

IN THE SUPREME COURT OF OHIO

CASE NO. 07-0140

ROBERT BARNES, ADMINISTRATOR

Plaintiff-Appellee

-vs-

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

ON APPEAL FROM THE CUYAHOGA COUNTY
COURT OF APPEALS
CASE NOS. 87247, 87285, 87710, 87903, and 87946

MERIT BRIEF OF PLAINTIFF-APPELLEE
ROBERT BARNES, ADMINISTRATOR

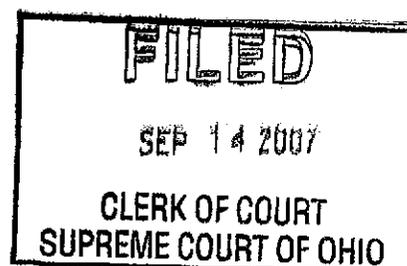
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INTRODUCTION

While the Memorandum in Support of Jurisdiction that had been presented by Defendant-Appellants, MedLink of Ohio and The MedLink Group, Inc. (hereinafter collectively "MedLink") had offered five (5) Propositions of Law, this Court accepted only two (2) of them. *Barnes v. University Hosp. of Cleveland*, 114 Ohio St.3d 1409, 2007-Ohio-2632, 867 N.E.2d 843. Supreme Court review was thus supposed to be confined to the narrow issues of whether (1) the award of punitive damages had been properly imposed in accordance with *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809, and (2) R.C. §2701.10 requires that a private judge must have retired from or vacated an elected position. Even though MedLink's three (3) other Propositions of Law were declined by this Court, they have all been interwoven in the home healthcare agency's Merit Brief. In accordance with the Order of June 6, 2007 granting only partial review of the Eighth District's ruling, MedLink must not be allowed to argue issues that are extraneous to this Court's jurisdictional grant of authority.

Even if this Court is inclined to consider all five (5) Propositions of Law, the Eighth Judicial District Court of Appeals' unanimous decision should be left intact. Further review of the jury's verdict is unwarranted for the simple reason that the positions asserted by MedLink have little basis in reality. As the evidentiary record attests, overwhelming testimony was introduced at trial establishing that MedLink's management had knowingly placed a high-risk mentally disabled kidney dialysis patient under the care of an unqualified employee who was prohibited by law from providing such services due to her prior criminal record. Even the company's own trial representative was forced to admit to the jury that profits had been placed over patient safety.

Private Judge Robert T. Glickman presided over the jury trial in strict compliance with the parties' written referral agreement, which had been approved by Judge Ann T. Mannen.

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

The verity is that Private Judge Glickman afforded MedLink a full and fair trial only after the defense attorneys agreed, both in writing and on the record, to refer the dispute to him and waive their appeal rights. As four (4) jurists (including three (3) elected ones) have now concluded, the verdict that was rendered was completely appropriate given the damaging evidence that was presented to the jury. The well-reasoned decisions that have been issued in the proceedings below should be affirmed in all respects.

STATEMENT OF CASE AND FACTS

A. THE REFERRAL AGREEMENT AND WAIVER.

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

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

After conferring together the parties determined that it would be in their respective best interests to submit the dispute to Private Judge Robert T. Glickman for purposes of conducting the jury trial. A court-approved agreement was entered to this effect, which was executed by counsel for each of the litigants and approved by the originally assigned judge.² *Supp. of Appellants*, p. 0001. The trial commenced on Monday, April 25, 2005.

Tellingly, MedLink's forty (40) page Merit Brief makes no mention of the parties' on-the-record waiver of their appeal rights with respect to the referral agreement. Prior to opening arguments, Private Judge Glickman had them confirm in open court that they were consenting to his authority and foregoing any rights to challenge his designation on appeal. *Vol. I, pp. 146-148; Sec. Supp.*, pp. 32-34.³

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

MR. BASHEIN: Yes.

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

MR. MCDONALD: Correct.

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

MR. COYNE: Yes. [emphasis added].

Id., p. 147; *Sec. Supp.*, p. 33. James L. Malone, Esq. and John C. Coyne, Esq. of Reminger & Reminger in Cleveland, Ohio represented MedLink at the time. Attorneys from Isaac, Brant, Ledman, & Teetor of Columbus, Ohio and Cozen & O'Connor of Chicago, Illinois were also retained to monitor the proceedings and were presumably present during the foregoing exchange and waiver of appeal rights. *Id.*

² The parties incorrectly dated the Agreement for May 18, 2005. *Supp. of Appellants*, p. 0002. As evidenced by the time-stamp on the first page of the document, it had actually been signed and filed on April 18, 2005. *Id.*, p. 0001.

³ The citations to "Vol. ___, p. ___" are to the eight (8) volume transcript of the trial proceedings.

B. NATALIE BARNES.

The following facts were developed during the ensuing jury trial. The Decedent, Natalie Barnes, was 24 years old and lived with her mother, Plaintiff Andrea Barnes. *Vol. VI, pp. 1128-1129 & 1135; Sec. Supp., pp. 180-181 & 182.* She was mentally retarded and epileptic. *Id., p. 1203; Sec. Supp., p. 186.* Due to her disabilities, she received aid from the Cuyahoga County Board of Mental Retardation and Developmental Disabilities ("MRDD"). The Decedent developed kidney disease and in June 2000 began hemodialysis treatments at UH.

The hemodialysis treatments were required because the Decedent's kidneys no longer functioned properly. *Vol. IV, pp. 830-831; Sec. Supp., pp. 130-131.* Blood is pumped out of the body during this procedure and into a device called an "artificial kidney," which removes impurities. *Id., p. 831; Sec. Supp., p. 131.* The purified blood is then returned to the patient. *Id.* Many patients requiring regular dialysis treatments, including the Decedent, have had a "perma cath" surgically implanted in their chests. *Id., p. 832; Sec. Supp., p. 132.* This flexible tube is threaded through the skin, into either the subclavian vein or the internal jugular vein and down to the heart. *Id., pp. 832-833; Sec. Supp., pp. 132-133.* The patient's skin grows over a small cuff at the end of the perma cath, thereby holding it intact and helping prevent infection. *Id., p. 833; Sec. Supp., p. 133.* Two (2) ports remain open that can be accessed for the hemodialysis procedures. *Id., p. 834; Sec. Supp., p. 134.* These exposed openings would be capped when the patient left the hospital. *Id.*

When the patient is connected to the machine, one of the "critical" concerns is that an "air embolism" can be created through an insecure connection or the catheter being removed from the body. *Vol. IV, pp. 836-838; Sec. Supp., pp. 135-137.* This phenomenon occurs when air enters the blood stream. *Vol. V, p. 978; Sec. Supp., p. 149.* In a worst case scenario, the air bubble will travel through the blood system and into a ventricle of the heart. *Id., pp. 979-980; Sec. Supp., pp. 150-151.* A "bubble trap" results as the heart continues to pump against the stagnate pocket of air. *Id.* The blood flow is disrupted and damage to the internal organ

systems ensues. *Id.* If the condition persists long enough, the heart will stop in an event known as a “cardiac arrest.” *Id.*, pp. 979-981; *Sec. Supp.*, pp. 150-152. The risk of an air embolism has been appreciated for as long as dialysis treatments have existed. *Id.*, p. 981; *Sec. Supp.*, p. 152.

C. MEDLINK’S RESPONSIBILITIES.

Because of the attendant dangers, mentally disabled patients require special attention during kidney dialysis treatments. *Vol. IV*, pp. 812-813, 1068-1069; *Sec. Supp.*, pp. 125-126, 165-166. This was particularly true for the Decedent, who had been known to tug at her catheter during dialysis. *Vol. VII*, p. 1283; *Sec. Supp.*, p. 210; *Vol. IV*, p. 705; *Sec. Supp.*, p. 107. “Sitters” would often accompany the patients during the procedures. *Vol. IV*, pp. 820 & 842; *Sec. Supp.*, pp. 129 & 139; *Vol. VI*, pp. 1089-1090; *Sec. Supp.*, pp. 173-174. In contrast to the rest of the busy hospital staff, these aides are able to devote their undivided time and attention to the patient one-on-one. *Vol. VI*, pp. 1083, 1091, 1239; *Sec. Supp.*, pp. 171, 175, 191. Their presence serves an important function in protecting the safety of the patient. *Vol. IV*, pp. 787, 812, 820, 841-842; *Sec. Supp.*, pp. 123, 125, 129, 138-139; *Vol. VI*, pp. 1083, 1105; *Sec. Supp.*, pp. 171, 178.

Defendant-Appellant, MedLink, provided home health care services in Cuyahoga County and elsewhere. *Vol. VII*, p. 1269; *Sec. Supp.*, p. 202. The highest-ranking local MedLink official was Administrator Robert Louche (hereinafter “Louche”). *Vol. III*, p. 660; *Sec. Supp.*, p. 93. He was largely responsible for the company’s finances as well as ensuring that the services were performed safely. *Vol. III*, pp. 660-662; *Sec. Supp.*, pp. 93-95. The Supervisor for MedLink’s MRDD Department was Cynthia M. Fribley (hereinafter “Fribley”). *Vol. III*, pp. 488-489; *Sec. Supp.*, pp. 42-43. She had years of experience working with the mentally handicapped. *Id.*, pp. 489-490; *Sec. Supp.*, pp. 43-44; *Vol. VII*, pp. 1266-1269; *Sec. Supp.*, pp. 199-202.

When Supervisor Fribley reviewed the paperwork she received from the County MRDD, a “red flag” immediately went up in her mind. *Vol. III*, p. 494; *Sec. Supp.*, p. 46; *Vol.*

Vol. VII, p. 1279; Sec. Supp., p. 206. The Decedent had significant disabilities, required constant monitoring during dialysis, and needed a high level of supervision. *Vol. III., p. 495; Sec. Supp., p. 47.* Fribley grew concerned that MedLink was not qualified to accept the case. *Id.* MedLink's Director of Nursing, Catherine Parker (hereinafter "Parker"), also possessed considerable experience with handicapped patients, but she was not consulted as she should have been. *Vol. III, pp. 495-496, 498-499; Sec. Supp., pp. 47-48, 50-51; Vol. VII, pp. 1280-1281; Sec. Supp., pp. 207-208.*

Instead, Supervisor Fribley referred the application to Administrator Louche. *Vol. III, p. 495; Sec. Supp., p. 47.* He had no medical training or discernable experience with the handicapped. *Id., p. 662; Sec. Supp., p. 95.* Fribley advised him of her safety concerns over whether MedLink could take the assignment. *Vol. III, pp. 495-496; Sec. Supp., pp. 47-48.* The Supervisor did not want to take the job, but Administrator Louche ordered her to do so. *Vol. VII, pp. 1279-1280; Sec. Supp., pp. 206-207.* Supervisor Fribley candidly acknowledged that:

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

A. At that point in time, yes.

Vol. III, p. 497; Sec. Supp., p. 49.

On September 1, 2000, Fribley met with Plaintiff and Mary Lynn Roberts (hereinafter "Roberts"), who was a supervisor at the Cuyahoga County Board of MRDD. *Vol. III, p. 499; Sec. Supp., p. 51.* Supervisor Fribley was instructed that she had to make sure that the MedLink aide did not leave the Decedent's side during dialysis. *Vol. VII, p. 1283; Sec. Supp., p. 210.* She was warned that the Decedent had attempted to pull, touch, and play with her catheter during the procedure previously. *Vol. III, pp. 504-505; Sec. Supp., pp. 54-55.* MedLink's job was to prevent the Decedent from removing the catheter either intentionally or inadvertently. *Vol. VII, pp. 1283-1284; Sec. Supp., pp. 210-211.*

During a meeting at the Barnes' residence with Roberts, Supervisor Fribley provided the Decedent's mother with MedLink brochures. *Vol. III, p. 502; Sec. Supp., p. 52.* The

promotional materials assured her that "health care is a matter of trust." *Id.* MedLink promised therein that "all staff are skills tested, health screened, referenced, and background checked as a requirement of employment." *Id.*, p. 503; *Sec. Supp.*, p. 53. Administrator Louche grudgingly acknowledged that MedLink expected potential clients to rely upon these written representations. *Id.*, pp. 672-673; *Sec. Supp.*, pp. 97-98.

D. MEDLINK'S KNOWLEDGE OF THE DANGER.

Supervisor Fribley understood that there could be dire consequences if the instructions she had received were not followed. *Vol. VII*, p. 1283; *Sec. Supp.*, p. 210. The following exchange took place during her cross-examination:

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

A. Yes.

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

A. Yes.

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

A. Right.

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

A. Yes, to be with her.

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

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

Vol. III, p. 505; *Sec. Supp.*, p. 55. By Fribley's own account, MedLink "knew" that the Decedent's health would be jeopardized if they failed to prevent her from pulling out her catheter. *Id.*, p. 506; *Sec. Supp.*, p. 56. These warnings were, the Supervisor agreed,

“[c]ritically important for [the Decedent’s] safety and well being.” *Id.*, pp. 506-507; *Sec. Supp.*, pp. 56-57. Death was even a possibility. *Id.*, pp. 507-508; *Sec. Supp.*, p. 57-58.

Fribley told the MedLink Director of Nursing, Parker, that the Decedent had a tendency to touch or pull at her catheter and could be harmed if the tube was removed. *Vol. III*, pp. 622-623; *Sec. Supp.*, pp. 84-85. Director Parker recognized that the aide would have to be “right around” the Decedent in order to intervene when needed. *Id.*, p. 622; *Sec. Supp.*, p. 84. If MedLink could not do the job, they should not have accepted it. *Id.*, p. 646-647; *Sec. Supp.*, pp. 91-92. Administrator Louche also understood that the instruction that the aide must remain next to the Decedent was “[c]ritical” for her “safety” and “well-being.” *Vol. IV.*, pp. 705-706; *Sec. Supp.*, pp. 107-108. Contrary to MedLink’s assurances, ample evidence was thus presented that the home health care agency fully appreciated that serious harm could result if the Decedent was allowed to dislodge her catheter. *Merit Brief of Appellants*, p. 31.

The MedLink aide initially selected to attend to the Decedent during her dialysis treatment was Ann Marie Lumpkin Vernon (hereinafter “Lumpkin”).⁴ *Vol. III*, p. 583; *Sec. Supp.*, p. 71. Lumpkin was specifically instructed that she had to remain at all times by the Decedent’s bedside and prevent her from pulling on the catheter. *Id.*, pp. 584-585, 588-589; *Sec. Supp.*, pp. 72-73, 74-75. She was advised that it “would be detrimental if [she] left [the Decedent] unattended and she pulled at her tube.” *Id.*, p. 585; *Sec. Supp.*, p. 73. Lumpkin’s job was to make sure that the Decedent did not go near or touch her catheter. *Id.*, p. 595; *Sec. Supp.*, p. 81. When Lumpkin arrived at UH with the Decedent, the hospital staff provided her with similar instructions. *Vol. III*, p. 588; *Sec. Supp.*, p. 74. The employees in the dialysis unit warned her that:

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

Vol. III, pp. 589-590; *Sec. Supp.*, pp. 75-76.

⁴ At the time of the pertinent events in 2000 she was known as Ann Marie Lumpkin.

A UH technician confirmed that the Decedent would be “very lethargic” and “slow” during dialysis. *Vol. VI, pp. 1090-1091; Sec. Supp., pp. 174-175.* Just as she had been warned, Lumpkin observed the Decedent attempt to touch and “pull at her catheter.” *Vol. III, p. 591; Sec. Supp., p. 77.* Lumpkin responded by distracting the Decedent with a tennis shoe, which was “like a teddy bear” for her. *Id., pp. 592-593; Sec. Supp., pp. 78-79.* Lumpkin was also able to gently remove the Decedent’s hand from the catheter. *Id., p. 593; Sec. Supp., p. 79.* Lumpkin accomplished this every time the Decedent reached for the tube without problem. *Id., pp. 593-594; Sec. Supp., pp. 79-80.*

E. ENDIA HILL.

Lumpkin was only able to accompany the Decedent to her dialysis treatments on a few occasions. *Vol. III, p. 596; Sec. Supp., p. 82.* The replacement that MedLink selected was Endia V. Hill (hereinafter “Hill”). Hill dropped out of high school in the eleventh grade. *Deposition of Endia V. Hill taken June 24, 2002, p. 75; Sec. Supp., p. 23.*⁵ In 1990, she pled guilty in a plea arrangement to felonious assault. *Id., p. 14; Sec. Supp., p. 12.* Hill knew that her criminal record would preclude her from serving as a home health aide for the disabled. *Id., pp. 24-25; Sec. Supp., pp. 15-16.* Two of her sisters worked for MedLink. *Id., p. 76; Sec. Supp., p. 24.* One of them told her that MedLink “hired felons.” *Id., p. 25; Sec. Supp., p. 16.* After hearing this, Hill applied for a job with MedLink. *Id., pp. 26-27; Sec. Supp., pp. 17-18.*

On her employment application of August 16, 2000, Hill wrote out that she had previously been convicted of assault. *Deposition of Endia Hill taken June 24, 2002, p. 19; Sec. Supp., p. 13.* MedLink never questioned her about the felonious assault and probation she disclosed on her application. *Id., p. 20; Sec. Supp., p. 14.* Additionally, Hill never hid the fact that she had not secured a high school diploma. *Id.* Documentation prepared by MedLink required such a degree as a minimum qualification for the job. *Id., p. 88; Sec. Supp., p. 25.* Administrator Louché has confirmed this was a prerequisite for employment. *Vol. III, p. 664; Sec. Supp., p. 96.* The rule is intended to ensure the patient’s safety. *Vol. III, p. 529; Sec. Supp.,*

⁵ Because she did not respond to the subpoena issued by the court, Hill’s deposition transcript was read to the jurors. *Vol. V, pp. 956-957; Sec. Supp., pp. 142-143.*

p. 67.

During his deposition, Administrator Louche testified that Hill told him before she was hired of her felony conviction. *Vol. III, pp. 677-679; Sec. Supp., p. 99-101.* He then claimed at trial that he had meant that Hill's disclosure had been made to "MedLink" as a corporate entity and not him personally. *Id., pp. 678-681; Sec. Supp., pp. 100-103.* He nevertheless conceded that she should have never been hired. *Id., pp. 680-681; Sec. Supp., pp. 102-103.* The conviction was "blatantly disclosed on her application." *Id., p. 681; Sec. Supp., p. 103.* The prohibition against hiring felons was supposed to protect patients and was there for their safety. *Vol. IV, p. 703; Sec. Supp., p. 105.*

Hill's brief tenure started with MedLink in September 2000. *Deposition of Endia Hill taken June 24, 2002, p. 7; Sec. Supp., p. 10.* One of her first patients was the Decedent. *Id., p. 99; Sec. Supp., p. 26.* She had never worked with anyone who needed kidney dialysis treatments before. *Id., pp. 43-44; Sec. Supp., pp. 19-20.* Supervisor Fribley supplied the following admission:

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

A. Yes. Yes.

Vol. VII, p. 1284; Sec. Supp., p. 211. The MedLink supervisor further conceded that the laws imposing minimum educational requirements and prohibiting felons from caring for the disabled were intended to protect the patient. *Id., p. 1278; Sec. Supp., p. 205.* MedLink "knew" that violating these standards jeopardized the Decedent's safety. *Id.* Administrator Louche acknowledged to the jurors that:

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

A. I don't know the reason why, but yes, they were very aware of the conditions that we had to follow.

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

A. Yes. [emphasis added].

Vol. IV, pp. 704-705; Sec. Supp., pp. 106-107.

According to MedLink, “the parties disputed whether Hill was required to stay with [the Decedent] throughout her dialysis treatment.” *Merit Brief of Appellants, p. 1.* What else is a “sitter” being paid to do? The truth is that only Hill and MedLink’s counsel have “disputed” the role of a sitter. Supervisor Fribley herself testified that she had specifically directed Hill to stay with the Decedent because she might attempt to remove her catheter. *Vol. III, p. 522; Sec. Supp., p. 65.* Hill’s predecessor, Lumpkin, confirmed that she had also been furnished with the same instructions. *Id., pp. 588-590; Sec. Supp., pp. 74-76.* There is thus no truth to MedLink’s assertion that “no evidence was presented to show whether Endia Hill knew that the removal of [the Decedent’s] catheter had a substantial probability of causing harm.” *Merit Brief of Appellants, p. 30.*

F. THE EVENTS OF OCTOBER 19, 2000.

On October 19, 2000, Hill transported the Decedent to her dialysis treatment at UH at approximately 1:00 P.M. *Deposition of Endia Hill taken June 24, 2002, p. 56; Sec. Supp., p. 21.* Once the catheter was attached, Hill promptly left the dialysis unit, went to the cafeteria, and then wandered around the hospital for the next several hours. *Id., 71; Sec. Supp., p. 22.*

UH hemodialysis technician Charles Lagunzad (hereinafter “Lagunzad”) attended to the Decedent and other patients that afternoon. *Vol. V, p. 1067; Sec. Supp., p. 164.* He has confirmed that there was no aide present with her, but he was not sure about whether she was supposed to have one. *Id., pp. 1067-1068; Sec. Supp., pp. 164-165.* He then went to lunch at 1:30 P.M. *Id., p. 1074; Sec. Supp., p. 168.* That left only Technician Larry Lawrence (hereinafter “Lawrence”) in the dialysis pod. *Id., pp. 1074-1075; Sec. Supp., pp. 168-169.* Lawrence had to attend to a total of four (4) patients at that point. *Vol. VI, p. 1244; Sec. Supp., p. 193.*

While he was engaged in another task, Lawrence turned and saw that the Decedent's catheter was detached and laying on the floor. *Vol. VI, pp. 1098-1099; Sec. Supp., pp. 176-177.* He yelled out for help. *Vol. VI, p. 1086; Sec. Supp., p. 172.* The Administrative Director of the UH Dialysis Program, Sue Blankschaen (hereinafter "Blankschaen"), was approximately twenty (20) feet away. *Id., pp. 1178 & 1181-1182; Sec. Supp., pp. 183, 184-185.* She observed a hole in the Decedent's chest. *Id., p. 1243; Sec. Supp., p. 192.* Blankschaen assessed the Decedent and determined that she had a weak pulse and shallow respirations. *Id., p. 1227; Sec. Supp., p. 187.* A decision was made at that point to initiate CPR, which was performed by Lawrence and another staff member. *Id.* A code was then called at 2:00 P.M., which brought a number of hospital specialists into the pod. *Id., pp. 1109 & 1227-1228; Sec. Supp., pp. 179 & 187-188.*

G. THE SITTER'S ABILITY TO INTERVENE.

In support of its deeply flawed proximate cause defense, MedLink has proclaimed that: "The most Endia Hill could have done was summons [sic] the health professional who was already there." *Merit Brief of Appellants, p. 29.* Perhaps the most obvious flaw in this reasoning is that the MedLink aide, Hill, had not been hired to "summon" the UH staff at all. She was supposed to forestall any "resuscitation" efforts from being necessary in the first place by preventing the Decedent from fiddling with her catheter during dialysis. *Vol. III, pp. 493, 503-506 & 522; Sec. Supp., pp. 45, 53-56 & 65.* Hill's predecessor, Ann Marie Lumpkin Vernon, had confirmed that she was able to accomplish this simple, yet critical, task without difficulty. *Vol. III, pp. 584-585, 588-589, 591-595; Sec. Supp., pp. 72-73, 74-75, 77-81.* As UH's Administrative Director explained to the jurors, the hospital's staff should not have been forced to scramble to save the Decedent's life. *Vol. VI, p. 1246-1247; Sec. Supp., pp. 195-196.* Not even the code team's best efforts prevented the Decedent from sustaining permanent brain damage as a result of the disruption of her blood flow. *Vol. V, pp. 996 & 1010; Sec. Supp., pp. 154 & 161.*

H. THE PROXIMATE CAUSE OF THE DECEDENT'S DEATH.

The UH treating physician, Jay Wish, M.D., determined that the Decedent had "pulled

out her dialysis catheter” and “went into cardiopulmonary arrest.” *Sec. Supp.*, p. 8. He further reported that:

The leading diagnosis from the intensive care unit was an air embolus. *** The patient was felt likely to have anoxic brain damage secondary to cardiopulmonary arrest. [emphasis added].

Id.

Plaintiff’s trial expert was Barry J. Sobel, M.D. (hereinafter “Dr. Sobel”), who is Board Certified in internal medicine and nephrology. *Vol. V*, pp. 964-968; *Sec. Supp.*, pp. 144-148. His professional opinion was that the Decedent had suffered an air embolism as a result of the removal of her catheter, which prompted her cardiac arrest. *Id.*, pp. 997-1002; *Sec. Supp.*, pp. 155-160. According to Dr. Sobel, the Decedent suffered substantial brain damage as a result of the cardiac arrest, which left her unable to eat or breathe without life support. *Vol. V*, pp. 996 & 1010; *Sec. Supp.*, pp. 154 & 161. Her mother eventually agreed to discontinue her daughter’s dialysis treatments and allow her to expire. *Vol. IV*, pp. 815-816; *Sec. Supp.*, pp. 127-128.

While admitting negligence, MedLink has disputed proximate cause and insisted, in essence, that the Decedent suffered a spontaneous cardiac arrest which, as a matter of pure coincidence, occurred at precisely the same time that her perma cath was dislodged.⁶ *Merit Brief of Appellants*, p. 6. Setting aside for the moment the fantastic odds militating against such a scenario, this defense was flatly contradicted by the UH chart. *Sec. Supp.*, p. 8. Just like the intensive care unit, the attending physician, Dr. Wish, had concluded and even certified to Medicare that his patient had indeed suffered an air embolism. *Vol. V*, pp. 999-1001; *Sec. Supp.*, pp. 157-159. MedLink’s protests that an air embolism was medically improbable are based solely upon the testimony of a handful of hospital employees who were subordinate to Dr. Wish. *Merit Brief of Appellants*, p. 6.

⁶ In order to create the appearance that such a coincidence is not really so far-fetched, MedLink contends that: “Cardiac arrest is something that happens frequently during dialysis.” *Merit Brief of Appellant*, p. 6. Right. The only witness that the home health agency has cited in support of this preposterous representation was hospital nurse Winfred Chambers (hereinafter “Chambers”). *Id.* Quite understandably, the jury apparently found that her incredible claims lacked credence.

MedLink's proximate cause defense hinges upon mischaracterizations of the trial testimony, such as:

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 that they never witnessed or even heard of a displaced catheter causing a fatal air embolism.

Merit Brief of Appellants, p. 30. Indeed, the home health care agency has gone so far as to assert that a displaced catheter "happens all the time" and is "not a big deal." *Id., p. 33.* This astonishingly lackadaisical view of patient welfare was supported only by the direct examination testimony of three (3) hospital employees. *Id.* One of them, UH Administrative Director Blankschaen, later acknowledged on cross-examination that she trained other nurses that an air embolism was one of the known consequences of a catheter that has been pulled out by the patient. *Vol. VI, pp. 1235-1236; Sec. Supp., pp. 189-190.* The second witness that MedLink has cited was UH Nurse Chambers. *Merit Brief of Appellants, p. 30.* She also conceded that she had been trained that an air embolism is a consequence of a dislodged catheter. *Vol. V, pp. 1055-1056; Sec. Supp., pp. 162-163.* The third and final defense witness, Technician Lagunzad, conceded that when he had previously testified about observing patients with their catheters removed, he was not referring to a perma-cath such as the one that had been sewn into the Decedent's skin. *Vol. V, pp. 1073-1074 ; Sec. Supp., pp. 167-168.* He did not actually recall that ever occurring. *Id.* He further admitted that he would have removed the Decedent's hand if he had seen her playing or fidgeting with the catheter because she could have been hurt. *Id. at 1069; Sec. Supp., p. 166.* As Plaintiff's nursing expert explained, such phenomenons were still a "high risk" even though they occur infrequently. *Vol. IV, p. 890; Sec. Supp., p. 140.*

I. MEDLINK'S RESPONSE TO THE EPISODE.

Supervisor Fribley confronted Hill the next day, which was October 20, 2000. *Vol. III, p. 510; Sec. Supp., p. 59.* Director of Nursing Parker and Administrator Louche were also present. *Id., p. 511; Sec. Supp., p. 60.* Hill denied that she was ever told to stay with the

Decedent. *Id.*, pp. 513 & 519; *Sec. Supp.*, pp. 61 & 63 Since she had specifically advised the aide to remain at the Decedent's side because she might pull out her catheter, Fribley knew this was a lie. *Id.*, pp. 522-523; *Sec. Supp.*, pp. 65-66; *Vol. VII*, pp. 1284-1285; *Sec. Supp.*, pp. 211-212. According to Fribley, Hill also stated during the meeting that "somebody at the hospital told her to leave." *Vol. III*, p. 544; *Sec. Supp.*, p. 70. Director Parker acknowledged that this claim was inconsistent with the earlier assertion that she never had been told that she had to stay. *Vol. III*, pp. 627-628; *Sec. Supp.*, pp. 86-87.

There was no doubt in Supervisor Fribley's mind following the meeting that Hill had violated their instructions and lied when confronted. *Vol. III*, pp. 522-523; *Sec. Supp.*, pp. 65-66; *Vol. VII*, pp. 1284-1286; *Sec. Supp.*, pp. 211-213. Director Parker agreed with this assessment. *Vol. III*, pp. 628-629; *Sec. Supp.*, pp. 87-88. Administrator Louche has also found Hill to be dishonest. *Vol. IV*, pp. 737 & 746; *Sec. Supp.*, pp. 109 & 112. He pulled Hill's employment file "right after the meeting" and read it. *Id.*, p. 739; *Sec. Supp.*, p. 110. He conceded that "we" would have seen that Hill was disqualified from holding the job at that time as a result of the felony conviction. *Id.*, pp. 739-740; *Sec. Supp.*, pp. 110-111. Administrator Louche – who was the highest ranking MedLink official to appear at the trial – further admitted that he had testified untruthfully the previous day when he had claimed that they did not know of the felony conviction until November 2000. *Id.*, p. 740; *Sec. Supp.*, p. 111.

Even though Administrator Louche and Supervisor Fribley were convinced that Hill had violated their instructions and lied to them, she was not fired on the spot. *Vol. IV*, p. 739; *Sec. Supp.*, p. 110. To the contrary, she was assigned to more MRDD patients. *Vol. III*, p. 521-523; *Sec. Supp.*, pp. 64-66; *Vol. VII*, pp. 1281-1288; *Sec. Supp.*, pp. 208-215.

The Major Unusual Incidents (MUI) Unit Coordinator for the Cuyahoga County Board of MRDD, Robert Case (hereinafter "Case") investigated the events of October 19, 2000. *Vol. IV*, pp. 752-753; *Sec. Supp.*, pp. 113-114. Within the next several days (and most likely by October 23, 2000), he had spoken with Supervisor Fribley. *Id.*, p. 756; *Sec. Supp.*, p. 115. There were no doubts in his mind at trial that Fribley had told him at that time that Hill had been

fired. *Id.*, pp. 756-757; *Sec. Supp.*, pp. 115-116. Fribley maintains that the investigator's sworn testimony in this regard is untrue. *Vol. VII*, p. 1290; *Sec. Supp.*, p. 216.

MedLink made it a point to share with the County that Hill had claimed that the UH staff had told her she was free to leave during the dialysis treatment, thereby implicating the hospital in the fatality. *Vol. III*, p. 518; *Sec. Supp.*, p. 62. During the entire course of the investigations, however, no one from MedLink ever divulged that Hill had been hired with a disqualifying felony offense. *Vol. IV*, p. 764; *Sec. Supp.*, p. 117. Had this been reported, MedLink's contract with the County would have been invalidated and a report would have been made to the Ohio Department of Mental Retardation for further action. *Id.*, pp. 764-765; *Sec. Supp.*, pp. 117-118.

J THE JURY'S VERDICT.

Following the presentation of approximately twenty (20) witnesses and the introduction of numerous exhibits, the jurors found against both MedLink and UH and apportioned liability between them at, respectively, 90% and 10%. *Vol. VIII*, p. 1515-1516; *Sec. Supp.*, pp. 224-225. The jury awarded compensatory damages of \$100,000.00 upon the survivorship claim, and \$3,000,000.00 upon the wrongful death claim. *Id.*, pp. 1516-1517; *Sec. Supp.*, pp. 225-226. The jurors unanimously concluded that MedLink had acted with actual malice and awarded an additional \$3,000,000.00 in punitive damages. *Id.*, pp. 1517-1518; *Sec. Supp.*, pp. 226-227. UH promptly paid its share of the verdict.

K. POST-VERDICT PROCEEDINGS.

In a Notice that was served on May 9, 2005, MedLink's trial counsel from Reminger & Reminger formally withdrew from the proceedings. MedLink then proceeded to barrage Private Judge Glickman with one motion after another imploring him to undo the verdict. On August 18, 2005, MedLink submitted its Motion for Due Process Hearing & Review of Punitive Damage Award which Plaintiff timely opposed. This application was denied in a written opinion that was issued on September 16, 2005. *Exhibit A, appended hereto.* On October 18, 2005 the court assessed attorney fees totaling \$1,013,460.00 against MedLink and entered final

judgment in the amount of \$6,803,460.00. *Merit Brief of Appellants, Appendix p. 0057.*

MedLink submitted a Motion for New Trial on November 1, 2005. Although numerous errors that were cited therein that purportedly required the verdict to be set aside, no suggestion was made that jurisdiction was lacking or Private Judge Glickman's appointment had been inappropriate. Before Plaintiff could respond and the trial judge could rule, the home health care agency prematurely filed its appeal three (3) days later on November 4, 2005.⁷

Plaintiff's timely Motion for Pre-Judgment Interest pursuant to R.C. §1343.03(C) had been pending since May 16, 2005. After discovery was completed, the court conducted an evidentiary hearing upon the application on Monday, January 30, 2006. On the Friday before the proceeding, MedLink's liability carrier, Lexington Insurance Company (hereinafter "Lexington"), submitted its Motion to Intervene. At the start of the hearing, Lexington's counsel addressed the issue of intervention and advised the Court that he had attempted to contact his client, without success, in order to secure consent to the private judge referral agreement. *Transcript of Proceedings of January 30, 2006 (hereinafter "PJI Tr."), p. 45; Sec. Supp., p. 233.* Intervention was then denied on the grounds that the request was untimely and the able attorneys that the carrier had hired to defend MedLink already protected Lexington's interests.

Lexington's counsel acknowledged during the proceedings that he was aware of the appeals pending in the Supreme Court of Ohio addressing the validity and scope of the Private Judge Act. *PJI Tr. p. 38; Sec. Supp., p. 229.* . According to MedLink, this was the first time that its own counsel became aware that "Glickman had never been elected to the bench."⁸

⁷ Because a Motion for New Trial had been filed, the thirty (30) day deadline for commencing an appeal had been tolled until the Private Judge ruled. *App.R. 4(B)(2)*. Interestingly, this Court later recognized that no final appealable order existed until the pending Motion for Pre-Judgment Interest was resolved. *Miller v. First Intl. Fid. & Trust Bldg., Ltd.*, 113 Ohio St.3d 474, 2007-Ohio-2457, 866 N.E.2d 1059. The end result was that the trial court proceedings were not concluded until pre-judgment interest was granted on March 13, 2006. By operation of *App.R. 4(C)* MedLink's appeal was still timely even though the Notice of November 4, 2005 had been filed months prematurely.

⁸ Not only is this representation unsupported by the evidentiary record, it is patently absurd. The notion that the two Reminger & Reminger trial attorneys, who lived and worked in

Merit Brief of Appellants, p. 9. Nevertheless, none of the attorneys representing MedLink and its insurer raised any objection to Private Judge Glickman's continued authority during the remainder of the hearing or at any point during the next five (5) weeks.

This issue first surfaced when MedLink commenced an Original Action in Prohibition against Private Judge Glickman in this Court on March 7, 2006. *Case No. 06-0478*. On March 13, 2006, Private Judge Glickman issued an entry resolving the Motion for Pre-Judgment Interest that had been pending since May 16, 2005.⁹ *Merit Brief of Appellants, Appendix p. 0068*. Due to a secretarial error, the final portion of the ruling was missing and an Amended Journal Entry was issued the next day. *Id.*, 0078. Finding that MedLink had failed to tender a good-faith settlement offer, pre-judgment interest was awarded in the amount of \$896,381.99. *Id.*, p. 0089.

In the first Supreme Court Prohibition proceeding, a Motion to Dismiss was filed on Private Judge Glickman's behalf on April 13, 2006. Before this Court could rule upon the Motion, MedLink quickly abandoned the action on April 28, 2006. MedLink then filed a second Original Action in this Court on May 11, 2006 against Administrative Judge Nancy R. McDonnell. *Case No. 06-0932*. All of the same "jurisdictional" arguments were asserted therein that are being pressed in the instant appeal. In an Entry dated August 2, 2006,

Cleveland, had failed to appreciate that Private Judge Glickman had lost a well-publicized election is simply implausible. The undersigned attorneys suspect that the defense firm had been actively involved in, and had contributed financially to, Private Judge Glickman's campaign. They were never able to confirm through discovery whether or not MedLink's small army of attorneys really had been unaware of how Private Judge Glickman had obtained his prior seat on the bench because this unlikely representation was not asserted until after the trial court proceedings had concluded.

⁹ There is also no truth to the criticisms of Judge Glickman for having "quickly issued" prejudgment interest to Plaintiff after receiving the first Complaint for Writ of Prohibition. *Merit Brief of Appellant*, p. 3. The reality is that the Motion had been pending for nine (9) months before the ruling was entered. The pre-judgment interest hearing had been concluded six (6) weeks earlier. More likely, MedLink filed its challenge to subject matter jurisdiction in the Supreme Court of Ohio only after it was apparent that an adverse ruling was eminent. This maneuver allowed their attorneys to later insinuate that the award that was entered in favor of Plaintiff pursuant to R.C. §1343.03(C) was purely retaliatory. There is nothing in the record that supports this reckless allegation. *Merit Brief of Appellant*, p. 3.

Administrative Judge McDonnell's Motion to Dismiss was summarily granted.

MedLink filed multiple appeals in the Eighth Judicial District. Plaintiff submitted a cross-appeal, which was limited to the issue of whether pre-judgment interest had been properly calculated. The appellate court affirmed Private Judge Glickman in all respects. *Barnes v. University Hosp. of Cleveland* (Nov. 30, 2006), 8th Dist. No. 87247, 2006-Ohio-6266, 2006 W.L. 3446244. MedLink responded by submitting a Memorandum in Support of Jurisdiction to this Court on January 30, 2007 containing five (5) Propositions of Law. In an Entry dated June 8, 2007, Supreme Court jurisdiction was extended to only two (2) of them. *Barnes*, 114 Ohio St.3d 1409.

ARGUMENT

The two (2) Propositions of Law that this Court has agreed to review will be addressed separately herein. Neither have merit.

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 LOWER COURTS' DUE PROCESS ANALYSIS.

MedLink's first Proposition of Law simply states a legal standard which, if correct, was fully satisfied in these proceedings. Following the entry of the punitive damage award in the amount of \$3,000,000.00, MedLink filed a lengthy Motion for Due Process Hearing & Review of Punitive Damage Award on August 18, 2005, which specifically identified the requirements of *BMW of North America, Inc. v. Gore* (1996), 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809, and *State Farm Mut. Auto Ins. Co. v. Campbell* (2003), 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585. MedLink has advised this Court that:

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 of October 26, 2005). [emphasis in original].

Merit Brief of Appellants, p. 8. The home health care agency is plainly mistaken. In a detailed Opinion that was issued on September 16, 2005 (not October 26, 2005), the Private Judge specifically analyzed the U.S. Supreme Court authorities for determining whether a punitive damage award violates the federal guarantee of due process.¹⁰ *See Exhibit A, appended hereto.*

He reasoned that:

At the time of [the] verdict, this Court was aware that the law mandates that a punitive damages award not be grossly excessive and that said award comports with due process. *State Farm Mutual Automobile Ins. Co. v. Campbell* (2003), 538 U.S. 408, 416; citing *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001), 532 U.S. 424, 433. The jury, and the Court, heard all the evidence in this matter. Unlike the facts of *State Farm*, all of the evidence presented by the plaintiff in this matter in support of an 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.

Exhibit A, pp. 1-2. As this opinion plainly confirms, there is no validity to MedLink's angry rantings over "Glickman's decision to ignore the BMW guideposts." *Merit Brief of Appellants*, p. 22. While the Private Judge did not specifically cite *BMW of North America, Inc. v. Gore*, 517 U.S. 559, he based his analysis instead upon *State Farm*, 538 U.S. 408, which was a more recent decision that had examined *Gore* in detail.¹¹ *Exhibit A, p. 1, appended hereto.*

Plaintiff is in complete agreement with MedLink that the "trial court is in the best position to conduct such a review." *Merit Brief of Appellants*, p. 36. In the proceedings below, MedLink had acknowledged that even the decisions of a Private Judge are entitled to deference

¹⁰ It is certainly odd that MedLink would advise this Court that the Private Judge had denied the "motion on October 26, 2005 without analysis" when he had plainly issued a Journal Entry denying the Motion over a month earlier with analysis. *See Exhibit A, appended hereto.* MedLink was plainly aware of this ruling, as evidenced by the thirty-eight (38) page "Motion for Reconsideration of Journal Entry dated September 13, 2005" that was served on October 18, 2005.

¹¹ During the course of the trial, Medlink's counsel had referenced the *State Farm* decision on no less than nine (9) occasions. *Trial Transcript, pp. 419, 656, 657, 684, 689, 959, 960, & 1170.* It is thus the height of hypocrisy for the home health care agency to berate the Private Judge for having the temerity to cite *State Farm* instead of *Gore*. *Merit Brief of Appellants, p. 22.*

on appeal. *Brief of Defendant-Appellees MedLink of Ohio and the MedLink Group, Inc.*, 8th Dist. No. Case No. 87903, p. 18; *MedLink Appellants' Reply Brief in Support of Appellants' Appeal and Answer Brief to Cross-Appeal of June 30, 2006*, 8th Dist. No. Case No. 87247/87285, p. 11.

While no "hearing" was held upon the Motion, MedLink never established that one was necessary.¹² The issues raised were purely legal and all the pertinent facts had already been established during the two-week jury trial. A defendant's due process rights can be adequately protected in Ohio through standard post-trial motions and a direct appeal. *Gollihue v. Consolidated Rail Corp.* (3rd Dist. 1997), 120 Ohio App.3d 378, 405-406, 697 N.E.2d 1109.

MedLink would further have this Court believe that: "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." *Merit Brief of Appellants*, p. 3. Again, the record shows otherwise. In addition to the rest of the home health care agency's seemingly endless grievances, the panel carefully analyzed the claim that the judgment was "contrary to the law on punitive damages and violates Appellants' constitutional rights." *Barnes*, 2006-Ohio-6266, p. *4. The Court considered and rejected essentially all of the same arguments that MedLink is continuing to press in the instant appeal. *Id.*, pp. *4-5. The Eighth District cogently concluded that:

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

¹² The U.S. Supreme Court decision MedLink is citing actually confirms that no further hearings are needed in order for a defendant's due process rights to be protected. In *State Farm*, 538 U.S. 408, the Court held that the Constitution prohibits extreme and unwarranted punitive damages. The majority concluded in that instance that the award of \$145,000,000.00 was inappropriate based upon the evidence that had been introduced during the jury trial upon the claim of bad faith insurance practices. *Id.*, at 412-414. There is no suggestion in the *State Farm* opinion that further post-verdict "due process hearings" are required. To the contrary, the insurer was successfully able to vindicate its constitutional rights through a direct appeal that ended in the U.S. Supreme Court.

patient safety.

MedLink acted with actual malice when it hired Hill. ***

Id., p. *5.

B. APPLICATION OF THE *GORE* AND *STATE FARM* GUIDEPOSTS.

1. Reprehensibility

Both the trial judge and court of appeals tacitly concluded that the three (3) “guideposts” described in *Gore*, 517 U.S. at 574-575, had all been satisfied in this instance. With respect to “reprehensibility,” it is not often that the highest ranking official to testify on behalf of the defense admits that the company “knowingly violated the law”. *Vol. IV, pp. 704-705; Sec. Supp. pp. 106-107.* Supervisor Fribley herself (who was MedLink’s designated trial representative) has confirmed that the company had decided to place profits over safety when Hill was hired. *Vol. III, pp. 538-539; Sec. Supp., pp. 68-69.* Assigning Hill to another patient after the incident involving the Decedent was an intentional decision. *Vol. VII, p. 1288; Sec. Supp., p. 215.* According to Hill, she continued to work for MedLink for another three (3) weeks. *Deposition of Endia Hill taken June 24, 2002, pp. 7-8; Sec. Supp., pp. 10-11.* She was not fired until November 2000 which – it was claimed – coincided with the completion of the criminal background check and verification of the disqualifying criminal offense (as if any was needed). *Vol. III, pp. 641-642; Sec. Supp., pp. 89-90.* That was the sole reason for her discharge. *Id.* By all accounts, Hill was never disciplined, admonished, or even chastised for her role in the events precipitating the death of the Decedent.

It must be remembered the jury was entitled to base the punitive award not just upon the decisions of MedLink’s management (*i.e.* Fribley and Louche), but also for Hill’s deplorable actions as well. Over a century ago, the this Court squarely recognized that:

A master is liable for the malicious acts of his servant, whereby others are injured, if the acts are done within the scope of the employment, and in the execution of the service for which he was engaged by the master.

Stranahan Bros. Catering Co. v. Coit (1896), 55 Ohio St. 398, 45 N.E. 634, paragraph one of

the syllabus; see also, *Osborne v. Lyles* (1992), 63 Ohio St.3d 326, 330, 587 N.E.2d 825, 829. Since there was no dispute at trial that Hill was in charge of the Decedent on October 19, 2000 only because of the position she had illegally secured with MedLink, the employer is liable for her actions even though her wrongdoing rose to a level justifying an award of punitive damages. *Wiebold Studio, Inc. v. Old World Restorations, Inc.* (1st Dist. 1985), 19 Ohio App.3d 246, 250-251, 484 N.E.2d 280, 286-287; *King v. Magaw* (9th Dist. 1957), 104 Ohio App. 469, 471-472, 150 N.E.2d 91, 93-94.

The determination of whether the defendant's misconduct was sufficiently "reprehensible" to warrant a sizeable award of punitive damages should ultimately be left to the collective wisdom and experience of the jury. See *Villella v. Waikem Motors, Inc.* (1989), 45 Ohio St.3d 36, 40-41, 543 N.E.2d 464; *Gollihue*, 120 Ohio App.3d at 402. It has been explained that:

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

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

2. Reasonable Relationship to Harm Inflicted

The lower courts were certainly entitled to conclude, moreover, that the punitive damage award bore a "reasonable relationship" to the actual harm that had been suffered. *Gore*, 517 U.S. at 580-581. For starters, the ratio of \$3,000,000.00 in punitives to \$3,100,000.00 in compensatory was slightly less than 1-to-1. That figure is well within the range suggested by every case that MedLink has cited. The jury had determined that the home health care agency's knowing violation of the law and deliberate indifference to patient safety had resulted in an easily preventable fatality and an exemplary award that was \$100,000.00 less than the combined

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wrongful death/survivorship recovery was entirely appropriate.

When all the evidence that was produced during the trial is properly considered, it is apparent that there was nothing “shocking” or even “startling” about the \$3,000,000.00 punitive damage award. During the pre-judgment interest proceedings below, evidence emerged that MedLink’s own trial counsel had predicted in a letter dated April 13, 2004 that the jury would be “angered by the aggravating facts” and “**a reasonable threat exists that a jury would make an award of punitive damages well into the seven figures.**” *Sec. Supp.*, pp. 1-4 (*emphasis original*). With amazing augury, MedLink’s attorney warned the adjuster handling the claim in a letter dated August 31, 2004 that:

With the above in mind, and in light of the information presently known in this case, a punitive damages award of \$3,000,000 is certainly possible, and is not likely to be reversed by the Court of Appeals based upon it being “excessive.” Please recall that, according to Plaintiff’s attorney, when they mock tried this case, the mock jury verdict for punitive damages went as high as \$10,000,000. *** [*emphasis added*].

Sec. Supp., p. 6. Not only was the resulting \$3,000,000.00 punitive damage award not surprising to a defense lawyer who had been intimately familiar with the facts, but the recovery also matched his earlier prediction to the penny. There was no “runaway verdict.” *Merit Brief of Appellants*, p. 8.

A proportionately large punitive damage award is not in and of itself a reason to reverse an award of punitive damages. The Court in *Smith v. Sass, Friedman & Assoc., Inc.* (Feb. 5, 2004), 8th Dist. No. 81953, 2004-Ohio-494, 2004 W.L. 229515, rejected a similar argument to the one advanced by MedLink here. In *Smith*, an appellant argued for remitter of a punitive damages award on the grounds that the award violated due process:

Low compensatory damages and high punitive damages assessed by a jury are not in and of themselves cause to reverse the judgment or to grant a remittitur, since it is the function of the jury to assess the damages and, generally, it is not for the trial or appellate court to substitute its judgment for that of the trier of fact. A large disparity, standing alone, is insufficient to justify a court’s interference with the province of the jury.

Id., p. *7, quoting *Villella*, 45 Ohio St.3d at 40.

Punitive damage awards have been approved in settings substantially less exigent than the instant case. In *Bardonaro v. General Motors Corp.* (Aug. 4, 2000), 2nd Dist. No. 18063, 2000 W.L. 1062188, the court upheld a punitive damage award of ten times the amount of compensatory damages awarded. The court rejected defendant's argument that the mere ratio of punitive to compensatory damages compelled a conclusion that the punitive damages were excessive or disproportionate:

Missing from GM's argument, however, is recognition of the Court's later affirmance of a punitive damages award that was 526 times the amount of the actual damages awarded. . . Nor does GM acknowledge the Ohio Supreme Court's recent rejection of an excessiveness challenge to a punitive damages award that was 5,250 times greater than the compensatory award. . . . Therefore, we cannot agree with GM that the ratio of punitive damages to actual damages compels a conclusion that the damages assessed against it are excessive or disproportionate. (citations omitted).

Id., p. *5; see also, *Waddell v. Roxane Labs., Inc.* (May 6, 2004), 10th Dist. No. 03AP-558, 2004-Ohio-2499, 2004 W.L. 1103710, p. *14 (punitive damages award of \$250,000 is not grossly excessive or arbitrary so as to constitute an arbitrary deprivation of property in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution); *Dunn v. Village of Put-in-Bay, Ohio* (Jan. 26, 2004), N.D. Ohio No. 3:02CV7252, 2004 W.L. 169788 (court upheld punitive damages award where ratio of punitive damages to compensatory damages was 15:1, finding conduct was sufficiently egregious to justify award); *Pollard v. E.I. DuPont De Nemours, Inc.* (6th Cir. 2005), 412 F.3d 657 (upholding \$2.5 million dollar punitive damages award as not violative of due process); *Gibbons v. The Bair Foundation, Inc.* (Feb. 20, 2007), N.D. Ohio No. 1:04CV2018, 2007 W.L. 582314 (upholding punitive damages award more than twice compensatory award); *Zomba Ents., Inc. v. Panorama Records, Inc.* (6th Cir. 2007), 491 F.3d 574 (upholding punitive damages award of 44:1).

3. Relationship to Civil and Criminal Penalties

Finally, the lower courts certainly acted within their discretion in determining that the third guideposts had been satisfied upon consideration of the "punitive damages award and the

civil or criminal penalties that could be imposed for comparable misconduct.” *Gore*, 517 U.S. at 583. There is no comparable penal statute in Ohio that specifically addresses fatalities caused by health care providers who knowingly accept patients that they are ill-equipped to handle, assign them to unqualified employees who have been hired in violation of law, and fail to fulfill the rudimentary responsibilities that are necessary to prevent a loss of life. However, it is certainly noteworthy that the \$3,000,000.00 punitive damage award complies with the caps recently imposed by R.C. §2315.21(D)(2)(a), which was part of the General Assembly’s tort reform effort.¹³ While the “civil” penalties referenced in *Gore*, 517 U.S. at 583, were not statutorily limited at the time Plaintiff’s claim accrued, the fact that the legislators still would not have forced a reduction of the exemplary award under the circumstances of this case is a telling indicia that the amount set by the jurors is not excessive under any reasonable standard.¹⁴

C. THE “BREACH OF CONTRACT DEFENSE”

In a final effort to avoid the punitive award, MedLink has advised this Court that its position is “that Plaintiff was never entitled to punitive damages in this case because her claim arose out of contract.” *Merit Brief of Appellants*, pp. 26-27. According to this novel logic, any tortfeasor who maintains some sort of contractual relationship with the victim is immune from an award of personal injury/wrongful death damages, as well as punitive awards, and can only be held liable for contractual losses.¹⁵ This is yet another example of one of the spurious arguments that was asserted in the proceedings below only after the jury’s verdict had been rendered. After the Private Judge instructed the jurors that they were entitled to award

¹³ As Plaintiff argued in the proceedings below and no one is now disputing, this legislation has no application to a case such as this that arose prior to April 7, 2005, which was the effective date of 2004 S.B. 80. See *Plaintiff’s Post-Hearing Brief in Support of Pre-Judgment Interest*, p. 29.

¹⁴ Given that MedLink had operated numerous facilities in and outside Ohio at the time the tort was committed in this instance, the definition of “small employer” set forth in revised R.C. §2315.21(A)(5) could not have been satisfied. Pursuant to R.C. §2315.21(D)(2)(a), the punitive damages would have been capped at twice the compensatory award had 2004 S.B. 80 applied. The instant jury’s punitive award of \$3,000,000.00 was well below this restriction.

¹⁵ As is true for many of MedLink’s imaginative arguments, not a single case from anywhere in the United States has been cited reaching such a bizarre result. This Court should refuse to be the first to do so.

compensatory and punitive damages upon the wrongful death/survivorship claims, MedLink failed to object on the grounds that only “contractual damages” were appropriate. *Vol. VII, p. 1510; Sec. Supp., p. 223*. The issue has thus been waived. *Galmish v. Cicchini*, 90 Ohio St.3d 22, 32, 2000-Ohio-7, 734 N.E.2d 782, 792; *Julian v. Creekside Health Cntr.* (June 17, 2004), 7th Dist. No. 03MA21, 2004-Ohio-3197, 2004 W.L. 1376214, p. *4.

D. INTERJECTION OF REJECTED PROPOSITION OF LAW.

1. The 30-to-1 Ratio.

MedLink’s first Proposition of Law, as drafted, was limited strictly to the question of whether Ohio courts must “independently analyze” the three (3) guideposts set forth in *Gore*, 517 U.S. 559. Although the answer to this question is undoubtedly “yes,” this duty was plainly performed at both the trial court and appellate court levels in the proceedings below. Recognizing this, MedLink has infused its analysis of the first Proposition of Law with all of the same arguments that had appeared in the Second Proposition of Law set forth in the Memorandum in Support of Jurisdiction. The home healthcare agency had asserted therein that:

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

Memorandum in Support of Jurisdiction of Defendant-Appellants, p. 9. As previously noted, Supreme Court jurisdiction was not extended to the Second Proposition of Law.

The decision to limit Supreme Court jurisdiction to only the First and Third Propositions of Law was sound. Over and over during its appeal to the Eighth District, MedLink had asserted that a supposed “30-to-1 ratio” between the punitive and compensatory awards violated U.S. Supreme Court edicts. The home health care agency has produced the convenient figure by treating \$3,000,000.00 of the compensatory award as if it was never imposed. This is permissible, in MedLink’s view, because “punitive damages are not recoverable in wrongful death action.” *Merit Brief of Appellants, pp. 32*. This is not true where, as here, there is evidence of conscious pain and suffering. See *Sharp v. Norfolk & W. Ry. Co.*, 72 Ohio St.3d 307, 311, 1995-Ohio-224, 649 N.E.2d 1219, 1223; *Case v. Norfolk & W. Ry. Co.* (6th Dist.

1988), 59 Ohio App.3d 11, 16, 570 N.E.2d 1132, 1136.

The callowness of MedLink's logic is forcefully demonstrated by the suggestion that: "Significantly, there was no direct evidence at trial that [the Decedent] suffered any conscious pain before she went into cardiac arrest and coded." *Merit Brief of Appellants*, p. 32 (citation omitted). By insisting upon "direct evidence", MedLink is plainly attempting to take advantage of the fact that the Decedent died and was thus unable to testify about her suffering. Dr. Sobel had confirmed that there would have been substantial pain associated with the forcible removal of a perma cath during dialysis. *Vol. V*, p. 989; *Sec. Supp.*, p. 153. In their collective wisdom, the jury certainly could conclude that the Decedent's physical suffering during her final few conscious moments of life would be substantially worse than the "momentary discomfort" that MedLink has described. *Merit Brief of Appellants*, pp. 32-33.

In its due process analysis, all the U.S. Supreme Court has required is a comparison between the punitive award and "the actual harm inflicted on the plaintiff." *Gore*, 517 U.S. at 580; *State Farm*, 538 U.S. at 425. Quite some time ago the Ohio General Assembly determined that those who tortiously cause the death of another are liable for all the "compensatory damages" that can be demonstrated, including loss of consortium and mental anguish. *R.C. §2125.02(B)*. The compensatory damages awarded by the jury in this case were \$3,100,000.00, not \$100,000.00. Under MedLink's risible reasoning, a defendant would be better off killing the plaintiff since most of the harm caused could not be considered for purposes of the punitive award.

MedLink has failed to cite a single case from anywhere in the United States actually holding that wrongful death damages should be ignored, and only the survivorship claim considered, when determining whether a punitive award comports with due process. *Merit Brief of Appellants*, pp. 31-33. This preposterous proposition is directly at odds with this Court's ruling in *Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St.3d 77, 2002-Ohio-7113, 781 N.E.2d 1211, which also involved a patient who had been allegedly killed by the defendant's tortious wrongdoing. This Court carefully considered the guideposts that had been

adopted in *Gore*, 517 U.S. 559. *Dardinger*, 98 Ohio St.3d at 98. Compensatory damages had been recovered upon the wrongful death claim slightly in excess of \$2,500,000.00. *Id. at 90*. Punitive damages were awarded of \$49,000,000.00 but were reduced by this Court to \$30,000,000.00. *Id. at 90, 104*. The resulting ratio of approximately twelve-to-one is substantially greater than that which was produced in the case *sub judice*. Far from following MedLink's theory that wrongful death damages are irrelevant in an analysis of the *Gore* guideposts, this Court reasoned that:

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

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

In its unsuccessful effort to convince this Court to grant jurisdiction over the Second Proposition of Law, MedLink had relied heavily upon *Burns v. Prudential Sec., Inc.* (3rd Dist. 2006), 167 Ohio App.3d 809, 2006-Ohio-3550, 857 N.E.2d 621. *MedLink's Memorandum in Support of Jurisdiction*, p. 11. For sound reasons, that decision is no longer being cited by the defense. *Burns* was not a wrongful death action and the Court certainly did not suggest that punitive damage awards may be compared only to that which a decedent's estate recovers upon a survivorship claim. In analyzing the guideposts established in *State Farm*, 538 U.S. at 419, the Third District specifically recognized that "the harm caused was economic and did not involve a disregard for the health or safety of others." *Burns*, 167 Ohio App.3d at 848. At the

risk of overstating the obvious, substantially higher awards of punitive damages are justified when a life has been lost.

2. Counsel's Inflammatory Statements.

MedLink's Merit Brief is also infused with arguments that had originally appeared in the failed Proposition of Law No. 4, which had stated:

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

Memorandum in Support of Jurisdiction of Appellants, p. 13. For the reasons previously stated, this Court should decline the invitation to review issues that are outside the jurisdictional grant of authority. Out of an abundance of caution, Plaintiff nevertheless offers the following response to these baseless contentions.

MedLink's first criticisms are directed to the opening statement of Plaintiff's counsel. *Merit Brief of Appellants*, p. 7. Ohio courts recognize that opening statements and closing arguments are not evidence. *State of Ohio v. Herron* (Feb. 20, 2004), 2nd Dist. No. 19894, 2004-Ohio-773, 2004 W.L. 315232; *State of Ohio v. Ahmed* 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E.2d 637. Accordingly, counsel is afforded wide latitude in opening statements. *Director of Hgwys. v. Bennett* (6th Dist. 1962), 118 Ohio App.207, 193 N.E.2d 702.

Plaintiff's counsel did remark that Hill had originally been charged with aggravated murder. *Vol. II*, p. 398; *Sec. Supp.*, p. 37. This was a true statement. *Deposition of Endia Hill taken June 24, 2002*, p. 14; *Sec. Supp.*, p. 12.¹⁶ Defense counsel's objection was sustained by Judge Glickman and he instructed the jurors to "disregard the comment as to what Endia Hill was charged with." *Vol. II*, p. 398; *Sec. Supp.*, p. 37. Ohio law has long recognized that jurors are presumed to have followed such instructions. *Pang v. Minich* (1990), 53 Ohio St.3d 186,

¹⁶ Because Private Judge Glickman later sustained a defense objection, this portion of Hill's deposition was not actually read to the jurors. *Deposition of Endia Hill*, p. 14; *Sec. Supp.*, p. _____. Plaintiff is citing this passage only to show that his counsel possessed a good faith basis to make the remark in opening statements.

195, 559 N.E.2d 1313, 1322; *Austin v. Kluczarov Constr.* (Feb. 11, 2004), 9th Dist. No. 02CA0103-M, 2004-Ohio-593, 2004 W.L. 239902, p. *3; *Roe v. Shaia Parking, Inc.* (Nov. 25, 1998), 8th Dist. No. 73756, 1998 W.L. 827603, p. *3; *Wallace v. Pitney-Bowes Corp.* (Nov. 20, 1980), 8th Dist. No. 41924, 1980 W.L. 355301, pp. *8-9. MedLink has not presented any evidence in this instance that Judge Glickman's admonishment was ignored.

The trial judge would have been entirely justified, in his sound exercise and discretion, in allowing Plaintiff to present evidence of Hill's original charges. A claim for negligent hiring was being pursued which, Plaintiff maintained, was so egregious that punitive damages were appropriate. See, e.g., *Stephens v. A-Able Rents Co.* (8th Dist. 1995), 101 Ohio App.3d 20, 654 N.E.2d 1315 (negligent hiring claim may be maintained where facts indicate the employee had a past history of criminal or tortious conduct, in this case, drug abuse, which the employer knew or should have known). Plaintiff had an obligation to address MedLink's defense, which was that an "innocent mistake" had been made which happens to companies both "big and small" all the time. *Vol. III, pp. 453 & 482; Sec. Supp., pp. 39 & 41.* In the "background screening" that was required by law and promised in the promotional materials that were furnished to Plaintiff, MedLink did not just miss a "felonious assault" conviction. MedLink actually allowed an individual who had been charged with a far more serious offense to care for a mentally challenged young woman. The original nature of the indictment was thus independently relevant with regard to the degree of MedLink's misconduct. In punitive damages cases, the egregiousness of the defendant's acts and omissions are factors in determining the amount to be imposed and is thus a critical issue for the jurors to resolve. *Dardinger*, 98 Ohio St.3d 77; *Bauer v. Georgeff* (Sept. 1, 1998), 10th Dist. No. 97APE03-313, 1998 W.L. 614636; *Allen v. Niehaus* (Dec. 14, 2001), 1st Dist. No. C-000213, 2001-Ohio-4021, 2001 W.L. 1589169; *Bardonaro*, 2000 W.L. 1062188; *Myer v. Preferred Credit, Inc.* (Ohio Com. Pl., Harrison Cty. 2001), 117 Ohio Misc.2d 8, 18, 2001-Ohio-4190, 766 N.E.2d 612. If anyone should be complaining about Judge Glickman's handling of the evidence of the aggravated murder charge, it should be Plaintiff.

MedLink has also taken issue with counsel's comment in opening argument that County

Inspector Case “was so upset he wanted murder charges filed.” *Vol. II, p. 390; Sec. Supp., p. 36.* Once again, MedLink’s objection to this remark was sustained. *Id.* At the conclusion of the trial, Judge Glickman specifically instructed the jury that opening arguments do not constitute evidence. *Vol. VII, p. 1325; Sec. Supp., p. 217.* MedLink has pointed to nothing in the proceedings that occurred which could overcome the longstanding presumption that the jury followed this admonishment. *Pang, 53 Ohio St.3d at 195; Austin, 2004 W.L. 239902, p. *3; Roe, 1998 W.L. 827603, p. *3; Wallace, 1980 W.L. 355301, pp. *8-9.*

Contrary to MedLink’s assertions, the statement was made in good faith by Plaintiff’s counsel based upon his pre-trial investigation. *Merit Brief of Appellants, p. 7.* Inspector Case testified in his deposition that he had concluded that Hill’s dereliction was so substantial as to justify criminal prosecution. *Deposition of Robert Case taken June 5, 2002, pp. 23-25; Sec. Supp., pp. 28-30.* He attempted to refer the matter to the Cleveland Police Department but was told it should be handled in “civil” court. *Id., p. 24; Sec. Supp., p. 29.*

The appropriateness and relevance of Inspector Case’s testimony in this regard was even more apparent by the end of the trial. Defense counsel advised the jurors in his opening statement that:

And [in] the final analysis not one government agency, not MRDD, not the State of Ohio, the [County] or anybody has ever taken any formal steps against MedLink to punish them as a company for this unfortunate situation, not one, until today when we have Mr. Becker and Mr. Bashein.

Vol. III, p. 478; Sec. Supp., p. 40. Over Plaintiff’s objection, MedLink’s counsel then elicited testimony from Case just with regard to the favorable findings and results of the County’s investigations. *Vol. IV, pp. 776-778, 783; Sec. Supp., pp. 119-121, 122; Vol. VII, pp. 1274-1275; Sec. Supp., pp. 203-204.* MedLink is now in no position to complain about Plaintiff’s attempts in opening statements to refute the claim that the company had been completely vindicated by the County investigators. *Austin, 2004-Ohio-593, p. *4.* Having devoted substantial time and attention at trial to the findings and results of the County’s investigation, MedLink should have fully appreciated that Plaintiff would be forced to demonstrate that

Inspector Case had actually decided that criminal charges were appropriate but was precluded from pursuing them.

The remainder of the supposed attempts to “incite the passion of the jury” that form the basis of this argumentation occurred seven (7) days later in closing argument. *Merit Brief of Appellants*, pp. 7-8. Counsel is similarly afforded latitude in this final stage of the trial. *Jones v. Olcese* (11th Dist. 1991), 75 Ohio App.3d 34, 39, 598 N.E.2d 853, 856.

Of the five (5) statements that have been identified in the closing arguments, not a single one was viewed as sufficiently “egregious” at the time to spark an objection from defense counsel. *Merit Brief of Appellants*, pp. 7-8. No concern was expressed when the “condemnation to death” remark was made and MedLink was chastised for its “frivolous” defense. *Tr. Vol. VII*, pp. 1488 & 1490. Any “error” that was committed in this regard has thus been waived. *Shore, Shirley & Co.*, 40 Ohio App.3d 10, 16; *State of Ohio v. Newton*, 108 Ohio St.3d 13, 31, 2006-Ohio-81, 840 N.E.2d 593, 613; *Toledo v. Bernard Ross Family Ltd. Ptrshp.* (Jan. 13, 2006), 6th Dist. No. L-04-1334, 2006-Ohio-117, 2006 W.L. 75252, p. *9.

As defense counsel undoubtedly recognized at the time, it was entirely appropriate for Plaintiff’s counsel to suggest to the jurors that they were the “conscience of Cuyahoga County” and they should “do the right thing,” as evidenced by the lack of any objections. *Merit Brief of Appellants*, p. 8. Sending a “message” to those who have injured others through their deliberate actions is an important function of punitive damages. *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 653, 1994-Ohio-324, 635 N.E.2d 331 (concluding that awarding a portion of the defendant’s net worth as punitive damages “will send the message”); *Bazali v. Winkle, Chevrolet, Olds, Pontiac, Inc.* (July 23, 1992), 3rd Dist. No. 11-91-7, 1992 W.L. 180085, p. *6 (holding that jury’s award of punitive damages was insufficient to penalize the defendant and “send a message”).

There was nothing wrong, moreover, with counsel’s comments that “anger” would be a predictable reaction to MedLink’s deplorable misconduct. *Merit Brief of Appellants*, pp. 7-8. At no time was it suggested that the verdict should actually be influenced by emotion. *Vol. VII*,

pp. 1405, 1418, 1491-1492; *Sec. Supp.*, pp. 219, 220, 221-222. The trial judge dutifully instructed the jurors not to be swayed by passion, sympathy, or prejudice. *Vol. VII, p. 1353; Sec. Supp.*, p. 218. They are presumed to have followed this charge. *Metaullics Syst. Co. L.P. v. Molten Metal Equip. Innov., Inc.* (8th Dist. 1996), 110 Ohio App.3d 367, 370, 674 N.E.2d 418, 420; *U.S. Aviation Underwriters, Inc. v. BF Goodrich Co.* (9th Dist. 2002), 149 Ohio App.3d 569, 577, 2002-Ohio-5429, 778 N.E.2d 122, 128.

MedLink seemingly fails to appreciate that this was a punitive damages case. Plaintiff was under no obligation to tiptoe around the startling evidence of deliberate patient neglect that emerged during the proceedings. Everything Plaintiff's counsel said in the presence of the jurors was completely justified by MedLink's callous disregard for the laws of Ohio and the safety of the Decedent. In light of the fact that a young woman had needlessly died as a result of - as Supervisor Fribley herself acknowledged - a company's decision to place "profits over safety" (*Vol. III, p. 539; Sec. Supp.*, p. 69), counsel's strong words to the jury were entirely appropriate. See *Villella*, 45 Ohio St.3d 36, 39-40; *Cicchillo v. A Best Prods. Co.* (Jan. 10, 2002), 8th Dist. No. 79288, 2002-Ohio-4, 2002 W.L. 42963, p. *5; *Klinebriel v. Smith* (Feb. 6, 1996), 4th Dist. No. 94 CA 1641, 1996 W.L. 57947, pp. *4-5. This Court's decision not to accept jurisdiction over the Fourth Proposition of Law was thus sound.

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.

A. STATUTORY REQUIREMENTS FOR PRIVATE JUDGES.

As worded, the Third Proposition of Law questions only whether a private judge must have been previously "elected" to the bench in order to serve under R.C. §2701.10. In the proceedings below the Eighth District rejected this contention and observed that:

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.

Barnes, 2006-Ohio-6266, p. *9. MedLink has cited no authorities to the contrary.

MedLink's analysis of this Proposition of Law is founded squarely upon exhibits that were never introduced at the trial court level and are thus extraneous to the record on appeal.¹⁷ *Merit Brief of Appellants*, pp. 15-16. Even if one assumes that Private Judge Glickman's background has been accurately described, he and the parties had every reason to believe at the time the dispute was referred to him that he was suitably qualified to serve as a private judge. In accordance with Section 13, Article IV of the Ohio Constitution, he had twice been appointed by Governor Taft to the Cuyahoga County Court of Common Pleas bench. *Id.* As a matter of both public record and knowledge, his first re-election bid in 2002 had been unsuccessful and he had voluntarily retired his seat in 2004 before his second term expired. *Id.* A little over two (2) months later, he submitted his registration as a potential Private Judge to the Supreme Court Clerk in accordance with R.C. §2701.10(A) and at no time in the months that followed was he ever advised that it was somehow defective. He proceeded to handle numerous trials for other parties during this period without incident. Moreover, not a single court had ever held (or has yet to hold) that only a judge who has retired from a seat won through an election could accept a referral through R.C. §2701.10. It was not until July 12, 2006, which was approximately three (3) months after the instant trial court proceedings had been concluded, that this Court held that the Private Judge Act only permitted bench trials. *State ex rel. Russo v. McDonnell*, 110 Ohio St.3d 144, 2006-Ohio-3459, 852 N.E.2d 145.

¹⁷ MedLink has struggled to interject new evidence throughout the appellate proceedings. In a decision dated November 9, 2006, the Cuyahoga County Court of Appeals denied the home health care agency's requests to modify the record with such materials. A similar application was rejected by this Court on August 16, 2007. Portions of MedLink's Supplement were then stricken on September 11, 2007 because they were not contained in the trial court record.

As Plaintiff has argued each time MedLink has attempted to introduce new evidence into the appeal, the real concern is that the defense is attempting to establish only one side of the story. Because no suggestion was ever made at the trial court level that MedLink's attorneys had somehow been duped when they entered the referral agreement and waived their client's appeal rights on the record, Plaintiff was effectively precluded from deposing them and confirming that they fully appreciated that Private Judge Glickman had never won an election. Because they withheld their objections to the Private Judge's authority until after the trial court proceedings had been concluded, MedLink was able to preclude any inquiry into whether its improbable representations are accurate.

The fact that Private Judge Glickman's Registration was accepted and left undisturbed by the Clerk for months is not surprising given the terms of the statute. R.C. §2701.10(A) allows referrals to either a "voluntarily retired judge" or "any judge who is retired under Section 6 of Article IV, Ohio Constitution." With regard to this latter classification, nothing within the text of Section 6 suggests that only judges who surrender a seat won through election can be considered to have "retired." *Merit Brief of Appellants, Appendix, p. 0100*. Like the statute, this Constitutional provision draws a distinction in Section 6(C) between a "voluntarily retired judge" and "any judge who has retired under this Section." *Id.*

If one assumes, for the sake of argument, that MedLink's unsubstantiated factual assertions are correct, then by operation of Section 13, Article IV of the Ohio Constitution, Judge Glickman received all the authority and responsibility of a Section 6(A)(3) Common Pleas judge upon his appointment to a vacant seat by Governor Taft on April 2, 2003. See generally *State, ex rel. Morgan v. Arshinkoff* (9th Dist. 1984), 15 Ohio App.3d 101, 104, 472 N.E.2d 1134, 1138. He then retired, according to MedLink, after serving the bench for approximately fourteen (14) months. *Merit Brief of Appellants, pp. 15-16*. Even if it is true that Judge Glickman was not a "voluntarily retired judge" he was still a "retired judge" under Section 6, Article IV of the Ohio Constitution.

MedLink has construed the second part of R.C. §2701.10(A) as applying only to "judges who are over the age of 70 and were required to retire under Article IV, Section 6 of the Ohio Constitution." *Merit Brief of Appellants, p. 14*. The "over age of 70" requirement is solely MedLink's own creation, as no such language appears in either the statute or the pertinent portions of the Ohio Constitution. While the first sentence of Subsection (C) of Section 6, Article IV, imposes an age limit of 70 years upon "elected or appointed" jurists, there is nothing in that provision that prevents an appointed judge from retiring under that Section. *Id., Appendix, p. 0100*. Indeed, the second sentence of Subsection (C) provides that:

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 ***. [emphasis added]

Id. A plain and obvious distinction has been drawn between a “voluntarily retired judge” and “any judge who is retired under this section,” and Private Judge Glickman indisputably qualifies under the latter category. Like the Eighth District, this Court should reject MedLink’s twisted interpretation of these provisions and simply afford them their plain and ordinary meaning. See generally, *Hubbard v. Canton City Sch. Bd. of Edn.*, 97 Ohio St.3d 451, 454, 2002-Ohio-6718, 780 N.E.2d 543.

This analysis is consistent with the Supreme Court’s Guidelines for Assignment of Judges, pertinent portions of which are appended hereto as *Exhibit B*. The phrase “retired judge” has been defined to include one who voluntarily retires from judicial service who served as a “sitting judge.” *Id.*, at §VI(15)(D). The Guidelines further define a “Sitting judge” as one who “holds office by reason of or gubernatorial appointment...” *Id.* at §VI(15)(E) (emphasis added). The aforementioned definition of “retired judge” was drafted to specifically include:

***[A]ny person who served as a sitting judge under either of the following circumstances:

- Without being defeated in an election for new service on that court or continued service on that court. ***

Id., p. 9. Even assuming MedLink’s descriptions of Judge Glickman’s credentials are correct, he was not defeated in an election following his gubernatorial appointment of April 2, 2003. *Merit Brief of Appellants*, p. 16. Rather, he retired voluntarily before the election on July 2, 2004. *Id.* By all accounts, his retirement complied with Section 6 of Article IV of the Ohio Constitution and he thus falls within the gambit of R.C. §2701.10(A).

It is inconsequential that Rule VI, Section 1(C)(2) of the Rules for Government of the Judiciary defines “voluntarily retired judge” to mean only a jurist who has prevailed in an election and then resigned. *Merit Brief of Appellants, Appendix*, p. 0092. Just as with the Ohio Constitution and R.C. §2701.10, those standards also draw a distinction in Section 1(C)(1) between a “voluntarily retired judge or a judge retired under Article IV, Section 6(C) of the Ohio Constitution.” *Id.* The latter category is plainly broader than the former. There is nothing

in the text of the Rules for Government of the Judiciary that supports MedLink's claim that only a judge who has retired following a successful election can be deemed to be "retired under Article IV, Section 6(C) of the Ohio Constitution." He only has to meet one or the other category to fall under R.C. §2701.10(A), not both.

B. ELECTED VS. APPOINTED JUDGES.

MedLink believes that its strained construction of R.C. §2701.10 must prevail because there is somehow something suspect or undesirable about a judge who was appointed to the bench by the Governor's office. *Merit Brief of Appellants*, pp. 12-14. It is safe to assume that if the General Assembly had agreed with this result-oriented logic, terms would have been included in the statute requiring the private judge to have previously held an elected seat. "In matters of construction, it is the duty of [the] court to give effect to the words used, not to delete words used or to insert words not used." *Cleveland Elec. Illum. Co. v. City of Cleveland* (1988), 37 Ohio St.3d 50, 524 N.E.2d 441, paragraph three of the syllabus (citation omitted).

There is, of course, no legitimate reason to believe that jurists who have received the honor of a Gubernatorial appointment are incapable of serving as private judges, especially with the consent of the parties and the approval of the court. The framers of the Ohio Constitution specifically provided that such individuals are afforded the same authority as elected jurists for the remainder of their terms under Section 6, Article IV. See generally *Morgan*, 15 Ohio App.3d 101, 104. Litigants who legitimately feel that nothing short of an elected judge will do need only withhold their consent to any proposed referrals to a "lesser" jurist. R.C. §2701.10(B)(1). Participation in proceedings under this statute is, of course, purely voluntary. *Russo*, 110 Ohio St.3d at 148. Private Judge Glickman's unsuccessful 2002 re-election bid was not a concern to MedLink and its numerous attorneys when the trial started, and it should be of no moment for this Court now. *Vol I*, pp. 146-148; *Sec. Supp.*, pp. 32-34.

C. MEDLINK'S ASSAULTS ON THE PRIVATE JUDGE.

MedLink's thinly-veiled accusations of dishonesty and concealment against Private Judge Glickman are both irresponsible and unfounded. *Merit Brief of Appellants*, pp. 13-14.

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The responsibility of determining whether he was a suitable individual to conduct the jury trial rested squarely upon the litigants' own legal counsel. The fact that he had never won an election was a matter of public record, which could be easily confirmed (if defense counsel was not aware of it already) by checking with the Cuyahoga County Board of Elections. Indeed, all of the documents appended to MedLink's short-lived Verified Complaint for a Writ of Mandamus in *Sup. Ct. Case No. 06-0932* pertaining to Judge Glickman's credentials were publicly available before MedLink agreed both in writing and in open court to refer the dispute to him. For strong public policy reasons that are too numerous to separately identify herein, it has been well recognized that an attorney's neglect (if there actually was any here) will be imputed to the client and cannot be cited as justification for disturbing a verdict in favor of the opposing party. *GTE Automatic Elec., Inc. v. ARC Indus., Inc.* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113, paragraph four of the syllabus; *Brown v. Akron Beacon Journal Pub. Co.* (9th Dist. 1991), 81 Ohio App.3d 135, 140, 610 N.E.2d 507, 510.

In an effort to explain why a timely objection was never raised, MedLink has maintained that its attorneys had not appreciated that the referral agreement of April 18, 2005 contained language confirming that the Private Judge was expected to "preside over a jury."¹⁸ *Merit Brief of Appellants*, p. 5. The absurdities of the home health care agency's reasoning has reached new lows. If the defense attorneys did not appreciate that Private Judge Glickman was going to "preside over" their jury trial at the time they executed the agreement, they certainly did once he began conducting *voir dire*. Perhaps more significantly, no one – especially an attorney – should expect to be excused from the full force and effect of a legal document that was voluntarily signed but not read. *Ullmann v. May* (1947), 147 Ohio St. 468, 72 N.E.2d 63, paragraph two of the syllabus; *Roback v. Roback* (1953), 97 Ohio App. 415, 113 N.E.2d 898; 17 OHIO JURISPRUDENCE 3D (1980), 447, Contracts, Section 18.

¹⁸ The parties, including MedLink, had decided to include the reference to the jury trial in the referral agreement precisely because the law was not settled with regard to whether such proceedings could be properly conducted under the Private Judge Act. The decisions that answered this question in the negative were not issued until well after the verdict had been rendered. *Russo*, 110 Ohio St.3d 144; *State ex rel. MetroHealth Med. Ctr. v. Sutula* (Nov. 23, 2005), 8th Dist. No. 87184, 2005-Ohio-6243, 2005 W.L. 3120209.

In a further assault upon the Private Judge's integrity, MedLink has accused him of making a "curious request" at the outset of the pre-judgment interest hearing that Lexington waive its appeal rights with regard to his authority. *Merit Brief of Appellants*, p. 9. It has been represented that the insurer "refused" to do so and it was at that moment that they realized that something was amiss with the Judge's appointment. *Motion to Supplement the Record by Defendant-Appellants filed August 1, 2007*, p. 2. In truth, it was Plaintiff's counsel (not Private Judge Glickman) who had offered to withdraw his opposition to the insurer's attempts to intervene in the pre-judgment interest proceeding if the carrier would join the waiver of appeal rights that MedLink had entered months earlier. *PJI Tr.*, pp. 40-42; *Sec. Supp.*, pp. 230-232. Far from "refusing" to accept the waiver, Lexington's counsel attempted without success to contact his client to discuss the issue. *PJI Tr.*, p. 45; *Sec. Supp.*, p. 233.

Citing one of the exhibits that has been the subject of the unsuccessful efforts to modify the appellate records, MedLink has represented that Douglas R. Stephens of this Court's Judicial & Court Services issued a letter "indicating that a determination was made that Glickman's name should not appear on the listing of appropriately registered private judges kept by the Supreme Court of Ohio." *Merit Brief of Appellants*, pp. 9-10 & 16. This is a blatant distortion of the official communication. Mr. Stephens had stated only that "it appears" that Private Judge Glickman should not have been listed and he was invited to present his own position in this regard. The undersigned counsel understands that Private Judge Glickman decided to remove his name from the roster because, following the announcement of *Sutula*, 2005-Ohio-6243, there was little (if any) remaining demand for private judges since the Act had been confined to bench trials.¹⁹ MedLink's unrelenting efforts to discredit a well-respected former judge who had been asked by all the parties to conduct their jury trial for them is the epitome of "sour grapes."

¹⁹ Of course, Plaintiff was unable to conduct discovery and submit evidence with regard to the Private Judge's status with this Court since a timely objection was never raised to his authority before the trial court proceedings concluded and a final judgment on March 14, 2006.

D. MEDLINK'S AVAILABLE RELIEF.

On a final note, it must be stressed that the Third Proposition of Law raises only the narrow question of whether Private Judge Glickman qualified for service as a private judge under R.C. §2701.10. Answering this question will be necessary only in the event that this Court concludes in the analysis of the First Proposition of Law that a remand is necessary for a determination of whether the punitive damage award comports with the requirements for due process under *State Farm* and *Gore*. In that event (and in that event only), the proceedings should simply be returned to the originally assigned judge (who has now been replaced by a successor) for further proceedings to this limited extent. Neither of the two Propositions of Law that were prepared by MedLink and accepted by this Court warrant any interference with the jury's award of compensatory damages and the imposition of pre-judgment interest.

E. INTERJECTION OF REJECTED PROPOSITIONS OF LAW.

As has been its penchant in this appeal, MedLink's Fifth Proposition of Law (which this Court declined to accept) is now embedded in the discussion of the Third Proposition of Law. *Merit Brief of Appellants*, pp. 17-22. The unsuccessful Fifth Proposition of Law had stated that:

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

Memorandum in Support of Jurisdiction of Defendant-Appellants, p. 14. It is, of course, quite ironic that MedLink's entire "subject matter jurisdiction" argument falls well outside the jurisdictional authority that was granted by this Court to review the Eighth District's decision.

This Court's refusal to consider the Fifth Proposition of Law (Subject Matter Jurisdiction) was justified on a number of levels. Perhaps the most apparent is that subject matter jurisdiction is a narrow legal concept which does not permit final judgments to be overturned years, if not decades, later through challenges to the trial judge's authority. *See generally Pratts v. Hurley*, 102 Ohio St.3d 81, 83, 2004-Ohio-1980, 806 N.E.2d 992, 996 ("**** [S]ubject-matter jurisdiction goes to the power of the court to adjudicate the merits of a case ***."); *State ex rel. Jones v. Suster*, 84 Ohio St.3d 70, 75, 1998-Ohio-275, 701 N.E.2d 1002,

1007 (“Subject matter jurisdiction is a court’s power to hear and decide a case on the merits.” (citation omitted)); *State ex rel. Wright v. Griffin* (July 1, 1999), 8th Dist. No. 76299, 1999 W.L. 462338, p. *4 (same). There has never been any dispute that common pleas courts possess authority to adjudicate medical malpractice/wrongful death claims. Because MedLink never objected to Private Judge Glickman’s authority before the trial commenced, they are now precluded from doing so notwithstanding their unfounded claims of “subject matter jurisdiction.” *Seaford v. Norfolk S. Ry. Co.* (8th Dist. 2004), 159 Ohio App.3d 374, 2004-Ohio-6849, 824 N.E.2d 94, *rev’d on other grds.*, (opining that “[t]he railroad cannot now for the first time, therefore, attack the jurisdiction of the visiting retired judges on appeal. . . . Clearly, the decision by the [appellants] to proceed without challenge or objection concerning the appointment of [the visiting judge] renders any possible error waived.” (citations omitted)).

Granting jurisdiction over the Fifth Proposition of Law would have made little sense given that this question had recently been answered by this Court adversely to MedLink. Although the ruling in *In re J.J.*, 111 Ohio St.3d 205, has now been cited by Plaintiff in two (2) separate filings and during the Eight District oral argument, MedLink has steadfastly refused to discuss the controlling precedent in its briefing.²⁰ This is undoubtedly because there is no escaping the fact that it has now been conclusively determined that “procedural irregularities” in the assignment of judges merely render a judgment merely voidable, not void. *Id.*, paragraph one of the syllabus. A litigant who willingly acquiesces to a referral has no right to later complain only after an adverse judgment has been rendered. *Id.* at 207-208.

In *In re J.J.*, 111 Ohio St.3d 205, this Court analyzed a child custody case that was litigated in Cuyahoga County. There was no dispute that the action had been improperly transferred to a magistrate in violation of Juv.R. 40. *Id.* at 209. The magistrate then transferred the dispute to a visiting judge, who awarded custody of the child to the Cuyahoga County

²⁰ Plaintiff first raised the implications of *In re J.J.*, 111 Ohio St.3d 205, in a Second Notice of Supplemental Authority that was submitted to the Court of Appeals on November 8, 2006. The decision was again discussed at length in the Memorandum Opposing Jurisdiction that was served in the instant proceedings on February 26, 2007 (pp. 1 & 22-23). The fact that MedLink’s Merit Brief does not attempt to address, let alone distinguish, this controlling precedent speaks volumes.

Department of Children and Family Services. *Id.* at 206. When the father argued for the first time on appeal that subject matter jurisdiction was lacking, the Eighth District agreed and reversed the ruling. *In re J.J.* (Nov. 17, 2005), 8th Dist. No. 86276, 2005-Ohio-6096, 2005 W.L. 3073689.

Writing for the Supreme Court, Justice Terrence O'Donnell observed that there are two forms of jurisdiction: subject-matter jurisdiction and jurisdiction over a particular case. *In re J.J.*, 111 Ohio St.3d 205, 207-208. Only the former renders a judgment void (not just voidable). *Id.* The Court proceeded to review a number of authorities recognizing that defects in the appointment of a judge do not implicate subject matter jurisdiction. *Id.* Included in this analysis was *State of Ohio v. Swiger* (9th Dist. 1998), 125 Ohio App.3d 456, 708 N.E.2d 1033, which Plaintiff had been citing in the instant proceedings. *Reply Brief of Plaintiff-Appellant*, 8th Dist. No. 87903, p. 10; *Plaintiff-Appellee/Cross-Appellant's Response to Notice of Additional Authority*, 8th Dist. Nos. 87247/87285, p. 2. This Court thus concluded that:

Juv.R. 40 does not extend this power of assignment to magistrates, and even the department concedes that the magistrate erred by signing the transfer order. This error, however, does not affect the subject-matter jurisdiction of the juvenile court over neglect and custody hearings. This case, like *Pratts* [v. *Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, 806 N.E.2d 992] and [*Ex Parte*] *Strang* [(1871), 21 Ohio St. 610], is "not an inquiry into the jurisdiction of the court, but an inquiry into the right of the judge to hold the office." *Strang*, 21 Ohio St. at 616. Therefore, the magistrate's order, although erroneous, did not divest the juvenile court of jurisdiction; further, because [the father] failed to object at any time during any of the proceedings, he has not properly preserved the error and has waived it for purposes of appellate review. [emphasis added].

In re J.J., 111 Ohio St.3d at 209.

In accordance with this controlling precedent, MedLink's failure to object to the purported violation of R.C. §2701.10 is also fatal to their claim that Private Judge Glickman lacked authority to preside over the jury trial. Quite clearly, *In re J.J.*, 111 Ohio St.3d 205, analyzed the doctrine of subject matter jurisdiction in sweeping terms and the decidedly broad syllabus holding cannot be artificially constricted to a magistrate's improper assignment of a

dispute to a visiting judge under Juv.R. 40. To its credit, MedLink has not suggested in its voluminous Merit Brief that *In re J.J.* is somehow distinguishable on the grounds that the Private Judge Act was not directly involved. That statute was at issue in *Huffman v. Huffman* (Nov. 5, 2002), 10th Dist. No. 02AP-101, 2002-Ohio-6031, 2002 W.L. 31466435, p. *3, and the same result was reached. The Tenth District sagely explained:

Because the retired judge assumed and carried out the functions of the special judicial office with the acquiescence of defendant during the post-decree proceedings, the retired judge became a *de facto* judge in the proceedings with all the power and authority of a judge appointed in accordance with the lawful authority of R.C. 2701.10. *** Defendant is estopped from raising his untimely challenge because he waited until he suffered adverse judgments to challenge the retired judge's authority in the post-decree proceedings. *** [emphasis added, citations omitted].

Id., p. *9. Significantly, *Huffman* was cited with approval in *Russo*, 110 Ohio St.3d at 150.²¹

The *In re J.J.* decision cited *In re J.L.* (Nov. 17, 2005), 8th Dist. No. 85668, 2005-Ohio-6125, 2005 W.L. 3081535, with approval. *In re J.J.*, 111 Ohio St.3d at 209. In the opinion authored by Judge Diane Karpinski, it was observed that "it has long been the rule that any challenge to a judge's authority must be raised at the time the judge is hearing the case." *In re J.L.*, 2005-Ohio-6125, p. *9, citing *Huffman v. Shaffer* (8th Dist. 1984), 13 Ohio App.3d 291, 292, 469 N.E.2d 566. Even a defectively appointed judge "is deemed a *de facto* judge with all the power and authority of a proper *de jure* judge" when his/her role in the action has not been properly challenged. *In re J.L.*, p. *10. The Supreme Court of Ohio remarked after discussing *In re J.L.* that:

That holding, unlike the one in the instant case, comports with our precedent because it recognizes that the magistrate's order, though improper, granted the visiting judge authority as a de facto officer to preside over the case. A party may timely object to the

²¹ MedLink's reliance upon *Russo*, 110 Ohio St.3d 144, is misplaced. *Merit Brief of Defendant-Appellants*, p. 10. In that Opinion (which was issued after final judgment had been rendered in the instant action) this Court held that jury trials were not permitted under the terms of the Private Judge Act, R.C. §2701.10. *Id.* at 154. The question of whether a judge appointed by the Governor can still qualify as one "who is retired under Section 6 of Article IV, Ohio Constitution" within the meaning of R.C. §2701.10(A) was never addressed.

authority of a visiting judge on the basis of an improper case transfer or assignment, but failure to timely enter such an objection waives the procedural error. [emphasis added].

In re J.J., 111 Ohio St.3d at 209.

MedLink has relied heavily upon *Cangemi v. Cangemi* (Feb. 24, 2005), 8th Dist. No. 84678, 2005-Ohio-772, 2005 W.L. 433529. *Merit Brief of Appellants*, pp. 17-19 & 21. The parties in that instance, with the approval of a domestic relations court judge, had attempted to fashion a binding arbitration proceeding that still permitted review through a direct appeal to the Court of Appeals. The arrangement violated nearly every requirement of the Private Judge Act and, in contrast to Private Judge Glickman, the arbitrator was not even arguably a “retired judge.” *Id.*, p. *3. Citing the aforementioned Tenth District decision, the Eighth District concluded that:

“Judicial power may be conferred upon a person or a court only by authority of law, and in the absence of such authority, a judge cannot delegate his judicial authority.” *Huffman v. Huffman*, Franklin App. Nos. 02AP-101, 02AP-698, 2002-Ohio-6031 (citing *Demereaux v. State* (1930), 35 Ohio App. 418, 172 N.E. 551). A delegation of judicial authority under color of right may allow the person to whom the judicial authority is transferred to act as a de facto judge, even if the delegation of authority is defective. Here, however, the appointment of Mr. Heutsche was made without color of authority, and was therefore void. [emphasis added].

Id. Since Private Judge Glickman had been approved by the originally assigned judge and all of the parties, his appointment to preside over the jury trial was – at a minimum – made with “color of authority.” *State ex rel. Fangman v. Police Relief Fund* (1st Dist. 1943), 72 Ohio App. 51, 53, 50 N.E.2d 609, 610-611. The Eighth District thus did not err in concluding that its prior decision in *Cangemi* did not justify a reversal.

There certainly can be no solace for MedLink in *State ex rel. Kline v. Carroll*, 96 Ohio St.3d 404, 2002-Ohio-4849, 775 N.E.2d 517. *Merit Brief of Defendant-Appellants*, pp. 17-18. In that case, the Cuyahoga County Court of Common Pleas had issued an order transferring a criminal proceeding from the Parma Municipal Court to the Lakewood Municipal Court due to an alleged conflict of interest among the judges. The Supreme Court held that the Lakewood Municipal Court “patently and unambiguously lacked jurisdiction” because there was no legal

authority whatsoever supporting a “court to court” transfer by a third court. *Id.* at 407. In no sense did the high court suggest that a dispute over a voluntary referral from the original judge to a private judge within the same court system would implicate “subject matter jurisdiction.” Even if the law were otherwise, MedLink was still not entitled to await the results of the proceeding before lodging an objection. *In re J.J.*, 111 Ohio St.3d at 207-208; *Seaford*, 159 Ohio App.3d at 384.

In the event that this Court possesses any inclination to restrict or overturn the unanimous decision that was rendered last year in *In re J.J.*, 111 Ohio St.3d 205, careful consideration should be given to the profound ramifications of this Proposition of Law. Private Judge Glickman and numerous other private judges, retired judges, and visiting judges have adjudicated countless jury trials during the course of Ohio jurisprudence. MedLink’s ardent position is that anyone who is dissatisfied with such a ruling should be permitted years later to challenge the legality of the referral since “subject matter jurisdiction” can never be waived and may be raised at any time. *Merit Brief of Appellants*, pp. 17-22. Countless plaintiff and defense verdicts alike would have to be set aside. *See, e.g., Stewart v. Giulitto* (June 23, 2006), 11th Dist. No. 2005-P-0074, 2006-Ohio-3217, 2006 W.L. 1725960, p. *4 (refusing to disturb acting judge’s grant of summary judgment to the defense where no timely objection to his authority was raised.) The impact of such a revolutionary holding upon Ohio’s legal system would be catastrophic. In order to ensure that plaintiffs and defendants alike are held to the judgments that have been entered against them, this Court should refuse to broaden the concept of “subject matter jurisdiction” beyond that which was carefully delineated in *In re J.J.*, 111 Ohio St.3d at 207-209.

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CONCLUSION

For the foregoing reasons, this Court should reject MedLink's two (2) remaining Propositions of Law in their entirety and affirm the Eighth District *in toto*. In the event that they are found to have merit, however, these proceedings should be remanded to the Cuyahoga County Court of Common Pleas solely for purposes of allowing an "elected" judge to reconsider the denial of MedLink's Motion for Due Process Hearing and Review of Punitive Damages Awarded Prior to Entry of Final Judgment of August 18, 2005. Apart from the punitive damage award, the other rulings issued in the proceedings below should be affirmed in all respects.

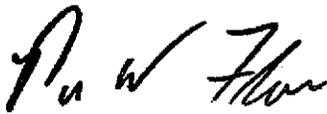
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the forgoing **Brief** was served via regular U.S. Mail on this

14th day of September, 2007 upon:

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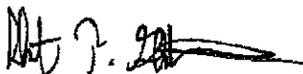
award of punitive damages was based on the incident that led to the death of Natalie Barnes. The plaintiff did not introduce evidence of MedLink conduct that did not directly relate to the tragic death of Ms. Barnes.

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.



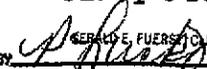
Judge Robert T. Glickman
sitting pursuant to R.C. 2701.10

9/16/05

Date

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BY  CLERK 0002

The Supreme Court of Ohio

GUIDELINES FOR ASSIGNMENT OF JUDGES

The Ohio Constitution and the Ohio Revised Code vest the Chief Justice with the authority to make temporary assignments of judges to serve in any court in Ohio as established by law in whatever circumstances the Chief Justice deems appropriate.

These guidelines are intended to establish consistent standards and procedures in implementing this authority. While these guidelines may impose specific duties upon other persons, the Chief Justice may waive compliance with any guidelines to assist the exercise of that discretion.

These guidelines have not been adopted as rules pursuant to Article IV, Section 5 of the Ohio Constitution, and should not be construed as requiring adoption.

SECTION I. REQUIREMENTS AND PROCEDURES

1. **Reasons for Assignment of Judges.** The administrative judge of any court or division of a court may request the Chief Justice to temporarily assign a sitting or retired judge to hold court pursuant to the guidelines set forth herein and for any of the following reasons:

(A) **Overburdened docket/extended trial.** A judge may be assigned if the court or division that is in need of the assigned judge has an overburdened docket or anticipates an extended trial that will disrupt its docket.

(B) **Recusals for conflict of interest.** A judge may be assigned if a sitting judge recuses from one or more specific cases because of a conflict of interest involving a litigant, counsel, or the subject of the case. The fact that a local attorney is a litigant should not cause the sitting judge to recuse unless the relationship of the sitting judge with the attorney justifies recusal.

(C) **Illness, emergency, vacation, and continuing education.** A judge may be assigned if a sitting judge will be temporarily absent for one or more of the following reasons:

- The sitting judge is ill or unable to attend to judicial duties.
- The sitting judge is experiencing a personal or family emergency that interferes with the performance of judicial duties.
- The sitting judge plans to take a reasonable vacation or attend a continuing legal education conference, seminar, or workshop and the sitting judge cannot

reasonably schedule his or her docket to eliminate the need for a replacement during the absence.

(D) **Extraordinary circumstance.** A judge may be assigned for any extraordinary circumstance approved by the Chief Justice.

2. **Type and Length of Assignment.**

(A) **Type of assignment.** A judge may be temporarily assigned by the Chief Justice to one or more specific cases, for a specific period of time, or in a special circumstance (e.g., the convening or deliberation of a grand jury, appointment of a special prosecutor, consideration of a particular type of docket, etc.).

(B) **Length of assignment.** A judge assigned for a specific period of time will not ordinarily be continued in service in the same court, or have the length of the assignment extended beyond the original term, without the agreement of the administrative judge of that court, except as noted in Guideline 11(B) (Assignment for specific period of time).

A sitting judge will not ordinarily be assigned for a specific period of time exceeding six months and a retired judge will not ordinarily be assigned for a specific period of time exceeding three months.

3. **Requirements Before Requesting Assignment.** Before requesting the Chief Justice to assign a judge to a court, the administrative judge of that court shall proceed as follows:

(A) **Other judge of the court.** The administrative judge shall attempt to arrange for another sitting judge of that court to perform the duties of the judge who is in need of a replacement.

(B) **Other judges of division in common pleas court.** The administrative judge of a division of the court of common pleas shall request the presiding judge of that court to assign a sitting judge from another division of that court to perform any unanticipated emergency duties of a temporarily absent judge if the temporarily absent judge has no hearings or trials scheduled for the time of that absence.

(C) **Certification by administrative judge.** The administrative judge who requests an assigned judge may cause the sitting judge who requests a replacement to satisfy the first two requirements of this guideline, but the administrative judge shall certify that it has been satisfied.

(D) **Affidavits of disqualification.** If a judge of a multiple-judge division of a court of common pleas is disqualified pursuant to an affidavit of disqualification, the administrative judge of that division shall assign another sitting judge as provided in R.C. 2101.39 and 2701.03. In other situations, including where all judges of a court or division are disqualified, the Chief Justice shall designate an assigned judge.

4. Procedure for Requesting Assignment. The administrative judge shall make the request for an assigned judge on behalf of the court, division, or any of its judges, and the request shall meet the following requirements:

(A) Written request to Chief Justice. The request shall be written and addressed to the Chief Justice. If unexpected circumstances preclude a written request, the administrative judge may request an assigned judge by telephone or other means, provided the administrative judge promptly confirms the request in writing.

(B) Statement of reason for request. The request shall state the reason the court requires the assistance of an assigned judge, pursuant to Guideline 1 (Assignment of Judges). The Chief Justice may deny any request for an assigned judge that does not contain the reason for the request.

(C) Type and length of assignment requested. The request shall state whether the assignment should be for one or more specific cases, for a specific period of time, or for a special circumstance, pursuant to Guideline 2 (Type and Length of Assignment), and, if for a specific period of time, it shall state the length of assignment requested.

(D) Certification. If the court is a multiple-judge or multiple-division court, the request shall certify compliance with Guideline 3 (Requirements Before Requesting Assignment).

5. Request for Specific Judge. The administrative judge may request the Chief Justice to assign a specific sitting or retired judge who has expressed a willingness to accept assignments. If the administrative judge has recused from a case, the administrative judge may not request a specific judge to be assigned to that case.

SECTION II. FACTORS IN SELECTING JUDGES

6. General Factors in Selecting Judges for Assignment. In considering a request for assignment, the Chief Justice may consider the following factors regarding the sitting or retired judge to be assigned:

(A) Status of docket. The Chief Justice may consider the status of the docket of the judge to be assigned, including a comparison of the docket of the judge with the docket of other judges on the same court as the judge to be assigned, and other similar courts. The Chief Justice may also consider the number of cases pending before the judge to be assigned with the number of cases the judge has pending beyond the guidelines provided by the Rules of Superintendence for the Courts of Ohio, and the extent to which the judge or court upon which the judge sits has requested assigned judges for their court.

(B) Competence. The Chief Justice may consider the competence of the judge to be assigned for the prospective duties.

(C) **Experience.** The Chief Justice may consider the experience of the judge to be assigned serving on courts of the level requesting the assignment. The Chief Justice will not ordinarily assign a sitting judge who has not completed at least one full year of judicial service as a judge on the level of court on which the judge currently serves.

(D) **Proximity.** The Chief Justice may consider the proximity of the judge to be assigned to the court making the request. Whenever feasible, an assigned judge from a nearby county should be designated in order to economize on travel time as well as to eliminate or minimize overnight expenses.

(E) **Infirmities.** The Chief Justice may consider the infirmities, if any, of the judge to be assigned.

7. **Additional Factors in Selecting Retired Judges for Assignment.** In addition to the general factors listed in Guideline 6 (General Factors in Selecting Judges for Assignment), the Chief Justice shall consider the following factors in deciding whether to assign a retired judge:

(A) **Practice of law.** A retired judge shall not be assigned while the judge is engaged in the full-time or part-time practice of law in any state.

(B) **Judicial education requirements.** A retired judge shall not be assigned unless the judge has completed and properly reported his or her judicial education requirements pursuant to the Rules for the Government of the Judiciary.

(C) **Resident of state.** A retired judge shall not be assigned unless the judge is a resident or elector of Ohio.

(D) **Good standing.** A retired judge shall not be assigned unless the judge has paid all current attorney registration fees and otherwise is in good standing as a member of the bar.

(E) **Age.** A retired judge shall not be assigned after December 31st of the year in which the judge turns 80 years of age. However in the interest of judicial economy, a retired judge may complete after this deadline any matters to which he or she had been previously assigned.

(F) **Serving as a paid expert witness in Ohio.** A retired judge shall not be assigned if the judge is serving or has served in the preceding twelve months as an expert witness for which he or she has received compensation from a party in a proceeding in any federal or state court in Ohio.

(G) **Arbitration, mediation, and private judging.** A retired judge who engages in alternative dispute resolution such as arbitration, mediation, and private judging pursuant to R.C. 2701.10, is not prohibited from being assigned per se, but the level of the judge's activity in this regard, including the status of his or her arbitration, mediation, or private judging docket may limit the opportunity for assignments under these Guidelines.

SECTION III. LEVELS OF ASSIGNMENT

8. Levels of Assignment of Sitting Judges. A sitting judge may be assigned by the Chief Justice to serve in other courts, subject to constitutional and statutory limitations, as follows:

(A) Municipal and county court judge. A sitting full-time or part-time municipal or county court judge may serve on another municipal court or county court.

(B) Court of common pleas judge. A sitting court of common pleas judge may serve on another court of common pleas, the Court of Claims, or a court of appeals.

(C) Court of appeals judge. A sitting court of appeals judge may serve on a court of common pleas, the Court of Claims, a court of appeals, or the Supreme Court.

(D) Supreme Court justice. A sitting Supreme Court justice may serve on any court of record as deemed necessary.

9. Levels of Assignment of Retired Judges. A retired judge may be assigned by the Chief Justice to serve in other courts, subject to constitutional, statutory, and rule limitations as follows:

(A) Municipal and county court judge. A retired full-time or part-time municipal or county court judge may serve on a municipal court or a county court.

(B) Court of common pleas judge. A retired court of common pleas judge may serve on a court of common pleas or the Court of Claims.

(C) Court of appeals judge. A retired court of appeals judge may serve on a court of common pleas, the Court of Claims, or a court of appeals.

(D) Supreme Court justice. A retired Supreme Court justice may serve on any court of record as deemed necessary.

SECTION IV. CERTIFICATES AND RESPONSIBILITIES ON ASSIGNMENT

10. Certificates of Assignment. A Certificate of Assignment shall be issued by the Chief Justice for each assignment made, as follows:

(A) Specific case. If the assignment is for a specific case, the Certificate of Assignment shall state the case caption and case number, with no more than one certificate issued per case.

The administrative judge of the court requesting the assignment shall direct that the original Certificate of Assignment be filed with the clerk of the court to which the judge has been assigned and included as part of the record in the case.

(B) **Specific period of time.** If the assignment is for a specific period of time, the Certificate of Assignment shall state the dates that the assignment shall be in effect.

The administrative judge of the court requesting the assignment shall direct that the original Certificate of Assignment be filed with the clerk of the court to which the judge has been assigned and entered upon the miscellaneous journal of the court. The administrative judge shall further direct that photocopies of the file-stamped certificate be placed in the case file of every matter considered by the assigned judge pursuant to the certificate.

(C) **Special circumstances.** If the assignment is for a special circumstance not covered by a specific case or for a specific period of time, the Certificate of Assignment shall state the special circumstance.

The administrative judge of the court requesting the assignment shall direct the original Certificate of Assignment to be filed with the clerk of the court to which the judge has been assigned and entered upon the miscellaneous journal of the court. The administrative judge shall further direct that photocopies of the file-stamped certificate be placed in the case file of every matter considered by the assigned judge pursuant to the certificate.

11. **Responsibility for Cases on Assignment.**

(A) **Assignment for specific case.** When a judge is assigned to a court for a specific case, the assignment shall continue until the conclusion of the case, including any post-judgment proceedings, unless and until the case is reassigned.

When an assigned judge arrives at a court on assignment to a specific case, the assigned judge may not exercise other judicial duties in that court until the conclusion of the assigned case, unless the administrative judge of the court or division specifically requests the Chief Justice to designate the assigned judge for that additional purpose by following the requirements of Guideline 4 (Procedure for Requesting Assignment).

(B) **Assignment for specific period of time.** When a judge is assigned to a court for a specific period of time, the temporarily absent sitting judge shall retain responsibility for cases in which the sitting judge has resolved or presided over substantial preliminary matters. The assigned judge shall assume responsibility for cases in which the temporarily absent sitting judge has had the least involvement when the assignment occurs.

When a judge is assigned to a court for specific period of time, all matters pending before the assigned judge should be concluded by the end of the period. Any matter presented to the assigned judge that is not concluded by the end of the period may be extended beyond the end of the period, to allow the assigned judge an opportunity to conclude the matter, not to exceed three months. If the matter continues for more than three months

after the end of the specified period, the administrative judge shall review the request and submit a request for continuation of the assignment, if appropriate.

(C) **Assignment for special circumstance.** When a judge is assigned to a court for a special circumstance, the assignment shall continue until the conclusion of the matter including any post-judgment proceedings, unless and until the case is reassigned.

When an assigned judge arrives at a court on assignment on a special circumstance, the assigned judge may not exercise other judicial duties in that court until the conclusion of the special circumstance, unless the administrative judge of the court or division specifically requests the Chief Justice to designate the assigned judge for that additional purpose by following the requirements of Guideline 4 (Procedure for Requesting Assignment).

12. **Responsibilities of Requesting Court.** In addition to any other responsibilities noted herein, the court to which a judge is assigned shall also meet the following duties and responsibilities:

(A) **Notification of counsel and parties.** The court to which a judge is assigned shall notify counsel of the assignment once it is made by the Chief Justice. If the parties are not represented by counsel, the parties shall be notified.

(B) **Facilities and staff support.** The court to which a judge is assigned shall provide sufficient facilities and staff support to enable the assigned judge to execute the responsibilities of the assignment properly and expeditiously. Support staff should include the services of a bailiff, court reporter, secretary, or law clerk as may be necessary and appropriate for the assignment.

(C) **Reporting of case statistics.** The court to which a judge is assigned shall report the work performed by the judge in the manner required by the Rules of Superintendence for the Courts of Ohio. No sitting judge shall report that he or she disposed of any case or conducted any jury or non-jury trial if the activity was performed by an assigned judge.

SECTION V. REIMBURSEMENT AND COMPENSATION

13. **Reimbursement for Travel Expenses.**

(A) **Appellate courts.** Reimbursement of travel expenses incurred by judges who are assigned to duty in the Supreme Court or a court of appeals shall be governed by the *Supreme Court Guidelines for Reimbursement of Travel and Education Expenses for Appellate Judges*.

(B) **Trial courts.** Reimbursement of travel expenses incurred by sitting and retired judges who are assigned to duty in a court of common pleas, municipal court, or county

court is the responsibility of the applicable county or municipal funding authority and is governed by the policies adopted by such authority.

14. Compensation of Assigned Judge.

(A) **Sitting judge.** If the assigned judge is a sitting judge, all requests for compensation should be forwarded as appropriate to the Supreme Court or local funding authority for payment as follows:

- if sitting with the Supreme Court, the payment of compensation is governed by R.C. 141.11, and all requests for compensation shall be submitted to the Supreme Court using its prescribed compensation form.
- if sitting with a court of appeals, the payment of compensation is governed by R.C. 141.10(B).
- if sitting with a court of common pleas, the payment of compensation is governed by R.C. 141.07.
- if sitting with a municipal or county court, the payment of compensation is governed by R.C. 1901.10 and Sup. R. 17.

(B) **Retired judge sitting on court of common pleas or court of appeals.** If the assigned judge is a retired judge sitting on a court of common pleas or a court of appeals, all requests for compensation should be forwarded to the Supreme Court as follows:

- A retired judge shall request compensation for work performed while serving on assignment by submitting a monthly compensation report on a form prescribed by the Supreme Court. The report shall be submitted after the retired judge performs such work, but not later than the end of the month that immediately follows the month in which the work was performed.
- In accounting for work performed while serving on assignment, a retired judge shall specifically note the type of work performed, as required by the instructions accompanying the monthly compensation report.
- The compensation paid to a retired judge for work performed each day shall be computed by multiplying the number of hours worked that day times one-eighth of the per diem associated with that assignment, not to exceed the full per diem associated with that assignment. A retired judge shall not be entitled to more than one full per diem for each calendar day worked, regardless of the number of hours worked in a particular day.
- The aggregate annual compensation paid to a retired judge as a result of all assignments shall not exceed the annual compensation payable to a judge

serving on the highest level of court to which the retired judge has been assigned during the calendar year.

- The Chief Justice reserves the right not to assign a retired judge who fails to submit monthly compensation reports in accordance with this guideline, and to order the reimbursement of compensation paid to a retired judge who through mistake, inadvertence, or error submits an inaccurate report.

(C) Retired judge sitting on municipal court or county court. If the assigned judge is a retired judge sitting on a municipal court or county court, all requests for compensation should be forwarded to the applicable local funding authority for payment.

SECTION VI. MISCELLANEOUS

15. Definitions. Unless otherwise limited by the context, the following definitions apply to terms used in the Guidelines:

(A) "Administrative judge" means the administrative judge of a court as defined at Sup. R. 4.

(B) "Assigned judge" means either of the following:

- Any sitting judge whom the Chief Justice assigns to serve temporarily on any Ohio court other than the court on which the sitting judge serves;
- Any retired judge whom the Chief Justice assigns to serve temporarily on any Ohio court.

(C) "Chief Justice" means the Chief Justice of the Supreme Court or a designee authorized by the Chief Justice.

(D) "Retired judge" means any person who voluntarily retired from judicial service on any Ohio court, including any person who served as a sitting judge under either of the following circumstances:

- Until the judge was ineligible to seek continued service by reason of constitutional or statutory age limitation;
- Without being defeated in an election for new service on that court or continued service on that court.

"Retired judge" does not include any person who has either 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 against that person under those Rules.

"Retired judge" also does not include any person who has resigned his or her office between the date of defeat in an election for further service on that court and the end of his or her term. The defeat of a judge for new or continued service on a court makes the defeated judge ineligible for assignment to any court that has the same subject-matter jurisdiction as the court for which the defeated judge was seeking election.

(E) "Sitting judge" means any person who holds office by reason of election or gubernatorial appointment on the Supreme Court, Courts of Appeals, Courts of Common Pleas, Municipal Courts, or County Courts of Ohio.

16. **Effective Date.** These Guidelines for Assignment of Judges are effective July 1, 2005.