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IN THE SUPREME COURT OF OHIO

Case No. 2009-0820

Richard Jaques,

Plaintiff-Appellee,

v.

Patricia A. Manton,

Defendant-Appellant.

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BRIEF OF *AMICUS CURIAE* ELK &ELK CO., Ltd., IN SUPPORT OF APPELLEE RICHARD JAQUES

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STATEMENT OF INTEREST

Amicus Elk & Elk Co., Ltd., is one of the largest law firms in Ohio that serves injured persons as its primary practice area. This Amicus has seen this Court's decision in Robinson v. Bates, 112 Ohio St.3d 17, 2006-Ohio-6362, affect many hundreds of injured persons' cases.

In only three years, at least 100 Ohio trial judges have taken written positions on how the Robinson decision will play out in their court rooms.[1] The great majority of these decisions have been to exclude evidence of so-called "write-offs." Ohio Civil Practice has not seen a proliferation of such numerous and divergent opinions since the aftermath of the Scott-Pontzer decision. As with that now discarded decision, the sub-issues being litigated in Robinson's wake are fractious and require extensive motion practice. It is increasingly common for both opposing sides to pull dozens of unreported decisions togther from trial courts that have opined on a particular issue. The difficulties trial courts are facing go well beyond the question of whether Robinson applies after the enactment of R.C. § 2315.20. They add expense, uncertainty, and duration to civil trials to the detriment of all parties, and the courts.

This Amicus writes to voice the concern of many injured parties, and to call this Court's attention to the practical effects of the Robinson decision. Where the Robinson decision is concerned, plaintiffs' attorneys' duties to advocate for their clients are compounded by their duty to the health of the civil justice system.

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[1]The archive kept by Amicus Nicholas Schepis at www.schepislaw.com/archive/ is the comprehensive source of judicial opinions and practitioner memoranda alike. Mr. Schepis's efforts have illuminated this issue for the benefit of all sides, and that of Ohio's courts.

STATEMENT OF THE CASE AND FACTS

Amicus rests with the Statements of the Case and of the Facts presented by Appellee Richard Jaques.

LAW AND ARGUMENT

Robinson v. Bates meets this Court's test for overruling or modifying precedent as announced in Westfield v. Galatis (2003), 100 Ohio St.3d 216, 2003-Ohio-5849, at syllabus 1. If the decision was correct at the time it was decided, then the enactment of R.C. 2315.20, and the collective experience of Ohio courts in the last three years are "changes of circumstances [that] no longer justify continued adherence to the decision." Id. at (1). Ohio trial judges' opinions, particularly on whether the introduction of insurance adjustments is more prejudicial than probative, demonstrate that Robinson defies practical workability. Id. at (2). And abandoning Robinson will not create hardship for those who have relied on it. Id. at (3). Instead, to overrule or limit Robinson will only end the uncertainty and expense associated with gathering evidence that is not truly reflective of the reasonable value of medical services.

The camps urging affirmance or reversal in this case have formed along predictable lines. Make no mistake, in every tort action where the plaintiff has insurance, someone gets an apparent windfall. It may go to the tortfeasor who was lucky enough to injure someone with insurance; or it may go to the plaintiff who had the foresight to obtain insurance, usually at considerable expense. As between these two options, the collateral source rule became the *rule* because it is better policy to reward the foresight to purchase insurance than the dumb luck of the tortfeasor who injured an insured plaintiff. The plaintiff is the only one who has *paid* for the so-called "windfall."

Thus, the matter of who gets the supposed "windfall" is a guide that can only take this Court so far. This is an opportunity to review the practical result of the Robinson decision. Ohio courts have found that to advise juries of insurance adjustment amounts, but then to pretend ***not*** to be talking about insurance, is like trying to put toothpaste back into the tube. It cannot be done.

I. BECAUSE EVIDENCE OF A "WRITE-OFF" IS EVIDENCE OF A BENEFIT, *ROBINSON V. BATES* SHOULD BE OVERRULED OR LIMITED TO CASES THAT ACCRUED PRIOR TO R.C. § 2315.20.

A growing number of Ohio trial courts are holding that the introduction of so-called Robinson numbers can only lead to jury confusion, and nullify the collateral source rule. As one Cuyahoga County judge put it, evidence of a "write off" is evidence of a benefit, and thus a violation of the collateral source rule:

> **It is settled, through Robinson, that a write-off is not a benefit. However, it is clear that *evidence* of a write-off is *evidence* of a benefit.** [*Emphasis sic;* **emphasis** added.]

Lococo v. Loprich (Cuyahoga C.P. 9/26/08), Case No. CV-07-629522, unreported (Exhibit I); Kuchta v. Merchant (Cuyahoga C.P. 10/9/08), Case No. CV-07-637839, unreported (Exhibit II).

Allowing evidence of "write-offs," or lesser amounts accepted than the amounts billed, destroys the effect of the collateral source rule:

> If the court were to allow evidence of the payment accepted as full and final payments, the jury would simply be able to subtract the write-off amount from the original amount of the medical bills and determine the benefit received.

Welsh v. Sudbury (Cuyahoga C.P. 11/19/08), Case No. CV-08-657562, unreported (Exhibit III); see also Kissling v. Ohler (Cuyahoga C.P. 11/19/08), Case No. CV-08-653636, unreported (Exhibit IV).

Courts in jurisdictions that have not been recognized as being friendly to plaintiffs have

agreed:

> As a general rule, evidence of a "write-off" shows, with no real stretch, that a collateral source will pay the bill. Evidence of the write-off is an end-around way of presenting evidence that there is a third party who will pay the reduced bill, or a "collateral source."
> ***
> Even if, as the Court in Bates, supra, stated, "any difference between an original medical bill and the amount accepted in full payment for the bill is not a 'benefit' under the collateral source rule," the ultimate consequence is the same. In most cases, evidence of the difference between an original medical bill and the amount accepted as full payment for the bill allows the conclusion that someone, other than the plaintiff made or will make the reduced payment.

Verhoff v. Diller (Allen C.P. 3/24/08), Case No. CV2007-1278, unreported (Exhibit V).

The Montgomery County Court of Common Pleas has noted that also that evidence of an insurance adjustment is evidence of insurance:

> But, even if the "write offs" are not a collateral benefit, when a jury is informed that a medical provider accepted as full payment an amount less than the original bill, it will inevitably conclude that a third party paid or promised to pay the reduced amount. Further anyone who can perform simple math would then know the amount paid by the third party. This payment is a collateral benefit. If the evidence of that collateral benefit is prohibited by R.C. 2315.20, then the Court must not allow evidence of these "write offs" to be admitted.

Garey v. Erie Ins. Co. (Montgomery C.P. 7/15/09), Case No. 2008-CV-2966, unreported (Exh. VI).

The Summit County Court of Common Pleas has noted that allowing information about lesser amounts accepted will allow the jury to infer the amounts paid by collateral sources:

> 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 [the collateral source] statute.

Herron v. Anderson (Summit C.P. 3/18/08), No. CV 2007-04-2600, unreported (Exhibit VII); see also Masaveg-Barry v. Stewart (Summit C.P. 5/8/08), No. CV 2007 08 5997, unreported (Exhibit VIII).

It is undeniable that to show the jury one amount representing the amount medical providers charged, and another amount for what they accepted as payment, is to say "insurance" to the jury. It is crucial to note that the parties in Robinson *stipulated* what the difference was between the amounts of the medical expenses as billed, and the amounts accepted in payment. Robinson, 112 Ohio St.3d 17 at *P3.

That means that this Court did not, in Robinson, consider a record on which the plaintiff ***objected*** to the introduction of the lesser amount on the grounds that it tells the jury about a collateral source. Numerous Ohio courts are confronted with this question on a daily basis. They overwhelmingly hold that evidence of an insurance adjustment is evidence of an insurance benefit. This Court perceived that Robinson was not a collateral source issue, but that is not how Robinson plays out in Ohio every day. Once insurance adjustments to medical bills are introduced, the trial courts of Ohio cannot un-ring the bell. Evidence of a "write-off" is evidence of a benefit.

II. *ROBINSON* DEFIES PRACTICAL WORKABILITY.

A. ROBINSON CONCERNS THE MEASURE OF REASONABLE VALUE OF MEDICAL EXPENSES.

Robinson is nothing if not a rule of evidence. The issue at all times is what is probative of the reasonable value of a plaintiff's medical expenses: "We first consider what evidence a jury may consider in evaluating the **reasonable value of medical expenses**." Id. at *P7 (emphasis added), citing Wagner v. McDaniels (1984), 9 Ohio St.3d 184, 186 (holding "proof of the amount paid or

the amount of the bill rendered and of the nature of the services performed constitutes prima facie evidence of the reasonableness of the charges for medical and hospital services").

The inquiry begins with the statutory presumption:

§ 2317.421. Personal injury or wrongful death action

> In an action for damages arising from personal injury or wrongful death, a written bill or statement, or any relevant portion thereof, itemized by date, type of service rendered, and charge, shall, if otherwise admissible, be prima-facie evidence of the reasonableness of any charges and fees stated therein for medication and prosthetic devices furnished, or medical, dental, hospital, and funeral services rendered by the person, firm, or corporation issuing such bill or statement, ...

R.C. § 2317.421. The issue that confronts Ohio trial courts in Robinson's wake is therefore what evidence is useful and probative toward rebutting that presumption.

B. ROBINSON EVIDENCE IS MORE PREJUDICIAL THAN PROBATIVE ON THE ISSUE OF REASONABLE VALUE.

The Verhoff court considered directly the question of whether the introduction of "write-off" evidence would be more prejudicial than probative. The Court stated:

> **This issue presented by the instant motion is confusing to the brightest and best legal minds in this state. The evidence discussed because of this motion would be confusing to a jury and legal gymnastics involved only serves to continue the charade that insurance has nothing to do with the case.** [Emphasis added.]
>
> ***[quoting Justice Lundberg-Stratton's concurrence/dissent in Robinson]
>
> Neither Bates nor R.C. 2315.20 *mandates* (emphasis by the court) introduction of "write-offs." ... Evidence of write-offs creates confusion of the issues and has the very real potential of misleading the jury. Therefore, under Evid. R. 403 and in the exercise of careful discretion, evidence of write-offs in this case will not be permitted.

Verhoff, supra, pp. 8-9 (Exhibit V).

The potential for confusion of the issues that would result by allowing a jury to guess the "reasonable value," as between the amounts charged, and the amounts accepted, was a great concern to the Court in Dimitroff v. Grishcow:

> It is the opinion of this Court that the real subject matter of this debate is what is relevant evidence pursuant to Ohio Evidence Rule 402 ... .
>
> Neither the Supreme Court in Robinson v. Bates, supra, nor the relevant Ohio Statutes prohibit the introduction of bills for actual medical, hospital, dental, medication, etc. incurred as prima-facie evidence of the reasonableness and necessity of those bills.
>
> ***
>
> In this Court's opinion, the introduction of the original bills not only provides prima-facie evidence of the reasonableness and necessity of those bills and the treatment of the injured person, they also are prima-facie evidence of the nature and extent of the injuries as well as future permanency of the injury and the pain and suffering or lack thereof that the Plaintiff is going to endure.
>
> The amount accepted by the provider as to any particular service, is a negotiated amount between the insurer, HMO, and the provider for payment for certain types of medical treatment, or medications, or hospital stays. The Plaintiff is not a participant in these negotiations.
>
> Further, if the doctor, hospital, or pharmacy wants to participate as a provider with respect to a particular insurer or HMO, he or she must accept the terms and amounts dictated.
>
> There is no evidence before this Court nor was there before the Ohio Supreme Court in Robinson v. Bates, supra, how these amounts of payments were arrived at. This Court is, however, of the opinion that if it were to have ten doctors or ten administrators of hospitals in front of it, who were asked if the amounts paid reflected a fair and reasonable amount of the services provided, the Court would receive a resoundingly negative response from all of them.
>
> The Court can take judicial notice that there is constant conflict between the medical providers and HMOs and insurers on what is reasonable in terms of medical and hospital costs. Most of it, however, has to do with balance sheets. None of it has to do with actual injury or lack thereof incurred by the injured person.
>
> ***
>
> However, in order to introduce evidence of the lesser amount

> paid, the jury must be told that there is a collateral source for some payment, and the payment of that amount is contractual between the provider and the insurer. It does not take into consideration the extent of injuries to Plaintiff, the permanency or non-permanency of the injury to the Plaintiff, and the pain and suffering or lack thereof. In fact, under Evidence Rule 403, this Court finds that such evidence is outweighed by the danger of unfair prejudice, confusion of the issues, or of misleading the jury.

Dimitroff v. Grishcow (Franklin C.P. 1/5/09), Case No. 07CVA-01-103, unreported (Exhibit IX).

The Lorain County Court of Common Pleas has held similarly:

> Since Robinson v. Bates, the courts and litigants have seen the practical effects of the ruling. Additional time and resources are spent on gathering the records, trying to decipher insurance payment records, and reconciling provider bills with insurance statements. This extra paper work for the litigants, the providers, and the courts seems to create a potential for confusion in the courtroom with an inordinate amount of time spent on these issues before trial and during trial at least in this judge's opinion.

Rivera v. Urbansky (Lorain C.P. 8/26/08), Case No. 08CV154436, unreported (Exhibit X).

The Lucas County Court of Common Pleas has explained:

> After careful consideration, this Court finds that the difference in the amount billed and the amount accepted, the "write-off," is paid by insurance companies through negotiations with medical providers and payment is made by the volume and good will of insurance companies and the guarantee to the medical provider to be paid a negotiated amount.

Goney v. Hill (Lucas C.P. 5/7/08), Case No. CI 06-5002, unreported (Exhibit XI).

The Supreme Court of Illinois has recently and thoroughly considered these issues, and declined to follow Robinson:

> Other courts have held that defendants may not introduce the amount paid by a third party to assist the jury in determining reasonable value. For instance, in Leitinger, the Supreme Court of Wisconsin

found that allowing defendants to introduce this evidence would undermine the collateral source rule: "If evidence of the collateral source payments were admissible, even for consideration of the reasonable value of the medical treatment rendered, a plaintiff's recovery of medical expenses would be affected by the amount actually paid by a collateral source for medical services."[cite omitted.] The court further considered the defendant's argument that it should be allowed to introduce the amount of the paid bill if it did not divulge the source of the payments. The court disagreed: "Although claiming that the evidence assists the fact-finder [*417] in determining the reasonable value of the medical treatment and does not limit or reduce the damages, [the defendant], in essence, is **seeking to do indirectly what it cannot do directly**, that is, it is seeking to limit [the plaintiff's] award for expenses for medical treatment by introducing evidence that payment was made by a collateral source." [cite omitted.] Moreover, the court shared the concern expressed by the South Carolina Supreme Court in [omitted], that this **unexplained evidence would confuse the jury, and any attempt by plaintiff to explain the compromised payment would lead to the existence of a collateral source**.[cite omitted] See also Papke, 738 N.W.2d at 536 ("when establishing the reasonable value of medical services, defendants in South Dakota are currently prohibited from introducing evidence that a plaintiff's award should be reduced because of a benefit received wholly independent of the defendants"); Radvany v. Davis, 262 Va. 308, 310, 551 S.E.2d 347, 348 (2001) (amounts paid by insurance carrier not admissible on question of reasonable value of medical services); Bynum, 106 Haw. at 94, 101 P.3d at 1162; Goble v. Frohman, 848 So. 2d 406, 410 (Fla. App. 2003) ("To challenge the reasonableness or necessity of the medical bills, [the defendant] could have introduced evidence on the value of or need for the medical treatment. As stated in Gormley [v. GTE Products Corp., 587 So. 2d 455, 457 (Fla. 1991)] 'there generally will be other evidence having more probative value and involving less likelihood of prejudice than the victim's receipt of insurance-type benefits'"). Chief Justice McMorrow expressed a similar concern in her dissent in Arthur, arguing that allowing the defense to bring out that the full billed amount had not been paid would compromise the protections of the collateral source rule and that "[a]llowing evidence of both the billed and discounted amounts compromises the [*418] collateral source rule, confuses the jury, and **potentially prejudices both parties** in the case." Arthur, 216 Ill. 2d at 98 (McMorrow, C.J., dissenting).

> We agree with the latter cases. In Arthur, this court made clear that the collateral source rule "operates to prevent the jury from learning anything about collateral income" (emphasis added) and that the evidentiary component prevents "defendants from introducing evidence that a plaintiff's losses have been compensated for, even in part, by insurance." Arthur, 216 Ill. 2d at 79, 80. Thus, defendants are free to cross-examine any witnesses that a plaintiff might call to establish reasonableness, and the defense is also free to call its own witnesses to testify that the billed amounts do not reflect the reasonable value of the services. **Defendants may not, however, introduce evidence that the plaintiff's bills were settled for a lesser amount because to do so would undermine the collateral source rule.** [**Emphasis** added.]

Wills v. Foster (Ill. 2008), 229 Ill. 2d 393, 417-418.

C. JURIES CANNOT EVALUATE "REASONABLE VALUE" WITHOUT EXPERT TESTIMONY.

When Robinson evidence is allowed, the jury has no rational mechanism by which to evaluate the "reasonable value" of medical care. Between the options presented (amount charged, or amount accepted), in the absence of some explanation for the difference between the two, jurors could only guess. The difference between what medical providers *bill* and what they *accept*, may be relevant to the question of reasonable value. But there is no way to invite the jury to make a reasonable choice between these alternatives without an expert explanation of where the numbers come from:

> In this case, the parties do not dispute that Ohlson complied with the statute and is therefore entitled to the presumption that the charges are reasonable or that Peterson is entitled to present evidence challenging the bills' reasonableness. Wood v. Elzoheary (1983), 11 Ohio App.3d 27, 28. At issue here, is the method by which Peterson may do this. Ohlson asserts that without expert testimony, Peterson may not submit to the jury an alternative amount as "reasonable."
>
> In Robinson v. Bates, supra, the Ohio supreme court held that

> both the original amount charged and the amount accepted as full payment may be considered by the jury. However, this case is distinguishable from Robinson where the parties stipulated to both types of bills and the court permitted them to both be considered. Here, Plaintiff will present uncontroverted testimony that the original bills were fair and reasonable.
>
> To allow Peterson to present the amount accepted as full payment without evidence that this amount is reasonable, violates the purpose and spirit of the collateral source rule. Robinson, supra at *P83-84. The collateral source rule applies to prevent a defendant-tortfeasor from benefitting from an agreement between a plaintiff's healthcare provider and insurer. [cite omitted].

Ohlson v. Peterson (Summit C.P. 4/12/07), CV 2006-05-3285, unreported (Exhibit XII). Without expert testimony as to the reasonable value, or how to evaluate the difference between the amounts billed and the amounts accepted, defendants should not present Robinson evidence at all. Lay persons are not competent to evaluate this difference without the assistance of an expert on the reasons why one amount is charged, but a different amount is accepted. To put a numerical discrepancy between the amount billed and the amount accepted in front of the jury, with no explanation, then to ask the jury which one represents the "reasonable value" of the medical care is simply to ask the jury to speculate.

Further, any jury that does anything better than to speculate would have to conclude that the difference between the amounts billed and the amounts accepted is the result of the Plaintiff's insurance. Common experience suggests no other options. Either the jury will work in a blind about why the numbers vary–and therefore have no calculus for attributing "reasonable value" to them–or the jury will infer that there is lower value accepted because of the collateral source. The latter outcome will certainly occur among jury members with ordinary experience with health insurance. It is naive to think that such jury members will not discuss this explanation for the difference

between the amounts billed an accepted with the rest of the jury. The introduction of any difference between the amounts billed and amounts accepted lead to a necessary inference of insurance. Again, the only alternative is to ask jury members to ***guess*** what the reasonable value might be, with no explanation of where the alternatives come from.

The introduction of any discrepancy between the amounts billed for medical services, and the amounts accepted in payment for those services, is extremely prejudicial to plaintiffs because only they are subjected to this dilemma. The application of the collateral source rule would protect the plaintiff from the jury learning that her expenses were paid in part, but would also leave the jury with no information with which to decide what is reasonable. The only thing that could fill that vacuum is the inference that the plaintiff was insured.

Because the introduction of any difference between amounts charged and amounts billed will deprive the Plaintiffs of the protection of the collateral source rule, the probative value of such evidence is substantially outweighed by the prejudice the Plaintiffs would experience. Rule 403(A) therefore requires that any evidence of amounts "written off" be excluded. No jury comprised of anyone other than insurance executives is in a position to judge the "reasonable value" of medical services by comparing the amounts billed by the medical providers to the amounts they accept as payment. The economics of group rate savings, collections expenses, and comparisons between rates obtained by different insurers are all matters well outside the grasp of lay jurors. But, they are all necessary to an informed determination of the "reasonable value" of medical services. The only two fair options are that all insurance is discussed with the jury, or that no insurance is discussed with the jury. The collateral source rule and Ohio Evid. R. 411 strongly suggest the latter.

D. PAYMENT AMOUNTS OF PUBLIC INSURANCE SOURCES LIKE MEDICARE AND MEDICAID ARE DETERMINED BY STATE AND/OR FEDERAL BUDGETS, NOT THE VALUE OF THE SERVICES.

Where private insurance often causes bills to be reduced significantly, public insurance requires provides to accept reimbursement at levels dramatically below the rates of private insurance. Medicaid payment amounts are largely governed by how much the General Assembly can commit to Medicaid services. See, e.g., O.A.C. § 5101:3-1-17-2(C). Medicare payments are governed by the amounts Congress can devote to the program. See section 1848 of the Social Security Act, 42 U.S.C. Sec 1395w-4, or go to http://www.cms.hhs.gov/sustainableGRatesConFact/.

This Court can take judicial notice of the fact that times are tough for governments at every level. The amounts that doctors and hospitals will be paid under Medicaid and Medicare next year will have much more to do with legislative budgeting than with the values of these services. Public insurance is driven by public policy, not just by the reasonable value of the services. Without exception, medical practitioners will testify that the "write-offs" imposed by public insurance do not reflect the reasonable value of their services.

Under Evid. R. 403(A), evidence of any amount "written off" is inadmissible. Exclusion is *mandatory* because the probative value of any written off amount is substantially outweighed by:

- **Unfair prejudice:** Only the Plaintiff will effectively lose the protection of the collateral source rule, while the Defendant's liability insurance remains unknown to the jury (Ohio Evid. R. 411);
- **Confusion of the issues/Misleading the jury:** The jury must decide the "reasonable value of medical expenses" as between the amount charged to the amount accepted. Without consideration of the plaintiff's insurance, there is no rational explanation for the discrepancy. A jury can only guess, or infer insurance.

III. ABANDONING *ROBINSON* WILL NOT CREATE UNDUE HARDSHIP FOR ANY PARTY WHO HAS RELIED ON IT.

On the contrary. For this Court to limit Robinson to cases that accrued prior to R.C. 2315.20 would benefit all parties.

To begin, the holding in Robinson is not that the lesser amount accepted is the reasonable value of services, but that both amounts go to the jury. Assuming that a case is in a jurisdiction that allows the introduction of insurance adjustments, notwithstanding the issues outlined above, no one should be counting on the jury's adoption of the lower number. The extent to which any party would then rely on one outcome or the other is greatly diminished, and parties should count on the jury's choice of one figure or the other at their peril.

The practical result is that the defense bar is saddled with gathering rebuttal evidence of the "reasonable value of medical services" with (1) no guarantee that it will be admissible, and (2) no guarantee that it will sway the jury. A rule of evidence that adds such unpredictability and expense is a rule that deserves re-examination.

Again, if it is assumed that the amounts accepted are introduced, courts are required to admit the obvious: evidence of an insurance adjustment is evidence of a benefit. Under R.C. § 2315.20(B), that means that plaintiffs are also permitted to introduce evidence of what they had to pay to secure these benefits. Deductibles in health insurance policies are only increasing, and they very substantially affect the amount of the benefit the insured really receives, as do co-pays.

On top of it all, it is still incumbent on the defendant–to rebut the presumption given by R.C. § 2317.421– to give the jury a way to make sense of it all. The contrast between what a doctor charges and what he or she is required to accept, for whatever reason, may not have anything to do

with the value of his or her services. R.C. § 2317.421 requires the defendant to answer this question. Only medical providers and those knowledgeable in the ways of their billing are competent to provide this evidence. In this way, the Robinson decision has the unique ability to transform what should be a two-day trial into a four-day trial. This helps explain why so many trial courts have recognized that insurance adjustment evidence is more prejudicial than probative: the simple rule is to keep insurance adjustments out of the courtroom.

One principal reason this Amicus writes is to inform this Court that Robinson has dramatically and detrimentally affected the civil justice system by forcing more claims into litigation. The holding of the case is that a jury should pick between the two numbers, when the parties have stipulated what amounts are charged, and what are accepted. But as virtually every lawyer in the Ohio Association for Justice will confirm, the experience of this Amicus was that insurance adjusters did not read Robinson that way. Instead, most insurance adjusters read Robinson to say that they only have to negotiate off the lower number. More often than not, pre-suit negotiation goes nowhere without insurance numbers. Practitioners either have to advise their clients to surrender their right to have a jury make this evaluation, or initiate more lawsuits. Worse still, many claims of lower value lose their economic viability if the expenses of litigation must be assumed. While this is likely one of the implicit hopes of the Appellant and the Amici who support her, it does not do justice on the merits. All attorneys and Courts must work toward keeping the courts accessible.

The Amici who support the Defendant-Appellant have actually taken a position that is at least in part contrary to their own interests. Whether pre-litigation or in suit, tort claims cannot settle until the plaintiff and her attorney account for third parties who have claims to the proceeds of the suit. It is a routine, time-consuming and expensive process for plaintiffs' attorneys to explain to all the

interested parties that there are only so many settlement dollars to go around. Settlements do not happen unless plaintiffs and their attorneys can make them happen. *See* W. Broad Chiropractic v. Am. Family Ins. (2009), 122 Ohio St. 3d 497, 501, *P 22-26 (recognizing that third party interests in the proceeds of a suit can discourage settlement, and encourage litigation).

Subrogated health insurers actually stand to benefit should this Court affirm. This case concerns insurance adjustments attributable to health insurance, which means that the overwhelming majority of plaintiffs must account for subrogation rights. ***But the subrogation interest is only worth what the plaintiff can make of it.*** Health plans seldom prosecute a civil case for monies they have paid out due to another's negligence. If they did, they would be required to overcome all the defenses the plaintiff must overcome. Yet, many expect to be paid back 100% of what they paid, regardless of whether the plaintiff can make a full recovery, and regardless of what it costs to plaintiff to obtain a recovery. See N. Buckeye Educ. Council Group Health Benefits Plan v. Lawson (2004), 103 Ohio St. 3d 188, 194 (allowing enforcement of language allowing priority of recovery to health insurers). Many claims face the very real problem of being essentially insolvent. In such cases, everyone loses, including the health insurance carrier.

Prior to Robinson, a plaintiff's purchase of health insurance also bought the potential for greater flexibility in resolving subrogation claims, paying medical bills not covered by insurance, and resolving other third-party interests. This Court is asked to be mindful that when claims cannot yield enough to merit prosecution, insurance interests and unpaid medical providers remain unpaid.

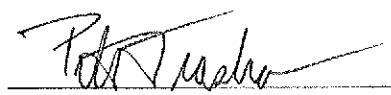
For these reasons, affirming the decision of the Sixth District Court of Appeals will not work a hardship on the parties interested in this case.

CONCLUSION

Evidence of the so-called "write-offs" ***is*** evidence of a benefit. This Court should give thorough consideration to the real experience of Ohio trial courts who have confronted issues begotten by the Robinson decision. The difficulty in applying Robinson in the trial courts has been stated in the words of numerous Ohio trial court judges. Their concerns for the administration of justice far outweigh any party's pecuniary interest in the outcome of this case.

For the reasons stated, in addition to those presented by the Appellee and the Amici in support of him, this Court should AFFIRM the decision of the Ohio Sixth District Court of Appeals.

Respectfully Submitted,



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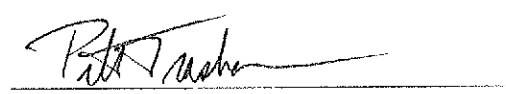

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Elk & Elk Co, Ltd.

APPENDIX

Unreported cases appended:

Lococo v. Loprich (Cuyahoga C.P. 9/26/08), Case No. CV-07-629522 I

Kuchta v. Merchant (Cuyahoga C.P. 10/9/08), Case No. CV-07-637839 II

Welsh v. Sudbury (Cuyahoga C.P. 11/19/08), Case No. CV-08-657562 III

Kissling v. Ohler (Cuyahoga C.P. 11/19/08), Case No. CV-08-653636 IV

Verhoff v. Diller (Allen C.P. 3/24/08), Case No. CV2007-1278 V

Garey v. Erie Ins. Co. (Montgomery C.P. 7/15/09), Case No. 2008-CV-2966 VI

Herron v. Anderson (Summit C.P. 3/18/08), No. CV 2007-04-2600 VII

Masaveg-Barry v. Stewart (Summit C.P. 5/8/08), No. CV 2007 08 5997 VIII

Dimitroff v. Grishcow (Franklin C.P. 1/5/09), Case No. 07CVA-01-103 IX

Rivera v. Urbansky (Lorain C.P. 8/26/08), Case No. 08CV154436 X

Goney v. Hill (Lucas C.P. 5/7/08), Case No. CI 06-5002 XI

Ohlson v. Peterson (Summit C.P. 4/12/07), CV 2006-05-3285 XII

STATE OF OHIO }
} SS.
CUYAHOGA COUNTY }

IN THE COURT OF COMMON PLEAS

CASE NO. CV-07-629522

DOMINIQUA LOCOCO,

Plaintiff(s),

- vs -

HEATHER A. LOPRICH,

Defendant(s).

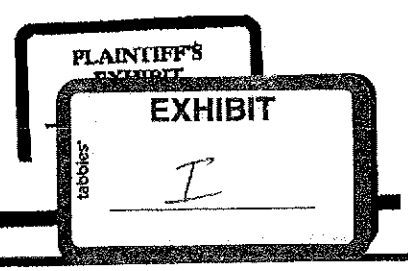
JOURNAL ENTRY AND OPINION

JOAN SYNENBERG, JUDGE:

This cause came on for consideration upon the parties' cross-motions in limine. Plaintiff argues that R.C. § 2315.20 prohibits the defendant from introducing evidence of any amount payable as a benefit to the plaintiff. Defendant argues that, according to *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, a write-off is not a benefit; therefore, introducing evidence of write-offs does not run afoul of R.C. § 2315.20.

It is settled, through *Robinson*, that a write-off is not a benefit. However, it is clear that *evidence* of a write-off is *evidence* of a benefit.

Because evidence of a write-off is evidence of an amount payable as a benefit, and because R.C. § 2315.20 prohibits the introduction of such evidence, defendant may not introduce evidence of write-offs at trial.



Law and Analysis

Generally, in a tort action, the measure of damages is that which will compensate and make the plaintiff whole. The collateral source rule is an exception to this general rule. *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, ¶ *11; accord, Pryor v. Webber* (1970), 23 Ohio St.2d 104, 107.

The Collateral Source Rule

The collateral source rule is a judicially-created rule of admissibility that excludes "'evidence of benefits *paid* by a collateral source.'" *[Emphasis in the original]*. *Robinson* at ¶ 16. Under the rule, "the plaintiff's receipt of benefits from sources other than the wrongdoer is deemed irrelevant and immaterial on the issue of damages." *Id.* at ¶ 11; *accord, Pryor*, 23 Ohio St.2d at 109.

The intent of the rule is to "prevent[] 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.* The policy behind the rule is simple: "[A] defendant wrongdoer should not . . . get the benefit of payments that come to the plaintiff from a 'collateral source.'" *Pryor*, 23 Ohio St.2d at 107-108.

Robinson v. Bates

In 2006, the Ohio Supreme Court revisited the collateral source rule in *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362. In *Robinson*, plaintiff sued to recover for personal injury. At trial, plaintiff proffered her original medical bills totaling $1,919, and stipulated that her insurance company had negotiated the amount of $1,350.43 as payment in full. The trial court refused to admit the original medical bills, and limited her proof of damages to the amount that was actually paid for her medical treatment.

The court of appeals reversed, holding in part that (i) the trial court had erred in refusing to admit the original medical bills; and (ii) evidence of the amount accepted as full payment of a medical bill is barred by the collateral source rule.

The Ohio Supreme Court affirmed in part and reversed in part. The Court affirmed the appellate court's finding that, pursuant to R.C. § 2317.421, the trial court had erred in refusing to admit into evidence the original medical bills. However, the Court reversed the appellate court's holding that the collateral source rule does not bar evidence of the amount accepted by a provider as full payment for medical services.

In presenting its analysis, the Supreme Court noted that the collateral source rule codified in, and "limited" by, R.C. § 2315.20 did not apply because it became effective after the cause of action accrued and after the complaint was filed. Conversely, because the complaint in the instant case was filed after the effective date of the statute, the *Robinson* holding is superseded by R.C. § 2315.20 and does not apply.

R.C. § 2315.20 (Evidence of Benefits To Plaintiff From Collateral Sources)

Effective April 7, 2005, the General Assembly passed R.C. § 2315.20. This statute applies prospectively. R.C. § 2315.20 provides that a defendant may introduce evidence of any amount payable as a benefit to the plaintiff.

R.C. § 2315.20 [Evidence of benefits to plaintiff from collateral sources] states:

> (A) 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. However, evidence of the life insurance

> payment or disability payment may be introduced if the plaintiff's employer paid for the life insurance or disability policy, and the employer is a defendant in the tort action.
>
> (B) *If the defendant elects to introduce evidence described in division (A)* of this section, the *plaintiff may introduce evidence of any amount that the plaintiff has paid or contributed to secure the plaintiff's right to receive the benefits of which the defendant has introduced evidence.*
>
> (C) A source of collateral benefits of which evidence is introduced pursuant to division (A) of this section shall not recover any amount against the plaintiff nor shall it be subrogated to the rights of the plaintiff against a defendant. *[Emphasis added].*

Under this statute, "evidence of any amount payable as a benefit" is admissible at trial *unless the source of the benefit has a right of subrogation.* If the source of the benefit has a right of subrogation, then evidence of any amount payable as a benefit is *not* admissible. Notably, if a defendant does produce evidence of amounts payable as a benefit (assuming the absence of subrogation), then the plaintiff is entitled to introduce evidence of premiums s/he has paid in order to secure the right to receive such benefit.

R.C. § 2315.20 -vs- The Collateral Source Rule

The *Robinson* court characterized R.C. § 2315.20 as "limiting" the collateral source rule. However, except in cases where there exists a federal, contractual, or statutory right of subrogation, R.C. § 2315.20 actually expands the rule. While the collateral source rule excludes evidence of benefits *paid*, the statute excludes evidence of benefits *payable* – a more inclusive term that covers benefits paid in the past as well as benefits payable presently or in the future.

The plain wording of the statute proscribes the admission of evidence of benefits payable. Permitting the defendant to introduce evidence of write-off amounts – and thereby permitting the

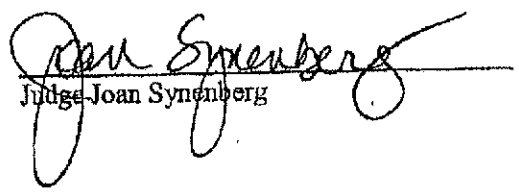
jury to deduce the amount of benefits paid – would violate both the letter and the intent of R.C. § 2315.20.

Conclusion

Plaintiff's motion in limine is granted. Defendant is prohibited from introducing evidence of any amount payable as a benefit to the plaintiff.

Defendant's cross-motion in limine is denied.

IT IS SO ORDERED.



Judge Joan Synenberg

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

SCOTT A. KUCHTA
Plaintiff

BRIAN L. MERCHANT, ET AL.
Defendant

Case No: CV-07-637839

Judge: JUDITH KILBANE-KOCH

JOURNAL ENTRY

PI SCOTT A. KUCHTA MOTION IN LIMINE EXCLUDING COLLATERAL SOURCE INFORMATION, FILED 07/16/2008, IS GRANTED.

THIS CAUSE CAME ON FOR CONSIDERATION UPON THE PLAINTIFF'S MOTION IN LIMINE EXCLUDING COLLATERAL SOURCE INFORMATION. PLAINTIFF ARGUES THAT THE COLLATERAL SOURCE RULE AND THE NEWLY ENACTED R.C. 2315.20 BAR THE INTRODUCTION OF ANY EVIDENCE REGARDING HEALTH INSURANCE BENEFITS RECEIVED BY THE PLAINTIFF AS A RESULT OF THE ACCIDENT, INCLUDING THE AMOUNTS OF ANY WRITE-OFFS OR ADJUSTMENTS.

DEFENDANT ARGUES THAT WRITE-OFFS SHOULD COME IN BECAUSE THE SUPREME COURT HELD THAT WRITE-OFFS ARE NOT A BENEFIT IN ROBINSON V. BATES (2006), 112 OHIO ST. 3D 17, AND THERE IS NO LANGUAGE IN R.C. 2315.20 THAT IDENTIFIES WRITE-OFFS AS BENEFITS.

AFTER CONSIDERING THE ARGUMENTS OF COUNSEL, THE APPLICABLE LAW AND THE RELEVANT FACTS, THE COURT ADOPTS THE REASONING OF THE COURT IN LOCOCO V. LOPRICH, (SEPTEMBER 26, 2008), CUYAHOGA C.P. NO. 07-629522, WHICH FOUND THAT A WRITE-OFF IS "EVIDENCE" OF AN AMOUNT PAYABLE AS A BENEFIT AND THUS IS COVERED BY R.C. 2315.20. FOR THESE REASONS, PLAINTIFF'S MOTION IN LIMINE EXCLUDING COLLATERAL SOURCE INFORMATION IS GRANTED. DEFENDANTS ARE HEREBY EXCLUDED FROM PRESENTING ANY EVIDENCE REGARDING HEALTH INSURANCE BENEFITS RECEIVED BY THE PLAINTIFF AS A RESULT OF THE ACCIDENT AT ISSUE, INCLUDING THE AMOUNTS OF CONTRACTUAL WRITE-OFFS OR ADJUSTMENTS.

Judith Kilbane Koch
Judge Signature 10/09/2008

10/07/2008

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EXHIBIT
II

54628061

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THERESA A. WELSH
Plaintiff

EILEEN M. SUDBURY
Defendant

Case No: CV-08-657562

Judge: EILEEN T GALLAGHER

JOURNAL ENTRY

P1 THERESA A WELSH MOTION FOR PROTECTIVE ORDER AND MOTION IN LIMINE NICHOLAS J SCHEPIS 0001423, FILED 11/05/2008, IS GRANTED.
THIS CAUSE IS BEFORE THE COURT ON PLAINTIFF'S MOTION FOR PROTECTIVE ORDER AND MOTION IN LIMINE REGARDING COLLATERAL BENEFITS. PLAINTIFF MOVES FOR AN ORDER PROHIBITING THE DEFENDANT FROM SEEKING DISCOVERY AND MENTIONING OR INTRODUCING EVIDENCE REGARDING HEALTH INSURANCE, WORKERS' COMPENSATION, AN/OR ANY OTHER COLLATERAL SOURCE BENEFITS PURSUANT TO R.C. 2315.20. DEFENDANTS CLAIM DISCOVERY SHOULD BE ALLOWED AND EVIDENCE OF SAID BENEFITS BE ADMITTED AT TRIAL.

IF THE COURT WERE TO ALLOW EVIDENCE OF THE PAYMENT ACCEPTED AS FULL AND FINAL PAYMENTS, THE JURY WOULD SIMPLY BE ABLE TO SUBTRACT THE WRITE-OFF AMOUNT FROM THE ORIGINAL AMOUNT OF THE MEDICAL BILLS AND DETERMINE THE BENEFIT RECEIVE. AS R.C. 2315.20 WAS IN EFFECT AT THE TIME OF THE ACCIDENT ROBINSON V. BATES, 112 OHIO ST.3D 17 (2006) IS INAPPLICABLE TO THE FACTS OF THIS CASE. THE COURT FINDS THE PLAINTIFF'S POSITION TO BE PERSUASIVE AND GRANTS HER MOTION IN LIMINE AND MOTION FOR PROTECTIVE ORDER.

Eileen T Gallagher
Judge Signature 11/19/2008

11/17/2008

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EXHIBIT
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III

54627021

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

IVY KISSLING
Plaintiff

JESSICA OHLER ET AL
Defendant

Case No: CV-08-653636

Judge: EILEEN T GALLAGHER

JOURNAL ENTRY

P1 IVY KISSLING MOTION IN LIMINE REGARDING COLLATERAL BENEFITS. THOMAS J SHEEHAN 0069601, FILED 10/03/2008, IS GRANTED.
THIS CAUSE IS BEFORE THE COURT ON PLAINTIFF'S MOTION IN LIMINE REGARDING COLLATERAL BENEFITS. PLAINTIFF MOVES FOR AN ORDER PROHIBITING THE DEFENDANT FROM MENTIONING OR INTRODUCING EVIDENCE OF ANY AMOUNTS PAID BY PLAINTIFF'S HEALTH INSURER AND THE AMOUNTS WRITTEN OFF BY HER HEALTH CARE PROVIDER PURSUANT TO R.C. 2315.20. DEFENDANT'S MOVES FOR AN ORDER DECLARING THAT DEFENDANT MAY INTRODUCE INTO EVIDENCE THE AMOUNT PLAINTIFF'S HEALTHCARE PROVIDERS ACCEPTED AS FULL PAYMENT, AN AMOUNT THAT IS LESS THAN THE AMOUNT ORIGINALLY BILLED.

IF THE COURT WERE TO ALLOW THE AMOUNT ACCEPTED AS FULL PAYMENT INTO EVIDENCE, THE JURY WOULD SIMPLY BE ABLE TO SUBTRACT THE WRITE-OFF AMOUNT FROM THE MEDICAL BILLS AND DETERMINE THE BENEFIT RECEIVE. AS R.C. 2315.20 WAS IN EFFECT AT THE TIME OF THE ACCIDENT ROBINSON V. BATES, 112 OHIO ST.3D 17 (2006) IS INAPPLICABLE. THE COURT FINDS THE PLAINTIFF'S POSITION TO BE PERSUASIVE AND GRANTS HER MOTION IN LIMINE.

D1 JESSICA OHLER MOTION IN LIMINE AND OPPOSITION BRIEF TO PLAINTIFF'S MOTION IN LIMINE JOSEPH R TIRA 0008523, FILED 10/30/2008, IS DENIED.
D1 JESSICA OHLER MOTION IN LIMINE AND OPPOSITION BRIEF TO PTLFS. MOTION IN LIMINE JOSEPH R TIRA 0008523, FILED 10/30/2008, IS DENIED.

Eileen T Gallagher
Judge Signature 11/19/2008

EXHIBIT
IV

11/17/2008

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IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

ELOISE M. VERHOFF,	*	CASE NO. CV2007 1278
Plaintiff[s]	*	
-v-	*	
HOPE E. DILLER,	*	JUDGMENT ENTRY MOTION IN LIMINE
Defendant[s]	*	

* * * * * * * * * * * * * * * * * * *

This matter comes on for consideration of the plaintiff's motion in limine, filed on March 18, 2009 and the defendant's memorandum in opposition, filed on March 24, 2009. On March 24, 2009, before the jury trial commenced, the Court allowed the parties an oral hearing on the issue presented by the motion, which is: whether evidence of the "written-off" amount of the medical bills, or the difference between the amount billed and the amount accepted as full payment by the providers, should be permitted. Plaintiff argues that R.C. 2315.20 bars such evidence. Defendant argues that such evidence is not barred.

The collateral-source rule, identified in *Pryor v. Webber* (1970), 23 Ohio St.2d 104, 263 N.E.2d 235, 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 v. Bates,* 112 Ohio St.3d 17, 2006 -Ohio- 6362, at ¶ 11, citing *Pryor,* at 107, 263 N.E.2d 235. "Under the collateral-

source rule, the plaintiff's receipt of benefits from sources other than the wrongdoer is deemed irrelevant and immaterial on the issue of damages." *Id.*, citing *Pryor*, at 109, 263 N.E.2d 235. The purpose of the collateral-source rule is to prevent juries from learning about a plaintiff's receipt of benefits from a source unrelated to the tortfeasor so that a tortfeasor is not given an advantage from third-party payments to plaintiffs. *Id.* "The collateral source rule is an exception to the general rule of compensatory damages in a tort action, and evidence of benefits from collateral sources is not admissible to diminish the damages for which a tortfeasor must pay for his negligent act." *State ex rel. Stacy v. Batavia Local School Dist. Bd. of Edn.*, 105 Ohio St.3d 476, 2005-Ohio-2974, 829 N.E.2d 298, at ¶ 38, quoting *Pryor*, 23 Ohio St.2d 104, 52 O.O.2d 395, 263 N.E.2d 235, at paragraph two of the syllabus.

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). Since the injury in the instant case occurred on September 24, 2007, the statute applies. 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.) The Ohio Supreme Court in *Robinson*, supra, said that in light of the legislative history under R.C. 2315.20, it is clear that the General Assembly intended to limit the collateral-source rule in Ohio. Robinson, at ¶14. The purpose of this statute was to set forth Ohio's

statement of law on the collateral-source rule. This provision is subject to exceptions.

R.C. 2315.20 states:

> "(A) 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. However, evidence of the life insurance payment or disability payment may be introduced if the plaintiff's employer paid for the life insurance or disability policy, and the employer is a defendant in the tort action.
>
> "(B) If the defendant elects to introduce evidence described in division (A) of this section, the plaintiff may introduce evidence of any amount that the plaintiff has paid or contributed to secure the plaintiff's right to receive the benefits of which the defendant has introduced evidence.
>
> "(C) A source of collateral benefits of which evidence is introduced pursuant to division (A) of this section shall not recover any amount against the plaintiff nor shall it be subrogated to the rights of the plaintiff against a defendant." [Emphasis added]

R.C. 2315.20 modifies the collateral-source rule, which has been defined as " 'the judicial refusal to credit to the benefit of the wrongdoer money ***or services*** received in reparation of the injury caused which emanates from sources other than the wrongdoer.' " [Emphasis added] *Pryor v. Webber* (1970), 23 Ohio St.2d 104, 107, 52 O.O.2d 395, 263 N.E.2d 235, quoting Maxwell, The Collateral Source Rule in the American Law of Damages (1962), 46 Minn.L.Rev. 669, 670. R.C. 2315.20 modifies this rule by allowing the defendant in a tort action to introduce evidence of

amounts payable to the plaintiff as a result of the injuries suffered ***unless*** "the source of collateral benefits has a mandatory self-effectuating right of subrogation or" a contractual or statutory right of subrogation or the benefits were from a life insurance or disability plan. R.C. 2315.20(A).

It is important to note that in drafting R.C. 2315.20, the legislature used the words, "evidence of any amount *payable* as a benefit to the plaintiff..." The legislature did not use the word "*paid*." Words in a statute should be given their plain meaning. It is a cardinal rule of statutory construction that where the terms of a statute are clear and unambiguous, the statute should be applied without interpretation. *Wingate v. Hordge* (1979), 60 Ohio St.2d 55. Webster defines the word "payable" as "that can be paid, due to be paid."

To the extent that the case still applies post-April 7, 2005, the *Robinson* court stated at ¶14:

> "The collateral-source rule does not apply to write-offs of expenses that are never paid. The written-off amount of a medical bill differs from the receipt of compensation or services addressed in *Pryor*. The collateral-source rule excludes only " 'evidence of benefits *paid* by a collateral source.' " (Emphasis added.) *Wentling v. Med. Anesthesia Servs., P.A.* (1985), 237 Kan. 503, 515, 701 P.2d 939, quoting 3 Minzer, Nates, Kimball, Axelrod & Goldstein, Damages in Tort Actions (1984) 17-5, Section 17.00. Because no one pays the write-off, it cannot possibly constitute *payment* of any benefit from a collateral source. See *Moorhead v. Crozer Chester Med. Ctr.* (2001), 564 Pa. 156, 165, 765 A.2d 786 (collateral-source rule does not apply to amounts written off by the insurer since those amounts are *never* paid by any collateral source). Because no one pays the negotiated reduction, admitting evidence of write-offs does not violate the purpose behind the collateral-source rule. The tortfeasor does not obtain a credit because of payments made by a third party on behalf of the plaintiff.

Id. at ¶ 16, 857 N.E.2d 1195. (Emphasis added.)

However, the Supreme Court of Ohio went on to state, at ¶17:

> To avoid the creation of separate categories of plaintiffs based on individual insurance coverage, we decline to adopt a categorical rule. Because different insurance arrangements exist, the fairest approach is to make the defendant liable for the reasonable value of plaintiff's medical treatment. Due to the realities of today's insurance and reimbursement system, in any given case, that determination is not necessarily the amount of the original bill or the amount paid. Instead, the reasonable value of medical services is a matter for the jury to determine from all relevant evidence. [...]
>
> The 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 ¶ 17-18. See, also, *Salvatore v. Findley*, 10th Dist. No. 07AP-793, 2008 -Ohio- 3294

It has been stated that a collateral benefit is a benefit received outside the scope of the litigation. *Ferrell v. Summa Health Sys.*, 165 Ohio App.3d 110, 2005 -Ohio- 5944. A write-off is a gratuitous *benefit* that is generally given only because a third party will pay the reduced amount. In most case, allowing evidence of the amount of a "write-off" would lead to a conclusion that a third party, collateral source was paying the reduced bill. Evidence of the "written-off" amount would show what amount "can be paid, or is due to be paid" or would show what *amount* is "*payable*."

Jurors in this day and age are sophisticated enough to understand that providers are generally willing to "write-off" a portion of the billed amount only because the provider is assured, usually contractually, that the third party collateral source will pay the reduced amount. As a general proposition, evidence of a "write-off" shows, with no real stretch, that a

collateral source will pay the bill. Evidence of the write-off is an end-around way of presenting evidence that there is a third party who will pay the reduced bill, or a "collateral source." Under such circumstances, considering evidence of the portions of plaintiff's medical bills that were written off and reducing the jury's verdict to cover only the actual expenses "payable as a benefit" is clearly impermissible under R.C. 2315.20 if the source of that 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. By allowing evidence of the "write-off" granted to the third party collateral source, the tortfeasor is granted the benefit of informing the jury that plaintiff received a benefit because of a collateral source, which Ohio law (R.C. 2315.20) does do not allow if the source of that 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. See *Stacy,* supra, 105 Ohio St.3d 476, 2005-Ohio-2974.

Even if, as the Court in *Bates*, supra, stated, "any difference between an original medical bill and the amount accepted as full payment for the bill is not a "benefit" under the collateral source rule," the ultimate consequence is the same. In most case, evidence of the difference between an original medical bill and the amount accepted as full payment for the bill allows the conclusion that someone, other than the plaintiff made or will

make the reduced payment. Under R.C. 2315.20, if that other source 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, the evidence is not be permitted.

If the source of payment of the reduced medical bill, whoever that may be, and who receives the "write-off," does *not* have a mandatory self-effectuating federal right of subrogation, a contractual right of subrogation, or a statutory right of subrogation or if the source does not pay the plaintiff a benefit that is in the form of a life insurance payment or a disability payment, then evidence of the write-off would be allowed.

Similarly if there were evidence that the provider offered the "write-off" or reduction in the bills directly to plaintiff who did not have a collateral source, evidence of the write-off would be permitted. In that case, the write-off would not be a gratuitous benefit given only because a third party will pay the reduced amount and would not be evidence of an amount payable by a collateral source. In that case, the reduced bill is direct evidence of the value of the services.

In any event, a motion *in limine* is designed "to avoid the injection into a trial of a potentially prejudicial matter which is not relevant and is inadmissible." *Rinehart v. Toledo Blade Co.* (1985), 21 Ohio App.3d 274, 278. Evid. R. 401 defines 'relevant evidence' as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be

without the evidence." This issue presented by the instant motion is confusing to the brightest and best legal minds in this state. The evidence discussed because of this motion would be confusing to a jury and the legal gymnastics involved only serves to continue the charade that insurance has nothing to do with the case. As Justice Stratton pointed out in her concurring/dissenting opinion in *Bates*:

> "[...] [I]n this day and age of managed care and discounting of medical bills by insurers, the amount reimbursed often has little relation to the actual cost of the services. However, the actual amount billed is more reflective of the actual value of the services rendered, which juries often use as a benchmark in deciding the seriousness of the injuries. [...] [C]laiming the plaintiff incurred only [a reduced amount] in treatment distorts the degree of medical care and physical damages actually incurred by the plaintiff and could diminish the seriousness of the plaintiff's injuries.
>
> "[...]
>
> "The majority's decision creates confusion by creating a grey area for judges instructing juries in considering medical damages. The majority holds the defendant liable for the "reasonable value of plaintiff's medical treatment" but gives no direction as to what that means-how does the jury weigh the amount billed, the amount paid, or "some amount in between"? What are the factors they may use to consider this issue? Then the majority further confuses the matter by saying that the General Assembly should resolve this issue, which it just decided was a jury question."

Evid. R. 403(A) provides:

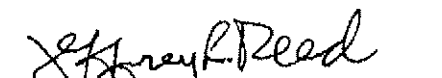
> Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

Neither *Bates* nor R.C. 2315.20 *mandates* introduction of evidence of "write-offs." Decisions as to the admissibility of evidence are generally discretionary. *State v. Tibbetts* (2001), 92 Ohio St.3d 146. Evidence of

write-offs creates confusion of the issues and has the very real potential of misleading the jury. Therefore, under Evid. R. 403 and in the exercise of careful discretion, evidence of the write-off in this case will not be permitted.

Plaintiff's motion in limine is sustained.

March 24, 2009



Jeffrey L. Reed, Judge

cc SIFERD
TAYLOR

Case: 2008 CV 02966
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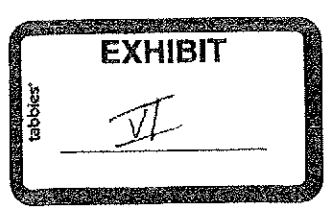
IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

ANGELA D. GAREY,	:	CASE NO.: 2008-CV-2966
Plaintiff,	:	JUDGE A. J. WAGNER
vs.	:	**JUDGMENT ENTRY**
ERIE INSURANCE COMPANY, et al.	:	
Defendants.	:	

This matter arose before this Court upon Plaintiff's filing of a Motion in Limine on April 22, 2009. Defendant Sidney Bieser filed a Response Contra to Plaintiff's Motion and Plaintiff then filed a Reply in Support of her Motion in Limine. Thus, the matter is properly before this Court.

This case arises out of an automobile collision where Garey alleges Bieser failed to yield to Garey's vehicle, resulting in Garey suffering personal injuries. A portion of Garey's medical expenses for these insurers was paid by health insurance, which has a contractual right of subrogation. Garey filed a motion in limine to prohibit Defendant from introducing evidence of the difference between the amount billed by Plaintiff's medical providers and the amount accepted as full payment by the providers. Defendant argued that it was permitted to present evidence of the amount actually accepted by the medical provider as payment in full, pursuant to *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362. Plaintiff argues that *Robinson*, supra is not applicable to this case as it predates the changes to R.C. 2315.20, which, when applied to this case demands a different result. Having reviewed the parties filings, this Court agrees with the Plaintiff.

Plaintiff's cause of action accrued March 31, 2006, after the enactment of R.C. 2315.20. This statute, enacted April 7, 2005, prevents Defendants from introducing evidence of any amount



payable as a benefit to the Plaintiff where the source of such payment maintains a right of subrogation. R.C. 2315.20 states:

> 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*** * * * . (emphasis added).

R.C. 2315.20 clearly applies to this case as plaintiff's health insurer paid a portion of her medical bills and that health insurer had a contractual right of subrogation.

This Court does not agree with Defendant that *Robinson*, supra is determinative of the issue in this case. Because *Robinson* addressed a cause of action arising prior to the effective date of R.C. 2315.20, it is inapplicable to a situation where this statute applies. Further, in *Robinson*, the Supreme Court specifically stated that R.C. 2315.20 did not apply because the cause of action accrued prior to the statute's effective date. *Robinson*, supra at footnote 1. Section 2315.20 explicitly prohibits the introduction of *any amount payable as a benefit* to Plaintiff as the result of damages when subrogation applies. It is simply not possible to reconcile *Robinson* in this case with the clear mandate of R.C. 2315.20. Admission of evidence of the amount paid by Ohio's Department of Jobs and Family Services or a health insurer would clearly violate R.C. 2315.20.

If this Court were to allow evidence of the lesser amount the medical provider accepted from a third party collateral source, the defendant obtains the advantage of having the jury informed that the plaintiff received a benefit from a collateral source. However, this is in direct conflict with R.C. 2315.20 that prohibits evidence that a plaintiff received a benefit from a collateral source when that source "has a * * * contractual right of subrogation, or a statutory right of subrogation * * *." R.C. 2315.20.

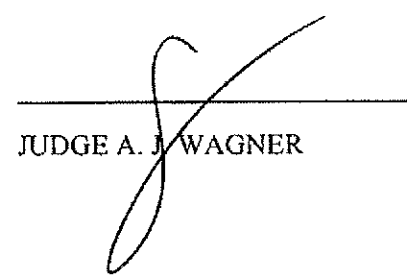
Defendant argues that R.C. 2315.20 does not prevent evidence of the "write offs" because the *Robinson* Court determined that the "write offs" were not a collateral benefit and R.C. 2315.20 prohibits evidence of "collateral benefits." But, even if the "write offs" are not a collateral benefit, when a jury is informed that a medical provider accepted as full payment an amount less than the

original bill, it will inevitably conclude that a third party paid or promised to pay the reduced amount. Further anyone who can perform simple math would then know the amount paid by the third party. This payment by the this party is a collateral benefit. If evidence of that collateral benefit is prohibited by R.C 2315.20, then the Court must not allow evidence of these "write offs" to be admitted.

Here, Plaintiff Garey's medical providers received payments from a health insurer, thus, Plaintiff received as a benefit the amount paid by the health insurer to her medical provider. This is a benefit for which there is a contractual right of subrogation. Thus, the reduced amounts were a collateral source benefit for which there is a right of subrogation. As a result, R.C. 2315.20 applies and prohibits Defendant from mentioning or introducing evidence of the amounts paid by a health insurer, including the source of such payments, and the amounts written off by Plaintiff's medical providers. Moreover, it appears to the court that any probation value of introduction of collateral benefits would be outweighed by prejudice and confusion for the jury.

Therefore, Plaintiff's Motion in Limine is GRANTED and Defendant is prohibited from introducing evidence of the difference between the amount billed by Plaintiff's medical providers and the amount accepted as full payment by the providers.

SO ORDERED.



JUDGE A. J. WAGNER

Copies of the above Order were mailed to all parties listed below by ordinary mail this date of filing.

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2008 WL 2871864 (Ohio Com.Pl.) (Trial Order)

Motions, Pleadings and Filings

Court of Common Pleas of Ohio.
Summit County
Joshua HERRON, Plaintiff.
v.
Robyn J. ANDERSON, et al., Defendants.
No. CV 2007-04-2600.
March 18, 2008.

Order

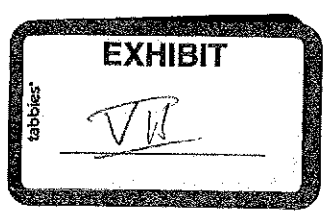
Judy Hunter, Judge.

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 damage.. 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 plaintiffs 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 ale 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 injures 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-á-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 light 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 Plaintiffs 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.[FN1] 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.

FN1. 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. Michan* (192 7), 116 Ohio St. 549, 553

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 Plaintiffs health insurance. Conversely, the Court 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.

<<signature>>

JUDGE JUDY HUNTER

cc: Attorney Robert Foulds

Attorney Tack Morrison Jr.

Herron v. Andeson
2008 WL 2871864 (Ohio Com.Pl.) (Trial Order)

Motions, Pleadings and Filings (Back to top)

• 2007 WL 4619405 (Trial Pleading) Separate Answer of Sonnenberg Mutual Insurance Company Incorrectly Named As Western Reserve Group With Cross-Claim Against Co-Defendant Robyn J. Anderson (May 14, 2007)
• 2007 WL 4619404 (Trial Pleading) Complaint (Apr. 4, 2007)
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SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

STEPHANIE MASAVEG-BARRY	)	CASE NO. CV 2007 08 5997
	)	
Plaintiff	)	JUDGE SPICER
	)	
-vs-	)	
	)	
KELLY STEWART	)	**ORDER**
	)	
Defendant	)	

- - -

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.

EXHIBIT

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VIII

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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.

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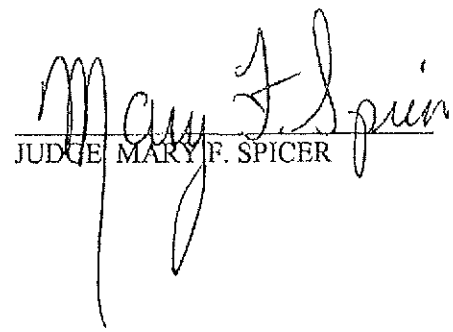
Accordingly, Plaintiff's Motion *in Limine* regarding collateral benefits is well taken and is granted.

It is so Ordered.



JUDGE MARY F. SPICER

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

JD:leb
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CLERK OF COURTS

COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

Loraine A. Dimitroff, et al.,	:	
Plaintiff,	:	CASE NO. 07CVA-01-103
-vs-	:	**JUDGE CONNOR**
Bryan T. Grishcow, D O, et al.,	:	
Defendant.	:	

DECISION AND ENTRY

Rendered this 5th day of January, 2009.

CONNOR, JUDGE

This matter comes before the Court upon motion of the Plaintiff *IN LIMINE* to Exclude Evidence of Collateral Source Information. Plaintiff's motion was filed on November 20, 2008, along with supplemental authority, which was filed December 1, 2008. The Defendant's memorandum contra was also filed December 1, 2008, and Plaintiff's reply was filed December 8, 2008.

The subject matter of plaintiff's motion is any evidence that Plaintiff's health insurance company paid any healthcare providers; any write-offs that may have occurred; and the source of any payments that were made.

Plaintiff asserts that ORC 2323.41 applies and that the decision in *Robinson v. Bates* (2006) 112 Ohio State 2nd 17 is not controlling.

The Defendant argues that pursuant to *Robinson v. Bates*, supra, both the original medical bills and the amount accepted as full payment for said medical services should be admitted

EXHIBIT
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IX

pursuant to R.C. 2317.421. This would give the jury the opportunity to consider all relevant evidence as to reasonableness and necessity of the medical bills.

The Plaintiff argues that the applicable statute in *Robinson v. Bates,* supra, as cited in the opinion by the Ohio Supreme Court was 2317.421 RC, which limits its application to damages arising from personal injury or wrongful death actions and basically provides that: "In an actions for damages arising from *personal injury or wrongful death*, a written bill or statement, or any relevant portion thereof, itemized by date, type of service rendered, and charge, shall, if otherwise admissible, be prima-facie evidence of the reasonableness of any charges and fees stated therein for medication and prosthetic devices furnished, or medical, dental, hospital, and funeral services..."

The Plaintiff further argues that R.C. 2315.20 was referred to by the Supreme Court in a footnote in the *Bates* opinion as follows: "We note that, effective April 7, 2005, the General Assembly passed R.C. 2315.20, a statute titled "Introduction of collateral benefits in tort actions." The purpose of this statute was to set forth Ohio's statement of law on the collateral-source rule. This new collateral-benefits statute does not apply in this case, however, because it became effective after the cause of action accrued and after the complaint was filed."

The defense argues that the footnote referring to R.C. 2315.20 is inconsequential and that the reasoning of the Supreme Court in *Robinson v. Bates,* supra, that the amount billed for services and the amount actually paid for services is all relevant evidence under Evidence Rule 402 as to the reasonableness and necessity of said services. Further, the fact that the provider took a lesser amount than the billed services is not a "paid benefit" to the Plaintiff, by any source, so the collateral source rule does not apply any way.

R.C. 2315.20 states in pertinent part as follows: "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. However, evidence of the life insurance payment or disability payment may be introduced if the plaintiff's employer paid for the life insurance or disability policy, and the employer is a defendant in the tort action."

Therefore, the Plaintiff argues because the insurer or source of collateral benefit in this case has either a statutory or contractual right of subrogation, the decision is *Robinson v. Bates*, supra, does not apply because the injury in this case occurs after the effective date of *Robinson v. Bates* and the effective date of R.C. 2315.20.

The defense argues that the payment of a lesser amount to the provider by the insurance company is a negotiated amount between the insurance company and the provider and this is not a "paid benefit to the Plaintiff" and therefore R.C. 2315.20 does not apply.

It is the opinion of this Court that the real subject matter of this debate is what is relevant evidence pursuant to Ohio Evidence Rule 402 which provides: "All relevant evidence is admissible, except or otherwise provided by … statutes enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, *by these rules*, or by other rules proscribed by the Supreme Court of Ohio."

Evidence Rule 403 provides: "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

Neither the Supreme Court in *Robinson v. Bates*, supra, nor the relevant Ohio Statutes prohibit the introduction of bills for actual medical, hospital, dental, medication, etc. incurred as prima-facie evidence of the reasonableness and necessity of those bills.

The question for this Court is to resolve the applicability of the Supreme Courts opinions in *Robinson v. Bates*, supra, and R.C. 2317.421 and R.C. 2315.20.

In this Court's opinion, the introduction of the original bills not only provides prima-facie evidence of the reasonableness and necessity of those bills and the treatment of the injured person, they also are prima-facie evidence of the nature and extent of the injuries as well as future permanency of the injury and the pain and suffering or lack thereof that the Plaintiff is going to endure.

The amount accepted by the provider as to any particular service, is a negotiated amount between the insurer, HMO, and the provider for payment for certain types of medical treatment, or medications, or hospital stays. The Plaintiff is not a participant in these negotiations.

Further, if the doctor, hospital or pharmacy wants to participate as a provider with respect to a particular insurer or HMO, he or she must accept the terms and amounts dictated.

There is no evidence before this Court nor was there before the Ohio Supreme Court in *Robinson v. Bates*, supra, how these amounts of payments were arrived at. This Court is, however, of the opinion that if it were to have ten doctors or ten administrators of hospitals in

front of it, who were asked if the amounts paid reflected a fair and reasonable amount of the services provided, the Court would receive a resoundly negative response from all of them.

The Court can take judicial notice that there is constant conflict between the medical providers and HMOs and insurers on what is reasonable in terms of medical and hospital costs. Most of it, however, has to do with balance sheets. None of it has to with the actual injury or lack thereof incurred by the injured person.

The Supreme Court in *Robinson v. Bates*, supra, extended the provision of R.C. 2317.421 to include the actual payments made by the insurance companies to the providers as evidence of the reasonableness of those bills. In this Court's opinion, such an extension should have been made by legislative enactment.

The Supreme Court did specifically provide in its footnote that R.C. 2315.20 was not applicable and specifically stated: "This new collateral source benefits statute does not apply in this case..."

The defense does argue that it is evident that the Supreme Court will ultimately apply *Robinson v. Bates*, supra, because the lack of payment or the fact that the provider took less is not a collateral benefit to the Plaintiff, so the collateral source rule does not apply anyway.

However, in order to introduce evidence of the lesser amount paid, the jury must be told that there is a collateral source for some payment, and the payment of that amount is contractual between the provider and the insurer. It does not take into consideration the extent of injuries to Plaintiff, the permanency or non-permanency of the injury to the Plaintiff, and the pain and suffering or lack thereof. In fact under Evidence Rule 403, this Court finds that such evidence is outweighed by the danger of unfair prejudice, confusion of the issues, or of misleading the jury.

Therefore, until the conflicts are resolved by either the General Assembly or the Ohio Supreme Court of Ohio between *Robinson v. Bates*, R.C. 2317.421, and R.C. 2315.20, this Court will apply Evidence Rule 403, which supersedes the statutes and in this particular only, the Court holds that the defendant is prohibited from introducing into evidence, or in opening statements, or closing arguments, the amount the Plaintiffs health insurance company paid to any healthcare providers, any write-offs that may have occurred, or any source of any payments that were made as a result of this injury.

There is one final argument this Court has not addressed and that is the possible windfall that a plaintiff might receive with respect to the awarding of damages for medical bills, hospitalization costs, medications, etc., when the actual amount paid by the medical provider is a lesser amount.

Before the decision in *Robinson v. Bates*, supra, a defendant always had the option of asking for interrogatories to be presented to the jury as to their findings of specific amounts for medical bills.

The filing of a motion for remission after the verdict is in would require an extra step, but such matters should be considered and determined by the Court outside the hearing of the jury. And in most cases it would probably be a mere mathematical determination, easily arrived at.

And in this way the plaintiff would receive a full and fair determination by a Jury as to the nature and extent of his/her injuries but without incurring a windfall as to what the actual payment of actual medical costs.

The Supreme Court opined in its decision in *Robinson v. Bates* that introducing the actual medical bills as well as the actual amounts paid to the provider by the insurer, would give the

jury the ability to determine whether the amounts actually paid should be awarded, the actual medical bills should be paid, or something in between.

In this Court's opinion, such evidence would be confusing and misleading and would interfere with the jury's determination of the instructions as to damages give by the Court: "You will consider the nature and extent of the injuries; the affect upon physical health; the pain that was experienced; the ability or inability to perform usual activities, the earnings that were lost; the reasonable costs of necessary medical and hospital expenses incurred by the Plaintiff as a result of this accident. From all these things you will determine what sum will compensate the Plaintiff for the injury to date. You will also note that the Plaintiff claims injury is permanent and that she will incur future expenses; and that her ability to work and enjoy the pursuits of normal life will be limited, affected or impaired, and that she will continue to experience pain and/or limited disability for an indefinite period of time in the future."

Again, the introduction of the contracted amounts actually paid by the insurer to the provider would have a certain detrimental affect upon the jury's ability to follow this charge. Especially, when a hearing after the verdict and a mathematical computation considering specific answers to interrogatories and actual payments made by the insurer to the provider would prevent any windfall to the plaintiff as to present, as well as future economic damages.

JOHN A. CONNOR, JUDGE

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LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

RON NABAKOWSKI, Clerk
JOURNAL ENTRY
James L. Miraldi, Judge

Date 08/26/08 Case No. 08CV154436

GEORGE RIVERA
Plaintiff

JOSEPH T JOSEPH
Plaintiff's Attorney (216)522-1600

VS

LILLIAN I URBANSKY
Defendant

MICHAEL J SPETRINO
Defendant's Attorney (216)623-1155

Defendant's motion to compel is granted in part and denied in part.

Defendant has moved for an order compelling the defendant to sign medical authorization forms to permit Medical Mutual to release to the defendant all records relating to the plaintiff. The defendant seeks this information on two distinct bases.

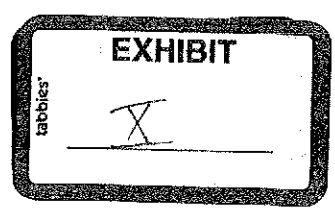
1) The defendant wants to obtain insurance "write-off" information pursuant to the Supreme Court's ruling in Robinson v. Bates (2006), 112 Ohio St. 3d 17. The courts in Ohio are in conflict as to whether Ohio Revised Code Section 2315.20 supersedes the Robinson holding at least where the insurer or other payor has a right of subrogation.

R.C. 2315.20 states in relevant part:

"[T]he 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 * * * contractual right of subrogation * * *." (Emphasis added.)

The Supreme Court in Robinson noted that this section did not apply to the parties in Robinson because the cause of action in that particular case arose before April 7, 2005, the effective date of the statute. To ignore the plain language of this statute would be against the ordinary rules of statutory construction.

Since Robinson v Bates, the courts and litigants have seen the practical effects of the ruling. Additional time and resources are spent on gathering the records, trying to



decipher insurance payment records, and reconciling provider bills with insurance statements. This extra paper work for the litigants, the providers, and the courts seems to create a potential for confusion in the courtroom with an inordinate amount of time spent on these issues before trial and during trial at least in this judge's opinion. Section 2315.20 eliminates these problems in those situations where there are subrogation rights. Such is the case here. The cause of action in this case accrued on the date of the collision January 13, 2006. Therefore, the defendant's motion is denied on that ground.

2) Defendant also requests insurance billing information to identify possible sources of prior treatment that is causally related to the injuries and damages in this case. As this information may lead to admissible evidence, the defendant's motion is granted. The defendant shall provide a limited release and authorization to be approved by plaintiff and plaintiff's counsel for the release of Medical Mutual's billing records. From there, it will be up to defendant to utilize discovery tools of interrogatories or a limited deposition to determine whether the treatment rendered is reasonably calculated to lead to the discovery of admissible evidence and then follow up with the appropriate subpoena request (supplemented if necessary with a medical authorization signed by the plaintiff. If the plaintiff or plaintiff's counsel believe that any such records are unrelated in any way to the claims in this case, then plaintiff may file a motion for a protective order. This would likely require some type of in camera inspection of the records. It is the court's hope that the parties can work this out in a reasonable and professional manner without further involvement of the court unless absolutely necessary.

VOL____PAGE____

James L Miraldi

James L Miraldi, Judge

cc:

JEREMY M BURNSIDE
JOSEPH T JOSEPH
MICHAEL J SPETRINO

FILED
LUCAS COUNTY

2008 MAY 7 AM 10:00

COMMON PLEAS COURT
BERNIE QUILTER
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

Rachel Goney, et al.,	*	Case No. CI 06-5002
Plaintiffs,	*	Judge Gary Cook
vs.	*	
Ryan Hill,	*	**JOURNAL ENTRY**
Defendant.	*	

****

This case is before the Court on plaintiffs' motion in limine. A memorandum in opposition has been filed and the case is now decisional. Upon review of the pleadings, applicable law and arguments of counsel, the Court finds the motion should be granted.

In addition to *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362 and R.C. 2315.20, plaintiffs cite several cases from the Lucas County Court of Common Pleas in support of their motion to prohibit defendants from mentioning or introducing collateral source information to the jury. Plaintiffs assert that the injury that gives rise to their claims took place on September 23, 2005, after the effective date of R.C. 2315.20, in further support of their position that certain evidence should be excluded from the jury's consideration.

Defendant contends that other decisions from the Lucas County Court of Common Pleas are not binding on this Court, and in opposition to plaintiffs' arguments, points to a decision by another judge on the Lucas County Court of Common Pleas which allowed the introduction of evidence of the amount of the plaintiff's medical bills that were actually paid and held that the collateral source statute excludes only evidence of benefits paid by a collateral source. Defendant maintains that evidence of medical bills that were actually paid should be submitted to the jury as well as the total amount of the medical bills. Defendant contends that the collateral source rule does not apply to "write-offs" because they are never paid.

After careful consideration, this Court finds that the difference in the amount billed and amount accepted, the "write-off," is paid by insurance companies through negotiations with medical providers and payment is made by the volume and good will of insurance companies and the guarantee to the medical provider to be paid a negotiated amount. The Court further finds that because the injury that plaintiffs assert gave rise to this cause of action occurred after April 7, 2005, and pursuant to the holdings of the majority of the judges on this bench, plaintiffs' motion is found well taken and hereby **GRANTED**. So **ORDERED**.

Dated: 5-7-08

Gary G. Cook

EXHIBIT
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XI

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SUMMIT COUNTY
CLERK OF COURTS

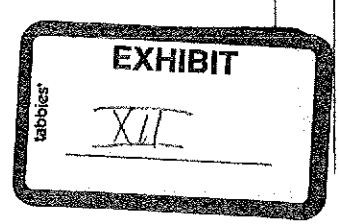
IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

JOHN D. OHLSON	)	**CASE NO. CV 2006-05-3285**
Plaintiffs,	)	**JUDGE ELINORE MARSH STORMER**
v.	)	
M. BJORN PETERSON TRANSPORTATION, INC., et al.	)	**Order Granting Plaintiff's Motion in Limine**
Defendants.	)	

This matter is before the Court upon Plaintiff, John D. Ohlson's Motion in Limine to exclude from trial evidence of the amount accepted by his medical providers as payment for his medical expenses. Defendants opposed.

This case arises out of a motor vehicle collision between Plaintiff, John D. Ohlson (Ohlson) and Defendants Charles P. Goldmann and M. Bjorn Peterson Transportation, Inc. (Peterson). Ohlson was injured in the collision and sought medical treatment including office visits, diagnostic tests and physical therapy. Ohlson seeks to introduce the amounts charged for these medical services to establish the reasonable and necessary expenses arising from his injury. In addition, Ohlson's treating physician testified that the medical treatment rendered was necessary and that the amounts charged were fair and reasonable for the services rendered.

Peterson seeks to introduce Ohlson's medical bills with the amount accepted as full payment in order to establish that this is the reasonable and necessary expense arising from Ohlson's injury. Peterson does not intend to introduce medical expert testimony to support this proposition.



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In personal injury cases, the injured party is entitled to recover necessary and reasonable expenses arising from the injury. *Robinson v. Bates* (2006), 112 Ohio St. 3d 17, 2006 Ohio 6362, citing *Wagner v. McDaniels* (1984), 19 Ohio St. 3d 184. "Proof of the amount paid or the amount of the bill rendered and of the nature of the services performed constitutes prima facie evidence of the necessity and reasonableness of the charges. . ." *Wagner*, supra at paragraph one of the syllabus. R.C. 2317.421 provides that:

> [i]n an action for damages arising from personal injury or wrongful death, a written bill or statement, or any relevant portion thereof, itemized by date, type of service rendered, and charge, shall, if otherwise admissible, be prima-facie evidence of the reasonableness of any charges and fees stated therein * * *.

In this case, the parties do not dispute that Ohlson complied with the statute and is therefore entitled to the presumption that the charges are reasonable or that Peterson is entitled to present evidence challenging the bills' reasonableness. *Wood v. Elzoheary* (1983), 11 Ohio App. 3d 27, 28. At issue here, is the method by which Peterson may do this. Ohlson asserts that without expert testimony, Peterson may not submit to the jury an alternative amount as "reasonable."

In *Robinson v. Bates*, supra, the Ohio Supreme Court held that both the original amount charged and the amount accepted as full payment may be considered by the jury. However, this case is distinguishable from *Robinson* where the parties stipulated to both types of bills and the court permitted them to both be considered. Here, Plaintiff will present uncontroverted testimony that the original bills were fair and reasonable.

To allow Peterson to present the amount accepted as full payment without evidence that this amount is reasonable, violates the purpose and spirit of the collateral source rule. *Robinson*, supra at *P83-84. The collateral source rule applies to prevent a defendant-tortfeasor from benefiting from an agreement between a plaintiff's healthcare provider and insurer. *See, Gustin v. Cheney* (march 2, 2006), 4th Dist. Case No. 05CA7, 2006 Ohio 1049.

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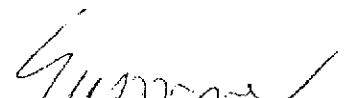
This Court holds that without additional information as to the fairness or reasonableness of the third party payer amounts, the bills are not admissible when the Plaintiff has evidence that only the original bills are fair and reasonable. This case is distinguishable from cases in which the parties rely only on stipulated bills pursuant to R. C. 2317.421.

Upon consideration the Court finds said motion well taken. Therefore, Plaintiff, John D. Ohlson's Motion in Limine is GRANTED.

IT IS SO ORDERED.



JUDGE ELINORE MARSH STORMER

cc: Attorney Joy Malek Oldfield; Attorney Michael Schmeltzer
Attorney Eric Stutz