

**IN THE SUPREME COURT OF OHIO**

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**CASE NO. 2013-0261**

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**HENRY JONTONY, PATRICIA JONTONY, KARA JONTONY,  
AND DOMINIC JONTONY,  
Plaintiffs/Appellees**

**v.**

**LEE J. COLEGROVE AND THE CITY OF STRONGSVILLE  
Defendants/Appellants**

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**ON APPEAL FROM THE EIGHTH APPELLATE DISTRICT,  
CUYAHOGA COUNTY, OHIO, CASE NO.: 12 098295**

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**MEMORANDUM IN RESPONSE OF APPELLANT/CROSS-APPELLEE, CITY OF  
STRONGSVILLE**

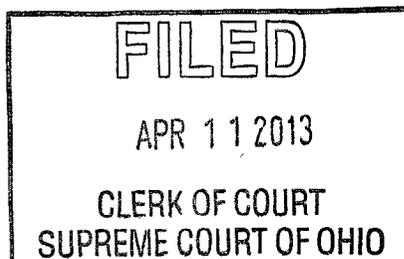
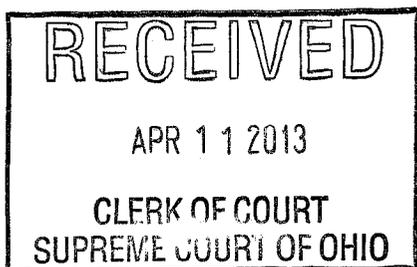
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**THE CROSS-APPEAL DOES NOT INVOLVE ISSUES OF PUBLIC AND GREAT GENERAL IMPORTANCE OR A SUBSTANTIAL CONSTITUTIONAL QUESTION**

Cross-Appellants claim error in the Eighth District's Order and Opinion affirming the trial court's denial of a motion for prejudgment interest. Cross-Appellants do not claim error in the legal standards applied by the Eighth District or the trial court. Rather, Cross-Appellants take issue with the conclusions reached by these lower courts in assessing the facts presented by the parties, and based upon the unsupported accusation that both courts "ignored the record." This is merely another way of saying the conclusions of these lower courts are against the weight of the evidence. This Court does not have jurisdiction to weigh evidence. *See* Section (B)(2), Article IV of the Ohio Constitution; and, *Neave Bldg. Co. v. Roudebush*, 96 Ohio St. 40, 42 (1917) ("Whether [a] finding was against the manifest weight of the evidence was a question properly before the lower courts for determination." \*\*\* "[T]his court does not determine as to the weight of the evidence.").

Contrary to the assertions in Cross-Appellant's "Statement of Public and Great General Importance," the decision of the Eighth District to affirm the trial court's denial of the motion for prejudgment interest does not "create confusion" because the proper legal standards were applied to the evidence presented. Cross-Appellants ask this Court to adopt a "proposition of law" that is fact specific to circumstances of this case; i.e. that the "good faith effort to settle" described in R.C. 1343.03(C) requires a defendant to offer more than 35% of the assessed authority for every civil lawsuit in Ohio regardless of the status of settlement negotiations and the viability of colorable defenses raised by the defendant. This "proposition of law" is a rather transparent attempt to improperly invoke the jurisdiction of this Court to review the reasons why a particular amount was offered to settle **this** case and whether those reasons comport with the good faith

requirement of the statute. Therefore, this Cross-Appellant has not presented an issue of public or great general importance and jurisdiction of the Cross-Appeal must be rejected.

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

This Statement is limited to the facts relevant to this Cross-Appeal. The facts of the case are set forth more fully in Cross-Appellee's Memorandum in Support of Jurisdiction previously filed with the Court. The facts set forth herein are related to Cross-Appellee's efforts to settle the case prior to trial, and were made part of the record at a hearing on Cross-Appellants' motion for prejudgment interest.

The motor vehicle accident that forms the basis for this litigation occurred in December, 2006. Shortly thereafter, Cross-Appellant ("Jontony") retained counsel to pursue a claim against the Cross-Appellee ("City of Strongsville") and Sergeant Lee Colegrove. Jontony's counsel initially contacted Strongsville's insurer regarding this claim on January 18, 2007. (TR 1662). Strongsville's insurer responded promptly and requested that counsel for Jontony provide specific allegations of liability, copies of medical records supporting the claimed injuries, and any available witness statements. *Id.*

Counsel for Jontony did not contact Strongsville's insurer again until more than a year later. (TR 1663). On January 23, 2008, counsel for Jontony contacted Strongsville's insurer and stated that his client had sustained a brain injury and was unable to work. *Id.* at 1664. Strongsville's insurer again requested medical documentation. *Id.* Jontony's counsel stated it would be an additional six or seven months before he would provide records. *Id.* Counsel also stated the claim was worth "six to seven figures," but declined to provide a settlement demand. *Id.* at 1664-65.

Suit was filed December 3, 2008. Jontony's counsel declined to provide a demand to Strongsville's insurer until January, 2009, more than two years post-accident. At that time, the initial demand was \$10.5 million. (TR at 1638). However, the documented medical history of Jontony's injury raised significant questions regarding the claimed damages. (Ex. W, January 30, 2012 hearing, deposition of Steve Afton at p. 35-36) (Mr. Afton was the insurance adjuster responsible for the case). Jontony returned to work just a few days after the motor vehicle accident. His medical presentation was initially typical for a patient who sustained a mild concussion. In fact, Jontony continued in his job as a union carpenter for nine consecutive months post-injury and his own treating neurologist had reported the concussion symptoms had resolved in typical fashion. (TR at 1787). Mr. Jontony could walk, he could talk, he could feed himself, he could bathe himself, he could drive an automobile, and for at least 9 months post-accident he could even work.

Based upon the apparent inconsistencies in Jontony's claimed level of impairment and his documented recovery post-accident, Strongsville requested and obtained an independent medical examination. (Deposition of Steve Afton at p. 35-36). The independent medical examiner determined that the claimed level of impairment was inconsistent with the nature and extent of the injury sustained. (TR at 1787-88). Further, the medical expenses incurred as a result of the injury barely totaled \$40,000, much of which was subject to set-off pursuant to statute. Likewise, non-economic damages were subject to a statutory cap of \$250,000 per person.

Strongsville's insurer evaluated exposure based upon all of the available information, set reserves, provided settlement authority, and participated in settlement negotiations. (See generally, Ex. W, deposition of Steve Afton). The case was mediated by a respected former jurist. Strongsville and its insurer participated in multiple settlement conferences and made good

faith offers to resolve the case prior to trial. It is important to note that the trial court judge actively participated in settlement conferences, and had face-to-face conversations with Strongsville's counsel and insurance representatives regarding its settlement position in this case. The trial court judge was made aware of Strongsville's full authority at each settlement conference for purposes of facilitating negotiations, which by the time of the final pretrial was \$500,000. (TR at 1756; see also claim file, Ex. V, January 30, 2012 hearing).

Despite Strongsville's good faith efforts, it was not possible to resolve the case prior to trial. A final pretrial conference was held on June 9, 2011. During the pretrial conference, the trial court judge again attempted to facilitate settlement negotiations. At the time of this conference, Jontony's demand was \$2.9 million. Strongsville attempted to stimulate negotiations and increased its prior offer of \$125,000 to \$175,000. (TR at 1800). Jontony's counsel informed Strongsville that the demand would not be reduced unless the offer was increased to \$1 million. *Id.* When Strongsville declined, Jontony terminated negotiations. *Id.*

The following day, counsel for Strongsville called counsel for Jontony on the telephone and reiterated to him that Strongsville remained open to negotiate a settlement in the "hundreds of thousands of dollars, but not in the millions of dollars," and inquired as to whether it was possible for Jontony to reduce his demand to \$1 million (TR 1777). Counsel for Strongsville made it clear that although there was significant room for movement by Strongsville, there was not \$1 million in authority available to resolve the case. Counsel for Jontony again declined to reduce the demand. *Id.*

On the day trial was scheduled to begin, the trial court judge inquired regarding the status of settlement negotiations. Counsel for Strongsville reported his telephone conference with Jontony's counsel and informed the court that each party had requested the other to come to \$1

million and both parties were unwilling to do so. (TR at 1775-77). The court was informed that neither party was willing to resolve the case for \$1 million. (TR at 1656, 1658, 1798, 1800-1802). The case was tried to a jury.

At the conclusion of the two week trial, the jury reached a verdict in favor of Mr. Jontony in the amount of \$1,056,608.80, and in favor of Plaintiff Patricia Jontony in the amount of \$50,000. Pursuant to R.C. 2744.05, the award for non-economic damages to Mr. Jontony was reduced from \$500,000 to \$250,000. An additional \$250,000 in lost wages and services was potentially subject to set-off based upon benefits received by Jontony. At the conclusion of trial, the potential range for final judgment in the case was roughly between \$450,000 and \$850,000. The set-off issues remain in dispute on this appeal.

Discovery was conducted and a full hearing was held on January 30, 2012, regarding Jontony's motion for prejudgment interest. The claims attorney responsible for Jontony's claim at Midwest Claim Service (Strongsville's insurance representative) was deposed and his deposition testimony was admitted as evidence at the hearing (See Ex. W, January 30, 2012 hearing). The claim file was produced to the trial court for in camera inspection, non-privileged portions of the claim file were produced to Jontony, and relevant portions were admitted as evidence at the January 30, 2012 hearing (See Ex. V, January 30, 2012 hearing). Correspondence between counsel relevant to settlement negotiations was admitted as evidence, and lead counsel for each party testified at the hearing.

On April 6, 2012, the trial court issued an order denying Jontony's motion for prejudgment interest. Specifically, the trial court found that Strongsville "rationally evaluated their risks and potential liability," and that Strongsville made a "good faith monetary settlement offer and responded in good faith to offers made by [Jontony]." Contrary to Jontony's assertion

that the trial court “ignored the record,” the order stated that the trial court considered “the briefings, the testimony provided at the hearing, and the exhibits.” The trial court concluded that it was proper for Strongsville to take into account not only the disputed evidence regarding the nature and extent of the injury, but also the potential application of statutory caps and set-offs:

As Defendants argue, and as the record indicates, Defendants had a reasonable expectation that any jury award would likely be subject to set-offs and non-economic damages caps pursuant to R.C. §2744.05. The likely imposition of both set-offs and non-economic damages caps to any jury award, then, would undeniably factor into Defendant’s calculus in evaluating their risks and potential liability in the matter *sub judice*.

Journal Entry and Opinion, April 6, 2012, at p. 2.

Although not directly stated by the trial court, Strongsville had also preserved an appeal for the denial of its motion to amend and assert immunity – a complete defense to the claimed damages.

The denial of the motion for prejudgment interest became the subject of Jontony’s cross-appeal in the Eighth District Court of Appeals. As here, Jontony argued that the amount offered by Strongsville was not offered in good faith because there was additional authority not offered during settlement negotiations. Essentially, Jontony argued that R.C. 1343.03(C) required a defendant to offer all (or almost all) of its authority regardless of any other facts and circumstances in a given civil case. The Eighth District rejected this contention, holding:

The Jontonys ask this court to establish a rule of law that good faith is evidenced by comparing the offers made by one party to the settlement authority it possesses — if an offer to settle is substantially disparate to actual settlement authority, then the offering party has not exercised good faith in settlement. While this may be a factor, it cannot be the sole basis for finding lack of good faith.

*Jontony v. Colegrove*, 2012-Ohio-5846, ¶63 (8<sup>th</sup> Dist.)

The court also recognized the disparity between the verdict and Plaintiff's multi-million dollar demand in the case, *id.* at ¶66, and the trial court judge's personal and active involvement in settlement negotiations throughout the litigation. *Id.* at ¶67. "We find the trial court's decision denying prejudgment interest was based on competent, credible evidence; thus, not an abuse of discretion." *Id.*

**ARGUMENT IN SUPPORT OF CROSS-APPELLEE'S POSITIONS REGARDING  
CROSS-APPELLANTS' PROPOSITIONS OF LAW**

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

This is not a proposition of law. This is an argument that misstates the evidence presented to the trial court. If it is a proposition of law, it is certainly not a proposition of law that should be adopted by this Court as the law of Ohio.

This is not a proposition of law because it is based solely upon the facts of the case as perceived by Cross-Appellant and not upon the standards this court set forth in *Kalain v. Smith* (1986), 25 Ohio St. 3d 157. In fact, Plaintiff's "argument" associated with the "proposition of law" is not supported by citation to a single case or any other authority from anywhere in the United States.

A party has not "failed to make a good faith effort to settle" under R.C. 1343.03(C) if the party 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 another party. *Kalain v. Smith* (1986), 25 Ohio St. 3d 157.

As it relates to the instant cross-appeal, Jontony does not claim Strongsville failed to cooperate in discovery, failed to rationally evaluate the risks and liability, or unnecessarily delayed proceedings. Rather, Jontony claims that Strongsville did not make a good faith effort to settle based upon one factor – the disparity between the amount offered and the authority and reserves. Such narrow “one factor” interpretations of R.C. 1343.03(C) have been unanimously rejected by the courts in Ohio. See, e.g., *Emerson v. Yurchak*, 2006-Ohio-6162, ¶11 (1st Dist.); *Burton v. Slusher*, 2008-Ohio-4812, ¶102 (7th Dist.); *Andre v. Case Design, Inc.*, 154 Ohio App.3d 323, 2003-Ohio-4960, ¶15; *Szitas v. Hill*, 165 Ohio App. 3d 439, 2006-Ohio-687(8th Dist.); *Flynn v. Nutt*, 11th Dist. No. 96-T-5466, 1996 Ohio App. LEXIS 4683 (Oct. 25, 1996) (the amount of the reserve, alone, is not determinative of whether a particular offer is reasonable, but is only one factor to be considered by the trial court).

It is well settled that a trial court may consider many factors in determining whether an offer is made in good faith. A trial court may consider the evidence presented at hearing and its own interaction and involvement with the parties in pretrial conferences and settlement conferences. *Pruszyński v. Reeves*, 117 Ohio St. 3d 92, 95 (Ohio 2008). “The court may also review the evidence presented at trial, as well as its prior rulings and jury instructions, especially when considering such factors as the type of case, the injuries involved, applicable law, and the available defenses.” *Galmish v. Cicchini*, 90 Ohio St. 3d 22, 34 (2000). Bright line rules are disfavored in the context of determining good faith because such rules necessarily interfere with the discretion afforded the trial court by the statute. *Allied Erecting & Dismantling Co. v. City of Youngstown*, 2004-Ohio-3665, at ¶22 (7th Dist.).

Jontony asks this Court to overturn almost two decades of precedent establishing a multi-factor test to determine good faith in favor of a bright line, single factor analysis. This request must be rejected. Adopting such a test would upset the balance of settlement negotiations in a way never intended by the legislature in adopting R.C. 1343.03(C). Jontony believes the statute should be used as a vehicle to impose a unilateral requirement (only on defendants) to offer all (or almost all) available money to demonstrate good faith in settlement negotiations. Obviously, such a burden on civil defendants would create an incentive for plaintiffs to refuse to negotiate at all, knowing that the defendant is required to offer all (or almost all) available funds to resolve a particular case even if that defendant has viable defenses or grounds for an appeal.

Further, Jontony ignores the provision in the statute that imposes a duty of good faith negotiating upon plaintiffs. Therefore, if this Court were to consider imposing a draconian bright line rule such as that proposed by Jontony, the rule would apply equally to plaintiffs. Plaintiff would be required to put forth their bottom line (or almost bottom line) demand in order to carry their burden of proof on prejudgment interest. In this case, the last demand was \$2.9 million (or \$2.75 million as claimed by Jontony). Viewed from the perspective of Jontony's proposed bright line test, it must be concluded that such a demand was not sought in good faith because the demand was more than three times the ultimate judgment in the case, and more than five times the \$500,000 Jontony claims was not offered to settle the case.

Ironically, Jontony complains that Strongsville offered only 35% of its \$500,000 authority, while ignoring the fact that \$500,000 is only 18% (or 17%) of Jontony's demand. Applying Jontony's own bright line 35% test, and assuming Jontony would have accepted \$500,000 (which there is no evidence in the record to support), the demand would have to be

\$1.4 million in order to have been made in good faith. Jontony cannot pass the test of good faith he asks this Court to adopt.

R.C. 1343.03 is not subject to such rudimentary calculations. The trial court is vested with the discretion to consider **all** of the facts and circumstances surrounding settlement negotiations – not just one. As is the case here, where there is competent, credible evidence in the record supporting the trial court’s conclusion, the conclusion must not be disturbed on appeal. The bright line 35% rule proposed by Jontony is inconsistent with this Court’s precedent and the purpose of R.C. 1343.03.

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

There is no basis to conclude that the trial court “ignored the record” in deciding Jontony’s motion for prejudgment interest. *Szitas* is easily distinguished from the instant case. In *Szitas*, the Eighth District concluded that the trial court abused its discretion in denying prejudgment interest because the defendant in the case (1) failed to cooperate in discovery, responding only when compelled to do so; (2) was sanctioned for dilatory conduct, procrastination, and delay; (3) based its valuation of the case on “length of treatment” without considering the past medical expenses incurred; (4) failed to rationally evaluate risks and liability; and, (5) failed to respond to 37% reduction in the demand just prior to trial. *Szitas v. Hill*, 165 Ohio App. 3d 439, 2006-Ohio-687(8th Dist.).

None of these factors are present in the instant matter. There is no allegation that Strongsville failed to cooperate in discovery, and Strongsville was not sanctioned at any point in this litigation. Strongsville’s valuation of the case was based upon a multitude of complex factors

including an atypical medical presentation, conflicting evidence regarding the onset of key symptoms associated with the claimed injury, conflicting medical opinions of treating physicians and independent experts, past medical expenses of approximately \$40,000 accrued over a four year period, the application of statutory set-offs and caps, and a potential complete defense of immunity contingent upon a successful appeal (which ultimately resulted in a 2-1 appellate decision against Strongsville). Strongsville participated in private mediation and multiple settlement conferences with the trial court and communicated the basis for its offers.

Unlike the defendant in *Szitas*, Strongsville did not fail to respond to a significant reduction in the demand prior to trial. In fact, it was Jontony who terminated negotiations at the final pretrial after Strongsville increased its offer, and it was Jontony who declined the invitation to reduce his demand to \$1,000,000, a figure representing **twice the authority** Strongsville had to settle case. Prior to trial, Jontony was aware that Strongsville had additional authority in the “hundreds of thousands of dollars” and nevertheless declined to reduce his multi-million demand prior to trial. The record is clear that Jontony’s counsel brazenly scoffed at the notion that the case should settle for less than \$1,000,000.

Therefore, this was a case that simply had to be tried. There is no evidence in the record that Plaintiff would have accepted an amount in settlement even remotely close Strongsville’s rationally evaluated authority. To the extent Jontony now claims after the fact that he would have accepted such a figure, there is certainly no evidence that this alleged intention was communicated to Strongsville.

Jontony curiously points to the trial court and appellate court findings that Strongsville’s assessment of the case was rationally based upon the application of caps and set-offs as evidence that these courts “ignored the record.” The record does in fact contain a plethora of evidence

suggesting that the vast gap between the parties' settlement positions was primarily caused by the parties' disparate views of the application of R.C. 2744. Jontony had relatively few economic damages that were not replaced by collateral benefits, including Medicare, insurance, social security, and disability benefits. Non-economic damages were capped by statute. It cannot be error for the trial court and the appellate court to recognize that a political subdivision is entitled to consider these as primary factors in assessing value for a personal injury claim. In recognizing these important factors, it further cannot be said that a trial court "ignored" the rest of the evidence presented at the hearing, or ignored the judge's own interaction with the parties and participation in settlement discussions.

A court must look not only at the amount of a settlement offer, but also what factors the party used in deciding that amount. *Szitas v. Hill*, 165 Ohio App. 3d 439, 448, 2006-Ohio-687. "The question of whether a good-faith offer to settle a case has been made depends on whether the amount of the offer was based on an objectively reasonable belief." *Id.* When a party has "a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer." *Iammarino v. Maguire*, 2003-Ohio-2042, at ¶11 (8<sup>th</sup> Dist.).

Here, the trial court properly found that Strongsville's settlement offers were objectively reasonable, and explained why - it was objectively reasonable to believe caps and set-offs would reduce any award. Further, there is evidence in the record that Strongsville had an objectively reasonable belief that it was immune from liability. Therefore, Strongsville was not necessarily required to make any offer on this case.

What Jontony is really saying is that, in the view of Jontony, other evidence presented was more important or should have carried greater weight than evidence relied upon by the trial

court and the court of appeals. Even if true, it is not an abuse of discretion for a judge to give greater weight to other evidence. The voluminous record on this issue is replete with competent, credible evidence that Strongsville attempted to negotiate a settlement of this complex case in good faith, even in the face of Jontony's outrageous monetary demands and the sometimes abusive conduct of his counsel.<sup>1</sup> The testimony of the insurance adjuster (who is not a resident of Ohio) was taken by deposition and submitted as evidence at the hearing. Counsel for Strongsville testified at the hearing and further explained the basis for Strongsville's settlement position in the case. The claim file was submitted as evidence. The trial court judge stated in her order that she reviewed all of these materials. Accordingly, there is no basis to conclude that the record was ignored. Jontony simply disagrees with the conclusion, and that is insufficient to establish an abuse of discretion.

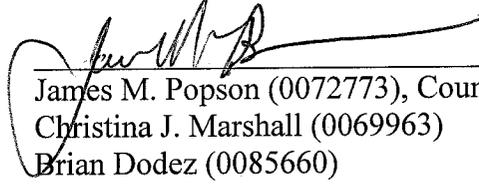
### **CONCLUSION**

For all the foregoing reasons, this Court should deny jurisdiction to review the propositions of law set forth by Cross-Appellant.

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<sup>1</sup> The record contains numerous letters sent by counsel for Jontony stating personal attacks on defense counsel.

Respectfully submitted,



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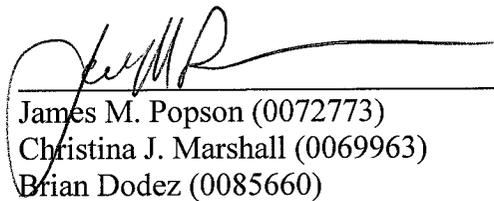
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**CERTIFICATE OF SERVICE**

A copy of the foregoing *Memorandum in Response of Appellant/Cross-Appellee* has been mailed via regular U.S. Mail, on this 10th day of April, 2013, to:

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