

ORIGINAL

IN THE SUPREME COURT OF OHIO

Richard Jaques,	)	
	)	
Appellee,	)	Case No. 2009-0820
	)	
	)	
-vs-	)	On Appeal from the Lucas County Court
	)	of Appeals, Sixth Appellate District
	)	
Patricia A. Manton,	)	
	)	
Appellant.	)	

**MERIT BRIEF OF AMICUS CURIAE THE ACADEMY OF MEDICINE OF CLEVELAND & NORTHERN OHIO IN SUPPORT OF APPELLANT PATRICIA MANTON**

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## **I. STATEMENT OF INTEREST OF AMICUS CURIAE**

The Academy of Medicine of Cleveland & Northern Ohio (“AMCNO”) is a professional medical association serving the Northern Ohio community. AMCNO functions as a non-profit 501(c)6 professional organization in representing Northern Ohio’s medical community through legislative action and community outreach programs. This professional organization has been in existence since 1824, and became known as The Academy of Medicine in 1902. Now known as the AMCNO, it has a membership of over 5,000 physicians, making it one of the largest regional medical association in the entire United States.

AMCNO strives to provide legislative advocacy for its physician members before the Ohio General Assembly, state medical board, and other state and federal regulatory boards. AMCNO also sponsors numerous community services initiatives, such as physician referrals and healthlines. AMCNO further works collaboratively with hospitals, chiefs of staffs, and other related organizations, on a myriad of different projects of interest and/or concern to its members. Simply put, AMCNO is the voice of physicians in Northern Ohio, and has been so for over 185 years.

AMCNO has an interest in the present subject matter because the outcome of this appeal directly impacts AMCNO membership. AMCNO’s membership has an interest in the fair and forthright computation of damages, and in ensuring that jury awards are based on actual damages incurred, not on hypothetical or inflated “damages”.<sup>1</sup>

As this Court is aware, physicians, including those in the Northern Ohio community, are often litigants in a wide variety of civil litigation. Additionally,

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<sup>1</sup> R.C. 2323.43 and R.C. 2305.18, which went into effect in April, 2003, are statutes applying to medical malpractice claims, with some relationship to determination of collateral benefits in medical malpractice claims and related claims. Nevertheless, the questions presented by this appeal remain exceedingly relevant to the interests of Amicus Curiae’s membership.

physicians play a critical role in the outcome of other litigation, even when they are neither plaintiffs nor defendants, but rather are serving as expert witnesses or testifying as treating physicians. Finally, in most general tort cases, such as the instant case, physicians are directly involved by way of providing medical treatment for injuries sustained and by way of negotiating payments with health care insurers.

The appeal presently before this Court requires this Court to determine whether juries in Ohio will once again be denied relevant evidence and provided with misleading and/or incomplete evidence concerning damages sustained. Obviously, as the representative of physicians and their related entities in Northern Ohio, AMCNO is keenly familiar with issues related to health insurance coverage, and the fact that health insurance carriers do not reimburse physicians, hospitals, and other medical institutions on a dollar for dollar basis for medical services provided. This is a reality of life in medical practice, and has been so for many, many years. The decision of the Court of Appeals below ignored this reality, and that decision's inevitable effect, if left undisturbed, will be a distortion of damages in lawsuits throughout the state, and a resultant ill-gotten windfall for plaintiffs and their attorneys.

If this Court were to step back from its holding in *Robinson v. Bates* (2006), 112 Ohio St. 3d 17, 2006-Ohio-6362, and once again sanction the provision of **only some information** concerning damages to the jury, while requiring that other equally probative damages information be withheld, the end result would be the artificial inflation of jury verdicts, institutionalized double recovery, and a less fair and a less equitable court system for all parties involved.

For all the foregoing reasons, AMCNO has a strong vested interest in the outcome of this matter. AMCNO urges on behalf of its entire membership that the decision of the

Sixth District Court of Appeals below be reversed, and that this Court recognize the continued viability and prospective application of *Robinson v. Bates*.

## II. STATEMENT OF FACTS

The relevant facts relating to the present appeal pending before this Court are set forth in appellant's Memorandum in Support of Jurisdiction of record with this Court, and are expected to be set forth again in the Merit Brief of Appellant. Those facts are expressly adopted by reference and incorporated herein.

For purposes of this Amicus Curiae Brief, the following facts are most significant:

- The trial below occurred after this Court's decision in *Robinson v. Bates*, supra, and after the effective date of R.C. 2315.20;
- The face value of the total medical bills submitted by appellee at trial was \$21,874.80, yet appellee's medical providers accepted a total of \$7,483.91 from her health insurer as full and final payment;
- The trial court refused to permit appellant to submit evidence to the jury of the amount accepted as full and final payment, or of the amount written off from the initial medical bills, in contradiction of both *Robinson v. Bates* and R.C. 2315.20;
- The Sixth District Court of Appeals affirmed the ruling of the trial court, holding that the collateral-source rule prevented appellant from presenting evidence of the amount accepted as full payment by appellee's healthcare providers.

## III. LAW AND ARGUMENT

### 1. Appellant's Proposition of Law No. 1

**Because no one pays the difference between amounts originally billed and amounts accepted as full payment, those amounts are not "benefits" under the collateral-source rule. Hence, evidence of such write-offs is not precluded by R.C. 2315.20, and such evidence is admissible on the issue of reasonableness and necessity of charges for medical treatment and hospital care.**

This case presents the question of whether this Court's less than three year old decision of *Robinson v. Bates* is still valid in Ohio, or whether the opinion was meant to apply only to a small handful of cases where the relevant injury occurred prior to the effective date of R.C. 2315.20. This Court's prior decision, well-reasoned decisions from other jurisdictions, public policy concerns, and logic all compel the conclusion that *Robinson v. Bates* should be given full prospective application.

The decision of the Court of Appeals below, while purportedly premised on the dual notions that *Robinson v. Bates* is no longer the law of Ohio and that R.C. 2315.20 precludes introduction of evidence of the difference between amounts originally billed and amounts accepted as full payment, is, in reality, a frontal assault on the holding and the reasoning of *Robinson v. Bates*. That is, the Court of Appeals below, as well as other courts across the state, have attempted an "end around" of this Court's prior straight forward and eminently logical decision.

The application of the collateral-source rule suggested by the appellate court below is absolutely indistinguishable from that of the First District Court of Appeals in *Robinson v. Bates* (2005), 160 Ohio App. 3d 668, 2005-Ohio-1879, which was reversed by this Court, in *Robinson v. Bates*, supra. Thus, this Court is in the unusual position of re-answering a question that it only recently resolved.

The Court of Appeals below concluded that R.C. 2315.20 was amended as a way to broaden the scope of the collateral-source rule, rather than as a reflection of Ohio's public policy of preventing double recovery. Amicus Curiae suggests that such an interpretation was plainly misplaced.

The decision of the Court of Appeals below is eleven paragraphs in length. A total of two of those paragraphs, or four entire sentences, constitute the sum and substance of the

appellate court's analysis of the indisputably weighty issues presently before this Court.

The Court of Appeals' relevant analysis in this respect was as follows:

[¶9] It is undisputed that this case arose after the enactment of R.C. 2315.20. It is further undisputed that the source of medical payments that appellant attempted to introduce at trial were subject to a contractual right of subrogation. Accordingly, the application of the collateral-source rule is controlled by R.C. 2315.20, and not by the rules set forth by *Robinson v. Bates*, supra.

[¶10] On consideration, we find that the trial court did not err by refusing to allow appellant to present evidence of the reduced amount accepted as full payment for appellee's medical bills to the jury, or by denying appellant's motion for new trial on the same basis. Appellant's two assignments of error are not well-taken. *Jaques v. Manton*, 6<sup>th</sup> App. No. L-08-1096, 2009-Ohio-1468.

Earlier in its opinion, in a seemingly innocuous footnote at ¶7, the Court of Appeals stated the following:

The Ohio Supreme Court recognized that R.C. 2315.20 did not apply in *Robinson*, because the statute became effective "after the cause of action [in that case] accrued and after the complaint was filed." Citing *Robinson* at ¶10 FN1.

The above assertion that *Robinson v. Bates* did not survive the enactment of R.C. 2315.20 is misguided. Furthermore, even if this Court were to agree with appellant's assertion that *Robinson v. Bates* was written either intentionally or unintentionally in a self-limiting fashion, this Court should nevertheless take this opportunity to reaffirm the viability of *Robinson v. Bates*, as well as to dispel the misconceptions as to the compatibility of that holding with R.C. 2315.20.

The specific footnote at issue from this Court's 2006 opinion in *Robinson v. Bates* is found at a juncture of this Court's decision referencing that the First District Court of Appeals had examined the law of other jurisdictions and concluded that Ohio, at that time, had no law limiting the collateral-source rule. This Court's footnote at issue merely clarified that, although the Court of Appeals was correct in noting that Ohio, at that time,

had no law limiting the collateral-source rule, in April, 2005 the General Assembly passed R.C. 2315.20, which represented the Ohio legislature's first attempt at establishing parameters of the collateral-source rule. This Court's footnote went on to state that "this new collateral benefit statute does not apply in this case, however, because it became effective after the cause of action accrued and after the complaint was filed." *Id.*

Based on that singular innocuous footnote outlining the timeline provided by the First District Court of Appeals vis-à-vis the legislative history of R.C. 2315.20, the appellate court below ignored this Court's entire syllabus of *Robinson v. Bates*, as well as its survey of the history of the collateral-source rule, and the application of the collateral-source in sister jurisdictions.

The appellate opinion below also ignores this Court's much more substantive discussion of R.C. 2315.20 found in Paragraph 14 of *Robinson v. Bates*, *supra*. This portion of this Court's prior decision on the identical issue of the effect of R.C. 2315.20 stated as follows:

[¶14] Effective April 7, 2005, the General Assembly passed R.C. 2315.20, entitled "Introduction of evidence of collateral benefits in tort actions." Am.Sub. S.B. No. 80 (2005). This statute allows the defendant in any tort action to introduce "evidence of any amount payable as a benefit to the plaintiff as a result of the damages that result from an injury \* \* \*." (Emphasis added.) This provision is subject to exceptions. In passing this statute, the General Assembly found that "[t]wenty-one states have modified or abolished the collateral-source rule. *Id.*, Section 3(A)(7)(b). The General Assembly also requested that we "reconsider [our] holding on the deductibility of collateral source benefits in *Sorrell v. Thevenir* (1994), 69 Ohio St. 3d 415, 633 N.E. 2d. 504]." *Id.*, Section 3(E). In light of this legislative history, it is clear that the General Assembly intended to limit the collateral-source rule in Ohio, just as the statutes have in Florida and Idaho cases.

Based on the foregoing, it cannot be reasonably disputed that this Court has already concluded that the legislature intended to "limit the collateral source rule in Ohio," as was previously done in other states. The opinion of the appellate court below constituted an

interpretation of R.C. 2315.20 not as a “limitation” of the collateral-source rule, but rather, as an unprecedented expansion of the collateral-source rule. Such a conclusion is entirely inconsistent both with this Court’s prior decision as laid out in *Robinson v. Bates*, and the plain text of R.C. 2315.20.

For appellant herein to focus on the ambiguous (at best) language of a footnote, while ignoring the crystal clear language of Paragraph 14 of this Court’s decision, in addressing the issue of this Court’s intentions as to the prospective application of *Robinson v. Bates*, is simply disingenuous. Frankly, it is disheartening, that such a specious and internally contradictory analysis has achieved as much success as it has throughout the State.

Nevertheless, the majority of courts that have addressed this issue have correctly decided that the collateral-source rule does not prohibit evidence of the difference between the amount of the original medical bill rendered and the amount accepted as full payment.

In *Schlegel v. Li Chen Song*, 547 F. Supp.2d 792, 798-799, (N.D. Ohio, 2008), the court made short shrift of the argument that *Robinson v. Bates* had been supplanted by R.C. 2315.20:

The plaintiff argues that Defendants' reliance on *Robinson* is misplaced and that the decision does not apply to the present action “because [§ 2315.20] became effective after the cause of action accrued and after the complaint [in *Robinson*] was filed.” Doc. 35 at 2 (citing *Robinson*, 112 Ohio St.3d at 21 n. 1, 857 N.E.2d 1195). Not only is the plaintiff incorrect, but his reasoning is unhelpful to his case. Even if *Robinson* did not apply to the case at bar, § 2315.20 certainly applies, and the *Robinson* Court acknowledged that once the statute became effective the rule would be *even more limited* than as applied by that court. *Robinson*, 112 Ohio St.3d at 22, 857 N.E.2d 1195 (“In light of [the] legislative history, it is clear that the General Assembly intended to limit the collateral source rule in Ohio”). (Emphasis sic.)

The sound reasoning of *Schlegel* has been adopted by numerous courts throughout the State. See e.g., Appellant’s Memorandum in Support of Jurisdiction, page 3 (charting

application of *Robinson v. Bates*, post April 7, 2005.) The tenor of the court’s reasoning in *Schlegel* seems to recognize the inherent illogic and baselessness of the argument being advanced by appellee herein.

This Court already concluded in *Robinson v. Bates* that “[t]he jury should have been permitted to examine both the original medical bill and the amount accepted as full payment to determine the reasonableness and necessity of charges rendered for *Robinson’s* medical and hospital care, for the collateral-source rule does not bar evidence of write-offs.” *Robinson v. Bates*, supra at ¶26. Based on the procedural history of the instant matter, as well as some misguided decisions across the State of Ohio, it is necessary that this Court reiterates its prior conclusion in this regard.

**2. Appellant’s Proposition of Law No. 2**

**Even if the Court of Appeals was correct in ignoring *Robinson*, amounts written off are still entirely admissible under R.C. 2315.20 because no contractual right of subrogation can exist for amounts that have never been paid.**

R.C. 2315.20, effective on April 7, 2005, applies to general tort actions. R.C. 2315.18, as well as R.C. 2323.43, which became effective in April, 2003, regulate “economic loss” and “noneconomic loss” in medical malpractice actions.<sup>2</sup> Amicus Curiae’s interest herein consists of seeing a fair and consistent application of all of these statutes, as well as of this Court’s prior pronouncements on the collateral-source rule.

The first rule of statutory construction is that a statute which is unambiguous and definite on its face is to be applied as written and not construed. *State v. Wemer* (1996), 112 Ohio App.3d 100, 103, citing *State ex rel. Herman v. Klopfleisch* (1995), 72 Ohio St.3d 581, 584. Courts must give effect to the words expressly used in a statute rather

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<sup>2</sup> These statutes were found to be constitutional in *Arbino v. Johnson & Johnson* (2007), 116 Ohio St. 3d 468.

than deleting words used, or inserting words not used, in order to interpret an unambiguous statute. *Id.*, citing *State v. Taniguchi*, 74 Ohio St.3d 154, 156, 1995-Ohio-163; See also R.C. 1.49.<sup>3</sup>

Another basic rule of statutory construction requires that no words in statutes be ignored. *E. Ohio Gas Co. v. Pub. Utilities Comm.* (1988), 39 Ohio St.3d 295, 299. Moreover, no part of statutory language should be treated as superfluous unless that is manifestly required, and courts should avoid that construction that renders a provision meaningless. *State ex rel. Myers v. Bd. of Edn. of Rural School Dist. of Spencer Twp.* (1917), 95 Ohio St. 367, 372-73.

R.C. 2315.20 precludes a defendant from introducing evidence of “any amount payable as a benefit to the plaintiff” where the source of that benefit has a mandatory self-effectuating federal right of subrogation or a contractual right of subrogation. There is no conceivable ambiguity to be resolved in the statute. See R.C. 2315.20(A). The plain language of the statute merely precludes evidence of collateral-benefits payable to the plaintiff that are subject to a contractual right of subrogation. For the appellate court below to have concluded that R.C. 2315.20 precludes evidence of the difference between

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<sup>3</sup> “If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

- (A) The object sought to be attained;
- (B) The circumstances under which the statute was enacted;
- (C) The legislative history;
- (D) The common law or former statutory provisions, including laws upon the same or similar subjects;
- (E) The consequences of a particular construction;
- (F) The administrative construction of the statute.”

amounts originally billed and amounts accepted as full payments (for which there can be no right to subrogation), constitutes a perversion of the plain meaning of the statute as written.

Clearly, such a determination by the lower court should have involved some analysis of the language of the statute at issue, as well as a comparison of this statute with the previous collateral-source rule applied throughout Ohio. Yet, no such analysis was provided by the appellate court below, perhaps in recognition of the fact that this issue would ultimately be decided once again by this Court.

The appellee took a very similar approach to statutory analysis to that of the lower court, in his Memorandum in Opposition to Jurisdiction. The appellee merely block cited R.C. 2315.20(A) in the introduction section of his Memorandum, and then stated the obvious - that “the General Assembly made a policy decision regarding the collateral-source rule in Ohio.” (Memorandum in Opposition to Jurisdiction at p. 1.) Appellee made no attempt to cast further light on the “policy decision” at issue, other than to suggest that “by using the word ‘evidence’ as opposed to using the phrase ‘benefit paid’ or some other similar phrase, the General Assembly has also *precluded* all evidence of ‘write-offs’ where the payor has a subrogated interest”. (Emphasis sic.) Id. at p. 4.

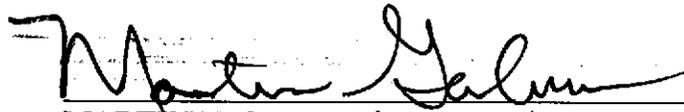
It is most certainly not self-evident that the use of the word “evidence” in R.C. 2315.20 compels a conclusion that the General Assembly intended to preclude all evidence of “write-offs.” Indeed, the context in which the word “evidence” is used requires the exact opposite conclusion. The statute states “the defendant may introduce ‘evidence’ of any amount payable as a benefit to the plaintiff as a results of the damages that result from an injury, death, or loss to person or property, that is the subject of the claim upon which the action is based” and then goes on to restrict this general rule in a few limited situations. Appellee’s analysis of this issue is simply misplaced.

Both the appellee and the Court of Appeals below ignored this Court's crystal clear holding of *Robinson v. Bates* in an attempt to return Ohio to a pre-*Robinson v. Bates* understanding of the collateral-source rule. Such attempts to reject the stated intention of the General Assembly, as well as the prior decision of a near unanimous Ohio Supreme Court, should not be countenanced.<sup>4</sup>

#### IV. CONCLUSION

For all of the foregoing reasons, Amicus Curiae requests that this Court reverse the decision of the Sixth District Court of Appeals below.

Respectfully submitted,



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<sup>4</sup> The majority opinion was joined in by five (5) Justices. One (1) Justice concurred in judgment only. The remaining Justice, who concurred in part and dissented in part, would have limited the collateral-source rule, albeit in a different fashion.

**CERTIFICATE OF SERVICE**

A copy of the foregoing was sent by ordinary United States mail, postage prepaid,  
on this 9<sup>th</sup> day of October, 2009 to the following:

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