

ORIGINAL

IN THE SUPREME COURT OF OHIO

RICHARD JAQUES	)	Case No. 2009-0820
	)	
Plaintiff-Appellee	)	
	)	
v.	)	
	)	On Appeal from the
PATRICIA A. MANTON	)	Lucas County Court of Appeals
	)	Sixth Appellate District
Defendant-Appellant	)	Case No. L-08-1096

---

**REPLY BRIEF OF APPELLANT PATRICIA A. MANTON**

---

Alan B. Dills (0016474)  
 Marshall & Melhorn, LLC  
 4 Seagate, 8<sup>th</sup> Floor  
 Toledo, Ohio 43604-2638  
 Phone: (419) 249-7100  
 Fax: (419) 249-7151  
 Email: [dills@marshall-melhorn.com](mailto:dills@marshall-melhorn.com)  
 Counsel for Appellant  
 Patricia A. Manton

David L. Lester (0021914)  
 Ulmer & Berne LLP  
 1660 West 2<sup>nd</sup> Street, Suite 1100  
 Cleveland, Ohio 44113-1448  
 Phone: (216) 583-7040  
 Fax: (216) 583-7041  
 Email: [dlester@ulmer.com](mailto:dlester@ulmer.com)  
 Counsel for Appellant  
 Patricia A. Manton

Michael D. Bell (0071325)  
 Russell Gerney (0080186)  
 Theodore A. Bowman (0009159)  
 Kevin J. Boissoneault (0040180)  
 Gallon, Takacs, Boissoneault  
 & Schaffer Co., L.P.A.  
 3516 Granite Circle  
 Toledo, Ohio 43617-1172  
 Phone: (419) 843-2001  
 Fax: (419) 843-6665  
 Email: [mbell@gallonlaw.com](mailto:mbell@gallonlaw.com)  
 Counsel for Appellee  
 Richard Jaques

FILED  
 DEC 28 2009  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

Martin T. Galvin (0063624)  
William A. Meadows (0037243)  
Reminger Co., L.P.A.  
1400 Midland Building  
101 Prospect Avenue, West  
Cleveland, Ohio 44115-1093  
Phone: (216) 687-1311  
Fax: (216) 687-1841  
Email: [mgalvin@reminger.com](mailto:mgalvin@reminger.com)  
[wmeadows@reminger.com](mailto:wmeadows@reminger.com)  
Counsel for Amicus Curiae, The Academy  
of Medicine of Cleveland & Northern Ohio

Ronald A. Rispo (0017494)  
Daniel A. Richards (0059478)  
Weston Hurd LLP  
1301 East 9<sup>th</sup> Street, Suite 1900  
Cleveland, Ohio 44114  
Phone: (216) 241-6602  
Fax: (216) 621-8369  
Email: [rrispo@westonhurd.com](mailto:rrispo@westonhurd.com)  
[drichards@westonhurd.com](mailto:drichards@westonhurd.com)  
Counsel for Amicus Curiae, Ohio  
Association of Civil Trial Attorneys

James L. Mann (0007611)  
Mann & Preston, LLP  
18 East Second Street  
Chillicothe, Ohio 45601  
Phone: (740) 775-2222  
Fax: (740) 775-2627  
Email: [jmann@horizonview.net](mailto:jmann@horizonview.net)  
Co-counsel for Amicus Curiae, Ohio  
Association of Civil Trial Attorneys

Anne Marie Sferra (0030855)  
Bridget Pursue Riddell (0082502)  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, Ohio 43215  
Phone: (614) 227-2300  
Fax: (614) 227-2390  
Email: [asferra@bricker.com](mailto:asferra@bricker.com)  
Counsel for Amici Curiae Ohio  
Hospital Association, Ohio State  
Medical Association, and Ohio  
Osteopathic Association

Paul W. Flowers, Esq. (0046625)  
Paul W. Flowers Co., L.P.A.  
Terminal Tower, 35<sup>th</sup> Floor  
50 Public Square  
Cleveland, Ohio 44113  
Phone: (216) 344-9393  
Fax: (216) 344-9395  
Email: [pwf@pwfco.com](mailto:pwf@pwfco.com)  
Counsel for Amicus Curiae  
Ohio Association of Justice

Nicholas J. Schepis (0001423)  
6181 Mayfield Road, Suite 302  
Mayfield Heights, Ohio 44124-3222  
Phone: (440) 442-9500  
Fax: (440) 449-2515  
Email: [njschepis@hotmail.com](mailto:njschepis@hotmail.com)  
Amicus Curiae

Peter D. Traska (0079036)  
Elk & Elk Co., Ltd.  
6105 Parkland Avenue  
Mayfield Heights, Ohio 44124  
Phone: (440) 442-6677  
Fax: (440) 442-7944  
Email: [ptraska@elkandelk.com](mailto:ptraska@elkandelk.com)  
Counsel for Amicus Curiae  
Elk & Elk Co., Ltd.

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
CONCLUSION.....	10
CERTIFICATE OF SERVICE .....	12

**TABLE OF AUTHORITIES**

	<b><u>Page</u></b>
<b><u>CASES</u></b>	
<i>Bynum v. Magno</i> (Hawaii 2004), 101 P.3d 1149, 1167 .....	6
<i>Coleman v. Drayton</i> (10 <sup>th</sup> Dist.), 1994 Ohio App. LEXIS 1202 .....	4
<i>Cooperative Leasing, Inc. v. Johnson</i> (Fla. 2004), 872 So.2d 956, 958.....	3
<i>Moorehead v. Crozer Chester Medical Center</i> (2001), 564 PA. 156, 765 A.2d 786 .....	3
<i>Pryor v. Weber</i> (1970), 23 Ohio St.2d 104, 263 N.E.2d 235 .....	3
<i>Robinson v. Bates</i> , 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.2d 1195 .....	1, 2, 7, 8, 9, 10
<i>State v. Price</i> (1979), 60 Ohio St.2d 136, 398 N.E.2d 772.....	7
<i>State v. Tipka</i> (1984), 12 Ohio St.3d 258, 261, 466 N.E.2d 898 .....	7
<i>Wagner v. McDaniels</i> (1984), 9 Ohio St.3d 184, 459 N.E.2d 561 .....	5
<i>Wood v. Elsoheary</i> (1983), 11 Ohio App.3d 27, 28, 462 N.E.2d 1243 .....	4
 <b><u>STATUTES</u></b>	
OHIO REVISED CODE SECCTION 1.47 .....	10
OHIO REVISED CODE SECTION 2315.20.....	1, 2, 6, 8, 9, 10
OHIO REVISED CODE SECTION 2317.421 .....	3, 4, 5
 <b><u>SENATE BILL</u></b>	
2003 Ohio S.B. 80, at Section 3(A)(7)(b).....	1

## Introduction

Plaintiff and his Amici make a number of assertions that are incorrect, misleading, and miss the point of this Court's decision in *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.2d 1195. Despite the tangled web that they weave, the Court should not lose sight of the following:

- As defendant pointed out in her Brief, the Ohio General Assembly has repeatedly enunciated its intent to limit, not expand, the collateral source rule. Indeed, the obvious purpose of R.C. 2315.20 is to limit that rule. Thus, the statute provides that “In any court action, the defendant may introduce evidence of any amount payable as a benefit to the plaintiff...,” unless the “source of collateral benefits” has certain rights at subrogation. In furtherance of the statute's limitation of the collateral source rule, its legislative history notes that “Twenty-one states have modified or abolished the collateral source rule.” See 2003 Ohio S.B. 80, at § 3(A)(7)(b).
- Nothing in R.C. 2315.20 defines “collateral benefit,” or affects in any way this Court's holding in *Robinson* (syllabus, ¶2) that “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.” Since the written-off amount of the medical bill is neither “payable” nor a “collateral benefit,” neither the collateral-source rule nor R.C. 2315.20 can possibly preclude admission of evidence of the write-off.
- Contrary to plaintiff's contention, nothing in R.C. 2315.20(C) affects an insurer's right of subrogation. That section provides that “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.” But under R.C. 2315.20(A), only collateral benefits for which there is no right of subrogation are admissible. It should be self-evident that an insurer that has no right of subrogation to begin with cannot lose any right of subrogation by admission of evidence of its collateral payment. Moreover, R.C. 2315.20(C) is irrelevant because written-off amounts are not “collateral benefits” to begin with.

- Plaintiff and his Amici read too much into footnote 1 in *Robinson*. That footnote simply notes that R.C. 2315.20 did not apply that case, because the statute became effective after the claim accrued. Nothing in the *Robinson* footnote, or anywhere else in *Robinson*, suggests that the result would be different under R.C. 2315.20.
- It is nonsensical to suggest, as plaintiff and his Amici do, that even though this Court held unequivocally in *Robinson* that a write-off is not a collateral benefit, evidence of a write-off is somehow evidence of a collateral benefit. Indeed, this Court held exactly the opposite in *Robinson*.
- Contrary to the contention of Amicus Elk & Elk, it is not at all “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.” (Brief, p. 4). The evidence would simply be, for example, that a medical provider accepted 50% of the billed charges as payment in full. Moreover, in enacting R.C. 2315.20, the General Assembly determined that certain insurance payments are admissible, whether or not they are a “collateral

benefit.” That is the whole point of the statute. Neither plaintiff nor his Amici have offered any justification for allowing a plaintiff to pretend that his medical bills were one amount, when they were in fact a fraction of that amount. Allowing such a charade only results in an award of make-believe “damages” that somebody has to pay for, and that “somebody” will be every Ohioan who pays liability insurance premiums.

**R.C.2317.421 Does Not Mandate Granting Plaintiffs an Unjustifiable Windfall**

As this Court held in *Pryor v. Weber* (1970), 23 Ohio St.2d 104, 263 N.E.2d 235 (First Syllabus), it is a settled rule that in a tort action “the measure of damages is that which will compensate and make the plaintiff whole.” Allowing the plaintiff to recover the amount of write-offs that were never actually paid by anybody violates this fundamental principle. See, for example, *Moorehead v. Crozer Chester Medical Center* (2001), 564 PA. 156, 765 A.2d 786, holding that awarding a plaintiff the difference between the amount billed by the hospital and the amount that the hospital accepted as full payment “will provide [plaintiff] with a windfall that would violate the fundamental tenets of just compensation;” and *Cooperative Leasing, Inc. v. Johnson* (Fla. 2004), 872 So. 2d 956, 958, holding that the plaintiff “was not entitled to recover for medical expenses beyond those paid by Medicare because she never had any liability for those expenses and would have been **made whole** by an award limited to the amount that Medicare paid to her medical providers.”

Nothing in R.C. 2317.421, which provides that medical bills “shall, if otherwise admissible, be prima-facia evidence of the necessity and reasonableness of any charges and fees stated therein,” mandates allowing a plaintiff to recover make-believe

charges that nobody ever paid. And to suggest, as Amicus Elk & Elk does (Brief, p. 13-14), that the difference between a doctor's billed charges and the amount accepted as full payment "may not have anything to do with the value of his or her services" ignores reality. Experienced and highly educated medical providers are not in the business of working for less than the reasonable value of their services.

Indeed, as the Legislative Service Commission pointed out in its analysis issued at the time of the enactment of R.C. 2317.421 in 1970, the purpose of the statute was to **simplify the presentation of evidence** as to the reasonable value of medical services. Rather than having to bring into court an expert witness, a plaintiff would now be able to make a prima facie showing that the amount of medical expenses she was claiming were reasonable simply by putting into the evidence the actual bills that plaintiff had received. Nothing in that statute, however, stated that such bills were to be conclusive evidence of reasonableness. To the contrary, Ohio courts have repeatedly held that R.C. 2317.421 allows a defendant to "challenge [a bill's] reasonableness with contrary evidence." *Wood v. Elsoheary* (1983), 11 Ohio App.3d 27, 28, 462 N.E.2d 1243; *Coleman v. Drayton* (10<sup>th</sup> Dist.), 1994 Ohio App. LEXIS 1202. Hence, to refuse to allow a defendant to present evidence that a medical service provider accepted a fraction of the billed amount as payment in full is to deny that defendant its statutory right to "challenge."

Further, R.C. 2317.421 was enacted back in 1970, at a time when the current system of managed care and the almost universal practice of discounting medical care bills did not exist. Hence, a bill received from a hospital in 1970 had a significance far different than such a bill has today. In 1970, the amount of the bill was the amount

that the medical care provider expected to (and ultimately did) receive. Nowadays, such a bill is simply the starting point for negotiations.

And certainly this Court had no inkling that this phenomenon was going to come about when it stated, in *Wagner v. McDaniels* (1984), 9 Ohio St.3d 184, 459 N.E.2d 561, that “[p]roof 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 for medical and hospital services.” Indeed, it is reasonable to conclude, from the way that statement was phrased, that this Court assumed that a plaintiff would rely on the “bill rendered” **only** in situations where payment had not yet been made.

The *Wagner* holding, of course, directly refutes the hue and cry of plaintiff and his Amici that adoption of appellant’s Proposition of Law will, in every case involving medical expenses, force the plaintiff to subpoena every medical provider, or call expert witnesses, to testify as to why each billed charge was reasonable. This hyperbolic foreboding makes no sense at all. A document reflecting the amount actually paid, **or accepted by the medical care provider as payment in full**, would, under R.C. 2317.421 and *Wagner*, be admissible and constitute a prima facie showing of the reasonableness of the paid charges.

#### **The “Two Injured Passengers” Example**

Amicus Curiae Ohio Association for Justice offers the “two injured passengers” example as purported evidence of the “irrelevance” of write-offs. Under this example, two passengers in an automobile are injured in an accident, but only one of them has health insurance. The example proceeds (OAJ Brief, p. 4):

In their ensuing trials against the tortfeasor, evidence of “write-offs” would only be available against the insured passenger. The usual, customary, and reasonable charges within the emergency room’s locality would be precisely the same for both of them, yet the one who purchased insurance would be subject to a reduction of the original amount charged while the other would not.

In the OAJ’s view, “This cannot be right.”

But why, however, does such a result create any more inequality than the normal application of the collateral source rule itself, which allows a plaintiff who has health insurance and hence is able to realize a double recovery to end up with significantly more dollars in his pocket than the plaintiff who does not have health insurance? And how does the windfall recovery by the first plaintiff promote equal treatment of litigants?

Moreover, hypothetical examples about differences in health insurance resulting in different recoveries relate only to differences in windfalls. What is wrong, one might ask, with a system that prevents plaintiff “A” from receiving the same windfall as plaintiff “B” so long as each of them is able to recover the amount that was actually paid on his behalf to a medical provider? As Chief Judge Moon pointed out in his dissent in *Bynum v. Magno* (Hawaii 2004), 101 P.3d 1149, 1167, “limiting the award to the amount incurred insures that *neither* party will receive a windfall. Tortfeasors would be held fully liable for their actions, and the beneficiary would be made whole.” Thus, it is hardly a “windfall” to a tortfeasor to reimburse the plaintiff for the actual amount of his medical expenses, rather than paying several times that amount.

### **There is no Constitutional Issue Before This Court**

Amicus Curiae Nicholas J. Schepis contends that this Court should find R.C. 2315.20 to be unconstitutional. But plaintiff never raised any constitutional issue in the lower courts, so neither he nor his Amici can do so here. It is axiomatic that this Court will not consider an issue that was not raised below. *See, e.g., State v. Tipka* (1984), 12 Ohio St.3d 258, 261, 466 N.E.2d 898 (“Appellees raised several other issues before this Court which were neither before, nor decided by, the Courts below. Accordingly, we decline to address these issues.”); *State v. Price* (1979), 60 Ohio St.2d 136, 398 N.E.2d 772 (2d Syllabus) (“The Supreme Court will not ordinarily consider a claim of error that was not raised in any way in the Court of Appeals and is not considered or decided by that court.”). Hence, there is no constitutional issue before this Court.

### **The Amount of A Write-Off is Neither Hard to Determine Nor Prejudicial**

Amicus Elk & Elk asserts (Brief p. 11) that 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.” But this contention misses the point of *Robinson*, which held squarely that written-off amounts are not “collateral benefits,” and that the collateral source rule simply does not apply to such write-offs. Moreover, there is nothing “prejudicial” about allowing a jury to hear that the plaintiff’s medical bills were satisfied by paying (for example, as here) 1/3 of the amount of the bills. The jury need never be informed who made the payment. They might guess that it was an insurer, but so what? That does not change the amount of the

plaintiff's true damages. What would be "prejudicial" is to allow a plaintiff to pretend that his medical bills were triple the amount actually paid. As defendant pointed out in her Merit Brief, over the past thirty years the Ohio General Assembly has repeatedly sought to limit, not expand, the collateral source rule. The statute here at issue, R.C. 2315.20, is another example of such limitation. The collateral source rule is not a license to recover windfalls of "phantom damages."

There is nothing difficult about determining the amount that a medical insurer paid on a medical bill. It is specifically set forth in an Explanation of Benefits. To suggest that figuring this out would turn a two-day trial into a four-day trial (as Amicus Elk & Elk does) is absurd. And if some trial courts don't want to be bothered with addressing this determination, they are simply abdicating their responsibility to follow this Court's controlling decisions.

Amicus Elk & Elk complains that disallowing the windfall of recovering unpaid medical "expenses" would cause "many claims of lower value" to "lose their economic viability...." (Brief, p. 14). Perhaps so, but is that really a bad thing? Is there any public policy justification for encouraging people to file lawsuits simply so that they can realize a windfall by recovering a phantom "expense" that nobody ever paid? If a claim of low value is not economically viable to bring, then it should not be brought. That circumstance is no different for tort claims than for any other claim. The answer is not to sanction a windfall for the plaintiff so that it becomes worthwhile to file small lawsuits. The answer is for parties to evaluate both the costs of litigation and the possible recovery, and to bring only those suits that make economic sense to bring.

The real problem here is that *Robinson* has, quite properly, diminished the value of personal injury claims. As the OAJ points out (Brief, p. 6):

In the experience of the OAJ attorneys, jurors overwhelmingly elect to base their awards upon the lesser amounts which are introduced by defense counsel whenever the plaintiff was insured. It is simply impossible for the plaintiff's counsel to present a convincing demonstration that the higher amounts actually reflect the true usual, customary, and reasonable charges within the locality and the discounts have been accepted by the providers only in exchange for alternative remuneration.

That, quite simply, is the crux of the biscuit, and that is why plaintiff and his Amici are trying so fervently to overturn this Court's well-reasoned decision *Robinson*. The motivation of plaintiff and his Amici – to artificially inflate the value of personal injury claims for their own aggrandizement – is readily apparent.

If a claimant intransigently insists on recovering make-believe medical “expenses” that nobody ever paid, then they may have to file suit, just like any other plaintiff who makes unreasonable and unjustifiable settlement demands. And if plaintiffs and their attorneys are unwilling to accept this Court's pronouncement in *Robinson* that written-off expenses are not collateral benefits, then it may take litigation for them to get the message. That is not a reason to overturn *Robinson*.

**There is No Right of Subrogation For Unpaid Medical Expenses, and Therefore**

**R.C. 2315.20 Does Not Apply to Write-Offs**

Finally, neither plaintiff nor his Amici have any viable response to defendant's Proposition of Law No. 2, which points out that R.C. 2315.20 on its face does not preclude admission of write-offs, because there is no right of subrogation for written-off amounts. It is indisputable that an insurer can only subrogate for amounts that

it has paid. In this regard, the starting point of R.C. 2315.20(A) is that collateral benefits are admissible. There is an exception that applies “If the source of collateral benefits” has certain subrogation rights. But a medical insurer has no right of subrogation for unpaid amounts. It is unpersuasive to contend, as the OAJ does, that since a health insurer may have a right of subrogation for paid benefits, this exception precludes admission of evidence of write-offs for which there is no right of subrogation.

Under R.C. 1.47(C), it is presumed that when the General Assembly enacts a statute, it intends a “just and reasonable” result. It is neither just nor reasonable to read the exception in R.C. 2315.20(A) as applying to unpaid medical expenses for which there is no right of subrogation. Contrary to the OAJ’s contention (Brief, p. 12), reading this exception as allowing evidence of write-offs will not “obliterate” any right of subrogation. The write-off is not a collateral benefit, and there is no right of subrogation for the write-off. Hence, admission of the write-off cannot possibly “obliterate” any insurer’s subrogation right. This argument is without merit.

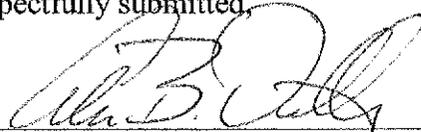
### **Conclusion**

This is not a complicated case, despite the efforts of plaintiff and his Amici to make it appear so. In *Robinson*, this Court held squarely and unequivocally that medical bill write-offs are not collateral benefits, and that the collateral source rule does not preclude admission of such write-offs. That claimants and their attorneys don’t like *Robinson* may be understandable, but that does not make it wrong. Nothing in R.C. 2315.20 changes the result in *Robinson*, as the statute does not re-define “collateral benefit.” Moreover, the obvious purpose of the new statute is to limit, not expand, the collateral source rule. Since medical bill write-offs are not collateral benefits, and since

medical insurers have no right of subrogation for unpaid amounts, the provision in R.C. 2315.20(A) that precludes admission of “collateral benefits” for which there is a right of subrogation simply does not apply. Hence, write-offs remain admissible.

For all of the foregoing reasons, and for the reasons that defendant previously set forth, this Court should reverse the judgment of the Sixth District Court of Appeals.

Respectfully submitted,



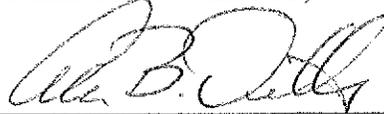
---

Alan B. Dills (0016474)  
Marshall & Melhorn, LLC  
4 Seagate, 8<sup>th</sup> Floor  
Toledo, Ohio 43604-2638  
Phone: (419) 249-7100  
Fax: (419) 249-7151  
Email: [dills@marshall-melhorn.com](mailto:dills@marshall-melhorn.com)  
Counsel for Record for Appellant  
Patricia A. Manton

David L. Lester (0021914)  
Ulmer & Berne LLP  
1660 West 2<sup>nd</sup> Street, Suite 1100  
Cleveland, Ohio 44113-1448  
Phone: (216) 583-7040  
Fax: (216) 583-7041  
Email: [dlester@ulmer.com](mailto:dlester@ulmer.com)  
Counsel for Appellant  
Patricia A. Manton

**Certificate of Service**

Copies of the foregoing Reply Brief were served upon all counsel identified on the cover page of this brief by first-class mail on December 23, 2009.



---

Alan B. Dills (0016474)  
Counsel of Record for Appellant

1812786v1  
06865.01168