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I. INTRODUCTION

“A statute is presumed to be prospective in its operation unless expressly made retrospective.” R.C. 1.48. This statute codifies a mandate in the Ohio Constitution—laws may govern only future behaviors, duties, burdens, obligations, and rights. Ohio Constitution, Article II, Section 28. Absent unambiguous intent by the General Assembly to apply a statute or amendment retroactively, a law may be applied only prospectively. Even when clear retroactive intent exists, if retroactive application of a law would reach back and alter parties’ duties, burdens, obligations, rights, or liabilities, retroactive application violates Ohio’s constitution and is therefore prohibited.

The narrow question certified for this Court’s review—whether the version of R.C. 1343.03(C) that became effective June 2, 2004 may be applied retroactively to claims accruing before its enactment—should be answered with a resounding “no.”

The 2004 amendment to R.C. 1343.03(C) (“2004 Amendment”) lacks *any* language suggesting retroactive intent, much less a clear expression. That lack of retroactive language should end the inquiry. But even if the 2004 Amendment had contained clear retroactive language, the Ohio Constitution bars its retroactive application because that application would alter accrued substantive rights and create new statutory duties that were not present before the 2004 Amendment was enacted.

Appellants Gary Huber and Qualified Emergency Specialists, Inc. (collectively, “Huber”) raise issues that make it necessary for Appellees (collectively, “the Smiths”) to clarify exactly which issues are before this Court and which issues are outside the scope of this appeal. This Court accepted for review one narrow 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?”

Because Huber’s merit brief so exceeds the scope of the certified question, the Smiths must clarify what this appeal is not about. This appeal does not involve:

- Whether a Civ.R. 41(A) dismissal of a lawsuit and subsequent refiling require application of a version of a statute that had been enacted after the original filing, but before the voluntary dismissal and subsequent refiling.¹
- Whether a Civ.R. 41(A) dismissal and subsequent refiling cause prejudgment interest to begin accruing on the date that the action was refiled.
- Whether a prejudgment-interest calculation should include the time between a Civ.R. 41(A) dismissal and subsequent refiling.

Huber attempts to interject these ancillary issues into the narrow question that this Court accepted for review because he failed to raise or appeal them at the appropriate time. Not only are those issues outside of the scope of the certified conflict, but also those issues have been waived. Until he filed his merit brief to this Court, Huber never suggested, to either the trial court or the Twelfth District, that the Smiths’ refiling their lawsuit in 2008, after the statute had been amended, justified application of the 2004 Amendment. Likewise, he had never raised the Smith’s 2008 refiling date as the proper date for prejudgment interest to begin accruing. While Huber may regret his failure to timely raise or appeal these issues, he cannot raise them now. *State ex rel. Zollner v. Indus. Comm.*, 66 Ohio St.3d 276, 278, 611 N.E.2d 830 (1993) (res

¹ The Smiths are aware that this Court recently heard oral argument on a case that raises this issue. Case No. 2012-0014, *Johnson v. Randall Smith, Inc.* This Court accepted discretionary review over *Johnson* to determine whether R.C. 2317.43—Ohio’s “apology statute”—may be retroactively applied to pending causes of action. *Johnson v. Randall Smith, Inc.*, 131 Ohio St.3d 1543, 2012-Ohio-2025, 966 N.E.2d 896.

judicata doctrine precludes party that failed to raise issue before Court of Appeals from raising it before Supreme Court of Ohio); *Miller v. Miller*, 132 Ohio St.3d 424, 2012-Ohio-2928, 973 N.E.2d 228, ¶ 41 (“appellees waived the issue because this argument was not presented before the court of appeals.”)

The only question before this Court is whether the 2004 Amendment may be applied retroactively to claims that accrued before its June 2, 2004 enactment. Because the statute contains no language evidencing legislative intent to apply the amendment retroactively, and because retroactive application would violate the Ohio Constitution’s ban on retroactive application of statutes, the Twelfth District’s decision, which applied the 2001 version of R.C. 1343.03(C), must be affirmed.

II. STATEMENT OF FACTS²

On March 22, 2002, Huber provided medical treatment to Appellee Kyle Smith, which a jury later determined resulted in permanent injuries.³ On March 14, 2003, Kyle’s parents, Appellees Kristi Longbottom and Jesse Smith, sued Huber individually and on Kyle’s behalf. The Smiths voluntarily dismissed the lawsuit without prejudice under Civ.R. 41(A) in 2007; a year later, they refiled their lawsuit, which contained the same causes of action against the same parties. In September 2010, after a two-week trial, a jury found that Huber’s treatment had been negligent and that his negligence caused Kyle’s injuries. The jury awarded the Smiths

² Contrary to Huber’s assertion on the first page of his merit brief (“Huber Br.”) that “[n]one of the facts relevant to the determination of this appeal are disputed,” the Smiths dispute several “facts” presented by Huber.

³ The Smiths agree with the facts of this case as presented in the Twelfth District’s opinion, *Longbottom v. Mercy Hosp. Clermont*, 2012-Ohio-2148, 971 N.E.2d 379 (12th Dist.). The facts presented in the Smiths’ brief are taken from that opinion.

\$2,412,899.00, which was offset by \$500,000 from an earlier settlement with another defendant.⁴ Huber moved for judgment notwithstanding the verdict (“JNOV”) or alternatively for a new trial, but the trial court denied his motion.

After winning at trial, the Smiths petitioned the trial court for prejudgment interest. In his memorandum opposing prejudgment interest, Huber specifically acknowledged that the Smiths had voluntarily dismissed their lawsuit, but he did not argue that the dismissal and refiling in 2008 necessitated application of the 2004 Amendment. (Supp. 7.) The trial court granted the Smiths’ prejudgment-interest motion, applied the version of R.C. 1343.03(C) that had been operative at the time that Kyle was injured and the Smiths filed their complaint (“former R.C. 1343.03(C)”)⁵ and computed prejudgment interest starting on March 22, 2002, the date that the Smiths’ cause of action had accrued. (Smith Appx. 12.) The trial court excluded from its prejudgment-interest calculation the time during which the lawsuit had been voluntarily dismissed, approximately one year. (*Id.*)

Huber appealed the trial court’s decision to the Twelfth District. He asserted three assignments of error: that the trial court erred by 1.) denying his motion for JNOV or a new trial; 2.) granting the Smiths’ motion for prejudgment interest; and 3.) applying former R.C. 1343.03(C). (Supp. 17.) In his briefing to the Twelfth District, Huber recognized that the Smiths had voluntarily dismissed their lawsuit, cited case law involving whether a Civ.R. 41(A) dismissal and refiling alters the prejudgment-interest accrual date, and explicitly acknowledged

⁴ Huber disingenuously asserts that “of the jury’s total award of damages, approximately 67% represented future damages.” Huber Br., p. 2. The parties disagree about what percentage of the verdict constitutes future damages, but that issue is not before this Court.

⁵ Former 1343.03(C)’s effective date was July 6, 2001. 2001 Am.Sub.S.B. 108. The portions of 2001 Am.Sub.S.B. 108 that amended R.C. 1343.03(C) are attached as Smith Appx. 24-25. This brief refers to Huber’s appendix and the Smiths’ appendix as “Huber Appx.” and “Smith Appx.,” respectively.

that the trial court had not changed the prejudgment-interest accrual date based on the dismissal and refiling. (Supp. 19, 30, 53-54.) While Huber argued that the trial court correctly excluded the year between the Smiths' Civ.R. 41(A) dismissal and refiling, he did not challenge the trial court's determination that the prejudgment-interest period commenced on the date that the cause of action accrued, March 22, 2002. (Supp. 11-57.) Nor did he argue that the Smiths' voluntary dismissal and subsequent refiling necessitated application of the 2004 Amendment. (*Id.*)

The Smiths cross-appealed to the Twelfth District, arguing that the trial court had erroneously excluded from its prejudgment-interest calculation the year in which the lawsuit had been dismissed.

The Court of Appeals overruled all of Huber's assignments of error. *Longbottom*, 2012-Ohio-2148, 971 N.E.2d 379, at ¶¶ 46, 51, 55. It affirmed the jury's verdict, the award of prejudgment interest, and the application of former R.C. 1343.03(C). And the Court of Appeals found in favor of the Smiths on their cross-appeal, holding that the prejudgment-interest 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.* at ¶ 62. ***Huber did not appeal to the Supreme Court of Ohio this adverse ruling on the Smiths' cross appeal.***

Huber sought this Court's discretionary jurisdiction over issues involving the jury's verdict, but this Court declined jurisdiction. *Longbottom v. Huber*, 133 Ohio St.3d 1468, 2012-Ohio-5149, 977 N.E.2d 695; motion for reconsideration denied by *Longbottom v. Huber*, 133 Ohio St.3d 1502, 2012-Ohio-5693, 979 N.E.2d 348. Huber also sought, and was granted, this Court's review over the instant certified-conflict issue: whether the 2004 Amendment may be applied retroactively to claims that accrued prior to the amendment's enactment. *Longbottom v. Huber*, 133 Ohio St.3d 1462, 2012-Ohio-5149, 977 N.E.2d 691.

Huber did not seek this Court's discretionary review over the Twelfth District's holdings that 1.) prejudgment interest shall be calculated starting from the date the Smiths' cause of action accrued—March 22, 2002; or 2.) prejudgment-interest calculation shall include the year between the date that the Smiths voluntarily dismissed the lawsuit and the date they refiled. He should not be allowed to raise these issues now.

After the time had expired for Huber to appeal the Twelfth District's decision, the trial court entered a remand "Decision and Final Judgment Entry." (Smith Appx. 17-18.) This final entry calculated the prejudgment interest from "March 22, 2002, through the present day." (Smith Appx. 17.) Huber did not appeal the trial court's August 30, 2012 final judgment. In October 2012, the trial court issued an entry increasing Huber's supersedeas bond and again calculating prejudgment interest starting March 22, 2002. (Smith Appx. 19-21.) Huber did not appeal the trial court's October 2012 entry.

III. ARGUMENT

The trial court and Twelfth District correctly determined that former R.C. 1343.03(C) applied to the Smiths' prejudgment-interest award. First, the Smiths' Civ.R. 41(A) dismissal and subsequent refileing are irrelevant to the issues before this Court. Second, applying the 2004 Amendment to the Smiths' case would reach back before the amendment's enactment to substantively affect rights, duties, burdens, consequences, facts, and acts that occurred before June 2, 2004, thus rendering such application retroactive. Third, retroactive application of the 2004 Amendment would be contrary to the Ohio General Assembly's intent. Finally, the Ohio Constitution forbids retroactive application of the 2004 Amendment because such application would impair rights and impose new burdens and duties.

A. CIV.R. 41(A) DISMISSAL AND SUBSEQUENT REILING DO NOT IMPACT QUESTION CERTIFIED FOR REVIEW

Much of Huber's argument is dependent upon his erroneous assertion that March 8, 2008, the date on which the Smiths refiled their lawsuit, is the relevant date to consider all issues involving application of R.C. 1343.03(C). (Huber Br. pp. 4, 5, 8, 16, 18, 20-24.) This assertion fails both because Huber waived this issue and because it is contrary to law.

1. Huber's Failure To Raise or Appeal Issues Constitutes Waiver

"[I]t is well settled that '[a] party who fails to raise an argument in the court below waives his or her right to raise it here.'" *Niskanen v. Giant Eagle, Inc.*, 122 Ohio St.3d 486, 2009-Ohio-3626, 912 N.E.2d 595, ¶ 34, quoting *Zollner*, 66 Ohio St.3d at 278, 611 N.E.2d 830. This Court should not "add matter to the record before [this Court] that was not part of the court of appeals' proceedings and then decide the appeal on the basis of the new matter." *Dzina v. Celebrezze*, 108 Ohio St.3d 385, 2006-Ohio-1195, 843 N.E.2d 1202, ¶ 16. This Court should decline to base its "consideration of this belatedly raised issue on a record that did not address the issue." *State ex rel. Hilltop Basic Resources v. Cincinnati*, 118 Ohio St.3d 131, 2008-Ohio-1966, 886 N.E.2d 839, ¶ 20. Further, if a party fails to appeal an issue to the Court of Appeals, the issue is waived on appeal to this Court. *E.g., North v. Beightler*, 112 Ohio St.3d 122, 2006-Ohio-6515, 858 N.E.2d 386, ¶ 6 (party waived issue on appeal to this Court because he had not raised it in proceedings before court of appeals); *State ex rel. Brady v. Pianka*, 106 Ohio St.3d 147, 2005-Ohio-4105, 832 N.E.2d 1202, ¶ 14 ("Brady raises constitutional issues on appeal that she did not raise in the court of appeals, and thus she has waived them.").

At no time prior to filing his merit brief to this Court in the instant appeal did Huber ever raise any argument that the Smiths' Civ.R. 41(A) dismissal and subsequent reiling necessitated applying the 2004 Amendment. Moreover, Huber had multiple opportunities to appeal, but

failed to preserve issues related to whether a Civ.R. 41(A) dismissal and subsequent refiling affect a prejudgment-interest calculation.

Pertinent Case Timeline

December 15, 2010: Trial court issues prejudgment-interest decision, which ordered prejudgment interest to be calculated starting on the date that the Smiths' cause of action accrued, March 22, 2002, minus the year that the lawsuit had been dismissed. (Smith Appx. 1-13.)

December 29, 2010: Trial court issues final judgment, which incorporates December 15, 2010 prejudgment-interest decision. (Smith Appx. 14-16.)

January 28, 2011: Huber's deadline to appeal the trial court's judgment. App.R. 4(A). Huber's assignments of error involved only underlying issues, the trial court's award of prejudgment interest in general, and the trial court's application of former R.C. 1343.03(C). (Supp. 17.) Responding to the Smiths' cross-appeal to the Twelfth District, Huber argued that the trial court correctly excluded the year during which the lawsuit had been dismissed. (Supp. 53-54.) But at no time did he not raise the Civ.R. 41(A) dismissal and refiling as a basis to apply the 2004 Amendment. (Supp. 11-57.)

May 14, 2012: Twelfth District releases its decision, which determined that former R.C. 1343.03(C) applied, prejudgment interest began accumulating on the date the Smiths' cause of action accrued, and that prejudgment-interest calculations must include the one-year period between the Civ.R. 41(A) dismissal and the subsequent refiling. *Longbottom*, 2012-Ohio-2148, 971 N.E.2d 379, at ¶ 55, 62, 65.

June 28, 2012: Huber's deadline to appeal the Twelfth District's judgment to this Court. Huber sought discretionary review of only underlying issues, and sought certification of the

narrow question certified by this Court: whether the 2004 Amendment can be applied retroactively to claims accruing before June 2, 2004.

August 30, 2012: Trial court enters remand decision consistent with the Twelfth District's judgment. (Smith Appx. 17-18.) The trial court recalculated prejudgment interest continuously "from the time the cause of action accrued, March 22, 2002, through the present day." (Smith Appx. 17.)

October 1, 2012: Huber's deadline to appeal the trial court's August 2012 entry. Huber did not appeal.

October 18, 2012: Trial court issues entry increasing Huber's supersedeas bond and calculating prejudgment interest starting March 22, 2002. (Smith Appx. 19-21.)

November 19, 2012: Huber's deadline to appeal the trial court's October 18, 2012 entry. Huber did not appeal.

Huber had multiple opportunities at every level to appeal decisions on the basis that the Smiths' voluntary dismissal and subsequent refiling altered the prejudgment-interest accrual date. Huber had numerous chances to assert that the dismissal and 2008 refiling necessitated application of the 2004 Amendment. But Huber never raised either issue.

- Huber did NOT appeal the trial court's December 2010 determination that prejudgment interest began to accrue on March 22, 2002, when the Smiths' cause of action accrued.
- Huber did NOT raise in his appeal to the Twelfth District the Smiths' voluntary dismissal and subsequent refiling as bases for applying the 2004 Amendment.
- Huber did NOT appeal the Twelfth District's determination that the prejudgment-interest period commenced on the date that the Smiths' cause of action accrued.
- Huber did NOT appeal the Twelfth District's determination that the prejudgment-interest calculation must include the approximately one-year period between the Civ.R. 41(A) dismissal and the refiling.

- Huber did NOT raise in his discretionary appeal to this Court the Smiths’ Civ.R. 41(A) dismissal and 2008 refiling as justifications for applying the 2004 Amendment.
- Huber did NOT appeal the trial court’s August 30, 2012 remand decision, which calculated prejudgment interest continuously starting on March 22, 2002.
- Huber did NOT appeal the trial court’s October 18, 2012 entry, which calculated prejudgment interest continuously starting on March 22, 2002.

It was not until Huber filed his merit brief with this Court that he raised or appealed on the basis that the Smiths’ Civ.R. 41(A) dismissal and subsequent refiling required application of the 2004 Amendment or pushed back the prejudgment-interest accrual date to 2008. Moreover, Huber failed to appeal the Twelfth District’s ruling requiring the prejudgment-interest calculation to include the year in which the lawsuit was dismissed. Huber waived these issues for appeal and this Court should decline to consider the Civ.R. 41(A) dismissal and subsequent refiling as bases for its decision.

2. Voluntary Dismissal and Subsequent Refiling Do Not Impact Application of Former R.C. 1343.03(C) or Prejudgment-Interest Accrual Date

A plaintiff’s right to dismiss its lawsuit once, without prejudice, at any time before trial is “absolute.” *Indus. Risk Insurers v. Lorenz Equip. Co.*, 69 Ohio St.3d 576, 579, 635 N.E.2d 14 (1994), quoting *Sturm v. Sturm*, 63 Ohio St.3d 671, 675, 590 N.E.2d 1214 (1992) (“*Sturm II*”). When a plaintiff voluntarily dismisses a lawsuit under Civ.R. 41(A), absent circumstances not present in this case, the dismissal is “*without prejudice*.” (Emphasis added.) Civ.R. 41(A).

a. Former R.C. 1343.03(C) Properly Applied After Voluntary Dismissal and Refiling

Huber argues—for the first time—that a voluntary dismissal divests a court of jurisdiction over a case and the original action is treated as if it had never been commenced. Huber Br. p. 26. It is true that a Civ.R. 41(A) dismissal temporarily divests a court of

jurisdiction. But the originally-filed case does not disappear—when the case is refiled, issues that arose in the originally-filed case continue to govern those issues when the case is refiled.

For example, it is well-settled law that when a case is dismissed under Civ.R. 41(A) and refiled under the savings statute, the case relates back to the original filing for statute-of-limitations purposes. *E.g.*, *Lewis v. Connor*, 21 Ohio St.3d 1, 4, 487 N.E. 2d 285 (1985). Moreover, this Court and Ohio Courts of Appeals have looked to originally-filed cases after voluntary dismissals and refilings for many purposes other than statute of limitations. *E.g.*, *Lorenz Equip. Co.*, 69 Ohio St.3d at 580-581, 635 N.E.2d 14 (“in an action that has once been voluntarily dismissed pursuant to Civ.R. 41(A)(1)(a), a trial court, when ruling on a Civ.R. 41(B)(1) motion to dismiss for failure to prosecute, may consider the conduct of the plaintiff in the prior action.”); *Soler v. Evans, St. Clair & Kelsey*, 94 Ohio St.3d 432, 438-439, 763 N.E.2d 1169 (2002) (voluntary dismissal of pleading containing jury demand does not waive right to jury trial even if subsequent pleadings do not contain a jury demand); *Sturm v. Sturm*, 61 Ohio St.3d 298, 300, 574 N.E.2d 522 (1991) (“*Sturm I*”), syllabus (when parties waive a conflict of interest in an original action, “such waiver remains in effect as a matter of law when the action of which it was a part is dismissed voluntarily and refiled in another county.”); *Merino v. Salem Hunting Club*, 7th Dist. No. 11 CO 2, 2012-Ohio-4553, ¶ 14 (motion for attorney’s fees for frivolous conduct related back to the original filing because “the cause of action itself relates back to the original filing.”).

This Court has previously considered whether courts may look to an originally-filed complaint to determine whether a new statute applied to an action in which there was a Civ.R. 41(A) dismissal and refiling. In *Sturm*, the original complaint had been filed in July 1987. *Sturm II*, 63 Ohio St.3d at 671, 590 N.E.2d 1214. The plaintiff dismissed the complaint under

Civ.R. 41(A) and then refiled. *Id.* This Court considered whether R.C. 2323.51, which was enacted after the original lawsuit was filed but before the case was refiled, applied to the action. *Id.* at 672. It held that “because the original divorce complaint was filed prior to the effective date of R.C. 2323.51, and was based on claims for relief occurring before October 20, 1987, that statute was inapplicable to allegedly frivolous conduct occurring after the effective date of the statute.” *Id.* at 673-674.

The 2008 refiling does not justify application of the 2004 Amendment because “the legal ramifications of a person’s conduct is predicated upon the ‘law’ that was in effect when the conduct occurred.” *Johnson v. Randall Smith, Inc.*, 196 Ohio App.3d 722, 2011-Ohio-6000, 965 N.E.2d 344, ¶ 21 (11th Dist.). The “conduct” relevant to this appeal is 1.) both parties’ actions related to settlement negotiations under former R.C. 1343.03(C), and 2.) the Smiths’ inability to foresee and fulfill new statutory duties that did not exist under former R.C. 1343.03(C), but were imposed by the 2004 Amendment.⁶ The prejudgment-interest award was not based only on the parties’ conduct after the 2008 refiling; rather, it was based on events that occurred as of March 22, 2002. The parties’ respective obligations to act in good faith commenced long before the 2004 Amendment was enacted. Moreover, at the time that the Smiths would have been obligated to begin fulfilling the new statutory duties and burdens imposed by the 2004 Amendment—immediately after Huber’s negligence caused Kyle’s injury on March 22, 2002—former R.C. 1343.03(C) was firmly in place. The law that governed the parties’ conduct and obligations from the beginning of this cause of action was former R.C. 1343.03(C). The Smiths’ voluntary dismissal and subsequent refiling do not change which statute governed the parties’ conduct and obligations.

⁶ The new statutory duties and burdens imposed by the 2004 Amendment will be discussed in detail in sections (B)(1)(b)(ii) and (B)(3)(b)(ii)(b) of this brief.

b. Prejudgment-Interest Accrual Date Is Not Discretionary

If a party meets former R.C. 1343.03(C)'s requirements, "the decision to allow or not allow prejudgment interest is not discretionary." *Moskovitz v. Mt. Sinai Medical Ctr.*, 69 Ohio St.3d 638, 658, 635 N.E.2d 331 (1994), superseded by R.C. 2505.02 as amended in 1998. Likewise, the prejudgment-interest accrual date is not discretionary. Former R.C. 1343.03(C) requires prejudgment interest to begin running on the date that the cause of action accrues. *Musisca v. Massillon Community Hosp.*, 69 Ohio St.3d 673, 676, 635 N.E.2d 358 (1994).

Under former R.C. 1343.03(C), it is irrelevant when a complaint is filed. The statute's provision requiring a prejudgment-interest award to begin running on the date that the cause of action accrues "is *mandatory*; a trial court *may not adjust the date the award begins to run* for equitable reasons." (Emphasis added.) *Id.*; *see, also, Moskovitz* at 664-665 (interest on wrongful death claim calculated from date of decedent's death); *Cek v. Rdoht*, 11th Dist. No. 99-L-023, 2000 Ohio App. LEXIS 3539, *19-21 (Aug. 4, 2000) (trial court erred by selecting accrual date other than date of injury); *Callos Professional Emp., LLC v. Greco*, 7th Dist. No. 06 MA 172, 2007-Ohio-4983, ¶ 47 ("When the Ohio Supreme Court applies [former R.C. 1343.03(C)], it does not concern itself with when the money becomes 'due and payable;' instead, it uses the date set forth in the statute, calling this 'mandatory.'").

In a brief to the Twelfth District, Huber cited *Cashin v. Corbett*, 8th Dist. No. 84475, 2005-Ohio-102. (Supp. 54.) As Huber acknowledged, "the issue in *Cashin* was whether the [prejudgment-interest] accrual date should start after the case was refilled [sic]." *Id.* In *Cashin*, the plaintiff dismissed and subsequently refiled her complaint. *Cashin* at ¶¶ 2-3. After she prevailed at trial, the trial court awarded the plaintiff prejudgment interest starting from the date of the injury. *Id.* at ¶ 4. The defendant appealed, asserting that the dismissal and refiling should

necessitate a later prejudgment-interest accrual date. *Id.* at ¶ 23. The Court of Appeals rejected that argument, finding that the dismissal and refiling did not give the trial court discretion to change the prejudgment-interest accrual date. *Id.* at ¶¶ 24-26. *See, also, Marous v. Ohio Bell Tel. Co.*, 80 Ohio App.3d 306, 313, 609 N.E.2d 192 (8th Dist.1992) (plaintiff's voluntary dismissal and subsequent refiling did not affect prejudgment-interest accrual date).

The Smiths' Civ.R. 41(A) dismissal and subsequent refiling did not entitle Huber to a 2008 interest accrual date. As this Court has determined, the trial court had no discretion regarding the prejudgment-interest accrual date. Prejudgment interest began accruing when the Smiths' cause of action accrued, March 22, 2002, and ran continuously until the judgment was paid. Any argument to the contrary has been waived because Huber did not argue that 2008 was the proper accrual date until he filed his brief to this Court. His failure to raise the issue before the trial court or Twelfth District deprived those courts the opportunity to rectify any alleged error. The prejudgment-interest accrual date is March 22, 2002, the date that the Smiths' cause of action accrued.

B. 2004 AMENDMENT MAY NOT BE APPLIED TO ACTIONS ACCRUING BEFORE ITS EFFECTIVE DATE

This certified-conflict appeal asks whether the 2004 Amendment, made effective June 2, 2004, can be applied retroactively to claims accruing before its enactment. The answer to this question is "no." First, application of the 2004 Amendment to previously-accruing claims would constitute retroactive application of a new law. Second, such application would be improper because the 2004 Amendment contains no expression of legislative retroactive intent. Third, even if the 2004 Amendment contained a clear expression of retroactive intent, its retroactive application would violate the Ohio Constitution.

1. Application of 2004 Amendment to Smiths' Cause of Action Would Constitute Retroactive Application of a New Law

This Court determined that *Barnes v. Univ. Hosps. of Cleveland*, 8th Dist. Nos. 87247, 87285, 87710, 87903, and 87946, 2006-Ohio-6266, conflicts with the Twelfth District decision.⁷ *Longbottom*, 133 Ohio St.3d 1462, 2012-Ohio-5149, 977 N.E.2d 691. In *Barnes*, the Eighth District held that the trial court properly applied the 2004 Amendment to a cause of action that had accrued prior to its enactment. *Barnes* at ¶ 75. Without conducting any analysis involving what constitutes retroactive application of laws, the Court held, “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.” *Id.*

As Ohio courts have overwhelmingly held, the *Barnes* decision was wrong. Prejudgment interest is awarded post-trial. But the award is based on pre-trial conduct. Prejudgment-interest awards are prospective from the date that the cause of action accrued. The 2004 Amendment reaches back before its enactment and affects previously-existing facts, acts, rights, duties, burdens, and legal consequences.

a. Ohio Appellate Courts Overwhelmingly Hold That Application of 2004 Amendment Constitutes Retroactive Application of New Law

The Eighth District ruled on *Barnes* in 2006. *Id.* Since that time, not a single Ohio appellate case has followed *Barnes*’ holding regarding application of the 2004 Amendment. Instead, four Courts of Appeals, including the Twelfth District in this case, have reached the

⁷ This Court reviewed the Eighth District’s decision, but the issues reviewed were unrelated to the instant appeal. *Barnes v. Univ. Hosps. of Cleveland*, 119 Ohio St.3d 173, 2008-Ohio-3344, 893 N.E.2d 142.

opposite conclusion—application of the 2004 Amendment to pending causes of action constitutes improper retroactive application of a new law—and some have even specifically criticized *Barnes*. *Hodesh v. Korelitz*, 1st Dist. Nos. C-061013, C-061040, C-070168, and C-070172, 2008-Ohio-2052, ¶ 63, reversed on other grounds by *Hodesh v. Korelitz*, 123 Ohio St.3d 72, 2009-Ohio-4220, 914 N.E.2d 186 (specifically rejecting *Barnes* and applying former R.C. 1343.03(C)); *Conway v. Dravenstott*, 3rd Dist. No. 3-07-05, 2007-Ohio-4933, ¶ 15 (2004 Amendment did not affect “types of damages on which prejudgment interest could accrue and the pertinent time periods over which prejudgment interest could accrue”); *Scibelli v. Pannunzio*, 7th Dist. No. 05 MA 150, 2006-Ohio-5652, ¶¶ 147-149 (rejecting application of 2004 Amendment because it contains no expression of retroactive intent); *Longbottom*, 2012-Ohio-2148, 971 N.E.2d 379, at ¶ 54-55 (rejecting *Barnes*; following *Hodesh*, *Scibelli*, and *Conway*).

In *Scibelli*, the complaint was filed before June 2, 2004, but trial and the prejudgment-interest award occurred after the 2004 Amendment’s enactment. *Scibelli* at ¶¶ 6-7. The trial court applied former R.C. 1343.03(C). *Id.* at ¶ 128. On appeal, the appellant asserted that the trial court should have applied the 2004 Amendment, arguing first that application of the 2004 Amendment did not constitute a retroactive application of a new law because it was enacted prior to trial. *Id.* at ¶¶ 140, 143. The Seventh District disagreed, holding that “an attempt to apply a newly enacted or amended statute to a case that arose before the statute’s enactment or amendment is an attempt to apply the statute retroactively, even if the trial has not yet taken place. It is a retroactive application if an amendment is applied to a case which arose prior to enactment.” *Id.* at ¶ 143. It noted that under this Court’s precedent, if a statute lacks a clear expression of retroactive intent, “then the statute may only apply to cases which arise subsequent to its enactment.” *Id.*, quoting *Van Fossen v. Babcock & Wilcox Co.*, 36 Ohio St.3d 100, 106,

522 N.E.2d 489 (1988). Next, the Court of Appeals determined that the 2004 Amendment contained no clearly expressed retroactive intent, and therefore, “pending litigants are not barred from collecting prejudgment interest on all damages as was allowed at the time they filed their action.” *Id.* at ¶ 149.

In *Hodesh*, the plaintiff was injured and filed his complaint before the 2004 Amendment’s enactment. *Hodesh*, at ¶¶ 3-13. The prejudgment-interest award occurred after its enactment. *Id.* at ¶¶ 14-16. The trial court applied former R.C. 1343.03(C). *Id.* at ¶ 60. On appeal, the appellant argued that application of the 2004 Amendment would be purely prospective because the jury verdict, the judgment, and the prejudgment-interest award occurred after the 2004 Amendment was enacted. *Id.* The First District,⁸ after reviewing *Barnes*, *Scibelli*, and *Conway*, rejected *Barnes* and agreed with the *Scibelli* and *Conway* Courts’ holdings that application of the 2004 Amendment would constitute retroactive application. *Id.* at ¶ 63.

The First, Third, Seventh, and Twelfth Districts correctly held that application of the 2004 Amendment to pending causes of action constituted improper retroactive application of a new law.

b. Application of 2004 Amendment Would Reach Back to Substantively Affect Events Occurring Before Its Enactment

A retroactive law is one “made to affect acts or facts occurring, or rights accruing, before it came into force.” *Bielat v. Bielat*, 87 Ohio St.3d 350, 353, 721 N.E.2d 28 (2000), quoting Black’s Law Dictionary 1317 (6th Ed.1990). “[A] law is retrospective if it changes the legal consequences of acts committed before its effective date.” *State v. Jones*, 4th Dist. No. 97 CA 42, 1998 Ohio App. LEXIS 2192, *5 (May 6, 1998), quoting *Miller v. Florida*, 482 U.S. 423,

⁸ Although *Hodesh* was a First District case, Ohio Second District Court of Appeals Judges Wolff, Brogan, and Fain heard and ruled on *Hodesh* by assignment of the Chief Justice of the Supreme Court of Ohio.

430, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987); *see also*, *State v. Williams*, 103 Ohio St.3d 112, 2004-Ohio-4747, 814 N.E.2d 818, ¶ 7 (“A statute is retroactive if it penalizes conduct that occurred before its enactment.”). Further, retroactive laws are those that “reach back and create new burdens, new duties, new obligations, or new liabilities not existing at the time.” *State v. White*, 132 Ohio St.3d 344, 2012-Ohio-2583, 972 N.E.2d 534, ¶ 40, quoting *Miller v. Hixson*, 64 Ohio St. 39, 51, 59 N.E.2d 749 (1901). Even if the trial and judgment occur after a statute’s enactment, a new statute may not be applied to causes of action accruing and conduct occurring before its enactment. *Johnson*, 196 Ohio App.3d 722, 2011-Ohio-6000, 965 N.E.2d 344, at ¶ 21 (legal ramifications of conduct are predicated upon law in effect when the conduct occurred).

Application of the 2004 Amendment would constitute retroactive application of a new law. The 2004 Amendment would reach back before its enactment, impose new legal duties and burdens, and affect facts, acts, rights, and legal consequences that happened or accrued before June 2, 2004.

i. 2004 Amendment Substantively Alters Rights That Existed Prior To Its Enactment

The prejudgment-interest statute “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*, 25 Ohio St.3d 157, 159, 495 N.E.2d 572 (1986).

Prejudgment interest is not a remedy—it is a substantive right. R.C. 1343.03(C) “creates the *right* to have the unliquidated claim made subject to interest.” (Emphasis added.) *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 88, 482 N.E.2d 1248 (1985), fn. 7. Prejudgment interest is a substantive right because it “compensate[s] a plaintiff for the defendant’s use of money

which *rightfully belonged* to the plaintiff.” (Emphasis added.) *Musisca*, 69 Ohio St.3d 673, 676, 635 N.E.2d 358.

A plaintiff’s right to prejudgment interest arises long before prejudgment interest is awarded. “The focus of an R.C. 1343.03(C) post-trial hearing for prejudgment interest must be the *pretrial* settlement efforts made between the plaintiffs and defendants and/or their insurers.” (Emphasis added.) *Moskovitz*, 69 Ohio St.3d at 661, 635 N.E.2d 331. Prejudgment interest begins accruing on the date of the injury because the injury is the event that triggers “plaintiff’s *right* to the wrongdoer’s money.” *Musisca* at 676. Even if some of the conduct that gave rise to the prejudgment-interest award occurred after the 2004 Amendment’s enactment, its application to this case would nevertheless constitute improper retroactive application of a new statute. *See, Blair v. McDonagh*, 177 Ohio App.3d 262, 2008-Ohio-3698, 894 N.E.2d 377, ¶ 67 (1st. Dist.) (rejecting retroactive application of amended punitive damages statute “to causes of action that arose before the statute’s effective date even if some of the conduct giving rise to the cause of action occurred after the effective date”).

At the time that the Smiths filed their complaint, their right to prejudgment interest was governed by former R.C. 1343.03(C). The focus of the trial court’s prejudgment-interest hearing was the parties’ conduct from March 2002 until trial. *Moskovitz* at 661. Huber’s failure to act in good faith between March 2002 and the trial gave the Smiths the right, under former 1343.03(C), to interest on the entire judgment—including future damages—to compensate them for Huber’s use of their money starting in March 2002. But the 2004 Amendment completely eliminates:

- All prejudgment interest that had accrued before March 14, 2003.
- All prejudgment interest on future damages.

The 2004 Amendment would impair the Smiths' right to be compensated for Huber's use of money that "rightfully belonged" to the Smiths since March 22, 2002. Its application to the Smiths' cause of action constitutes retroactive application of a new law.

ii. 2004 Amendment Creates New Statutory Duties and Burdens

The 2004 Amendment reaches back and creates new duties and burdens that did not exist in 2002, when the Smith's cause of action accrued. Under former R.C. 1343.03(C), a trial court was permitted to exercise its discretion regarding whether the parties acted in good faith. But that was where discretion of any kind ended. If the party seeking interest timely moved for prejudgment interest and the trial court, after a hearing, made the relevant determinations regarding good-faith conduct, all further acts involving prejudgment interest were mandatory. Interest was mandatorily levied on the entire judgment calculated from the date that the cause of action accrued. *Moskovitz*, 69 Ohio St.3d at 658, 635 N.E.2d 331; *Musisca*, 69 Ohio St.3d at 676, 635 N.E.2d 358. But under the 2004 Amendment, nothing about a prejudgment-interest award is mandatory. Instead, the 2004 Amendment imposes new statutory duties that must be fulfilled in order to trigger prejudgment-interest accrual and to establish on what portion of the judgment interest is levied.

Under the version of the statute that was in place when Kyle was injured and the Smiths filed their complaint, prejudgment-interest automatically began accruing on March 22, 2002, the date that the Smiths' cause of action accrued. Former R.C. 1343.03(C). But under the 2004 Amendment, the prejudgment-interest accrual date would be delayed by nearly a year. Under the amended statute, the prejudgment-interest accrual date would be one of two dates: 1.) some date between Kyle's injury and March 14, 2003; or 2.) March 14, 2003, the date that the Smith's filed their complaint. R.C. 1343.03(C)(1)(c).

It is impossible to know whether the accrual date could have been earlier than March 14, 2003, and if so, what that date would have been. Under the 2004 Amendment, the prejudgment-interest accrual date would have been dependent upon whether the Smiths' performed new statutory duties that did not even exist prior to June 2, 2004. The only way that the Smiths could have triggered prejudgment-interest accrual before filing their complaint would have been for them to determine whether Huber had insurance to cover his liability and to provide written notice to Huber and his insurer that the Smiths' cause of action had accrued. R.C. 1343.03(C)(1)(c). This new statutory obligation placed the burden on the Smiths to put Huber and his insurer on notice that they had a duty to act in good faith.⁹

Retroactively placing this new statutory duty on the Smiths would reduce the prejudgment-interest accrual period by nearly a year. A party may trigger prejudgment-interest accrual as early as the date that their cause of action arises—if the party provides notice as required by the 2004 Amendment. But parties cannot be expected to predict what new duties a statute might impose years before its enactment or to fulfill statutory duties that do not yet exist. If the 2004 Amendment were applied to the Smiths' cause of action, they would be penalized for their inability in 2002 to foresee and undertake statutory duties that did not even exist until 2004.

The 2004 Amendment also imposes new burdens of production on parties regarding future versus past damages. A future damage is defined as a loss that will accrue after the jury reaches its verdict. R.C. 2323.56(A)(2). The 2004 Amendment grants the jury discretion to determine what portion of a judgment constitutes future damages and, therefore, the portion of the award on which prejudgment interest may be levied. *Id.*; R.C. 2323.56(B)(1). This substantive change alters parties' burdens before and during trial. Under former R.C.

⁹ Huber was on notice of Kyle's injury within a few days of March 22, 2002. (Supp. 58, Tr. 1595.)

1343.03(C), a party did not have to be concerned about its prejudgment-interest award being subject to a jury's finding on when a loss accrued and therefore did not have to prove when claims such as loss of consortium accrued. But the 2004 Amendment adds an affirmative duty to prove that each and every past loss actually accrued in the past.

The 2004 Amendment's new statutory-notice duty and new obligation to prove when losses occurred significantly affect a party's right to prejudgment interest. Imposing legal consequences upon parties for their inability to foresee and fulfill statutory burdens and duties—which did not even exist at the time when the parties should have begun to undertake those burdens and duties—clearly constitutes retroactive application of new law.

iii. 2004 Amendment Substantively Affects Facts and Consequences

Application of the 2004 Amendment would change a basic fact that existed prior to its enactment. On March 22, 2002, prejudgment interest began accruing on the entire judgment, including future damages. But if the 2004 Amendment were to be applied, all interest that had accrued between March 22, 2002 and March 14, 2003 would cease to exist. Likewise, all prejudgment interest that had accrued on future damages would be eliminated. Even though the amount of the judgment was not determined until 2010, interest began accruing on March 22, 2002, when Huber's negligence caused Kyle's injuries, because that was the event giving rise to the Smiths' right to the judgment.

The 2004 Amendment also affects legal consequences for the parties' conduct prior to its enactment. Both parties were obligated to act in good faith regarding settlement. When, as here, the injured party acts in good faith, but the tortfeasor fails to act in good faith, the parties' respective conduct "allows the interest monies on the [tortfeasor's] monetary reserves to accumulate to the benefit of the [tortfeasor] and to the detriment of the [injured] party." *Galayda*

v. Lake Hosp. Sys., 71 Ohio St.3d 421, 427, 644 N.E.2d 298 (1994), quoting *Dailey v. Nationwide Demolition Derby, Inc.*, 18 Ohio App.3d 39, 41, 480 N.E.2d 110 (5th Dist.1984). The legal consequence for the parties' conduct is the transfer of that benefit from the tortfeasor to the injured party. *Id.* at 427-428. Under former R.C. 1343.03(C), the benefit owed by Huber to the Smiths was interest on the entire judgment calculated from March 22, 2002. But under the 2004 Amendment, the consequence for the parties' conduct would change. The benefit Huber would have to transfer to the Smiths would no longer include interest on a significant portion of the verdict or interest accumulated before March 13, 2003. The change in legal consequences for the parties' conduct constitutes retroactive application of a new law.

“[A]n attempt to apply a newly enacted or amended statute to a case that arose before the statute's enactment or amendment is an attempt to apply the statute retroactively, even if the trial has not yet taken place. It is a retroactive application if an amendment is applied to a case which arose prior to enactment.” *Scibelli*, 2006-Ohio-5652, at ¶ 143. The trial court awarded prejudgment interest after the 2004 Amendment was enacted. But former R.C. 1343.03(C) governed rights, facts, duties, burdens, and consequences long before the amendment was enacted. Application of the 2004 Amendment would reach back to change what had already occurred under the statute that was operative when the Smiths' cause of action arose and when they filed their complaint. The 2004 Amendment deprives the Smiths of rights that had accrued before its enactment, imposes additional burdens, alters facts that had already happened, and inflicts on the Smiths detrimental legal consequences because they did not know that, under a statute enacted two years after their cause of action accrued, they would have to provide Huber's insurer notice of their claim and prove which of their losses accrued before the jury's verdict.

Application of the 2004 Amendment to this case would constitute retroactive application of a new law.

2. Retroactivity of R.C. 1343.03(A) Does Not Render the 2004 Amendment Retroactive

Huber argues that because the 2004 version of R.C. 1343.03(A) must be retroactively applied, the 2004 Amendment must also be retroactively applied. First, citing *Maynard v. Eaton Corp.*, 119 Ohio St.3d 443, 2008-Ohio-4542, 895 N.E.2d 145, Huber claims that “R.C. 1343.03 has previously been determined to apply to all cases pending as of June 2, 2004” and that interpreting the 2004 Amendment as being prospective only would be “at odds with” *Maynard*. Huber Br., p. 7, 20. Huber appears to argue that because this Court determined that Section (A) of the 2004 version of R.C. 1343.03 is retroactive, the 2004 Amendment must be applied retroactively as well.

Maynard involved only one issue: “whether the amendment to R.C. 1343.03(A) * * * adjusts the statutory rate of postjudgment interest on a final judgment * * * when the case is pending on appeal on the effective date of the amended statute.” *Maynard* at ¶ 1. This Court found that R.C. 1343.03(A) was retroactive because 2003 Am.Sub.H.B. 212 clearly expressed that different statutory interest rates would apply to “actions *pending* on the effective date of this act.” (Emphasis added.) *Id.* at ¶ 13.

But as the First, Third, and Seventh Districts recognized, the General Assembly’s intent for R.C. 1343.03(A) to be applied retroactively did not affect Section (C) of the amendment. *Hodesh*, 2008-Ohio-2052, at ¶ 66; *Conway*, 2007-Ohio-4933, at ¶ 15; *Scibelli*, 2006-Ohio-5652, at ¶ 144-147. Indeed, *Hodesh* and *Scibelli* correctly observed that the fact that there was a clear expression of retroactive intent regarding Section (A), but none in Section (C), actually

contraindicated legislative intent to make any other section of the 2004 version of R.C. 1343.03 retroactive. *Hodesh* at ¶ 66; *Scibelli* at ¶ 147. *Maynard* has no bearing on the 2004 Amendment.

Huber also argues that the 2004 Amendment should be applied retroactively because “parsing of different sections of R.C. 1343.03 did an injustice to their shared legislative history.” *Huber Br.*, p. 32. But whether Section (A) of R.C. 1343.03 may be applied retroactively has nothing to do with Section (C). A statute can be prospective in some sections and retroactive in others. For example, this Court determined that R.C. 4123.512 (H) applied retroactively, but the remainder of the statute applied only prospectively. *Thorton v. Montville Plastics & Rubber, Inc.*, 121 Ohio St.3d 124, 2009-Ohio-360, 902 N.E.2d 482, syllabus. Moreover, retroactivity may not be inferred from another statute. Instead, “[a] statute must *clearly proclaim its own retroactivity* to overcome the presumption of prospective application.” (Emphasis added.) *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, ¶ 14-15 (rejecting argument that a different version of a statute, which contained retroactive language, rendered the version at issue retroactive). As no retroactive intent exists within the 2004 Amendment itself, it cannot “borrow” retroactive intent from Section (A) of the amendment.

Applying the 2004 version of R.C. 1343.03(A) retroactively makes sense, as it is purely remedial. Before the June 2, 2004 amendment, the statutory rate for calculating interest on a judgment had been ten percent. (Smith Appx. 25.) Now, R.C. 1343.03(A) ties the rate to the variable federal short-term rate. R.C. 1343.03(A). This change did not affect a party’s right to collect prejudgment interest—it only affects the procedure for calculating interest on the corpus of an interest award. In other words, Section (A) changed the rate at which prejudgment interest was calculated, but it left the corpus of a prejudgment-interest award untouched.

The corpus of the Smiths' prejudgment-interest award was the \$1,912,899 judgment, calculated for a period of no less than eight years and nine months (March 22, 2002 through the December 29, 2010 final judgment). Retroactive application of R.C. 1343.03(A) would involve applying interest percentage rates tied to the federal short-term interest rate. But those variable percentages would be calculated on the same corpus: \$1,912,899 judgment for no less than eight years and nine months.

Retroactive application of the 2004 Amendment, however, would not merely change percentage rates or other procedures for obtaining a remedy. Instead, it would eliminate the Smiths' right to collect interest on two significant portions of the corpus—the future damages portion of the judgment and all interest that had accrued before March 14, 2003.

Retroactive application of these two sections of the amendment would have very different results. Section (A) changes only the percentage used to calculate interest. But Section (C) changes the corpus of the award itself, which is an accrued substantive right. That Section (A) may be applied retroactively does not permit the 2004 Amendment to be applied retroactively.

3. Retroactive Application of the 2004 Amendment Is Prohibited

Application of the 2004 Amendment to the Smiths' cause of action would constitute retroactive application of a new law. And application of the 2004 Amendment to the Smiths' case would be improper because the amendment lacks retroactive intent and its application would violate the Smiths' constitutional rights.

a. Courts Must Apply A Two-Part Test Before Retroactively Applying A Statute

Huber's analysis regarding whether the 2004 Amendment may be applied retroactively focuses largely on constitutional and policy considerations, but is sorely lacking in scrutiny of legislative intent. His focus is backwards. If there is no clear expression that the General

Assembly intended for a statute to apply retroactively, the inquiry ends. No constitutional analysis or policy concerns are considered unless the statute contains clear retroactive intent. A statute lacking the required retroactive intent may not be applied retroactively.

This Court has created a two-part test for courts to evaluate whether a new or newly-amended statute may apply retroactively. *Van Fossen*, 36 Ohio St.3d 100, 522 N.E.2d 489 at paragraphs one, two, and three of the syllabus (describing the relevant inquiries); *Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, at ¶ 10 (“we have distilled these principles into a two-part test for evaluating whether statutes may be applied retroactively.”)

First, the court “must determine as a threshold matter whether the statute is expressly made retroactive.” *Consilio* at ¶ 10. If the General Assembly did not “**clearly enunciate retroactivity**,” the analysis ends. (Emphasis added.) *Id.* A court does “not address the question of constitutional retroactivity **unless and until** [it] determine[s] that the General Assembly expressly made the statute retroactive.” (Emphasis added.) *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, 882 N.E.2d 899, ¶ 9. If a statute does not clearly express retroactive intent, it may not be applied retroactively—period. *Consilio* at ¶ 10.

If, and only if, a statute clearly expresses retroactive intent, then the court may continue to the second step of the two-part test, which involves a constitutional analysis of the new statute. A law may not be retroactively applied simply because the general assembly labeled it retroactive. *E.g.*, *Groch v. GMC*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, ¶ 187 (“The General Assembly expressly states its intent in former R.C. 2305.10(F) that ‘this section shall be considered to be purely remedial in operation.’ However, whether the statute is remedial **depends upon its operation and not upon a label placed upon it by the General Assembly**.”). (Emphasis added.) Only a court may determine whether retroactive application of a new statute

violates Section 28, Article II of the Ohio Constitution. *Id.*; *Van Fossen* at paragraph three of the syllabus. This constitutional inquiry requires a reviewing court to determine whether a statute is substantive or remedial. *Id.* While it is permissible to retroactively apply a purely remedial statute, a substantive statute may be applied only prospectively. *Id.*

A substantive statute is one that “impairs or removes vested rights, affects an accrued substantive right, imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction, or creates a new right.” *Pratte v. Stewart*, 125 Ohio St.3d 473, 2010-Ohio-1860, 929 N.E.2d 415, ¶ 37. A remedial law only involves procedures to enforce an existing right. *Id.* Only if a new statute is both remedial and clearly intended to be retroactive may it be applied retroactively.

b. The 2004 Amendment Fails Both Steps of the Two-Part Retroactivity Test

There is no indication—much less a clear indication—that the General Assembly intended the 2004 Amendment to be applied retroactively. Moreover, application of the 2004 Amendment to pending cases would impair vested rights, affect accrued substantive rights, and impose duties and burdens that did not exist when the Smiths’ cause of action arose. Therefore, retroactive application of the 2004 Amendment would be contrary to the General Assembly’s intent and would violate the Smiths’ constitutional rights.

i. Step One: The General Assembly Did Not Express Retroactive Intent

“A statute is presumed to be prospective in its operation unless expressly made retrospective.” R.C. 1.48. If a statute does not clearly express retroactive intent, courts are forbidden to apply it retroactively. *Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, at ¶ 10. A statute may not be applied retroactively unless the legislature “*clearly expressed* retroactive intent.” (Emphasis added.) *Rohloff v. FedEx Ground*, 6th Dist. No. L-07-

1182, 2007-Ohio-6530, ¶ 11, citing *Williams*, 103 Ohio St.3d 112, 2004-Ohio-4747, 814 N.E.2d 818, at ¶ 8.

This Court has “emphasize[d] that *ambiguous language is not sufficient* to overcome the presumption of prospective application. * * * [A] suggestion of retroactivity * * * is not sufficient to establish that a statute applies retroactively.” *Hyle*, 117 Ohio St.3d 165, 2008-Ohio-542, 882 N.E.2d 899, at ¶ 13. Courts may not “infer retroactivity from suggestive language.” *Id.* at ¶ 10. Rather, “a statute must ‘*clearly proclaim*’ its retroactive application.” (Emphasis added.) *Id.*, quoting *Consilio* at paragraph one of the syllabus.

a) 2004 Amendment Contains No Expression of Retroactive Intent

Huber argues that language contained in the 2004 Amendment, such as “any ‘civil action,’” “[i]n all other actions,” and “shall,” evidences the General Assembly’s intent to apply R.C. 1343.03(C) retroactively. *Huber Br.*, pp. 12-13. He suggests that “one would expect clear legislative wording on for [sic] the determination of such issues [prejudgment-interest accrual date], if there had not been the intent that R.C. 1343.03(C), as amended, be applied to all pending actions.” *Id.* at p. 13.

All Ohio statutes are “presumed to be prospective in [their] operation unless *expressly made retrospective*.” (Emphasis added.) R.C. 1.48. Huber effectively asks this Court to shift the statutory presumption so that statutes are applied retroactively, absent clear legislative wording showing the General Assembly’s intent to apply the statute only prospectively. But R.C. 1.48 unambiguously mandates the presumption that statutes are prospective only, and nothing short of a clear expression of retroactive intent is sufficient to overcome R.C. 1.48’s presumption against retroactive application of new statutes.

To overcome R.C. 1.48's presumption, a statute's language must actually use the prefix "retro-" or specifically state that it applies to pending actions or to all actions regardless of when filed. *E.g., Nichols v. Villarreal*, 113 Ohio App.3d 343, 348-349, 680 N.E.2d 1259 (4th Dist.1996) (statute was not retroactive because "[t]he Ohio General Assembly did not use the term "retroactive" or "retrospective" in the statute, nor did the Ohio General Assembly state that the amended statute language applied to pending cases."). The following are examples of statutory language that overcame R.C. 1.48's presumption:

- "This section applies to and governs any action * * * ***pending in any court on the effective date of this section.***" (Emphasis added.) Former R.C. 4121.80(H), held to express retroactive intent by *Van Fossen*, 36 Ohio St.3d at 106, 522 N.E.2d 489.
- "[T]his act shall apply to all work-relief employees who are injured * * * whether such [event] occurs ***prior to the operative date of this act or subsequent thereto.***" (Emphasis added.) Former G.C. 3496-3, held to express retroactive intent by *State ex rel. Slaughter*, 132 Ohio St. 537, 539, 9 N.E.2d 505 (1937).
- "[T]his paragraph * * * ***shall be applied retrospectively.***" (Emphasis added.) R.C. 119.12, held to express retroactive intent by *Ostrander v. Grossman*, 6th Dist. No. L-10-1083, 2010-Ohio-4379, ¶ 15.

The 2004 Amendment does not contain any language that overcomes R.C. 1.48's presumption against retroactive application. The 2004 Amendment does NOT contain the words "retroactive" or "retrospective," does NOT specifically state that it applies to pending actions, and does NOT explicitly express that it applies to actions arising before or after its enactment.

Because the 2004 Amendment does not contain the clear and specific retroactive language that Ohio courts require to overcome R.C. 1.48's presumption, Huber is left to argue

that generic language is sufficient to overcome R.C. 1.48's presumption. But the very language that Huber presents as proof of retroactive intent—"any 'civil action,'" "[i]n all other actions," and "shall"—has been firmly rejected as lacking clear retroactive intent. Courts rejected retroactive application of statutes stating:

- “[S]hall submit.” (Emphasis added.) R.C. 2901.07(B)(3)(a), **rejected** by *Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, at ¶ 12, 17.
- “[S]hall not include.” (Emphasis added.) R.C. 5739.01(B)(3)(e), **rejected** by *ComTech Systems, Inc. v. Limbach*, 59 Ohio St.3d 96, 102, 570 N.E.2d 1089 (1991).
- “A civil action * * * **shall first be filed.**” (Emphasis added.) R.C. 2743.02(F), **rejected** by *Worrell v. Court of Common Pleas*, 69 Ohio St.3d 491, 494-495, 633 N.E.2d 1130 (1994).
- “[U]pon the motion of **any** party, the trial of the tort action **shall be** bifurcated.” (Emphasis added.) R.C. 2315.21(B)(1), **rejected** by *Mastellone v. Lightning Rod Mut. Ins. Co.*, 175 Ohio App.3d 23, 2008-Ohio-311, 884 N.E.2d 1130, ¶ 21 (8th Dist.).
- “[I]n **any tort action**” and “**shall not** recover **any** amount.” (Emphases added.) R.C. 2315.20, **rejected** by *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.2d 1195, ¶ 10, fn. 1.
- “**Any person** * * * may institute a civil proceeding.” (Emphasis added.) R.C. 2923.34(A), **rejected** by *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006-Ohio-2625, 849 N.E.2d 268, ¶¶ 40-41.
- “[A]ll of the following apply **regarding any** award;” “[i]n **any tort action**,* * * punitive or exemplary damages **shall not be awarded**,” and “[t]he **court shall not.**” (Emphases

added.) R.C. 2315.21(D), rejected by *Blair*, 177 Ohio App.3d 262, 2008-Ohio-3698, 894 N.E.2d 377, at ¶ 67.

- “[*A*]ny claim that is asserted in *any civil action*.” (Emphasis added.) R.C. 2305.113, rejected by *Brannon v. Austinburg Rehab. & Nursing Ctr.*, 190 Ohio App.3d 662, 2010-Ohio-5396, 943 N.E.2d 1062, ¶ 25 (11th Dist.).
- “*In any civil action*” and “*any and all* statements.” (Emphases added.) R.C. 2317.43(A), rejected by *Johnson*, 196 Ohio App.3d 722, 2011-Ohio-6000, 965 N.E.2d 344, at ¶¶ 19-20.

Courts have consistently rejected retroactive application of statutes that contain only generic language, such as “shall,” “any,” and “all.” Indeed, this Court even rejected retroactive application of a statute that not only used the word “shall,” but also contained an explicit intent to supersede previous case law. *Cole v. Holland*, 76 Ohio St.3d 220, 224-225, 667 N.E.2d 353 (1996). In *Cole*, this Court considered a 1994 amendment to R.C. 3937.18(A)(2), which provided that underinsured motorist coverage “*is not and shall not* be excess insurance,” “*shall*” not provide coverage in excess of a specified policy limit, and “*shall be*” setoff by the tortfeasor’s insurance payments. (Emphases added.) *Id.* This Court acknowledged the legislature’s “crystal clear” intent to supersede a prior Supreme Court of Ohio decision that had pronounced law significantly different from that contained in the 1994 amendment. *Id.* at 224-225. Yet, this Court held that the amendment applied prospectively only because the General Assembly “would have had to specifically manifest an intention for the statute to have retroactive effect in order for the statute to so operate.” *Id.* at 225.

Even if a statute’s language creates ambiguity regarding whether it may be applied retroactively, that ambiguity is not enough to overcome the presumption against retroactive

application. *Hyle*, 117 Ohio St.3d 165, 2008-Ohio-542, 882 N.E.2d 899, at ¶ 13 (“Although we acknowledge that the language of R.C. 2950.031 is ambiguous regarding its prospective or retroactive application, *we emphasize that ambiguous language is not sufficient* to overcome the presumption of prospective application.”) (Emphasis added.) But here, there is no ambiguity. It would be unfair to retroactively apply a statute that is silent as to retroactivity. If the General Assembly had chosen to make the 2004 Amendment retroactive, it would have used unambiguously retroactive language, such as the language it used in countless other statutes that have overcome the presumption against retroactivity. But it did not choose to do so. No language contained in the 2004 Amendment overcomes the presumption against retroactive application contained in R.C. 1.48. Therefore, the 2004 Amendment may be applied only to causes of action that accrued after June 2, 2004.

b) Uncodified Language Does Not Render 2004 Amendment Retroactive

Huber points to 2003 Am.Sub.H.B. 212 to argue that the General Assembly intended for the 2004 Amendment to apply to pending actions. *E.g.*, *Huber Br.*, pp. 13-16. He suggests that the trial court and Twelfth District “failed to consult the legislative history relevant to R.C. 1343.03(C),” and argues that this supposed failure led to erroneous results. *Id.* p. 29. Huber’s approach to statutory construction is flawed. Because the 2004 Amendment is unambiguous, only the statute itself should be interpreted. Moreover, nothing in the uncodified language even suggests, much less clearly expresses, that the General Assembly intended for the 2004 Amendment to be applied retroactively to pending cases.

It is improper for a court to “employ uncodified statements of legislative intent to change the meaning of” a statute. *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, 920 N.E.2d 958, ¶ 45 (Pfeifer, J., dissenting). If a statute is unambiguous, a court need not interpret its

meaning; instead, it should simply apply the statute. *State v. Hairston*, 101 Ohio St.3d 308, 2004-Ohio-969, 804 N.E.2d 471, ¶ 13. Only if a statute is ambiguous may a court engage in statutory interpretation. *Id.* at ¶ 11; R.C. 1.49. Statutory interpretation must start with the language contained within the statute; if the statutory language is clear, there is no need to look to other sources, such as legislative history. *Id.* at ¶ 12. “***The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. That body should be held to mean what it has plainly expressed, and hence no room is left for construction.***” (Emphasis added.) *Id.*, quoting *Slingluff v. Weaver*, 66 Ohio St. 621, 64 N.E. 574 (1902), at paragraph two of the syllabus.

The 2004 Amendment is unambiguous regarding retroactive intent—it is completely silent on the issue. Therefore, courts should not look to sources other than the statutory language itself to interpret its meaning.

Even if it were appropriate to examine uncodified language, nowhere in the 2004 Amendment’s legislative history is retroactive application even suggested, much less clearly expressed. Huber Appx. 0066-0069. Huber even concedes that uncodified language precluding awards of prejudgment interest on future damages was “***unqualified.***” (Emphasis added.) Huber Br., p. 14. Huber is correct that the preclusion was unqualified—the General Assembly did not use terms like “retroactive” or “retrospective,” nor did it declare that the 2004 Amendment shall be applied to pending cases, or to all cases regardless of when they accrued. (Huber Appx. 0066-0069.) It simply described the purpose of the amendment: “to change the computation of the period for which prejudgment interest is due in certain civil actions, to preclude prejudgment interest on future damages.” Huber Appx. 0066. This unqualified statement of the statute’s purpose is silent on retroactivity, which does not overcome R.C. 1.48’s presumption against

retroactivity. *Brannon*, 190 Ohio App.3d 662, 2010-Ohio-5396, 943 N.E.2d 1062, at ¶ 25. And even if the provisions created ambiguity, that ambiguity does not overcome the prohibition against retroactive application of the statute. *Hyle*, 117 Ohio St.3d 165, 2008-Ohio-542, 882 N.E.2d 899, at ¶ 13.

There is no clear expression of retroactive intent contained in the 2004 Amendment or its legislative history. When, as here, an amended statute lacks clear retroactive intent, the newly-enacted amendment may not be applied to causes of action accruing before its enactment.

ii. *Step 2: Constitution Prohibits Retroactive Application of Substantive Laws*

A court should not engage in a constitutional analysis unless it first determines that the statute contains a clear expression of retroactive intent. *Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, 871 N.E.2d 1167, at ¶ 10. A court does “not address the question of constitutional retroactivity *unless and until* [it] determine[s] that the General Assembly expressly made the statute retroactive.” (Emphasis added.) *Hyle* at ¶ 9. This Court need not engage in a constitutional analysis because the 2004 Amendment contains no expression of retroactive intent, much less the clear expression required to overcome R.C. 1.48’s presumption against retroactive application of laws.

But even if the 2004 Amendment’s silence could somehow be construed as retroactive intent, the Ohio Constitution forbids its application to pending causes of action. The Ohio Constitution restricts the General Assembly’s power to enact retroactive statutes: “The general assembly shall have no power to pass retroactive laws.” Ohio Constitution, Article II, Section 28. Accordingly, legislative retroactive intent alone does not justify retroactive application of a new statute; instead, a court must determine whether its retroactive application violates the parties’ constitutional rights. *E.g., Roe v. Planned Parenthood Southwest Ohio Region*, 122

Ohio St.3d 399, 2009-Ohio-2973, 912 N.E.2d 61, ¶ 34-37 (Supreme Court of Ohio refused to retroactively apply statute; although General Assembly had expressed clear retroactive intent, statute affected substantive rights and therefore, retroactive application violated due process); *Groch*, 117 Ohio St.3d 192, 2008-Ohio-546, 883 N.E.2d 377, at ¶ 187 (“The General Assembly expressly states its intent in former R.C. 2305.10(F) that ‘this section shall be considered to be purely remedial in operation.’ However, whether the statute is remedial *depends upon its operation and not upon a label placed upon it by the General Assembly.*”). (Emphasis added.)

A constitutional inquiry into retroactivity requires a reviewing court to determine whether a statute is substantive or remedial. *Roe* at ¶ 33. A substantive statute “impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction.” *Id.* at ¶ 34, quoting *Bielat*, 87 Ohio St.3d at 354, 721 N.E.2d 28. Retroactive application of substantive statutes violates parties’ constitutional rights; therefore, it is impermissible to retroactively apply a substantive statute. *Id.* at ¶ 37.

Only if a statute is “*purely* remedial” may it be applied retroactively without violating the Ohio Constitution. (Emphasis added.) *Bielat* at 354. Remedial laws govern only methods of enforcing rights. *Roe* at ¶ 34. A statute “may be remedial in some contexts but not in all.” *Groch* at ¶ 187. Even if a statute pertains to procedural issues, it is not inevitably remedial. *Havel v. Villa St. Joseph*, 131 Ohio St.3d 235, 2012-Ohio-552, 963 N.E.2d 1270, ¶ 34. “[A] statute may create a substantive right despite being ‘packaged in procedural wrapping.’” *Id.*, quoting *State ex rel. Loyd v. Lovelady*, 108 Ohio St.3d 86, 2006-Ohio-161, 840 N.E.2d 1062, ¶ 14.

a) Application of the 2004 Amendment Would Impair Rights

1. Right to prejudgment interest is a substantive right

This Court has determined that a judgment awarding damages is a substantive right that is protected by the Ohio Constitution. *Sorrell v. Thevenir*, 69 Ohio St.3d 415, 426, 633 N.E.2d 504 (1994) (“Section 16, Article I [of the Ohio Constitution] not only protects the right to file a lawsuit, but *also protects the right to a judgment* or verdict properly rendered in the suit * * *, *since obtaining damages is the ultimate goal of any tort action.*”). (Emphasis added.)

Indeed, this Court has specifically determined that prejudgment interest is a right, rather than a remedy. *Huffman*, 19 Ohio St.3d at 88, 482 N.E.2d 1248, fn. 7.¹⁰ In *Huffman*, this Court held that R.C. 1343.03(C) “creates the *right* to have the unliquidated claim made subject to interest.” (Emphasis added.) *Id.* The *Huffman* Court determined that R.C. 1343.03(C) was partly remedial and partly substantive. *Id.* It was remedial “to the extent it provides procedures to remedy wrongs and abuses.” *Huffman* at 88, fn. 7. But this Court found that interest on the judgment was a substantive right. *Id.* The *Huffman* Court reasoned that R.C. 1343.03(C) was not purely remedial because it “not only provides the method by which the interest shall be computed, it also creates the *right* to have the unliquidated claim made subject to interest if” the losing party failed to act in good faith. *Id.*

This Court’s determination that prejudgment interest is a substantive right was correct in 1985 and continues to be correct today. When a defendant fails to act in good faith, a plaintiff earns the right to prejudgment interest because that lack of good faith “allows the interest monies

¹⁰ Because *Huffman* was decided before the *Van Fossen* Court created its two-step retroactivity test, *Huffman* does not analyze whether R.C. 1343.03(C) contained a clear expression of retroactive intent; rather, it only discusses constitutional considerations. *Id.*

on the defendant's monetary reserves to accumulate to the benefit of the [defendant] and to the detriment of the [plaintiff]." *Galayda*, 71 Ohio St.3d at 427, 644 N.E.2d 298, quoting *Dailey*, 18 Ohio App.3d at 41, 480 N.E.2d 110. Prejudgment interest is a substantive right because it "compensate[s] a plaintiff for the defendant's use of money which **rightfully belonged** to the plaintiff." (Emphasis added.) *Musisca*, 69 Ohio St.3d at 676, 635 N.E.2d 358.

The Smiths' prejudgment-interest award was a substantive right. The Smiths were awarded prejudgment interest as compensation "for [Huber]'s use of money which **rightfully belonged** to the [Smiths]." (Emphasis added.) *Id.* Where one party possesses money that **rightfully belongs** to the other party, the award of that money to its rightful owner is not a remedial procedure to enforce a right. Rather, the rightful owner taking possession of that money is itself a substantive right.

2. Smiths' substantive right to prejudgment interest had accrued before 2004

A plaintiff's right to prejudgment interest arises long before prejudgment interest is awarded. "The focus of an R.C. 1343.03(C) post-trial hearing for prejudgment interest must be the **pretrial** settlement efforts made between the plaintiffs and defendants and/or their insurers." (Emphasis added.) *Moskovitz*, 69 Ohio St.3d at 661, 635 N.E.2d 331. Prejudgment interest begins accruing on the date of the injury because the injury is the event that triggers "plaintiff's **right** to the wrongdoer's money." (Emphasis added.) *Musisca* at 676.

Retroactive application of a statute is unconstitutional if it "affects an accrued substantive right." *Bielat*, 87 Ohio St.3d at 354, 721 N.E.2d 28. This Court has determined that "accrued compensation' means 'remuneration that has been earned but not yet paid.'" *Harden v. Ohio AG*, 101 Ohio St.3d 137, 2004-Ohio-382, 802 N.E.2d 1112, ¶ 9, quoting Black's Law Dictionary 21, 277 (7th Ed.1999).

Prejudgment interest is remuneration—its purpose is to compensate the Smiths for Huber’s “use of money which *rightfully belonged* to” the Smiths. *Musisca* at 676. The Smiths earned the right to be compensated for Huber’s use of their money when Kyle was injured because that was “the event giving rise to plaintiff’s right to the wrongdoer’s money.” *Id.*

That the trial court did not make its prejudgment-interest award until after the amendment had been enacted is immaterial. The prejudgment-interest award was based on Huber’s conduct from March 22, 2002, when the Smiths’ cause of action arose. As long as Huber continued to act contrary to good faith, the Smith’s right to prejudgment interest continued to accrue. Applying the 2004 Amendment would significantly affect the Smiths’ accrued right to prejudgment interest.

3. Smiths’ right to prejudgment interest vested in March 2002

Retroactive application of a statute that “impairs vested rights” is unconstitutional. *Bielat*, 87 Ohio St.3d at 354, 721 N.E.2d 28. This Court defined a vested right as follows: “a right is ‘vested’ when it ‘so completely and definitely belongs to a person that it cannot be impaired or taken away without the person’s consent.’” *Harden*, 101 Ohio St.3d 137, 2004-Ohio-382, 802 N.E.2d 1112 at ¶ 9, quoting Black’s Law Dictionary 1324 (7th Ed.1999).

Former R.C. 1343.03(C) “compensat[es] a plaintiff for the defendant’s use of money which *rightfully belonged* to the plaintiff.” (Emphasis added.) *Musisca* at 676. Former R.C. 1343.03(C) required the trial court to focus on the parties’ conduct prior to trial. *Moskovitz*, 69 Ohio St.3d at 661, 635 N.E.2d 331. A party’s entitlement to prejudgment interest vests “when the cause of action accrued because the accrual date is when the event giving rise to the plaintiff’s right to the wrongdoer’s money occurred.” *See, id.*

The trial court's prejudgment-interest award was based on the parties' conduct starting on March 22, 2002 through the 2010 trial. That the *amount* of the prejudgment-interest award was determined after trial is irrelevant—the Smiths' right to prejudgment interest itself vested on March 22, 2002 because it was at that point that Huber's "monetary reserves [began to] accumulate to the benefit of [Huber] and to the detriment of [the Smiths]." *Galayda*, 71 Ohio St.3d at 427, 644 N.E.2d 298, quoting *Dailey*, 18 Ohio App.3d at 41, 480 N.E.2d 110.

Application of the 2004 Amendment would do more than just impair the Smiths' vested right to prejudgment interest. Rather, retroactive application would completely eliminate the Smiths' vested right to prejudgment interest on future damages. Further, it would retroactively dispose of all prejudgment interest that had accrued from March 22, 2002 through March 14, 2003. Such application of the 2004 Amendment would unconstitutionally impair the Smiths' vested rights.

b) 2004 Amendment Imposes New Duties and Burdens

Even if prejudgment interest were not a substantive right, application of the 2004 Amendment would nevertheless be unconstitutional. A retroactive statute is substantive—and therefore unconstitutionally retroactive—if it "imposes new or additional burdens, duties, obligations, or liabilities as to a past transaction. *Bielat*, 87 Ohio St.3d 350, 354, 721 N.E.2d 28. The 2004 Amendment imposes new statutory duties that would have been impossible for the Smiths to perform after its enactment because the Smiths would have had to perform those duties before those new statutory duties even existed.

Under former R.C. 1343.03(C), prejudgment-interest calculation automatically began on the date that the cause of action arose, without any further action by the plaintiff. Former R.C. 1343.03(C). But the 2004 Amendment forces a plaintiff to undertake new statutory duties in

order to trigger prejudgment-interest accrual, thus depriving the party of prejudgment-interest accrual at all times before the new duties are performed. R.C. 1343.03(C)(1)(c).

Under the 2004 Amendment, except in situations not relevant to this appeal,¹¹ prejudgment interest does not begin to accrue until the plaintiff either 1.) files a pleading; or 2.) complies with new statutory insurer-notification provisions. *Id.* As such, under the 2004 Amendment, prejudgment-interest calculations exclude time between the date that the cause of action accrued and the date the complaint is filed, *unless* the injured party undertakes new statutory duties. R.C. 1343.03(C)(1). To trigger prejudgment-interest accrual before a complaint is filed, the 2004 Amendment requires the injured party to attempt to determine whether the tortfeasor has insurance to cover liability for the tortious conduct and provide simultaneous written notice, in person or via certified mail, to the tortfeasor and the tortfeasor's insurer that the cause of action had accrued. R.C. 1343.03(C)(1)(c)(i).

In March 2002, when the Smiths' cause of action accrued, the Smiths had no statutory duty to attempt to discover whether Huber had insurance to cover his tortious conduct or to provide Huber's insurer notice of their claim. Retroactively applying a statute that eliminates all prejudgment interest that had accrued before March 13, 2003 based on the Smiths' inability to foresee and fulfill new statutory duties—which were created more than two years *after* prejudgment interest began to accrue—penalizes the Smiths for not undertaking statutory duties in 2002 that did not even exist at that time. The 2004 Amendment is not “purely remedial”—it imposes new notification duties upon a transaction that occurred in March 2002 and penalizes the Smiths for not undertaking duties regarding that transaction at a time when the duties did not

¹¹ R.C. 1343.03(C)(1)(a) and (b) govern actions in which the tortfeasor admitted liability or deliberately caused harm.

even exist. Retroactively applying a statute that imposes new statutory duties on a past transaction would violate the Ohio Constitution's prohibition against retroactive laws.

The 2004 Amendment also imposes a new burden of production involving when losses occurred. Under former R.C. 1343.03(C), prejudgment interest was mandatorily levied on the entire judgment. But the 2004 Amendment prohibits interest on future damages. Whether a damage is a future or past damage is determined by the jury. Thus, for a party to merely ensure that its prejudgment-interest award encompasses interest levied on all allowable damages, the party is required to prove to the jury when each and every loss occurred.

When the Smiths' cause of action arose, they had no idea that a future amendment would impose new statutory burdens. Imposing these additional burdens on the Smiths would be unjust because it would eliminate a significant portion of the corpus of their prejudgment-interest award based on burdens that they did not know existed when their cause of action arose.

The 2004 Amendment fails both steps of the two-step test for retroactive application. It contains no expression of retroactive intent, much less a clear expression. Even if it contained a clear expression of retroactive intent, its retroactive application would be unconstitutional because it impairs vested rights, affects accrued rights, and imposes new statutory duties upon the Smiths that they were required to perform before the amendment's enactment. The 2004 Amendment should not be applied to any cause of action that accrued before its enactment on June 2, 2004.

IV. CONCLUSION

It is axiomatic that application of a statutory amendment to a cause of action that accrued prior to the amendment's enactment constitutes retroactive application of new law. This is true regardless of when judgment is entered.

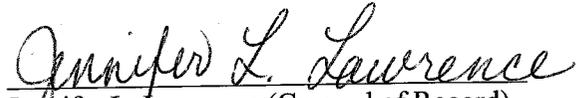
Courts are not free to retroactively apply new law to pending causes of action. Indeed, the Ohio Constitution, the Ohio Revised Code, and more than a century of case law protect parties against such application. Legal consequences for past conduct must be based upon the law that existed when the conduct occurred. A new statute may not be retroactively applied unless two requirements are met: 1.) the statutory language clearly and unambiguously proclaims that the General Assembly intended that specific statute to retroactively apply to pending causes of action; and 2.) such application does not reach back and impose additional obligations, or affect facts, acts, rights, conduct, or consequences that existed prior to the statute's enactment.

The trial court and Twelfth District properly applied former R.C. 1343.03(C) to calculate the Smiths' prejudgment-interest award. Application of the 2004 Amendment to this case would contravene the Ohio General Assembly's intent. If the General Assembly had wanted the 2004 Amendment to be retroactively applied, it would have employed the clear retroactive language required to overcome the statutory presumption against retroactive application of laws. But the General Assembly drafted and enacted the 2004 Amendment without including any language pertaining to retroactive application. Its silence ends the inquiry—a court is forbidden from retroactively applying any statute that lacks clear retroactive intent.

But even if the 2004 Amendment had contained language expressing retroactive intent, the Ohio Constitution prohibits its retroactive application to pending causes of action. The 2004 Amendment reaches back to impair accrued substantive rights, impose additional statutory burdens and duties, and affect facts, acts, conduct, and consequences that existed before its enactment. Such application would violate the Smiths' constitutional right to be free from retroactive application of substantive laws.

Retroactive application of the 2004 Amendment would defy the General Assembly's intent and violate the Ohio Constitution. Therefore, the Smiths respectfully ask this Court to affirm the Twelfth District's judgment.

Respectfully Submitted,



Jennifer L. Lawrence (Counsel of Record)

Richard D. Lawrence

Ginger S. Bock

Counsel for Appellees,

Kristi Longbottom, Jesse Smith, and Kyle

Jacob Smith

CERTIFICATE OF SERVICE

I certify that a copy of the Merit Brief of Appellees Kristi Longbottom, Jesse Smith, and Kyle Jacob Smith was sent by ordinary U.S. mail to the following on March 12, 2013:

Martin T. Galvin
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Jennifer L. Lawrence

Counsel for Appellees,

Kristi Longbottom, Jesse Smith, and Kyle

Jacob Smith

APPENDIX

<u>Appendix Item</u>	<u>Appx. Page</u>
Decision of the Clermont County Court of Common Pleas (Dec. 15, 2010)	1-13
Judgment Entry of the Clermont County Court of Common Pleas (Dec. 29, 2010)	14-16
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CLERK OF COURT
CLERMONT COUNTY, OHIO

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

**KRISTI LONGBOTTOM, et al.,
Plaintiffs,**

v.

**MERCY HOSPITAL CLERMONT,
et al.,
Defendants.**

CASE NO. 2008CVA00499

DECISION

Richard D. Lawrence and Jennifer L. Lawrence, Attorneys for Plaintiffs, The Lawrence Firm, PSC, MainStrasse Village, 606 Philadelphia Street, Covington, Kentucky 41011.

Karen Carroll, Attorney for Defendant Mercy Hospital Clermont, Rendigs Fry Kiely & Dennis LLP, 1 West Fourth Street, Suite 900, Cincinnati, Ohio 45202-3688.

Michael F. Lyon and Laurie A. McCluskey, Attorneys for Defendants Gary S. Huber, D.O. and Qualified Emergency Specialists, Lindhorst & Dreidame, 312 Walnut Street, Suite 3100, Cincinnati, Ohio 45202.

This matter is before the Court upon Plaintiffs Kristi Longbottom and Jesse Smith's, Individually and as Natural Guardians of Kyle Jacob Smith, motion seeking prejudgment interest on the judgment entered by the Court on the jury's verdict of September 28, 2010. An award of prejudgment interest acts as compensation.¹ "(I)nterest is allowed, not only on account of the loss which a creditor may be supposed to have sustained by being deprived of the use of his money, but on account of the gain made from its use by the debtor."²

The plaintiffs seek a prejudgment interest award pursuant to Section 1343.03(C) of the Ohio Revised Code. In support of their motion, the plaintiffs assert that Defendants Dr.

¹ *Royal Elec. Constr. Corp. v. Ohio State Univ.* (1995), 73 Ohio St. 3d 110.

² *Moskovitz v. Mt. Sinai Medical Center*, 69 Ohio St. 3d at 656; quoting *Kalain v. Smith* (1986), 25 Ohio St. 3d 157, at syllabus.

Huber and Qualified Emergency Specialists, Inc. ("QESI") failed to make a good faith effort to settle the case.

The facts relevant to this matter are as follows. On March 22, 2002, Kyle Smith fell and hit the left side of his head against a coffee table. Kyle's parents took him to the emergency room at Clermont Mercy Hospital. Dr. Huber then sutured Kyle's ear and discharged Kyle from the hospital. At approximately 5 a.m. the next morning, Kyle's mother awoke to the sound of Kyle vomiting, choking, and gasping for air. Kyle's father called 911 and Kyle was transported via air flight helicopter to Cincinnati Children's Hospital. Once at Children's Hospital, a head CT scan was taken that revealed a massive epidural hematoma causing a midline shift of Kyle's brain and brain herniation. Dr. Kerry Crone performed emergent neurosurgery to remove the bleeding. Kyle spent multiple days in the ICU and weeks in the hospital relearning how to swallow, eat, communicate, and walk. As a result of the delay in diagnosing the epidural hematoma, Kyle suffered brain herniation, causing a permanent injury to the temporal and parietal portions of his brain and left side hemiparesis, which resulted in Kyle walking with an altered gait.

The plaintiffs sued Dr. Huber, his employer, QESI, and Mercy Hospital Clermont on March 13, 2003, Case No. 2003CVH370, for negligence, loss of consortium, loss of chance, and conscious disregard. The plaintiffs voluntarily dismissed the case under Civ. R. 41(A), without prejudice, on March 8, 2007 on the eve of trial. The plaintiffs re-filed the case against the same parties and upon the same causes of action on March 3, 2008. Plaintiff's settled all claims against Mercy Hospital in the weeks prior to trial. The matter came for a nine-day jury trial commencing on September 14, 2010. On September 28, 2010, the jury returned a verdict in the plaintiffs' favor finding Defendants Dr. Huber and QESI negligent.

The plaintiffs now move for prejudgment interest under R.C. 1343.03(C). The

statute sets out four requirements that a party seeking prejudgment interest must fulfill: (1) the party must petition the court; (2) the trial court must hold a hearing on the motion; (3) the court must find that the party required to pay the judgment failed to make a good faith effort to settle; and (4) the court must find that the party to whom the judgment is to be paid did not fail to make a good faith effort to settle the case.³

Whether the plaintiffs are entitled to prejudgment interest depends upon whether they can prove each element by a preponderance of the evidence. The plaintiffs' motion for prejudgment interest filed on October 20, 2010 satisfies the first requirement that they petition the court for relief. On December 2, 2010, a hearing was held on the motion at which the parties offered evidence and argument on the issue, thereby satisfying the second requirement of the statute.

The third element requires a showing that Defendants Huber and QESI failed to make a good faith effort to settle the case. Determining whether a party lacked good faith in efforts to settle the case is within the court's discretion.⁴ The Ohio Supreme Court has held that a party has made a good faith effort to settle 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."⁵ However, "if a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer."⁶ The Ohio Supreme Court strictly construes its holding that a party need not make a settlement offer so as to carry out the purposes of R.C. 1343.03(C) which are compensation of Plaintiffs and encouraging settlement of matters by the parties.

³ R.C. 1343.03(C).

⁴ *Moskovitz v. Mt. Sinai Medical Center* (1994), 69 Ohio St. 3d 638.

⁵ *Id.*; quoting *Kalain v. Smith* (1986), 25 Ohio St. 3d 157, at syllabus.

⁶ *Id.*

The plaintiffs do not dispute that the defendants fully cooperated in discovery proceedings and that they made no attempt to unnecessarily delay any of the proceedings. However, the plaintiffs contend that the defendants did not rationally evaluate their risk or potential liabilities. In support of this argument, the plaintiffs note that the defendants knew that Kyle had sustained permanent and serious injuries from his head injury in 2002. The plaintiffs further note that Dr. Paula Sundance, an expert retained by the defense, evaluated Kyle on August 7, 2006 and opined in her report dated October 5, 2006 that Kyle had permanent injuries and required future medical care needs. Additionally, Kyle's parents testified in their depositions that Dr. Huber had instructed them that they did not need to awaken Kyle every two hours after he was discharged from the hospital. Dr. Huber in his deposition testimony refused to answer a hypothetical question of Plaintiff's counsel regarding the negligence of a physician who failed to give appropriate head injury discharge instructions though such questioning was extensive.⁷ Dr Huber and counsel were certainly on notice of the potential issue for consideration by a jury. At trial, Dr. Huber admitted that, if he did so inform the parents, that doing so would be below the standard of care for an emergency room physician. Additionally, Dr. Huber failed to order a CT scan for Kyle. A number of Plaintiffs' experts testified that his failure to do so violated the standard of care. Although the defendants are free to choose their own experts, the defendants are not free to rely solely on those physicians' conflicting analysis when making a rational evaluation of risks and liabilities. Defendant must rationally evaluate all evidence in the case. Defendant Huber and Defendant QESI failed to do so in the court's opinion.

The fourth element in establishing a good faith settlement effort is whether the defendant made a good faith monetary settlement offer or responded in good faith to an

⁷ Dr Huber Deposition, June 24, 2004 at p.73-76.

offer from the other party. The defendants do not deny that they did not make a monetary settlement offer or respond to the plaintiffs' offers prior to trial. The defendants assert that the insurance companies could not make a settlement offer because Dr. Huber refused to consent to a settlement which prevented an offer of compromise under the terms of his policy. During a pretrial conference with the court on January 7, 2010, counsel for Defendants Huber and QESI informed the court and the Plaintiffs' that they did not have Dr. Huber's consent to settle the case and that there was "no chance that the case was going to settle". However, the verdict rendered judgment against Dr. Huber, not against the insurance company. Therefore, whether Dr. Huber's decision to refuse to consent to settlement was based upon an objectively reasonable belief that he was not liable for Kyle's injuries is central to the issue of whether prejudgment interest is appropriate in this case. Additionally, QESI did not have a contractual right of consent in its policy of insurance and the insurer was free, and obligated, to independently evaluate the issues of liability. By counsel's admission at oral argument on this motion, the insurer would never offer any settlement on behalf of the employer QESI without the physician employees consent under these circumstances. It appears from the portions of the claims file reviewed by the court that no serious consideration was given by Dr Huber or QESI to the fact scenario which the jury accepted as true: Dr. Huber was untruthful and failed to adequately inform the parents of their duties of observation after discharge.

The defendants assert that they did not make a settlement offer to the plaintiffs because the defendants reasonably believed that they had no liability. The defendants claim that they based this belief on their understanding that the primary issue in the case was whether Dr. Huber was negligent in failing to order a CT scan of the patient prior to discharge. The defendants assert that there is virtually no suggestion that Dr. Huber's

discharge communication would be an issue of liability. However, the Complaint alleges that Dr. Huber failed to adequately instruct Kyle's parents with respect to his care after discharge. Specifically, the Complaint alleges that "Defendant 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."⁸ The Complaint further alleges that Dr. Huber's negligence arose, in part, from his "failure to warn the family of potential risks and dangers."⁹ At his deposition in the earlier filed case, as outlined above, the issue of discharge instructions was fully explored. Additionally, Dr. Huber admitted during trial on cross examination that it would have been below the standard of care if he had failed to instruct Kyle's parents to follow the instructions for a head wound. Therefore, the defendants' suggestion that they were totally unaware of this potential source of liability is disingenuous.

The defendants were on notice of the liability claims against them and that it was possible that a jury could find the defendants liable for Kyle's injuries. Dr. Huber testified that he instructed Kyle's parents to follow the instructions for a head wound. However, the defense knew that Kyle's parents had testified in their depositions that Dr. Huber had told them to disregard the head injury literature. Additionally, Jesse Smith had said to the 911 operator that Dr. Huber told him that they did not need to wake Kyle up every two hours. Therefore, whether Dr. Huber was negligent was an issue of credibility at trial. Clearly the defense was on notice that the jury could find in Kyle's favor if they determined that Dr. Huber's testimony was not credible.

Defense counsel asserts that his pretrial communications to the insurer that Dr.

⁸ Complaint at ¶ 22.

⁹ Id. at ¶ 23.

Huber and QESI would win this case 93% of the time is evidence that Dr Huber and QESI had a rational, objective basis to decline to make any offers. A party must have an objectively reasonable belief that he has *no* liability, not a 93% chance of winning, to be released from the responsibility of making a monetary settlement offer.¹⁰ The purpose of R.C. 1343.03(C) is to encourage settlement and to compensate the plaintiff.

After reviewing the pleadings, pre-trial depositions of experts, admitted exhibits, and argument by counsel, the court finds that the defense's alleged belief that they had no liability was not objectively reasonable. Additionally, the plaintiffs made several settlement demands to which the defendants did not respond. Under these circumstances, the defendants' failure to make a settlement offer before trial and failure to respond to pre-trial settlement demands by the plaintiff was not in good faith.

Finally, to be entitled to prejudgment interest, the court must find that the party to whom the judgment is to be paid did not fail to make a good faith effort to settle the case. The plaintiffs assert that they fulfilled the elements of good faith. Since the burden of proof is on the party seeking prejudgment interest, that party must "present evidence of a written (or something equally persuasive) offer to settle that was reasonable considering such factors as the type of case, the injuries involved, applicable law, defenses available, and the nature, scope and frequency of efforts to settle."¹¹

The plaintiffs contend that they cooperated in discovery proceedings and the defendant does not challenge this contention. The plaintiffs also asserts that they rationally evaluated the amount of compensation due based upon the injuries that Kyle Smith incurred and his treating physicians' evaluations of the extent of those injuries. The

¹⁰ *Id.*

¹¹ *Moskovitz v. Mt. Sinai Medical Center*, 69 Ohio St. 3d at 659.

plaintiffs made several attempts to offer a settlement to the defendant. Plaintiffs' counsel informed the court and the parties that they were ready, willing and able to negotiate the claims within the insurance coverage available to Dr. Huber and QESI. On February 17, 2010, the plaintiffs made a separate demand by letter to Dr. Huber and QESI in the amount of \$2,500,000.00.¹² Again, defendants' counsel informed the court and the parties at a pretrial conference on September 8, 2010 that they did not have Dr. Huber's consent to settle the case. Plaintiffs' counsel informed the court and the parties at that time that they were ready, willing, and able to settle the case. The defendants neither responded to these settlement demands nor attempted to settle the case.

Additionally, the plaintiffs were in negotiations with Defendant Mercy Hospital Clermont and had scheduled mediation with the Court on September 9, 2010. Plaintiffs' counsel invited defense counsel to attend the mediation. Defense counsel responded by informing the plaintiffs that their belief was that the case would not settle.¹³

At trial, the plaintiff was awarded \$2,412,899.00 by a jury. Although the amount of the award at trial is not determinative of good faith, the absence of a large discrepancy indicates that the plaintiffs' demands were reasonable. Based upon the criteria for good faith, the plaintiffs have proven that they made several good faith settlement demands prior to trial.

Having determined that the plaintiffs are entitled to prejudgment interest, it is now necessary to determine the date from which the interest should accrue. As a preliminary matter, the parties disagree as to which version of the statute applies in this case. When the plaintiffs filed suit in 2003, R.C. 1343.03(C) read:

¹² See Exhibit 8, Plaintiffs' Motion for Prejudgment Interest.

¹³ See Exhibit 9, Plaintiffs' Motion for Prejudgment Interest.

“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.”

An amended version of R.C. 1343.03 became effective on June 2, 2004, while the plaintiffs’ lawsuit was pending. As amended, R.C. 1343.03(C) now provides:

- “(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 . . .
 - (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.”

As is evident from the above statutory language, the amendments to R.C. 1343.03(C) potentially changed the accrual date for a prejudgment interest award and prohibited prejudgment interest on future damages. The plaintiffs contend that the version that took effect on July 6, 2001 applies to this motion because this version was in effect when the case

was first filed in March 2003. In support of this argument, the plaintiffs point to the First District Court of Appeals' decision in *Hodesh v. Korelitz, M.D.*¹⁴ In *Hodesh*, the First District Court of Appeals did not apply the amended version of the statute stating "that since prejudgment interest started on the date the cause of action accrued, use of a statute different than the one existing on that date would constitute a retroactive application in a pending case."¹⁵

On the contrary, the defendants assert that the version that took effect on June 2, 2004 applies in this case because the amendments to the statute may be retroactively applied. In support of this argument, the defendants note that the Court of Appeals for the Eighth District held in *Barnes v. University Hospital of Cleveland* that R.C. 1343.03(C)(1)(c)(ii) was remedial, procedural, and retroactive.¹⁶ Although the statute had been amended after the filing date, the Eighth District Court of Appeals found that the amended statute could be applied because it was amended before the court conducted the determination hearing for prejudgment interest.¹⁷ Although the Ohio Supreme Court granted an appeal in *Barnes*, the issues allowed on appeal do not include the retroactive application of R.C. 1343.03(C). Therefore, the outcome of *Barnes* will not affect the plaintiffs' case.

In *Scibelli v. Pannunzio*,¹⁸ the Seventh District rejected the same argument adopted by the Eighth District in *Barnes*.¹⁹ The *Scibelli* court found more persuasive the plaintiff's

¹⁴ 2008-Ohio-2052; reversed on other grounds *Hodesh v. Korelitz, M.D.* (2009), 123 Ohio St. 3d 72, 914 N.E.2d 186.

¹⁵ *Id.* at 2062; citing *Scibelli v. Pannunzio* 2006-Ohio-5652.

¹⁶ *Barnes v. University Hospital of Cleveland*, 2006-Ohio-6266, appeal allowed, 114 Ohio St.3d 1409, 2007-Ohio-2632, 867 N.E.2d 843.

¹⁷ *Id.*

¹⁸ 2006-Ohio-5652 (Ohio App. 7th Dist.).

¹⁹ *Id.* at ¶ 143.

assertion “that since prejudgment interest started on the date the cause of action accrued, use of a statute different than the one existing on that date would constitute a retroactive application in a pending case.”²⁰ Additionally, in *Conway v. Dravenstott*,²¹ the Third District followed *Scibelli* and held that the pre-amendment version of R.C. 1343.03(C) applied, in an action pending on the effective date of the amendments, to determine the accrual date for prejudgment interest and whether prejudgment interest could be awarded on future damages.²²

Having reviewed *Barnes*, *Scibelli*, *Conway*, and *Hodesh*, this court agrees with the Seventh, Third, and First Districts. Under the pre-amendment version of the statute, prejudgment interest started on the date a cause of action accrued. When the plaintiffs’ cause of action accrued, and when they filed this lawsuit, the pre-amendment version of the statute was in effect. Moreover, immediately after the plaintiffs’ filed this lawsuit, the parties’ respective obligations to act in good faith were governed by the pre-amendment version of R.C. 1343.03(C). Therefore, this court agrees with *Scibelli*, *Conway*, and *Hodesh* that applying the post-amendment version of R.C. 1343.03(C) in the plaintiffs’ case would constitute retroactive application.

The defendants next assert that retroactive application of the statute is appropriate because an amended statute may be applied retroactively if (1) the legislature clearly expresses its intent to make the statute retroactive and (2) the statute is remedial in nature.²³ The defendants argue that the first part of this test is satisfied because the amended statute expressly states that it “applies to actions pending on the effective date” of the amendment.

²⁰ *Id.* at ¶ 141.

²¹ Crawford App. No. 3-07-05, 2007-Ohio-4933 (Ohio App. 3d Dist.).

²² *Id.* at fn. 3 and ¶ 15.

²³ *State v. Consilio*, 114 Ohio St.3d 295, 298, 2007-Ohio-4163, 871 N.E.2d 1167, at ¶ 10.

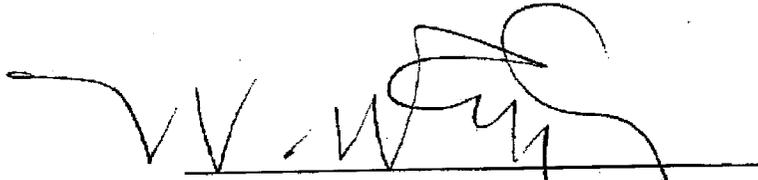
However, House Bill 212, which effected the changes in the statute, expressly addresses the retroactivity of R.C. 1343.03(A), while failing to mention any retroactivity in R.C. 1343.03(C). This supports the view that R.C. 1343.03(C) does not have retroactive application to pending cases.²⁴ Absent a clear indication that the legislature intended the amended version of R.C. 1343.03(C) to apply retroactively, it may be applied prospectively only.²⁵ Accordingly, the court finds that the pre-amendment version of the R.C. 1343.03(C) applies in the present case. However, the amended version of R.C. 1343.03(A), which addresses the applicable interest rate, also applies because the legislature expressly made it applicable to pending cases.

The jury awarded \$2,412,899.00 to the plaintiffs. However, this amount is reduced by the \$500,000.00 settlement the plaintiffs reached with Mercy Hospital Clermont. By agreeing to the settlement, the plaintiffs forgave the interest on that portion of the claim. Therefore, the prejudgment interest will be computed on \$1,912,899.00. Additionally, though it is not clear whether a court can alter the date from which 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 the plaintiffs voluntarily dismissed the Complaint under Civ. R. 41(A) on March 8, 2007. The prejudgment interest will then resume when the plaintiffs re-filed the Complaint on March 3, 2008 to the date on which 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.

²⁴ *Id.* at ¶ 147.

²⁵ *Scibelli v. Pannunzio*, 2006-Ohio-5652.

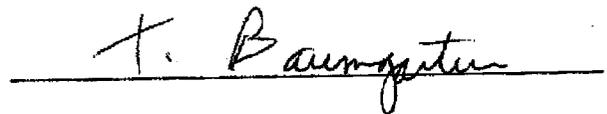
Based upon the foregoing, the Court grants the Plaintiffs' motion for prejudgment interest, which shall be computed as set forth above. Counsel for plaintiffs shall prepare, circulate for signature pursuant to local rule and submit such entry within 15 days. Costs taxed to defendants.



JUDGE WILLIAM WALKER

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was sent to all counsel of record this 15th day of December, 2010.



FILED

2010 DEC 29 PM 1:10
COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

Kristi Longbottom and Jesse Smith,	:	CASE NO. 2008 CVA 499
Individually and as Natural Guardians	:	
of Kyle Jacob Smith,	:	Judge Walker
	:	
Plaintiffs	:	
	:	DECISION AND
Gary S. Huber, D.O. and Qualified	:	FINAL JUDGMENT ENTRY
Emergency Specialists, Inc.	:	
	:	
Defendants	:	

The jury having returned a verdict for Plaintiffs against Defendants Gary S. Huber, D.O, and Qualified Emergency Specialists Inc. in the amount of \$2,412,899.00; and the Court having entered judgment in that amount for the Plaintiffs on October 14, 2010; and the Court having since heard and decided Defendants' Gary S. Huber, D.O. and Qualified Emergency Specialists, Inc.'s Motion for Judgment Notwithstanding the Verdict and Defendants' Motion for a New Trial; and the Court having since held an evidentiary hearing on Plaintiffs' Motion for Prejudgment Interest, it is hereby ORDERED AND ADJUDGED as follows:

1. Defendants' Motion for Judgment Notwithstanding the Verdict and Defendants' Motion For a New Trial is DENIED as set forth in the Court's decision dated November 29, 2010.
2. Plaintiffs' Motion for Prejudgment Interest is hereby GRANTED against Defendants Gary S. Huber, D.O. and Qualified Emergency Specialists, Inc. as set forth in the Court's decision dated December 15, 2010.
3. Defendants are entitled to an offset in the amount of \$500,000.00 on the October 14, 2010 judgment for the amount paid in settlement by Co-Defendant Mercy

Clermont Hospital for a net award of \$1,912,899.00.

4. Plaintiffs are entitled to prejudgment interest of \$830,774.66 against Defendants Gary S. Huber, D.O. and Qualified Emergency Specialists, Inc., jointly and severally, this amount being prejudgment interest on the net award of \$1,912,899.00 from the time the cause of action accrued through the 28th of December, 2010, exclusive of the time period during which the matter had been voluntarily dismissed.
5. Accordingly, based upon the foregoing, as of December 28, 2010, the new total amount of the October 14, 2010, judgment in favor of the Plaintiff and against the Defendants Gary S. Huber, D.O., and Qualified Emergency Specialists, Inc., jointly and severally, is \$2,743,673.66.
6. Furthermore, pursuant to R.C. §1343.03(A), the entire unpaid judgment shall accrue post-judgment interest from December 28, 2010. As of the date of this entry, the entire unpaid judgment amount is \$2,743,673.66.
7. It is further ordered that Defendants Gary S. Huber, D.O. and Qualified Emergency Specialists, Inc. shall pay the costs of this action.

There being no further outstanding issues for the Court, this entry is a final appealable order.

Dated at Batavia, Ohio, this 28th day of December, 2010.


Judge William Walker

HAVE SEEN:

/s/ Richard D. Lawrence

Richard D. Lawrence, Esq. (0001584)

Jennifer L. Lawrence, Esq. (0066864)

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/s/ Michael F. Lyon (without waiver of any arguments or objections)

Michael F. Lyon, Esq.

Laurie McCluskey, Esq.

LINDHORST & DREIDAME

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*Attorneys for Defendants Gary S. Huber, D.O. and
Qualified Emergency Specialists, Inc.*

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

FILED

2012 AUG 30 PM 1:42

CLERK OF COURT
COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

**Kristi Longbottom and Jesse Smith,
Kyle Jacob Smith, Individually**

CASE NO. 2008 CVA 499

Judge Herman

Plaintiffs

**DECISION AND
FINAL JUDGMENT ENTRY**

**Gary S. Huber, D.O. and Qualified
Emergency Specialists, Inc.**

Defendants

In accordance with the 12th District Court of Appeals decision dated May 14, 2012 affirming in part and overruling in part this Court's Decision and Final Judgment Entry of 12/28/2010, it is hereby ORDERED AND ADJUDGED as follows:

1. Pursuant to the Jury's Decision of September 28, 2010, Plaintiffs recover against Defendants Gary S. Huber, D.O, and Qualified Emergency Specialists Inc. the sum of \$2,412,899.00, subject to an offset in the amount of \$500,000.00 for the amount paid in settlement by Co-Defendant Mercy Clermont Hospital;
2. Plaintiffs' Motion for Prejudgment Interest is hereby GRANTED against Defendants Gary S. Huber, D.O. and Qualified Emergency Specialists, Inc. as set forth in the trial court's decision dated December 15, 2010 and AFFIRMED in the 12th District Court of Appeals decision dated May 14, 2012;
3. Plaintiffs are entitled to prejudgment interest of \$1,091,767.45 against Defendants Gary S. Huber, D.O. and Qualified Emergency Specialists, Inc., jointly and severally, this amount being interest on the net award of \$1,912,899.00 from the time the cause of action accrued, March 22, 2002, through the present day, July 16, 2012;

4. Accordingly, based upon the foregoing, the Court hereby enters judgment in favor of the Plaintiffs and against the Defendants Gary S. Huber, D.O. and Qualified Emergency Specialists, Inc., jointly and severally, in the total amount of \$3,004,666.45.
5. Furthermore, pursuant to R.C. §1343.03(A), the judgment amount of \$3,004,666.45 shall accrue post-judgment interest from July 16, 2012 until the judgment is satisfied in full.
6. It is further ordered that Defendants Gary S. Huber, D.O. and Qualified Emergency Specialists, Inc. shall pay all costs of this action.

There being no further outstanding issues for the Court this entry is a final appealable order.

Dated at Batavia, Ohio, this 30th day of Aug, 2012.



Judge Thomas R. Herman
Court of Common Pleas

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

FILED
2012 OCT 18 PM 2:26
BARBARA WIEDENBEIN
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OH

KRISTI LONGBOTTOM, et al.,
Plaintiffs,

v.

MERCY HOSPITAL CLERMONT,
et al.,
Defendants.

CASE NO. 2008CV00499

DECISION/ENTRY

Jennifer Lawrence and Richard D. Lawrence, Attorneys for Plaintiffs, The Lawrence Firm, PSC, MainStrasse Village, 606 Philadelphia Street, Covington, Kentucky 41011.

Michael F. Lyon and Laurie A. McCluskey, Attorneys for Defendants Gary S. Huber, D.O. and Qualified Emergency Specialists, Lindhorst & Dreidame, 312 Walnut Street, Suite 3100, Cincinnati, Ohio 45202.

Michael Romanello and Melvin Block, Reminger Co., LPA, 65 East State Street, 4th Floor, Columbus, Ohio 43215.

This matter is before the Court upon Plaintiffs Kristi Longbottom and Jesse Smith's, Individually and as Natural Guardians of Kyle Jacob Smith, motion to increase the supersedeas bond set in this case. This case came for trial before this Court in September 2010. The jury rendered a verdict for Plaintiffs, filed with the Clerk of this Court on September 28, 2010. This Court entered a Judgment Entry in this case on October 14, 2010, awarding to the plaintiffs the sum of \$2,412,899.00. On December 28, 2010, this Court entered a Decision and Final Judgment Entry finding that the defendants are entitled to an offset in the mount of \$500,000.00 on the October 14, 2010 judgment for the amount paid in settlement by Co-Defendant Mercy Clermont Hospital for a net award of \$1,912,899.00. The Court also found that the plaintiffs were entitled to prejudgment interest of

\$830,774.66 against Defendants Gary S. Huber, D.O. and Qualified Emergency Specialists, Inc., jointly and severally, this amount being prejudgment interest on the net award from the time the cause of action accrued through December 28, 2010, exclusive of the time period during which the matter had been voluntarily dismissed.

The Defendants appealed the judgment and the case was transferred to the Court of Appeals on January 25, 2011. The plaintiffs agreed not to execute on the judgment. On April 14, 2011, the defendants entered a bond in the amount of \$3 million pursuant to the requirements of R.C. 2505.09.

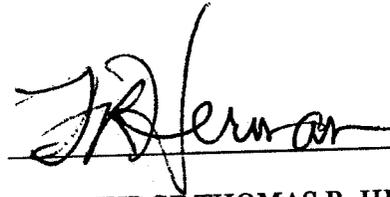
On May 14, 2012, the Court of Appeals affirmed this Court's judgment entry in part and reversed in part with respect to this Court's failure to award prejudgment interest to the plaintiffs from the date that they voluntarily dismissed their complaint under Civ. R. 41(A) to the date that they re-filed it. The Court of Appeals also remanded the case to this Court for the limited purpose of amending the amount of prejudgment interest awarded to the plaintiffs to include prejudgment interest for this period.

On May 22, 2012, the plaintiffs moved to increase the amount of the supersedeas bond to \$3.5 million. In support of their motion, the plaintiffs argue that the amount of the judgment plus interest reached \$3 million in June 2012 and that the supersedeas bond must be increased to cover the award during the pendency of the defendants' appeal to the Ohio Supreme Court. The Court has reviewed the judgment in this matter plus all applicable interest and has determined that \$3.25 million is sufficient to cover the amount of the judgment. On December 28, 2010, this Court determined that the defendants owed \$2,743,673.66 to the plaintiffs. However, this amount was exclusive of the time during which the plaintiffs had voluntarily dismissed their suit. The plaintiffs dismissed the suit on March 8, 2007 and re-filed it on March 3, 2008. In 2007 and 2008, the interest rate used

to calculate pre-judgment interest was 8%. Adding this pre-judgment interest increases the judgment in excess of \$150,000.00. Additionally, the Court must add post-judgment interest at a rate of 4% for 2011 and 3% for 2012. Thus, on December 31, 2012, the judgment will be approximately \$3.1 million. As such, the \$3 million supersedeas bond currently posted is insufficient.

The plaintiffs have asked that the supersedeas bond be increased to \$3.5 million. However, given the above calculations, this Court finds that a supersedeas bond in the amount of \$3.25 million provides the plaintiffs with sufficient sureties and is a sum that encompasses the cumulative total for all claims covered by the final order.

IT IS SO ORDERED.

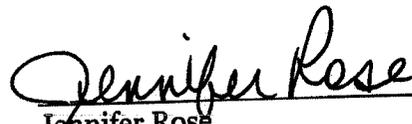


JUDGE THOMAS R. HERMAN

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Decision was served upon the following by regular U.S. Mail or Electronic Mail on this 18th day of October, 2012.

Richard D. Lawrence
Jennifer L. Lawrence
Michael Romanello
Melvin Block
Michael F. Lyon


Jennifer Rose
Administrative Assistant

CONTESTED ELECTIONS.

§21 The General Assembly shall determine, by law, before what authority, and in what manner elections shall be conducted.

(1851)

APPROPRIATIONS.

§22 No money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law; and no appropriation shall be made for a longer period than two years.

(1851)

IMPEACHMENTS; HOW INSTITUTED AND CONDUCTED.

§23 The House of Representatives shall have the sole power of impeachment, but a majority of the members elected must concur therein. Impeachments shall be tried by the Senate; and the senators, when sitting for that purpose, shall be upon oath or affirmation to do justice according to law and evidence. No person shall be convicted without the concurrence of two-thirds of the senators.

(1851)

OFFICERS LIABLE TO IMPEACHMENT; CONSEQUENCES.

§24 The governor, judges, and all state officers, may be impeached for any misdemeanor in office; but judgment shall not extend further than removal from office, and disqualification to hold any office under the authority of this state. The party impeached, whether convicted or not, shall be liable to indictment, trial, and judgment, according to law.

(1851)

REPEALED. WHEN SESSIONS SHALL COMMENCE.

§25

(1851, rep. 1973)

LAWS TO HAVE A UNIFORM OPERATION.

§26 All laws, of a general nature, shall have a uniform operation throughout the state; nor, shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the General Assembly, except, as otherwise provided in this constitution.

(1851)

ELECTION AND APPOINTMENT OF OFFICERS; FILLING VACANCIES.

§27 The election and appointment of all officers, and the filling of all vacancies, not otherwise provided for by this constitution, or the constitution of the United States, shall be made in such manner as may be directed by law; but no appointing power shall be exercised by the General Assembly, except as prescribed in this constitution; and in these cases, the vote shall be taken "viva voce."

(1851, am. 1953)

RETROACTIVE LAWS.

§28 The General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

(1851)

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Current through Legislation passed by the 129th Ohio General Assembly
and filed with the Secretary of State through File 201
*** Annotations current through November 5, 2012 ***

OHIO REVISED CODE GENERAL PROVISIONS
CHAPTER 1. DEFINITIONS; RULES OF CONSTRUCTION
CONSTRUCTION

Go to the Ohio Code Archive Directory

ORC Ann. 1.48 (2013)

§ 1.48. Statute presumed prospective

A statute is presumed to be prospective in its operation unless expressly made retrospective.

HISTORY:

134 v H 607. Eff 1-3-72.

OHIO ADVANCE LEGISLATIVE SERVICE
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OHIO 124TH GENERAL ASSEMBLY -- 2001-02 REGULAR SESSION

SENATE BILL NO. 108

2001 Ohio SB 108

BILL TRACKING SUMMARY FOR THIS DOCUMENT

SYNOPSIS: AN ACT To amend sections 1701.95, 1707.01, 1901.18, 2101.31, 2305.25, 2305.251, 2305.37, 2307.24, 2307.27, 2307.30, 2307.60, 2307.61, 2313.46, 2315.23, 2315.24, 2743.18, 2743.19, 2744.01, 2744.02, 2744.03, 2744.05, 3123.17, 4112.02, 4507.07, 4513.263, 4582.27, and 5111.81; to amend, for the purpose of adopting new section numbers as indicated in parentheses, sections 2307.24 (2307.16), 2307.27 (2307.17), 2307.30 (2307.18), 2315.07 (2315.05), 2315.08 (2315.06), 2315.23 (2315.08), and 2315.24 (2315.09); to revive and amend sections 109.36, 2117.06, 2125.01, 2125.02, 2125.04, 2305.10, 2305.16, 2305.27, 2305.38, 2307.31, 2307.32, 2307.75, 2307.80, 2315.01, 2315.19, 2315.21, 2501.02, 2744.06, 3722.08, 4112.14, 4113.52, 4171.10, and 4399.18; to revive, amend, and amend, for the purpose of adopting a new section number as indicated in parentheses, section 2315.18 (2315.07); to repeal sections 163.17, 723.01, 1343.03, 1775.14, 2305.01, 2305.11, 2305.35, 2307.33, 2307.71, 2307.72, 2307.73, 2307.78, 2315.20, 2317.62, 2323.51, 2744.04, 4112.99, 4909.42, 5591.36, and 5591.37; to repeal sections 109.36, 163.17, 723.01, 1343.03, 1775.14, 1901.041, 1901.17, 1901.181, 1901.20, 1905.032, 2117.06, 2125.01, 2125.02, 2125.04, 2305.01, 2305.10, 2305.11, 2305.16, 2305.35, 2305.38, 2307.32, 2307.33, 2307.331, 2307.71, 2307.72, 2307.73, 2307.75, 2307.78, 2307.801, 2315.01, 2315.18, 2315.19, 2315.20, 2315.21, 2317.62, 2323.51, 2501.02, 2744.04, 2744.06, 3701.19, 3722.08, 4112.14, 4112.99, 4113.52, 4171.10, 4399.18, 4909.42, 5591.36, and 5591.37, as they result from Am. Sub. H. B. 350 of the 121st General Assembly; to repeal sections 901.52, 2101.163, 2151.542, 2303.202, 2305.011, 2305.012, 2305.113, 2305.131, 2305.252, 2305.381, 2305.382, 2307.31, 2307.42, 2307.43, 2307.48, 2307.791, 2307.792, 2307.80, 2309.01, 2315.37, 2317.45, 2317.46, 2323.54, and 2323.59; to repeal sections 1901.262 and 1907.262, as enacted by Am. Sub. H. B. 350; to suspend part of section 1707.01; and to suspend sections 1707.432, 1707.433, 1707.434, 1707.435, 1707.436, 1707.437, and 1707.438 of the Revised Code and to amend Section 3 of Am. Sub. H. B. 438 of the 121st General Assembly and to repeal Sections 3, 4, 5, 6, 7, 8, 9, 13, and 16 of Am. Sub. H. B. 350 of the 121st General Assembly to repeal the Tort Reform Act, Am. Sub. H. B. 350 of the 121st General Assembly; to clarify the status of the law; to reorganize certain tort related provisions; and to revive prior law; to amend sections 2744.01 and 2744.03 of the Revised Code as scheduled to take effect on January 1, 2002, to continue the amendments of this act on and after that date; and to declare an emergency.

NOTICE: [A> UPPERCASE TEXT WITHIN THESE SYMBOLS IS ADDED <A]
[D> Text within these symbols is deleted <D]

To view the next section, type .np* TRANSMIT.

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. It is the intent of this act (1) to repeal the Tort Reform Act, Am. Sub. H. B. 350 of the 121st General Assembly, 146 Ohio Laws 3867, in conformity with the Supreme Court of Ohio's decision in (1999), *86 Ohio St.3d 451*; (2) to clarify the status of the law; and (3) to revive the law as it existed prior to the Tort Reform Act.

[*2x1] Section 2.01. That sections 1701.95, 1707.01, 1901.18, 2101.31, 2305.25, 2305.251, 2305.37, 2307.24, 2307.27, 2307.30, 2307.60, 2307.61, 2313.46, 2315.23, 2315.24, 2743.18, 2743.19, 2744.01, 2744.02, 2744.03, 2744.05, 3123.17, 4112.02, 4507.07, 4513.263, 4582.27, and 5111.81 be amended; that sections 2307.24 (2307.16), 2307.27 (2307.17), 2307.30 (2307.18), 2315.07 (2315.05), 2315.08 (2315.06), 2315.23 (2315.08), and 2315.24

(2315.09) be amended for the purpose of adopting new section numbers as indicated in parentheses; that sections 109.36, 2117.06, 2125.01, 2125.02, 2125.04, 2305.10, 2305.16, 2305.27, 2305.38, 2307.31, 2307.32, 2307.75, 2307.80, 2315.01, 2315.19, 2315.21, 2501.02, 2744.06, 3722.08, 4112.14, 4113.52, 4171.10, and 4399.18 be revived and amended; that section 2315.18 (2315.07) be revived, amended, and amended, for the purpose of adopting a new section number as indicated in parentheses; and that sections 163.17, 723.01, 1343.03, 1775.14, 2305.01, 2305.11, 2305.35, 2307.33, 2307.71, 2307.72, 2307.73, 2307.78, 2315.20, 2317.62, 2323.51, 2744.04, 4112.99, 4909.42, 5591.36, and 5591.37 of the Revised Code be revived, all to read as follows:

* * *

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 of ten per cent per annum, and no more, 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.

(B) Except as provided in divisions (C) and (D) of this section, interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct, including, but not limited to a civil action based on tortious conduct 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.

(C) 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.

(D) Divisions (B) and (C) of this section do 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.

* * *