

IN THE SUPREME COURT OF OHIO

12-1260

KRISTI LONGBOTTOM, et al., Individually
and as Natural Guardians of Kyle Jacob
Smith

Plaintiff-Appellees,

vs.

GARY S. HUBER, D.O., et al.

Defendant-Appellants.

Supreme Court Case No. _____

On Appeal from the Clermont County
Court of Appeals, Twelfth Appellate
District

Court of Appeals
Case Nos. CA 2011-01-005
CA 2011-01-006

NOTICE OF CERTIFIED CONFLICT

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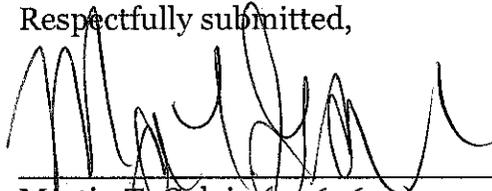
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SUPREME COURT OF OHIO

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SUPREME COURT OF OHIO

Now come Defendant-Appellants, Gary S. Huber, D.O. and Qualified Emergency Specialists, Inc., by and through undersigned counsel, and hereby provide notice to this Court of a conflict of law certified by the Twelfth District Court of Appeals, as discussed in the attached July 12, 2012 Order of Certification. A copy of the certifying court's opinion and a copy of the conflicting court of appeals' opinion (*Barnes v. University Hospitals of Cleveland*, 8th Dist. Nos. 87247, 87285, 87710, 87903, and 87946, 2006-Ohio-6266, ¶75, affirmed in part and overruled on other grounds, 119 Ohio St.3d 173, 2008-Ohio-3344) are attached hereto.

Additionally, this Court should note that the court of appeals declined to certify an additional conflict, which appellants believe exists. Appellants will be filing a separate Notice of Appeal, and a Memorandum in Support of Jurisdiction, requesting that this Court exercise its discretionary jurisdiction to hear that issue as well.

Respectfully submitted,



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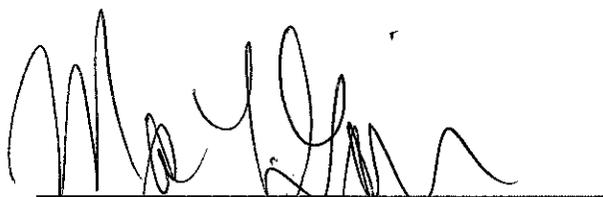
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served on the undersigned counsel, this 25th day of July, 2012, via ordinary U.S. mail, postage prepaid.

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IN THE COURT OF APPEALS OF CLERMONT COUNTY, OHIO

KRISTI LONGBOTTOM, Ind. and as
Natural Guardians of Kyle Jacob Smith,;

CASE NO. CA2011-01-005, -006

Appellees/Cross-appellants,

ENTRY GRANTING MOTION TO
CERTIFY IN PART AND DENYING

vs.

COURT OF APPEALS IN PART

FILED

GARY S. HUBER, D.O., et al.,

JUL 12 2012

Appellants/Cross-appellees.

BARBARA A. WIEDENBELL
CLERK
CLERMONT COUNTY

The above cause is before the court pursuant to a motion to certify conflicts filed by counsel for appellants/cross-appellees, Gary S. Huber, D.O. and Qualified Emergency Specialists, Inc., on May 24, 2012.

Ohio courts of appeal derive their authority to certify cases to the Ohio Supreme Court from Section 3(B)(4), Article IV of the Ohio Constitution, which provides that when the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by another court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination. For a conflict to warrant certification, it is not enough that the reasoning expressed in the opinions of the two courts of appeal is inconsistent; the judgment of the two courts of appeal must be in conflict. *State v. Hankerson*, 52 Ohio App.3d 73 (1989).

Appellants/cross-appellees claim that this court's decision is in conflict with other appellate districts on two issues. First, appellants/cross-appellees claim that this court's decision is in conflict with decisions by the Fifth, Sixth, Seventh, Eighth and Eleventh Districts on the following question: "When a plaintiff does not present expert testimony to establish causation in a medical malpractice action, can the plaintiff rely on

EXHIBIT

A

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the "common knowledge" exception in *Bruni v. Tatsume*, 46 Ohio St.2d 127 (1976), when the alleged injury is not the product of a "foreign object" left by the defendant, the operation on the wrong body part, or where a plaintiff suffers a fall injury while being unattended?"

Appellants/cross-appellees' request for certification is based on the erroneous premise that in this court permitted appellees/cross-appellants to establish causation through a series of stacked inferences and not by way of expert testimony. Appellants/cross-appellees conclude that it is only logical "that this Court relied on the 'common knowledge' exception to the expert testimony requirement set forth in *Bruni* ***."

However, this court did not rely on the common knowledge exception set forth in *Bruni*. Instead, our decision was based upon a painstaking review of all of the evidence which included expert testimony presented by both sides as well lay testimony. Thus, this court's decision is not in conflict with any of the decisions cited by appellants/cross-appellees on pages 6 and 7 of their motion to certify conflict.

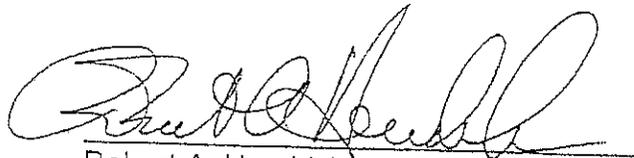
Second, appellants/cross-appellees contend that this court's decision is in conflict with the Eighth District's decision in *Barnes v. Univ. Hosp. of Cleveland*, 8th Dist. Nos. 87247, 87285, 87710, 87903 and 87946, 2006-Ohio-6266, ¶ 75, affirmed in part and overruled in part on other grounds, 119 Ohio St.3d 173, 2008-Ohio-3344. This court acknowledged this conflict in its opinion at ¶ 58. Appellants/cross-appellees argued that the trial court erred by failing to apply a version of the prejudgment interest statute (R.C. 1343.03(C)) that was in effect at the time the jury rendered its verdict, instead of the version of the statute that was in effect at the time of the incident occurred or at the time Kyle Smith and his parents filed their original complaint. This court noted that there was authority, namely the Eighth District's decision in *Barnes*, to

support appellants/cross-appellees' argument that the version of the prejudgment interest statute contained in the amended version of R.C. 1343.03(C) could be applied retroactively. However, this court sided with the First, Third and Seventh Districts, which held to the contrary.

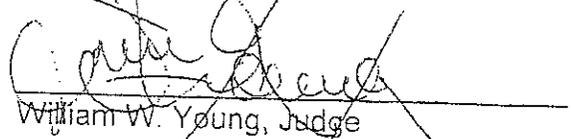
Accordingly, appellants/cross-appellees' request to certify this court's decision as in conflict with the Eighth District's decision in *Barnes* is GRANTED. The question for certification is as follows:

Whether the version of the prejudgment interest statute, R.C. 1343.03(C), as amended effective June 2, 2004, can be applied retroactively to claims accruing before June 2, 2004?

IT IS SO ORDERED.


Robert A. Hendrickson, Presiding Judge


Robert P. Ringland, Judge


William W. Young, Judge



Warning
As of: Jul 22, 2012

ANDREA BARNES, EXECUTRIX, OF THE ESTATE OF NATALIE BARNES, ET AL., PLAINTIFFS-APPELLEES/CROSS-APPELLANTS vs. UNIVERSITY HOSPITALS OF CLEVELAND, ET AL., DEFENDANTS-APPELLANTS/CROSS-APPELLEES

Nos. 87247, 87285, 87710, 87903, 87946

COURT OF APPEALS OF OHIO, EIGHTH APPELLATE DISTRICT, CUYA-HOGA COUNTY

2006 Ohio 6266; 2006 Ohio App. LEXIS 6251

November 30, 2006, Released

SUBSEQUENT HISTORY: Stay denied by *Barnes v. Univ. Hosp. of Cleveland*, 112 Ohio St. 3d 1489, 2007 Ohio 724, 862 N.E.2d 116, 2007 Ohio LEXIS 491 (2007)

Discretionary appeal allowed by *Barnes v. Univ. Hosp.*, 114 Ohio St. 3d 1409, 2007 Ohio 2632, 867 N.E.2d 843, 2007 Ohio LEXIS 1333 (2007)

Motion denied by *Barnes v. Univ. Hosp. of Cleveland*, 114 Ohio St. 3d 1496, 2007 Ohio 4160, 871 N.E.2d 1196, 2007 Ohio LEXIS 1901 (2007)

Motion to strike granted by *Barnes v. Univ. Hosp. of Cleveland*, 114 Ohio St. 3d 1523, 2007 Ohio 4647, 873 N.E.2d 321, 2007 Ohio LEXIS 2181 (2007)

Affirmed in part and reversed in part by, Remanded by *Barnes v. Univ. Hosps. of Cleveland*, 2008 Ohio 3344, 2008 Ohio LEXIS 1776 (Ohio, July 9, 2008)

DISPOSITION: AFFIRMED.

COUNSEL: For Plaintiffs-Appellees/Cross-Appellants Andrea and Robert Barnes: W. Craig Bashein, Bashein & Bashein, Cleveland, Ohio; Michael F. Becker, Lawrence F. Peskin, Becker & Miskind Co., L.P.A., Elyria, Ohio; Paul W. Flowers, Paul W. Flowers Co., L.P.A., Cleveland, Ohio.

For Defendant-Appellant/Cross-Appellee MedLink of Ohio: James M. Roper, Jessica K. Walls, Isaac, Brant,

Ledman & Teetor, L.L.P., Columbus, Ohio; Richard P. Goddard, Calfee, Halter & Griswold, L.L.P., Cleveland, Ohio.

For Intervenor-Appellant Lexington Insurance Co.: Steven G. Janik, Andrew J. Dorman, John M. Heffernan, Crystal L. Nicosia, Kelly H. Rogers, Janik & Dorman, L.L.P., Cleveland, Ohio; Matthew M. Nee, McDonald Hopkins Co., L.P.A., Cleveland, Ohio; Lori S. Nugent, Maya Hoffman, Cozen O'Connor, P.C., Chicago, Illinois.

For Defendant-Appellee University Hospitals of Cleveland: Michele Y. Wharton, C. Richard McDonald, Davis & Young, Cleveland, Ohio.

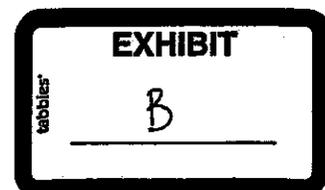
JUDGES: BEFORE: Celebrezze, P.J., Sweeney, J., and Calabrese, J. FRANK D. CELEBREZZE, JR., PRESIDING JUDGE. JAMES J. SWEENEY, J., and ANTHONY O. CALABRESE, JR. [**2], J., CONCUR.

OPINION BY: FRANK D. CELEBREZZE, JR.

OPINION

JOURNAL ENTRY AND OPINION

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



[*P1] This journal entry and opinion addresses five separate appeals and cross-appeals¹, which have been consolidated for review and disposition. MedLink of Ohio and Lexington Insurance Company each appeal the trial court's decision awarding judgment in favor of Andrea Barnes. Barnes cross-appeals asserting several assignments of error. After a thorough review of all the arguments and for the reasons set forth below, we affirm the judgments of the trial court.

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

PROCEDURAL HISTORY

[*P2] On December 4, 2001, appellee, Andrea Barnes, filed a medical malpractice/wrongful death action against University Hospitals of Cleveland ("UH") and MedLink of Ohio ("MedLink"). [*3] Barnes sought compensatory damages on behalf of her daughter, Natalie Barnes, who died while undergoing kidney dialysis treatment. The complaint alleged that UH and MedLink violated the applicable standard of care owed to the decedent. UH and MedLink each served answers to Barnes' complaint denying liability. The parties proceeded with discovery.

[*P3] After conducting discovery, the parties each determined that it would be in their best interest to submit the dispute to a retired judge for the purpose of conducting a jury trial. On April 18, 2005, each of the parties executed a court-approved agreement with respect to conducting the jury trial before a retired judge, and trial commenced on April 25, 2005. Prior to opening arguments, the presiding judge had the parties confirm on the record that they consented to his authority and waived any rights to challenge his jurisdiction on appeal.

[*P4] The trial concluded on May 3, 2005. After deliberations, the jury awarded judgment in favor of Barnes, finding MedLink ninety percent liable and UH ten percent liable for Natalie's death. The jury awarded Barnes \$ 100,000 on her survivorship claim and \$ 3,000,000 on the wrongful [*4] death claim. In addition, the jury unanimously concluded that MedLink acted with actual malice and awarded Barnes an additional \$ 3,000,000 in punitive damages. On October 18, 2005, the trial court assessed attorney fees and litigation expenses in the amount of \$ 1,013,460 against MedLink and entered a final judgment on the entire case in the amount of \$ 6,803,460.

[*P5] On March 7, 2006, MedLink filed an original action in prohibition with the Supreme Court of Ohio, arguing that the presiding judge lacked the proper qualifications to preside over the trial, thus, his involvement was unlawful. Barnes filed a motion to dismiss the prohibition; however, on April 28, 2006, before the court could rule on the motion, MedLink abandoned the prohibition action.

UNDERLYING FACTS

[*P6] The incident that gave rise to the present case occurred on October 19, 2000. On that day, decedent, Natalie Barnes, was undergoing routine kidney dialysis treatment at UH. Natalie was 24 years old at the time and suffered from both mental retardation and epilepsy. In 2000, Natalie developed kidney disease and began hemodialysis treatments at UH on a regular basis. During the dialysis treatment, [*5] blood was pumped out of her body into a device called an "artificial kidney." The artificial kidney would remove impurities from Natalie's blood, and the blood would be returned to her body.

[*P7] Many individuals who undergo ongoing kidney dialysis, including Natalie, require a device called a "perma cath," which is a catheter that is surgically implanted into the patient's chest to aid in the dialysis procedure. The perma cath consists of a flexible tube that is threaded through the skin into either the subclavian vein or the internal jugular vein, down to the heart. The patient's skin grows over a small cuff at the end of the perma cath, holding the device in place and preventing infection. Two ports in the perma cath remain open so they can be accessed for dialysis. After each dialysis treatment is completed, the exposed ends are capped to protect the patient.

[*P8] One of the primary concerns during dialysis treatment utilizing a perma cath is that an air embolism can occur if there is an insecure connection with the catheter or if the catheter is removed from the body. An air embolism would cause air to enter the blood stream and travel into the ventricle of the heart. [*6] If this persists, the heart will stop, and the patient will go into cardiac arrest.

[*P9] Because Barnes was aware of the dangers dialysis posed and her daughter's tendency to pull at her catheter, she requested the services of a medical aide to sit with Natalie while she underwent dialysis treatment. These services were available to her daughter through the Cuyahoga County Board of Mental Retardation and Developmental Disabilities ("MRDD"). MRDD contracted with MedLink to provide home health care services for patients like Natalie who needed individual care.

[*P10] On September 1, 2000, Cynthia Fribley and Mary Lynn Roberts, both supervisors for MRDD, met to discuss Natalie's request for a medical aide. During the meeting, they were informed that Natalie had previously touched and attempted to pull at her catheter during dialysis. Fribley was instructed that she had to ensure that the MedLink aide would not leave Natalie's side during dialysis.

[*P11] MedLink aide, Ann Marie Lumpkin Vernon, was originally selected to sit with Natalie during her dialysis treatments. During a meeting at Barnes' home, Lumpkin was informed that Natalie had a tendency to touch and pull [**7] at her catheter, and she was instructed not to leave Natalie's side during the dialysis treatments. Lumpkin successfully cared for Natalie as she underwent dialysis. When Natalie would attempt to touch or pull at her catheter, Lumpkin would distract her or gently remove her hand. If Lumpkin had to use the restroom, or otherwise excuse herself from the dialysis unit, she always ensured that a hospital staff member took her place and informed the staff member that Natalie was not to touch her catheter.

[*P12] Lumpkin successfully accompanied Natalie during several dialysis treatments, but was later replaced by MedLink aide Endia Hill. Hill did not have the proper experience or background to work as a health care aide. She had previously been convicted of a felony and did not have a high school education, a minimum qualification for MedLink employment. Much like Lumpkin, Hill received strict instructions to sit with Natalie and prevent her from touching or attempting to pull at her catheter. She was also advised that Natalie had attempted to pull at her catheter in the past and needed to be closely monitored.

[*P13] On October 19, 2000, Hill transported Natalie to UH for her [**8] dialysis treatment. Once Natalie's catheter was attached to the dialysis equipment, Hill left the dialysis unit, went to the hospital cafeteria and then walked around the UH facility for several hours. UH hemodialysis technician, Charles Lagunzad, attended to Natalie once Hill left. During his testimony, Lagunzad stated that he was unaware whether Natalie had a medical aide with her or if she was even supposed to have an aide. At 1:30 p.m., Lagunzad went to lunch, leaving technician Larry Lawrence with Natalie. Although Lawrence was present in the dialysis unit, he had four other patients to attend to and could not give Natalie his full attention.

[*P14] Lawrence testified that at around 1:34 p.m., he looked away from Natalie for several seconds, and she pulled her catheter out of her chest. Lawrence yelled for help, and Sue Blankschaen, administrative director of the UH dialysis program, reported to the dialysis center.

As Blankschaen arrived, she saw the hole in Natalie's chest and, after performing an assessment, determined that Natalie had a weak pulse and shallow breathing. Lawrence initiated CPR, which he performed with the help of another UH staff member. At 2:00 p.m. [**9], an emergency code was called, and a number of specialists responded to the dialysis unit to aid Natalie.

[*P15] Natalie's medical chart indicates that she had suffered an air embolism, which caused cardiac arrest. As a result of the cardiac arrest, she was left severely brain damaged. After this incident, Natalie was unable to eat or breathe without life support. After several months, when Natalie's condition failed to improve, Barnes decided to discontinue life support, and Natalie died.

DISCUSSION

[*P16] In the five separate appeals consolidated here for review and decision, there are a total of 16 assignments of error, ² several of which are similar in nature. We will tailor our discussion accordingly and will address certain assignments of error together where it is appropriate.

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

JURY'S VERDICT - PASSION AND PREJUDICE

[*P17] MedLink cites two assignments of error ³ dealing with the jury's [**10] verdict. Because they are substantially interrelated, we address them together.

3 Case No. 87247-MedLink's appeal:

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

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

[*P18] MedLink argues that the jury's verdict was the product of passion and prejudice and was overwhelmingly disproportionate on the basis of the evidence. More specifically, it contends that the remarks of plaintiff's counsel inflamed the jury and appealed to the jury's sympathy and anger.

[*P19] A new trial may be granted where a jury awards damages under the influence of passion and prejudice. *Cox v. Oliver Machinery Co.* (1987), 41 Ohio App.3d 28, 534 N.E.2d 855; *Jones v. Meinking* (1987), 40 Ohio App.3d 45, 531 N.E.2d 728; *Hancock v. Norfolk & Western Ry. Co.* (1987), 39 Ohio App.3d 77, 529 N.E.2d 937; *Litchfield v. Morris* (1985), 25 Ohio App.3d

42, 25 Ohio B. 115, 495 N.E.2d 462. [**11] In a personal injury suit, a damage award should not be set aside unless the award is so excessive that it appears to be the result of passion and prejudice, or unless the award is so manifestly against the weight of the evidence that it appears that the jury misconceived its duty. *Toledo, C. & O. RR Co. v. Miller* (1923), 108 Ohio St. 388, 1 Ohio Law Abs. 849, 140 N.E. 617; *Cox, supra*; *Litchfield, supra*.

[*P20] We do not agree with MedLink's contention that the jury's verdict was a product of passion and prejudice. We accept that plaintiff's counsel discussed the facts of this case in detail and emphasized the heart wrenching nature of the events leading to Natalie's death; however, we cannot ignore that the facts of this case, irrespective of plaintiff's counsel, were incredibly devastating and tragic. MedLink argues that the jury's verdict was swayed by passion and prejudice, but it fails to accept that the reality of the facts involved in this case, no matter how they were relayed to the jury, would insight passion.

[*P21] The case involves a 24-year-old, mentally disabled and epileptic young woman who needed constant care while undergoing [**12] kidney dialysis. Despite the strict warnings her caretaker received, she left Natalie by herself, which resulted in Natalie's cardiac arrest and severe brain damage. After Natalie's condition failed to improve, her mother was placed in the unenviable position of having to remove her daughter from life support.

[*P22] Both Barnes and Natalie placed their faith in MedLink to provide attentive and constant care. The record clearly indicates that MedLink failed to provide that care, and its omission resulted in Natalie's death. The jury's three million dollar award was in no way shocking. A young woman lost her life, and a mother lost her daughter. Although MedLink argues that plaintiff's counsel appealed to the jury's sympathy and anger, it is clear that the facts of this case, standing alone, were enough to substantiate the jury's verdict.

[*P23] Accordingly, we do not find that the judgment awarded to Barnes was a product of passion and prejudice, and these assignments of error are overruled.

REVERSIBLE ERROR - PUNITIVE DAMAGES

[*P24] We next address MedLink's three assignments of error⁴ dealing with the court's instruction regarding punitive damages.

4 Case No. 87247-MedLink's appeal:

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

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

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

[**13] [*P25] MedLink argues that the trial court committed reversible error when it instructed the jury regarding punitive damages. It asserts that plaintiff's counsel failed to establish a nexus between hiring Hill and Natalie's death. MedLink contends that because this nexus was never established at trial, plaintiff's counsel failed to show actual malice on its part, making an instruction for punitive damages improper. MedLink concedes that it was negligent in hiring Hill, yet maintains it did not act with actual malice, a requirement for an award of punitive damages.

[*P26] To constitute plain error, the error must be obvious on the record, palpable, and fundamental, so that it should have been apparent to the trial court without objection. See *State v. Tichon* (1995), 102 Ohio App.3d 758, 767, 658 N.E.2d 16. Moreover, plain error does not exist unless the appellant establishes that the outcome of the trial clearly would have been different but for the trial court's allegedly improper actions. *State v. Waddell* (1996), 75 Ohio St.3d 163, 166, 1996 Ohio 100, 661 N.E.2d 1043. Notice of plain error is to be taken with utmost caution, under exceptional circumstances, [**14] and only to prevent a manifest miscarriage of justice. *State v. Phillips* (1995), 74 Ohio St.3d 72, 83, 1995 Ohio 171, 656 N.E.2d 643.

[*P27] In Ohio, an award of punitive damages cannot be awarded based on mere negligence, but requires actual malice as well. Actual malice is (1) that state of mind under which a person's conduct is characterized by hatred, ill will or a spirit of revenge, or (2) a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm. *Preston v. Murty* (1987), 32 Ohio St.3d 334 at 336, 512 N.E.2d 1174. In fact, liability for punitive damages is reserved for particularly egregious cases involving deliberate malice or conscious, blatant wrongdoing, which is nearly certain to cause substantial harm. *Spalding v. Coulson* (Sep. 3, 1998), *Cuyahoga App. Nos. 70524, 70538, 1998 Ohio App. LEXIS 4105*.

[*P28] We find no merit in MedLink's argument that the jury instruction regarding punitive damages violated its constitutional rights and constituted plain error. The record clearly indicates that plaintiff's counsel established a strong nexus between MedLink's hiring of Hill

and Natalie's injuries and subsequent [**15] death, establishing actual malice. Hill's felony conviction made her ineligible for employment as a health care aide, and a high school diploma was a prerequisite for employment with MedLink. When MedLink hired Hill, it consciously disregarded the facts that she had a felony conviction and did not have a high school diploma. It is important to note that at no time did Hill conceal her felony conviction or her failure to complete high school from MedLink's administrators. Quite the contrary, Hill disclosed both her criminal history and educational background on her application for employment with MedLink.

[*P29] MedLink's actions were not only negligent, they also constituted actual malice. MedLink provides a service to patients who need individual medical care. Because of the vital nature of the services MedLink provides, it must hire employees who are highly qualified and responsible. When MedLink hired Hill, who did not even meet the minimum educational requirements and had previously been convicted of a felony, it consciously disregarded patient safety.

[*P30] MedLink acted with actual malice when it hired Hill. Accordingly, the trial court did not commit plain error [**16] when it instructed the jury regarding punitive damages, and these assignments of error are overruled.

[*P31] MedLink next argues that the trial court abused its discretion when it denied its motion to bifurcate issues regarding compensatory damages and punitive damages. It contends that in failing to separate the issues, the jury's decision making process was tainted, resulting in an excessive award of damages.

[*P32] To constitute an abuse of discretion, the ruling must be more than legal error; it must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 5 Ohio B. 481, 450 N.E.2d 1140.

[*P33] "The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations." *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, 15 Ohio B. 311, 473 N.E.2d 264, quoting *Spalding v. Spalding* (1959), 355 Mich. 382, 384-385, 94 N.W.2d 810. In order to have an abuse of that choice, the result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, [**17] not the exercise of reason but instead passion or bias." *Id.*

[*P34] This court cannot accept MedLink's assertion that the trial court abused its discretion when it denied the motion to bifurcate. Although MedLink argues

that *R.C. 2315.21(B)* mandates that compensatory and punitive damages be bifurcated upon request, the trial court may exercise its discretion when ruling upon such a motion.

[*P35] The issues surrounding compensatory damages and punitive damages in this case were closely intertwined. MedLink's request to bifurcate would have resulted in two lengthy proceedings where essentially the same testimony given by the same witnesses would be presented. Knowing that bifurcation would require a tremendous amount of duplicate testimony, the presiding judge determined it was unwarranted.

[*P36] The trial court's actions were not unreasonable, arbitrary, or unconscionable when it denied MedLink's motion for bifurcation. Accordingly, the trial court did not abuse its discretion, and this assignment of error is overruled.

ATTORNEY FEES

[*P37] Both MedLink and Barnes cited assignments of error dealing with the issue of attorney [**18] fees. ⁵ Because they are substantially interrelated, they will be addressed together.

5 Case No. 87247-MedLink's appeal:

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

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

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

[*P38] Medlink argues that the trial court abused its discretion when it awarded attorney fees. Specifically, it asserts that the trial court failed to consider the contingency agreement that was entered into by Barnes when it calculated attorney fees. MedLink asserts that the contingency fee agreement executed between Barnes and her counsel should have limited the overall attorney fees.

[*P39] On the other hand, Barnes argues that the trial court abused its discretion in calculating attorney fees because it failed to consider the original contingency [**19] fee agreement and instead based attorney fees on an hourly rate and lodestar multiplier.

[*P40] We do not agree with either of these arguments. Barnes submitted documentation supporting attorney fees in the amount of \$ 4,239,900. The presiding judge conducted an evidentiary hearing, where a substantial amount of evidence was presented regarding the total fees. He carefully evaluated the difficulty of this case,

the cost of representation, and the time and diligence exerted by counsel on behalf of the plaintiff. After a thorough evaluation, the presiding judge determined that an award of fees in the amount of \$ 1,013,460 was fair and appropriate.

[*P41] Because of the extremely complex nature of this wrongful death/medical malpractice action, it required significant time and resources to litigate. Medical experts and reports were necessary, in addition to extensive research. It is well accepted that the trial court may exercise its discretion in the calculation of attorney fees. When considering the time and resources expended to properly litigate this case, it is clear that the trial court's actions were not unreasonable, arbitrary, or unconscionable when it awarded attorney [**20] fees to Barnes in the amount of \$ 1,013,460.

[*P42] Accordingly, we do not find that the trial court abused its discretion in calculating attorney fees, and these assignments of error are overruled.

INTERVENTION OF LEXINGTON

[*P43] Lexington Insurance Company ("Lexington"), MedLink's insurer, cites two assignments of error⁶ dealing with its motion to intervene. Because they are substantially interrelated, they will be addressed together.

6 Case No. 87710-Lexington's appeal:

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

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

[*P44] Lexington argues that the trial court abused its discretion when it denied its motion for intervention. Specifically, Lexington asserts that pursuant to *Civ.R. 24(A)*, it meets all of the requirements for intervention [**21] of right, thus, it is entitled to intervene.

[*P45] *Civ.R. 24* provides in pertinent part:

[*P46] "(A) Intervention of Right -- Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of this state confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction that is the subject of the action and the appellant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

[*P47] "(B) Permissive Intervention- Upon timely application anyone may be permitted to intervene in an action:(1) when a statute of this state confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency upon any regulation, order, requirement or agreement issued [**22] or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

[*P48] "(C) Procedure-A person desiring to intervene shall serve a motion to intervene upon the parties as provided in *Civ.R. 5*. The motion and any supporting memorandum shall state the grounds for intervention and shall be accompanied by a pleading, as defined in *Civ.R. 7(A)*, setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of this state gives a right to intervene."

[*P49] We find no merit in Lexington's contention that it was in full compliance with *Civ.R. 24* when it submitted its motion for intervention to the court. First, Lexington's motion was untimely. Lexington waited until one business day prior to the prejudgment interest hearing to file its motion for intervention. This is clearly untimely considering that the bulk of the [**23] litigation had been completed by that time. The presiding judge was fully aware that permitting Lexington to intervene at such a late stage in the litigation would disrupt the proceedings considerably. Lexington received adequate notice of the action at the time it was filed, giving it ample opportunity to intervene. *Civ.R. 24(A)* requires that for intervention of right, a motion must be timely. The fact that Lexington waited until the prejudgment interest proceedings to intervene evidences its untimeliness.

[*P50] In addition, Lexington failed to establish that it had a legally recognized interest in the prejudgment interest proceedings. *Civ.R. 24(A)* requires that for an intervention of right, a party must make a showing that it cannot adequately protect its interest without intervening in the action. Lexington failed to meet this burden.

[*P51] When comparing the arguments of MedLink in this case to those of Lexington, it is clear that they are closely aligned. Accordingly, Lexington's interests were adequately represented by MedLink, making intervention unnecessary.

[*P52] Lastly, Lexington failed to submit a proposed [**24] pleading with its motion to intervene, in violation of *Civ.R. 24(C)*. *Rule 24(C)* specifically provides that a motion for intervention shall be accompanied by a pleading, as defined in *Civ.R. 7(A)*, setting forth the claim or defense for which intervention is sought. When Lexington submitted its motion for intervention to the court, it neglected to include a proposed pleading. Although it later offered to submit the pleading, the trial court ruled that the motion was denied on the basis that it was untimely. Although the motion was denied on valid grounds, it is important to note that Lexington failed to file the appropriate documentation when submitting its motion for intervention to the court.

[*P53] We do not find that the trial court's decision was unreasonable, arbitrary, or unconscionable when it denied Lexington's motion for intervention. Accordingly, the trial court did not abuse its discretion, and these assignments of error are overruled.

SUBJECT MATTER JURISDICTION OF TRIAL JUDGE

[*P54] Assignments of error dealing with subject matter jurisdiction of the trial judge were included in three of the five appeals.⁷ [**25]

7 Case No. 87247-MedLink's appeal:

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

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

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

Case No. 87710-Lexington's appeal:

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

[*P55] MedLink argues that the presiding judge did not have subject matter jurisdiction to hear the case. More specifically, it asserts that Judge Glickman did not have jurisdiction because during his original tenure as a judge he was appointed and not elected, as required by *R.C. 2701.10*. Lexington presents the same argument as that asserted by MedLink.

[*P56] *R.C. 2701.10* provides in pertinent part:

[*P57] "(A) Any voluntarily retired judge, or any judge who is retired under *Section 6 of Article IV, Ohio Constitution*, may register with the [**26] clerk of any court of common pleas, municipal court, or county court for the purpose of receiving referrals for adjudication of civil actions or proceeding, and submissions for determi-

nation of specific issues or questions of fact or law in any civil action or proceeding pending in court. There is no limitation upon the number, type, or location of courts with which a retired judge may register under this division. Upon registration with the clerk of any court under this division, the retired judge is eligible to receive referrals and submissions from that court, in accordance with this section. Each court of common pleas, municipal court, and county court shall maintain an index of all retired judges who have registered with the clerk of that court pursuant to this division and shall make the index available to any person, upon request."

[*P58] *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 [**27] rather than appointed.

[*P59] MedLink also argues that Article IV, section six, of the Ohio Constitution requires that a judge be elected in order to serve as a retired judge. After a thorough review, this court concludes that the Ohio Constitution does not impose such a restriction.

[*P60] Furthermore, on April 18, 2005, before the trial commenced, all parties to the litigation signed a court-approved agreement with respect to the presiding judge's jurisdiction over the matter. Similarly, on the day of trial, the presiding judge had each of the parties state on the record that they consented to his authority and waived any rights to contest his jurisdiction on appeal. The fact that MedLink and Lexington now challenge the presiding judge's jurisdiction does not ignore the fact that, at trial, they both effectively waived their right to do so. They cannot now seek to question the presiding judge's authority because they did not receive their desired outcome.

[*P61] Accordingly, we find that Judge Glickman did have proper jurisdiction to preside over the trial, and these assignments of error are overruled.

PRE-JUDGMENT INTEREST

[*P62] Assignments of error [**28] dealing with pre-judgment interest were included in three of the five appeals.⁸

8 Case No. 87903-Barnes' appeal:

"I. The trial judge misconstrued the applicable privilege and unjustifiably refused to allow plaintiff-appellants to discover reports and information that defendant-appellees had obtained

prior to trial that were necessary to contest their defense to pre-judgment interest."

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

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

Case No. 97946-MedLink's appeal:

"I. The trial court erred in awarding pre-judgment interest to plaintiff."

[*P63] Barnes first argues that the trial court abused its discretion when it barred her from discovering reports and information that MedLink. [**29] obtained from a non-testifying expert prior to trial. More specifically, she asserts that the information was necessary to her defense to prejudgment interest. Barnes contends that *Civ.R. 26(B)(4)(a)* provides that such discovery is permissible.

[*P64] We do not agree that the trial court abused its discretion when it prevented her from discovering certain reports and information. *Civ.R. 26(B)(4)(a)* specifically provides:

[*P65] "Subject to the provisions of subdivision (B)(4)(b) of this rule 35(B), a party may discover facts known or opinions held by an expert retained or specially employed by another party seeking discovery if unable without undue hardship to obtain facts and opinions on the same subject by other means or upon showing other exceptional circumstances indicating that denial of discovery would cause manifest injustice."

[*P66] Barnes is correct in her contention that she is entitled to discovery of an expert witness retained or specially employed; however, the information Barnes sought to discover was from a medical expert that was never retained or employed by MedLink. MedLink merely consulted with the [**30] medical expert when it was developing its trial strategy. The expert never testified and never even created or submitted a report to MedLink. The expert witness had so little involvement in the preparation of MedLink's defense that his or her name was never even disclosed during the prejudgment interest hearing.

[*P67] The trial court's actions were not unreasonable, arbitrary, or unconscionable when it prevented Barnes from discovering information from the undisclosed medical expert. Accordingly, the trial court did not abuse its discretion, and this assignment of error is overruled.

[*P68] Barnes next argues that the trial court abused its discretion in calculating prejudgment interest. She asserts that interest was calculated from the date the complaint was filed, rather than from the date the cause of action accrued, in direct violation of *R.C. 1343.03(C)(1)(c)(ii)* as it existed at the time the original complaint was filed. She contends that the trial court's application of the current version of *R.C. 1343.03(C)(1)(c)(ii)*, which calculates interest from the date the action was filed, constitutes a retroactive application and is thus prohibited.

[**31] [*P69] We do not agree with Barnes' argument that the trial court erred when it calculated prejudgment interest from the date of the original filing rather than from the date that the incident occurred. The current version of *R.C. 1343.03(C)(1)(c)(ii)* specifically provides:

[*P70] "(C) If, upon motion of any party to a civil action that is based on tortious conduct, that has not been settled by agreement of the parties, and in which the court has rendered a judgment, decree, or order for the payment of money, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case, interest on the judgment, decree, or order shall be computed as follows:

[*P71] "****

[*P72] "(c) In all other actions for the longer of the following periods:

[*P73] "****

[*P74] "(ii) From the date on which the party to whom the money is to be paid filed the pleading on which the judgment, decree, or order was based to the [**32] date on which the judgment, decree, or order was rendered."

[*P75] The language of the statute clearly supports the trial court's decision to calculate prejudgment interest from the date the action was filed. Although this statute was enacted after the suit was originally filed, it was in place before the prejudgment interest determination hearing was conducted, thus, it is applicable. The trial court's actions did not constitute a retroactive application because the current version of the statute was firmly in place before prejudgment interest was evaluated.

[*P76] We do not find that the trial court's actions were unreasonable, arbitrary, or unconscionable when it calculated prejudgment interest from the date the action was filed rather than from the date the incident occurred.

Accordingly, the trial court did not abuse its discretion, and this assignment of error is overruled.

[*P77] Barnes next argues that the trial court abused its discretion when it excluded attorney fees from the calculation of prejudgment interest. Specifically, she asserts that such additional compensation is viewed as purely compensatory and should be included in the prejudgment interest [*33] calculation.

[*P78] We do not agree. Attorney fees are future damages and, as such, are not subject to prejudgment interest. *R.C. 1343.03(C)(2)* states:

[*P79] "No court shall award interest under division (C)(1) of this section on future damages, as defined in *section 2323.56 of the Revised Code* that are found by the finder of fact."

[*P80] *R.C. 2323.56* defines future damages as "any damages that result from an injury to a person that is a subject of a tort action and that will accrue after the verdict or determination of liability by the trier of fact is rendered in that tort action."

[*P81] It is clear from the mandate of *R.C. 1343.03(C)(2)* and the definition provided by *R.C. 2323.56* that attorney fees constitute future damages and are not subject to prejudgment interest. The trial court's actions were not unreasonable, arbitrary, or unconscionable when it failed to include attorney fees in the calculation of prejudgment interest. Accordingly, the trial court did not abuse its discretion, and this assignment of error is overruled.

[**34] [*P82] In its appeal, MedLink argues that the trial court abused its discretion when it awarded prejudgment interest in favor of Barnes. More specifically, MedLink asserts that Barnes did not satisfy her burden to show that MedLink did not make a good faith effort to settle the case, pursuant to *R.C. 1343.03(C)*.

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

[*P83] When evaluating the nature of this case and the truly devastating circumstances surrounding Natalie's death, MedLink's offer of \$ 400,000 did not constitute

[**35] a good faith effort to settle. The trial court's actions were not unreasonable, arbitrary, or unconscionable when it awarded prejudgment interest to Barnes. Accordingly, the trial court did not abuse its discretion, and this assignment of error is overruled.

CONCLUSION

[*P84] Following a thorough review of the record, the briefs, and the arguments of all parties, we find no merit in any of the assignments of error and ultimately affirm the judgments of the trial court.

Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

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

A certified copy of this entry shall constitute the mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*. FRANK D. CELEBREZZE, JR., PRESIDING JUDGE

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

APPENDIX A

Case Nos. 87247 and 87285:

Appellant MedLink's Assignments of Error:

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

[**36] II. The judgment is contrary to the law on punitive damages and violates appellants' constitutional rights.

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

IV. The trial court erred in denying Appellant's Motion To Separate Plaintiff's Claim For Punitive Damages.

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

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

VII. Judge Glickman Did Not Have Subject Matter Jurisdiction To Hear This Case.

Appellee Barnes' Cross-Assignment of Error:

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

Case No. 87903:

Appellant Barnes' Assignments of Error:

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

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

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

Case No. 87946:

Appellant MedLink's Assignments of Error:

I. The trial court erred in awarding prejudgment interest to Plaintiff.

II. Robert T. Glickman did not have subject matter jurisdiction to decide Plaintiff's Motion for Prejudgment Interest.

Case No. 87710:

Appellant Lexington Insurance Co.'s Assignments of Error:

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

II. Judge Robert T. Glickman patently and unambiguously lacked subject matter jurisdiction to adjudicate [**38] the underlying case, styled, *Andrea Barnes v. University Hospitals of Cleveland, et al.*, Cuyahoga County Common Pleas Court, Case No. CV 01 455448 (hereinafter, "Barnes"), including the motion of Lexington Insurance Company to intervene (hereinafter, "motion to intervene").

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

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

KRISTI LONGBOTTOM, et al., Individually :
and as Natural Guardians of Kyle Jacob :
Smith, :
Appellees/Cross-Appellants, :

CASE NOS. CA2011-01-005
CA2011-01-006

- vs -

OPINION
5/14/2012

MERCY HOSPITAL CLERMONT, et al. :
Appellants/Cross-Appellees. :

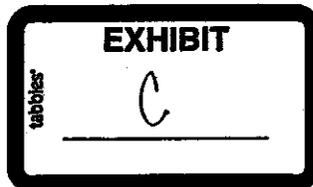
CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2008 CVA 499

The Lawrence Firm, P.S.C., Richard D. Lawrence, Jennifer L. Lawrence, 606 Philadelphia Street, MainStrasse Village, Covington, KY 41011, for appellees/cross-appellants

Reminger Co., L.P.A., Michael Romanello, Melvin J. Davis, 65 East State Street, 4th Floor, Columbus, Ohio 43215, for appellants/cross-appellees, Gary S. Huber, D.O. and Qualified Emergency Specialists, Inc.

Lindhorst & Dreidame Co., L.P.A., Michael F. Lyon, Bradley D. McPeck, 312 Walnut Street, Suite 3100, Cincinnati, Ohio 45202, for appellants/cross-appellees, Gary S. Huber, D.O. and Qualified Emergency Specialists, Inc.

HENDRICKSON, P.J.



{¶ 1} Appellants/cross-appellees, Gary Steven Huber, D.O. and Qualified Emergency Specialists, Inc., appeal from a judgment of the Clermont County Court of Common Pleas awarding \$2,743,673.66 in damages and prejudgment interest to appellees/cross-appellants,

Kyle Jacob Smith and his parents, Kristi Longbottom and Jesse Smith, on their claims for medical malpractice and loss of consortium. Dr. Huber and QESI argue the trial court erred by, among other things, overruling their motion for judgment notwithstanding the verdict or, alternatively, for a new trial, because Kyle and his parents presented no evidence to establish a causal link between Dr. Huber's alleged negligence and Kyle's injuries. Kyle and his parents argue on cross-appeal that the trial court erred by refusing to award them prejudgment interest for the period in which they voluntarily dismissed their action under Civ.R. 41(A) and then refiled it less than one year later, and by refusing to instruct the jury on the emotional distress claim brought by Kyle's parents.

{¶ 2} For the reasons that follow, we overrule all of Dr. Huber and QESI's assignments of error, as well as Kyle and his parents' second cross-assignment of error regarding the emotional distress claim of Kyle's parents. However, we sustain Kyle and his parents' first cross-assignment of error, because the trial court erred in refusing to grant them prejudgment interest from the date they voluntarily dismissed their malpractice action to the date they re-filed it less than one year later. Therefore, we remand this cause to the trial court for the limited purpose of awarding prejudgment interest to Kyle and his parents for that period.

{¶ 3} On March 22, 2002, Kyle Smith, who was then nine years old, was playing a game with two other children at the home of a family friend. The children were holding hands and spinning around to see who would fall first. Kyle fell and hit the left side of his head against a coffee table. Jesse Smith was in the next room and heard Kyle hit the coffee table so hard that he could hear the glass in the table rattle. Smith took Kyle home and told Longbottom what had happened. After Kyle vomited and began to experience jaw pain, his parents took him to the emergency room at Mercy Hospital Clermont.

{¶ 4} While they were waiting to see a physician, an emergency room nurse, Diane Kruse, R.N., gave Kyle's parents a pamphlet on head injury that stated any head injury should be considered serious, irrespective of whether the person was rendered unconscious thereby, and that it was most important that the injured person be watched closely for the first 24 hours following the injury. The pamphlet stated that a responsible person must stay in the room with the patient and watch for a list of symptoms, including whether the patient is mentally confused, cannot be awakened from sleep, is unusually drowsy or vomits persistently, or the patient's pupils are of unequal size. The pamphlet further stated that if the patient cannot be awakened, then the person watching the patient was to call 911 and have the patient returned to the emergency room. Nurse Kruse later testified that it was her usual practice to explain the pamphlet to the parents of a child who suffered a head injury but to defer to the physician the final determination as to whether the instructions in the pamphlet were indicated for any given patient.

{¶ 5} Kyle was seen by Dr. Huber, who performed a neurological exam on Kyle and found the results to be normal. He sutured the wound on Kyle's ear, gave him some medicine to prevent infection, and discharged him. He chose not to order a CT scan for Kyle because he did not believe one was necessary. Kyle's parents later testified that Dr. Huber told them that they did not need to worry about the instructions in the head injury pamphlet because Kyle's head injury was "not typical" and that they should just let him "sleep it off." Dr. Huber disputed this, testifying that his standard practice was to tell the parents of patients like Kyle to follow the instructions in the head injury pamphlet and that he had done so on this occasion.

{¶ 6} Kyle and his parents returned home from the emergency room sometime around midnight. Kyle threw up just a little bit, gagged a few times, and had the dry heaves. Longbottom made a bed for Kyle on the couch so that she could sleep next to him. Kyle

went to sleep around 12:20 a.m. Longbottom heard Kyle talking in his sleep at about 2:00 a.m. and then fell asleep herself around 2:00 a.m. or 2:30 a.m. Around 5:00 a.m., Longbottom awoke and noticed that Kyle had vomited, and that he was choking and gasping for air. Longbottom screamed for Smith, who called 911. Just before the police and ambulance arrived, Smith told the 911 dispatcher that when he and Longbottom had asked Dr. Huber at the emergency room if they should wake Kyle every two hours, Dr. Huber told them "no, it won't be a problem."

{¶ 7} Kyle was air-cared to Cincinnati Children's Hospital. Upon his arrival, he was found to be near death. A CT scan of his head revealed a massive epidural hematoma causing a midline shift of his brain and brain herniation. Dr. Kerry Crone performed emergency surgery on Kyle to remove the hematoma. Dr. Crone told Kyle's parents that he was not sure if Kyle would live. After spending several days in the hospital's ICU, Kyle survived. He then spent several weeks in the hospital relearning such tasks as swallowing, eating, communicating and walking. As a result of the incident, Kyle sustained permanent injury to his brain and now walks with an altered gait.

{¶ 8} In 2003, Kyle and his parents filed a medical malpractice complaint against Dr. Huber and his employer, QESI, and Mercy Hospital. In 2007, Kyle and his parents voluntarily dismissed their action but refiled it less than one year later in 2008. Prior to trial, Kyle and his parents settled their claims against Mercy Hospital.

{¶ 9} The matter was tried to a jury over nine days in 2010. Kyle and his parents argued that Dr. Huber was negligent in failing to order a CT scan for Kyle when his parents brought him to the emergency room at Mercy Hospital and that this failure proximately caused Kyle's injuries. Both sides presented expert testimony in support of their respective positions on this issue. Another issue raised at trial was whether Dr. Huber advised Kyle's parents to follow the instructions in the head injury pamphlet, with Kyle's parents and Dr.

Huber providing conflicting testimony on the matter as set forth above. Dr. Huber acknowledged during his testimony that if he actually did tell Kyle's parents that they did not need to follow the instructions in the head injury pamphlet—an assertion that Dr. Huber denied—then such advice would have fallen below the standard of care.

{¶ 10} The jury returned a verdict in favor of Kyle and his parents for \$2,412,899 after finding that Dr. Huber had been negligent in the care and treatment of Kyle and that Dr. Huber's negligence directly and proximately caused Kyle's injuries. In response to an interrogatory asking them to state in what respects Dr. Huber was negligent, the jury answered, "Based on the evidence, we believe, Dr. Gary S. Huber did not instruct the parents about the possibility of significant head injury or how to observe and monitor Kyle for such injuries." QESI was found liable to Kyle and his parents under a theory of respondeat superior.

{¶ 11} The trial court overruled Dr. Huber and QESI's motion for judgment notwithstanding the verdict or, alternatively, for a new trial. The trial court reduced the jury's award to Kyle and his parents by the \$500,000 they received from their settlement with Mercy Hospital and awarded them prejudgment interest of \$830,774.66, giving them with a total award of \$2,743,673.66.

{¶ 12} Dr. Huber and QESI now appeal, assigning the following as error:

{¶ 13} Assignment of Error No. 1:

{¶ 14} THE TRIAL COURT ERRED IN DENYING DR. HUBER'S MOTION FOR JNOV, OR IN THE ALTERNATIVE, FOR A NEW TRIAL, BECAUSE THERE WAS NO EVIDENCE TO ESTABLISH A CAUSAL LINK BETWEEN DR. HUBER'S ALLEGED NEGLIGENCE AND KYLE SMITH'S INJURIES.

{¶ 15} Assignment of Error No. 2:

{¶ 16} THE TRIAL COURT ERRED BY GRANTING APPELLEES' MOTION FOR PREJUDGMENT INTEREST.

{¶ 17} Assignment of Error No. 3:

{¶ 18} THE TRIAL COURT ERRED AS A MATTER OF LAW BY FAILING TO APPLY THE CURRENT VERSION OF THE PREJUDGMENT INTEREST STATUTE THAT WAS EFFECTIVE AT THE TIME THE JURY RENDERED ITS VERDICT.

{¶ 19} Kyle and his parents cross-appeal, assigning the following as error:

{¶ 20} Cross-assignment of Error No 1:

{¶ 21} THE TRIAL COURT ERRED AS A MATTER OF LAW BY FAILING TO GRANT PREJUDGMENT INTEREST DURING THE TIME PERIOD THAT THE CASE WAS DISMISSED PURSUANT TO CIVIL RULE 41(A).

{¶ 22} Cross-assignment of Error No. 2:

{¶ 23} THE TRIAL COURT ERRED IN FAILING TO GIVE A JURY INSTRUCTION AND INTERROGATORY ON THE EMOTIONAL DISTRESS CLAIMS OF KYLE SMITH'S PARENTS.

{¶ 24} In their first assignment of error, Dr. Huber and QESI argue the trial court erred in overruling their motion for JNOV or, alternatively, for a new trial, because there was no evidence to establish a causal link between Dr. Huber's alleged negligence and Kyle's injuries. We disagree with this argument.

{¶ 25} The standard for granting a motion for JNOV or, alternatively, for a new trial under Civ.R. 50(B) is the same as that for granting a motion for a directed verdict under Civ.R. 50(A). *Wagner v. Roche Laboratories*, 77 Ohio St.3d 116, 121, 1996-Ohio-85, fn. 2. Civ.R. 50(A)(4) states:

When a motion for directed verdict has been properly made, and the trial court, after construing the evidence most strongly in

favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.

{¶ 26} In ruling on a motion for directed verdict or JNOV, a trial court may not consider either the weight of the evidence or the credibility of the witnesses. *Wagner* at 119. So long as there is substantial, competent evidence to support the party against whom the motion is directed and reasonable minds may reach different conclusions on such evidence, the motion must be denied. *Id.* A trial court's decision to grant or deny a motion for a directed verdict or a motion JNOV involves a question of law, and therefore an appellate court's review of that decision is de novo. *White v. Leimbach*, 131 Ohio St.3d 21, 2011-Ohio-6238, ¶ 22, citing *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, ¶ 4.

{¶ 27} To prevail on a medical malpractice claim, a plaintiff must prove by a preponderance of the evidence that the injury complained of was caused by doing or failing to do some particular thing or things that a physician of ordinary skill, care and diligence would not have done or failed to do under the same or similar circumstances, and that the injury complained of was the direct and proximate result of the physician's doing or failing to do such particular thing or things. *Taylor v. McCullough-Hyde Mem. Hosp.*, 116 Ohio App.3d 595, 599 (12th Dist.1996), citing *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 131-132 (1976).

{¶ 28} Kyle and his parents argued at trial that Dr. Huber was negligent in not ordering a CT scan for Kyle and that this negligence was the proximate cause of Kyle's injuries. To prove their claim, Kyle and his parents presented expert testimony from Dr. Kenneth Swaiman and Dr. John Tilleli, who testified that Dr. Huber breached the standard of care by failing to order a CT scan for Kyle when he was brought to the emergency room at Mercy

Hospital and that this breach of the standard of care proximately caused Kyle's injuries. However, the jury found Dr. Huber negligent for failing to warn Kyle's parents about the possibility of a significant head injury or to instruct them on how to observe and monitor Kyle for such an injury.

{¶ 29} The jury's decision to find Dr. Huber negligent on a theory different from the one advanced by Kyle and his parents at trial has led Dr. Huber and QESI to argue that (1) they were unfairly surprised by the jury's verdict, and (2) Kyle and his parents failed to present "any evidence to establish a causal link between Dr. Huber's alleged negligence and Kyle's injuries," and thus failed to establish the requisite element of proximate cause in support of their medical malpractice claim. We find these arguments unpersuasive.

{¶ 30} Initially, Kyle and his parents alleged in their complaint that "Dr. Huber was negligent and deviated from the acceptable standards of care in failing to properly assess, evaluate and treat Kyle Smith on March 22, 2002, in the emergency room and in failing to inform the family of potential dangers," and that Dr. Huber's negligent acts or omissions included "the failure to warn the family of potential risks and dangers." The issue of whether or not Dr. Huber issued proper discharge instructions to Kyle's parents was raised during Dr. Huber's 2004 deposition, which was taken during the original action brought by Kyle and his parents.

{¶ 31} Additionally, Dr. Huber noted in his March 2010 pretrial statement that several of his experts were going to testify that the discharge instructions that he gave to Kyle's parents, which, according to Dr. Huber, included the recommendation that they follow the instructions in the head injury pamphlet, met the standard of care, and those experts did, in fact, so testify at trial. Finally, Dr. Huber acknowledged at trial that failing to issue proper discharge instructions to Kyle's parents would amount to conduct that fell below the standard of care. Consequently, the record amply supports the trial court's decision to reject Dr. Huber

and QESI's claim of unfair surprise. We also conclude that Kyle and his parents presented sufficient evidence to establish that Dr. Huber's failure to warn Kyle's parents about the possibility of significant head injury and to instruct them on how to observe Kyle for such injuries following his discharge, was the proximate cause of Kyle's injuries.

{¶ 32} In order to prevail on a medical malpractice claim, a plaintiff is generally required to present expert testimony to establish the medical standard of care, that defendant breached that standard of care, and that the defendant's breach of the standard of care proximately caused plaintiff's injuries. *Taylor*, 116 Ohio App.3d at 599; *Powell v. Hawkins*, 175 Ohio App.3d 138, 2007-Ohio-3557, ¶ 13 (1st Dist.). However, if a plaintiff's claims are well within the comprehension of laypersons and require only common knowledge and experience to understand them, the plaintiff is not required to present expert testimony to prove them. *Bruni, supra*, 46 Ohio St.2d at 130; and *Schraffenberger v. Persinger, Malik & Haaf, M.D.s', Inc.*, 114 Ohio App.3d 263, 266 (1st Dist.1996).

{¶ 33} As to establishing the medical standard of care, this element was established by Dr. Huber's admission at trial that failing to instruct Kyle's parents to follow the instructions in the head injury pamphlet would amount to conduct that fell below the standard of care. There is case law to support this proposition, as well. See, e.g., *D'Amico v. Delliquadri*, 114 Ohio App.3d 579, 583 (1996) ("indisputably, a physician has a duty to give his patient all necessary and proper instructions regarding the level of care and attention the patient should take and the caution to be observed"). See also, *Turner v. Children's Hosp., Inc.*, 76 Ohio App.3d 541, 555 (10th Dist.1991) ("many courts have found physicians liable in malpractice for failure to communicate important information to patients[,] and "a physician, upon completion of his services, must give the patient proper instructions to guard against the risk of future harm").

{¶ 34} As to establishing that Dr. Huber breached the standard of care, we note that while Dr. Huber testified that he told Kyle's parents that they needed to follow the instructions in the head injury pamphlet, it is obvious from the jury's answers to the interrogatories that the jury chose to believe Kyle's parents, who testified that Dr. Huber told them that they did not need to worry about those instructions, because Kyle's head injury was "not typical" and that they should just let him "sleep it off." Moreover, there was compelling evidence presented to support the testimony of Kyle's parents on this issue, namely, the recording of the 911 call that was played for the jury, in which Jesse Smith told the dispatcher that when he and Longbottom asked Dr. Huber if they should wake up Kyle every two hours, Dr. Huber told them "no, it won't be a problem." The jury was permitted to infer that given the circumstances, it was unlikely that Smith would have fabricated what Dr. Huber had told him and Longbottom.

{¶ 35} As to the element of proximate cause, we note that Kyle and his parents did not present an expert witness at trial who testified to a reasonable degree of medical certainty that Dr. Huber's failure to instruct Kyle's parents to follow the instructions in the head injury pamphlet was the proximate cause of Kyle's injuries. Nevertheless, we believe that there was sufficient evidence presented at trial from expert and lay witnesses to allow the jury to find that Dr. Huber's negligence in failing to warn Kyle's parents about the possibility of a significant head injury and to instruct them on how to observe for Kyle for such an injury upon his discharge was the proximate cause of Kyle's injuries.

{¶ 36} "Proximate cause is a happening or event that, as a natural and continuous sequence, produces an injury without which the result would not have occurred." *McDermott v. Tweel*, 151 Ohio App.3d 763, 2003-Ohio-885, ¶ 39 (10th Dist.), citing *Randall v. Mihm*, 84 Ohio App.3d 402, 406 (2nd Dist.1992). "The general rule of causation in medical malpractice cases requires the plaintiff to present some competent, credible evidence that the

defendant's breach of the applicable standard of care 'probably' caused plaintiff's injury or death." *McDermott*. When establishing proximate cause through the use of expert testimony, an expert's opinion must be stated at a level of probability, meaning there is a greater than 50 percent likelihood that the physician's act or failure to act led to a given result. *Zhun v. Benish*, 8th Dist. No. 89408, 2008-Ohio-572, ¶ 16.

{¶ 37} Furthermore, the plaintiff in a medical malpractice action may elicit expert testimony from the defendant-physician in support of the plaintiff's malpractice claim against the defendant-physician, see generally, *Oleksiw v. Weidner*, 2 Ohio St.2d 147, 148-150 (1965), and *Faulkner v. Pezeshki*, 44 Ohio App.2d 186, 195 (1975), and a finding of negligence in a malpractice case may be based on the testimony of the defendant-physician. See *Ware v. Richey*, 14 Ohio App. 3d 3, 8 (8th Dist.1983), disapproved of on other grounds by *Kalain v. Smith*, 25 Ohio St. 3d 157 (1986).

{¶ 38} Here, Kyle and his parents called Dr. Crone as an expert witness to testify as to whether Kyle's foot drop is the result of his brain herniation and whether it is permanent. Dr. Crone answered both questions in the affirmative. Admittedly, they did not ask Dr. Crone to give his expert opinion as to whether Dr. Huber's failure to warn Kyle's parents about the possibility of a significant head injury and to instruct them on how to observe Kyle for such an injury following his discharge was the proximate cause of Kyle's injuries. Nevertheless, Dr. Crone's testimony provided crucial evidence that aided the jury in determining that it was.

{¶ 39} Dr. Crone testified that Kyle's injuries would have been prevented if surgery had taken place before Kyle's brain herniation. Dr. Crone testified that Kyle's brain herniation occurred at some point prior to the time he was taken to Children's Hospital, since emergency personnel had observed that Kyle had a "blown" pupil at the time they air-cared him to Children's Hospital. Dr. Crone testified that Kyle's hematoma grew bigger over time and as it grew, he would have expected Kyle to demonstrate signs and symptoms.

{¶ 40} Dr. Huber and QESI point out that Dr. Crone acknowledged that he could not state with certainty when Kyle's brain had herniated, other than it had occurred at some point prior to the time he was transported to Children's Hospital. Dr. Huber and QESI also point out that Dr. Crone acknowledged that Kyle's brain herniation may have taken place as early as the time Kyle was discharged from the Mercy Hospital emergency room at 10:40 p.m. However, Dr. Crone made it clear during his testimony that while it was *possible* that Kyle's brain had herniated at the time Kyle was discharged from the emergency room, and thus before he and his parents returned home from the emergency room at Mercy Hospital, it was very unlikely, since Dr. Crone testified that in his opinion, if Kyle's brain had herniated six hours before he was brought to Children's Hospital, Kyle would have been dead.

{¶ 41} Furthermore, Dr. Huber, in response to the charge that he breached the standard of care by not ordering a CT scan for Kyle, asserted that he had met the standard of care by instructing Kyle's parents to follow the instructions in the head injury pamphlet, testifying as follows: "Head injury is a continuum. You watch. You watch. You watch, and that's what you do. If there's nothing up front to indicate that there is * * * a possibility of [an] active [intracranial] process [or bleed], then you're left to watch, and that's what we do. We observe for changes."

{¶ 42} Later on, Dr. Huber testified:

There are no black and whites in medicine, and no absolutes. We're always dealing with percentages of percentages. But when you look at the literature * * * there are many, many studies showing that children that are asymptomatic, no neurologic findings, normal mental status, no loss of consciousness * * * had zero percent chance of having a significant intracranial bleed of any kind. We know that that's always a potential, and that is why we invoke the head injury instruction sheet. So if I had to put an actual number on it, it was .00001 percent that there was any problem or chance of an intracranial bleed, and that is why we use the head injury instruction sheet.

{¶ 43} Dr. Huber then referred to a 1999 document produced by the "American Academy of Family Practitioners, the American Academy of Pediatrics along with emergency medicine specialists," in order to give emergency room physicians guidance as to what to do with "minor head trauma." Dr. Huber summarized the document as follows:

[A]ccording to the Academy as they have reviewed the literature they make a statement in the article – in the guidelines that says that they could find no evidence that early neuro [sic] imaging of asymptomatic children had any benefit over simple observation. In other words, what they're saying is if we simply observe these * * * children over time *we will always pick up any offending events. Does it make sense? So if you observe them, they're always going to be symptomatic at some point, and you'll discover them. That's how the process works.* (Emphasis added.)

{¶ 44} Kyle's parents testified that Kyle threw up before they took him to the emergency room at Mercy Hospital, during the time he was in Dr. Huber's examining room, and after they returned home from the emergency room around midnight. Dr. Huber acknowledged that if Kyle had vomited, that would have been a significant symptom for him to know about. However, Dr. Huber testified that neither Kyle nor his parents told him that Kyle had vomited. Dr. Huber's testimony was supported by Nurse Kruse, and Emergency Room Technician, Melissa Wright, who testified that Kyle and his parents had told her that Kyle did not throw up. However, the jury was obviously in the best position to determine who was telling the truth on this matter. Moreover, in ruling on Dr. Huber and QESI's motion for JNOV, the trial court was obligated to view the evidence in the light most favorable to Kyle and his parents as the non-moving parties. *Wagner*, 77 Ohio St.3d 116, 121, 1996-Ohio-85, fn. 2, and Civ.R. 50(A)(4)

{¶ 45} There was also testimony from Kyle's parents that Kyle fell asleep when Dr. Huber sutured the wound on Kyle's ear and that Kyle did not cry during this procedure as he normally would have. Kyle's parents testified that Kyle cried off and on while they drove

home from the emergency room and that when they got home around midnight, Kyle threw up a little bit, gagged or had the dry heaves. Kyle's parents testified that shortly before Kyle was discharged, Dr. Huber assured them that there was no need to wake Kyle every two hours, and advised them to let Kyle "sleep it off." It was reasonable for the jury to infer from this testimony that Dr. Huber's advice caused Kyle's parents "to let their guard down," since he failed to properly instruct them to watch for the symptoms listed in the head injury pamphlet, including whether the patient is unusually drowsy or vomits persistently.

{¶ 46} In light of the foregoing, we conclude that that there was ample evidence presented from expert and lay witnesses to allow the jury to conclude that Dr. Huber's failure to issue proper discharge instructions to Kyle's parents was the proximate cause of Kyle's injuries. Therefore, Dr. Huber and QESI's first assignment of error is overruled.

{¶ 47} In their second assignment of error, Dr. Huber and QESI argue the trial court erred by awarding prejudgment interest, because Dr. Huber had a good faith, objectively reasonable belief that he had no liability, and thus was not required to make a settlement offer. We find this argument unpersuasive.

{¶ 48} When a party moves for prejudgment interest in a civil action based on tortious conduct, the trial court must hold a hearing on the motion and determine whether or not "the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case[.]" R.C. 1343.03(C). As stated in *Kalain*, 25 Ohio St.3d 157, syllabus:

A party has not "failed to make a good faith effort to settle" under R.C. 1343.03(C) if he has (1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party. If a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer.

{¶ 49} The determination as to whether a party has made a good faith effort to settle is a matter within the trial court's sound discretion. *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 658, 1994-Ohio-324.

{¶ 50} Here, there was sufficient evidence to support the trial court's finding that Dr. Huber and QESI failed to rationally evaluate their risks and potentially liabilities, and thus failed to make a good faith effort to settle the case. The evidence shows that Dr. Huber and QESI knew in 2002 that Kyle had sustained permanent and serious injuries as a result of the incident in question. One of Dr. Huber and QESI's experts, Dr. Paula Sundance, evaluated Kyle in 2006 and opined that Kyle had permanent injuries that would require future medical care. Dr. Huber and QESI were also aware that not only had Dr. Huber failed to order a CT scan for Kyle, but that Kyle's parents had testified in their depositions that Dr. Huber had told them that they did not need to follow the instructions in the head injury pamphlet, including the instruction to wake Kyle every two hours while he was sleeping during the 24 hours following the incident.

{¶ 51} Given the foregoing, we cannot say that the trial court abused its discretion in finding that Dr. Huber and QESI failed to make a good faith offer to settle this case or in rejecting Dr. Huber's assertion that he had a good faith, objectively reasonable belief that he had no liability and thus did not need to make a monetary settlement offer. Thus, Dr. Huber and QESI's second assignment of error is overruled.

{¶ 52} In their third assignment of error, Dr. Huber and QESI argue the trial court erred by failing to apply the version of the prejudgment interest statute that was in effect at the time the jury rendered its verdict rather than the version of the statute that was in effect at the time of the incident in March 2002 or at the time Kyle and his parents' filed their original complaint in March 2003. We disagree with this argument.

{¶ 53} The amended version of R.C. 1343.03(C), which became effective on June 2, 2004, while the original complaint filed in this case was pending, potentially changes the accrual date for purposes of a prejudgment interest award and prohibits an award of prejudgment interest on future damages found by the trier of fact. See R.C. 1343.03(C)(1) and (C)(2). The jury in this case awarded future damages to Kyle.

{¶ 54} Initially, there is case law to support Dr. Huber and QESI's argument that the version of the prejudgment interest statute contained in the amended version of R.C. 1343.03(C) may be applied retroactively. See *Barnes v. University Hospital of Cleveland*, 8th Dist. Nos. 87247, 87285, 87710, 87903 and 87946, 2006-Ohio-6266, ¶ 75, affirmed in part and overruled in part on other grounds, 119 Ohio St.3d 173, 2008-Ohio-3344. However, several other appellate districts in this state have reached the opposite conclusion. See *Hodesh v. Korelitz, M.D.*, 1st Dist. Nos. C-061013, C-061040, and C-070172, 2008-Ohio-2052, ¶ 62-63, reversed on other grounds, *Hodesh v. Korelitz, M.D.*, 123 Ohio St.3d 72, 2009-Ohio-4220; *Scibelli v. Pannunzio*, 7th Dist. No. 05 MA 150, 2006-Ohio-5652, ¶ 148-149; and *Conway v. Dravenstott*, 3rd Dist. No. 3-07-05, 2007-Ohio-4933, ¶ 15, following *Scibelli*.

{¶ 55} We agree with the trial court's decision to follow the First, Third and Seventh Districts' decisions in *Hodesh*, *Scibelli* and *Conway*, respectively, because there is no clear indication in the amended version of the prejudgment interest statute that the legislature intended for it to apply retroactively, and therefore the statute should apply prospectively, only. *Scibelli*.

{¶ 56} Consequently, Dr. Huber and QESI's third assignment of error is overruled.

{¶ 57} In their first assignment of error on cross-appeal, Kyle and his parents argue the trial court erred by refusing to award them prejudgment interest from the date they

voluntarily dismissed their action under Civ.R. 41(A) and then refiled it less than one year later. We agree with this argument.

{¶ 58} Former R.C. 1343.03(C) states:

Interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct and not settled by agreement of the parties, shall be computed from the date the cause of action accrued to the date on which the money is paid if, upon motion of any party to the action, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case.

{¶ 59} The trial court explained its decision to exclude from its calculation of prejudgment interest the one-year period in which Kyle and his parents voluntarily dismissed their case, as follows:

[T]hough it is not clear whether a court can alter the date from which [prejudgment] interest is computed, this court believes that it can in the exercise of discretion. The court here chooses to exercise its discretion in computing the prejudgment interest and orders prejudgment interest to be computed from the date the cause of action accrued to the date that [Kyle and his parents] voluntarily dismissed [their complaint] under Civ.R. 41(A) on March 8, 2007. The prejudgment interest will then resume when [Kyle and his parents] re-filed [their] [complaint] on March 3, 2008 to the date the money is paid. *Giving prejudgment interest for the period after dismissal of the initial complaint and prior to re-filing would not serve to fulfill any of the purposes of the statute.* (Emphasis added.)

{¶ 60} While the trial court's decision on this issue appears reasonable at first glance, the decision cannot be fairly reconciled with *Musisca v. Massillon Community Hosp.*, 69 Ohio St.3d 673, 676, 1994-Ohio-451. In that case, the Ohio Supreme Court considered "whether a trial court, for equitable reasons, may apply some date other than the date the cause of action accrued for beginning the period for which prejudgment interest is awarded pursuant to R.C. 1343.03(C)." The *Musisca* court determined that the provision in former R.C.

1343.03(C) requiring that prejudgment interest "shall be computed from the date the cause of action accrued" was not subject to "equitable adjustment in the appropriate case," as the court of appeals in that case had ruled, because the statute uses the word "shall," and therefore the decision to allow or not allow prejudgment interest from the date the plaintiff's cause of action accrues is not discretionary. *Id.* Consequently, the *Musisca* court agreed "with the holding of *Brumley* [*v. Adams Cty. Hosp.*] 72 Ohio App.3d [614,] at 616, * * * that 'the plain language of R.C. 1343.03(C) allows no room for equitable adjustment.'"

{¶ 61} The *Musisca* court further explained the rationale for its holding as follows:

R.C. 1343.03(C) "was enacted to promote settlement efforts, to prevent parties who have engaged in tortious conduct from frivolously delaying the ultimate resolution of cases, and to encourage good faith efforts to settle controversies outside a trial setting." *Kalain v. Smith* (1986), 25 Ohio St.3d 157 * * *. See, also, *Moskovitz*, 69 Ohio St.3d at 661 * * *; *Peyko v. Frederick* (1986), 25 Ohio St.3d 164, 167 * * *. In addition to promoting settlement, R.C. 1343.03(C), like any statute awarding interest, has the additional purpose of compensating a plaintiff for the defendant's use of money which rightfully belonged to the plaintiff. See *West Virginia v. United States* (1987), 479 U.S. 305, 309–310, 107 S.Ct. 702, 706, * * * fn. 2. The statute requires that the interest award begins to run when the cause of action accrued because the accrual date is when the event giving rise to plaintiff's right to the wrongdoer's money occurred. To allow a trial court to equitably adjust the date the interest begins to run would ignore the compensatory purpose behind the statute. As the *Brumley* court stated [at 616]: "The [defendant was not] required to settle the case to avoid prejudgment interest, but merely to make a genuine effort to do so. Having failed to do so, there is no unfairness, given the clear command of R.C. 1343.03(C), in its being required to forfeit the benefit it has derived from the use of the [money] awarded to plaintiff since the date the cause of action accrued."

Musisca at 676-677.

{¶ 62} Former R.C. 1343.03(C) establishes the period for which the defendant in a tort case is obligated to pay prejudgment interest to the plaintiff. Under the plain language of the statute, the period commences on the date the plaintiff's cause of action accrues and

terminates on the date the defendant pays the money due the plaintiff. *Id.* The defendant's obligation to pay prejudgment interest is dependent on the trial court's determination that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case. However, there is no express provision in former R.C. 1343.03(C) that allows a trial court to exclude, from its calculation of prejudgment interest, a period in which the plaintiff voluntarily dismisses his action under Civ.R. 41(A) and then re-files it less than one year later.

{¶ 63} The trial court justified its decision to exclude the one-year period of voluntary dismissal from its calculation of prejudgment interest on the basis that requiring Dr. Huber and QESI to pay for this period would not serve the purposes of former R.C. 1343.03(C). Dr. Huber and QESI defend the trial court's decision on the basis that Kyle and his parents should not be rewarded for unnecessarily delaying the proceedings in this case. We find these arguments unpersuasive.

{¶ 64} As stated in *Musisca*, 69 Ohio St. 3d at 676-677, one of the purposes of former R.C. 1343.03(C) is to compensate a plaintiff for the defendant's use of money which rightfully belonged to the plaintiff. *Id.*, citing *West Virginia v. United States*, 479 U.S. at 309–310, fn. 2. To allow a trial court to equitably adjust the period for which a tortfeasor must pay prejudgment interest would ignore the compensatory purpose behind former R.C. 1343.03(C). *Musisca* at 676. Additionally, Dr. Huber and QESI were not required to settle the case to avoid prejudgment interest, but merely to make a genuine effort to do so, and failed to do so. Therefore, there is no unfairness, given the clear language in R.C. 1343.03(C), in requiring Dr. Huber and QESI to forfeit the benefit they have derived from their use of the money awarded to Kyle and his parents from the date the cause of action accrued,

including the period Kyle and his parents voluntarily dismissed their case under Civ.R. 41(A) and then refiled it less than a year later. *Id.*, quoting *Brumley*, 72 Ohio App.3d at 616.

{¶ 65} In light of the foregoing, the trial court erred in excluding from its calculation of prejudgment interest the date from which Kyle and his parents voluntarily dismissed their complaint under Civ.R. 41(A) and then refiled it less than one year later. Therefore, Kyle and his parents' first cross-assignment of error is sustained.

{¶ 66} In their second assignment of error on cross-appeal, Kyle and his parents argue the trial court erred in refusing to give the jury their requested instruction and interrogatory on the emotional distress claim of Kyle's parents. This argument lacks merit.

{¶ 67} A trial court does not err in refusing to give a requested jury instruction if it is not a correct statement of the law or if it is not supported by the evidence presented in the case. *Hammerschmidt v. Mignogna*, 115 Ohio App.3d 276, 280 (8th Dist.1996), citing *Pallini v. Dankowski*, 17 Ohio St.2d 51, 55 (1969).

{¶ 68} In Ohio, a cause of action may be stated for the negligent infliction of serious emotional distress without a contemporaneous physical injury. *Paugh v. Hanks*, 6 Ohio St.3d 72 (1983), paragraphs one and two of the syllabus. Where the person bringing such a claim has not sustained a contemporaneous physical injury as a result of the event in question, the emotional injuries the person has sustained "must be found to be both serious and reasonably foreseeable, in order to allow a recovery." *Id.* at paragraph three of the syllabus. "Serious emotional distress" involves emotional injury that is both "severe and debilitating," and "may be found where a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case." *Id.* at paragraph three of the syllabus (subparagraph 3a).

{¶ 69} Kyle and his parents argue the evidence shows that Longbottom and Smith suffered severe emotional distress because Kyle almost died as a result of his injuries. They point out that Longbottom awoke at 5:00 a.m. to find Kyle choking and gasping for air, and that during his trial testimony, Smith had to take a break because he was crying uncontrollably. However, while there is no question that Kyle's parents suffered serious emotional distress as a result of these events, Kyle and his parents failed to present sufficient evidence to demonstrate that the serious emotional distress they experienced was both severe and debilitating, or that a reasonable person in their position "would be unable to cope adequately with the mental distress engendered by the circumstances of his case." *Paugh*. Therefore, the trial court did not err in refusing to give Kyle's parents their requested jury instruction and interrogatory on their emotional distress claim. *Hammerschmidt*, 115 Ohio App.3d at 280.

{¶ 70} Accordingly, Kyle and his parents' second cross-assignment of error is overruled.

{¶ 71} In light of the foregoing, the trial court's judgment is affirmed in part, reversed in part with respect to the trial court's refusal to award prejudgment interest to Kyle and his parents from the date they voluntarily dismissed their complaint under Civ.R. 41(A) to the date they refiled it, and remanded to the trial court for the limited purpose of amending the amount of prejudgment interest awarded to Kyle and his parents to include prejudgment interest for this period.

RINGLAND and YOUNG, JJ., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6 (C), Article IV of the Ohio Constitution.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>