

**IN THE SUPREME COURT OF OHIO**

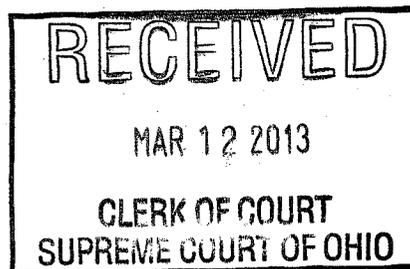
Henry Jontony, et al.	)	Supreme Court Case No. 2013-0261
	)	
Appellees/Cross-Appellants,	)	
	)	On Appeal from the Cuyahoga County
v.	)	Court of Appeals, Eighth Appellate District
	)	
Lee J. Colegrove, et al.	)	Court of Appeals
	)	Case No. CA 12 098295
	)	
Appellants/Cross-Appellees	)	
	)	

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**COMBINED MEMORANDUM IN RESPONSE OF APPELLEES/CROSS-APPELLANTS  
AND MEMORANDUM IN SUPPORT OF JURISDICTION FOR CROSS-APPEAL**

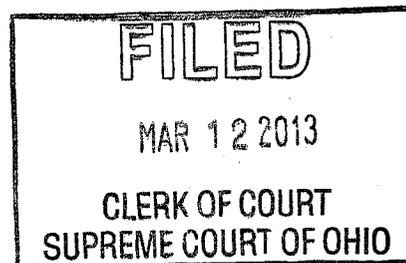
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**THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION  
NOR IS IT A CASE OF PUBLIC OR GREAT GENERAL INTEREST**

For the second time in this prolonged matter, the City of Strongsville has petitioned this Honorable Court with overly-dramatic arguments which are distorted in fact, which paint the political subdivision as a victim of the judicial system, and which demean the authority vested in the trial and appellate courts in this State.

Appellees submit to this Honorable Court that this matter is extremely fact specific, and the furthest thing from involving a case of public or great general interest. When looking at the entirety of the actions taken by the Appellants, and the rulings made by the trial court, it is clear that there is no “threat to the freedom of Ohio litigants to amend their pleadings”; there is no “dangerous expansion of the definition of a judicial admission”; and there is absolutely no threat that this case will “encourage plaintiffs to submit improper interrogatories as a matter of trial strategy.”

Appellants grasp onto the language of Civ. R. 15(A), which allows for liberal amendment of pleadings, when justice so requires. Although permitting amendment should be liberal, **it is not absolute**. In fact, this Court has consistently found that it is an abuse of discretion to allow amendment if it is untimely, in bad faith, or prejudicial to the nonmoving party. *Turner v. Central Local Sch. Dist.*, 85 Ohio St. 3d 95, 706 N.E.2d 1261 (1999). A party should not be permitted to amend its answer to assert an affirmative defense, after it has stated in writing that the defense did not apply and would not be raised, and when reasonable reliance on those statements dictated the entire course and scope of the costly litigation.

The trial court has been vested with the sole discretion to determine whether liberal amendment under Civ. R. 15(A) should be permitted. That discretionary decision shall not be overturned absent an abuse of discretion. Abuse of discretion is a very high standard and

“evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof \* \* \*.” *Aponte v. Aponte*, 8<sup>th</sup> Dist. Nos. 77394 and 78090, 2001 Ohio App. LEXIS 529 (Feb. 15, 2001), quoting *State v. Jenkins*, 15 Ohio St.3d 164, 222, 473 N.E.2d 264 (1984).

Pleadings are regularly amended in Ohio when a party discovers some new facts, or some new evidence which was unknown when the original pleadings were filed. A liberal mechanism for amendment serves its purpose to ensure that parties are able to amend their pleadings upon discovering these new facts or evidence. As outlined by the Court of Appeals in its affirming opinion, this case does not involve such a situation. No new evidence came to light. No new case law regarding immunity became available for the Appellant. Here, the Appellant decided in the pleadings, in person in front of the trial court, and in writing, that immunity was not an issue to be decided in this matter. The Appellant allowed the Appellees to prepare their complex and complicated damages case at great time and expense with the issue of liability removed. Suddenly, without any changes or developments in the law or facts, the City attempted to turn the litigation on its head, at the expense of the Appellees.

The waiver provisions of the Civil Rules apply to political subdivisions. Political immunity can be waived if not timely asserted, and political subdivisions are not always “king.” *Hubbell v. City of Xenia*, 115 Ohio St.3d 77, 2007 Ohio 4839, 873 N.E.2d 878, at ¶ 41 (Pfeifer, J., dissenting). The City attempts to invoke this Court’s jurisdiction by dramatically stating that it was denied its right to have the case decided on its merits.<sup>1</sup> There could be nothing further from the truth. The City determined in its pleadings, in person at the trial court, and in a

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<sup>1</sup> An ironic statement in and of itself, in that the case was, in fact, fully decided on its merits for nearly two full weeks.

written stipulation that immunity was not an issue. After suddenly changing its mind, allowing amendment to plead that defense was determined to be prejudicial to the Appellees.

The Appellant presents absolutely no issues of public or great general interest. It simply would like this Court to act as an additional court of appeals. This Honorable Court has previously stated:

\* \* \*our role as a court of last resort is not to serve as an additional court of appeals on review, but rather to clarify rules of law arising in courts of appeals that are matters of public or great general interest.

*The State of Ohio v. Bartrum*, 121 Ohio St. 3d 148, 2009-Ohio-355, 902 N.E.2d 961, ¶ 31 (O'Donnell, J., dissenting).

The trial court's discretionary decisions were supported by well established case-law, statutes, and the Rules of Civil Procedure. Appellees submit that there are no rules or laws in need of clarifying. If such discretionary matters were designed to be decided by this Court, then it would completely eliminate the purpose and function of this State's lower courts. The laws and statutes relied upon by the lower courts are clear and concise.

**I. There is no Constitutional Question:**

In its Propositions of Law, the City of Strongsville argues that there is a substantial constitutional question, but yet it never makes an argument that in any way implicates the Constitution, nor does it cite to any section of the Ohio Constitution. Never has the Appellant attempted to raise or argue that O.R.C. 2744.05, or any other statute was applied contrary to the Ohio Constitution. A Constitutional issue simply does not exist, and as such will not be further discussed by the Appellees. Jurisdiction should be declined in this matter as there is absolutely no Constitutional question before this Court.

## II. There is no Issue of Public or Great General Interest:

Although this case may be a matter of great **corporate** interest for the Appellant's insurance carrier, it does not meet this Court's jurisdictional requirement of a case "of public or great general interest." Ohio Constitution, Article IV, Section 2(B)(2)(e). The fact-specific nature of how the Appellant failed to timely assert immunity, to the prejudice of the Appellees, removes any possibility of a case involving public or great general interest.

The facts demonstrate that the Appellant's pleadings and oral and written statements, dictated the course of this lengthy and costly litigation. When it attempted to raise immunity five weeks before the trial, and after almost a year of litigation on damages only, the trial court held that permitting leave to amend at that time would be prejudicial to the Appellees.

This scenario is precisely what the Eighth District Court of Appeals recently envisioned when it stated in *Supportive Solutions Training Acad. L.L.C. v. Elec. Classroom of Tomorrow*, 2012 Ohio 1185 (8<sup>th</sup> Dist.) ¶ 17, that:

A political subdivision should timely assert its immunity defense so that the other litigant does not devote its time and resources in litigating a lawsuit that could be barred by immunity.

See also *Hubbell v. City of Xenia*, 115 Ohio St. 3d 77, 873 N.E.2d 878 (2007), ¶ 26, quoting *Burger v. Cleveland Hts.*, 87 Ohio St.3d 188, 199-200, 1999-Ohio-319, 718 N.E.2d 912 (1999) (Lundberg Stratton, J., dissenting) ("As the General Assembly envisioned, the determination of immunity could be made prior to investing the time, effort, and expense of the courts, attorneys, parties, and witnesses \* \* \*")

Further, there is no issue of public or great general interest when a political subdivision fails to propose<sup>2</sup> specific jury interrogatories so that it can prove what portions of the jury's award are subject to a statutory set-off. This issue of law is clear, and has been well established by this Court in *Buchman v. Wayne Trace Local School District*, 73 Ohio St. 3d 260, 1995 Ohio 136, 652 N.E.2d 952 (1995). The City has simply failed in its burden of proof, and has not demonstrated that its failure to meet its burden of proof constitutes a matter of public or great general interest.

As will be set forth in the statement of facts, the City of Strongsville's conscious decisions throughout this litigation have lead the parties down an irreversible road to trial. This matter was decided on the merits by a two week long jury trial. The Appellant would like this Court to accept jurisdiction, fully knowing that justice could never be done if this Court were to now remand this case. The trial court used its discretion in this matter, and that discretion has been affirmed by the Court of Appeals. The Appellant has failed to demonstrate that these discretionary decisions contain issues of public or great general interest.

#### **STATEMENT OF THE CASE AND FACTS:**

On the night of December 21, 2006, Henry Jontony was driving eastbound on S.R. 82 on his way to the Strongsville Giant Eagle to purchase some apples for his son to have at a wrestling tournament the next day. (Trial at 362). Sergeant Lee J. Colegrove of the Strongsville Police Department (hereinafter referred to as Colegrove), made a left hand turn in front of Mr. Jontony's vehicle, causing a significant collision. Colegrove testified at trial that he did not have his lights or sirens on, and that he was **not responding to an emergency situation**. (Trial. At 1271). It is undisputed that Sgt. Colegrove **unilaterally decided** to drive to a location, which he

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<sup>2</sup> It should be noted that the City of Strongsville never filed proposed jury interrogatories, nor did it ever raise as an assignment of error in the Court of Appeals whether the court erred in submitting the jury interrogatories to the jury.

overheard on the radio, to see what was going on. He in no way was dispatched or ordered to go to that scene.

After the collision, Mr. Jontony was taken by ambulance to the emergency room where he was diagnosed with a concussion caused by a direct trauma to his head. Although his condition worsened, he attempted to go back to work within several days after the collision. His co-workers and supervisors noticed that his work performance had taken a 180 degree turn. He became extremely forgetful, and would ask less-experienced carpenters how to complete simple tasks which he once trained them to do.

The Jontony family noticed that something was wrong with Mr. Jontony. He was unable to socialize with others appropriately, and would now isolate himself from friends and family. The City's position in this matter was that Mr. Jontony suffered a minor concussion. Unfortunately, all of the doctors, psychologists, psychiatrists, speech language pathologists, physiatrists, and otolaryngologists had diagnosed him with a permanent traumatic brain injury.<sup>3</sup>

On December 3, 2008, Plaintiffs-Appellees/Cross-Appellants filed the within action in the Cuyahoga County Court of Common Pleas alleging negligence against Colegrove and the City of Strongsville. On January 7, 2009, through their attorneys Tomino & Latchney, Lee J. Colegrove and the City of Strongsville filed their Answer to the Complaint.<sup>4</sup> The Answer specifically listed the affirmative defense of sovereign immunity under R.C. 2744 "for Defendant Colegrove". **The City did not raise the affirmative defense of sovereign immunity.** The remainder of the affirmative defenses were raised as to both the Sergeant and the City.

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<sup>3</sup> It should also be noted that the Appellant hired a neuropsychologist (Jennifer Simkins-Bullock, PhD) to examine Mr. Jontony and give an opinion as to his condition. The City's retained medical expert diagnosed him with a permanent traumatic brain injury as a result of the December 21, 2006 automobile collision, and was called to the stand as a witness for the Plaintiffs/Appellees.

<sup>4</sup> Tomino and Latchney regularly represent political subdivisions.

In addition, Sergeant Colegrove filed a Motion for Judgment on the Pleadings, asserting immunity under R.C. 2744.05. In its pleading, the City stated that the case should proceed against the City. Specifically, the pleading filed on January 7, 2009 by the City of Strongsville stated: “Defendant Colegrove is entitled to judgment as a matter of law and **the lawsuit should proceed against remaining Defendant City of Strongsville.**” (Emphasis added.)

From discussions with defense counsel and the insurance carrier, along with the City’s Statement in its Motion for Judgment on the Pleadings, it was clear from the beginning that the City of Strongsville agreed that immunity did not apply and was not an issue that would be raised by the City. Based on all of the above, on January 16, 2009, the Plaintiffs filed a voluntarily dismissal of Colegrove from the action.

On March 11, 2009, the trial court conducted a case management conference. During the conference, the City’s counsel represented to the Court that no dispositive motion deadline would be necessary, as immunity was not being raised on behalf of the City. As such, with the exception of a very abbreviated/limited deposition of Sergeant Colegrove, discovery proceeded for the next eight months **solely on damages.**

On June 18, 2009, counsel for the Jontons sent a correspondence to the city’s counsel **requesting a stipulation that the City was not going to raise immunity.** Specifically, that correspondence stated:

This will also confirm that you have indicated that you will send me a letter stipulating to liability and that no immunities apply against the City of Strongsville only. It is fully understood that you will argue causation regarding the damages sustained by Mr. Jontony. I look forward to that letter.

The City’s counsel responded to that letter in writing on June 22, 2012 stating:

This letter will confirm that the City of Strongsville does not intend to assert an immunity defense because Officer Colegrove

was not on an “emergency call” as that phrase has been defined by R.C. §2744.02(B)(1) and the case law interpreting the same.

Additionally, as Officer Colegrove did during his deposition, the City is admitting he was negligent. ...the City is assuming 100% responsibility for the accident.

As I see it, the only remaining issues are what damages were proximately cause by this accident and whether the City is entitled to setoff under R.C. §2744.05(B).

With the issue of immunity removed from the case, the matter was scheduled for trial to commence on September 28, 2009. Less than seven weeks before trial, the City of Strongsville then attempted to raise the immunity defense, the same defense that had previously been determined to have no application to the facts of the case, by filing their Motion for Leave to File Summary Judgment on August 11, 2009.

On August 31, 2009, the trial Court denied the City’s Motion for Leave to File Summary Judgment. The same day of the trial court’s order, Defendant-Appellant retained the services of the law firm of Sutter, O’Connell & Farchione (now Sutter O’Connell) as new lead counsel in the action. Although both law firms continued to represent the City of Strongsville, **neither Tomino & Latchney, nor Mr. Sutter’s law firm filed an appeal of the decision of the trial court denying the City of Strongsville the benefit of immunity.**

On August 19, 2009, Plaintiffs-Appellees filed their trial brief with the court, anticipating the trial of the matter on September 28, 2009. Plaintiffs-Appellees included in the trial brief that the parties have stipulated to negligence and have waived immunity. This filed pleading was never challenged or opposed by the City of Strongsville.

The trial date of September 28, 2009 was then continued, over objection, when the trial court granted the City of Strongsville’s Motion for Enlargement of Time Re: IME and Expert Report Supplementation (filed August 24, 2009). Trial was rescheduled for December 28, 2009.

Discovery and preparation for trial was ongoing and extremely active. In fact, a private mediation was conducted between the parties. Suddenly, on Friday, November 20, 2009, approximately **five weeks before the rescheduled trial date**, and after the Jontony's had incurred and expended over \$20,000 in case expenses preparing their case solely on damages, Defendant-Appellant City of Strongsville filed its Motion for Leave to Amend its Answer to assert the defense of immunity.

On January 25, 2010, the trial Court denied the City's Motion to Amend the Answer citing Civ. R. 15 and the guidelines set out in *Hoover v. Sumlin*, 12 Ohio St.3d 1, 465 N.E.2d 377 (1984). The trial court held that allowing the City to amend its answer at that time was prejudicial to the Plaintiffs-Appellees.

The City of Strongsville appealed the January 25, 2010 judgment entry, but it was summarily dismissed by the Eighth District Court of Appeals as not being a final appealable Order. The City then appealed the Eight District's dismissal of the matter to this Court. This Court declined jurisdiction on June 9, 2010.

Upon remand, the parties engaged in protracted pretrial discovery. A total of five continuances were requested by the Defendant, all leading up to the ultimate trial which was conducted on June 20, 2011, and lasted two full weeks. On July 1, 2011, the jury unanimously found in favor of the Plaintiffs/Appellees in the amount of \$1,106,608.80<sup>5</sup>.

On July 11, 2011, the City of Strongsville filed its Motion to Enforce Set-Off and Non-Economic Damages Cap Pursuant to O.R.C. §2744 *Et Seq.*, requesting that the \$1,106,608.87 verdict be set-off by \$1,478,690.79, which was more than the entire verdict.

On February 7, 2012, a hearing was held regarding Defendant/Appellant's Motion to Enforce Set-Offs and Non-Economic Damages Cap. The trial court received the evidence and

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<sup>5</sup> Defendant/Appellant mistakenly lists the final verdict in its brief as \$1,056,608.80

issued its Judgment Entry with Opinions on April 6, 2012, granting in part and denying in part the City's Motion for Set-Offs and Non-Economic Damages Caps.

The trial court held that to the extent that it was left to speculate as to what part of the jury's award was for lost wages and what part was for loss of services, the City of Strongsville failed its burden of proof. The trial court set off \$48,859 of the \$250,000 award for lost wages and loss of services, as that was the only amount which the court did not have to speculate was for lost wages pursuant to the evidence presented at trial.<sup>6</sup> After applying the statutory set-offs and caps on non-economic damages, the trial court apportioned the verdict in favor of the Plaintiffs as follows:

Past Medical Expenses:	\$30,609.17	(reduced from \$41,418.87)
Lost Wages and Loss of Services:	\$201,141.00	(reduced from \$250,000.00)
Future Medical Care:	\$265,140.90	(not reduced)
Pain and Suffering & Loss of Enjoyment of Life as to Plaintiff, Henry Jontony:	\$250,000.00	(reduced from \$500,000.00)
Loss of Consortium for Patricia Jontony:	\$50,000.00	(not reduced)
Loss of Consortium for Kara Jontony:	\$0.00	
Loss of Consortium for Dominic Jontony:	\$0.00	
<b>FINAL JUDGMENT:</b>	<b>\$796,891.07</b>	<b>(reduced from \$1,106,608.87)</b>

The Appellant filed its Notice of Appeal with the Eighth District Court of Appeals on April 27, 2012. The matter was briefed extensively and presented in oral argument. On December 10, 2012, the Court of Appeals found that the trial court did not abuse its discretion when it denied the City's Motion for Leave to Amend Answer. The panel found that the trial

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<sup>6</sup> Evidence of the value of the loss of services was presented to be \$201,141 (Tr. at 1055)

court's decision finding that it would be prejudicial to the Jontons to allow amendment is neither unreasonable nor arbitrary. In finding, the Court cited to evidence in the record that the Appellees reasonably relied on the assurances of the City that liability was not an issue to be litigated, along with the evidence in the record showing the great time and expense expended by the Appellees in preparing the matter for a trial on damages.

Further, regarding the statutory set-offs, the Court of Appeals found that the trial court did not err when it found the following: 1.) Retirement pension benefits are not a collateral source subject to set-off pursuant to the Ohio Supreme Court's decision in *Vogel v. Wells*, 57 Ohio St.3d 91, 98, 566 N.E.2d 154; 2.) The jury interrogatories proposed/approved by the City failed to sufficiently separate lost wages and loss of services to determine what amount the jury apportioned for "lost wages" and "loss of services, and that the City failed to meet its burden of proof as a result of the speculation; 3.) The City failed to raise as an assignment of error the trial court's decision denying the use of the City's proposed jury interrogatories, the inclusion of "loss of services" within "lost wages," or the inclusion of "loss of services" under the "economic compensatory damages" category of the jury interrogatories.

**ARGUMENT IN SUPPORT OF APPELLEES' POSITIONS REGARDING  
APPELLANT'S PROPOSITIONS OF LAW**

Appellant argued its first two propositions of law together. As such, Appellees will respond to both assignments of error together for the convenience of the Court.

**APPELLANT'S PROPOSITION OF LAW I: ABSENT BAD FAITH, IT IS AN ABUSE OF DISCRETION TO DENY A TIMELY MOTION TO AMEND AN ANSWER WHERE THE PLAINTIFFS FACED NO OBSTACLES BY AMENDMENT THAT THEY WOULD NOT HAVE FACED HAD THE ORIGINAL PLEADING RAISED THE DEFENSE.**

**APPELLANT’S PROPOSITION OF LAW II: JUDICIAL  
ADMISSIONS BY COUNSEL CONSTITUTE A DISTINCT  
STATEMENT OF FACT IN A PLEADING WHICH IS  
MATERIAL AND COMPETENT, ADMISSIONS OF FACTS  
DURING TRIAL, OR ADMISSIONS IN MOTIONS OR  
OTHER PAPERS FILED BY THEM.**

This case, in no way changes the current status of Ohio law involving a litigant’s ability to amend his/her pleadings. Upon a review of the record, there is a plethora of evidence demonstrating that the Appellant’s actions left the trial court with no choice but to find that allowing the Appellant to amend its answer at that time was prejudicial to the Appellees. This decision should not be overturned absent an abuse of discretion. This Court has established that motions to amend pleadings should be refused upon a showing of bad faith, undue delay, or undue prejudice to the opposing party. *Hoover v. Sumlin*, 12 Ohio St.3d 1, 465 N.E.2d 377 (1984). In *Hoover*, this Court stated:

Although the grant or denial of such leave is within the sound discretion of the trial court, where the defense is tendered timely and in good faith, **and no reason is apparent or disclosed for denying leave**, the denial of leave to file such an amended pleading or the subsequent striking of a defense from an amended pleading is an abuse of discretion.

*Id.* at 5-6. (Emphasis added).

In *Hoover*, the trial court gave absolutely no reasoning, and no reason was apparent as to why it prevented the Defendant from pleading the affirmative defense of statute of limitations. To the contrary, the trial court in this action did give reasoning as to why it prevented the City from amending its answer to assert immunity. The trial court held that amendment would be prejudicial to the Appellees.

The Appellant’s argument that there was no prejudice to the Jontons in this matter is patently erroneous. The City clings to language in *Hoover* which states that prejudice is not established where the non-moving party “faced no obstacles by the amendment which they

would not have faced had the original pleading raised the defense”. The City’s use of this phrase from the *Hoover* decision is contorted and confusing. *Hoover* involved the statute of limitations defense. In such a defense, the **sole** issue is whether the cause of action was timely filed within the limitations period. A party who files their action **after** the statute of limitations cannot be prejudiced, because they have missed their opportunity to bring an action pursuant to clear and unambiguous statutes. As such, it does not matter when the affirmative defense was raised, because there is no prejudice to the party who filed after the statute of limitations.

In this situation, the prejudice to the Jontony’s is immeasurable. Plaintiffs-Appellees filed their action, and were assured by the City of Strongsville that immunity was not an issue to be litigated **several times**. These conscious decisions and actions dictated the entire litigation and discovery. The City assured the Appellees and the trial court that immunity was not to be an issue for litigation in the following manners:

I. **Answer:**

In its Answer, the City purposely included the defense of immunity for Sgt. Colegrove, but **not for the City of Strongsville**. It is a clear, unquestioned statement of existing law in Ohio that statutory immunity is an affirmative defense, and if it is not raised in a timely fashion, it is waived. *State Ex. Rel. Koren v. Grogan*, 68 Ohio St.3d 590, 594, 629 N.E.2d 446, 450 (1994); *Turner v. Central Local School District*, 85 Ohio St.3d 95, 706 N.E.2d 1261 (1999); Civil Rule 8(C); Civil Rule 12(H).

Further, the Eighth District Court of Appeals has also held that a political subdivision’s failure to assert sovereign immunity in its answer will act as a waiver or abandonment of that affirmative defense. In *Krieger v. Cleveland Indians Baseball Company*, 176 Ohio App.3d 410, 2008 Ohio 2183, 892 N.E.2d 461 (8<sup>th</sup> Dist.), the City of Cleveland, along with a police officer,

asserted immunity in its **original** answer to the Complaint. Subsequently, the plaintiff filed an amended complaint. The police officer filed an amended answer, once again raising immunity as an affirmative defense. On the other hand, in its amended answer, the City of Cleveland did not raise immunity as an affirmative defense. The city later tried asserting immunity in a motion in limine, motion for directed verdict, and motion for new trial. As such, the Eighth District held that the trial court did not abuse its discretion in denying the City's motion in limine, motion for directed verdict, and motion for new trial, all of which were made *after* the City had abandoned its statutory immunity defense.

a.) **Motion for Judgment on The Pleadings:**

In its Memorandum in Support, the City argues that in order to have a stipulation of fact, it must be something filed with the Court. The City **did file with the court** its Motion for Judgment on the Pleadings on January 7, 2009. In that Motion, the City specifically stated: “Defendant Colegrove is entitled to judgment as a matter of law and **the lawsuit should proceed against remaining Defendant City of Strongsville.**” (Emphasis added.) This pleading filed by the City is an admission of fact that the City’s position was that immunity did not apply.

b.) **During the Case Management Conference:**

The record also demonstrates that the City represented to the trial court during court proceedings that it would not assert sovereign immunity in this case. The City told the trial court that a dispositive motions deadline was not necessary, as the City would not be asserting the affirmative defense of immunity.

c.) **In Writing After a Request for a Stipulation:**

On June 22, 2009, the Appellant responded in writing to Appellees’ request for a written stipulation that immunity would not be an issue in this litigation. The City of Strongsville

responded affirmatively in writing that in response to Appellees' request, the City was 100% negligent, and that immunity does not apply because Sergeant Colegrove was not on an emergency call as defined by the existing applicable law. The City further confirmed in that writing that the only issues to be decided were the extent of damages to Mr. Jontony and the statutory set-offs.

**II. The Prejudice:**

**a.) Directed the Scope of Discovery:**

Based upon the Appellant's assurances that the City of Strongsville was accepting liability and not asserting the defense of immunity, the parties prepared their entire case on damages alone. Discovery on liability, other than a short, basic deposition of Officer Colegrove, and issues involving immunity were not relevant, as immunity had been waived orally, in pleadings, and in a written correspondence.

Further, the Appellees had absolutely no reason to explore a claim of reckless and wanton disregard on behalf of the officer, as a possible exception to sovereign immunity, because the City had agreed that the City was responsible several times.

Had liability been an issue, extensive discovery on liability would have been completed, and the parties would have permitted the trial court to decide whether immunity shielded the City from liability **before conducting expensive preparation for a trial on damages**. Had liability been in dispute, and ripe for deciding, Appellees would not have had to retain expert witnesses at great expenses from around the country to testify regarding Mr. Jontony's traumatic brain injury.

**b.) Resources and Expenses:**

By the time the Motion for Leave to Amend Answer was filed, five weeks before trial, the record demonstrates that Appellees had already expended \$20,170.20 in case expenses

preparing their case on damages alone, and counsel for Appellees spent hundreds of hours preparing the case. Contrary to the City's statement that the case expenses were "unidentified", this information is clearly contained in the record in an affidavit. Had the City raised immunity at the beginning, the Plaintiffs/Appellees would not have needed to expend such great resources in preparing the liability aspect of the matter. A few depositions of all of the officers at or near the scene, in addition to an in-depth deposition of Colegrove and his supervisor would have been the extent of the discovery. Because liability was stipulated, the Plaintiffs **did not have the burden of proving liability**. That issue had been removed. Upon requesting leave to amend, the City now wanted the Plaintiffs/Appellees to also prove liability.

The City of Strongsville's **conscious** decision that immunity did not apply directly caused the expending of a great deal of resources. This Court has stated in *Hubbell*, "As the General Assembly envisioned, the determination of immunity [should] be made prior to investing the time, effort, and expense of the courts, attorneys, parties, and witnesses." *Id.* at 26, quoting *Burger v. Cleveland Hts.*, 87 Ohio St.3d 188, 199-200, 1999 Ohio 319, 718 N.E.2d 912 (1999).

The Eighth District Court of Appeals reiterated the importance of a political subdivision asserting immunity at the beginning of litigation so as to avoid prejudice to an opposing party in *Supportive Solutions Training Acad. L.L.C. v. Elec. Classroom of Tomorrow*, 2012 Ohio 1185 (8<sup>th</sup> Dist.) stating: "A political subdivision should timely assert its immunity defense so that the other litigant does not devote its time and resources in litigating a lawsuit that could be barred by immunity." *Id.* at p. 17.

- c.) **Any Claim of Recklessness and Wanton Disregard as Against Sgt. Colegrove is Now Forever Time Barred:**

As a result of Appellants assurance that liability was not an issue, Officer Colegrove was dismissed from the claim, and a claim for wanton and reckless disregard against the officer was never considered or investigated. If the case were to now be remanded to be decided on liability, Appellees would be unable to pursue a claim against Officer Colegrove, as it would be barred pursuant to the Statute of Limitations, and the Savings Statute. This prejudice should not be underestimated.

### III. The Written Stipulation:

In Proposition of Law #2, Appellant attempts to argue that the correspondence it sent to Appellees' counsel on June 22, 2009, **in response to a request for a written stipulation**, is not the equivalent of a legal stipulation which can be reasonably relied upon. In so doing, Appellant cites to the Eighth District's decision in *Karwowska v. St. Michael Hospital*, 2008 Ohio 4235 (8<sup>th</sup> Dist). To even attempt to compare the situation in *Karwowska* to the writing in this case is out of place.

The *Karwowska* decision involved an unsolicited settlement letter sent by the Plaintiff to the Defendant in a medical malpractice case. At issue was whether the Defendant was entitled to a set-off of settlement funds received pursuant to former R.C. 2307.32(F), now R.C. 2307.33(F). As stated by the court of appeals, the letter in question was an **unsolicited letter attempting to induce settlement**. The letter in *Karwowska* was merely a negotiations letter in which the attorney stated:

"\* \* \*This offer will remain open until Friday, July 28, 2006. If this matter is not resolved and proceeds to trial, and, as we reasonably anticipate, the verdict and judgment are in excess of the \$ 1,000,000 that may now settle this case, your client, Dr. Rivera, will be held liable for the entire amount of such verdict and judgment (**less the \$ 250,000 paid by University Hospitals of Cleveland**) including the amount in excess of \$ 1,000,000."

*Id.* at 20. (Emphasis added.) The Court held that this letter, attempting to promote settlement, did not satisfy the definition of a judicial admission or stipulation which was reasonable for opposing counsel to rely on as a stipulation of set-off as stated in R.C. 2307.33(F). The Court held that “given the context of the statement, it was not reasonable for UES’s counsel to rely on that statement to his purported detriment.” *Id.* at 22.

There is no legal comparison between the written correspondence sent to the Jontonys by the City of Strongsville **in response to a request for a written stipulation**, with the settlement demand letter in *Karwowska*. Appellees asked for a written stipulation, and received one. In addition to the other ways that the City of Strongsville indicated that immunity was not an issue to be litigated, the written stipulation solidified the issue. As the trial court and appellate court found, it was completely reasonable for the Appellees to rely on the letter as a stipulation between the parties that immunity was not an issue to be litigated.

**APPELLANT’S PROPOSITION OF LAW III: A COURT CANNOT DENY A DEFENDANT SET-OFFS PURSUANT TO R.C. 2744.05(B) BASED ON JURY INTERROGATORIES DRAFTED BY THE PLAINTIFF WHEN THE DEFENDANT BOTH OBJECTED TO PLAINTIFF’S INTERROGATORIES AND PROVIDED ALTERNATIVE INTERROGATORIES.**

The City misconstrues the facts, in an attempt to convince this Court to accept jurisdiction. There is no issue of public or great general interest when a political subdivision fails to propose<sup>7</sup> specific jury interrogatories so that it can prove what portions, if any, of the jury’s award are subject to a statutory set-off. This issue of law is clear, and has been well established by this Court in *Buchman v. Wayne Trace Local School District*, 73 Ohio St. 3d 260, 1995 Ohio 136, 652 N.E.2d 952 (1995).

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<sup>7</sup> It should be noted that the City of Strongsville never filed proposed jury interrogatories.

The City of Strongsville stipulated on the record to all of the Appellees' proposed jury interrogatories, except that it requested that there be a separate jury interrogatory for "past lost wages and loss of services" and "future lost wages and loss of services". Appellant argues to this Court that it "proposed an alternative set" of instructions, but in reality, the only change to the interrogatories it requested was to separate past and future lost wages. The distinction between past and future lost wages is not even an issue on appeal. The City did not request that loss of services be separated from lost wages. The trial court held that it was left to speculate as to whether the jury's \$250,000 award was for lost wages or for loss of services.

As the Court of Appeals points out, the City **did not** assign as error the trial court's decision denying the use of the City's proposed jury interrogatories, the inclusion of "loss of services" within "lost wages," or the inclusion of "loss of services" under the "economic compensatory damages" category of the jury interrogatories. Where a party disagrees with the jury interrogatories submitted to a jury, that party must object to the jury interrogatory and raise the submission of that jury interrogatory as an assignment of error on appeal. *See* Civ. R. 49(B). The City did not raise the propriety of the jury instructions as an assignment of error in the court of appeals. As such, the City has waived the argument that the jury interrogatories submitted were improper.

The City's argument that litigants will purposely propose deficient interrogatories as a result of the trial court's holding is inaccurate. Plaintiffs in actions have never had a duty to propose jury interrogatories which would help their opponent meet their burden of proof. Doing such could be construed as legal malpractice. The burden of proof to present adequate jury interrogatories was solely on the City of Strongsville. Just as the City of Strongsville had no duty

to help Mr. Jontony meet his burden of proof for damages, Mr. Jontony has no duty to aid a political subdivision in meeting its burden of proving its claimed entitlement to set-offs.

As stated by this Court in *Buchman*, proper jury interrogatories are the best **if not the only way** to break down a jury's award of damages. How much of the \$250,000 award was for lost services? How much of the award was for lost wages? Did the jury find that Henry Jontony was forever disabled from employment? Did the jury find that Mr. Jontony could ever work again? We simply do not know, because the City of Strongsville failed to ask the jury those very questions. The City is held to this daunting burden, as the right to statutory set-offs is a very powerful right not enjoyed by the average defendant. These issues are well established, and not a matter of public or great general interest.

**APPELLANT'S PROPOSITION OF LAW IV: O.R.C. 2744.05(B)**  
**ENTITLES POLITICAL SUBDIVISIONS TO CONSTITUTIONALLY**  
**DEDUCT SOCIAL SECURITY BENEFITS AND DISABILITY BENEFITS**  
**FROM AWARDS FOR LOST WAGES AND SERVICES.**

**I. Retirement Benefits:**

It would be completely improper and contrary to law to allow a political subdivision to receive a set-off from a person's retirement pension. The trial and appellate courts have decided that one's retirement pension funds are not collateral source payments pursuant to R.C. 2744 and this Court's prior decisions. Specifically, this Court has previously defined a collateral benefit subject to a statutory set-off as:

financial assistance received in time of sickness, disability, unemployment, etc. either from insurance or public programs such as social security.

*Vogel v. Wells*, 57 Ohio St.3d 91, 98, 566 N.E.2d 154, quoting *Black's Law Dictionary* 158 (6th Ed.1990). At issue is whether the Appellees' self-funded retirement pension is a collateral source pursuant to Ohio law so as to allow a political subdivision to set-off an award of damages

against it. It would be contrary to *Vogel* and public policy to allow the City to take a set off from one's contributions that he made solely for his retirement. Would the City be able to access one's 401K plan because they decided to access it early because of an injury? Appellee would have been entitled to his retirement regardless of the injury.

## **II. Loss of Services and Social Security:**

It is deceptive to argue that an award for loss of services corresponds to benefits of an award of social security. Social security disability is a right that one receives after paying into the system for the years while they worked. One who receives social security benefits is not necessarily entitled to an award for loss of services. Loss of Services is designed to be awarded when the jury determines that one cannot do household tasks such as taking out the garbage, mowing the lawn, doing the dishes and cooking. Simply because one qualified to receive social security does not mean that they cannot cook, clean, take out the garbage, etc. Lost wages are given by a jury when the jury determines that the person can no longer work. The two are not synonymous.

Further, as previously stated, it is the City's burden to prove that the jury's award matches to a collateral benefit. At the hearing conducted on the set-offs, the Appellant provided **absolutely no evidence** that social security is matched to loss of services. The Appellant's argument fails, and the City has failed in its burden of proof.

Pursuant to the unequivocal language created in this Court, the trial and Appellate Courts' decisions were correct, and in no way create an issue of public or great general interest. Appellant should not be permitted to invoke jurisdiction strictly because it would like this Court to act as an additional court of appeals.

## **PART II.**

### **STATEMENT OF ISSUES OF PUBLIC AND GREAT GENERAL IMPORTANCE FOR CROSS-APPEAL:**

The Eighth Appellate District's Journal Entry and Opinion, affirming the trial court's denial of the Plaintiff-Appellees-Cross Appellants' post trial Motion for Prejudgment Interest creates confusion on the important issue of pretrial settlement efforts and creates issues of public and great general importance for not only the bench and bar in Ohio but for all litigants who avail themselves of the civil justice system.

The Court of Appeals Decision in the pending controversy creates a dangerous precedent that arms individual attorneys with the apparent authority to disregard or even defy the directives of their clients and thereby unilaterally control the entire course of settlement discussions. This precedent should not stand in the State of Ohio. Allowing the Appellate Decision in the pending case to stand undisturbed effectively eliminates any encouragement to promptly resolve a matter in good faith that the prejudgment interest statute in Ohio once provided.

Despite mounting and overwhelming evidence establishing the severity of the Plaintiff's injuries, defense counsel throughout the entire course of the case denied, discounted or delayed any efforts whatsoever to put forth a good faith offer of settlement. Post trial discovery in anticipation of the prejudgment interest hearing confirmed that the Defendant, City of Strongsville's insurance carrier, fully appreciated the nature and extent of the injuries that had been sustained by the Plaintiff, Henry Jontony, as a result of their employee/insured's admitted negligence.

Evidence was presented to the trial court as well as the Court of Appeals clearly establishing that the insurance carrier for the City of Strongsville responded by significantly increasing their reserves and correspondingly increasing the settlement authority that they had

bestowed upon their retained counsel. This same post trial discovery also clarified that although settlement authority had been conveyed, the defense lawyer and his litigation team ignored the settlement authority conveyed onto them and never made any settlement offer throughout the course of the proceedings that conveyed their full settlement authority.

Specifically, the City's insurance carrier had increased the settlement authority on the case to \$500,000 and the reserve to \$1.5 million. Despite this tremendous increase in evaluation and settlement authority, the City of Strongsville's attorney conveyed its absolute final offer of \$175,000 to resolve the matter, forcing the case to then be fully litigated.

The Journal Entry and Opinion issued by the Eighth District Court of Appeals on the issue of prejudgment interest seriously dilutes the primary purpose of Ohio Revised Code Section 1343.03(C). The prejudgment interest statute in Ohio, without question, was implemented to foster and promote meaningful settlement negotiations between litigants. In order for Courts to evaluate the settlement efforts of the parties, the trial court must consider all evidence in the record including all discussions involving demands for settlement and responses thereto. In the underlying controversy, the trial court failed to consider numerous pieces of evidence in the record and failed to conduct the type of analysis that provides guidance to the bench and bar in Ohio dealing with the prejudgment interest statute.

This case presents issues of public and great general importance not only to all members of the bench and bar, but to all future litigants in the State of Ohio. Settlement discussions will become meaningless under the authority of this case unless the Decision of the Eighth District Court of Appeals is reversed.

## **STATEMENT OF THE FACTS AND CASE INVOLVING CROSS-APPEAL:**

Throughout the entire litigation, the City of Strongsville attempted to minimize the extent of Mr. Jontony's head injury. Despite the overwhelming medical evidence, including a PET scan which objectively demonstrated brain damage to Mr. Jontony's temporal lobe, the City referred to his injury as a minor concussion throughout the course of the litigation.

Evidence demonstrated that the City of Strongsville's insurance carrier had initial settlement authority of \$250,000. As the litigation progressed, the insurance carrier then raised the settlement authority to \$350,000. Finally, after the neuropsychologist hired by the City, Jennifer Simkins-Bullock wrote a report substantiating Mr. Jontony's permanent traumatic brain injury, the City was given \$500,000 in settlement authority with a reserve of \$1.5 million dollars. Despite this continued rise in the authority to settle the matter, the City's offers in the case were \$75,000, then \$125,000, and the **highest amount ever offered was \$175,000**. Despite being given the authority by the City's carrier to settle the case at \$500,000, counsel for the City unilaterally offered a mere 35% of the settlement authority given to him.

On August 2, 2011, the Jontonys filed their Motion for Prejudgment Interest. On January 30, 2012, an evidentiary hearing was held regarding the Motion. In the hearing, the Jontonys called Mark Obral, counsel for the Plaintiffs/Appellees/Cross-Appellants, James Popson, counsel for the City of Strongsville, and Mr. John Bostwick as witnesses during the hearing. The City of Strongsville called only Mr. Popson to the stand, and **did not even have the claims adjuster testify or appear at the evidentiary hearing**.

During the hearing, testimony was presented that the Plaintiffs would have considered an offer of around \$1,000,000 to settle the matter. Further, Plaintiffs'/Appellees expert opined that

the City of Strongsville failed to make a good faith offer of settlement when it only offered a mere 35% of its settlement authority.

On April 6, 2012, the trial court issued its decision denying Plaintiffs'/Appellees'/Cross-Appellants' Motion for Prejudgment Interest. The trial court held that the Plaintiffs did not meet their burden of proof to impose prejudgment interest because the "Defendants had a reasonable expectation that any jury award would likely be subject to set-offs and non-economic damages caps pursuant to R.C. §2744.05." (Journal Entry denying Plaintiffs' Motion for Prejudgment Interest filed April 6, 2012). The court bases its entire denial of the imposition of prejudgment interest on that one statement but provides no further analysis. The trial court ignored the entire record, and never even discussed the amounts of the offers of settlement and the settlement authority.

As a result, Appellees/Cross-Appellant' filed their notice of cross-appeal challenging the trial court's denial of their Motion for Prejudgment Interest on May 7, 2012. The Eight District Court of Appeals erroneously held that the trial court did not abuse its discretion when it denied the Motion for Prejudgment Interest. Further, the appellate court mistakenly stated in its opinion that Plaintiffs/Appellees'/Cross-Appellant's final settlement demand was \$2.9 million. ¶66. The record reflected that Plaintiffs' final demand was "2.75 [million] with absolute significant room to move". The Court of Appeals Decision in the pending controversy was decided strictly and solely upon the contention that the City of Strongsville was justified in extending a low offer of settlement due to its belief that set-offs and damage caps would significantly reduce the jury verdict.

Plaintiffs/Appellees/Cross-Appellants filed their Notice of Cross-Appeal to this Honorable Court on February 13, 2013.

**ARGUMENT IN SUPPORT OF APPELLEES'-CROSS APPELLANTS' CROSS  
APPEAL**

**APPELLEES/CROSS-APPELLANTS' PROPOSITION OF LAW #1:  
**IT IS AN ABUSE OF DISCRETION TO DENY A PLAINTIFF'S  
MOTION FOR PREJUDGMENT INTEREST WHERE COUNSEL  
FOR THE OPPOSING PARTY UNILATERALLY OFFERS A MERE  
35% OF THE RATIONALLY EVALUATED SETTLEMENT  
AUTHORITY GIVEN TO RESOLVE THE MATTER SIMPLY  
BECAUSE DEFENDANT'S COUNSEL DID NOT FEEL THAT THE  
PLAINTIFF WOULD ACCEPT AN OFFER OF THE FULL  
AUTHORITY:****

Despite the overwhelming evidence presented not only by the Plaintiffs' treating healthcare professionals, co-workers, friends, family, and even opinions made by the experts hired by the City itself, the maximum offer to settle the case was \$175,000.00. The record, however, clearly shows that according to the insurance company's own claims file, it placed valuations on this case in the ranges of a low of \$250,000.00 (in 2009) to any where up to \$1.5 million (the reserve set in May of 2011).

In fact, the insurance company's claims file clearly reflects that its settlement authority began at \$250,000.00, was increased on or about October 20, 2010 to \$350,000.00 and then was ultimately increased after their defense expert's opinion was contrary to their position to \$500,000.00. The claims file further reflects that the initial reserve set on this file was set initially at \$500,000.00 and then **tripled** on June 8, 2011 to \$1.5 million. What good is the authority if only a mere 35% of it is offered at the **final pre-trial**, usually a party's very last opportunity to resolve a matter before trial? The insurance carrier evaluated the matter much higher, and yet its counsel chose to ignore the evaluation and unilaterally offer a mere \$175,000.00.

At the prejudgment interest hearing, defense counsel testified under oath that the \$500,000 authority was not offered because he didn't believe the offer would ever be taken. (Tr.

at 1778.) Counsel for the Defendant ignored the carrier's settlement value recommendation on this belief alone. The Plaintiffs/Cross-Appellants were never given the opportunity to even **consider** an amount over \$175,000 as a result of defense counsel's failure to offer anywhere near the settlement authority.

Allowing a defense attorney to unilaterally disregard the settlement evaluation of the insurance carrier completely ignores the entire purpose and intent of R.C. 1343.03(C). The statute was enacted to make sure that all parties make a good faith effort to resolve matters prior to expending the resources of the trial court. Upholding the Eighth District's reasoning in this matter will effectively wash away prejudgment interest as it is known today.

The appellate court's decision fails to take into account that the City of Strongsville's insurance carrier had also taken into account set-offs and damage caps that would likely be imposed and still placed a settlement value on the case of \$500,000, an amount significantly higher than any offer that had been tendered throughout the course of settlement discussions. Quite simply, the Jontons were never afforded an opportunity to consider any offer of settlement that would even remotely be considered as being reasonable. The conduct of the Defendants in the pending case was in direct and blatant violation of Ohio's prejudgment interest statute and flies square in the face of a long standing line of precedential cases that would have otherwise imposed prejudgment interest under the facts of this case.

**APPELLEES/CROSS-APPELLANTS' PROPOSITON OF LAW #2:**  
**IT IS AN ABUSE OF DISCRETION WHEN THE TRIAL COURT**  
**IGNORES THE RECORD IN DENYING A MOTION FOR**  
**PREJUDGMENT INTEREST *Szitas v. Hill*, 165 Ohio App. 3d 439,**  
**2006 Ohio 687, 846 N.E.2d 919 (8<sup>th</sup> Dist.), approved.**

A trial court should not be permitted to ignore overwhelming evidence supporting an

award for prejudgment interest. The Eighth District's opinion is in direct contravention with its decision in *Szitas v. Hill*, 165 Ohio App. 3d 439, 2006 Ohio 687, 846 N.E.2d 919 (8<sup>th</sup> Dist.). In *Szitas*, the Eighth District concluded that there was little evidence, let alone competent, credible evidence, supporting the trial court's decision to deny the Plaintiff's motion for prejudgment interest.

This case is the prime example of where the trial court ignored the record in denying a motion for prejudgment interest. Here, the trial court failed to look at the record and at the abundance of evidence presented at the prejudgment interest hearing to make its decision. The trial court simply stated that the City was taking into consideration set-offs and caps when it made its last offer, so it acted in good faith. What the court failed to consider is that even after the city took those caps into account, the tortfeasor itself, valued the case between \$500,000.00 and \$1,500,000.00. Also, the court never expounded upon or analyzed whether the city's reliance on the caps was proper or justified in offering only \$175,000.00 as a final offer. The trial Court itself only set off a small percentage of the jury's award based on the evidence presented at the hearing on set-offs.

Virtually every case involving prejudgment interest to ever come before this Court and the various courts of appeals in the State, the trial court analyzed the demands and offers to make its determination of whether an award of prejudgment interest is warranted. The trial court **fails to make one mention of the offers, the demands, or the settlement authority of the insurance company** in its opinion. There is absolutely no analysis of what the offers were, and why they were good faith offers, other than stating that the offers were taking into account "likely set-offs".

The Journal Entry and Opinion issued by the Eighth District seriously dilutes the primary purpose of Ohio Revised Code Section 1343.03(C). The prejudgment interest statute in Ohio, without question, was implemented to foster and promote meaningful settlement negotiations between litigants. In order for Courts to evaluate the settlement efforts of the parties, the trial court must consider all evidence in the record including all discussions involving demands for settlement and responses thereto. In the underlying controversy, the trial court failed to consider numerous pieces of evidence in the record and failed to conduct the type of analysis that provides guidance to the bench and bar in Ohio dealing with the prejudgment interest statute. The trial court's sole reason for denying prejudgment interest in the context of this case was as follows:

The likely imposition of both set-offs and noneconomic damage caps to any jury award, then, would undeniably factor in Defendant's calculus in evaluating their risks and potential liability in the matter *sub judice*. Accordingly, any approach towards settlement would reflect this.

Quite simply, the Court failed to consider numerous factors and avoided the issue by simply indicating that the Defendants relied upon "likely set-offs" as affecting their settlement offers. Unfortunately, this flawed decision was affirmed by the Eighth District Court of Appeals, utilizing the same barren analysis. The Court of Appeals Decision failed to consider numerous factors that are customarily considered by trial courts and appellate courts when revealing Ohio's prejudgment interest statute.

Unless this decision is reversed, there will be absolutely no incentive for a defendant to make a good faith effort to resolve litigation. Defense attorneys will be much more likely to "roll the dice" with litigation, and create billable hours, as they have nothing to lose. The prejudgment interest statute will no longer be a catalyst to inducing all parties to negotiate resolutions in good faith.

**CONCLUSION:**

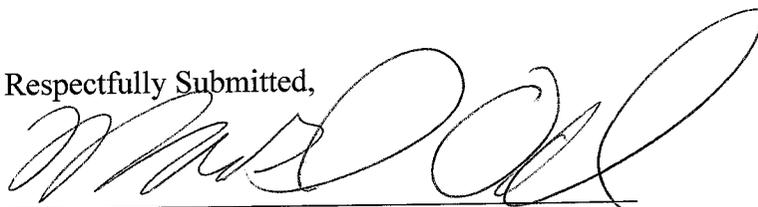
The Eighth District Court of Appeals was correct in holding that the trial court did not abuse its discretion in denying the City of Strongsville's Motion for Leave to Amend Answer. The unique and specific facts of the case demonstrate that allowing the City to Amend its Answer to assert immunity as a defense five weeks before the scheduled trial under the circumstances was prejudicial to the Appellees. It cannot be said that the trial court's ruling was an abuse of discretion.

The Eighth District was also correct in finding that the trial court did not err in finding that the City was entitled to a setoff of Social Security disability payments up to \$48,859. The trial court set-off only that amount on which it was not forced to speculate.

Appellees/Cross-Appellants respectfully request this Honorable Court decline jurisdiction of Appellant's Propositions of Law #1, #2, #3, and #4 as not involving any substantial constitutional question and as not being a matter of public or great general interest.

Appellees/Cross-Appellants also respectfully request this Honorable Court accept jurisdiction of Cross-Appellant's Propositions of Law # 1 and #2 as involving matters of public and great general interest.

Respectfully Submitted,



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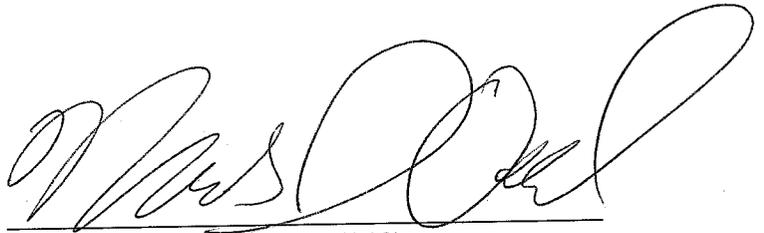
*Counsel for Appellees/Cross-Appellants Henry Jontony, et al.*

**CERTIFICATE OF SERVICE**

I certify that a copy of this Combined Memorandum in Response Of Appellees/Cross-Appellants And Memorandum in Support Of Jurisdiction for Cross-Appeal was sent by ordinary U.S. Mail on this 11<sup>th</sup>, day of March, 2013 to the following:

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