**[Cite as *Longbottom v. Mercy Hosp. Clermont*, 2012-Ohio-2148.]**

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

| | | |
|---|---|---|
| KRISTI LONGBOTTOM, et al., Individually and as Natural Guardians of Kyle Jacob Smith, | : | |
| Appellees/Cross-Appellants, | : | CASE NOS. CA2011-01-005<br>CA2011-01-006 |
| | : | O P I N I O N |
| - vs - | : | 5/14/2012 |
| | : | |
| MERCY HOSPITAL CLERMONT, et al. | : | |
| Appellants/Cross-Appellees. | : | |

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

The Lawrence Firm, P.S.C., Richard D. Lawrence, Jennifer L. Lawrence, 606 Philadelphia Street, MainStrasse Village, Covington, KY 41011, for appellees/cross-appellants

Reminger Co., L.P.A., Michael Romanello, Melvin J. Davis, 65 East State Street, 4th Floor, Columbus, Ohio 43215, for appellants/cross-appellees, Gary S. Huber, D.O. and Qualified Emergency Specialists, Inc.

Lindhorst & Dreidame Co., L.P.A., Michael F. Lyon, Bradley D. McPeek, 312 Walnut Street, Suite 3100, Cincinnati, Ohio 45202, for appellants/cross-appellees, Gary S. Huber, D.O. and Qualified Emergency Specialists, Inc.

**HENDRICKSON, P.J.**

**{¶ 1}** Appellants/cross-appellees, Gary Steven Huber, D.O. and Qualified Emergency Specialists, Inc., appeal from a judgment of the Clermont County Court of Common Pleas awarding $2,743,673.66 in damages and prejudgment interest to appellees/cross-appellants,

Kyle Jacob Smith and his parents, Kristi Longbottom and Jesse Smith, on their claims for medical malpractice and loss of consortium. Dr. Huber and QESI argue the trial court erred by, among other things, overruling their motion for judgment notwithstanding the verdict or, alternatively, for a new trial, because Kyle and his parents presented no evidence to establish a causal link between Dr. Huber's alleged negligence and Kyle's injuries. Kyle and his parents argue on cross-appeal that the trial court erred by refusing to award them prejudgment interest for the period in which they voluntarily dismissed their action under Civ.R. 41(A) and then refiled it less than one year later, and by refusing to instruct the jury on the emotional distress claim brought by Kyle's parents.

**{¶ 2}** For the reasons that follow, we overrule all of Dr. Huber and QESI's assignments of error, as well as Kyle and his parents' second cross-assignment of error regarding the emotional distress claim of Kyle's parents. However, we sustain Kyle and his parents' first cross-assignment of error, because the trial court erred in refusing to grant them prejudgment interest from the date they voluntarily dismissed their malpractice action to the date they re-filed it less than one year later. Therefore, we remand this cause to the trial court for the limited purpose of awarding prejudgment interest to Kyle and his parents for that period.

**{¶ 3}** On March 22, 2002, Kyle Smith, who was then nine years old, was playing a game with two other children at the home of a family friend. The children were holding hands and spinning around to see who would fall first. Kyle fell and hit the left side of his head against a coffee table. Jesse Smith was in the next room and heard Kyle hit the coffee table so hard that he could hear the glass in the table rattle. Smith took Kyle home and told Longbottom what had happened. After Kyle vomited and began to experience jaw pain, his parents took him to the emergency room at Mercy Hospital Clermont.

**{¶ 4}** While they were waiting to see a physician, an emergency room nurse, Diane

Kruse, R.N., gave Kyle's parents a pamphlet on head injury that stated any head injury should be considered serious, irrespective of whether the person was rendered unconscious thereby, and that it was most important that the injured person be watched closely for the first 24 hours following the injury. The pamphlet stated that a responsible person must stay in the room with the patient and watch for a list of symptoms, including whether the patient is mentally confused, cannot be awakened from sleep, is unusually drowsy or vomits persistently, or the patient's pupils are of unequal size. The pamphlet further stated that if the patient cannot be awakened, then the person watching the patient was to call 911 and have the patient returned to the emergency room. Nurse Kruse later testified that it was her usual practice to explain the pamphlet to the parents of a child who suffered a head injury but to defer to the physician the final determination as to whether the instructions in the pamphlet were indicated for any given patient.

**{¶ 5}** Kyle was seen by Dr. Huber, who performed a neurological exam on Kyle and found the results to be normal. He sutured the wound on Kyle's ear, gave him some medicine to prevent infection, and discharged him. He chose not to order a CT scan for Kyle because he did not believe one was necessary. Kyle's parents later testified that Dr. Huber told them that they did not need to worry about the instructions in the head injury pamphlet because Kyle's head injury was "not typical" and that they should just let him "sleep it off." Dr. Huber disputed this, testifying that his standard practice was to tell the parents of patients like Kyle to follow the instructions in the head injury pamphlet and that he had done so on this occasion.

**{¶ 6}** Kyle and his parents returned home from the emergency room sometime around midnight. Kyle threw up just a little bit, gagged a few times, and had the dry heaves. Longbottom made a bed for Kyle on the couch so that she could sleep next to him. Kyle went to sleep around 12:20 a.m. Longbottom heard Kyle talking in his sleep at about 2:00

a.m. and then fell asleep herself around 2:00 a.m. or 2:30 a.m. Around 5:00 a.m., Longbottom awoke and noticed that Kyle had vomited, and that he was choking and gasping for air. Longbottom screamed for Smith, who called 911. Just before the police and ambulance arrived, Smith told the 911 dispatcher that when he and Longbottom had asked Dr. Huber at the emergency room if they should wake Kyle every two hours, Dr. Huber told them "no, it won't be a problem."

**{¶ 7}** Kyle was air-cared to Cincinnati Children's Hospital. Upon his arrival, he was found to be near death. A CT scan of his head revealed a massive epidural hematoma causing a midline shift of his brain and brain herniation. Dr. Kerry Crone performed emergency surgery on Kyle to remove the hematoma. Dr. Crone told Kyle's parents that he was not sure if Kyle would live. After spending several days in the hospital's ICU, Kyle survived. He then spent several weeks in the hospital relearning such tasks as swallowing, eating, communicating and walking. As a result of the incident, Kyle sustained permanent injury to his brain and now walks with an altered gait.

**{¶ 8}** In 2003, Kyle and his parents filed a medical malpractice complaint against Dr. Huber and his employer, QESI, and Mercy Hospital. In 2007, Kyle and his parents voluntarily dismissed their action but refiled it less than one year later in 2008. Prior to trial, Kyle and his parents settled their claims against Mercy Hospital.

**{¶ 9}** The matter was tried to a jury over nine days in 2010. Kyle and his parents argued that Dr. Huber was negligent in failing to order a CT scan for Kyle when his parents brought him to the emergency room at Mercy Hospital and that this failure proximately caused Kyle's injuries. Both sides presented expert testimony in support of their respective positions on this issue. Another issue raised at trial was whether Dr. Huber advised Kyle's parents to follow the instructions in the head injury pamphlet, with Kyle's parents and Dr. Huber providing conflicting testimony on the matter as set forth above. Dr. Huber

acknowledged during his testimony that if he actually did tell Kyle's parents that they did not need to follow the instructions in the head injury pamphlet—an assertion that Dr. Huber denied—then such advice would have fallen below the standard of care.

**{¶ 10}** The jury returned a verdict in favor of Kyle and his parents for $2,412,899 after finding that Dr. Huber had been negligent in the care and treatment of Kyle and that Dr. Huber's negligence directly and proximately caused Kyle's injuries. In response to an interrogatory asking them to state in what respects Dr. Huber was negligent, the jury answered, "Based on the evidence, we believe, Dr. Gary S. Huber did not instruct the parents about the possibility of significant head injury or how to observe and monitor Kyle for such injuries." QESI was found liable to Kyle and his parents under a theory of respondeat superior.

**{¶ 11}** The trial court overruled Dr. Huber and QESI's motion for judgment notwithstanding the verdict or, alternatively, for a new trial. The trial court reduced the jury's award to Kyle and his parents by the $500,000 they received from their settlement with Mercy Hospital and awarded them prejudgment interest of $830,774.66, giving them with a total award of $2,743,673.66.

**{¶ 12}** Dr. Huber and QESI now appeal, assigning the following as error:

**{¶ 13}** Assignment of Error No. 1:

**{¶ 14}** THE TRIAL COURT ERRED IN DENYING DR. HUBER'S MOTION FOR JNOV, OR IN THE ALTERNATIVE, FOR A NEW TRIAL, BECAUSE THERE WAS NO EVIDENCE TO ESTABLISH A CAUSAL LINK BETWEEN DR. HUBER'S ALLEGED NEGLIGENCE AND KYLE SMITH'S INJURIES.

**{¶ 15}** Assignment of Error No. 2:

**{¶ 16}** THE TRIAL COURT ERRED BY GRANTING APPELLEES' MOTION FOR PREJUDGMENT INTEREST.

**{¶ 17}** Assignment of Error No. 3:

**{¶ 18}** THE TRIAL COURT ERRED AS A MATTER OF LAW BY FAILING TO APPLY THE CURRENT VERSION OF THE PREJUDGMENT INTEREST STATUTE THAT WAS EFFECTIVE AT THE TIME THE JURY RENDERED ITS VERDICT.

**{¶ 19}** Kyle and his parents cross-appeal, assigning the following as error:

**{¶ 20}** Cross-assignment of Error No 1:

**{¶ 21}** THE TRIAL COURT ERRED AS A MATTER OF LAW BY FAILING TO GRANT PREJUDGMENT INTEREST DURING THE TIME PERIOD THAT THE CASE WAS DISMISSED PURSUANT TO CIVIL RULE 41(A).

**{¶ 22}** Cross-assignment of Error No. 2:

**{¶ 23}** THE TRIAL COURT ERRED IN FAILING TO GIVE A JURY INSTRUCTION AND INTERROGATORY ON THE EMOTIONAL DISTRESS CLAIMS OF KYLE SMITH'S PARENTS.

**{¶ 24}** In their first assignment of error, Dr. Huber and QESI argue the trial court erred in overruling their motion for JNOV or, alternatively, for a new trial, because there was no evidence to establish a causal link between Dr. Huber's alleged negligence and Kyle's injuries. We disagree with this argument.

**{¶ 25}** The standard for granting a motion for JNOV or, alternatively, for a new trial under Civ.R. 50(B) is the same as that for granting a motion for a directed verdict under Civ.R. 50(A). *Wagner v. Roche Laboratories*, 77 Ohio St.3d 116, 121, 1996-Ohio-85, fn. 2. Civ.R. 50(A)(4) states:

> When a motion for directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.

**{¶ 26}** In ruling on a motion for directed verdict or JNOV, a trial court may not consider either the weight of the evidence or the credibility of the witnesses. *Wagner* at 119. So long as there is substantial, competent evidence to support the party against whom the motion is directed and reasonable minds may reach different conclusions on such evidence, the motion must be denied. *Id.* A trial court's decision to grant or deny a motion for a directed verdict or a motion JNOV involves a question of law, and therefore an appellate court's review of that decision is de novo. *White v. Leimbach*, 131 Ohio St.3d 21, 2011-Ohio-6238, ¶ 22, citing *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.,* 95 Ohio St.3d 512, 2002-Ohio-2842, ¶ 4.

**{¶ 27}** To prevail on a medical malpractice claim, a plaintiff must prove by a preponderance of the evidence that the injury complained of was caused by doing or failing to do some particular thing or things that a physician of ordinary skill, care and diligence would not have done or failed to do under the same or similar circumstances, and that the injury complained of was the direct and proximate result of the physician's doing or failing to do such particular thing or things. *Taylor v. McCullough-Hyde Mem. Hosp.*, 116 Ohio App.3d 595, 599 (12th Dist.1996), citing *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 131-132 (1976).

**{¶ 28}** Kyle and his parents argued at trial that Dr. Huber was negligent in not ordering a CT scan for Kyle and that this negligence was the proximate cause of Kyle's injuries. To prove their claim, Kyle and his parents presented expert testimony from Dr. Kenneth Swaiman and Dr. John Tilleli, who testified that Dr. Huber breached the standard of care by failing to order a CT scan for Kyle when he was brought to the emergency room at Mercy Hospital and that this breach of the standard of care proximately caused Kyle's injuries. However, the jury found Dr. Huber negligent for failing to warn Kyle's parents about the possibility of a significant head injury or to instruct them on how to observe and monitor Kyle

for such an injury.

**{¶ 29}** The jury's decision to find Dr. Huber negligent on a theory different from the one advanced by Kyle and his parents at trial has led Dr. Huber and QESI to argue that (1) they were unfairly surprised by the jury's verdict, and (2) Kyle and his parents failed to present "any evidence to establish a causal link between Dr. Huber's alleged negligence and Kyle's injuries," and thus failed to establish the requisite element of proximate cause in support of their medical malpractice claim. We find these arguments unpersuasive.

**{¶ 30}** Initially, Kyle and his parents alleged in their complaint that "Dr. Huber was negligent and deviated from the acceptable standards of care in failing to properly assess, evaluate and treat Kyle Smith on March 22, 2002, in the emergency room and in failing to inform the family of potential dangers," and that Dr. Huber's negligent acts or omissions included "the failure to warn the family of potential risks and dangers." The issue of whether or not Dr. Huber issued proper discharge instructions to Kyle's parents was raised during Dr. Huber's 2004 deposition, which was taken during the original action brought by Kyle and his parents.

**{¶ 31}** Additionally, Dr. Huber noted in his March 2010 pretrial statement that several of his experts were going to testify that the discharge instructions that he gave to Kyle's parents, which, according to Dr. Huber, included the recommendation that they follow the instructions in the head injury pamphlet, met the standard of care, and those experts did, in fact, so testify at trial. Finally, Dr. Huber acknowledged at trial that failing to issue proper discharge instructions to Kyle's parents would amount to conduct that fell below the standard of care. Consequently, the record amply supports the trial court's decision to reject Dr. Huber and QESI's claim of unfair surprise. We also conclude that Kyle and his parents presented sufficient evidence to establish that Dr. Huber's failure to warn Kyle's parents about the possibility of significant head injury and to instruct them on how to observe Kyle for such

injuries following his discharge, was the proximate cause of Kyle's injuries.

**{¶ 32}** In order to prevail on a medical malpractice claim, a plaintiff is generally required to present expert testimony to establish the medical standard of care, that defendant breached that standard of care, and that the defendant's breach of the standard of care proximately caused plaintiff's injuries. *Taylor*, 116 Ohio App.3d at 599; *Powell v. Hawkins*, 175 Ohio App.3d 138, 2007-Ohio-3557, ¶ 13 (1st Dist.). However, if a plaintiff's claims are well within the comprehension of laypersons and require only common knowledge and experience to understand them, the plaintiff is not required to present expert testimony to prove them. *Bruni*, *supra*, 46 Ohio St.2d at 130; and *Schraffenberger v. Persinger, Malik & Haaf, M.D.s', Inc.*, 114 Ohio App.3d 263, 266 (1st Dist.1996).

**{¶ 33}** As to establishing the medical standard of care, this element was established by Dr. Huber's admission at trial that failing to instruct Kyle's parents to follow the instructions in the head injury pamphlet would amount to conduct that fell below the standard of care. There is case law to support this proposition, as well. See, e.g., *D'Amico v. Delliquadri,* 114 Ohio App.3d 579, 583 (1996) ("indisputably, a physician has a duty to give his patient all necessary and proper instructions regarding the level of care and attention the patient should take and the caution to be observed"). *See also*, *Turner v. Children's Hosp., Inc.*, 76 Ohio App.3d 541, 555 (10th Dist.1991) ("many courts have found physicians liable in malpractice for failure to communicate important information to patients[,]" and "a physician, upon completion of his services, must give the patient proper instructions to guard against the risk of future harm").

**{¶ 34}** As to establishing that Dr. Huber breached the standard of care, we note that while Dr. Huber testified that he told Kyle's parents that they needed to follow the instructions in the head injury pamphlet, it is obvious from the jury's answers to the interrogatories that the jury chose to believe Kyle's parents, who testified that Dr. Huber told them that they did

not need to worry about those instructions, because Kyle's head injury was "not typical" and that they should just let him "sleep it off." Moreover, there was compelling evidence presented to support the testimony of Kyle's parents on this issue, namely, the recording of the 911 call that was played for the jury, in which Jesse Smith told the dispatcher that when he and Longbottom asked Dr. Huber if they should wake up Kyle every two hours, Dr. Huber told them "no, it won't be a problem." The jury was permitted to infer that given the circumstances, it was unlikely that Smith would have fabricated what Dr. Huber had told him and Longbottom.

**{¶ 35}** As to the element of proximate cause, we note that Kyle and his parents did not present an expert witness at trial who testified to a reasonable degree of medical certainty that Dr. Huber's failure to instruct Kyle's parents to follow the instructions in the head injury pamphlet was the proximate cause of Kyle's injuries. Nevertheless, we believe that there was sufficient evidence presented at trial from expert and lay witnesses to allow the jury to find that Dr. Huber's negligence in failing to warn Kyle's parents about the possibility of a significant head injury and to instruct them on how to observe for Kyle for such an injury upon his discharge was the proximate cause of Kyle's injuries.

**{¶ 36}** "Proximate cause is a happening or event that, as a natural and continuous sequence, produces an injury without which the result would not have occurred." *McDermott v. Tweel*, 151 Ohio App.3d 763, 2003-Ohio-885, ¶ 39 (10th Dist.), citing *Randall v. Mihm*, 84 Ohio App.3d 402, 406 (2nd Dist.1992). "The general rule of causation in medical malpractice cases requires the plaintiff to present some competent, credible evidence that the defendant's breach of the applicable standard of care 'probably' caused plaintiff's injury or death." *McDermott*. When establishing proximate cause through the use of expert testimony, an expert's opinion must be stated at a level of probability, meaning there is a greater than 50 percent likelihood that the physician's act or failure to act led to a given

result. *Zhun v. Benish*, 8th Dist. No. 89408, 2008-Ohio-572, ¶ 16.

**{¶ 37}** Furthermore, the plaintiff in a medical malpractice action may elicit expert testimony from the defendant-physician in support of the plaintiff's malpractice claim against the defendant-physician, see generally, *Oleksiw v. Weidner*, 2 Ohio St.2d 147, 148-150 (1965), and *Faulkner v. Pezeshkl*, 44 Ohio App.2d 186, 195 (1975), and a finding of negligence in a malpractice case may be based on the testimony of the defendant-physician. See Ware v. Richey, 14 Ohio App. 3d 3, 8 (8th Dist.1983), disapproved of on other grounds by *Kalain v. Smith*, 25 Ohio St. 3d 157 (1986).

**{¶ 38}** Here, Kyle and his parents called Dr. Crone as an expert witness to testify as to whether Kyle's foot drop is the result of his brain herniation and whether it is permanent. Dr. Crone answered both questions in the affirmative. Admittedly, they did not ask Dr. Crone to give his expert opinion as to whether Dr. Huber's failure to warn Kyle's parents about the possibility of a significant head injury and to instruct them on how to observe Kyle for such an injury following his discharge was the proximate cause of Kyle's injuries. Nevertheless, Dr. Crone's testimony provided crucial evidence that aided the jury in determining that it was.

**{¶ 39}** Dr. Crone testified that Kyle's injuries would have been prevented if surgery had taken place before Kyle's brain herniation. Dr. Crone testified that Kyle's brain herniation occurred at some point prior to the time he was taken to Children's Hospital, since emergency personnel had observed that Kyle had a "blown" pupil at the time they air-cared him to Children's Hospital. Dr. Crone testified that Kyle's hematoma grew bigger over time and as it grew, he would have expected Kyle to demonstrate signs and symptoms.

**{¶ 40}** Dr. Huber and QESI point out that Dr. Crone acknowledged that he could not state with certainty when Kyle's brain had herniated, other than it had occurred at some point prior to the time he was transported to Children's Hospital. Dr. Huber and QESI also point out that Dr. Crone acknowledged that Kyle's brain herniation may have taken place as early

as the time Kyle was discharged from the Mercy Hospital emergency room at 10:40 p.m. However, Dr. Crone made it clear during his testimony that while it was *possible* that Kyle's brain had herniated at the time Kyle was discharged from the emergency room, and thus before he and his parents returned home from the emergency room at Mercy Hospital, it was very unlikely, since Dr. Crone testified that in his opinion, if Kyle's brain had herniated six hours before he was brought to Children's Hospital, Kyle would have been dead.

**{¶ 41}** Furthermore, Dr. Huber, in response to the charge that he breached the standard of care by not ordering a CT scan for Kyle, asserted that he had met the standard of care by instructing Kyle's parents to follow the instructions in the head injury pamphlet, testifying as follows: "Head injury is a continuum. You watch. You watch. You watch, and that's what you do. If there's nothing up front to indicate that there is * * * a possibility of [an] active [intracranial] process [or bleed], then you're left to watch, and that's what we do. We observe for changes."

**{¶ 42}** Later on, Dr. Huber testified:

> There are no black and whites in medicine, and no absolutes. We're always dealing with percentages of percentages. But when you look at the literature * * * there are many, many studies showing that children that are asymptomatic, no neurologic findings, normal mental status, no loss of consciousness * * * had zero percent chance of having a significant intracranial bleed of any kind. We know that that's always a potential, and that is why we invoke the head injury instruction sheet. So if I had to put an actual number on it, it was .00001 percent that there was any problem or chance of an intracranial bleed, and that is why we use the head injury instruction sheet.

**{¶ 43}** Dr. Huber then referred to a 1999 document produced by the "American Academy of Family Practitioners, the American Academy of Pediatrics along with emergency medicine specialists," in order to give emergency room physicians guidance as to what to do with "minor head trauma." Dr. Huber summarized the document as follows:

> [A]ccording to the Academy as they have reviewed the literature they make a statement in the article – in the guidelines that says that they could find no evidence that early neuro [sic] imaging of asymptomatic children had any benefit over simple observation. In other words, what they're saying is if we simply observe these * * * children over time *we will always pick up any offending events*. Does it make sense? *So if you observe them, they're always going to be symptomatic at some point, and you'll discover them. That's how the process works*. (Emphasis added.)

**{¶ 44}** Kyle's parents testified that Kyle threw up before they took him to the emergency room at Mercy Hospital, during the time he was in Dr. Huber's examining room, and after they returned home from the emergency room around midnight. Dr. Huber acknowledged that if Kyle had vomited, that would have been a significant symptom for him to know about. However, Dr. Huber testified that neither Kyle nor his parents told him that Kyle had vomited. Dr. Huber's testimony was supported by Nurse Kruse, and Emergency Room Technician, Melissa Wright, who testified that Kyle and his parents had told her that Kyle did not throw up. However, the jury was obviously in the best position to determine who was telling the truth on this matter. Moreover, in ruling on Dr. Huber and QESI's motion for JNOV, the trial court was obligated to view the evidence in the light most favorable to Kyle and his parents as the non-moving parties. *Wagner*, 77 Ohio St.3d 116, 121, 1996-Ohio-85, fn. 2, and Civ.R. 50(A)(4)

**{¶ 45}** There was also testimony from Kyle's parents that Kyle fell asleep when Dr. Huber sutured the wound on Kyle's ear and that Kyle did not cry during this procedure as he normally would have. Kyle's parents testified that Kyle cried off and on while they drove home from the emergency room and that when they got home around midnight, Kyle threw up a little bit, gagged or had the dry heaves. Kyle's parents testified that shortly before Kyle was discharged, Dr. Huber assured them that there was no need to wake Kyle every two hours, and advised them to let Kyle "sleep it off." It was reasonable for the jury to infer from

this testimony that Dr. Huber's advice caused Kyle's parents "to let their guard down," since he failed to properly instruct them to watch for the symptoms listed in the head injury pamphlet, including whether the patient is unusually drowsy or vomits persistently.

**{¶ 46}** In light of the foregoing, we conclude that that there was ample evidence presented from expert and lay witnesses to allow the jury to conclude that Dr. Huber's failure to issue proper discharge instructions to Kyle's parents was the proximate cause of Kyle's injuries. Therefore, Dr. Huber and QESI's first assignment of error is overruled.

**{¶ 47}** In their second assignment of error, Dr. Huber and QESI argue the trial court erred by awarding prejudgment interest, because Dr. Huber had a good faith, objectively reasonable belief that he had no liability, and thus was not required to make a settlement offer. We find this argument unpersuasive.

**{¶ 48}** When a party moves for prejudgment interest in a civil action based on tortious conduct, the trial court must hold a hearing on the motion and determine whether or not "the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case[.]" R.C. 1343.03(C). As stated in *Kalain*, 25 Ohio St.3d 157, syllabus:

> A party has not "failed to make a good faith effort to settle" under R.C. 1343.03(C) if he has (1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party. If a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer.

**{¶ 49}** The determination as to whether a party has made a good faith effort to settle is a matter within the trial court's sound discretion. *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 658, 1994-Ohio-324.

**{¶ 50}** Here, there was sufficient evidence to support the trial court's finding that Dr.

Huber and QESI failed to rationally evaluate their risks and potentially liabilities, and thus failed to make a good faith effort to settle the case. The evidence shows that Dr. Huber and QESI knew in 2002 that Kyle had sustained permanent and serious injuries as a result of the incident in question. One of Dr. Huber and QESI's experts, Dr. Paula Sundance, evaluated Kyle in 2006 and opined that Kyle had permanent injuries that would require future medical care. Dr. Huber and QESI were also aware that not only had Dr. Huber failed to order a CT scan for Kyle, but that Kyle's parents had testified in their depositions that Dr. Huber had told them that they did not need to follow the instructions in the head injury pamphlet, including the instruction to wake Kyle every two hours while he was sleeping during the 24 hours following the incident.

**{¶ 51}** Given the foregoing, we cannot say that the trial court abused its discretion in finding that Dr. Huber and QESI failed to make a good faith offer to settle this case or in rejecting Dr. Huber's assertion that he had a good faith, objectively reasonable belief that he had no liability and thus did not need to make a monetary settlement offer. Thus, Dr. Huber and QESI's second assignment of error is overruled.

**{¶ 52}** In their third assignment of error, Dr. Huber and QESI argue the trial court erred by failing to apply the version of the prejudgment interest statute that was in effect at the time the jury rendered its verdict rather than the version of the statute that was in effect at the time of the incident in March 2002 or at the time Kyle and his parents' filed their original complaint in March 2003. We disagree with this argument.

**{¶ 53}** The amended version of R.C. 1343.03(C), which became effective on June 2, 2004, while the original complaint filed in this case was pending, potentially changes the accrual date for purposes of a prejudgment interest award and prohibits an award of prejudgment interest on future damages found by the trier of fact. See R.C. 1343.03(C)(1) and (C)(2). The jury in this case awarded future damages to Kyle.

**{¶ 54}** Initially, there is case law to support Dr. Huber and QESI's argument that the version of the prejudgment interest statute contained in the amended version of R.C. 1343.03(C) may be applied retroactively. See *Barnes v. University Hospital of Cleveland*, 8th Dist. Nos. 87247, 87285, 87710, 87903 and 87946, 2006-Ohio-6266, ¶ 75, affirmed in part and overruled in part on other grounds, 119 Ohio St.3d 173, 2008-Ohio-3344. However, several other appellate districts in this state have reached the opposite conclusion. See *Hodesh v. Korelitz, M.D.*, 1st Dist. Nos. C-061013, C-061040, and C-070172, 2008-Ohio-2052, ¶ 62-63, reversed on other grounds, *Hodesh v. Korelitz, M.D.*, 123 Ohio St.3d 72, 2009-Ohio-4220; *Scibelli v. Pannunzio*, 7th Dist. No. 05 MA 150, 2006-Ohio-5652, ¶ 148-149; and *Conway v. Dravenstott*, 3rd Dist. No. 3-07-05, 2007-Ohio-4933, ¶ 15, following *Scibelli*.

**{¶ 55}** We agree with the trial court's decision to follow the First, Third and Seventh Districts' decisions in *Hodesh*, *Scibelli* and *Conway*, respectively, because there is no clear indication in the amended version of the prejudgment interest statute that the legislature intended for it to apply retroactively, and therefore the statute should apply prospectively, only. *Scibelli*.

**{¶ 56}** Consequently, Dr. Huber and QESI's third assignment of error is overruled.

**{¶ 57}** In their first assignment of error on cross-appeal, Kyle and his parents argue the trial court erred by refusing to award them prejudgment interest from the date they voluntarily dismissed their action under Civ.R. 41(A) and then refiled it less than one year later. We agree with this argument.

**{¶ 58}** Former R.C. 1343.03(C) states:

> Interest on a judgment, decree, or order for the payment of money rendered in a civil action based on tortious conduct and not settled by agreement of the parties, shall be computed from the date the cause of action accrued to the date on which the money is paid if, upon motion of any party to the action, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money

> failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case.

**{¶ 59}** The trial court explained its decision to exclude from its calculation of prejudgment interest the one-year period in which Kyle and his parents voluntarily dismissed their case, as follows:

> [T]hough it is not clear whether a court can alter the date from which [prejudgment] interest is computed, this court believes that it can in the exercise of discretion. The court here chooses to exercise its discretion in computing the prejudgment interest and orders prejudgment interest to be computed from the date the cause of action accrued to the date that [Kyle and his parents] voluntarily dismissed [their complaint] under Civ.R. 41(A) on March 8, 2007. The prejudgment interest will then resume when [Kyle and his parents] re-filed [their] [complaint] on March 3, 2008 to the date the money is paid. *Giving prejudgment interest for the period after dismissal of the initial complaint and prior to re-filing would not serve to fulfill any of the purposes of the statute*. (Emphasis added.)

**{¶ 60}** While the trial court's decision on this issue appears reasonable at first glance, the decision cannot be fairly reconciled with *Musisca v. Massillon Community Hosp.*, 69 Ohio St.3d 673, 676, 1994-Ohio-451. In that case, the Ohio Supreme Court considered "whether a trial court, for equitable reasons, may apply some date other than the date the cause of action accrued for beginning the period for which prejudgment interest is awarded pursuant to R.C. 1343.03(C)." The *Musisca* court determined that the provision in former R.C. 1343.03(C) requiring that prejudgment interest "shall be computed from the date the cause of action accrued" was not subject to "equitable adjustment in the appropriate case," as the court of appeals in that case had ruled, because the statute uses the word "shall," and therefore the decision to allow or not allow prejudgment interest from the date the plaintiff's cause of action accrues is not discretionary. *Id.* Consequently, the *Musisca* court agreed "with the holding of *Brumley* [v*. Adams Cty. Hosp.*] 72 Ohio App.3d [614,] at 616, * * * that 'the plain language of R.C. 1343.03(C) allows no room for equitable adjustment.'"

**{¶ 61}** The *Musisca* court further explained the rationale for its holding as follows:

> R.C. 1343.03(C) "was enacted to promote settlement efforts, to prevent parties who have engaged in tortious conduct from frivolously delaying the ultimate resolution of cases, and to encourage good faith efforts to settle controversies outside a trial setting." *Kalain v. Smith* (1986), 25 Ohio St.3d 157 * * *. See, also, *Moskovitz,* 69 Ohio St.3d at 661 * * *; *Peyko v. Frederick* (1986), 25 Ohio St.3d 164, 167 * * *. In addition to promoting settlement, R.C. 1343.03(C), like any statute awarding interest, has the additional purpose of compensating a plaintiff for the defendant's use of money which rightfully belonged to the plaintiff. See *West Virginia v. United States* (1987), 479 U.S. 305, 309–310, 107 S.Ct. 702, 706, * * * fn. 2. The statute requires that the interest award begins to run when the cause of action accrued because the accrual date is when the event giving rise to plaintiff's right to the wrongdoer's money occurred. To allow a trial court to equitably adjust the date the interest begins to run would ignore the compensatory purpose behind the statute. As the *Brumley* court stated [at 616]: "The [defendant was not] required to settle the case to avoid prejudgment interest, but merely to make a genuine effort to do so. Having failed to do so, there is no unfairness, given the clear command of R.C. 1343.03(C), in its being required to forfeit the benefit it has derived from the use of the [money] awarded to plaintiff since the date the cause of action accrued."

*Musisca* at 676-677.

**{¶ 62}** Former R.C. 1343.03(C) establishes the period for which the defendant in a tort case is obligated to pay prejudgment interest to the plaintiff. Under the plain language of the statute, the period commences on the date the plaintiff's cause of action accrues and terminates on the date the defendant pays the money due the plaintiff. *Id.* The defendant's obligation to pay prejudgment interest is dependent on the trial court's determination that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case. However, there is no express provision in former R.C. 1343.03(C) that allows a trial court to exclude, from its calculation of prejudgment interest, a period in which the plaintiff voluntarily dismisses his action under Civ.R. 41(A) and then re-files it less than one year

later.

**{¶ 63}** The trial court justified its decision to exclude the one-year period of voluntary dismissal from its calculation of prejudgment interest on the basis that requiring Dr. Huber and QESI to pay for this period would not serve the purposes of former R.C. 1343.03(C). Dr. Huber and QESI defend the trial court's decision on the basis that Kyle and his parents should not be rewarded for unnecessarily delaying the proceedings in this case. We find these arguments unpersuasive.

**{¶ 64}** As stated in *Musisca*, 69 Ohio St. 3d at 676-677, one of the purposes of former R.C. 1343.03(C) is to compensate a plaintiff for the defendant's use of money which rightfully belonged to the plaintiff. *Id.*, citing *West Virginia v. United States*, 479 U.S. at 309–310, fn. 2. To allow a trial court to equitably adjust the period for which a tortfeaser must pay prejudgment interest would ignore the compensatory purpose behind former R.C. 1343.03(C). *Musisca* at 676. Additionally, Dr. Huber and QESI were not required to settle the case to avoid prejudgment interest, but merely to make a genuine effort to do so, and failed to do so. Therefore, there is no unfairness, given the clear language in R.C. 1343.03(C), in requiring Dr. Huber and QESI to forfeit the benefit they have derived from their use of the money awarded to Kyle and his parents from the date the cause of action accrued, including the period Kyle and his parents voluntarily dismissed their case under Civ.R. 41(A) and then refiled it less than a year later. *Id*., quoting *Brumley*, 72 Ohio App.3d at 616.

**{¶ 65}** In light of the foregoing, the trial court erred in excluding from its calculation of prejudgment interest the date from which Kyle and his parents voluntarily dismissed their complaint under Civ.R. 41(A) and then refiled it less than one year later. Therefore, Kyle and his parents' first cross-assignment of error is sustained.

**{¶ 66}** In their second assignment of error on cross-appeal, Kyle and his parents argue the trial court erred in refusing to give the jury their requested instruction and interrogatory on

the emotional distress claim of Kyle's parents. This argument lacks merit.

**{¶ 67}** A trial court does not err in refusing to give a requested jury instruction if it is not a correct statement of the law or if it is not supported by the evidence presented in the case. *Hammerschmidt v. Mignogna*, 115 Ohio App.3d 276, 280 (8th Dist.1996), citing *Pallini v. Dankowski*, 17 Ohio St.2d 51, 55 (1969).

**{¶ 68}** In Ohio, a cause of action may be stated for the negligent infliction of serious emotional distress without a contemporaneous physical injury. *Paugh v. Hanks*, 6 Ohio St.3d 72 (1983), paragraphs one and two of the syllabus. Where the person bringing such a claim has not sustained a contemporaneous physical injury as a result of the event in question, the emotional injuries the person has sustained "must be found to be both serious and reasonably foreseeable, in order to allow a recovery." *Id*. at paragraph three of the syllabus. "Serious emotional distress" involves emotional injury that is both "severe and debilitating," and "may be found where a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances of the case." *Id*. at paragraph three of the syllabus (subparagraph 3a).

**{¶ 69}** Kyle and his parents argue the evidence shows that Longbottom and Smith suffered severe emotional distress because Kyle almost died as a result of his injuries. They point out that Longbottom awoke at 5:00 a.m. to find Kyle choking and gasping for air, and that during his trial testimony, Smith had to take a break because he was crying uncontrollably. However, while there is no question that Kyle's parents suffered serious emotional distress as a result of these events, Kyle and his parents failed to present sufficient evidence to demonstrate that the serious emotional distress they experienced was both severe and debilitating, or that a reasonable person in their position "would be unable to cope adequately with the mental distress engendered by the circumstances of his case." *Paugh*. Therefore, the trial court did not err in refusing to give Kyle's parents their requested jury

instruction and interrogatory on their emotional distress claim. *Hammerschmidt*, 115 Ohio App.3d at 280.

**{¶ 70}** Accordingly, Kyle and his parents' second cross-assignment of error is overruled.

**{¶ 71}** In light of the foregoing, the trial court's judgment is affirmed in part, reversed in part with respect to the trial court's refusal to award prejudgment interest to Kyle and his parents from the date they voluntarily dismissed their complaint under Civ.R. 41(A) to the date they refiled it, and remanded to the trial court for the limited purpose of amending the amount of prejudgment interest awarded to Kyle and his parents to include prejudgment interest for this period.

RINGLAND and YOUNG, JJ., concur.

Young, J., retired, of the Twelfth Appellate District, sitting by assignment of the Chief Justice, pursuant to Section 6 (C), Article IV of the Ohio Constitution.