ORIGINAL

IN THE SUPREME COURT OF OHIO

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

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

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In appellees' merit brief, appellees seek to avoid this court's consideration of a number of issues which are germane to the certified conflict question and relevant to the analytical basis of the cases deemed to be in conflict. These issues are potentially determinative of the resolution of which pre-judgment interest statute should apply in this case. Appellees seek to: (1) limit this court's consideration of the fact that the underlying tort judgment rendered by the trial court was predicated on their re-filed complaint filed on 3/8/08; (2) disregard the analytical basis of the Eighth District Court of Appeal's decision in *Barnes v. Univ. Hosp. of Cleveland, 8th Dist. No. 87247,* 2006-Ohio-6266; and (3) unfairly construe the language selected by the underlying appellate court in certifying the issue in conflict. Appellants respectfully submit that when this court gives proper consideration of the analytical basis of the *Barnes* decision, it must likewise take into consideration those facts from this case which would be dispositive on the determination on which version of R.C. 1343.03(A) should govern appellees' pre-judgment interest (hereinafter "PJI") claim.

I. THE RELEVANT ISSUES BEFORE THIS COURT.

The certified question before this court as phrased by the Clermont County Court of Appeals is as follows:

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

The underlying appellate court framed this certified issue based on that court's recognition that its decision to apply the former version of R.C. 1343.03(C) to the

plaintiff's PJI claim was in conflict with the decision rendered in the *Barnes* case.[1] In *Barnes,* the court reviewed a situation where a plaintiff filed his tort claim before the 2004 amendment to R.C. 1343.03(C). However, the trial and verdict in the tort action and the subsequent PJI hearing after the verdict all took place after the 2004 amendment. Under these facts, the *Barnes* court concluded that the 2004 version of the statute controlled the plaintiff's PJI claim. Importantly, the *Barnes* court decision was *not* predicated on a retroactive application of the 2004 version of R.C. 1343.03(C). Rather, *Barnes* predicated its application of the 2004 statute on the basis of the court's determination that the plaintiff's right to PJI did not accrue until after the effective date of the 2004 statute. On this issue, the *Barnes* court reasoned:

> The language of the statute clearly supports the trial court's decision to calculate pre-judgment interest from the date the action was filed. Although [the amended version of R.C. 1343.03] 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 retroactive application because the current version of the statute was firmly in place before the prejudgment interest was evaluated. Id.* at ¶ 75. (Emphasis added).

In contrast to the analysis applied in *Barnes*, the underlying appellate court cited to the holdings in *Hodesh v. Korelitz, M.D.,* 1st Dist. No. C-061013, 2008-Ohio-2052, *Scibelli v. Pannunzo,* 7th Dist. No. 05MA150, 2006-Ohio-5652, ¶¶ 148-149; and *Conway*

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[1] It is noteworthy that the underlying appellate court chose to frame the conflict issue in a manner very different from that as proposed by appellees. Appellees sought to have the certified issue framed in a manner which would be more consistent with the actual holding in the *Barnes* case on the PJI issue:

1. Whether amended R.C. §1343.03(C) or pre-amendment R.C. §1343.03(C) applies to claims arising and filed before June 2, 2004, the amendment's effective date – when the verdict is not reached and the pre-judgment interest determination does not occur until after that effective date?

v. Dravenstott, 3rd Dist. No. 3-07-05, 2007-Ohio-4933, ¶15, and concluded that the 2004 amendment could not be applied retroactively. While not directly addressed in the underlying decision, the underlying *Longbottom* court nevertheless concluded that appellees' PJI claim had "[accrued] before June 2, 2004." See certified conflict issue. The *Longbottom* court elaborates on this finding in the court's entry which certified the conflict to this court:

> Appellant/cross-appellees argued that the trial court erred by failing to apply a version of the pre-judgment interest statute (R.C. 1343.03(C)) that was in effect at the time the jury rendered its verdict, *instead of the version of the statute that was in effect at the time the incident occurred or at the time Kyle Smith and his parents filed their original complaint.* This court noted that there was authority, namely the Eighth District's opinion in *Barnes*, to support appellant/cross-appellee's argument that the version of the pre-judgment interest statute contained in the amended version of R.C. 1343.03(C) could be applied retroactively. However, this court cited with the First, Third, and Seventh Districts which held to the contrary. Based on the foregoing, the Eighth District Court of Appeals applied the issue presently before this court. (See 7/12/2012 entry granting motion to certify in part and denying in part, pgs. 2-3). (Emphasis added).

Appellees have asserted that the underlying appellate court's PJI decision is predicated on the conclusion that appellees' rights to PJI accrued at the time of the tort action. (Appellees brief, pgs. 38-40)

In light of the foregoing, it is evident that the two cases certified to be in conflict actually "conflict" in two separate and distinct ways. The *Barnes* case concludes that a plaintiff's right to PJI accrues at a point in time after the accrual of the tort action. The *Longbottom* case, on the other hand, holds that the PJI claim accrues at the same time as the tort claim. Separately, the *Longbottom* court also rejects the *Barnes* decision on the basis of the conclusion that the 2004 amendment may not be applied retroactively.

Appellants submit that both aspects of these "conflicts" can and should be resolved by this court in this case. These issues are raised by virtue of the analysis in each conflicting decision and in the contrary results. Moreover, the underlying courts of this state would undoubtedly benefit from a definitive determination from this court of when a plaintiff's right to PJI accrues. This court has held on numerous occasions that the certification of the record of a case to the Ohio Supreme Court because of a conflict between judgments of the Court of Appeals upon any question brings the entire case, not merely the certified issue, before the Supreme Court for review. See *State v. Volpe,* 38 Ohio St.3d 141, 142, 527 N.E.2d 818 (1988); *Brown v. Borchers Ford, Inc.,* 50 Ohio St.2d 38, 39, 361 N.E.2d 1063 (1941); *Couk v. Ocean Accident & Guaranty Corp.,* 138 Ohio St. 110, 33 N.E.2d 9 (1941). Along the same lines, this court has commented that it may address issues beyond the confines of the certified conflict to avoid the resolution of that issue at a later day. *Penrod v. Ohio Dept. of Admin. Servs,* 2007-Ohio-1688, 113 Ohio St.3d 239, 864 N.E.2d 79, at ¶¶ 28, 42-43.

II. A PLAINTIFF'S RIGHT TO PJI DOES NOT ACCRUE AT THE TIME OF THE TORT.

Appellees have asserted that they have a substantive vested interest in PJI which accrued on the same date that their tort claim accrued. (Appellees' Brief, pg. 34). In support of this proposition, appellees rely on this court's decision in *Musisca v. Massillon Community Hosp.,* 69 Ohio St.3d 673, 635 N.E.2d 358 (1994). Appellees' reliance on this authority is without merit. The singular issue before the court in *Musisca* was whether a trial court, under the pre-2004 version of R.C. 1343.03(C) could apply some date other than the date the tort cause of action accrued as the beginning

date for the calculation of awarded PJI. *Musisca* at ¶ 676. While this case may be relevant to the identification of when PJI may begin to accrue on a judgment, it did *not* consider nor identify the point in time when a plaintiff's right to PJI may be deemed to arise.

More importantly, appellees' position that a plaintiff's right to PJI accrues at the same time the tort right accrues directly contradicts this court's discussion of the basis of a PJI remedy in *Huffman v. Hair Surgeon, Inc.* (1985), 19 Oho St.3d 83. Therein, this characterized the PJI remedy in Footnote 7 as follows:

> R.C. 1343.03(C) is remedial in nature to the extent it provides procedures to remedy wrongs and abuses. *However, its application does not hinge upon, nor does it seek to redress, the underlying tort. Rather, it seeks to remedy the subsequent misconduct of the losing party who fails to make a good-faith effort to settle the case.* As such, the penalty imposed is an award of interest on the judgment in favor of the prevailing litigant.
>
> * * *
>
> *Since the statute is concerned with appellee's continuing misconduct (i.e., lack of good faith in negotiating a settlement) until the time of judgment, and not the underlying tort,* we believe it is appropriate to allow interest to be calculated from the effective date of the statute until "the money is paid." However, appellee's lack of good faith occurring prior to the effective date of the statute cannot be constitutionally penalized. Section 28, Article II of the Ohio Constitution. *Id.* at 87. (Emphasis added).

Pursuant to the analysis in *Huffman,* there can be no question that a plaintiff's right to pre-judgment interest does not "accrue" at the time of the injury. As discussed in *Huffman*, the claim for PJI is neither "hinged" upon the tort claim nor does it seek to redress the tort claim. A plaintiff's PJI claim addresses conduct wholly distinct from the conduct which caused the tort: the defendants' lack of good faith with respect to negotiations which take place after the civil action is filed.

Based on the purpose of the PJI remedy and this court's holding in *Huffman,* there is no rational basis to support appellees' position that a plaintiff's right to PJI accrues at the same point in time as the tort claim.

III. A PLAINTIFF'S PJI CLAIM MUST BE DEEMED TO ACCRUE AT EITHER THE TIME OF THE PJI DETERMINATION OR AT THE TIME THE PLAINTIFF FILED THE CIVIL ACTION WHICH ULTIMATELY GAVE RISE TO THE TORT JUDGMENT.

As discussed in *Huffman,* the PJI remedy is wholly unrelated to the tort action as it arises from conduct which occurs after the action is filed. Moreover, it is also an undisputed fact that a plaintiff does not have a right to PJI merely because his or her tort action was successful. Under both versions of the pre-judgment interest statute, a plaintiff must demonstrate a lack of good faith negotiations. The *Barnes* court concluded that the PJI hearing constituted the point in time when a plaintiff's PJI claim accrues for purposes of determining which version of R.C. 1343.03(C) should apply to the PJI claim. For reasons previously discussed, this conclusion is far more consistent with the holding in *Huffman* versus the *Longbottom* court's conclusion that the plaintiff's right to PJI accrues at the same time the tort claim accrued.

A second logical alternative which, although not directly addressed in the *Barnes* case and finds support in the statutory language of amended R.C. 1343.03(C), is that a plaintiff's right to PJI should be deemed to accrue when the plaintiff files the civil action upon which the judgment is rendered in the tort claim. Appellees have acknowledged that the civil action upon which the judgment was rendered in this case was premised on the re-filed complaint which was filed after the effective date of R.C. 1343.03(C).

The 2004 version of R.C. 1343.03(C) provides as follows:

> 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 their 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 cas4e 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: . . . (Emphasis added).

The italicized language in this statue unequivocally links the right to seek PJI to the filing of "a civil action . . . in which the court has rendered a judgment . . ." When applying this language in the context of this case, it is undeniable that the tort "judgment" rendered by the underlying trial court was based on the re-filed "civil action" instituted by the plaintiffs on March 3, 2008. As the "civil action" giving rise to the underlying judgment in this case was filed after the 2004 version of R.C. 1343.03(C) became effective, appellees' PJI claim should be subject to the 2004 statute.

Appellees argue that their re-filed complaint in 2008 should be deemed to "relate back" to the originally filed complaint in 2003, relying on cases which have considered statute of limitation issues, failure to prosecute under Civ. R. 41(B)(1), a plaintiff's jury demand, or a request for attorney fees. However, appellees' reliance on this case law ignores the fact that the issue addressed in each case related to legal issues which were relevant to the originally filed tort claim. Once again, a PJI claim is not "hinged" upon the tort claim nor does it seek redress related to the tort claim. *Huffman* at fn 7.

Moreover, appellees' "relation back" position ignores the express language in the 2004 statute which unequivocally links the right to PJI to the filing of the civil action upon which the tort judgment was granted. As such, appellees proposed reliance on "relation back" principles impacting the underlying tort claim is misplaced.

In sum, the express statutory language as set forth in amended R.C. 1343.03(C) compels the determination that a right to assert PJI is linked to the PJI determination and/or the plaintiff's filing of the civil action in which a judgment was rendered. Both of these dates occurred after the effective date of R.C. 1343.03(C), and, as such, the amended statute should be construed to govern appellees' PJI claim.

IV. THE 2004 VERSION OF R.C. 1343.03(C) SHOULD BE CONSTRUED TO APPLY RETROACTIVELY TO PJI CLAIMS WHICH ARE DEEMED TO HAVE ACCRUED PRIOR TO THE STATUTE.

For the reasons set forth in argument sections 2 and 3, appellants submit that this court can resolve the conflict issue by determining that appellees' right to PJI accrued at either the time of the PJI hearing or when appellees filed their re-filed civil action on 3/8/2008. However, should this court disagree with appellants' position on the accrual of a plaintiff's PJI claim, appellants may still prevail in the case if this court agrees that the 2004 version of the statute should be applied retroactively.

In arguing against the retroactive application of the 2004 version of the statute, the appellees first claim, citing to the appellate court decisions in *Hodesh v. Korelitz, M.D.*, 1st Dist. No. C-061013, 2008-Ohio-2052; *Scibelli v. Pannunzo*, 7th Dist. No. 05MA150, 2006-Ohio-5652, and *Conway v. Dravenstott*, 3rd Dist. No. 3-07-05, 2007-Ohio-4933, that the "overwhelming" majority perspective holds against the retroactive application. While appellees are correct in their characterization of these holdings, a review of the logic behind the holdings evidences a fundamental flaw in their analysis.

In *Scibelli*, the court of appeals recognized the *Barnes* court holding that the right to PJI did not accrue until the PJI hearing. *Scibelli* at 149. However, *Scibelli* ultimately

ignored this position and applied an analysis of whether the amended statute could be applied retroactively. *Scibelli* at ¶¶ 142-149. It can only be presumed that the *Scibelli* court adopted the plaintiff's position that "since pre-judgment 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. *Scibelli* at ¶ 141. Based on this conclusion, *Scibelli* conducted a retroactive application analysis and held that because there was no clearly expressed statutory language indicating the General Assembly's intent to have amended R.C. 1343.03(C) applied retroactively to pending cases, the pending litigants' PJI claim should be subject to the pre-2004 version of the statute.

In light of the foregoing, the *Scibelli* decision is predicated on the presumption that the plaintiff's right to assert the PJI claim arises at the same time as the tort action. For reasons already discussed in Sections 2 and 3, this conclusion is contrary to Ohio law and the very purpose of the PJI remedy.

In *Conway*, the appellant also argued that amended R.C. 1343.03(C) should apply to the plaintiff's PJI claim as this statute was amended while the case was still pending. Without even addressing the issue of when the plaintiff's claim for PJI may be deemed to accrue and how that determination may impact the issue on which version of the statue to apply, the *Conway* court, citing the decision in *Scibelli,* concluded that amended R.C. 1343.03(C) could not be applied retroactively. *Conway* at ¶ 15.

Lastly, in *Hodesh*, the court noted that when the plaintiff filed his tort claim in 2002, PJI was governed by the pre-2004 version of R.C. 1343.03(C). The appellant argued, relying on the *Barnes* decision, that the 2004 version of the statute should apply

to the plaintiff's PJI claim because the jury verdict on the tort claim, the judgment, the motion for pre-judgment interest, and the pre-judgment interest hearing all took place after the effective date of the 2004 statute. The *Hodesh* court rejected the analysis set forth in *Barnes* and, citing to the *Scibelli* and *Conway* decisions, held that under the previous version of the statute, pre-judgment interest started on the date a cause of action accrued. *Hodesh* at ¶ 63. Thus, the *Hodesh* decision is likewise premised on the conclusion that the plaintiff's right to the PJI claim accrued at the time the tort action accrued. Based on this conclusion, the court went on to hold that the 2004 amendment could not be applied retroactively to a claim which had already accrued. *Hodesh* at ¶¶ 65-66.

In sum, the decisions rendered in this case, as well as in *Scibelli, Conway,* and *Hodesh,* are all premised on the position that a plaintiff's right to a PJI claim accrues at the time the tort claim accrues. This conclusion is contrary to this court's holding in *Huffman* which held that a PJI remedy claim "does not hinge upon, nor does it seek to redress the underlying tort." *Huffman* at Footnote 7. Again, a PJI claim seeks to remedy the subsequent misconduct of the defendant in failing to make a good-faith effort to settle the case. These holdings likewise ignore the express language in amended R.C. 1343.03(C) which links a party's right to raise a PJI claim to "a civil action . . ." in which the court had rendered judgment.

For the reasons previously discussed, the most logical accrual point of a plaintiff's PJI claim would be at the time of the PJI hearing as recognized in *Barnes,* or, in the alternative, on the day that plaintiff filed the civil action upon which the tort action judgment was rendered. Under either standard, appellees' PJI claim in this case must

be deemed to accrue after the effective date of the amended version of the statute. As such, the underlying appellate decision is in error.

Next, appellees argue that the retroactive application of amended R.C. 1343.03(C) would improperly interfere with a right which had already come into existence. This argument is nothing more than a reiteration of the erroneous position that a plaintiff's PJI claim accrues when the tort claim accrues. Appellees' reliance on this court's decision in *Musisca v. Massillon Community Hosp.*, 69 Ohio St.3d 673, 635 N.E.2d 358 (1994) is misplaced. In *Musisca*, this court addressed the singular issue of whether a trial court, for equitable reasons, may apply some date other than the date the cause of action accrued as the beginning date to calculate PJI. *Musisca* at ¶ 676. While this decision may be relevant to the calculation of PJI interest, it is not relevant to the determination of when a plaintiff's right to PJI accrues.

Appellees' reliance on *Blair v. McDonagh,* 177 Ohio App.3d 2102, 2008-Ohio-3698, 894 N.E.2d 377 (1st Dist.) is likewise misplace as that case dealt with the potential retroactive application of a damage remedy (punitive damages) to a plaintiff's vested interest in the tort action. For reasons previously argued, a PJI claim is wholly unrelated to the tort claim. As a consequence, the analysis of a change in the law impacted a vested tort claim is not relevant.

Appellees also argue that the 2004 statute creates new statutory duties and burdens which did not exist "when the Smith's cause of action accrued." (Appellees' Brief, pg. 20). Specifically, appellees cite to Sections R.C. 1343.03(C)(1)(c)(i) and (ii) in the 2004 statute which provides that PJI shall be calculated "for the longer of" the point when the plaintiff first gave notice to the party and the party's insurer that a cause of

action had accrued (Section (i)) or the date on which the plaintiff filed the pleading on which judgment was rendered (Section (ii)). Appellees' efforts to characterize the foregoing as new "statutorily imposed duties" is disingenuous. Sections (i) or (ii) do not impact a party's right to PJI, they only impact the date from which PJI may be calculated from. These sections of the statute do not impose any new "duties" which impact the right of a plaintiff to receive PJI.

Lastly, appellees argue that the statutory language of amended R.C. 1343.03(C) does not express the requisite legislative intent to permit retroactive application of that section. Appellees concede that this court has already determined that R.C. 1343.03(A) has retroactive application in *Maynard v. Eaton Corp.*, 119 Ohio St.3d 443, 2008-Ohio-4542, 895 N.E.2d 145, but nevertheless argue that this court may find otherwise with respect to Subsection (C).

Appellees' statutory construction argument understandably ignores the full context of amended R.C. 1343.03. Subsection C references its application to "a civil action" upon which a judgment is rendered. There is no terminology utilized which would justify the restricted construction advocated by appellee. Appellees also would have this court ignore the legislative history of 2003 Ohio H.B. 212 which evidences the legislature's intent to "preclude" interest on future damages. Finally, appellees' statutory construction analysis completely disregards the conclusion reached in *Barnes* which appropriately focuses on when a plaintiff's right to PJI may be deemed to accrue.

In sum, the language of amended R.C. 1343.03(C) and the legislative history giving rise to its passage reflect the General Assembly's intent to preclude PJI on future damages on all "civil actions" upon which a tort judgment is rendered.

V. AMENDED R.C. 1343.003(C) IS A REMEDIAL STATUTE WHICH MAY BE CONSTITUTIONALLY APPLIED RETROACTIVE.

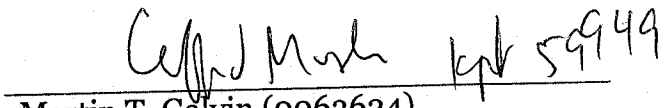
In the final argument, appellees contend that amended R.C. 1343.03(C) cannot be constitutionally applied retroactively as it is not a purely remedial statute because it imposes new obligations and impacts vested rights. These arguments have been demonstrated to be disingenuous. More importantly, as amended R.C. 1343.03(C) merely substitutes a new, more appropriate remedy for the enforcement of an existing right, it must be deemed remedial in nature. *Ackison v. Anchute Packing Co.*, 129 Ohio St.3d 228, 231, 2008-Ohio-5243, 897 N.E.2d 1118. Appellees' final argument also ignores the fact that this court has already construed R.C. 1343.03 as a remedial statute in *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83, 87, 482 N.E.2d 1248 (1985).

VI. CONCLUSION

For all the reasons presented herein, appellants request that this court resolve the certified conflict in favor of the analysis set forth by the Eighth District Court of Appeals in *Barnes v. Univ. Hosp. of Cleveland*, 8th Dist. No. 87247, 2006-Ohio-6266. This court should determine that a plaintiff's right to PJI either accrues as of the hearing date for PJI, or, in the alternative, upon the plaintiff's filing of the civil action which gave rise to the judgment in the tort action. Under either accrual date, appellees' claim for PJI must be deemed subject to amended R.C. 1343.03(C).

Alternatively, this court should find that amended R.C. 1343.03(C) may be applied retroactively to PJI claims which may be deemed to have accrued prior to the effective date of this statute.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served on the undersigned counsel, this 1 day of April, 2013, via ordinary U.S. mail, postage prepaid.

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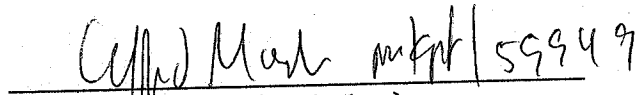

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