185	225	250	304
9 to 20 Lawyers	Under 2 Years	59	89	136	117	135	150	185
	2 or 3 Years	60	97	155	135	150	170	200
	4 or 5 Years	60	91	161	140	165	180	200
	6 or 7 Years	46	84	177	150	178	200	228
	8 to 10 Years	55	86	178	150	175	185	230
	11 to 15 Years	72	143	203	160	185	230	275
	16 to 20 Years	63	128	208	175	200	235	288
	21 or More Years	90	363	228	186	225	254	319
21 to 40 Lawyers	Under 2 Years	82	216	138	120	135	154	172
	2 or 3 Years	85	210	150	130	150	185	185
	4 or 5 Years	78	213	165	140	160	185	210
	6 or 7 Years	66	186	181	150	175	200	250
	8 to 10 Years	92	240	197	165	165	225	265
	11 to 15 Years	97	319	210	175	200	240	275
	16 to 20 Years	87	339	222	182	220	250	300
	21 or More Years	113	828	247	200	245	290	326

(continued on next page)

**INDIVIDUAL LITIGATION SPECIALTIES BY YEARS OF LEGAL EXPERIENCE  
STANDARD HOURLY BILLING RATES  
As of January 1, 2004**

Specialty/Years of Experience		Number of Offices	Number of Lawyers	RATE				
				Average \$	Lower Quartile \$	Median \$	Upper Quartile \$	Ninth Decile \$
Labor-Mgmt.	Under 2 Years	9	13	153	--	150	--	--
	2 or 3 Years	6	7	169	--	--	--	--
	4 or 5 Years	13	16	181	--	185	--	--
	6 or 7 Years	7	10	200	--	--	--	--
	8 to 10 Years	15	20	214	180	208	258	270
	11 to 15 Years	21	26	232	185	235	270	292
	16 to 20 Years	10	10	246	--	--	--	--
	21 or More Years	28	47	279	235	275	320	355
Maritime	11 to 15 Years	6	7	219	--	--	--	--
	21 or More Years	10	13	234	--	200	--	--
Natural Resources	16 to 20 Years	7	9	213	--	--	--	--
	21 or More Years	11	21	250	210	225	268	390
Personal Injury	Under 2 Years	13	18	141	120	130	150	230
	2 or 3 Years	10	13	163	--	165	--	--
	4 or 5 Years	8	13	181	--	170	--	--
	6 or 7 Years	8	13	152	--	150	--	--
	8 to 10 Years	14	20	194	163	175	206	309
	11 to 15 Years	21	24	211	175	200	250	288
	16 to 20 Years	19	34	226	171	205	264	325
	21 or More Years	49	78	248	195	243	300	351

(continued on next page)

B

  
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Re: *Andrea L. Barnes, Executrix of the Estate of Natalie Barnes v. University Hospitals of Cleveland, et al.*

Gentlemen:

INTRODUCTION

You have asked me to offer my opinion regarding the range of reasonable attorney fees for Plaintiffs' counsel in the above-referenced action. This letter is a supplement to my letter dated July 13, 2005.

MATERIALS REVIEWED

In reaching my opinion, I have reviewed the following materials:

- 1) Evidentiary Deposition/Steven Nissen, M.D. - 11/19/04
- 2) Summary of Nissen Deposition
- 3) Discovery Deposition/Steven Nissen, M.D. - 4/28/04
- 4) Summary of Nissen Discovery Deposition
- 5) Discovery Deposition/Barry Sobel, M.D. - 4/23/04
- 6) Summary of Sobel Deposition (Part I)

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- 7) Discovery Deposition/Barry Sobel, M.D. - 5/8/04
- 8) Summary of Sobel Deposition (Part II)
- 9) Billing Records - Reminger & Reminger
- 10) Recap of time spent by attorneys, Becker, Bashein, Flowers and Peskin.

#### HOURLY RATE APPROACH

It is my understanding that Plaintiffs' counsel did not maintain contemporaneous time records in this matter. That is consistent with the prevailing practice of counsel representing Plaintiffs in these types of cases.

I have reviewed the Plaintiffs' counsel's compilation of the time actually spent. I know from personal experience the difficulty of compiling hours spent after a case is concluded. Plaintiffs' counsel had the aid of the defense billing records in compiling these time records.

It is my experience that compilations done after the fact understate rather than overstate time spent. While I have reviewed the compilations, I have not attempted to analyze each entry to determine if the time spent was reasonable. In this instance, however, the Plaintiffs' counsel's time spent compares reasonably with that spent by defense counsel.

In accordance with the foregoing, it is my opinion that the total amount of hours submitted by Plaintiffs' counsel - approximately 2,120 - is reasonable.

I am familiar with the hourly rates of trial counsel in Northeast Ohio. I am also familiar with the reputations, skill and experience of Messrs. Bashein and Becker. In my opinion, a reasonable rate for these two counsel would be between \$400.00 and \$500.00 per hour.

It is my understanding that both Messrs. Peskin and Flowers have been in practice for 10 - 14 years. A reasonable rate for well qualified counsel at this level would be between \$300.00 and \$400.00 per hour.

#### LODESTAR

A "Lodestar" or multiplier is appropriate in cases where certain factors are present. The Court is certainly familiar with these factors and they are enumerated in *Blitner v. Tri-County Toyota* (1991) 58 Ohio St.3d 143. I will not comment on all of the factors since most of the factors are obviously applicable.

Briefly, let me comment on the complexity of the litigation. From my review of certain deposition transcripts, it is evident that the case involved complex medical issues and that the matter was vigorously defended on proximate cause.

The Defendant put on a witness from the Cleveland Clinic Foundation with excellent credentials (albeit for a cardiologist). This expert, Dr. Nissen, was adamant in his position that the removal of the catheter did not cause an air embolism. Plaintiffs' counsel had to employ considerable skill in overcoming this defense.

It should be mentioned that both Defendants were represented by very experienced and skillful counsel. This fact certainly should be considered with respect to the difficulty of the questions involved.

The case was, of course, originally pursued on a contingency fee basis. Plaintiffs' counsel spent in excess of \$200,000.00 pursuing this matter. If the jury had believed the defense theory, these expenses, along with all the time and effort, would have been lost.

Under all of the foregoing circumstances, it is my opinion that a multiplier of 3 to 6 would be reasonable and appropriate.

#### CONTINGENCY FEE

In my previous letter I opined regarding the reasonableness of the 40% contingency fee in this case and that the fee was in compliance with the Code of Professional Responsibility EC #2-19. My further review of this matter has only fortified that opinion. Suffice it to say the contingency fee was the key to the Courthouse for these unfortunate victims of negligence. The Court would be completely justified in adopting the contingency fee amount.

#### EXPENSES

The actual out-of-pocket expenses should be added to the award of attorney fees. Expenses are customarily borne by the client. The jury's award of attorney fees indicates a desire on the jury's part to relieve the Plaintiffs of the burden of the fees. This burden necessarily includes expenses.

#### CONCLUSION

The foregoing sets forth my opinions based upon my review of the materials identified, my knowledge of the custom and practice regarding contingency fees in personal injury/wrongful death cases and my knowledge of the hourly rates routinely charged by trial counsel in Northeast Ohio. If I can be of further assistance to the Court or counsel I would be pleased to do so.

Very truly yours,

  
Dennis R. Lansdowne

DRL/ar

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fee would be the amount they are due pursuant to their contingency fee contract. The award in this matter was \$6,100,000.00 and Plaintiff's counsel were working pursuant to a contingency fee agreement that called for a fee equal to forty percent (40%) of that award. Pursuant to that contract, they are entitled to a fee of \$2,440,000.00. Alternatively, Plaintiff's counsel have argued that they should be paid a reasonable hourly rate and that their fee should be increased using a multiplier, or "lodestar", due to the risk involved in taking a contingency fee matter. MedLink argues that it is inappropriate to use the amount due pursuant to a contingency fee agreement as a reasonable attorneys' fee award and that a reasonable hourly rate should be applied without any multiplier. The Court does not find either argument completely persuasive.

In Ohio, the amount of an attorney fee award is left to the discretion of the trial court. See *Brookover v. Flexmag Industries, Inc.* (2002, 4th Dist.), 2002 WL 1189156, \*32 (citing *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St.3d 143, 146; *Freeman v. Crown City Mining, Inc.* (1993), 90 Ohio App.3d 546, 552; *Nielson v. Bob Schmidt Homes, Inc.* (1990), 69 Ohio App.3d 395, 399). "Unless the amount of fees determined is so high or so low as to shock the conscience, an appellate court will not interfere." *Bittner*, 58 Ohio St.3d at 146. Thus, the amount of attorney fees awarded by the trial court is only reversible upon showing that the court abused its discretion when determining the amount.

The Ohio Supreme Court held that it is an abuse of discretion for a trial court to require a defendant to pay attorney fees pursuant to a contingency fee agreement. See *Landis v. Grange Mut. Ins. Co.* (1998), 82 Ohio St.3d 339, 343. The Supreme Court reasoned that because a contingency fee agreement is a private contract, it is unreasonable to hold a third party, who did not participate in its negotiation nor received its benefit of risk transfer, liable under such agreement. See *Landis*, 82 Ohio St.3d at 343; see also *Blancett v. Nationwide Care, Inc.* (1998,

5th Dist.), 1999 WL 3958, \*7. Despite this reasoning, it does appear reasonable to consider the contingency agreement as a factor when determining the amount of fees to be awarded. See *Brookover*, 2002 WL 1189156, \*34-35. However, Ohio courts have held that a contingency fee agreement cannot be the sole factor when determining the amount of fees to award. See *Landis*, 82 Ohio St.3d at 342-43; *Blancett*, 1999 WL 3958, \*7; *Brookover*, 2002 WL 1189156, \*35.

The Ohio Supreme Court has listed a set of factors to consider when determining the reasonable amount of attorney fees a plaintiff is entitled to following a jury verdict awarding payment of those fees. See *Villella v. Waikem Motors, Inc.* (1989), 45 Ohio St.3d 36, 41.

In determining the amount of attorney fees, a court should consider the following factors: (1) the time and labor involved in maintaining the litigation; (2) the novelty, complexity and difficulty of the questions involved; (3) the professional skill required to perform the necessary legal services; (4) the experience, reputation and ability of the attorneys; (5) the miscellaneous expenses of the litigation; (6) the fee customarily charged in the locality for similar legal services; and (7) the amount involved and the results obtained. See *Villella v. Waikem Motors, Inc.* (1989), 45 Ohio St.3d 36, 41, 543 N.E.2d 464, 470; *Hutchinson v. J.C. Penney Cas. Ins. Co.* (1985), 17 Ohio St.3d 195, 200, 478 N.E.2d 1000, 1005; see also, *Summa Health Systems v. Viningre* (2000), 140 Ohio App.3d 780, 792, 794 N.E.2d 344, 353; *Furr v. State Farm Mut. Auto. Ins. Co.* (1998), 128 Ohio App.3d 607, 627-28, 716 N.E.2d 250, 265.

*Brookover*, 2002 WL 1189156, \*33.

For further guidance on this matter, courts have looked to the Code of Professional Responsibility section DR 2-106(B) (the "Code") for factors to consider when calculating the amount of attorney fees to award. See Code of Prof.Resp., DR 2-106(B); *Bittner*, 58 Ohio St.3d at 145-46; *Galmish v. Cicchini* (2000), 90 Ohio St.3d 22, 35; *Brookover*, 2002 WL 1189156, \*31. The Code has listed a set of factors to consider when determining the reasonableness of attorney fees. See Code of Prof.Resp., DR 2-106(B). The factors listed in the Code include:

(1) The time and labor required, the novelty and difficulty of the

questions involved, and the skill requisite to perform the legal service properly. (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer. (3) The fee customarily charged in the locality for similar legal services. (4) The amount involved and the result obtained. (5) The time limitations imposed by the client of the circumstances. (6) The nature and length of the professional relationship with the client. (7) The experience, reputation, and ability of the lawyer or lawyers performing the services. (8) Whether the fee is fixed or contingent.

See Code of Prof.Resp., DR 2-106(B). The existence of a contingency fee agreement is listed in the Code, and the Code is cited in many cases as a guide to determine a reasonable amount of attorney fees to award a plaintiff. However, it is important to note that the Ohio Supreme Court has not expressly held that the existence of a contingency agreement is to be considered when determining the amount of an attorney fee award. See *Brookover*, 2002 WL 1189156, \*34.

Ohio courts have applied these principles in a variety of ways. In *Brookover*, the Fourth District affirmed an attorney fee award where the trial court used a reasonable fee method to determine the amount of the award despite the existence of a contingency fee agreement. See *id.* Under the forty percent (40%) contingency agreement, Plaintiff's attorneys stood to collect over two million dollars in fees. However, the trial court awarded attorney fees just over four hundred thousand dollars (\$400,000). There, the trial court relied on expert witnesses and the factors in the Code to determine a reasonable hourly rate. Then, the court relied on the testimony of expert witnesses to determine a reasonable amount of hours expended in the case because Plaintiff's attorneys did not keep any time records while working on the case. After considering that information, "[t]he trial court concluded [the attorneys] expended 1,075.1 hours between them and that \$375 per hour constituted a reasonable fee." That award was affirmed on appeal.

In *Galmish*, the Defendant appealed an attorney fee award "equal to one-third of the total

award.” *Galmish*, 90 Ohio St.3d at 25. On appeal, the defendant asserted that the trial court erred by awarding fees pursuant to the contingency agreement. *See id.* at 35-36. However, the Ohio Supreme Court affirmed the award. The Supreme Court found that the trial court did not award fees pursuant to the contingency agreement and referred to the trial court’s opinion to support its conclusion. Specifically, when determining the amount of the award, the trial court discussed several factors, including those found in the Code. For this reason, the award of fees equal to one-third of the total recovery was found not to be an abuse of discretion. Accordingly, the Court affirmed the award.

In *Blancett*, the Fifth District remanded an attorney fee award where there was no evidence the trial court considered any of the Code factors when awarding attorney fees based on the contingency agreement. *See Blancett*, 1999 WL 3958, \*7. Therefore, the appellate court remanded the issue, and instructed the trial court to make findings of fact consistent with DR 2-106.

This Court is guided by the DR 2-106(B) and Ohio Supreme Court precedent in determining a reasonable fee to award in this matter. As such, the Court makes the following findings:

1. This was a significant wrongful death trial that required a significant amount of time and attention from counsel. The Plaintiff presented evidence that her counsel did not keep contemporaneous time records and prepared an estimate of time spent using the records of Defense Counsel. She claimed that 2,120 total hours were spent by Plaintiff’s counsel in this matter. The Court agrees with Mr. Lansdowne that this is a reasonable amount of time spent in the investigation, preparation and presentation of this matter. In fact, the Court further agrees that this is most likely a significant underestimation of time spent, as it is very difficult to recapture every hour when one attempts to estimate time spent in this fashion.
2. The Court agrees with the Plaintiff that this case presented novel issues, but agrees with MedLink that those issues did not rise to the level of those found in the significantly complex litigation cited by both parties in their briefs. However, in this matter, Plaintiff was confronted with a difficult medical issue and faced with

the expert opinion of a highly credentialed cardiologist retained by MedLink. This was neither the most complex nor the least complex of medically related cases.

3. The skill required to adequately present this case severely limited the number of attorneys in this community who could have competently prosecuted this litigation. Both Mr. Becker and Mr. Bashein are among this community's most talented and experienced trial attorneys. It should be noted, that Mr. Malone and Mr. McDonald are similarly experienced and skilled and that each party was represented admirably. MedLink did stipulate to negligence in this matter, but vigorously argued that Plaintiff's injury was not caused by said negligence. Plaintiff's counsel needed to prove to the jury that the injury to Natalie Barnes was caused by an air embolism created by the displacement of her catheter. This was not a simple "cause and effect" to demonstrate to a jury, and was made more difficult by the skill in which defense counsel defended this action.
4. This case was prosecuted by Plaintiff's counsel for more than four (4) years. From the start, it was apparent to everyone that this would be a long, complex and hard fought battle. All of the attorneys in this case were forced to spend an inordinate amount of time educating themselves on the law, the medicine, and the duties associated with being a health care aid.
5. The fee similarly charged in a comparable case in this community would be a contingency fee agreement which calls for the recovery of forty percent (40%) of any recovery after the filing of a lawsuit. This Court is unaware of any competent attorney in this community, or any community, who would accept such a plaintiff's case on any other basis.
6. There was no significant time limitation imposed by the client in this matter other than counsels' obvious desire to bring closure and comfort to Mrs. Barnes and her family.
7. The professional relationship between Plaintiff and counsel began with this matter, but that relationship was obviously significant. The evidence showed that Mrs. Barnes' future was going to be significantly effected by the result of this case. That weight was apparent to the Court in how Plaintiff's counsel prosecuted this action.
8. Once again, the experience and ability of Plaintiff's counsel put them among the best prepared and most persuasive this Court has ever witnessed. Mr. Becker's reputation as one of the foremost plaintiff's medical negligence attorneys in this country is well deserved. Mr. Bashein has tried over two hundred cases to a jury verdict and is one of this community's most experienced and skilled trial attorneys.
9. Plaintiff's counsel accepted this case on a contingent basis. In determining an reasonable fee, this Court will take into consideration that they would only be compensated if they prevailed on the merits. Had MedLink's arguments carried the

day, Mr. Bashein and Mr. Becker would have received nothing, having already spent over \$200,000.00 in the prosecution of this case.

MedLink argues that the number of hours spent by counsel in this matter would have been significantly reduced absent the involvement of Defendant University Hospitals of Cleveland. The Court agrees that time spent solely on prosecuting a case against University Hospitals should not be used in connection with a fee calculation against MedLink. However, in this matter, the Plaintiff's case against all Defendants was interrelated. The Court finds that almost all of the work performed by Plaintiff's counsel would have been necessary even if the case had only been prosecuted against MedLink. The injury to Natalie Barnes occurred at University Hospital and would have required almost the same preparation had University Hospital not been included as a Defendant. After having reviewed all of the time records provided by the parties, the Court does find that the total number of hours claimed by Plaintiff's counsel should be reduced by seven percent to off-set time spent working solely on the prosecution of Defendant University Hospital.

The parties also cannot agree on what a reasonable hourly rate would be for the attorneys in this matter. Plaintiff's counsel asks the Court to blindly adopt the opinion of Judge O'Malley in *In re Sulzer Hip Prosthesis and Knee Prosthesis Liability Litigation* (2003, N.D. Ohio), 268 F. Supp. 2d 907, 926. Defense counsel asks the Court to apply a rate using the average hourly rates of all attorneys in the area. Neither formula would be appropriate. The Court has reviewed the expert reports submitted by the parties, the testimony of the relevant witnesses, and the briefs submitted. The Court finds a reasonable hourly rate for Mr. Bashein and Mr. Becker to be \$375.00 per hour. This rate is appropriate given their experience, skill, and reputation in the community. The Court adopts the rate of \$250.00 per hour for Mr. Flowers and Mr. Peskin given their respective experience, skill and reputation. Each has been lead counsel in a number of

complex cases.

Attorney Michael Becker has been able to provide the Court with time records showing 844.5 hours of work. Debiting that amount by seven percent (7%) leaves Mr. Becker with 784.4 hours. At a rate of \$375.00 per hour, this results in a \$294,150.00 fee. Counsel from Mr. Becker's firm assisted him in this matter. Attorney Larry Peskin has provided the Court with records showing 105.5 hours of time spent on this case. Debiting that amount by seven percent (7%) leaves Mr. Peskin with 98.1 hours. At a rate of \$250.00 per hour, this results in a fee of \$26,375.00. Attorney John Burnett and Attorney David Kulwicki also assisted Mr. Becker. The Court was not presented outside evidence regarding their experience; however, the Court has dealt with these attorneys in the past and has presided over a medical negligence wrongful death case prosecuted by Mr. Burnett. The Court finds that a reasonable hourly rate for both Mr. Kulwicki and Mr. Burnett to be \$250.00 per hour. Mr. Burnett has provided the Court with records showing 10 hours spent on this case. Debiting that amount by seven percent (7%) leaves Mr. Burnett with 7 hours spent attributable to MedLink. At a rate of \$250.00 per hour, this results in a total amount of \$1,750.00. Mr. Kulwicki has provided the Court with records showing 21 hours spent on this case. Debiting that amount by seven percent (7%) leaves Mr. Kulwicki with 19.5 hours spent attributable to MedLink. At a rate of \$250.00 per hour, this results in a total amount of \$4,875.00. Using these hourly rates, the total amount of hourly fees accumulated by the firm of Becker & Mishkind Co., LPA is \$327,150.00.

Attorney Craig Bashein has provided the Court with records documenting 1018.25 hours spent on this case. Debiting that amount by seven percent (7%) leaves 947 hours. At a rate of \$375.00 per hour, this results in a fee of \$355,125.00. Paul Flowers, an attorney working with Mr. Bashein, has provided the Court with records documenting 179 hours spent on this matter.

Debiting that amount by seven percent (7%) leaves 166.5 hours. The Court is familiar with Mr. Flowers and heard his testimony at hearing. A reasonable hourly rate to attribute to Mr. Flowers is \$250.00 per hour. At a rate of \$250.00 per hour, this results in a fee of \$41,625.00. Using these hourly rates, the total amount of hourly fee accumulated by the firm of Bashein & Bashein Co., LPA is \$396,750.00.

The Plaintiff's attorneys were forced to create these hourly billings because they do not keep contemporaneous time records in cases that they have accepted pursuant to a contingency fee contract. The Court has reviewed those records along with the contemporaneous records kept by defense counsel. The Court finds that the hours claimed by each of Plaintiff's attorneys is reasonable given the length and complexity of the case.

The total amount of hourly fees accumulated by counsel for the Plaintiff is \$723,900.00. The Plaintiff argues that a multiplier should be applied to that figure to appropriately compensate the Plaintiff given the legal complexities and uncertainty of recovery in this matter. This matter involved a complex medical theory that was vigorously defended. The Plaintiff's attorneys prosecuted the matter with great skill on a contingency basis. The Court must weigh the factors in DR 2-106(B) in deciding an appropriate fee. The Court gives weight to all of the factors, but gives great weight to the following:

1. This case presented a complex proximate cause issue that was vigorously defended. In fact, MedLink spent a large part of their case attempting to prove that the displaced catheter could not have been the cause of injury to Natalie Barnes;
2. The fee customarily charged in the community is a forty percent (40%) contingency fee. Based on the award in this matter, that fee would be \$2,440,000.00; and
3. The fact that this case was accepted on a contingency fee basis. Had MedLink prevailed on its proximate cause theory, there would have been no fee paid to Plaintiff's counsel and it is unlikely that they would have

recovered any of their expenses.

Based on the factors in DR 2-106(B), it is not reasonable to merely find a fee based on a reasonable hourly rate multiplied by the hours worked. The Court agrees with Mr. Lansdowne that a multiplier, or "lodestar", is appropriate. The Court notes that the use of a multiplier is permissible in order to arrive at a reasonable fee. *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St. 3d 143, 145. Counsel for the Plaintiff requests the Court use a multiplier similar to that used in complex class action and multiple defendant litigation. The Court does not believe such a multiplier is appropriate in this action. However, the Court finds that a multiplier of 1.4 allows for a reasonable fee in this matter. The Court finds that \$1,013,460.00 is a reasonable amount to award to the Plaintiff to compensate her for the attorney fees in this matter.

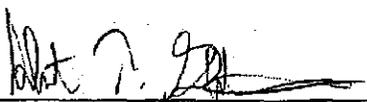
Plaintiff has also requested that this Court award her \$209,848.53 in litigation expenses. Evidence was given regarding those expenses at hearing, but they were not itemized in Plaintiff's brief to the Court. The Defendant argues that these expenses are not reasonable, as a large portion is attributable to the costs of power point presentations during trial. This was a lengthy litigation that resulted in a trial of over seven (7) full days. The Plaintiff is entitled to recover the "costs" of this action. A trial court is authorized to award costs under Civ. R. 54(D). However, the categories of litigation expenses included in "costs" are limited. *Estate of Nicolas Fite v. University Hospital* (2004, 1<sup>st</sup> Dist. App.), 2004 WL 535751; citing, *Williamson v. Ameritech Corp.* (1998), 81 Ohio St. 3d 342, 343; *Centennial v. Liberty Mutual Ins. Co.* (1982), 69 Ohio St. 2d 50, 50. Courts have held that expenses for photocopies, long distance telephone communication, exhibits and expert witness fees do not constitute costs. However, a trial court may tax as costs expenses for depositions, including videotape depositions, actually introduced at trial. *Estate of Fite*, 2004 WL 535751 at 4.

Both parties had the opportunity to present evidence on the issue of expenses at hearing. The Court does not have appropriate evidence to determine what part, if any, of the alleged \$209,848.53 constitutes "costs" under the applicable law. As such, the Court orders that the costs of this action are to be paid by the Defendants, but will not award the expenses requested by the Plaintiff be awarded against MedLink.

The Jury in this matter found against the MedLink Defendants (MedLink Group and MedLink of Ohio) and Defendant University Hospital. Pursuant to the Jury's verdict, the Plaintiff is awarded \$100,000.00 for its survivorship claim, \$3,000,000.00 for its wrongful death claim, and \$3,000,000.00 for its punitive damages claim. Defendant University Hospital is responsible, per the Jury's verdict, for ten percent (10%) of the survivorship claim and the wrongful death claim. MedLink is responsible for the remainder of the survivorship claim and the wrongful death claim (\$2,790,000.00), as well as the full amount of the punitive damages claim (\$3,000,000.00). The Plaintiff is further awarded \$1,013,460.00 against MedLink for reasonable attorneys' fees in the prosecution of this action.

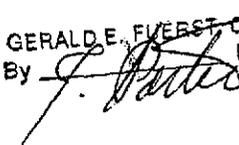
Final judgment is hereby awarded to the Plaintiff against MedLink of Ohio and The MedLink Group, Inc. in the amount of \$6,803,460.00. The parties' time to file a notice of appeal begins to run upon the filing of this entry. The Defendants have fourteen days from the filing date of this entry to request a new trial.

IT IS SO ORDERED. FINAL.

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

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By  Deputy



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), 8<sup>th</sup> 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), 8<sup>th</sup> 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), 8<sup>th</sup> Dist. App. No. 80260.

#### FACTUAL HISTORY

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

The parties conducted extensive discovery in this matter. Further, the Court determines

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

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

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

alone, which was disclosed in her employment application, should have disqualified her from employment with MedLink.

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

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

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

MedLink's proximate cause defense was expertly presented by two superb defense counsel who did the absolute best job possible given the evidence and expert opinion available.

However, the jury concluded that the MedLink's negligence was the proximate cause of Natalie Barnes' injury and death.

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

#### SETTLEMENT HISTORY

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

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

Plaintiff's counsel continued to warn MedLink that it faced a legitimate possibility of a large plaintiff's verdict that could include punitive damages. Plaintiff's counsel informed

MedLink of a recent settlement of a wrongful death / medical malpractice case involving dialysis for \$4,750,000.00. Plaintiff's counsel also informed MedLink that they had employed a "mock jury" in this matter that awarded the Plaintiff verdicts ranging from \$8,500,000.00 to \$10,000,000.00.

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

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

Qualified defense counsel had communicated to AIG that the chances of a defense verdict were as low as twenty percent (20%) after the summary judgment ruling and that a punitive damages award of \$3,000,000.00 was "possible." Surprisingly, this resulted in AIG

electing to break off settlement negotiations.

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

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

After a jury was selected, but prior to opening statements, an offer of \$400,000.00 was communicated by MedLink to the Plaintiff. This was the last offer made by MedLink prior to the verdict. The Court was surprised by the lack of on-going settlement negotiations during the trial of this matter, as the case that went to jury was incredibly damaging to MedLink. At one point, MedLink's representative at the trial, Cindy Fribley, testified that MedLink "put profits over safety" by accepting the Natalie Barnes assignment and employing Endia Hill. Throughout the trial, there were representatives of MedLink and AIG present. AIG employed appellate and punitive damage counsel to monitor the case each day. On various occasions, the Court encouraged those individuals to pursue settlement given how the case was progressing. Similar advice was communicated by trial counsel to AIG, but to no avail.

#### LAW & ANALYSIS

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

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

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

The Court scheduled a post-verdict mediation to attempt to resolve this matter shortly after the verdict. AIG was requested to send a representation with settlement authority. AIG did

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

IT IS SO ORDERED.



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

Date: December 29, 2005

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By:  Deputy



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

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

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

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:

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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), 8<sup>th</sup> 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), 8<sup>th</sup> 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), 8<sup>th</sup> 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:

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### 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

Westlaw

OH ST § 2701.10

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R.C. § 2701.10

**C**

**BALDWIN'S OHIO REVISED CODE ANNOTATED  
TITLE XXVII. COURTS--GENERAL PROVISIONS--SPECIAL REMEDIES  
CHAPTER 2701. COURTS OF RECORD--GENERAL PROVISIONS**

**→2701.10 Parties may agree to have certain determinations in a case made by a retired judge; judges to register with courts in which they wish to serve**

(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 proceedings, and submissions for determination of specific issues or questions of fact or law in any civil action or proceeding, pending in the 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.

(B)(1) The parties to any civil action or proceeding pending in any court of common pleas, municipal court, or county court unanimously may choose to have the action or proceeding in its entirety referred for adjudication, or to have any specific issue or question of fact or law in the action or proceeding submitted for determination, to a judge of their choosing who has registered with the clerk of that court in accordance with division (A) of this section.

If the parties unanimously do choose to have a referral or submission made to a retired judge pursuant to this section, all of the parties to the action or proceeding shall enter into a written agreement with the retired judge that does all of the following:

- (a) Designates the retired judge to whom the referral or submission is to be made;
- (b) If a submission is to be made, describes in detail the specific issue or question to be submitted;
- (c) Indicates either of the following:
  - (i) That the action or proceeding in its entirety is to be referred to, and is to be tried, determined, and adjudicated by that retired judge;
  - (ii) Indicates that the issue or question is to be submitted, and is to be tried and determined by that retired judge.
- (d) Indicates that the parties will assume the responsibility for providing facilities, equipment, and personnel reasonably needed by the retired judge during his consideration of the action or proceeding and will pay all costs arising out of the provision of the facilities, equipment, and personnel;
- (e) Identifies an amount of compensation to be paid by the parties to the retired judge for his services and the manner of payment of the compensation.

(2) In any case described in division (B)(1) of this section, the agreement shall be filed with the clerk of the court

**R.C. § 2701.10**

or the judge before whom the action or proceeding is pending. Upon the filing of the agreement, the judge before whom the action or proceeding is pending, by journal entry, shall order the referral or submission in accordance with the agreement. No referral or submission shall be made to a retired judge under this section, unless the parties to the action or proceeding unanimously choose to have the referral or submission made, enter into an agreement of the type described in division (B)(1) of this section with the retired judge, and file the agreement in accordance with this division.

(C) Upon the entry of an order of referral or submission in accordance with division (B)(2) of this section, the retired judge to whom the referral or submission is made, relative to the action or proceeding referred or the issue or question submitted, shall have all of the powers, duties, and authority of an active judge of the court in which the action or proceeding is pending. The court in which the action or proceeding is pending is not required to provide the retired judge with court or other facilities, equipment, or personnel during his consideration of the action, proceeding, issue, or question. The retired judge shall not receive any compensation, other than that agreed to by the parties and the retired judge, for his services during his consideration of the action, proceeding, issue, or question.

(D) A retired judge to whom a referral is made under this section shall try all of the issues in the action or proceeding, shall prepare relevant findings of fact and conclusions of law, and shall enter a judgment in the action or proceeding in the same manner as if he were an active judge of the court. A retired judge to whom a submission is made under this section shall try the specific issue or question submitted, shall prepare relevant findings of fact or conclusions of law, shall make a determination on the issue or question submitted, and shall file the findings, conclusions, and determination with the clerk of the court in which the action or proceeding is pending. Any judgment entered, and any finding of fact, conclusion of law, or determination of an issue or question made, by a retired judge in accordance with this section shall have the same force and effect as if it had been entered or made by an active judge of the court, and any appeal from the judgment, finding, conclusion, or determination shall be made as if the judgment had been entered, or the finding, conclusion, or determination had been made, by an active judge of the court.

(E) Any judge who registers with any court in accordance with division (A) of this section may have his name removed from the index of registered retired judges maintained by that court at any time after the registration. On and after the date of removal of the name of a retired judge from the index of a court, the retired judge is not eligible under this section to receive referrals or submissions from that court.

(F) This section does not affect, and shall not be construed as affecting, the provisions of section 141.16 of the Revised Code. This section does not apply to any action or proceeding pending in a small claims division of a municipal court or county court.

Current through 2007 Files 1 to 24 of the 127th GA  
(2007-2008), apv. by 8/12/07, and filed with the Secretary  
of State by 8/12/07.

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**C**

BALDWIN'S OHIO REVISED CODE ANNOTATED

SUPREME COURT RULES FOR THE GOVERNMENT OF THE JUDICIARY

→ Gov Jud R VI Reference of civil action pursuant to section 2701.10 of the Revised Code

**Section 1. Authority; registration; eligibility**

(A) Parties to a civil action or proceeding pending in a court of common pleas, municipal court, or county court who agree to have their action or proceeding referred or issue or question submitted to a voluntarily retired judge pursuant to section 2701.10 of the Revised Code shall refer the action or proceeding or submit the issue or question according to the provisions of this rule and that section.

(B) To be eligible for the referral of actions or proceedings or submission of issues or questions, a retired judge shall register with the appropriate clerk of courts in accordance with section 2701.10 of the Revised Code and shall file a retired judge registration form with the Supreme Court.

(C) (1) A voluntarily retired judge or a judge retired under Article IV, Section 6(C) of the Ohio Constitution may register pursuant to section 2701.10 of the Revised Code.

(2) As used in this rule, "voluntarily retired judge" means any person who was elected to and served on an Ohio court without being defeated in an election for new or continued service on that court. "Voluntarily retired judge" does not include either of the following:

(a) A judge who has been removed or suspended without reinstatement from service on any Ohio court pursuant to the Supreme Court Rules for the Government of the Judiciary or who has resigned or retired from service while a complaint was pending under those rules;

(b) A judge who has resigned from office between the date of defeat in an election for further service on that court and the end of his or her term.

(D) A retired judge who registers and is selected to receive referrals and submissions pursuant to section 2701.10 of the Revised Code may accept assignments from the Chief Justice of the Supreme Court pursuant to Article IV, Section 6(C) of the Ohio Constitution.

**Section 2. Reference procedure**

(A) Upon the consent of all parties to a civil action or proceeding pending in any court of common pleas, municipal court, or county court, the parties shall notify the court of their agreement to have the action or proceeding referred for adjudication or have any specific issues or questions of fact or law in the action or proceeding submitted for determination to a retired judge of their choosing who is eligible to accept referrals or submissions. The parties shall file with the clerk of courts in which the action or proceeding was pending a copy of the written agreement and exchange copies between or among themselves. The agreement shall comply with the requirements of section 2701.10 of the Revised Code and serves as the notice of the intention of the parties to refer the action or proceeding, or submit an issue or question in the action or proceeding, to a retired judge pursuant to that section.

(B) After the agreement is filed with the clerk, the judge before whom the action or proceeding is pending shall

**Gov. Jud. R. Rule 6**

order the referral or submission in accordance with the agreement or any amendment to the agreement.

**Section 3. Trial procedure**

(A) The Ohio Rules of Civil Procedure and the Ohio Rules of Evidence apply to actions or proceedings referred or issues or questions submitted to a retired judge pursuant to section 2701.10 of the Revised Code.

(B) Within a reasonable time after accepting the referral or submission, the judge shall schedule a pretrial conference. An order shall be filed with the clerk of courts that includes all of the following:

(1) The issues to be decided by the judge;

(2) A determination as to whether the case shall be submitted entirely on documentary evidence or if oral testimony is required;

(3) A date for completion of discovery;

(4) A trial date or, if the case is to be submitted to the judge on documentary evidence alone, a date for submission;

(5) Any other matters agreed upon by the parties at the pretrial conference;

(6) Any other matters resolved before trial.

(C) At the conclusion of the trial or after submission on documentary evidence, the judge may direct the parties to file post-trial memoranda. The judge shall decide the case promptly.

(D) The decision of the judge shall be in writing and contain separate findings of fact and conclusions of law. The judge shall file a copy of the decision and a judgment entry with the clerk of courts and direct the clerk to serve copies of the decision and judgment entry on all the parties.

(E) If the judge dies or becomes incapacitated before filing a decision and judgment entry in a case with the appropriate clerk of courts, the parties shall notify the court in which the action or proceeding was pending and the clerk shall return the action or proceeding to the regular docket of the judge to whom it originally was assigned.

**Section 4. Authority of Chief Justice; code of judicial conduct**

(A) The Chief Justice of the Supreme Court shall have the same authority over actions or proceedings referred or issues or questions submitted pursuant to section 2701.10 of the Revised Code and this rule as in all other cases.

(B) A judge selected pursuant to section 2701.10 of the Revised Code shall comply with the Code of Judicial Conduct.

**Section 5. Appendix of forms**

The following forms are intended for illustration only. Substantial compliance with the prescribed forms is sufficient. Minor departures that do not negate substantial compliance shall not render void forms that are otherwise sufficient, and the forms may be varied when necessary to meet the facts of a particular case.

Form

Table of Forms

Gov. Jud. R. Rule 6

- 1 RETIRED JUDGE REGISTRATION FORM
- 2 REGISTRATION OF RETIRED JUDGE
- 3 AGREEMENT FOR REFERRAL OR SUBMISSION TO RETIRED JUDGE
- 4 ORDER OF REFERRAL OR SUBMISSION TO RETIRED JUDGE

(1)  
 INDEX OF RETIRED JUDGES  
 REGISTRATION FORM \*  
 R.C. 2701.10

IN THE \_\_\_\_\_ COURT OF \_\_\_\_\_ COUNTY:

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone Number: \_\_\_\_\_

Social Security Number: \_\_\_\_\_

(Optional; for payroll purposes only)

I, \_\_\_\_\_, hereby place my name on the index of retired judges in this court. In doing so, I state that I have registered with the Supreme Court of Ohio as a retired judge and I am eligible for service as a retired judge under the Constitution and laws of Ohio. I further state that, upon removing my name from registration with the Supreme Court of Ohio, I shall notify this court in writing.

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

\* TO BE FILED WITH THE APPROPRIATE LOCAL CLERK OF COURT.

(2)  
 THE SUPREME COURT OF OHIO  
 30 East Broad Street  
 Columbus, Ohio 43266-0419

REGISTRATION OF RETIRED JUDGE \*  
 R.C. 2701.10

Name: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone Number: \_\_\_\_\_

Social Security Number: \_\_\_\_\_

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Date of Birth: \_\_\_\_\_

Undergraduate and graduate education (include schools, graduation date(s) and degree(s) conferred):  
\_\_\_\_\_  
\_\_\_\_\_

Law school education (include graduation date):  
\_\_\_\_\_  
\_\_\_\_\_

Judicial experience (include administrative experience):  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Date of retirement from judicial service:  
\_\_\_\_\_  
\_\_\_\_\_

Area(s) of expertise (based upon legal and judicial experience, other career experience, and scholarly pursuits):  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Publications:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

I state that the information contained on this form is correct.

\_\_\_\_\_  
Signature Date

\* TO BE FILED WITH THE SUPREME COURT OF OHIO

(3)  
IN THE COURT OF COMMON PLEAS  
\_\_\_\_\_ COUNTY, OHIO

A.B. ) CASE NO. \_\_\_\_\_  
 )  
Plaintiff(s) )  
v. ) ASSIGNED JUDGE \_\_\_\_\_  
 )

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C.D. ) AGREEMENT FOR REFERRAL OR  
 ) SUBMISSION TO RETIRED JUDGE  
 Defendant(s) ) PURSUANT TO R.C. 2701.10

1. Plaintiff(s) \_\_\_\_\_ and \_\_\_\_\_ and defendant(s) \_\_\_\_\_ and \_\_\_\_\_ do hereby agree that this case shall be transferred to \_\_\_\_\_, a Retired Judge, who shall: (check appropriate item)
- ( ) a. Hear and determine all issues of law and fact which may hereafter arise in this case, receive evidence, and render a judgment adjudicating the action or proceeding in its entirety, including all post-trial proceedings, if any.
  - ( ) b. Hear and determine issues of law and fact, receive evidence, and render a decision with respect to the following specific issue(s) or question(s) only:  
 \_\_\_\_\_  
 \_\_\_\_\_

2. The parties hereto agree to assume the responsibility for providing all facilities, equipment, and personnel reasonably deemed necessary by the Retired Judge during his or her consideration of the action or proceeding referred, or the issue(s) or question(s) submitted, and that they will pay all costs arising out of the provision of the facilities, equipment, and personnel.

3. The parties hereto agree to pay the sum of \$ \_\_\_\_\_ (per diem) or \$ \_\_\_\_\_ (per hour) plus all reasonable expenses incurred incident to the conduct of the proceedings. Payment of all amounts due and owing to the Retired Judge for his or her services shall be made at such times and in such amounts as the parties hereto and the Retired Judge may find mutually agreeable.

4. If any different or additional terms and conditions are desired by the parties hereto and the Retired Judge, the same will be appended hereto and signed by the parties and the Retired Judge.

THIS AGREEMENT entered into this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_.

Plaintiff(s): \_\_\_\_\_  
 \_\_\_\_\_  
 Defendant(s): \_\_\_\_\_  
 \_\_\_\_\_  
 Retired Judge: \_\_\_\_\_  
 \_\_\_\_\_

Gov. Jud. R. Rule 6

(4)  
IN THE COURT OF COMMON PLEAS  
\_\_\_\_\_ COUNTY, OHIO

A.B. ) CASE NO. \_\_\_\_\_  
 )  
Plaintiff(s) )  
v. ) ASSIGNED JUDGE \_\_\_\_\_  
 )  
C.D. ) ORDER OF REFERRAL OR  
 ) SUBMISSION TO RETIRED JUDGE  
Defendant(s) ) PURSUANT TO R.C. 2701.10

The parties having elected to have a duly registered Retired Judge (act as an adjudicator of the action between them in its entirety, including all post-trial proceedings, if any) (decide the particular issue(s) of fact and/or law which they have set forth in their agreement); and it appearing that they and the Retired Judge have filed their written agreement concerning this (referral) (submission) with this Court:

IT IS HEREBY ORDERED that this case is transferred, pursuant to R.C. 2701.10, to \_\_\_\_\_, a duly registered Retired Judge, as provided in their agreement. Should the Retired Judge become unable, for any reason, to fulfill the agreement, the case will revert to the docket of this Court for further proceeding.

The Clerk of this Court is hereby ordered to deliver to \_\_\_\_\_, the Retired Judge, a complete copy of the court file in this case, including copies of all documents filed as of the date of this order. Henceforth, copies of all documents filed with this Court shall also be served upon the Retired Judge at an address he or she shall provide to the parties.

Dated: \_\_\_\_\_  
Judge of the Court of Common Pleas

Current with amendments received through 4/9/07

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**FORM 3. AGREEMENT FOR REFERRAL OR SUBMISSION TO RETIRED JUDGE**

(3)

IN THE COURT OF COMMON PLEAS

\_\_\_\_\_ COUNTY, OHIO

A.B. ) CASE NO. \_\_\_\_\_

Plaintiff(s) ) ASSIGNED JUDGE \_\_\_\_\_

v. ) AGREEMENT FOR REFERRAL

) OR SUBMISSION TO RETIRED

C.D. ) JUDGE PURSUANT TO R.C.

Defendant(s) ) 2701.10

1. Plaintiff(s) \_\_\_\_\_ and \_\_\_\_\_ and defendant(s) \_\_\_\_\_ and \_\_\_\_\_ do hereby agree that this case shall be transferred to \_\_\_\_\_, a Retired Judge, who shall:  
(check appropriate item)

( ) a. Hear and determine all issues of law and fact which may hereafter arise in this case, receive evidence, and render a judgment adjudicating the action or proceeding in its entirety, including all post-trial proceedings, if any.

( ) b. Hear and determine issues of law and fact, receive evidence, and render a decision with respect to the following specific issue(s) or question(s) only:

---

2. The parties hereto agree to assume the responsibility for providing all facilities, equipment, and personnel reasonably deemed necessary by the Retired Judge during his or her consideration of the action or proceeding referred, or the issue(s) or question(s) submitted, and that they will pay all costs arising out of the provision of the facilities, equipment, and personnel.

3. The parties hereto agree to pay the sum of \$ \_\_\_\_\_ (per diem) or \$ \_\_\_\_\_ (per hour) plus all reasonable expenses incurred incident to the conduct of the proceedings. Payment of all amounts due and owing to the Retired Judge for his or her services shall be made at such times and in such amounts as the parties hereto and the Retired Judge may find mutually agreeable.

4. If any different or additional terms and conditions are desired by the parties hereto and the Retired Judge, the same will be appended hereto and signed by the parties and the Retired Judge.

THIS AGREEMENT entered into this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_.

Plaintiff(s): \_\_\_\_\_

\_\_\_\_\_

Defendant(s): \_\_\_\_\_

\_\_\_\_\_

Retired Judge: \_\_\_\_\_

[Effective: January 1, 1989.]

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Const. Art. IV, § 6

C

Baldwin's Ohio Revised Code Annotated Currentness  
 Constitution of the State of Ohio (Refs & Annos)  
 Article IV. Judicial (Refs & Annos)

**→ O Const IV Sec. 6 Election and compensation of judges; mandatory retirement; assignment of retired judges**

(A) (1) The chief justice and the justices of the supreme court shall be elected by the electors of the state at large, for terms of not less than six years.

(2) The judges of the courts of appeals shall be elected by the electors of their respective appellate districts, for terms of not less than six years.

(3) The judges of the courts of common pleas and the divisions thereof shall be elected by the electors of the counties, districts, or, as may be provided by law, other subdivisions, in which their respective courts are located, for terms of not less than six years, and each judge of a court of common pleas or division thereof shall reside during his term of office in the county, district, or subdivision in which his court is located.

(4) Terms of office of all judges shall begin on the days fixed by law, and laws shall be enacted to prescribe the times and mode of their election.

(B) The judges of the supreme court, courts of appeals, courts of common pleas, and divisions thereof, and of all courts of record established by law, shall, at stated times, receive, for their services such compensation as may be provided by law, which shall not be diminished during their term of office. The compensation of all judges of the supreme court, except that of the chief justice, shall be the same. The compensation of all judges of the courts of appeals shall be the same. Common pleas judges and judges of divisions thereof, and judges of all courts of record established by law shall receive such compensation as may be provided by law. Judges shall receive no fees or perquisites, nor hold any other office of profit or trust, under the authority of this state, or of the United States. All votes for any judge, for any elective office, except a judicial office, under the authority of this state, given by the general assembly, or the people shall be void.

(C) No person shall be elected or appointed to any judicial office if on or before the day when he shall assume the office and enter upon the discharge of its duties he shall have attained the age of seventy years. Any voluntarily retired judge, or any judge who is retired under this section, may be assigned with his consent, by the chief justice or acting chief justice of the supreme court to active duty as a judge and while so serving shall receive the established compensation for such office, computed upon a per diem basis, in addition to any retirement benefits to which he may be entitled. Laws may be passed providing retirement benefits for judges.

(1973 SJR 30, am. eff. 11-6-73; 132 v HJR 42, adopted eff. 5-7-68)

**HISTORICAL AND STATUTORY NOTES**

**Ed. Note:** Former Art IV, § 6 repealed by 132 v HJR 42, eff. 5-7-68; 128 v 1346, am. eff. 11-3-59; 120 v 746, am. eff. 1-1-45; 1912 constitutional convention, am. eff. 1-1-13; 80 v 382, am. eff. 10-9-1883; 1851 constitutional convention, adopted eff. 9-1-1851.

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Appx. P. 0100

Const. Art. IV, § 6

**Ed. Note:** Art IV, § 6 contains provisions analogous to former Art IV, § 14, repealed by 132 v HJR 42, eff. 5-7-68.

**Ed. Note:** Effective date and repeal date for revision of O Const Art IV by 132 v HJR 42 is May 7, 1968. See *Euclid v Heaton*, 15 OS(2d) 65, 238 NE(2d) 790 (1968).

**Ed. Note:** Guidelines for Assignment of Judges were announced by the Chief Justice of the Ohio Supreme Court on 5-24-88, and revised 2-25-94 and 3-25-94, but not adopted as rules pursuant to O Const Art IV §5: For the full text, see 37 OS(3d) xxxix, 61 OBar A-2 (6-13-88) and 69 OS(3d) XCIX, 67 OBar xiii (4- 18-94).

#### EDITOR'S COMMENT

1990:

This section provides that judges are to be elected rather than appointed, fixes terms of office for justices of the Supreme Court and judges of the courts of appeals and common pleas courts, and also provides for the compensation of all judges, prohibits dual office, establishes age seventy as a base date for mandatory retirement, and allows employment of retired judges on the bench.

Under the first Constitution all judges of courts of record were appointed by the General Assembly (justices of the peace were elected). §8 and 11, Article III, 1802 Ohio Constitution. This arrangement worked against the independence of the judiciary, since the legislature was naturally inclined to appoint and retain judges sympathetic to its wishes, and on occasion blatantly abused its power of appointment or impeachment. In 1806 two judges were impeached by an outraged House for holding a statute unconstitutional, and were acquitted by the Senate by only a single vote. Carrington T. Marshall, *A History of the Courts and Lawyers of Ohio* 94-6 (The American Historical Society, Inc 1934). In 1810, using its appointing power and an imaginative interpretation of the term of office provision, the General Assembly swept all judges and key state officers from office by resolution (called the "sweeping resolution," appropriately enough), and appointed new incumbents of more pliable disposition. The administration of justice was seriously disrupted for a time, and the incident left a lingering aroma of political skullduggery. *Id.*, at 97. The appointing power of the General Assembly was marked for extinction by the 1850 Constitutional Convention, and Article III, §1 and Article IV, §2 and 3 of the 1851 Ohio Constitution as adopted made the key state offices and all judgeships elective. This principle has been continued in present §6, Article IV. Judges are elected by nonpartisan ballot. RC 3505.04.

Division (B) of this section is taken from §14, Article IV as adopted in 1851, which in turn was based on §8, Article III of the 1802 Ohio Constitution. The provisions for equalizing the pay of all judges of equal rank were added in 1973. Also, the section formerly prohibited any change in a judge's compensation during term, but this was amended in 1973 to allow increases but prohibit pay cuts during term.

The retirement provisions in division (C) of this section were added by the Modern Courts Amendment in 1968. The section provides for mandatory retirement of judges, using age seventy as the base date rather than the mandatory retirement date per se, by prohibiting election or appointment if the judge will be seventy at the time his term begins. Thus, under this section the mandatory retirement age may be as high as seventy-seven less one day if a six-year term is involved and the last term begins the day before the seventieth birthday. This section also creates a pool of additional, experienced judicial manpower by allowing the recall of retired judges to active duty, with their consent. The measure is sufficiently flexible to permit the Chief Justice to choose only judges who are physically and mentally able to serve, and to tailor work loads to the individual needs and wishes of the retirees. Prior to adoption of this measure, it was not possible to employ retired judges to serve as such, since their judicial powers terminated on leaving office. A complementary measure provides a procedure somewhat akin to arbitration, by permitting parties to submit a dispute to a retired judge for resolution. RC 2701.10. See Commentary to §19, Article IV.

Const. Art. IV, § 6

CROSS REFERENCES

Additional compensation for common pleas and probate judges computed on county population, 141.05

Administration of courts during civil disorder, Sup R 14

Assignment of judges to relieve crowded dockets, 2503.04

Assignment of retired judges, 2743.03; Sup R 17

Compensation of county court judges; holding additional offices forbidden, 1907.16, 1907.17

Compensation of municipal court judges; holding additional offices forbidden, 1901.11

Compensation of supreme court justices, and appeals, common pleas, and probate judges; holding additional offices forbidden, 141.04

Courts of record, parties may agree to submit all or part of a case to a retired judge; judges to register with courts they wish to serve, 2701.10

Disqualification of judge and assignment of substitute, 2101.38, 2101.39, 2501.13 to 2501.15, 2701.03, 2937.20; CJC 2

Election and terms of appeals court judges, 2501.011, 2501.012, 2501.013, 2501.02

Election and terms of common pleas court judges; general and domestic relations division; Hamilton County juvenile division, 2301.01 to 2301.03

Election and terms of probate judges, 2101.02, 2101.021

Election of chief justice and justices of supreme court, 2503.02, 2503.03

Election years, 3501.02

Improper compensation or fees; misconduct, 3.07, 141.13, 2701.12, 2921.43

Judge to resign bench before running for other office, Code of Jud Cond Canon 7

Nomination, election, and terms of county court judges, 1907.13

Nomination, election, and terms of Cuyahoga County juvenile court judges, 2153.03

Nomination, election, and terms of municipal court judges, 1901.051 to 1901.08

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Per diem and expenses of judges on assignment, 141.07, 141.11

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## R.C. § 2903.341

**C**

Baldwin's Ohio Revised Code Annotated Currentness  
 Title XXIX. Crimes--Procedure (Refs & Annos)  
 Chapter 2903. Homicide and Assault  
 Patient Abuse or Neglect (Refs & Annos)

**-2903.341 Patient endangerment; affirmative defenses**

(A) As used in this section:

(1) "MR/DD caretaker" means any MR/DD employee or any person who assumes the duty to provide for the care and protection of a mentally retarded person or a developmentally disabled person on a voluntary basis, by contract, through receipt of payment for care and protection, as a result of a family relationship, or by order of a court of competent jurisdiction. "MR/DD caretaker" includes a person who is an employee of a care facility and a person who is an employee of an entity under contract with a provider. "MR/DD caretaker" does not include a person who owns, operates, or administers a care facility or who is an agent of a care facility unless that person also personally provides care to persons with mental retardation or a developmental disability.

(2) "Mentally retarded person" and "developmentally disabled person" have the same meanings as in section 5123.01 of the Revised Code.

(3) "MR/DD employee" has the same meaning as in section 5123.50 of the Revised Code.

(B) No MR/DD caretaker shall create a substantial risk to the health or safety of a mentally retarded person or a developmentally disabled person. An MR/DD caretaker does not create a substantial risk to the health or safety of a mentally retarded person or a developmentally disabled person under this division when the MR/DD caretaker treats a physical or mental illness or defect of the mentally retarded person or developmentally disabled person by spiritual means through prayer alone, in accordance with the tenets of a recognized religious body.

(C) No person who owns, operates, or administers a care facility or who is an agent of a care facility shall condone, or knowingly permit, any conduct by an MR/DD caretaker who is employed by or under the control of the owner, operator, administrator, or agent that is in violation of division (B) of this section and that involves a mentally retarded person or a developmentally disabled person who is under the care of the owner, operator, administrator, or agent. A person who relies upon treatment by spiritual means through prayer alone, in accordance with the tenets of a recognized religious denomination, shall not be considered endangered under this division for that reason alone.

(D)(1) It is an affirmative defense to a charge of a violation of division (B) or (C) of this section that the actor's conduct was committed in good faith solely because the actor was ordered to commit the conduct by a person to whom one of the following applies:

(a) The person has supervisory authority over the actor.

(b) The person has authority over the actor's conduct pursuant to a contract for the provision of services.

(2) It is an affirmative defense to a charge of a violation of division (C) of this section that the person who owns,

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operates, or administers a care facility or who is an agent of a care facility and who is charged with the violation is following the individual service plan for the involved mentally retarded person or a developmentally disabled person or that the admission, discharge, and transfer rule set forth in the Administrative Code is being followed.

(3) It is an affirmative defense to a charge of a violation of division (C) of this section that the actor did not have readily available a means to prevent either the harm to the person with mental retardation or a developmental disability or the death of such a person and the actor took reasonable steps to summon aid.

(E)(1) Except as provided in division (E)(2) or (E)(3) of this section, whoever violates division (B) or (C) of this section is guilty of patient endangerment, a misdemeanor of the first degree.

(2) If the offender previously has been convicted of, or pleaded guilty to, a violation of this section, patient endangerment is a felony of the fourth degree.

(3) If the violation results in serious physical harm to the person with mental retardation or a developmental disability, patient endangerment is a felony of the third degree.

(2004 S 178, eff. 1-30-04)

**CROSS REFERENCES**

Criminal records check, 109.572

Criminal records check; form and standard impression sheet; violations preventing employment; fee; confidentiality of reports; conditional employment, 5123.081

Testimony of mentally retarded or developmentally disabled victim, 2152.821, 2945.482

Testimony of mentally retarded or developmentally disabled victim; videotaped testimony, 2945.491

**LIBRARY REFERENCES**

Assault and Battery ↪64.  
Westlaw Topic No. 37.  
C.J.S. Assault §§ 117 to 119.

**R.C. § 2903.341, OH ST § 2903.341**

Current through 2007 Files 1 to 24 of the 127th GA (2007-2008), apv. by 8/12/07, and filed with the Secretary of State by 8/12/07.

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## R.C. § 2929.18

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BALDWIN'S OHIO REVISED CODE ANNOTATED  
 TITLE XXIX. CRIMES--PROCEDURE  
 CHAPTER 2929. PENALTIES AND SENTENCING  
 FELONY SENTENCING

## →2929.18 Financial sanctions

(A) Except as otherwise provided in this division and in addition to imposing court costs pursuant to section 2947.23 of the Revised Code, the court imposing a sentence upon an offender for a felony may sentence the offender to any financial sanction or combination of financial sanctions authorized under this section or, in the circumstances specified in section 2929.32 of the Revised Code, may impose upon the offender a fine in accordance with that section. Financial sanctions that may be imposed pursuant to this section include, but are not limited to, the following:

(1) Restitution by the offender to the victim of the offender's crime or any survivor of the victim, in an amount based on the victim's economic loss. If the court imposes restitution, the court shall order that the restitution be made to the victim in open court, to the adult probation department that serves the county on behalf of the victim, to the clerk of courts, or to another agency designated by the court. If the court imposes restitution, at sentencing, the court shall determine the amount of restitution to be made by the offender. If the court imposes restitution, the court may base the amount of restitution it orders on an amount recommended by the victim, the offender, a presentence investigation report, estimates or receipts indicating the cost of repairing or replacing property, and other information, provided that the amount the court orders as restitution shall not exceed the amount of the economic loss suffered by the victim as a direct and proximate result of the commission of the offense. If the court decides to impose restitution, the court shall hold a hearing on restitution if the offender, victim, or survivor disputes the amount. All restitution payments shall be credited against any recovery of economic loss in a civil action brought by the victim or any survivor of the victim against the offender.

If the court imposes restitution, the court may order that the offender pay a surcharge of not more than five per cent of the amount of the restitution otherwise ordered to the entity responsible for collecting and processing restitution payments.

The victim or survivor may request that the prosecutor in the case file a motion, or the offender may file a motion, for modification of the payment terms of any restitution ordered. If the court grants the motion, it may modify the payment terms as it determines appropriate.

(2) Except as provided in division (B)(1), (3), or (4) of this section, a fine payable by the offender to the state, to a political subdivision, or as described in division (B)(2) of this section to one or more law enforcement agencies, with the amount of the fine based on a standard percentage of the offender's daily income over a period of time determined by the court and based upon the seriousness of the offense. A fine ordered under this division shall not exceed the maximum conventional fine amount authorized for the level of the offense under division (A)(3) of this section.

(3) Except as provided in division (B)(1), (3), or (4) of this section, a fine payable by the offender to the state, to a political subdivision when appropriate for a felony, or as described in division (B)(2) of this section to one or more law enforcement agencies, in the following amount:

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- (a) For a felony of the first degree, not more than twenty thousand dollars;
  - (b) For a felony of the second degree, not more than fifteen thousand dollars;
  - (c) For a felony of the third degree, not more than ten thousand dollars;
  - (d) For a felony of the fourth degree, not more than five thousand dollars;
  - (e) For a felony of the fifth degree, not more than two thousand five hundred dollars.
- (4) A state fine or costs as defined in section 2949.111 of the Revised Code.
- (5)(a) Reimbursement by the offender of any or all of the costs of sanctions incurred by the government, including the following:
- (i) All or part of the costs of implementing any community control sanction, including a supervision fee under section 2951.021 of the Revised Code;
  - (ii) All or part of the costs of confinement under a sanction imposed pursuant to section 2929.14, 2929.142, or 2929.16 of the Revised Code, provided that the amount of reimbursement ordered under this division shall not exceed the total amount of reimbursement the offender is able to pay as determined at a hearing and shall not exceed the actual cost of the confinement.
- (b) If the offender is sentenced to a sanction of confinement pursuant to section 2929.14 or 2929.16 of the Revised Code that is to be served in a facility operated by a board of county commissioners, a legislative authority of a municipal corporation, or another local governmental entity, if, pursuant to section 307.93, 341.14, 341.19, 341.23, 753.02, 753.04, 753.16, 2301.56, or 2947.19 of the Revised Code and section 2929.37 of the Revised Code, the board, legislative authority, or other local governmental entity requires prisoners to reimburse the county, municipal corporation, or other entity for its expenses incurred by reason of the prisoner's confinement, and if the court does not impose a financial sanction under division (A)(5)(a)(ii) of this section, confinement costs may be assessed pursuant to section 2929.37 of the Revised Code. In addition, the offender may be required to pay the fees specified in section 2929.38 of the Revised Code in accordance with that section.
- (c) Reimbursement by the offender for costs pursuant to section 2929.71 of the Revised Code.
- (B)(1) For a first, second, or third degree felony violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code, the sentencing court shall impose upon the offender a mandatory fine of at least one-half of, but not more than, the maximum statutory fine amount authorized for the level of the offense pursuant to division (A)(3) of this section. If an offender alleges in an affidavit filed with the court prior to sentencing that the offender is indigent and unable to pay the mandatory fine and if the court determines the offender is an indigent person and is unable to pay the mandatory fine described in this division, the court shall not impose the mandatory fine upon the offender.
- (2) Any mandatory fine imposed upon an offender under division (B)(1) of this section and any fine imposed upon an offender under division (A)(2) or (3) of this section for any fourth or fifth degree felony violation of any provision of Chapter 2925., 3719., or 4729. of the Revised Code shall be paid to law enforcement agencies pursuant to division (F) of section 2925.03 of the Revised Code.
- (3) For a fourth degree felony OVI offense and for a third degree felony OVI offense, the sentencing court shall impose upon the offender a mandatory fine in the amount specified in division (G)(1)(d) or (e) of section 4511.19 of the Revised Code, whichever is applicable. The mandatory fine so imposed shall be disbursed as provided in

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the division pursuant to which it is imposed.

(4) Notwithstanding any fine otherwise authorized or required to be imposed under division (A)(2) or (3) or (B)(1) of this section or section 2929.31 of the Revised Code for a violation of section 2925.03 of the Revised Code, in addition to any penalty or sanction imposed for that offense under section 2925.03 or sections 2929.11 to 2929.18 of the Revised Code and in addition to the forfeiture of property in connection with the offense as prescribed in Chapter 2981. of the Revised Code, the court that sentences an offender for a violation of section 2925.03 of the Revised Code may impose upon the offender a fine in addition to any fine imposed under division (A)(2) or (3) of this section and in addition to any mandatory fine imposed under division (B)(1) of this section. The fine imposed under division (B)(4) of this section shall be used as provided in division (H) of section 2925.03 of the Revised Code. A fine imposed under division (B)(4) of this section shall not exceed whichever of the following is applicable:

(a) The total value of any personal or real property in which the offender has an interest and that was used in the course of, intended for use in the course of, derived from, or realized through conduct in violation of section 2925.03 of the Revised Code, including any property that constitutes proceeds derived from that offense;

(b) If the offender has no interest in any property of the type described in division (B)(4)(a) of this section or if it is not possible to ascertain whether the offender has an interest in any property of that type in which the offender may have an interest, the amount of the mandatory fine for the offense imposed under division (B)(1) of this section or, if no mandatory fine is imposed under division (B)(1) of this section, the amount of the fine authorized for the level of the offense imposed under division (A)(3) of this section.

(5) Prior to imposing a fine under division (B)(4) of this section, the court shall determine whether the offender has an interest in any property of the type described in division (B)(4)(a) of this section. Except as provided in division (B)(6) or (7) of this section, a fine that is authorized and imposed under division (B)(4) of this section does not limit or affect the imposition of the penalties and sanctions for a violation of section 2925.03 of the Revised Code prescribed under those sections or sections 2929.11 to 2929.18 of the Revised Code and does not limit or affect a forfeiture of property in connection with the offense as prescribed in Chapter 2981. of the Revised Code.

(6) If the sum total of a mandatory fine amount imposed for a first, second, or third degree felony violation of section 2925.03 of the Revised Code under division (B)(1) of this section plus the amount of any fine imposed under division (B)(4) of this section does not exceed the maximum statutory fine amount authorized for the level of the offense under division (A)(3) of this section or section 2929.31 of the Revised Code, the court may impose a fine for the offense in addition to the mandatory fine and the fine imposed under division (B)(4) of this section. The sum total of the amounts of the mandatory fine, the fine imposed under division (B)(4) of this section, and the additional fine imposed under division (B)(6) of this section shall not exceed the maximum statutory fine amount authorized for the level of the offense under division (A)(3) of this section or section 2929.31 of the Revised Code. The clerk of the court shall pay any fine that is imposed under division (B)(6) of this section to the county, township, municipal corporation, park district as created pursuant to section 511.18 or 1545.04 of the Revised Code, or state law enforcement agencies in this state that primarily were responsible for or involved in making the arrest of, and in prosecuting, the offender pursuant to division (F) of section 2925.03 of the Revised Code.

(7) If the sum total of the amount of a mandatory fine imposed for a first, second, or third degree felony violation of section 2925.03 of the Revised Code plus the amount of any fine imposed under division (B)(4) of this section exceeds the maximum statutory fine amount authorized for the level of the offense under division (A)(3) of this section or section 2929.31 of the Revised Code, the court shall not impose a fine under division (B)(6) of this section.

(C)(1) The offender shall pay reimbursements imposed upon the offender pursuant to division (A)(5)(a) of this

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section to pay the costs incurred by the department of rehabilitation and correction in operating a prison or other facility used to confine offenders pursuant to sanctions imposed under section 2929.14, 2929.142, or 2929.16 of the Revised Code to the treasurer of state. The treasurer of state shall deposit the reimbursements in the confinement cost reimbursement fund that is hereby created in the state treasury. The department of rehabilitation and correction shall use the amounts deposited in the fund to fund the operation of facilities used to confine offenders pursuant to sections 2929.14, 2929.142, and 2929.16 of the Revised Code.

(2) Except as provided in section 2951.021 of the Revised Code, the offender shall pay reimbursements imposed upon the offender pursuant to division (A)(5)(a) of this section to pay the costs incurred by a county pursuant to any sanction imposed under this section or section 2929.16 or 2929.17 of the Revised Code or in operating a facility used to confine offenders pursuant to a sanction imposed under section 2929.16 of the Revised Code to the county treasurer. The county treasurer shall deposit the reimbursements in the sanction cost reimbursement fund that each board of county commissioners shall create in its county treasury. The county shall use the amounts deposited in the fund to pay the costs incurred by the county pursuant to any sanction imposed under this section or section 2929.16 or 2929.17 of the Revised Code or in operating a facility used to confine offenders pursuant to a sanction imposed under section 2929.16 of the Revised Code.

(3) Except as provided in section 2951.021 of the Revised Code, the offender shall pay reimbursements imposed upon the offender pursuant to division (A)(5)(a) of this section to pay the costs incurred by a municipal corporation pursuant to any sanction imposed under this section or section 2929.16 or 2929.17 of the Revised Code or in operating a facility used to confine offenders pursuant to a sanction imposed under section 2929.16 of the Revised Code to the treasurer of the municipal corporation. The treasurer shall deposit the reimbursements in a special fund that shall be established in the treasury of each municipal corporation. The municipal corporation shall use the amounts deposited in the fund to pay the costs incurred by the municipal corporation pursuant to any sanction imposed under this section or section 2929.16 or 2929.17 of the Revised Code or in operating a facility used to confine offenders pursuant to a sanction imposed under section 2929.16 of the Revised Code.

(4) Except as provided in section 2951.021 of the Revised Code, the offender shall pay reimbursements imposed pursuant to division (A)(5)(a) of this section for the costs incurred by a private provider pursuant to a sanction imposed under this section or section 2929.16 or 2929.17 of the Revised Code to the provider.

(D) Except as otherwise provided in this division, a financial sanction imposed pursuant to division (A) or (B) of this section is a judgment in favor of the state or a political subdivision in which the court that imposed the financial sanction is located, and the offender subject to the financial sanction is the judgment debtor. A financial sanction of reimbursement imposed pursuant to division (A)(5)(a)(ii) of this section upon an offender who is incarcerated in a state facility or a municipal jail is a judgment in favor of the state or the municipal corporation, and the offender subject to the financial sanction is the judgment debtor. A financial sanction of reimbursement imposed upon an offender pursuant to this section for costs incurred by a private provider of sanctions is a judgment in favor of the private provider, and the offender subject to the financial sanction is the judgment debtor. A financial sanction of restitution imposed pursuant to this section is an order in favor of the victim of the offender's criminal act that can be collected through execution as described in division (D)(1) of this section or through an order as described in division (D)(2) of this section, and the offender shall be considered for purposes of the collection as the judgment debtor. Imposition of a financial sanction and execution on the judgment does not preclude any other power of the court to impose or enforce sanctions on the offender. Once the financial sanction is imposed as a judgment or order under this division, the victim, private provider, state, or political subdivision may bring an action to do any of the following:

(1) Obtain execution of the judgment or order through any available procedure, including:

(a) An execution against the property of the judgment debtor under Chapter 2329. of the Revised Code;

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- (b) An execution against the person of the judgment debtor under Chapter 2331. of the Revised Code;
- (c) A proceeding in aid of execution under Chapter 2333. of the Revised Code, including:
  - (i) A proceeding for the examination of the judgment debtor under sections 2333.09 to 2333.12 and sections 2333.15 to 2333.27 of the Revised Code;
  - (ii) A proceeding for attachment of the person of the judgment debtor under section 2333.28 of the Revised Code;
  - (iii) A creditor's suit under section 2333.01 of the Revised Code.
- (d) The attachment of the property of the judgment debtor under Chapter 2715. of the Revised Code;
- (e) The garnishment of the property of the judgment debtor under Chapter 2716. of the Revised Code.
- (2) Obtain an order for the assignment of wages of the judgment debtor under section 1321.33 of the Revised Code
- (E) A court that imposes a financial sanction upon an offender may hold a hearing if necessary to determine whether the offender is able to pay the sanction or is likely in the future to be able to pay it.
- (F) Each court imposing a financial sanction upon an offender under this section or under section 2929.32 of the Revised Code may designate the clerk of the court or another person to collect the financial sanction. The clerk or other person authorized by law or the court to collect the financial sanction may enter into contracts with one or more public agencies or private vendors for the collection of, amounts due under the financial sanction imposed pursuant to this section or section 2929.32 of the Revised Code. Before entering into a contract for the collection of amounts due from an offender pursuant to any financial sanction imposed pursuant to this section or section 2929.32 of the Revised Code, a court shall comply with sections 307.86 to 307.92 of the Revised Code.
- (G) If a court that imposes a financial sanction under division (A) or (B) of this section finds that an offender satisfactorily has completed all other sanctions imposed upon the offender and that all restitution that has been ordered has been paid as ordered, the court may suspend any financial sanctions imposed pursuant to this section or section 2929.32 of the Revised Code that have not been paid.
- (H) No financial sanction imposed under this section or section 2929.32 of the Revised Code shall preclude a victim from bringing a civil action against the offender.

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