

IN THE SUPREME COURT OF OHIO

ORIGINAL

CASE NO. 2009-0820

**RICHARD JAQUES**  
Plaintiff-Appellee

-vs-

**PATRICIA A. MANTON**  
Defendant-Appellant

**BRIEF OF AMICUS CURIAE,  
OHIO ASSOCIATION FOR JUSTICE  
IN SUPPORT OF PLAINTIFF-APPELLEE, RICHARD JAQUES**

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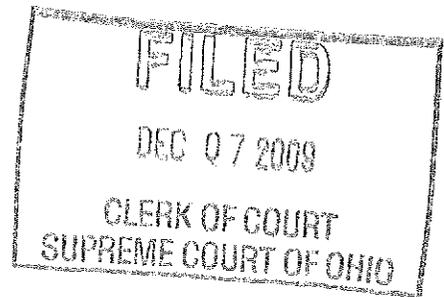


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## INTRODUCTION AND INTERESTS OF AMICUS CURIAE

This *Amicus Curiae* represents the interests of the Ohio Association for Justice (“OAJ”). The OAJ is comprised of approximately two thousand attorneys practicing personal injury and consumer law in the State of Ohio. These lawyers are dedicated to preserving the rights of private litigants and to the promotion of public confidence in the legal system.

As will be developed further in this Brief, overturning the Sixth District’s sound decision and adopting the extreme positions which have been advanced by Defendant-Appellant, Patricia A. Manton, and her *amici*, will set a troubling precedent. As the appellate court had no difficulty concluding, the parties’ dispute is governed by the unambiguous terms of a “tort reform” statute which precluded the introduction of collateral source benefit payments under the particular facts of this case. *R.C. §2315.20*. The will of the General Assembly prevailed, but Defendant-Appellant and her *amici* remain unsatisfied. They long to return to the pre-tort reform collateral source rule which had been adopted by this Court in *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.2d 1195. In so doing, they would effectively nullify an important aspect of R.C. §2315.20(A) which was plainly designed by the legislature to preserve a limited form of the collateral source rule in those instances where legally recognized rights of subrogation exist.

Thus far, challenges to the recent tort reform enactments which have been brought by tort claimants have met with virtually no success. It is therefore only just that this Court reject this effort by Defendant and her *amici* to erect additional barriers to full and complete recoveries which the General Assembly did see fit to adopt.

If these demands for a complete elimination of that which is left of the collateral source rule are accommodated, then a dangerous precedent will be established. No

longer will courts be limited to applying the plain and ordinary terms which appear in statutes. Instead, they will be empowered to delve into the true "intent" of the legislators in an effort to divine that which produces the more "reasonable" result. Ohio's judiciary soon will be awash in a sea of public policy debates initiated by special interests who have been unable to convince the General Assembly to enact specific legislation furthering their cause. Public and great general interests will best be served if this Court continues to adhere to the plain and unambiguous terms of statutory language and affirms the appellate court's ruling.

## ARGUMENT

Two Propositions of Law have been devised for this Court's consideration. Each will be addressed separately herein.

**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.**

### **I. DISCLOSURE OF COLLATERAL SOURCES**

One point needs to be made clear at the outset. No one is advocating that "phantom damages" should ever be recovered in a tort action. *Merit Brief of Defendant-Appellant, p. 12.* Defendants will remain free in Ohio to argue that the bills which have been submitted by the plaintiff's health care providers exceed that which is usual, customary, and reasonable. *See generally St. Vincent Med. Cntr. v. Sader* (6<sup>th</sup> Dist. 1995), 100 Ohio App. 3d 379, 384, 654 N.E. 2d 144, 147; *Fiorini v. Whiston* (1<sup>st</sup> Dist. 1993), 92 Ohio App. 3d 419, 427, 635 N.E. 2d 1311, 1316. That is not going to change.

The real question here which emerged from the trial is whether such a demonstration can be accomplished through "evidence that [the Plaintiff's] medical providers accepted reduced payments pursuant to a contract with [his] insurer, thereby reducing the reasonable value of his medical expenses." *Jaques v. Manton*, 6<sup>th</sup> Dist. No. L-08-1096, 2009-Ohio-1468, 2009 W.L. 806858 ¶ 2. These write-offs are typically accepted by the physicians and medical facilities in exchange for any number of privileges and benefits, such as being included as a "preferred provider" in the health plan. The insurer proceeds to promote the preferred provider to its insureds, thereby

furnishing them with a steady influx of patients (all of whom possess insurance). The existence of the write-offs thus has no logical relationship to the legitimate question of whether the amounts charged were usual, customary, and reasonable within the locality.

The irrelevance of the write-offs is aptly demonstrated by the “two injured passengers” example. It is hardly unusual for two passengers in the same automobile to be injured in an accident, only one of whom possesses health insurance coverage. Presumably, if they received treatment at the same local emergency room their bills would be computed under the same fee schedules. In their ensuing trials against the tortfeasor, evidence of “write-offs” would only be available against the insured passenger. The usual, customary, and reasonable charges within the emergency room’s locality would be precisely the same for both of them, yet the one who purchased insurance would be subject to a reduction of the original amount charged while the other would not. This cannot be right.

The motivations of Defendant and her *amici* are not difficult to discern. Their objective is to secure a ruling from this Court which will allow juries to be routinely advised that the plaintiff had both the financial means and good sense to purchase health insurance coverage. The presentation of both the original amounts billed and the “actual amounts paid” accomplishes precisely that. No sensible juror would believe for a moment that the plaintiff had negotiated the write-off on his/her own. They all appreciate that such discounts can only be secured by health insurance plans and programs which have something to offer in exchange to the physicians and medical facilities.

Once the availability of medical insurance has been revealed, the impetus to fully and fairly compensate the tort victim for the expenses incurred – and to be

incurred – is significantly diminished. The jurors will continue to remain in the dark over whether the defendant possesses any liability insurance which can cover the damages being sought. Their natural feelings of sympathy will often lead them into reducing, or even eliminating, the compensation earmarked for medical expenses due to their belief that health insurance should cover all such losses. This is precisely the same reason that evidence of the defendant's liability coverage remains off-limits.

Appropriate assessments of damages cannot be expected when the existence of alternate sources of payment are disclosed. The manifestly unfair dichotomy which results when one party's insurance coverage is introduced but the other's is not will serve only to irreparably skew the administration of justice in Ohio.

## II. DEVELOPMENT OF THE COMMON LAW RULE

In recognition of the disruptive impact of such tactics, the "collateral source rule" was developed long ago in Ohio's jurisprudence. *Pryor v. Webber* (1970), 23 Ohio St.2d 104, 263 N.E.2d 235; *Sorrell v. Thevenir*, 69 Ohio St.3d 415, 1994-Ohio-38, 633 N.E.2d 504. The Cuyahoga County Court of Appeals has explained that:

Under the collateral source rule, as it pertains to this action, benefits received by an injured party from a source wholly independent of the wrongdoer, such as workers' compensation, are not deductible from the amount of damages which the injured party might otherwise recover from the wrongdoer. That is, the receipt of collateral benefits is irrelevant and immaterial to the issue of damages, and concomitantly, the receipt of such benefits is not to be admitted into evidence or otherwise disclosed to the jury. [footnote and citations omitted]

*Ganobcik v. Industrial First, Inc.* (8<sup>th</sup> Dist. 1991), 72 Ohio App.3d 619, 625, 595 N.E.2d 951, 955; see also *Mitchel v. Borton* (6<sup>th</sup> Dist. 1990), 70 Ohio App.3d 141, 145-146, 590 N.E.2d 832, 835.

The common law collateral source rule was indeed modified in *Robinson*, 112 Ohio St.3d 17, when this Court held in paragraph one of the syllabus that:

Both an original medical bill rendered and the amount accepted as full payment are admissible to prove the reasonableness and necessity of charges rendered for medical and hospital care. [citation omitted]

The *Robinson* decision represented a compromise between the traditional view that the availability of insurance should never be disclosed, even indirectly, and the novel theory which had been adopted by the trial judge that only the amounts actually paid can ever be introduced. *Id.*, ¶ 3. The middle-of-the-road approach of allowing both the original bills and the amount actually accepted (and hence the “write-off”) to be presented to the jury had not been advocated or briefed by either of the parties.

The *Robinson* compromise has proven to be illusory. In the experience of the OAJ attorneys, jurors overwhelmingly elect to base their awards upon the lesser amounts which are introduced by defense counsel whenever the plaintiff was insured. It is simply impossible for the plaintiff’s counsel to present a convincing demonstration that the higher amounts actually reflect the true usual, customary, and reasonable charges within the locality and the discounts have been accepted by the providers only in exchange for alternative remuneration. In addition to disclosing the availability of health insurance coverage, the interjection of the amounts actually paid often discredits treating providers by creating the unmistakable impression that they over-bill their patients.

### III. IMPACT OF TORT REFORM

Fortunately, there is no legitimate need for this Court to entertain a public policy debate in this appeal. The General Assembly already did so, and enacted R.C. §2315.20. Having taken effect on April 7, 2005, this enactment had no relevance to this Court’s prior examination of the common law collateral source rule. *Robinson*, 112 Ohio St.3d at 21 fn. 1.

R.C. §2315.20 was adopted as part of the tort reform effort embodied in 2004

S.B. No. 80. Admittedly, the General Assembly's apparent intention was to restrict the common law collateral source rule. In Section 3(E) of the uncodified portion of the Act, the legislators noted merely that:

The Ohio General Assembly respectfully requests the Ohio Supreme Court to uphold this intent in the courts of Ohio, \*\*\* [and] to reconsider its holding on the deductibility of collateral source benefits in *Sorrel [sic.] v. Thevenir* (1994), 69 Ohio St. 3d 415 \*\*\*.

The legislature was thus concerned primarily with the deductibility of the collateral benefits from the damage awards, and not the admissibility of the insurance benefits and write-offs themselves. Although the General Assembly expressed great dissatisfaction with *Sorrell*, 69 Ohio St. 3d 415, and a number of other Supreme Court precedents within S.B. 80, no discernable suggestion was made that *Pryor*, 23 Ohio St. 2d 104, and its progeny should be "reconsidered."

As zealous advocates of tort reform, one would have expected Defendant's insurer and her *amici* to be acknowledging that the explicit terms of R.C. §2315.20 control over the common law precedents which had existed prior to S.B. 80, which includes *Robinson*, 112 Ohio St. 3d 17. They should be applauding the Sixth District for adhering closely to the terms of the statute and refusing to indulge in a debate over how public policy would best be served. But that has not been the case.

Regardless, subsection (A) now provides that:

In any tort action, the defendant may introduce evidence of any amount payable as a benefit to the plaintiff as a result 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, except if the source of collateral benefits has a mandatory self-effectuating federal right of subrogation, a contractual right of subrogation, or a statutory right of subrogation or if the source pays the plaintiff a benefit that is in the form of a life insurance payment or a disability payment. \*\*\* [emphasis added]

The statute restricts the common law rule which was established in *Pryor* by allowing

collateral source benefits to be introduced, subject to a few specifically defined exceptions. *Id.* There is no dispute in this case that Plaintiff's private health insurers possessed a contractual right of subrogation with regard to the recovery that he realized in his lawsuit. *Jaques*, 2009-Ohio-1468 ¶ 9. Evidence of the amounts payable by collateral sources were thus inadmissible under R.C. §2315.20(A). And since the existence of write-offs cannot be established without "evidence of the amount payable[,]" the statute precludes exactly that which Defendant is demanding in this appeal. *Id.*

For this same reason, the tort-reform statute is incompatible with *Robinson*, 112 Ohio St. 3d 17. The syllabus of the decision permits evidence of "the amount accepted as full payment" while R.C. §2315.20(A) precludes evidence of "any amount payable" whenever the subrogation exception applies. The pertinent terminology is indistinguishable. As a matter of simple logic, the amount accepted (*Robinson*) is the same as the amount payable (statute).

The likely objective behind the exception that lies at the heart of this appeal is to ensure that health insurers and plans are able to fully exercise their rights to reimbursement from the recovery which is secured against the tortfeasor. If the availability of health insurance could be disclosed in such cases through the introduction of the amounts actually accepted and the existence of write-offs, the jury's awards would be substantially diminished and little would be left to subrogate against. Properly understood, R.C. §2315.20(A) simply reflects a legislative preference for medical insurers and plans over tortfeasors and their liability carriers in such instances.

#### **IV. THE RETURN TO ROBINSON**

Other than alerting juries to the existence of health insurance coverage,

returning to the pre-tort reform common law collateral source rule will accomplish nothing more than robbing Peter to pay Paul. Under R.C. §2315.20(C), the “source” of the collateral benefits (*i.e.*, the health insurers and plans) are precluded from exercising their subrogation rights once the amounts payable have been introduced. Responsibility for the accident related medical bills are simply shifted from one insurer to another (when there is insurance). Perhaps this explains why none of the insurance industry advocates that traditionally submit amicus briefs in tort reform appeals have asked this Court to overturn the Sixth District’s decision.

The notion that following the tort-reform statute will result in an unintended windfall for accident victims is certainly misplaced. One might just as well argue that under *Robinson* the tortfeasor receives a “windfall” by having the good fortune to injure someone who has the means and sense to purchase health insurance. If the plaintiff is uninsured, there will be no opportunity to lecture the jury about “write-offs.” Through R.C. §2315.20(A) & (C), the General Assembly has determined how any “windfalls” should be allocated. That public policy decision should be left undisturbed.

In their effort to wiggle out from under this statute, Defendant and her *amici* have made much ado over this Court’s observation in *Robinson* that: “The collateral-source rule does not apply to write-offs of expenses that are never paid.” *Id.*, 112 Ohio St. 3d at 42 ¶ 16. That statement was made, however, to distinguish *Pryor*, 23 Ohio St. 2d 104. In that seminal decision, this Court had held that a trial judge had erred by “allowing the defense to elicit, on cross-examination of plaintiff, over objection, that payments of money were made to [her] by her employer during the period she was unable to work as a result of the accident.” *Id.*, at 107. The precedent established in *Pryor* seemingly would have required the First District to be affirmed in *Robinson*, since the defense had been allowed at trial to present evidence of the amounts paid on

the plaintiff's behalf by a collateral source (i.e. her health insurer). *Id.*, 112 Ohio St. 3d at 18 ¶ 3. But *Robinson* modified the rule of *Pryor*.

While this Court does enjoy the prerogative to redefine common law standards as deemed necessary to advance legitimate public and judicial interests, a vastly different situation is presented when a plain and unambiguous statute controls. As adopted by the General Assembly, R.C. §2315.20(A) permits the introduction of collateral benefit payments “except if the source of collateral benefits has a mandatory self-effectuating federal right of subrogation, a contractual right of subrogation, or a statutory right of subrogation \*\*\*.” *Id.* (emphasis added). It is thus the “source” of the collateral benefits which must be entitled to subrogation for the exception to apply, which can only refer to the health insurer or plan. That requirement has been satisfied in this instance. *Jaques*, 2009-Ohio-1468 ¶ 9.

This Court's observation in *Robinson* that *Pryor's* “collateral-source rule does not apply to write-offs of expenses that are never paid[,]” has no logical relevance to the specific terms of R.C. §2315.20(A). As drafted and enacted by the General Assembly, the statute does not limit the exception to the payment of subrogated benefits. Rather, the “source” (i.e., health insurer or plan) only needs to possess a mandatory and legally recognized right of subrogation. This construction comports with the legislature's intention to protect the ability of those insurers and plans to fully exercise their rights to reimbursement. When collateral benefits are disclosed under subsection (A), they lose the subrogation rights altogether under subsection (C).

## V. OTHER STATE'S COLLATERAL SOURCE RULE

Defendant also feels that it is significant that: “In reaching its decision in *Robinson*, this Court examined cases from Idaho, California, Florida and Pennsylvania holding that the amount written off by medical providers is neither a ‘collateral source’

nor a 'benefit received,' and that evidence of such write-offs is admissible." *Merit Brief of Defendant-Appellant*, p. 6 (emphasis original, citations omitted). She seems to be overlooking that the *Robinson* opinion had also observed that: "Ten state courts have concluded that plaintiffs are entitled to claim and recover the full amount of reasonable medical expenses charged, including amounts written off from the bills pursuant to contractual rate reductions." *Robinson*, 112 Ohio St. 3d at 22 ¶ 12. This Court thus elected to follow the minority view.

*Robinson's* analysis of the common law rules employed in other states hardly matters at this point, given that the issue is now controlled by statute in Ohio. Defendant contends that "both Florida and Idaho have enacted statutes that limit or abolish the collateral source rule, joining 19 other states that have modified or abolished the collateral source rule." *Defendant's Brief*, p. 6. She has not bothered to furnish citations to either the Florida or Idaho statutes or identify the "19 other states[.]" She had directed this Court's attention only to Section 3(A)(7)(b) of S.B. 80, which is equally silent in this regard.

The Florida collateral source statute that the OAJ has located requires non-subrogated collateral source benefits to be deducted from the recovery and does not address the admissibility of payments or write-offs. *Fla. Stat. §768.76, Appx. 0001*. Evidence of collateral benefits is actually prohibited in that state notwithstanding the legislative effort. *Sheffield v. Superior Ins. Co.* (Fla. 2001), 800 So.2d 197, 200-201; *Benton v. CSX Transp., Inc.* (Fla. App. 2005), 898 So.2d 243, 245. The Florida Supreme Court has sagely reasoned that:

Because a jury's fair assessment of liability is fundamental to justice, its verdict on liability must be free from doubt, based on conviction, and not a function of compromise. Evidence of collateral source benefits may lead the jury to believe that the plaintiff is "trying to obtain a double or triple payment for one injury," \*\*\* or to believe that

compensation already received is "sufficient recompense."  
\*\*\* [citations omitted]

*Gormley v. GTE Prods.* (Fla. 1991), 587 So.2d 455, 458.

Likewise, an Idaho statute also requires collateral source payments to be deducted from damage awards but does not authorize such evidence to be presented during trials. *Idaho Code §6-1606, Appx. 0004*. To the contrary, the jury should never find out about the availability of health insurance because: "Evidence of payment by collateral sources is admissible to the court after the finder of fact has rendered an award." *Id. (emphasis added)*. Neither Florida nor Idaho thus actually take an approach to collateral source benefits that is comparable to that which has been adopted in Ohio. *R.C. §2315.20(A) & (C)*.

## VI. OBLITERATION OF THE SUBROGATION EXCEPTION

The most obvious flaw with Defendant's interpretation of the Ohio statute is that the exception provided in the first sentence of R.C. §2315.20(A) would be rendered pointless. Since it is always true that "no one pays the write-offs," extrapolating this aspect of *Robinson* to the enactment will mean that the exception provided in the first sentence will never be available and collateral benefits will always be admissible even though the health insurer/plan possesses rights of subrogation. These subrogation rights will then be lost by operation of subsection (C). That cannot be what the General Assembly intended, as the existence of the exception was undoubtedly designed to ensure that the usual, customary, and reasonable value of the medical expenses are recovered so that subrogated medical insurers/plans will be fully reimbursed.

R.C. 1.47(B) creates a presumption that the entire statute is "intended to be effective" and courts are thus required to afford positive meaning to each and every term. *State ex rel. Semetko v. Bd of Commrs.* (6th Dist. 1971), 30 Ohio App. 2d 130, 283 N.E. 2d 648,651. A law should never be interpreted in a manner which renders it a

nullity. *Montalto v. Yeckley* (1941), 138 Ohio St. 314, 34 N.E. 2d 765, 768. In *Commonwealth Loan Co. v. Downtown Lincoln Mercury Company* (1964), 4 Ohio App. 2d 4, 6, 211 N.E. 2d 57, 59, the court reasoned that:

It is the duty of a court called upon to interpret a statute to breathe sense and meaning into it; to give effect to all its terms and provision; and to render it compatible with other and related enactments whenever and wherever possible.

Applying the reasoning of *Robinson* to a statute which was never at issue in that case will preclude an exception which the General Assembly had specifically approved from ever being invoked, and thus should be avoided regardless of the costs which are shifted to tortfeasors and the liability insurance industry.

## VII. VIEWS OF THE TRIAL COURTS

Trial judges who possess first-hand experience with the impact of the *Robinson* rule upon jury verdicts have concluded on repeated occasions that the plain and unambiguous text of R.C. §2315.20(A) prohibits the introduction of write-offs (and the availability of health insurance by implication) whenever the source of the collateral benefits possesses subrogation rights. One example is *Herron v. Anderson* (March 18, 2008), Summit C.P. Case No. CV2007-04-2600, *Appx. 0005*. That personal injury action had also involved a claim which had accrued following the effective date of R.C. §2315.20. Judge Judy Hunter recognized that the statutory collateral source rule, and not *Robinson*, thus governed. *Id.* The Court concluded that “Defendant is not permitted to introduce evidence of the amount payable or the write-off amount for said medical bills.” *Appx. 0008*.

The courts of Cuyahoga and Summit Counties rarely agree on much, but it is noteworthy that they have here. In *Pride v. Ortez* (May 15, 2008), Cuyahoga C.P. Case No. 630869, *Appx. 0009*, the defendant had maintained that under *Robinson*, 112 Ohio St.3d 17, he was allowed to introduce evidence of the amounts “written off” by the

health care providers notwithstanding the dictates of R.C. §2315.20. Judge Dick Ambrose disagreed and reasoned that:

After considering the arguments of counsel, the applicable law and relevant facts, the court adopts the reasoning of the court in *Herron v. Anderson* (March 18, 2008), Summit C.P. Case No. 2007-04-2600, which found that the Supreme Court's holding in *Robinson v. Bates* was limited to cases dealing with personal injuries preceding the implementation of R.C. 2315.20. The court also held that by passing R.C. 2315.20, the legislature intended to limit the collateral source rule. The Summit County court also reasoned that if the defendant was allowed to introduce evidence of "write-offs" because they are not considered "payments" of collateral source benefit, as discussed by the court in *Robinson v. Bates*, the jury would be able to determine the amount of collateral payments by simply subtracting the "write-off" from the plaintiff's medical bills. This would clearly circumvent the statute and the legislature's intent in enacting the new collateral benefit statute – R.C. 2315.20.

See also, *Masaveg-Barry v. Stewart* (May 8, 2008), Summit C.P. Case No. CV 2007-08-5997, Appx. 00010; *Kral v. Hren* (Aug 27, 2008) Cuyahoga C.P. Case No. 64206, Appx. 00013; *Hohman v. MetLife Auto and Home*, Lorain C.P. Case No. 08CV159471, Appx. 00014. In accordance with these sound authorities and (more significantly) the unmistakable directive of R.C. §2315.20(A), this Court should reject this Proposition of Law and hold that the *Robinson* analysis has no application to lawsuits which are subject to the legislative enactment.

**PROPOSITION OF LAW NO. 2: EVEN IF THE COURT OF APPEALS IS 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.**

The Sixth District certainly did not "ignor[e]" *Robinson*, 112 Ohio St. 3d 17, as has been represented in this ill-conceived Proposition of Law. The decision was cited and/or discussed in no less than six of the eleven paragraphs which comprised the

succinct and well-reasoned decision. The unanimous panel simply did not share Defendant's view that the pre-tort reform *Robinson* rule controlled over the new statute. Accusing an appellate court of "ignoring" potentially controlling Supreme Court precedent plainly attempts to convey a sense of dereliction, which one would not expect from a litigant who is confident in his/her position.

The second Proposition of Law is nothing more than a play on words. It is correct enough that "no contractual right of subrogation can exist for amounts that have never been paid." *Merit Brief of Appellant*, p. 13. But that truism has nothing to do with R.C. §2315.20(A). Pursuant to the exception which has been furnished in the first sentence, collateral benefits are inadmissible whenever "the source of collateral benefits has \*\*\* a contractual right of subrogation \*\*\*." *Id.* The "source" plainly refers to the health insurer or plan. It thus is not benefits which have actually been "paid" which must be subrogated, only the "source" needs to be. At the risk of being repetitive, there has been no dispute "that the source of medical payments that [Defendant] attempted to introduce at trial were subject to a contractual right of subrogation." *Jaques*, 2009-Ohio-1468 ¶ 9.

Once again, Defendant's illogical construction of the legislative collateral source rule would render the first exception set forth in R.C. §2315.20(A) superfluous. As Defendant and her *amici* have astutely noted (over and over), "no contractual right of subrogation can exist for amounts that have never been paid." *Merit Brief of Appellant*, p. 13. The exception would thus serve no conceivable purpose, and any such interpretation run afoul of R.C. §1.47(B) and this Court's established precedents. *Montalto*, 138 Ohio St. 3d at 321. As was recognized over a century ago:

It is the bounden duty of courts to endeavor by every rule of construction to ascertain the meaning of, and give full force and effect to, every enactment of the General Assembly not obnoxious to constitutional prohibition.

*Beaverstock v. Board of Edn.* (1906), 75 Ohio St. 144, 150, 78 N.E. 1007, 1008; see also *Eastman v. State* (1936), 131 Ohio St. 1, 7-8, 1 N.E. 2d 140, 143. Instead of overriding the will of the General Assembly as Defendant and her *amici* have urged, this Court should affirm the Sixth District and reject this second Proposition of Law.

**CONCLUSION**

Unless Ohio jurists are now going to be expected to disregard unambiguous statutory language and return to pre-tort reform standards whenever deemed necessary, this Court should reject the two Propositions of Law which have been fashioned and affirm the Sixth Judicial District Court of Appeals in all respects.

Respectfully submitted,



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[COUNSEL OF RECORD]  
**PAUL W. FLOWERS CO., L.P.A.**  
*Amicus Curiae Chairman,  
Ohio Association for Justice*

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Brief was served by regular U.S. Mail on this

7<sup>th</sup> day of December, 2009 upon:

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Respectfully submitted,



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*Amicus Curiae Chairman,  
Ohio Association for Justice*

C

**Effective:[See Text Amendments]**

West's Florida Statutes Annotated Currentness

Title XLV. Torts (Chapters 766-774) (Refs &amp; Annos)

▣ Chapter 768. Negligence (Refs &amp; Annos)

▣ Part II. Damages

→ **768.76. Collateral sources of indemnity**

(1) In any action to which this part applies in which liability is admitted or is determined by the trier of fact and in which damages are awarded to compensate the claimant for losses sustained, the court shall reduce the amount of such award by the total of all amounts which have been paid for the benefit of the claimant, or which are otherwise available to the claimant, from all collateral sources; however, there shall be no reduction for collateral sources for which a subrogation or reimbursement right exists. Such reduction shall be offset to the extent of any amount which has been paid, contributed, or forfeited by, or on behalf of, the claimant or members of the claimant's immediate family to secure her or his right to any collateral source benefit which the claimant is receiving as a result of her or his injury.

(2) For purposes of this section:

(a) "Collateral sources" means any payments made to the claimant, or made on the claimant's behalf, by or pursuant to:

1. The United States Social Security Act, [FN1] except Title XVIII and Title XIX; [FN2] any federal, state, or local income disability act; or any other public programs providing medical expenses, disability payments, or other similar benefits, except those prohibited by federal law and those expressly excluded by law as collateral sources.

2. Any health, sickness, or income disability insurance; automobile accident insurance that provides health benefits or income disability coverage; and any other similar insurance benefits, except life insurance benefits available to the claimant, whether purchased by her or him or provided by others.

3. Any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the costs of hospital, medical, dental, or other health care services.

4. Any contractual or voluntary wage continuation plan provided by employers or by any other system intended to provide wages during a period of disability.

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JANEL M. HERRIGAN

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THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO

SUMMIT COUNTY  
CLERK OF COURTS

JOSHUA HERRON, )

Plaintiff, )

v. )

ROBYN J. ANDERSON, et al. )

Defendants. )

CASE NO.: CV 2007-04-2600

JUDGE HUNTER

**ORDER**

This matter comes before the Court on Plaintiff's Motion in Limine and Defendants' Motion to Compel Discovery. The Court has been advised having reviewed the Motions, response and reply briefs, and applicable law. Upon review, the Court finds Plaintiff's Motion in Limine well taken and it is granted. Conversely, the Court finds Defendant's Motion to Compel Discovery not well taken and it is denied.

LAW AND ANALYSIS

Plaintiff Joshua Herron initially brought suit against the Defendant Robyn Anderson for the personal injury and property damage related to a motor vehicle accident that occurred on January 10, 2007 in the City of Cuyahoga Falls, Ohio and also against the Defendant Sonnenberg Mutual Insurance Co. under Plaintiff's policy of uninsured/underinsured benefits related to said injuries. Both Plaintiff and Defendant Sonnenberg have settled their respective personal injury/property damage suit and subrogation cross-claim against Ms. Anderson. This matter is set for trial on the remaining uninsured/underinsured issue on April 28, 2008. The parties have briefed the *Robinson v. Bates* issue herein as required by the Court.

In *Robinson v. Bates*, 112 Ohio St. 3d 17 (Ohio 2006), the Ohio Supreme Court reaffirmed the general premise that collateral-source rule is an exception to the general rule that in a tort action, the measure of damages is that which will compensate and make the plaintiff whole. *Robinson*, 112 Ohio St.3d. at 21. Under the collateral-source rule, a plaintiff's receipt of benefits from sources other than a wrongdoer is deemed irrelevant and immaterial on the issue of damages in a personal injury case. *Id.* The rule prevents the jury from learning about a plaintiff's income from a source other than the tortfeasor so that a tortfeasor is not given an advantage from third-party payments to the plaintiff. *Id.*

Ultimately, the Ohio Supreme Court held in *Robinson* that “[t]he jury may decide that the reasonable value of medical care is the amount originally billed, the amount the medical provider accepted as payment, or some amount in between. Any difference between the original amount of a medical bill and the amount accepted as the bill's full payment is not a ‘benefit’ under the collateral-source rule because it is not a payment, but both the original bill and the amount accepted are evidence relevant to the reasonable value of medical expenses.” *Id.* at 23. However, the Ohio Supreme Court noted that the above holding was limited to personal injuries that preceded the implementation of R.C. 2305.20, effective April 7, 2005. *Id.* at 20, foot-note one. Furthermore, the Court noted that, in light of the legislative history, the General Assembly clearly intended to limit the collateral source rule in Ohio by its passage of R.C. 2305.20. *Id.* at 22.

At issue herein is the application of the above statute in relation to the holding in *Robinson* vis-à-vis the collateral-source rule. In pertinent part, R.C. 2315.20 (A) states that “[i]n any tort action, the defendant may introduce evidence of any amount payable as a benefit to the plaintiff as a result 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, except if the source of collateral benefits has a mandatory self-effectuating federal right of subrogation, a contractual right of subrogation, or a statutory right of subrogation or if the source pays the plaintiff a benefit that is in the form of a life insurance payment or a disability payment.”

In the case at hand, both parties agree that Plaintiff’s health insurance carrier, United Health Care, a non-party herein, has a contractual right of subrogation against Plaintiff. As this right of subrogation is an exception to Defendant’s right to introduce evidence of any amount payable under R.C. 2315.20(A) above, the Court finds Plaintiff’s Motion in Limine is well taken. Although Defendant asserts that it is entitled to introduce evidence of the “write-off” amounts from said medical bills, the Court finds said amounts would be in direct contravention of the inherent meaning and intent of the above statute.<sup>1</sup> To permit the same would give the jury the necessary information to make the logical deduction that the total billed amount less the write-off amount equals the amount paid, the latter amount, clearly not permitted by said statute.

Wherefore, in the case herein, where the personal injury occurred after April 7, 2005, and where the Plaintiff’s health insured has a contractual right of subrogation, the Defendant is not permitted to introduce evidence of the amount payable or the write-off amount for said medical bills. As such, the Court finds Plaintiff’s Motion in Limine well taken and it is granted. Defendant is precluded from referencing or introducing at trial any evidence regarding health insurance benefits received as a result of the accident at issue, including the amounts of contractual write-offs or adjustments from Plaintiff’s health insurance. Conversely, the Court

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<sup>1</sup> It is the duty of courts, in the interpretation of statutes, unless restrained by the letter, to adopt that view which will avoid absurd consequences, injustice, or great inconvenience, as none of these can be presumed to have been within the legislative intent. *Moore v. Given* (1884), 39 Ohio St. 661, 664 cited in *Hill v. Micham* (1927), 116 Ohio St. 549, 553.

finds Defendant's Motion to Compel Discovery not well taken and it is denied. Defendant is not entitled to receive medical authorizations from the Plaintiff relating his medical records and invoices related to the injuries herein.

So Ordered.

  
JUDGE JUDY HUNTER

cc: Attorney Robert Foulds  
Attorney Jack Morrison Jr.



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**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

KIMBERLY PRIDE  
Plaintiff

DORIAN L. ORTEZ, ET AL  
Defendant

Case No: CV-07-630869

Judge: DICK AMBROSE

**JOURNAL ENTRY**

5-13-08. PLAINTIFF HAS MOVED THE COURT TO DECLARE THE CASE OF ROBINSON V. BATES (2006), 112 OHIO ST. 3D 17, INAPPLICABLE TO THE INSTANT PROCEEDING DUE TO THE APPLICATION OF R.C. 2315.20 TO THE FACTS OF THIS CASE.

PLAINTIFF ASSERTS THAT R.C. 2315.20, WHICH WAS IN EFFECT AT THE TIME PLAINTIFF WAS INJURED ON AUGUST 15, 2005, CONTROLS THE INTRODUCTION OF EVIDENCE OF COLLATERAL BENEFITS AT TRIAL. IN PARTICULAR, PLAINTIFF ARGUES THAT THE STATUTE ALLOWS THE INTRODUCTION OF EVIDENCE OF COLLATERAL PAYMENTS FOR DAMAGES RESULTING FROM AN INJURY OR LOSS TO PERSONS "EXCEPT IF THE SOURCE OF COLLATERAL BENEFITS HAS A MANDATORY SELF-EFFECTUATING FEDERAL RIGHT OF SUBROGATION, A CONTRACTUAL RIGHT OF SUBROGATION, OR A STATUTORY RIGHT OF SUBROGATION."

DEFENDANT ARGUES THAT R.C. 2315.20 DOES NOT AFFECT THE HOLDING IN ROBINSON V. BATES AND THAT EVIDENCE OF MEDICAL EXPENSES "WRITTEN OFF" BY HEALTHCARE PROVIDERS, PURSUANT TO CONTRACTUAL AGREEMENTS WITH HEALTHCARE INSURERS, CAN STILL BE INTRODUCED AT TRIAL IN ORDER TO ESTABLISH THE REASONABLE VALUE OF PLAINTIFF'S MEDICAL CARE.

AFTER CONSIDERING THE ARGUMENTS OF COUNSEL, THE APPLICABLE LAW AND RELEVANT FACTS, THE COURT ADOPTS THE REASONING OF THE COURT IN HERRON V. ANDERSON, (MARCH 18, 2008), SUMMIT C.P. NO. 2007-04-2600, WHICH FOUND THAT THE SUPREME COURT'S HOLDING IN ROBINSON V. BATES WAS LIMITED TO CASES DEALING WITH PERSONAL INJURIES PRECEDING THE IMPLEMENTATION OF R.C. 2315.20. THE COURT ALSO HELD THAT BY PASSING R.C. 2315.20, THE LEGISLATURE INTENDED TO LIMIT THE COLLATERAL SOURCE RULE. THE SUMMIT COUNTY COURT ALSO REASONED THAT IF THE DEFENDANT WAS ALLOWED TO INTRODUCE EVIDENCE OF "WRITE-OFFS" BECAUSE THEY ARE NOT CONSIDERED "PAYMENTS" OF COLLATERAL BENEFITS, AS DISCUSSED BY THE COURT IN ROBINSON V. BATES, THE JURY WOULD BE ABLE TO DETERMINE THE AMOUNT OF COLLATERAL PAYMENTS BY SIMPLY SUBTRACTING THE "WRITE-OFF" FROM THE PLAINTIFF'S MEDICAL BILLS. THIS WOULD CLEARLY CIRCUMVENT THE STATUTE AND THE LEGISLATURE'S INTENT IN ENACTING THE NEW COLLATERAL BENEFIT STATUTE - R.C. 2315.20.

FOR THESE REASONS, PLAINTIFF'S MOTION IN LIMINE EXCLUDING COLLATERAL SOURCE INFORMATION IS GRANTED.

Judge Signature

05/15/2008

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SUMMIT COUNTY  
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

STEPHANIE MASAVEG-BARRY )

Plaintiff )

-vs- )

KELLY STEWART )

Defendant )

CASE NO. CV 2007 08 5997

JUDGE SPICER

**ORDER**

- - -

This matter is before the Court upon Plaintiff's Motion *in Limine* regarding collateral benefits filed March 25, 2008. Defendant files a brief in opposition. Plaintiff files a reply and additional authority in support. The Court deems all matters submitted and will proceed to consider the issues and applicable law.

Plaintiff brings this action for personal injury arising out of injuries alleged to have arisen out a motor vehicle accident that occurred on August 29, 2008. Plaintiff claims to have sustained injuries to her neck, left shoulder and back. Following the accident, Plaintiff treated with the following: her primary care physician, Thomas Mandat, M.D., Jon Wronko, D.C., and Vernon Patterson, D.O. at Horizon Orthopedics. Plaintiff also had an MRI. Plaintiff's health care expenses of the foregoing totaled \$4,883.00. Of that amount, Plaintiff's private health care insurer, United Healthcare, paid \$929.54, to which they have a subrogated interest. Plaintiff's automobile insurer, Progressive, paid \$2,025.00, for which they have a subrogated amount.

Plaintiff seeks to preclude Defendant from introducing the amounts paid by United Healthcare and Progressive into evidence. Plaintiff also seeks to exclude the introduction of the amounts "written off" by her health care professionals.

Defendant states that it does not dispute that the collateral source rule applies to this case, but argues that the Ohio Supreme Court decision in *Robinson v. Bates* (2006), 112 Ohio St. 3d 17, held that the collateral source rule does not apply to write-offs of expenses that were never paid, such as in this case.

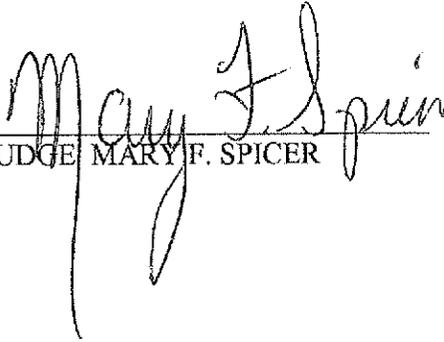
At issue herein is the application of R.C. 2305.20(A), which became effective on April 7, 2005, in relation to the holding in *Robinson v. Bates*. Plaintiff submits a recent decision of Judge Judy Hunter, *Herron v. Anderson*, Summit C.P. Case No. CV 2007 044 2600, which the Court finds well reasoned. In particular, the Court concurs with Judge Hunter's decision at page 3:

"Although Defendant asserts that it is entitled to introduce evidence of the "write-off" amounts from said medical bills, the Court finds said amounts would be in direct contravention of the inherent meaning and intent of the above statute [R.C.2305.20(A)]. To permit the same would give the jury the necessary information to make the logical deduction that the total billed amount less the write-off amount equals the amount paid, the latter amount, clearly not permitted by statute."

Thus, in this case, this Court likewise finds as the personal injury occurred after April 7, 2005, and Plaintiff's health insured has a contractual right of subrogation, the Defendant is not permitted to introduce evidence of the subrogated amount or the write off amount for said medical bills.

Accordingly, Plaintiff's Motion *in Limine* regarding collateral benefits is well taken and is granted.

It is so Ordered.

  
JUDGE MARY F. SPICER

cc: Attorney Thomas J. Sheehan  
Attorney Kimberly K. Wyss

JD:lcb  
07-5997



53274713

**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

DONNA M KRAL ET AL  
Plaintiff

GERALD HREN ET AL  
Defendant

Case No: CV-07-642068

Judge: PETER J CORRIGAN

**JOURNAL ENTRY**

DEFENDANT ENCOMPASS INSURANCE COMPANY OF AMERICA'S MOTION TO COMPEL RE: ROBINSON V. BATES IS DENIED. THIS COURT ADOPTS JUDGE AMBROSE'S WELL REASONED OPINION IN PRIDE V. ORTEZ (MAY 16, 2008), CUYAHOGA C.P.NO. CV-07-630869 AND FINDS THAT ROBINSON V. BATES 112 OHIO ST.3D 17, 2006-OHIO-6362 IS INAPPLICABLE PURSUANT TO R.C. 2315.20 IN EFFECT AT THE TIME OF THE OCCURRENCE. SETTLEMENT CONFERENCE SET FOR 09/15/2008 AT 02:30 PM. ALL CLIENTS, PERSONS WITH SETTLEMENT AUTHORITY, ADJUSTERS MUST BE PRESENT.

Judge Signature

08/27/2008

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CLERK OF COMMON PLEAS  
RON NABAKOWSKI  
IN THE COURT OF COMMON PLEAS  
LORAIN COUNTY, OHIO

MICHAEL HOHMAN, ET AL,	}	CASE NO. 08CV159471
	}	
Plaintiff,	}	JUDGE EDWARD M. ZALESKI
	}	
vs.	}	
	}	
METLIFE AUTO AND HOME	}	<u>JOURNAL ENTRY</u>
	}	
Defendants.	}	

This matter is before the Court for consideration of Plaintiff's Motion in Limine. Plaintiff seeks to limit the ability of defense to refer to or attempt to introduce evidence that medical providers have accepted less for services than referenced in the billing statement. The Defendant, Metlife Auto and Home, has opined that, pursuant to *Robinson v. Bates*, 112 Ohio State 3d 17 (2006), the evidence is both relevant and admissible. Ohio courts are in conflict regarding whether the holding in *Robinson*, is superseded by ORC 2315.20, which provides that collateral source payments are inadmissible where the collateral source has a right of subrogation. The Supreme Court in *Robinson*, specifically noted that the cause of action arose prior to April 7, 2005, the effective date of ORC 2315.20. In the within action, the accident occurred on July 5, 2007, after the aforementioned effective date.

Accordingly, the Motion in Limine is granted and defendant is precluded from introducing evidence of collateral source payments in instances where the collateral source has a right of subrogation, as set forth in ORC 2315.20.

Dated: July 29, 2009

  
\_\_\_\_\_  
Judge Edward M. Zaleski