

ORIGINAL

IN THE SUPREME COURT OF OHIO

KRISTI LONGBOTTOM, et al., Individually and as Natural Guardians of Kyle Jacob Smith	:	Supreme Court Case No. 2012-1260
	:	
	:	On Appeal from the Clermont County Court of Appeals, Twelfth Appellate District
Plaintiff-Appellees,	:	
	:	
vs.	:	Court of Appeals
	:	Case Nos. CA 2011-01-005
GARY S. HUBER, D.O., et al.	:	CA 2011-01-006
	:	
Defendant-Appellants.	:	

MERIT BRIEF OF APPELLANTS GARY S. HUBER, D.O. AND QUALIFIED EMERGENCY SPECIALISTS, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....v

I. STATEMENT OF THE FACTS.....1

A. BACKGROUND1

B. PREJUDGMENT INTEREST CONSIDERATIONS.....1

C. THE DECISION OF THE COURT OF APPEALS 3

D. THE CERTIFIED QUESTION NOW BEFORE THIS COURT..... 4

II. LAW AND ARGUMENT..... 5

A. SUMMARY OF ARGUMENT 6

B. R.C. 1343.03(C), AS AMENDED JUNE 2, 2004, SHOULD BE APPLIED TO CALCULATE PREJUDGMENT INTEREST IN CASES PENDING ON OR AFTER JUNE 2, 2004.....7

1. R.C. 1343.03 HAS PREVIOUSLY BEEN DETERMINED TO APPLY TO ALL CASES PENDING AS OF JUNE 2, 20047

C. PURSUANT TO ESTABLISHED OHIO CASE LAW, R.C. 1343.03, INCLUDING R.C. 1343.03(C) AS AMENDED, MAY BE APPLIED RETROACTIVELY 8

1. R.C. 1343.03(C) MAY BE APPLIED RETROACTIVELY IF NO SUBSTANTIAL RIGHTS WOULD BE IMPAIRED BY DOING SO10

2. SUBSTANTIVE VS. REMEDIAL LAWS 11

3. THERE IS ABUNDANT EVIDENCE OF LEGISLATIVE INTENT FOR RETROACTIVE APPLICATION 12

4. THE RETROACTIVE LANGUAGE USED IN ENACTING R.C. 1343.03(A)14

5. THE CURRENT VERSION OF R.C. 1343.03(C) SHOULD BE APPLIED BECAUSE HB 212 WAS A REMEDIAL STATUTE.....16

6. APPELLEES POSSESSED NO SUBSTANTIVE RIGHT TO PREJUDGMENT INTEREST UNTIL SEPTEMBER, 2010, AT THE EARLIEST.....16

7. THE CASE AUTHORITY RELIED ON BY THE COURT OF APPEALS IS SUSPECT ... 17

8.	<i>BARNES V. UNIVERSITY HOSPITALS OF CLEVELAND</i>	19
9.	<i>TERRAGO-SNYDER V. MAURO</i>	19
D.	THE PLAIN LANGUAGE OF R.C. 1343.03(C) DEMONSTRATES THAT IT GOVERNS THE PRESENT DISPUTE BECAUSE NO “CIVIL ACTION” EXISTED PRIOR TO MARCH 3, 2008	20
1.	PREJUDGMENT INTEREST CANNOT BE CALCULATED FROM ANY DATE PRIOR TO THE FILING OF THE PLEADING UPON WHICH JUDGMENT WAS RENDERED 24	
2.	THE COURT OF APPEALS’ DECISION FAILED TO RECOGNIZE THE MANDATORY STATUTORY LANGUAGE USED IN THE CURRENT VERSION OF R.C. 1343.03(C)	25
3.	THE COURT OF APPEALS’ REFUSAL TO APPLY THE CURRENT VERSION OF R.C. 1343.03(C) RESULTED IN A PROFOUND MISCALCULATION OF DAMAGES	25
E.	BECAUSE THE INITIAL LAWSUIT WAS VOLUNTARILY DISMISSED, ITS FILING DATE CANNOT BE USED BY A TRIAL COURT AS THE ACCRUAL DATE FOR PREJUDGMENT INTEREST	26
F.	R.C. 1343.03(C), AS AMENDED, DOES NOT PERMIT PREJUDGMENT INTEREST ON FUTURE DAMAGES FOR REASONS WHICH ARE SELF-EVIDENT, AND WHICH CONSTITUTE WELL-ESTABLISHED PUBLIC POLICY IN OHIO	27
G.	APPLYING WELL-ESTABLISHED RULES OF STATUTORY CONSTRUCTION COMPELS THE CONCLUSION THAT THE CURRENT VERSION OF R.C. 1343.03(C) SHOULD HAVE BEEN APPLIED	28
1.	R.C. 1.47 REQUIRES THAT STATUTES BE INTERPRETED TO EFFECT JUST AND REASONABLE RESULTS	28
2.	THE PLAIN LANGUAGE OF A STATUTE IS A REVIEWING COURT’S FIRST LINE OF INQUIRY	29
3.	A REVIEWING COURT SHOULD INTERPRET A STATUTE CONTEXTUALLY AND SHOULD CONSTRUE WORDS CONSISTENT WITH THEIR COMMON USAGE	31
4.	RELATED STATUTES MUST BE INTERPRETED “IN PARI MATERIA”	31
III.	CONCLUSION	32
	CERTIFICATE OF SERVICE	33

TABLE OF AUTHORITIES

Cases

<i>Ackison v. Anchor Packing Co.</i> , 120 Ohio St.3d 228, 231, 2008-Ohio-5243, 897 N.E.2d 1118	11, 12, 16
<i>Barnes v. University Hospitals of Cleveland</i> , 8th Dist. Nos. 87247, 87285, 87710, 87903 and 87946, 2006 Ohio 6266	3, 19
<i>Bergman v. Monarch Const.</i> , 124 Ohio St. 3d 534, 539; 2010-Ohio-622, 925 N.E.2d 116	25
<i>Bielat v. Bielat</i> , 87 Ohio St. 3d 350, (2000).....	8, 11
<i>Carter v. Youngstown</i> (1946), 146 Ohio St. 203, 32 O.O.184, 65 N.E.2d 63	30, 31
<i>Chuparkoff v. Kapron</i> , 9th Dist. No. 24234, 2009-Ohio-5462	26
<i>Cline v. Ohio Bur. of Motor Vehicles</i> , 61 Ohio St.3d 93, 573 N.E.2d 77 (1991)	30
<i>Conway v. Dravenstott</i> , 3rd Dist. No. 3-07-05, 2007 Ohio 4933	3, 18, 19
<i>Denham v. New Carlisle</i> , 86 Ohio St. 3d 594, 716 N.E.2d 184, 186 (1999)	27
<i>Denicola v. Providence Hospital</i> , 57 Ohio St.2d 115, 387 N.E.2d 231 (1979)	12
<i>DeVille Photography, Inc. v. Bowers</i> , 169 Ohio St. 267, 159 N.E.2d 443 (1959).....	27
<i>Discount Cellular, Inc. v. Pub. Util. Comm.</i> , 112 Ohio St. 3d 360, 2007-Ohio-53, 859 N.E. 2d 957	18
<i>Dorrian v. Scioto Conservancy Dist.</i> (1971), 27 Ohio St.2d 102, 56 O.O.2d 58, 271 N.E.2d 834.....	25
<i>Havel v. Villa St. Joseph</i> , 131 Ohio St. 3d 235, 2012-Ohio-552	30
<i>Hodesh v. Korelitz, M.D.</i> , 123 Ohio St.3d 72, 2009-Ohio-4220, 914 N.E.2d 186	3
<i>Hodesh v. Korelitz, M.D.</i> , 1st Dist. Nos. C-061013, C-061040, and C-070172, 2008 Ohio 2052	3, 18, 19
<i>Hubbell v. Xenai</i> , 115 Ohio St.3d 77, 2007 Ohio 4839, 873 N.E.2d 878	29
<i>In re Nevius</i> , 174 Ohio St. 560, 191 N.E.2d 166 (1963)	10

<i>Johnson's Mkts., Inc. v. New Carlisle Dept. of Health</i> (1991), 58 Ohio St.3d 28, 567 N.E.2d 1018	32
<i>Jones v. Progressive Preferred Ins. Co.</i> , 169 Ohio App.3d 291, 2006-Ohio-5420, 862 N.E.2d 850	23
<i>Keplinger v. Kinsser</i> (Montgomery C.P. 1933), 31 Ohio N.P. (N.S.) 338	10
<i>Kilbreath v. Rudy</i> (1968), 16 Ohio St. 2d 70, 45 O.O. 2d 370, 242 N.E. 2d 658	9, 11
<i>Lawrence RR. Co. v. Commrs. of Mahoning Cty.</i> (1879), 35 Ohio St. 1	10
<i>Longbottom v. Mercy Hospital Clermont</i> , 2012-Ohio-2148, 971 N.E.2d 379, 392	3
<i>Maynard v. Eaton Corporation</i> , 119 Ohio St.3d 443, 2008-Ohio-4542, 895 N.E.2d 145	6, 7, 8, 13, 20, 23
<i>McNeil v. Kingsley</i> , 178 Ohio App.3d 674, 2008-Ohio-5536	22
<i>Meeks v. Papadopoulos</i> (1980), 62 Ohio St.2d 187, 16 O.O.3d 212, 404 N.E.2d 159	30
<i>Morgan v. Western Electric Co.</i> , 69 Ohio St. 2d 278 (1982)	17
<i>Moskovitz v. Mt. Sinai Med. Ctr.</i> , 69 Ohio St.3d 638, 1994-Ohio-324, 635 N.E.2d 331 ..	9
<i>O'Toole v. Denihan</i> (2008), 118 Ohio St. 3d 374, 2008-Ohio-2574	24
<i>Payton v. Rehberg</i> , 119 Ohio App.3d 183, 694 N.E.2d 1379 (1997)	26
<i>Portage Cty. Bd. of Commrs. v. Akron</i> , 109 Ohio St.3d 106, 2006 Ohio 954, 846 N.E.2d 478	29
<i>Rairden v. Holden</i> (1865), 15 Ohio St. 207	10
<i>Scibelli v. Pannunzio</i> , 7th Dist. No. 05 MA 150, 2006 Ohio 5652	3, 17, 18, 19, 20
<i>Selker & Furber v. Brightman</i> , 138 Ohio App.3d 710, 742 N.E.2d 203 (2000)	26
<i>State ex rel. Burrows v. Indus. Comm.</i> (1997), 78 Ohio St.3d 78, 1997 Ohio 310, 676 N.E.2d 519	29
<i>State ex rel. Fifth Third Mortg. Co. v. Russo</i> , 129 Ohio St. 3d 250, 253, 2011-Ohio-3177, 951 N.E.2d 414.....	26
<i>State ex rel. Holdridge v. Indus. Comm.</i> , 11 Ohio St.2d 178, 228 N.E.2d 621 (1967)	11

<i>State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.</i> (1996), 74 Ohio St.3d 543, 1996 Ohio 291, 660 N.E.2d 463	30
<i>State ex rel. Shisler v. Ohio Pub. Emps. Retirement Sys.</i> , 122 Ohio St.3d 148, 2009-Ohio-2522, 909 N.E.2d 610	31
<i>State v. Barlow</i> (1904), 70 Ohio St. 363, 71 N.E. 726	10
<i>State v. Cook</i> , 128 Ohio St. 3d 120, 2010-Ohio-6305	31
<i>State v. Moore</i> , 165 Ohio App.3d 538, 2006-Ohio-114, 847 N.E.2d 452, 456	11, 16
<i>State v. White</i> , 132 Ohio St. 3d 344, 2012-Ohio-2583	8
<i>State, ex rel. Michaels, v. Morse</i> (1956), 165 Ohio St. 599, 60 O.O. 531, 138 N.E. 2d 660	10
<i>Summerville v. v. City of Forest Park</i> , 128 Ohio St. 3d 221, 2010-Ohio-6280, 943 N.E.2d 522.....	29, 30, 31
<i>Templeton v. Kraner</i> (1874), 24 Ohio St. 554	10
<i>Terrago-Snyder v. Mauro</i> , 7 th App. No. 08 MA 237, 2010-Ohio-5524	19, 20
<i>United Tel. Co. of Ohio v. Limbach</i> (1994), 71 Ohio St.3d 369, 1994 Ohio 209, 643 N.E.2d 1129.....	32
<i>Van Fossen v. Babcock & Wilcox Co.</i> , 36 Ohio St. 3d 100, 522 N.E.2d 489 (1988)9, 12, 16	
<i>Vogel v. Wells</i> , 57 Ohio St. 3d 91, 566 N.E.2d 154 (1991)	9
<i>Wolk v. Paino</i> , 8th Dist. No. 93095, 2010-Ohio-1755	26
<i>Zimmie v. Zimmie</i> , 11 Ohio St.2d 94, 464 N.E.2d 142 (1984)	26

Statutes

2003 H.B. 212	7, 8, 13, 14, 15, 16, 19, 20, 22, 23, 28
R.C. 1.42	25
R.C. 1.47(B)	32
R.C. 1.47(C)	28

R.C. 1343.03	6, 7, 8, 12, 13, 15, 16, 17, 22, 23, 24, 25, 27, 32
R.C. 1343.03(A)	7, 14, 22
R.C. 1343.03(B)	20
R.C. 1343.03(C)	1, 2, 3, 4, 5, 6, 8, 12, 13, 16, 17, 18, 19, 20, 22, 23, 24, 28, 29, 30, 32
R.C. 1343.03(C)(1)	5, 12, 13, 20, 21, 25, 31
R.C. 1343.03(C)(1)(c)	12, 21, 31
R.C. 1343.03(C)(1)(c)(i)	21
R.C. 1343.03(C)(1)(c)(ii)	21, 24
R.C. 1343.03(C)(2)	5, 13, 21, 25, 30, 31
R.C. 2323.56	21, 25, 28, 32
R.C. 2323.56(B)	28
R.C. 2323.56(C)	28
Other Authorities	
Black's Law Dictionary (8th Ed. 2004) 31, 235	22
Rules	
Civ.R. 41(A)	26
Civ.R. 41(A)(1)	1, 2, 16, 23, 26
Constitutional Provisions	
Ohio Constitution, Article II, Section 28	9, 10, 11, 16

I. STATEMENT OF THE FACTS

A. BACKGROUND

None of the facts relevant to the determination of this appeal are disputed. This appeal arises out of a medical malpractice lawsuit, filed by appellees, Kristi Longbottom and Jesse Smith (parents of Kyle Smith) (hereinafter “appellees”), against appellants, Dr. Gary Huber and Qualified Emergency Specialists, Inc. (“jointly hereafter “appellant”), which proceeded to trial in September, 2010. This lawsuit, Clermont County Common Pleas Case No. 2008 CV 499, was filed on March 3, 2008. A prior lawsuit, Clermont County Common Pleas Case No. 2003 CV 370 had been filed on March 14, 2003 and was voluntarily dismissed pursuant to Civ.R. 41(A)(1) on March 8, 2007.¹ The claims asserted sounded in medical malpractice and arose out of the care and treatment rendered to minor Kyle Smith.

B. PREJUDGMENT INTEREST CONSIDERATIONS

A plaintiffs’ verdict was returned on September 28, 2010 and judgment was then journalized on October 14, 2010. Thereafter a Motion for Prejudgment interest was filed and briefed. The trial court granted the Motion for Prejudgment Interest on December 28, 2010 and, in so doing, expressly determined that R.C. 1343.03(C), as amended on June 2, 2004, did not govern the calculation of prejudgment interest because that statute was not in effect at the time of the filing of the initial lawsuit. The amount of

¹ Subsequent to trial, the jury completed interrogatories in favor of appellant on almost all of the dispositive issues. The general verdict in favor of plaintiff was arguably inconsistent with these interrogatories. This jury verdict, per the jury’s interrogatories, was based on what the jury considered to be inadequate medical discharge instructions given to the parents of the injured minor, Kyle Smith, at the time of his discharge. All of the expert testimony pertained only to the issue of whether a CT scan should have been ordered during treatment. The minor, Kyle Smith, had been seen at the Clermont Mercy Hospital Emergency Room for treatment after falling and hitting his head. Subsequent to returning home, he developed an epidural hematoma.

prejudgment interest awarded was \$830,774.66. The trial court further determined that because there was no clear legislative intent that amended R.C. 1343.03(C) should be applied retroactively, that the court was required to apply the former version of R.C. 1343.03(C), which version did not include a prohibition on prejudgment interest on future damages.

The total jury verdict was approximately \$2,412,899, which was subject to a \$500,000 offset. Notably, of the jury's total award of damages, approximately 67% represented future damages. Past and future damages were separately determined by the jury in their answers to jury interrogatories and verdict forms at appellant's request. Nevertheless, the trial court awarded prejudgment interest on the **entire** amount of the damages award, in contravention of R.C. 1343.03(C), as amended on June 2, 2004, for the reasons outlined above.

In deciding the appropriate period of time for which to award prejudgment interest, the trial court, in what it termed an exercise of discretion under the former version of R.C. 1343.03(C), did not award prejudgment interest for the period of time between the voluntary dismissal pursuant Civ.R. 41(A)(1) and the re-filing of the second lawsuit. This period ran from March 8, 2007 to March 3, 2008.

An appeal of the verdict and the award of prejudgment interest was filed with the Twelfth District Court of Appeals on January 28, 2011. Appellees cross-appealed, assigning as error the trial court's decision not to award interest for the approximate one-year period of time between the voluntary dismissal of Case No. 2003 CV 370 and the filing of Case No. 2008 CV 499.

C. THE DECISION OF THE COURT OF APPEALS

The Twelfth District, in an opinion issued May 14, 2012, affirmed the award of prejudgment interest in its entirety, expressly finding that the trial court was correct in using the former version of R.C. 1343.03(C), and that the trigger date for calculating prejudgment interest was the filing date of the first lawsuit. See *Longbottom v. Mercy Hospital Clermont*, 2012-Ohio-2148, at ¶52-56, 971 N.E.2d 379, 392. (See Appx. 0041-0062)

The following is the entirety of the court of appeals' analysis of this issue:

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 Hospitals 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, 893 N.E.2d 142. 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, 914 N.E.2d 186; *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*.

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*.

Id. at ¶54-55.

As seen above, the court of appeals recognized that there was a split of authority on the issue of the retroactivity of amended R.C. 1343.03(C) in its opinion. Appellant filed a Motion to Certify Conflict on May 24, 2012, which was granted on July 12, 2012.

(Appx. 0063-0065) The conflict certified was on the issue of whether the present version of R.C. 1343.03(C) should be applied retroactively to lawsuits filed prior to the effective date of the newer version of the statute. (Appx. 0065)

The court of appeals also reversed the trial court's decision to toll the running of prejudgment interest during the approximate one-year time period in which no lawsuit was pending (despite concluding that the decision to do so "appears reasonable at first glance"), finding that trial court lacked equitable discretion under the former version of R.C. 1343.03(C) to adjust the accrual date for prejudgment interest and/or to not award interest for some of the period of time between the accrual date and the date of the verdict. *Id.* at ¶57-65, 971 N.E.2d at 392-394. (Appx. 0056-0060)

D. THE CERTIFIED QUESTION NOW BEFORE THIS COURT

This Court accepted the following certified question on November 7, 2012:

"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?" (Appx. 0072)

Thus, one of the central issues before this Court is whether appellees are entitled to prejudgment interest, in an amount in excess of \$800,000, on future damages. Such an award can only have resulted from the trial court's application of the former version of R.C. 1343.03(C), and consideration of the pendency of originally filed action that was voluntarily dismissed by the plaintiffs. This former version of the statute had been superseded for a period of more than six years at the time of the jury verdict, and thus inoperable for a period of almost four years at the time that this action was re-filed on March 3, 2008. As recognized by the court of appeals, if the present version of R.C. 1343.03(C) had been applied in this case, then there would necessarily be no entitlement

to prejudgment interest on the majority of the damages awarded and the award would need to be significantly modified:

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.

Id. at ¶53.

The resolution of the certified question necessarily requires a determination of whether the accrual date for prejudgment interest was properly determined, and whether the filing date of the voluntarily dismissed initial lawsuit as opposed to the filing of the second lawsuit (upon which judgment was entered) was properly considered.

A second related issue of law before this Court is whether the present version of R.C. 1343.03(C) or, in the alternative, the former version of that statute, grants a trial court discretion to toll the running of prejudgment interest during a time period in which a plaintiff had voluntarily dismissed his lawsuit. In this case, the period was tolled for a period of almost one year, which is the amount of time the plaintiff allowed the lawsuit to remain unfiled after being voluntarily dismissed.

II. LAW AND ARGUMENT

CERTIFIED QUESTION

“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?”

A. SUMMARY OF ARGUMENT

This Court should apply the current version of R.C. 1343.03(C) to the present dispute for the following reasons:

- R.C. 1343.03 has previously been determined by this Court to be controlling of all pending cases as of June 2, 2004, in *Maynard v. Eaton*, 119 Ohio St. 3d 443.
- Amended R.C. 1343.03(C) can be applied retroactively because it is a remedial, rather than a substantive, statute.
- Amended R.C. 1343.03(C) can be applied retroactively because there is clear legislative intent that the statute govern all civil actions pending as of June 2, 2004 or filed after June 2, 2004.
- The existing case authority which has applied amended R.C. 1343.03(C) retroactively is more persuasive, and more consistent with the Legislature's intent, than the case law which has concluded otherwise.
- The plain language of amended R.C. 1343.03(C) requires that it be applied to all cases pending as of June 2, 2004, or filed after June 2, 2004.
- The court of appeals' refusal to apply amended R.C. 1343.03(C) resulted in an improper award of prejudgment interest on future damages, because the present version of the statute contains a prohibition on the award of prejudgment interest on future damages.
- The court of appeals' refusal to apply amended R.C. 1343.03(C) resulted in prejudgment interest being calculated for a much longer period of time than was appropriate, because under the present version of the statute, the start date for calculating prejudgment interest is the date of the filing of the pleading upon which the judgment was based.
- The filing date of the earlier lawsuit, which was voluntarily dismissed, is irrelevant to prejudgment interest considerations. Once a lawsuit is voluntarily dismissed, the law treats it as though it was never filed and as if no lawsuit was ever commenced.
- It is against well-established Ohio public policy to award prejudgment interest on future damages.
- Well-established rules of statutory construction support the application of the present version of R.C. 1343.03(C) to the present dispute.

B. R.C. 1343.03(C), AS AMENDED JUNE 2, 2004, SHOULD BE APPLIED TO CALCULATE PREJUDGMENT INTEREST IN CASES PENDING ON OR AFTER JUNE 2, 2004

1. R.C. 1343.03 HAS PREVIOUSLY BEEN DETERMINED TO APPLY TO ALL CASES PENDING AS OF JUNE 2, 2004

This Court decided a similar certified question in *Maynard v. Eaton Corporation*, 119 Ohio St.3d 443, 2008-Ohio-4542, 895 N.E.2d 145, after the Third District had likewise failed to apply the amended version of R.C. 1343.03(A) as related to post-judgment interest calculations. A conflict on the following question had been certified:

“Does the amendment to R.C. 1343.03, effective June 2, 2004, adjust the ten percent rate of post-judgment interest calculated on a final judgment that was entered prior to the date of the amendment, but not paid in full and pending on appeal?”

In finding that the General Assembly, in enacting 2003 H.B. 212 (hereinafter “H.B. 212”), intended that the amended post-judgment interest statute be applied to all cases “pending” after the effective date, this Court stated as follows:

In contrast to the appellate court’s resolution of this matter, the General Assembly clearly provided that interest on a judgment in a case pending after the effective date of H.B. 212 would be calculated at a rate different from that used for the calculation of interest accruing before the effective date of H.B. 212. The uncodified section of the H.B. 212 directs that the fixed rate of ten percent per annum in effect prior to June 2, 2004, applies through June 2, 2004, and is to be used to calculate the amount of interest accrued through June 1, 2004; the annually determined rate then applies and is used to calculate the amount of interest to be paid from June 2, 2004, forward.

Id. at ¶12.

Ultimately, this Court concluded:

“We hold that the amendment to R.C. 1343.03(A) applies to cases in which the trial court has entered final judgment prior to June 2, 2004, the effective date of the amendment, but the

judgment is not yet paid in full **and the case was pending** on appeal as of that date.” *Id.* at ¶15. (Emphasis added.)

In the present matter, both the initial and subsequent lawsuits were obviously pending well after the effective date of amended R.C. 1343.03. In fact, the case was voluntarily dismissed in March, 2007 and not re-filed until March, 2008. Thus, there is no way to reconcile the court of appeals’ finding that the application of R.C. 1343.03(C), as amended in 2004, to the award of prejudgment interest in this case constitutes a “retroactive” application of that statute with this Court’s holding in *Maynard*. Additionally, the discussion of the legislative history of H.B. 212 contained in *Maynard* suggests that the Legislature did in fact intend the amended version of R.C. 1343.03 to be immediately applied to all cases which were pending either on or after the effective date of the amendment. To the extent that such an application is deemed “retroactive” it is nevertheless appropriate. Simply, the court of appeals’ conclusion that there is no evidence of legislative intent is not supported by the record, or by the case law which has examined this precise issue.

C. PURSUANT TO ESTABLISHED OHIO CASE LAW, R.C. 1343.03, INCLUDING R.C. 1343.03(C) AS AMENDED, MAY BE APPLIED RETROACTIVELY

Laws are applied retroactively when they “reach back in time” to regulate past conduct. *Bielat v. Bielat*, 87 Ohio St. 3d 350, 359 (2000); *see also, State v. White*, 132 Ohio St. 3d 344, 2012-Ohio-2583, at ¶34. Thus, “the constitutional test for substantive legislation focuses on new laws that reach back in time and create new burdens, deprivations, or impairments of vested rights.” *Bielat*, 87 Ohio St.3d at 359; *White*, 132 Ohio St. 3d at 352.

Article II, Section 28 of the Ohio Constitution prohibits retroactive laws. Using statutory construction as a guide, it has also been settled that the ban against retroactive legislation “includes a prohibition against laws which commenced on the date of enactment and which operated in futuro, but which, in doing so, divested rights, particularly property rights, **which had been vested anterior to the time of enactment of the laws.**” *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St. 3d 100, 104-05, 522 N.E.2d 489 (1988). (Emphasis added.) Thus, implicit in the analysis of the court of appeals was a determination that a right to prejudgment interest had “vested” in appellees prior to June 2, 2004, based solely on the accrual date of the cause of action. When viewed against the timeline of this lawsuit, such a determination is both illogical and untenable.

This Court has held that there are four mandatory requirements to an award of prejudgment interest: (1) a timely motion within 14 days after judgment; (2) a hearing on the motion; (3) a finding by the court that the party required to pay failed to make a good faith effort to settle; and (4) a finding by the court that the party to whom the judgment is to be paid made a good faith effort to settle. *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 658, 1994-Ohio-324, 635 N.E.2d 331.

In *Vogel v. Wells*, 57 Ohio St. 3d 91, 100, 566 N.E.2d 154, 162 (1991)(Justice Holmes dissenting), Justice Holmes reviewed the long line of Ohio jurisprudence standing for the proposition that there is no “vested right” to a particular remedy:

Section 28, Article II of the Ohio Constitution prohibits the passage of retroactive laws which are substantive in nature. *Kilbreath v. Rudy* (1968), 16 Ohio St. 2d 70, 45 O.O. 2d 370, 242 N.E. 2d 658. Within the meaning of this constitutional provision, prohibited retroactive laws are those which create and define substantive rights or which give rise to, or take away, the right to

sue and to defend actions at law. *Rairden v. Holden* (1865), 15 Ohio St. 207. Section 28, Article II does not apply to laws of a remedial or procedural nature.

No one has a vested right to a particular remedy. *State v. Barlow* (1904), 70 Ohio St. 363, 374, 71 N.E. 726, 728; *State, ex rel. Michaels, v. Morse* (1956), 165 Ohio St. 599, 60 O.O. 531, 138 N.E. 2d 660.

"Remedy' means the action or means given by law for the recovery of a right. It pertains more particularly to those modes of procedure and pleading which lead up to and end in the judgment. A remedy is not a right." *Keplinger v. Kinsser* (Montgomery C.P. 1933), 31 Ohio N.P. (N.S.) 338, 342. **The legislature has complete control over the remedies afforded to parties and it is a fundamental principle of law that a person may not acquire a vested right in a remedy or any part of it.** *Rairden v. Holden, supra*; *Templeton v. Kraner* (1874), 24 Ohio St. 554, 563; *Lawrence RR. Co. v. Commrs. of Mahoning Cty.* (1879), 35 Ohio St. 1.

(Emphasis added.)

In this case as well, appellees are merely disputing the availability of a "remedy" not a "right." Of course, even if such a right to have prejudgment interest awarded under the old statute existed, it could not conceivably have been a "vested right" as of June 2, 2004, because none of the requirements for an award of prejudgment interest were met as of that date.

1. R.C. 1343.03(C) MAY BE APPLIED RETROACTIVELY IF NO SUBSTANTIAL RIGHTS WOULD BE IMPAIRED BY DOING SO

The Ohio Constitution prohibits the implementation of retroactive laws only if such implementation would impair substantive rights. Art. II, Sec. 28; *See also, In re Nevius*, 174 Ohio St. 560, 564, 191 N.E.2d 166, 169-170 (1963). In determining whether a statute may apply retroactively, a court must look at the intent of the General

Assembly in enacting the statute and determine whether the statute is remedial or substantive in nature. *Id.*

2. SUBSTANTIVE VS. REMEDIAL LAWS

Substantive and remedial laws are defined as follows:

A statute **is substantive if it impairs or takes away vested rights, affects an accrued substantive right**, imposes new or additional burdens, duties, obligations, or liabilities to a past transaction or creates a new right. *** Conversely, remedial laws are those affecting only the remedy provided, and **include laws that merely substitute a new or more appropriate remedy for the enforcement of an existing right.** *** "Further, while we have recognized the occasional substantive effect, we have found that **it is generally true that laws that relate to procedures are ordinarily remedial in nature.**" (internal citations omitted)(Emphasis added)

Ackison v. Anchor Packing Co., 120 Ohio St.3d 228, 231, 2008-Ohio-5243 at ¶15, 897 N.E.2d 1118.

"A purely remedial statute does not violate Section 28, Article II of the Ohio Constitution, even when it is applied retroactively." *Bielat v. Bielat, supra*, 87 Ohio St.3d at 354, 721 N.E.2d at 33.

Substantive laws are those that "create duties, rights and obligations, while procedural or remedial law prescribes the method of enforcement of rights or obtaining redress." *Kilbreath v. Rudy*, 16 Ohio St.2d 70, 242 N.E.2d 658 (1968); citing *State ex rel. Holdridge v. Indus. Comm.*, 11 Ohio St.2d 178, 228 N.E.2d 621 (1967). "Remedial laws are those enacted to correct past defects, to redress an existing wrong, or to promote the public good." *State v. Moore*, 165 Ohio App.3d 538, 544, 2006-Ohio-114 at ¶21, 847 N.E.2d 452, 456. Remedial laws that limit what evidence may be presented at trial are properly applied when the law is enacted prior to the trial date, even if the law

was enacted after the cause of action accrued. *Denicola v. Providence Hospital*, 57 Ohio St.2d 115, 117-118, 387 N.E.2d 231, 233 (1979).

In this case, amended R.C. 1343.03(C) “merely substituted a new or more appropriate remedy for the enforcement of an existing right.” See, *Ackison*, *supra*. Thus, the statute is remedial, not substantive in nature.

3. THERE IS ABUNDANT EVIDENCE OF LEGISLATIVE INTENT FOR RETROACTIVE APPLICATION

The plain language of R.C. 1343.03 meets the first requirement set forth in *Van Fossen* that the General Assembly intended the statute to be applied retroactively. Specifically, R.C. 1343.03 applies to any “civil action” regardless of when the cause of action accrued. By including the encompassing language in any “civil action” language the General Assembly evidenced its intent that amended R.C. 1343.03(C) be applied to all such civil actions pending or filed after the effective date of the amendment.² Clearly, the language of the statute could have been worded differently had it been the Legislature’s intent to only apply amended R.C. 1343.03 to those actions where the accrual date did not precede the enactment of the amendments to the statute.

² R.C. 1343.03 states in this respect:

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

(c) **In all other actions**, for the longer of the following periods:

Given that the accrual date determination was very different under the prior statute than it is under the present statute, one would expect clear legislative wording on for the determination of such issues, if there had not been the intent that R.C. 1343.03(C), as amended, be applied to all pending actions. Indeed, such clarifications were provided in the uncodified section of H.B. 212 dealing with the determination of post-judgment interest prior to June 2, 2004 and after June 2, 2004. See *Maynard*, supra, 119 Ohio St. 3d at 445, 2007-Ohio-1069, at ¶13.

Likewise, R.C. 1343.03(C)(2) directs that “[n]o court shall award interest under division (C)(1) of this section on future damages.”(Emphasis added) This mandatory language further demonstrates intent by the Legislature that the newly enacted statutory provisions be applied immediately to all pending civil actions.

There is also clear language contained in the legislative history of H.B. 212 demonstrating that the Legislature intended to “preclude” all future awards of prejudgment interest on future damages. (See Appx. 0066-0069)

A cursory review of the legislative history for 2003 Ohio H.B. 212, the statutory enactment which became R.C. 1343.03, demonstrates that the Legislature did in fact intend to immediately preclude the award of prejudgment interest on future damages. For example, the pertinent legislative history synopsis gives the following rationale for passage of 2003 Ohio H.B. 212:

AN ACT To amend sections 1343.03 * * * of the Revised Code to change the rate of interest on money due under certain contracts and on judgments, to provide trial courts notification of the rate of interest, to specify that the rate of interest is that in effect on the date of the judgment in a civil action and remains in effect until the judgment is satisfied, **to change the computation of the period for which prejudgment interest is due in certain civil actions, to preclude prejudgment interest on future**

damages, to require that the finder of fact in certain tort actions in which future damages are claimed specify the amount of past and future damages awarded * * *. (Emphasis added.) (Appx. 0066-0069)

Thus, the Legislature clearly and unambiguously indicated its intent to “preclude” prejudgment interest on future damages. This mandate to preclude such an award of prejudgment interest on future damages was not limited to causes of actions that would accrue in the future, or to civil actions which were not yet filed. This legislative mandate to preclude future award of prejudgment interest on future damages was unqualified, and there was no indication that the ban on future award of prejudgment interest on future damages should only apply to actions accruing after June 2, 2004.

In addition to precluding prejudgment interest on future damages, the Legislature required via H.B. 212 that the finder of fact in certain tort actions in which future damages are claimed specify the amount of both past and future damages awarded, as a means of preventing the award of prejudgment interest on future damages, and, presumably, to prevent confusion on what damages are future damages as opposed to past damages. (*Id.*, See also Appx. 0070-0071) This requirement that finders of fact in certain tort actions specify the amount of past and future damages could have been drafted so as to only apply to causes of action accruing after June 2, 2004, but it was not.

4. THE RETROACTIVE LANGUAGE USED IN ENACTING R.C. 1343.03(A)

The uncodified language of H.B. 212 provided that the interest rate provided for in R.C. 1343.03(A), dealing with post-judgment interest, applies to actions pending on the effective date of the Act, that is June 2, 2004. This verbiage is properly viewed as

administrative reconciliation of the post-judgment interest portion of the statute pre and post amendment, which lays out the different rates of post-judgment interest to be applied for actions pending prior to and after June 2, 2004. Plainly, a party who had already accrued post-judgment interest prior to June 2, 2004, would already have had a vested right in such funds, and they would already have been due and owing as of the effective date of the statute. This is not also the case where an award of prejudgment interest is made six and one-half years after the enactment of the statute, especially where such an award is premised on conduct which occurred many years after the effective date.

To conclude from this language, as did apparently the court of appeals, that the Legislature did not intend the prohibition on prejudgment interest on future damages to apply to any cause of action which accrued prior to June 2, 2004, regardless of the filing date, is an enormous, analytical reach, and one which is not supported by the context of the statute, nor by its actual legislative history.

The court of appeals also determined that there was no way to conclude from reading the statute that the Legislature intended revised R.C. 1343.03 to be applied retroactively. Again, this ignores the legislative history, which clearly and unambiguously states that 2003 Ohio H.B. 212 was enacted for the express purpose of precluding prejudgment interest on future damages and to require the finder of fact in certain tort actions to specify the amount of past and future damages awarded, for the express purpose of prohibiting prejudgment interest on future damages. The Legislature did not intend this "prohibition" to be implemented gradually over a period

of many years based on factors which determined the accrual date for prejudgment interest under the old statute.

In this case, appellees had no “action” or “civil action” until March 3, 2008. The previous lawsuit that was voluntarily dismissed became a legal nullity by operation of the Civ.R. 41(A)(1) dismissal. Per the wording of amended R.C. 1343.03(C) the accrual date of any “cause of action” is simply irrelevant to the present determination. Yet this was exactly the improper analysis conducted by the court of appeals.

5. THE CURRENT VERSION OF R.C. 1343.03(C) SHOULD BE APPLIED BECAUSE HB 212 WAS A REMEDIAL STATUTE

In addition, the second requirement under *Van Fossen* is met because R.C. 1343.03 is a remedial statute. Remedial statutes are generally procedural in nature and are often enacted to promote the public good. *See Ackison, supra*; and *Moore, supra*. As a remedial statute, H.B. 212, and, thus, R.C. 1343.03, can be applied retroactively without offending Section 28, Article II of the Ohio Constitution. R.C. 1343.03(C) is properly viewed as remedial because it corrected an anomaly in the prior version of the statute which permitted parties to be awarded pre-judgment interest on future damages, or damages not yet incurred at the time of the verdict. The Legislature clearly and unambiguously articulated its intent that such awards be henceforth “precluded.” The prior version of the statute was as anomalous because it permitted the award of retroactive interest going back many, many years on monetary damages not yet sustained.

6. APPELLEES POSSESSED NO SUBSTANTIVE RIGHT TO PREJUDGMENT INTEREST UNTIL SEPTEMBER, 2010, AT THE EARLIEST

In *Morgan v. Western Electric Co.*, 69 Ohio St. 2d 278, 281 (1982), this Court determined that a statute was "not retroactive" where it created a right to appeal after cause of action arose, but before the appealable order issued. Similarly, in this case, there was no right to prejudgment interest until after the verdict was journalized, in October, 2010. Prior to the time a verdict in excess of a settlement offer was received, no conceivable "right" to prejudgment interest could have existed. Also, the determination of prejudgment interest involves an analysis of whether each side failed to rationally evaluate the risks presented by proceeding to trial. This analysis includes a review of conduct and actions of each party all the way up to the time of trial, and potentially into trial. Trial in this matter did not start until September, 2010, more than six years after the effective date of the statute. Therefore, the application of the amended statute below would not have been retroactive, contrary to the determination of both lower courts.

7. THE CASE AUTHORITY RELIED ON BY THE COURT OF APPEALS IS SUSPECT

Frankly, much of the case law relied on by the court of appeals for the proposition that R.C. 1343.03(C) cannot be applied retroactively is conclusory and result-oriented. The first such case cited by the court of appeals was *Scibelli v. Pannunzio*, 7th App. No. 05 MA 150, 2006-Ohio-5652. The *Scibelli* court concluded in analyzing R.C. 1343.03, without much in the way of explanation, that there was no express intent to make "amendments to other divisions retroactive." The court also stated that "the mere existence of this passage mentioning only *division (A)* is a contra-indicator of legislative intent to make other divisions retroactive." (Emphasis sic) *Id.* at ¶147. This "contra-indicator" meme was subsequently picked up by two other appellate courts, even though

there was no discussion in any of these decisions of established rules of statutory construction.

In *Conway v. Dravenstott*, 3rd App. No. 3-07-05, 2007-Ohio-4933 at ¶9, footnote 3, the court merely stated in a footnote that “aside from issues concerning the applicable interest rate, which we will discuss herein, the remaining portions of the statute were intended to act prospectively.” The cited authority for this conclusion was *Discount Cellular, Inc. v. Pub. Util. Comm.*, 112 Ohio St. 3d 360, 2007-Ohio-53 at ¶41, 859 N.E. 2d 957. The *Discount Cellular* case involves public utilities statutes, and has nothing to do with R.C. 1343.03(C), and no discussion of R.C. 1343.03(C) is contained therein.

Finally, in *Hodesh v. Korelitz*, 1st App. No. C-061013, C-061040, C-070168, C-070172, 2008-Ohio-2052, the court adopted the reasoning of the *Scibelli* and the *Conway* decisions, finding that because “prejudgment interest started on the date the cause of action accrued,” the use of a statute different than the one existing on that date would constitute a “retroactive application in a pending case.” *Id.* at ¶63.

Notwithstanding this analysis, no potential right to prejudgment interest can vest unless and until there is a verdict, a hearing on the motion for prejudgment interest, and a ruling on such a motion. Additionally, it is simply not true that under the present version of the statute, prejudgment interest calculations start on the date that the cause of action accrued. Under the present version of the statute, as applied to the facts of this case, prejudgment interest calculations should have started on the date of the filing of the pleading upon which judgment was based, which was on March 3, 2008. When that

appropriate date is used, it is clear that the application of R.C. 1343.03(C) to this matter is indeed prospective, not retroactive.

8. BARNES V. UNIVERSITY HOSPITALS OF CLEVELAND

In *Barnes v. University Hospitals of Cleveland*, 8th App. Nos. 87247, 87285, 87710, 87903, 87946, 2006-Ohio-6266, appeal allowed, 114 Ohio St. 3d 1409, 2007-Ohio-2632, 867 N.E. 2d 843, the court appropriately concluded that the present version of R.C. 1343.03(C) should have been applied to the prejudgment interest considerations in that matter even though a complaint was filed before the effective date of H.B. 212. The Eighth District held in this respect:

“Although the 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.” *Id.* at ¶75.

Appellant submits that this is a much clearer, and more cogent analysis than the circular reasoning employed by the *Scibelli*, *Conway*, and *Hodesh* courts. Implicit in the *Barnes*’ decision was the notion that no potential right to prejudgment interest could have vested, prior to the determination of entitlement to prejudgment interest at the prejudgment interest hearing.

9. TERRAGO-SNYDER V. MAURO

In *Terrago-Snyder v. Mauro*, 7th App. No. 08 MA 237, 2010-Ohio-5524, the court applied the present version of R.C. 1343.03(C) notwithstanding the fact that the accident upon which judgment was based (which may serve as the accrual date under the old statute) had occurred prior to the statutory amendments because the complaint upon which judgment was based was not filed until after the effective date of the

revisions. Based upon these facts the court concluded that “the trial court erred when it applied the previous version of the statute in fashioning the prejudgment interest award.” *Id.* at ¶88. The *Mauro* court stated that its decision was consistent with the *Scibelli* decision from the same court. *Scibelli* was one of the decisions cited by the court of appeals below for the proposition that amended R.C. 1343.03(C) was not controlling. Thus it appears that the court of appeals below may have overbroad in its application of *Scibelli* to the facts of this case, given that the Seventh District Court of Appeals had already clarified and narrowed the intended import of that decision.

D. THE PLAIN LANGUAGE OF R.C. 1343.03(C) DEMONSTRATES THAT IT GOVERNS THE PRESENT DISPUTE BECAUSE NO “CIVIL ACTION” EXISTED PRIOR TO MARCH 3, 2008

Some case authority relied on by the court of appeals was based on the peculiar reasoning that the Legislature intended section (B) of R.C. 1343.03 to be retroactive, but did not intend that section (C) of the same statute be retroactive. The court of appeals reached this conclusion despite the fact that both sections of the statute were amended at the same time, and as part of the same legislation, H.B. 212.

There is simply no support for this conclusion contained in the text of the statute. Nor do principals of statutory construction support such an anomalous interpretation of the statute and its legislative history. Also, such an interpretation is at odds with this Court’s determination in *Maynard* discussed earlier herein.

R.C. 1343.03(C) provides as follows:

- (1) If, upon motion of any party to a **civil action** that is based on tortious conduct, that has not been settled by agreement of the parties, and in which the court has rendered a judgment, decree, or order for the payment of money, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to

settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case, interest on the judgment, decree, or order shall be computed as follows:

* * *

(c) **In all other actions**, for the longer of the following periods:

(i) From the date on which the party to whom the money is to be paid gave the first notice described in division (C)(1)(c)(i) of this section to the date on which the judgment, order, or decree was rendered. The period described in division (C)(1)(c)(i) of this section shall apply only if the party to whom the money is to be paid made a reasonable attempt to determine if the party required to pay had insurance coverage for liability for the tortious conduct and gave to the party required to pay and to any identified insurer, as nearly simultaneously as practicable, written notice in person or by certified mail that the cause of action had accrued.³

(ii) From the **date on which the party to whom the money is to be paid filed the pleading on which the judgment, decree, or order was based** to the date on which the judgment, decree, or order was rendered. (Emphasis added.)

(2) **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 trier of fact.

This language plainly and unambiguously evidences an intent that 1) prejudgment interest only be calculated from the date of the filing of the pleading upon which judgment is based (assuming that R.C. 1343.03(C)(1)(c)(i) does not apply) and 2) that no court award prejudgment interest on future damages subsequent to the enactment of the amended statute.

³ It is not disputed that no notice as described in section (c)(i) was given.

Again, the controlling date to start prejudgment interest in this case is March 3, 2008, because that is the date the pleading on which the judgment was based was filed. The current version of the statute was effective June 2, 2004. Thus, the application of the current version of the statute to this case is not retroactive.

In *McNeil v. Kingsley*, 178 Ohio App.3d 674, 689, 2008-Ohio-5536, at ¶49 the Third District provided a definition of a legal action, and juxtaposed that definition with the definition of a "cause of action":

Section 3 of H.B. 212 specifically states that "the interest rate provided for in division (A) of section 1343.03 of the Revised Code, as amended by this act, applies to *actions pending* on the effective date of this act." (Emphasis sic). **An "action" is defined as "a civil or criminal judicial proceeding,"** whereas a "cause of action" is defined as "a group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person." Black's Law Dictionary (8th Ed. 2004) 31, 235. Here, the accident occurred on December 4, 2002, which would have given McNeil a cause of action as of that date; **however, McNeil did not have an "action" until she filed her complaint on December 3, 2004, which was when she officially had a "civil judicial proceeding."** Because H.B. 212 section 3 specifically states that the change in interest rate only applies to "actions pending as of the effective date" of the act, and McNeil did not have an action until after the effective date, the prior version of R.C. 1343.03 is not applicable. Consequently, when McNeil filed her complaint on December 3, 2004, she was under the amended provisions of R.C. 1343.03, and thus could not take advantage of the previous interest rate or measurements of time. (Emphasis added.)

The *McNeil* court concluded that the current version of R.C. 1343.03(C) governed prejudgment interest calculations as follows:

In conclusion, because McNeil did not file her complaint until after the effective date of the amended statute, the amended version of R.C. 1343.03 applied, rather than the prior version. *Id.* at ¶52.

See also, *Jones v. Progressive Preferred Ins. Co.*, 169 Ohio App.3d 291, 2006-Ohio-5420 at ¶20-22, 862 N.E.2d 850.

In this case, appellees had no “action” or “civil action” until March 3, 2008. The previous lawsuit that was voluntarily dismissed became a legal nullity by operation of the Civ.R. 41(A)(1) dismissal. Per the wording of R.C. 1343.03(C) the accrual date of any “cause of action” is simply irrelevant to the present determination. Yet this was exactly the analysis improperly conducted by the court of appeals.

As discussed earlier herein, in *Maynard v. Eaton Corporation*, 119 Ohio St. 3d at ¶15, it was determined by this Court the certain other revisions to R.C. 1343.03 apply to “all cases” in which a trial court has entered final judgment after the effective date of the amendment. This holding applies with equal force to civil actions pending five years or ten years, or even longer, prior to June 2, 2004. All that matters for that particular analysis is the date upon which final judgment was entered. The accrual date of a cause of action is irrelevant. In fact, in *Maynard*, this Court concluded at ¶15 that the amended statutory language applied even where a judgment was rendered prior to June 2, 2004, but was not yet paid in full and where the case was pending on appeal as of that effective date. Certainly, under such a scenario, a much more substantive, presently vested right to interest existed than the right of appellees to prejudgment interest as of June 2, 2004.

The legislative history of H.B. 212 already discussed herein does not justify the distinction between different sections of R.C. 1343.03 made by the court of appeals. The relevant case law discusses the retroactivity of “statutes” and does not provide for disparate application of the same statute. The conclusions reached by the lower courts and some other Ohio courts on this issue would require that the Legislature henceforth

separately indicate its intention to make each section or subsection of a statute retroactive, leading to inconsistent and piecemeal application of various statutes.

In *O'Toole v. Denihan* (2008), 118 Ohio St. 3d 374, 2008-Ohio-2574, at ¶60, this Court cautioned against reaching acontextual statutory conclusions, rather than interpreting each portion of the statute in the context of the statute as a whole, stating “[t]hese words cannot be read in a vacuum, but rather must be read in the context of the statute as a whole.”

1. PREJUDGMENT INTEREST CANNOT BE CALCULATED FROM ANY DATE PRIOR TO THE FILING OF THE PLEADING UPON WHICH JUDGMENT WAS RENDERED

The court of appeals erred in applying the former version of R.C. 1343.03(C). This application of the superseded former statute resulted in an accrual date different than what is required by the present version of that statute. R.C. 1343.03(C)(1)(c)(ii) provides that interest shall be calculated “from the date on which the party to whom the money is to be paid filed the pleading on which the judgment, decree, or order was based to the date on which the judgment, decree, or order was rendered.” In this case, there is no dispute that the pleading on which the judgment was based was the March 3, 2008 Complaint, Case No. 2008 CV 499. Thus, pursuant to the plain language of R.C. 1343.03, as effective June 2, 2004, prejudgment interest should **only** have been calculated from March 3, 2008 to the date of final judgment on December 20, 2010. The trial court’s confusion concerning retroactive application in this regard resulted in interest being calculated over a much longer period of time than is appropriate under the statute.

2. THE COURT OF APPEALS' DECISION FAILED TO RECOGNIZE THE MANDATORY STATUTORY LANGUAGE USED IN THE CURRENT VERSION OF R.C. 1343.03(C)

The present version of R.C. 1343.03 is as clear as it possibly can be that no interest should be awarded on future damages. Indeed, R.C. 1343.03(C)(2) states explicitly that "**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 trier of fact." (Emphasis added.) In view of this language, the trial court's refusal to apply the current version of the statute due to retroactivity concerns was in error.

In *Bergman v. Monarch Const.*, 124 Ohio St. 3d 534, 539; 2010-Ohio-622, at ¶16; 925 N.E.2d 116, this Court discussed the "basic rule of statutory construction" requiring that the word "shall" be construed in a mandatory sense:

A basic rule of statutory construction is that "shall" is "construed as mandatory unless there appears a clear and unequivocal legislative intent" otherwise. *Dorrian v. Scioto Conservancy Dist.* (1971), 27 Ohio St.2d 102, 56 O.O.2d 58, 271 N.E.2d 834, paragraph one of the syllabus; R.C. 1.42 ("Words and phrases shall be read in context and construed according to the rules of grammar and common usage")(Emphasis added).

Plainly, the above legislative mandate is not ambiguous, nor can a reasonable case be made that the application of this mandate to a final judgment rendered in December, 2010 somehow constitutes a retroactive application of the statute.

3. THE COURT OF APPEALS' REFUSAL TO APPLY THE CURRENT VERSION OF R.C. 1343.03(C) RESULTED IN A PROFOUND MISCALCULATION OF DAMAGES

Almost exactly two-thirds of the total award of damages constituted future damages. In applying the former version of R.C. 1343.03, the trial court ignored the prohibition on prejudgment interest relating to future damages, and also ignored the

well-established public policy proscriptions underlying the Legislature's decision not to award prejudgment interest on damages that have not yet been incurred. Additionally, the application of the former version of the statute resulted in interest being assessed going back five years prior to the filing of this lawsuit.

E. BECAUSE THE INITIAL LAWSUIT WAS VOLUNTARILY DISMISSED, ITS FILING DATE CANNOT BE USED BY A TRIAL COURT AS THE ACCRUAL DATE FOR PREJUDGMENT INTEREST

Any argument by appellees to the effect that they "brought" this civil action when they initially filed their Complaint against the appellant in April, 2003, must be rejected as contrary to established Ohio law. The plain import of Civ.R. 41(A)(1) is that once a plaintiff voluntarily dismisses all claims against a defendant, the court is divested of jurisdiction over those claims. *State ex rel. Fifth Third Mortg. Co. v. Russo*, 129 Ohio St. 3d 250, 253, 2011-Ohio-3177 at ¶17, 951 N.E.2d 414. The notice of voluntary dismissal is self-executing and completely terminates the possibility of further action on the merits of the case upon its mere filing, without the necessity of court intervention. *Id.*, citing *Selker & Furber v. Brightman*, 138 Ohio App.3d 710, 714, 742 N.E.2d 203 (2000); *Payton v. Rehberg*, 119 Ohio App.3d 183, 191-192, 694 N.E.2d 1379 (1997).

It is axiomatic that when an action has been voluntarily dismissed, Ohio law treats the previously filed action **as if it had never been commenced**. See, e.g., *Zimmie v. Zimmie*, 11 Ohio St.2d 94, 95, 464 N.E.2d 142 (1984); *Wolk v. Paino*, 8th Dist. No. 93095, 2010-Ohio-1755 at ¶21 ("Because a dismissal without prejudice relieves the court of jurisdiction over the matter, and **the action is treated as though it had never been commenced** ***")(Emphasis added); *Chuparkoff v. Kapron*, 9th Dist. No. 24234, 2009-Ohio-5462 at ¶9 (finding that a voluntary dismissal under Civ.R. 41(A)

deprives a trial court of jurisdiction and results in the action being treated as if it had never been filed).

"A dismissal without prejudice leaves the parties as if no action had been brought at all." *Denham v. New Carlisle*, 86 Ohio St. 3d 594, 596, 716 N.E.2d 184, 186 (1999), citing *DeVille Photography, Inc. v. Bowers*, 169 Ohio St. 267, 272, 159 N.E.2d 443, 446 (1959).

Accordingly, the initial action filed in 2003 is properly treated as though it never existed and as if it was never "commenced." If not ever commenced, then how can the filing date of such a dismissed action possibly be the appropriate start date for prejudgment interest calculation purposes? Likewise, if this first lawsuit was "never filed" then it could not have been pending as of June 2, 2004. The only "civil action" that has any significance to the present dispute is the civil action filed on March 3, 2008.

In disregarding this well-developed Ohio law, the court of appeals erroneously assumed that the initial lawsuit filed in April, 2003 was to be considered in its analysis of whether the statute as it presently is worded was applicable. As a result, the court of appeals determined that the statute could not be retroactively applied to any cases predating its enactment. But, as noted above, the only civil action that has any legal effect is the one filed on March 3, 2008. Because R.C. 1343.03 became effective on June 2, 2004, its application to this civil action was therefore prospective.

F. R.C. 1343.03(C), AS AMENDED, DOES NOT PERMIT PREJUDGMENT INTEREST ON FUTURE DAMAGES FOR REASONS WHICH ARE SELF-EVIDENT, AND WHICH CONSTITUTE WELL-ESTABLISHED PUBLIC POLICY IN OHIO

The Ohio Legislature correctly concluded in 2004 that it is unfair, unreasonable and illogical to permit prejudgment interest on future damages. It is equally unfair and

unreasonable to permit an award of prejudgment damages for a case filed before June 2, 2004, as one filed after June 2, 2004.

Future damages are defined by R.C. 2323.56 as follows:

“Future damages” means any damages that result from an injury to 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.” (Emphasis added.)

Thus, by their very nature, future damages are damages which have not yet been incurred and which “accrue” post-verdict. Amended R.C. 2323.56(B)-(C), which was also part of H.B. 212, memorializes the requirement that finders of fact separately determine past and future damages, as well as economic and non-economic loss, specifically to prevent prejudgment interest from being awarded on future damages. This is the only logical conclusion to be drawn because the requirement that damages be apportioned was part of the same legislative enactment as R.C. 1343.03(C).

It is illogical to award prejudgment interest on future damages because these are damages which have by definition not yet been incurred. Because the damages have not yet been incurred, there can be no prejudice to any plaintiff for the loss of use of these funds prior to the time that a jury verdict is entered.

G. APPLYING WELL-ESTABLISHED RULES OF STATUTORY CONSTRUCTION COMPELS THE CONCLUSION THAT THE CURRENT VERSION OF R.C. 1343.03(C) SHOULD HAVE BEEN APPLIED

1. R.C. 1.47 REQUIRES THAT STATUTES BE INTERPRETED TO EFFECT JUST AND REASONABLE RESULTS

R.C. 1.47(C) is a statute outlining the rules for statutory construction and requires that a court construing a statute start with the basic premise that “[a] **just and reasonable result is intended.**” The result being challenged herein was neither just

nor reasonable, nor does it withstand the scrutiny of further review in accord with Ohio's rules of statutory construction. It was not just and reasonable to award over seven years of prejudgment interest in December, 2010 on future damages, i.e., damages that were not yet incurred at the time of the award. Nor was it just and reasonable that an existing statute, enacted in June, 2004, not be applied to a verdict journalized in October, 2010, arising from a lawsuit filed in March, 2008, due to "retroactivity" concerns.

The trial court and the court of appeals both failed to consult the legislative history relevant to R.C. 1343.03(C) in reaching a determination as to whether the statutory language in question should be applied "retroactively." Based on this failure to consult legislative history, both lower courts mistakenly concluded that there was no evidence that the Legislature intended R.C. 1343.03(C) to apply to actions which were pending as of June 2, 2004.

2. THE PLAIN LANGUAGE OF A STATUTE IS A REVIEWING COURT'S FIRST LINE OF INQUIRY

In *Summerville v. v. City of Forest Park*, 128 Ohio St. 3d 221, 2010-Ohio-6280 at ¶18-19, 943 N.E.2d 522, this Court discussed numerous rules of statutory construction and related legal maxims that may prove useful to this Court for the purpose of resolving the certified question:

We must first look to the plain language of the statute itself to determine the legislative intent." *Hubbell [v. Xenai]*, 115 Ohio St.3d 77, 2007 Ohio 4839, 873 N.E.2d 878, P 11, citing *State ex rel. Burrows v. Indus. Comm.* (1997), 78 Ohio St.3d 78, 81, 1997 Ohio 310, 676 N.E.2d 519. "We apply a statute as it is written when its meaning is unambiguous and definite." *Id.*, citing *Portage Cty. Bd. of Commrs. v. Akron*, 109 Ohio St.3d 106, 2006 Ohio 954, 846 N.E.2d 478, P 52; see also *State ex rel. Savarese v. Buckeye Local*

School Dist. Bd. of Edn. (1996), 74 Ohio St.3d 543, 545, 1996 Ohio 291, 660 N.E.2d 463.

"However, where a statute is found to be subject to various interpretations, a court called upon to interpret its provisions may invoke rules of statutory construction in order to arrive at legislative intent." *Cline v. Ohio Bur. of Motor Vehicles* (1991), 61 Ohio St.3d 93, 96, 573 N.E.2d 77, citing *Meeks v. Papadopulos* (1980), 62 Ohio St.2d 187, 190, 16 O.O.3d 212, 404 N.E.2d 159. "The primary rule in statutory construction is to give effect to the legislature's intention." *Id.* at 97, citing *Carter v. Youngstown* (1946), 146 Ohio St. 203, 32 O.O.184, 65 N.E.2d 63, paragraph one of the syllabus.

It is a "well-settled rule of statutory construction" that a court is required to "first look at the words of the statute itself to determine legislative intent." *Havel v. Villa St. Joseph*, 131 Ohio St. 3d 235, 2012-Ohio-552, ¶28.

The words to be interpreted in this case are not many, they are not complex, and they are easily understood. R.C. 1343.03(C) applies to "all" civil actions and does not permit an award of prejudgment interest on future damages. R.C. 1343.03(C)(2) states that "no court shall" award prejudgment interest on future damages. The lawsuit from which this appeal is taken was filed in March, 2008. The conduct upon which prejudgment interest was premised occurred solely between 2008 and 2010. Thus, the application of the existing statute to the facts of this case was mandatory.

Where a statute is found to be subject to various interpretations, a court called upon to interpret its provisions may invoke rules of statutory construction in order to arrive at legislative intent." *Summerville, supra*, 128 Ohio St. 3d at 225, 2010-Ohio-6289 at ¶19, 943 N.E.2d at 527, citing *Cline v. Ohio Bur. of Motor Vehicles*, 61 Ohio St.3d 93, 96, 573 N.E.2d 77 (1991), citing *Meeks v. Papadopulos*, 62 Ohio St.2d 187, 190, 404 N.E.2d 159 (1980). "The primary rule in statutory construction is to give effect to

the legislature's intention." *Summerville* at 225, citing *Carter v. Youngstown*, 146 Ohio St. 203, 65 N.E.2d 63 (1946), paragraph one of the syllabus .

3. A REVIEWING COURT SHOULD INTERPRET A STATUTE CONTEXTUALLY AND SHOULD CONSTRUE WORDS CONSISTENT WITH THEIR COMMON USAGE

In analyzing the pertinent statutory provisions, a court must "determine the legislative intent by reading words and phrases in context and construing them in accordance with rules of grammar and **common usage**." *State ex rel. Shisler v. Ohio Pub. Emps. Retirement Sys.*, 122 Ohio St.3d 148, 151, 2009-Ohio-2522 at ¶18, 909 N.E.2d 610, 613. (Emphasis added.) Presently, existing R.C. 1343.03(C)(1)(c) applies to "all" other civil actions based on tortious conduct and has governed all such civil actions since June 2, 2004. *See*, R.C. 1343.03(C)(1) and (C)(1)(c). The prohibition of awarding prejudgment interest on future damages found in R.C. 1343.03(C)(2) is indisputably mandatory, unqualified, and unambiguous.

4. RELATED STATUTES MUST BE INTERPRETED "IN PARI MATERIA"

In *State v. Cook*, 128 Ohio St. 3d 120, 2010-Ohio-6305, at ¶45, this Court discussed the need to generally construe statutes concerning the same subject matter "*in pari materia*":

We have judicially recognized similar rules of statutory construction:

First, all statutes which relate to the same general subject matter must be read *in pari materia*. And, in reading such statutes *in pari materia*, and construing them together, this court must give such a reasonable construction as to give the proper force and effect to each and all such statutes. The interpretation and application of statutes must be viewed in a manner to carry out the legislative intent of the sections. All provisions of the Revised Code bearing upon the same subject matter should be construed harmoniously. This court

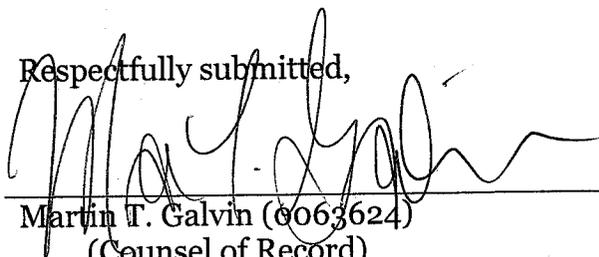
in the interpretation of related and co-existing statutes must harmonize and give full application to all such statutes unless they are irreconcilable and in hopeless conflict." (Citations omitted.) *United Tel. Co. of Ohio v. Limbach* (1994), 71 Ohio St.3d 369, 372, 1994 Ohio 209, 643 N.E.2d 1129, quoting *Johnson's Mkts., Inc. v. New Carlisle Dept. of Health* (1991), 58 Ohio St.3d 28, 35, 567 N.E.2d 1018.

Likewise, R.C. 1.47(B) is a rule of statutory construction that specifically directs courts to give effect to an entire statute. The court of appeals parsing of different sections of R.C. 1343.03 did an injustice to their shared legislative history, and failed to harmonize the related portions of this statute and also failed to harmonize the statute with the future damages statute, R.C. 2323.56, as well as with the other statutes amended by H.B. 212.

III. CONCLUSION

For all of the foregoing reasons, this Court should hold that R.C. 1343.03(C), as amended on June 2, 2004, applies to all actions pending on or filed after that date. As to the present dispute, this Court should hold that prejudgment interest commenced on March 3, 2008, and that prejudgment interest may not be awarded on that part of the verdict which represents future damages.

Respectfully submitted,



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CERTIFICATE OF SERVICE

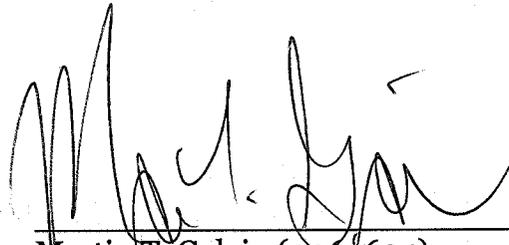
The undersigned hereby certifies that a copy of the foregoing was served on the undersigned counsel, this 21st day of January, 2013, via ordinary U.S. mail, postage prepaid.

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APPENDIX

DESCRIPTION	APPENDIX PAGE No.
Notice of Certified Conflict to Ohio Supreme Court of Appellants Gary S. Huber, D.O. and Qualified Emergency Specialists, Inc. – July 26, 2012	APPX0001
Twelfth District Court of Appeals Judgment Entry and Opinion – May 14, 2012	APPX0039
Twelfth District Court of Appeals Entry Granting Motion to Certify in Part and Denying in Part – July 12, 2012	APPX0063
Ohio House Bill No. 212	APPX0066
Ohio Revised Code 1343.03	APPX0070
Supreme Court of Ohio Entry Determining that a Conflict Exists – November 7, 2012	APPX0072

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

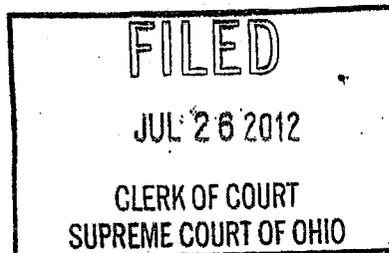
Court of Appeals
Case Nos. CA 2011-01-005
CA 2011-01-006

NOTICE OF CERTIFIED CONFLICT

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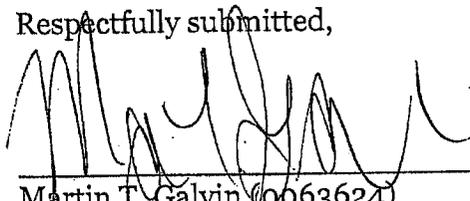
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Now come Defendant-Appellants, Gary S. Huber, D.O. and Qualified Emergency Specialists, Inc., by and through undersigned counsel, and hereby provide notice to this Court of a conflict of law certified by the Twelfth District Court of Appeals, as discussed 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, ¶175, 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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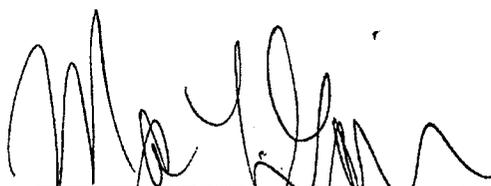
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CERTIFICATE OF SERVICE

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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Michael Romanello (0003583)

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. WIEDENBACH
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

APPX 0004

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.

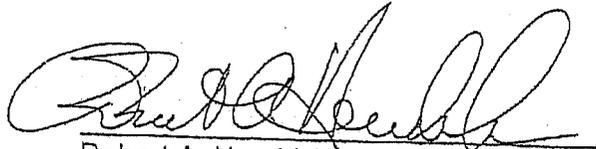
Second, appellants/cross-appellees contend that this court's decision is in conflict with the Eighth District's decision in *Barnes v. Univ. Hosp. of Cleveland*, 8th Dist. Nos. 87247, 87285, 87710, 87903 and 87946, 2006-Ohio-6266, ¶ 75, affirmed in part and overruled in part on other grounds, 119 Ohio 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.

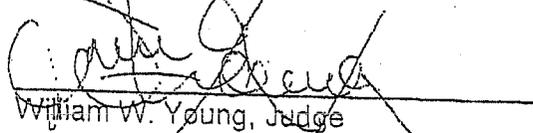
Accordingly, appellants/cross-appellees' request to certify this court's decision as in conflict with the Eighth District's decision in *Barnes* is GRANTED. The question for certification is as follows:

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.

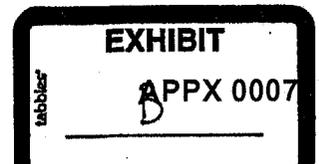
JUDGES: BEFORE: Celebrezze, P.J., Sweeney, J., and Calabrese, J. **FRANK D. CELEBREZZE, JR., PRESIDING JUDGE. JAMES J. SWEENEY, J., and ANTHONY O. CALABRESE, JR. [*2], J., CONCUR.**

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 Cuyaboga 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 error³ 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 error 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.

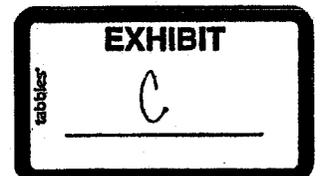
CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2008 CVA 499

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,

APPX 0017

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 potential 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>

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

COURT OF APPEALS
FILED
MAY 14 2012
BARBARA A. WIEDENBEIN
CLERK
CLERMONT COUNTY, OH

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 -

JUDGMENT ENTRY

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

The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed in part, reversed in part, and remanded to the trial court for the limited purpose of awarding appellees/cross-appellants additional prejudgment interest against appellants/cross-appellees for the period from March 8, 2007, until March 3, 2008.

It is further ordered that a mandate be sent to the Clermont County Court of Common Pleas, for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

All costs to be taxed to appellants/cross-appellees.


Robert A. Hendrickson, Presiding Judge

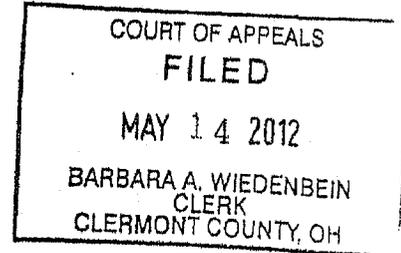

Robert P. Ringland, Judge


William W. Young, Judge

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.

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,

APPX 0041

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 potential 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>

IN THE COURT OF APPEALS OF CLERMONT COUNTY, OHIO

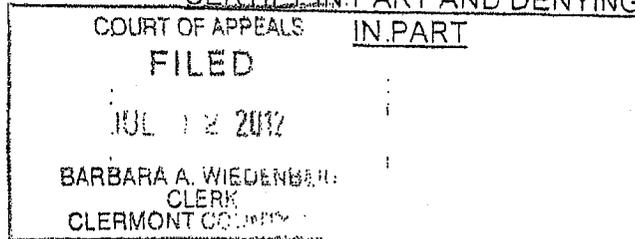
KRISTI LONGBOTTOM, Ind. and as
Natural Guardians of Kyle Jacob Smith, : CASE NO. CA2011-01-005, -006

Appellees/Cross-appellants, : ENTRY GRANTING MOTION TO
CERTIFY IN PART AND DENYING

vs.

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

Appellants/Cross-appellees.



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

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.

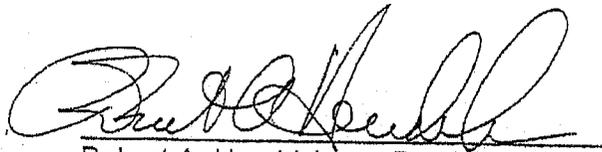
Second, appellants/cross-appellees contend that this court's decision is in conflict with the Eighth District's decision in *Barnes v. Univ. Hosp. of Cleveland*, 8th Dist. Nos. 87247, 87285, 87710, 87903 and 87946, 2006-Ohio-6266, ¶ 75, affirmed in part and overruled in part on other grounds, 119 Ohio 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.

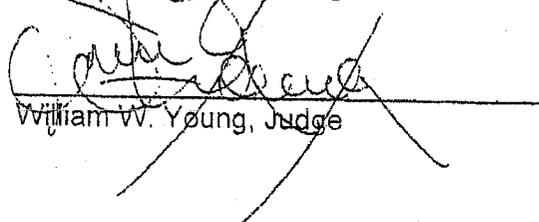
Accordingly, appellants/cross-appellees' request to certify this court's decision as in conflict with the Eighth District's decision in *Barnes* is GRANTED. The question for certification is as follows:

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



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OHIO 125TH GENERAL ASSEMBLY -- 2003-04 REGULAR SESSION

HOUSE BILL NO. 212

2003 Ohio HB 212

BILL TRACKING SUMMARY FOR THIS DOCUMENT

SYNOPSIS: AN ACT To amend sections 1343.03, 2325.18, and 5703.47 and to enact sections 319.19, 1901.313, 1907.202, 2303.25, and 2323.57 of the Revised Code to change the rate of interest on money due under certain contracts and on judgments, to provide trial courts notification of the rate of interest, to specify that the rate of interest is that in effect on the date of the judgment in a civil action and remains in effect until the judgment is satisfied, to change the computation of the period for which prejudgment interest is due in certain civil actions, to preclude prejudgment interest on future damages, to require that the finder of fact in certain tort actions in which future damages are claimed specify the amount of past and future damages awarded, to modify the period of limitations for revivor of judgments, and to preclude the accrual of interest from the date a judgment becomes dormant to the date the judgment is revived.

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To view a specific section, transmit p* and the section number. e.g. p*1

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

[*1] Section 1. That sections 1343.03, 2325.18, and 5703.47 be amended and sections 319.19, 1901.313, 1907.202, 2303.25, and 2323.57 of the Revised Code be enacted to read as follows:

[A> SEC. 319.19. WITHIN TEN DAYS AFTER RECEIVING THE NOTIFICATION FROM THE TAX COMMISSIONER UNDER SECTION 5703.47 OF THE REVISED CODE OF THE INTEREST RATE PER ANNUM DETERMINED UNDER THAT SECTION, THE AUDITOR SHALL NOTIFY IN WRITING THE CLERK OF THE COURT OF COMMON PLEAS AND THE CLERK OF EACH MUNICIPAL COURT AND COUNTY COURT IN THE COUNTY OF THAT INTEREST RATE. <A]

Sec. 1343.03. (A) In cases other than those provided for in sections 1343.01 and 1343.02 of the Revised Code, when money becomes due and payable upon any bond, bill, note, or other instrument of writing, upon any book account, upon any settlement between parties, upon all verbal contracts entered into, and upon all judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of tortious conduct or a contract or other transaction, the creditor is entitled to interest at the rate [D> of ten per cent <D] per annum [D> , and no more <D] [A> DETERMINED PURSUANT TO SECTION 5703.47 OF THE REVISED CODE <A] , unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract. [A> NOTIFICATION OF THE INTEREST RATE PER ANNUM SHALL BE PROVIDED PURSUANT TO SECTIONS 319.19, 1901.313, 1907.202, 2303.25, AND 5703.47 OF THE REVISED CODE. <A]

(B) Except as provided in divisions (C) and (D) of this section [A] AND SUBJECT TO SECTION 2325.18 OF THE REVISED CODE <A> , interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct [A] OR A CONTRACT OR OTHER TRANSACTION <A> , including, but not limited to a civil action based on tortious conduct [A] OR A CONTRACT OR OTHER TRANSACTION <A> that has been settled by agreement of the parties, shall be computed from the date the judgment, decree, or order is rendered to the date on which the money is paid [A] AND SHALL BE AT THE RATE DETERMINED PURSUANT TO SECTION 5703.47 OF THE REVISED CODE THAT IS IN EFFECT ON THE DATE THE JUDGMENT, DECREE, OR ORDER IS RENDERED. THAT RATE SHALL REMAIN IN EFFECT UNTIL THE JUDGMENT, DECREE, OR ORDER IS SATISFIED <A> .

(C) [D] 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 <D> [A] (1) IF <A> , upon motion of any party to [D] the <D> [A] A CIVIL <A> action [A] 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 <A> , 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 [A] , INTEREST ON THE JUDGMENT, DECREE, OR ORDER SHALL BE COMPUTED AS FOLLOWS: <A>

[A] (A) IN AN ACTION IN WHICH THE PARTY REQUIRED TO PAY THE MONEY HAS ADMITTED LIABILITY IN A PLEADING, FROM THE DATE THE CAUSE OF ACTION ACCRUED TO THE DATE ON WHICH THE ORDER, JUDGMENT, OR DECREE WAS RENDERED; <A>

[A] (B) IN AN ACTION IN WHICH THE PARTY REQUIRED TO PAY THE MONEY ENGAGED IN THE CONDUCT RESULTING IN LIABILITY WITH THE DELIBERATE PURPOSE OF CAUSING HARM TO THE PARTY TO WHOM THE MONEY IS TO BE PAID, FROM THE DATE THE CAUSE OF ACTION ACCRUED TO THE DATE ON WHICH THE ORDER, JUDGMENT, OR DECREE WAS RENDERED; <A>

[A] (C) IN ALL OTHER ACTIONS, FOR THE LONGER OF THE FOLLOWING PERIODS: <A>

[A] (I) FROM THE DATE ON WHICH THE PARTY TO WHOM THE MONEY IS TO BE PAID GAVE THE FIRST NOTICE DESCRIBED IN DIVISION (C)(1)(C)(I) OF THIS SECTION TO THE DATE ON WHICH THE JUDGMENT, ORDER, OR DECREE WAS RENDERED. THE PERIOD DESCRIBED IN DIVISION (C)(1)(C)(I) OF THIS SECTION SHALL APPLY ONLY IF THE PARTY TO WHOM THE MONEY IS TO BE PAID MADE A REASONABLE ATTEMPT TO DETERMINE IF THE PARTY REQUIRED TO PAY HAD INSURANCE COVERAGE FOR LIABILITY FOR THE TORTIOUS CONDUCT AND GAVE TO THE PARTY REQUIRED TO PAY AND TO ANY IDENTIFIED INSURER, AS NEARLY SIMULTANEOUSLY AS PRACTICABLE, WRITTEN NOTICE IN PERSON OR BY CERTIFIED MAIL THAT THE CAUSE OF ACTION HAD ACCRUED. <A>

[A] (II) FROM THE DATE ON WHICH THE PARTY TO WHOM THE MONEY IS TO BE PAID FILED THE PLEADING ON WHICH THE JUDGMENT, DECREE, OR ORDER WAS BASED TO THE DATE ON WHICH THE JUDGMENT, DECREE, OR ORDER WAS RENDERED. <A>

[A] (2) 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 TRIER OF FACT <A> .

(D) [D] Divisions <D> [A] DIVISION <A> (B) [A] OF THIS SECTION DOES NOT APPLY TO A JUDGMENT, DECREE, OR ORDER RENDERED IN A CIVIL ACTION BASED ON TORTIOUS CONDUCT OR A CONTRACT OR OTHER TRANSACTION, <A> and [A] DIVISION <A> (C) of this section [D] do <D> [A] DOES <A> not apply to a judgment, decree, or order rendered in a civil action based on tortious conduct [A] , <A> if a different period for computing interest on it is specified by law, or if it is rendered in an action against the state in the court of claims, or in an action under Chapter 4123. of the Revised Code.

[A] SEC. 1901.313. UPON RECEIVING THE NOTIFICATION OF THE INTEREST RATE PER ANNUM FROM THE COUNTY AUDITOR PURSUANT TO SECTION 319.19 OF THE REVISED CODE, THE CLERK OF A MUNICIPAL COURT SHALL POST OR CAUSE TO BE POSTED NOTICE OF THAT INTEREST RATE PER ANNUM IN A CONSPICUOUS AND PUBLIC LOCATION IN OR NEAR THE OFFICE OF THE CLERK OF THE COURT IN THE COURTHOUSE OR BUILDING IN WHICH THE MUNICIPAL COURT IS LOCATED. <A>

[A] SEC. 1907.202. UPON RECEIVING THE NOTIFICATION OF THE INTEREST RATE PER ANNUM FROM THE COUNTY AUDITOR PURSUANT TO SECTION 319.19 OF THE REVISED CODE, THE CLERK OF A COUNTY COURT SHALL POST OR CAUSE TO BE POSTED NOTICE OF THAT INTEREST RATE PER ANNUM IN A CONSPICUOUS AND PUBLIC LOCATION IN OR NEAR THE OFFICE OF THE CLERK OF THE COURT IN THE COURTHOUSE OR BUILDING IN WHICH THE COUNTY COURT IS LOCATED. <A]

[A] SEC. 2303.25. UPON RECEIVING THE NOTIFICATION OF THE INTEREST RATE PER ANNUM FROM THE COUNTY AUDITOR PURSUANT TO SECTION 319.19 OF THE REVISED CODE, THE CLERK OF THE COURT OF COMMON PLEAS SHALL POST OR CAUSE TO BE POSTED NOTICE OF THAT INTEREST RATE PER ANNUM IN A CONSPICUOUS AND PUBLIC LOCATION IN OR NEAR THE OFFICE OF THE CLERK OF THE COURT IN THE COURTHOUSE OR BUILDING IN WHICH THE COURT OF COMMON PLEAS IS LOCATED. <A]

[A] SEC. 2323.57. IN ANY TORT ACTION TO WHICH SECTION 2323.55 OR 2323.56 OF THE REVISED CODE DOES NOT APPLY, IF A PLAINTIFF MAKES A GOOD FAITH CLAIM AGAINST A DEFENDANT FOR FUTURE DAMAGES, THE TRIER OF FACT SHALL RETURN A GENERAL VERDICT AND, IF THAT VERDICT IS IN FAVOR OF THE PLAINTIFF, ANSWERS TO INTERROGATORIES OR FINDINGS OF FACT THAT SPECIFY BOTH OF THE FOLLOWING: <A]

[A] (A) THE PAST DAMAGES RECOVERABLE BY THAT PLAINTIFF; <A]

[A] (B) THE FUTURE DAMAGES RECOVERABLE BY THAT PLAINTIFF. <A]

Sec. 2325.18. [A] (A) <A] An action to revive a judgment can only be brought within [D] twenty-one <D] [A] TEN <A] years from the time it became dormant, unless the party entitled to bring [D] such <D] [A] THAT <A] action, at the time the judgment became dormant, was within the age of minority, of unsound mind, or imprisoned, in which cases the action may be brought within [D] fifteen <D] [A] TEN <A] years after [D] such <D] [A] THE <A] disability is removed.

[A] (B) FOR THE PURPOSE OF CALCULATING INTEREST DUE ON A REVIVED JUDGMENT, INTEREST SHALL NOT ACCRUE AND SHALL NOT BE COMPUTED FROM THE DATE THE JUDGMENT BECAME DORMANT TO THE DATE THE JUDGMENT IS REVIVED. <A]

Sec. 5703.47. (A) As used in this section, "federal short-term rate" means the rate of the average market yield on outstanding marketable obligations of the United States with remaining periods to maturity of three years or less, as determined under section 1274 of the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C.A. 1274, for July of the current year.

(B) On the fifteenth day of October of each year, the tax commissioner shall determine the federal short-term rate. For purposes of any section of the Revised Code requiring interest to be computed at the rate per annum required by this section, the rate determined by the commissioner under this section, rounded to the nearest whole number per cent, plus three per cent shall be the interest rate per annum used in making the computation for interest that accrues during the following calendar year.

[A] (C) WITHIN TEN DAYS AFTER THE INTEREST RATE PER ANNUM IS DETERMINED UNDER THIS SECTION, THE TAX COMMISSIONER SHALL NOTIFY THE AUDITOR OF EACH COUNTY IN WRITING OF THAT RATE OF INTEREST. <A]

[*2] Section 2. That existing sections 1343.03, 2325.18, and 5703.47 of the Revised Code are hereby repealed.

[*3] Section 3. The interest rate provided for in division (A) of section 1343.03 of the Revised Code, as amended by this act, applies to actions pending on the effective date of this act. In the calculation of interest due under section 1343.03 of the Revised Code, in actions pending on the effective date of this act, the interest rate provided for in section 1343.03 of the Revised Code prior to the amendment of that section by this act shall apply up to the effective date of this act, and the interest rate provided for in section 1343.03 of the Revised Code as amended by this act shall apply on and after that effective date.

HISTORY:

Approved by the Governor on March 3, 2004

SPONSOR: Seitz

1343.03 Rate not stipulated.

(A) In cases other than those provided for in sections 1343.01 and 1343.02 of the Revised Code, when money becomes due and payable upon any bond, bill, note, or other instrument of writing, upon any book account, upon any settlement between parties, upon all verbal contracts entered into, and upon all judgments, decrees, and orders of any judicial tribunal for the payment of money arising out of tortious conduct or a contract or other transaction, the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code, unless a written contract provides a different rate of interest in relation to the money that becomes due and payable, in which case the creditor is entitled to interest at the rate provided in that contract. Notification of the interest rate per annum shall be provided pursuant to sections 319.19, 1901.313, 1907.202, 2303.25, and 5703.47 of the Revised Code.

(B) Except as provided in divisions (C) and (D) of this section and subject to section 2325.18 of the Revised Code, interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct or a contract or other transaction, including, but not limited to a civil action based on tortious conduct or a contract or other transaction that has been settled by agreement of the parties, shall be computed from the date the judgment, decree, or order is rendered to the date on which the money is paid and shall be at the rate determined pursuant to section 5703.47 of the Revised Code that is in effect on the date the judgment, decree, or order is rendered. That rate shall remain in effect until the judgment, decree, or order is satisfied.

(C) (1) If, upon motion of any party to a civil action that is based on tortious conduct, that has not been settled by agreement of the parties, and in which the court has rendered a judgment, 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:

(a) In an action in which the party required to pay the money has admitted liability in a pleading, from the date the cause of action accrued to the date on which the order, judgment, or decree was rendered;

(b) In an action in which the party required to pay the money engaged in the conduct resulting in liability with the deliberate purpose of causing harm to the party to whom the money is to be paid, from the date the cause of action accrued to the date on which the order, judgment, or decree was rendered;

(c) In all other actions, for the longer of the following periods:

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

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

(2) 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 trier of fact.

(D) Division (B) of this section does not apply to a judgment, decree, or order rendered in a civil action based on tortious conduct or a contract or other transaction, and division (C) of this section does not apply to a judgment, decree, or order rendered in a civil action based on tortious conduct, if a different period for computing interest on it is specified by law, or if it is rendered in an action against the state in the court of claims, or in an action under Chapter 4123. of the Revised Code.

Effective Date: 06-02-2004

The Supreme Court of Ohio

FILED

NOV 07 2012

CLERK OF COURT
SUPREME COURT OF OHIO

Kristi Longbottom, Ind. and as Natural
Guardians of Kyle Jacob Smith

Case No. 2012-1260

ENTRY

v.

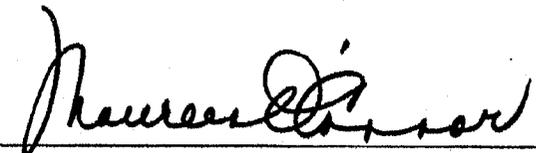
Gary S. Huber, D.O., et al.

This cause is pending before the court on the certification of a conflict by the Court of Appeals for Clermont County. On review of the order certifying a conflict, it is determined that a conflict exists. The parties are to brief the issue stated at page 3 of the court of appeals' Entry filed July 12, 2012, 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 ordered by the court that the clerk shall issue an order for the transmittal of the record from the Court of Appeals for Clermont County.

(Clermont County Court of Appeals; Nos. CA2011-01-005 and CA2011-01-006)



Maureen O'Connor
Chief Justice

APPX 0072