

ORIGINAL

No. 12-0797

**In the Supreme Court of Ohio**

APPEAL FROM THE COURT OF APPEALS  
NINTH APPELLATE DISTRICT  
SUMMIT COUNTY, OHIO  
CASE No. CA-25602

**LARRY J. MORETZ, et al.**

Plaintiffs-Appellees  
v.

**KAMEL MUAKKASSA, M.D., et al.**

Defendant-Appellant

**MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT-APPELLANT  
KAMEL MUAKKASSA, M.D.**

Mark D. Amaddio, Esq.  
55 Public Square, Suite 850  
Cleveland, Ohio 44114

David M. Todaro, Esq.  
126 N. Walnut Street  
Wooster, Ohio 44691

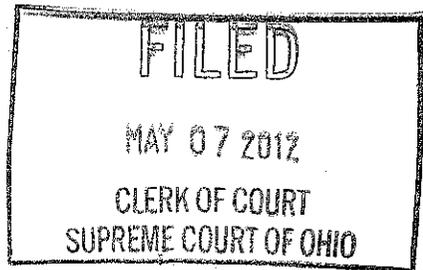
Mark S. Fusco, Esq.  
Walter & Haverfield, LLP  
1301 E. 9th Street; Suite 3500  
Cleveland, Ohio 44114

*Attorneys for Plaintiffs-Appellees*

DOUGLAS G. LEAK (0045554)(Counsel of Record)  
dleak@ralaw.com  
Roetzel & Andress, LPA  
One Cleveland Center, Ninth Floor  
1375 East Ninth Street  
Cleveland, OH 44114  
Telephone: 216.623.0150  
Facsimile: 216.623.0134

STACY DELGROS (0066923)  
sdelgros@ralaw.com  
Roetzel & Andress, LPA  
222 South Main Street  
Akron, OH 44308  
Telephone: 330.376.2700  
Facsimile: 330.376.4577

*Attorneys for Defendant-Appellant*



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I. **EXPLANATION OF WHY THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST**

This case is of great public and general interest because the Ninth District Court of Appeals' Decision relies upon both legally and factually flawed grounds to affirm a verdict against a physician who did not actually perform the surgery that is the subject of this medical malpractice action. The Ninth District misapplied and misinterpreted the Civil and Evidentiary Rules and longstanding legal precedents and, consequently, a case that should never have made it to the jury has resulted in an appellate decision that has left Ohio with conflicting and confusing law. The numerous errors in the Ninth District's Decision violate principles of substantial justice and due process and effectively punished Dr. Muakkassa for a surgery that was actually performed by another physician.

The Ninth District's Decision has redefined Evid. R. 803 (18), Civ. R. 49(B), Civ. R. 32(A) and this Court's collateral source rule as set forth in *Jaques vs. Manton*, 125 Ohio St. 3d 342, 2010-Ohio-1838, 928 N.E. 2d 434. The Ninth District issued a result-oriented Decision that is internally inconsistent both legally and factually and, more importantly, legally inconsistent with the Rules of Civil Procedure and Evidence and this Court's longstanding precedents, as well as other Appellate Courts. The unjustifiable manner in which the Ninth District chose to affirm a jury verdict has profound consequences. This Court should take this opportunity to review the Ninth District's legally flawed Decision so that the Ninth District and other Courts will be deterred from creating and relying upon unsound legal reasons to justify a Decision.

The first misinterpretation of law committed by the Ninth District involves its refusal to follow the strict mandates of Civ. R. 32(A) which governs the mandatory duty to file depositions before trial. Despite acknowledging that Civ. R. 32(A) allows for a later filing of a deposition only upon a finding of "good cause," the Ninth District's Decision has completely redefined Civ. R. 32(A) by eliminating the "good cause" requirement. In refusing to address the "good cause"

aspect of Civ. R. 32(A), the Ninth District has set forth a precedent that is wholly inconsistent with the language of Civ.R. 32(A) and, precedents set forth by this Court and other Appellate Courts. Had the Ninth District properly applied Civ. R. 32(A), Dr. Muakkassa would have been entitled to judgment as a result of Appellees' failure to timely file their only expert's deposition. The Ninth District's obvious error with respect to the mandates of Civ. R. 32(A) should be reviewed by this Court in order to eliminate the confusion the Ninth District has created.

Another misinterpretation of the law committed by the Ninth District involves the erroneous admission of a portion of a medical textbook in direct violation of Ohio's Learned Treatise Law as set forth in Evid. R. 803(18). Evidence Rule 803(18) explicitly precludes the admission of a Learned Treatise as a trial exhibit and does not allow a Learned Treatise to be sent to the jury for its consideration in deliberations. Yet, the Ninth District mistakenly allowed for just this by affirming the admission of an illustration taken directly from a medical textbook as a trial exhibit. This Court has yet to construe Evid. R. 803(18) and the actual admission of a Learned Treatise as a trial exhibit. As such, this Court should review the Ninth District's erroneous analysis of Evid. R. 803 (18) which improperly allows for the admission of a Learned Treatise as a trial exhibit.

Similarly, the Ninth District has redefined Civ.R. 49(B) by completely eliminating a trial court's mandatory duty to submit a jury narrative interrogatory where there exists multiple claims of negligence. In ignoring the mandatory language of Civ. R. 49(B) and this Court's precedents, the Ninth District made legal and factual misstatements in order to justify its erroneous holding. For example, in the Introduction portion of the Ninth District's Decision, the Ninth District specifically referenced at least three allegations of negligence. Then, in the Law and Argument portion of its Decision, the Ninth District repeated the three ways in which Appellees alleged Dr. Muakassa was negligent. Yet, the Ninth District ignored its own findings

and the fact that there were actually five allegations of negligence by holding that a narrative jury interrogatory pursuant to Civ. R. 49(B) was not warranted in this case. The Ninth District's illogical and legally flawed misinterpretation of Civ. R. 49(B) warrants this Court's review.

Finally, the Ninth District's Decision with respect to the collateral source rule and the admission of evidence of "write-offs" of medical bills is in direct conflict with this Court's recent Decision in *Jaques*, supra. The Ninth District's erroneous determination that the admission of evidence of "write-offs" of medical bills requires supporting expert testimony is not only illogical, it has now called into question the sound law explicitly set forth in *Jaques*. In misapplying *Jaques*, the Ninth District has added an evidentiary rule of law that is inconsistent with this Court's holding in *Jaques* with respect to the collateral source rule. This Court must clarify its holding in *Jaques* by reviewing the Ninth District's erroneous misinterpretation.

The issues presented herein have implications far beyond the parties of this case and resolution and clarification of the issues will guarantee all litigants in Ohio with equitable treatment. This Court now has the opportunity to provide the proper guidance with respect to the law governing the filing of depositions to be used at trial, the proper use of Learned Treatises, the proper use of narrative jury interrogatories and the admission of evidence of "write-offs" of medical bills. This Court should accept jurisdiction of this case in order to correct the obvious injustice caused by the Ninth District's legally and factually flawed Decision.

## II. STATEMENT OF THE CASE AND FACTS

This case arises from a surgery that was not actually performed by Defendant-Appellant Kamel Muakkassa, M.D. Instead, the surgery at issue that was performed on Mr. Moretz was done by Co-defendant Gary Williams, M.D.. Dr. Williams was dismissed from this case after he settled with Appellees for \$235,000.00. Although Dr. Muakkassa did not perform Mr.

Mortez's surgery, Appellees proceeded to trial against Dr. Muakkassa alleging that he was negligent in several different ways.

As to the underlying facts, Mr. Moretz had lower back problems which he described as "intolerable." On September 7, 2005, Mr. Moretz presented to the emergency room and a CT scan performed revealed a mass in Mr. Moretz's pelvis. (Tr. 196). Consequently, Mr. Moretz was referred to Dr. Muakkassa, a neurosurgeon. (Tr. 196).

During the initial office visit, Dr. Muakkassa diagnosed Mr. Moretz with a "cyst on sacrum and coccyx." (Tr. 263-270). Dr. Muakkassa ordered a CT scan and MRI. The CT scan demonstrated a "huge presacral cystic mass with bony defect in the anterior sacrum." (Exhibit D). An MRI revealed no nerves in the cyst. (Exhibit E; Tr. 279). After reviewing the CT scan and MRI results, Dr. Muakkassa saw Mr. Moretz in the office on July 22, 2005. Dr. Muakkassa had a lengthy discussion with Mr. Moretz about the cyst which included an explanation of treatment options. Dr. Muakkassa further informed Mr. Moretz that his condition was very rare and that neither he nor anyone else in the Akron area had performed this type of surgery. (Tr. 280-294).

Since the mass was grapefruit-size and it was directly impacting his bladder and rectum, Mr. Moretz decided to proceed with surgery. (Tr. 283-289). Dr. Muakkassa referred Mr. Moretz to Dr. Williams, a general surgeon, in order to further discuss the surgical approach. (Tr. 292-295). At the office visit, Dr. Williams discussed the surgery. (Exhibit 15). Since Dr. Muakkassa had never done this type of surgery to remove such a mass, Dr. Muakkassa and Dr. Williams discussed, at great length, the scope and type of surgery to be performed by Dr. Williams. (Tr. 294-295, 538-542). Both Dr. Williams and Dr. Muakkassa believed the best approach would be a laparoscopic technique, a technique for which Dr. Muakkassa was not credentialed, trained or qualified to do. (Tr. 292-294). Dr. Williams scheduled the surgery to be performed on

September 28, 2005 without either the inclusion of Dr. Muakkassa in the scheduling or confirming Dr. Muakkassa's participation. (Exhibit I).

On September 28, 2005, Dr. Williams performed Mr. Moretz's surgery to remove the meningocele/cyst. Dr. Williams started with a laparoscopic procedure which he ultimately converted to an open laparotomy. What Dr. Williams believed was a meningocele was isolated and removed by Dr. Williams. (Exhibit 6; Tr. 545-549). With respect to Dr. Muakkassa's presence for the surgery, Dr. Muakkassa was in the hospital and entered the operating room on at least two occasions. Dr. Muakkassa's role was merely as an observer while Dr. Williams performed the surgery. Dr. Muakkassa simply reassured Dr. Williams that from his perspective, everything looked fine. Dr. Williams never requested that Dr. Muakkassa scrub in. (Tr. 304-309, 314-317).

Post-operatively, Mr. Moretz had difficulty voiding and was discharged home urinating with the assistance of a Foley catheter. (Exhibit 8). Mr. Moretz had a neurapraxia involving his bladder and rectum, which is a mild type of a focal nerve lesion which causes certain deficits. Mr. Moretz's bladder was not functioning and he was diagnosed with a neurogenic bladder and impotence. (Tr. 83-84).

On March 16, 2007, Appellees filed this medical malpractice action against Dr. Muakkassa, Dr. Williams and his medical group. On April 20, 2007, Dr. Muakkassa filed his Answer denying all of Appellees' allegations.

Prior to the commencement of trial, on Wednesday, July 7, 2010, the trial preservation video/deposition of Appellees' only expert, Dr. Gary Dennis, was taken. At the trial video/deposition, there was no waiver by the parties of the mandatory Civ. R. 32(A) filing requirements. (See Dr. Dennis' transcript filed on July 13, 2010). Dr. Dennis' video/deposition was provided to the parties on Friday, July 9, 2010. Yet, Appellees did not file either Dr.

Dennis' trial video or deposition transcript with the Trial Court which was required pursuant to Civ. R. 32(A).

On the first day of trial, Monday, July 12, 2010 Appellees, once again, failed to file either Dr. Dennis' trial video or his deposition transcript. After the jury was empaneled, Dr. Muakkassa invoked Civ. R. 32(A) and requested that the Trial Court prohibit Appellees from mentioning Dr. Dennis during their Opening Statements and preclude them from playing the trial video for the jury during their case-in-chief. (Tr. 13-16). When the issue was addressed, Appellees did not present the Trial Court with any "good cause" for their failure to timely file Dr. Dennis' trial video/deposition.

The Trial Court acknowledged that whether it was a trial video or a deposition transcript, the filing requirements of Civ. R. 32(A) applied equally. (Tr. 15-16). The Trial Court also noted that "the court finds that video or written deposition, it's all a deposition." (Tr. 16). Additionally, the Trial Court recognized that Appellees were not in compliance with Civ. R. 32(A) by failing to file Dr. Dennis' trial video and/or deposition transcript. (*Id.*).

Although Civ. R. 32(A) provides an exception to the filing requirement upon a party's proof of "good cause" for failing to do so, the Trial Court neither addressed nor issued a ruling on the "good cause" exception. (*Id.*) Instead, the Trial Court erroneously excused Appellees from the Civ. R. 32(A) mandatory filing requirements on the basis that "there is no surprise," which is not an exception within Civ. R. 32(A). Consequently, Appellees were erroneously permitted to mention Dr. Dennis during Opening Statements.

On the day after the Trial Court overruled Dr. Muakkassa's objection to the use of Dr. Dennis' trial video/deposition, Appellees filed **only** the written transcript of Dr. Dennis.<sup>1</sup> Dr. Muakkassa renewed his objection to the untimely filing of Dr. Dennis' trial deposition and also

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<sup>1</sup> Appellees withdrew Dr. Dennis' trial video as an Exhibit to be admitted into evidence. (Tr. 517-518)

challenged the untimely filing of the other depositions. (Tr. 109-112). When the Trial Court addressed Dr. Muakkassa's renewed objection, admissions were made by both Appellees' counsel and the Trial Court with respect to the filing requirements for depositions pursuant to Civ. R. 32(A). (Tr. 110). Then, after Dr. Muakkassa's counsel stated that he had an obligation to raise an objection to Appellees' failure to timely file Dr. Dennis' trial deposition, the Trial Court agreed and confirmed that Dr. Muakkassa's position was absolutely correct: "Mr. Treadon [Dr. Muakkassa's counsel], you absolutely do, and **as to the motion yesterday under 32 you were absolutely correct.**" (Emphasis added). (Tr. 111). Although the Trial Court acknowledged that Civ. R. 32(A) required Appellees to timely file Dr. Dennis' trial video/deposition and that Dr. Muakkassa was correct in establishing that Appellees failed to comply with Civ. R. 32(A), Appellees were erroneously permitted to present Dr. Dennis' trial video/deposition to the jury (Tr. 190).

During Dr. Muakkassa's case-in-chief, Appellees' counsel cross-examined Dr. Mark R. McLaughlin and in doing so, utilized two illustrations taken directly from a medical textbook. (Tr. 455-460). However, Appellees' counsel neither identified nor marked either illustration as an exhibit. (Tr. 457-458). Additionally, Dr. McLaughlin never recognized that either illustration taken from the textbook was an accurate depiction of what occurred in this case. (*Id.*). All Dr. McLaughlin testified to was that what was shown to him by Appellees' counsel was what was reflected in the textbook. (Tr. 455-460).

When the Trial Court addressed the admission of Appellees' trial exhibits, Appellees' counsel incorrectly claimed that the illustration was the drawing that came out of the medical textbook that Dr. McLaughlin indicated was representative of the cyst that Mr. Moretz had. (Tr. 520). Similarly, the Trial Court mischaracterized Dr. McLaughlin's trial testimony by stating

that “the expert [Dr. McLaughlin] testified that it was an accurate representation of the anatomy of Mr. Moretz at the time.” (Tr. 521).

Dr. Muakkassa objected to the admission of the illustration because Evid R. 803(18) explicitly precludes the admission of a Learned Treatise as a trial exhibit. (Tr. 520-522). The Trial Court admitted the illustration over Dr. Muakkassa’s objection. (Tr. 587-588). The Trial Court allowed for its admission by erroneously concluding that “the fact that this depiction comes from a learned treatise does not obviate the fact that it is, in fact, an artistic diagram, and as such, presuming it is properly authenticated as accurately representing the anatomy in question ... is properly admissible.” (Tr. 587).

With respect to Appellees’ medical bills, the Trial Court erroneously concluded, contrary to this Court’s *Jaques* Decision, that the admission of evidence of “write-offs” of medical bills is contingent upon expert testimony that establishes “reasonableness.” (Dr. Muakkassa’s Appellate Brief, Appx. 1-2) Consequently, the Trial Court precluded Dr. Muakkassa from presenting evidence of “write-offs” of medical bills. (Tr. 2)

After the close of all the evidence, Dr. Muakkassa renewed his request that the Trial Court submit his proposed jury interrogatories which were filed on July 2, 2010. Included within Dr. Muakkassa’s proposed jury interrogatories was Interrogatory (B) asking the jury to “state the respect in which you find Kamel Muakkassa was negligent.” Since Appellees had multiple claims of negligence against Dr. Muakkassa, as well as Dr. Williams, Dr. Muakkassa was entitled to said jury interrogatory under Civ. R. 49(B). Although the Trial Court acknowledged that an interrogatory pursuant to Civ. R. 49 was mandatory, it declined to submit Dr. Muakkassa’s proposed narrative interrogatory on the basis that Appellees’ allegations of negligence as to both Dr. Muakkassa and Dr. Williams were actually summarized in a single allegation of negligence. (Tr. 499-504).

Thereafter, the jury was instructed by the Trial Court and given the case to deliberate. Deliberations were long and contentious and resulted in a split verdict in favor of Appellees in the amount of \$999,428.73.

On September 24, 2010, Dr. Muakkassa filed a Notice of Appeal to the Ninth District Court of Appeals challenging numerous rulings made by the Trial Court. On March 21, 2012, the Ninth District issued its Decision affirming the jury verdict. In doing so, the Ninth District issued a Decision that is both legally and factually flawed and, more importantly, inconsistent with Ohio's Civil and Evidentiary Rules and longstanding precedents of this Court and other Appellate Courts.

For instance, the Ninth District completely ignored the mandatory filing requirements of Civ. R. 32(A) by outrightly excusing Appellees from its filing requirements. (Appx. 4-6). Basically, the Ninth District eliminated the "good cause" exception of Civ. R. 32(A) when it completely failed to address the "good cause" exception altogether. (*Id.*)

Also, with respect to the admission of the illustration taken directly from a medical textbook as a trial exhibit and its submittal for the jury's consideration, the Ninth District completely ignored this Court's adoption of Evid. R. 803(18) – Ohio's Learned Treatise rule. (Appx. 9-13). Although Evid. R. 803 (18) allows for the "use" of Learned Treatises during trial, the rule explicitly precludes the admission of a Learned Treatise as a trial exhibit.

Further, the Ninth District redefined the mandatory duty of a trial court to submit a narrative jury interrogatory pursuant to Civ. R. 49(B). (Appx. 6-8) Not only did the Ninth District redefine Civ. R. 49(B), its Decision is internally inconsistent. For example, although the Ninth District recognized "at least" three separate allegations of negligence, it erroneously determined that a narrative jury interrogatory on these separate allegations was not warranted pursuant to Civ. R. 49(B). (Appx. 1; 6-8).

Finally, the Ninth District's Decision is in direct conflict with this Court's recent collateral source rule Opinion in *Jaques*, supra. The Ninth District erroneously added a completely new element to this Court's Decision in *Jaques* by requiring proof of "write-offs" of medical bills through expert testimony. (Appx 16-20).

Dr. Muakkassa is now requesting that this Court accept jurisdiction over this matter in order to address the obvious legal errors committed by the Ninth District that will have grave ramifications if allowed to stand as legal precedents.

### **III. LAW AND ARGUMENT**

#### **Proposition of Law No. 1: The Ninth District's Decision Excusing A Party From The Mandatory Filing Requirements For Depositions Has Effectively Rendered Civ. R. 32(A) Meaningless And The End Result Will Be Uncertainty Throughout Ohio As To The Requisite Procedures For Filing Depositions Pursuant To Civ. R. 32(A)**

Civil Rule 32(A) governs the use of depositions at trial and it explicitly imposes a mandatory duty to file depositions at least one day before trial. Civil R. 32(A) provides that "[E]very deposition intended to be presented as evidence must be filed at least one day before the day of trial or hearing unless for good cause shown the court permits a later filing." (Emphasis added).

It is a mandatory duty that a deposition, if it is to be presented as evidence, be filed with the court at least one day before the day of trial. *Creak v. Montville Plastics & Rubbers, Inc.* (1988), 48 Ohio App. 3d 167, 548 N.E.2d 1319; *In the Matter of the Estate of Polvko*, Mahoning App. No. 93 C.A. 181, 1999 WL 264253. Failure to comply with the mandatory procedural requirements of Civ. R. 32(A) bars the admission into evidence of the deposition. (*Id.*).

In this case, there is no dispute that Appellees did not comply with the requirements of Civ. R. 32(A) by failing to timely file Dr. Dennis' trial video/deposition with the Trial Court. Appellees did not file the trial video/deposition on Friday, July 9, 2010 when the transcript

became available. Additionally, Appellees did not file the trial video/deposition when trial commenced on Monday, July 12, 2010. In fact, Appellees did not file Dr. Dennis' trial deposition transcript until the second day of trial on July 13, 2010, only after Dr. Muakkassa raised his objections pursuant to Civ. R. 32(A).

Not only did Appellees admit that they were in non-compliance with Civ. R. 32(A), so did the Trial Court. When Dr. Muakkassa renewed his objection to the playing of Dr. Dennis' trial testimony on July 13, 2010 after Appellees finally filed the deposition transcript, the Trial Court explicitly stated that Dr. Muakkassa's objection raised the prior day was "absolutely correct." (Tr. 111). The Trial Court went even further in acknowledging that Appellees were required to file Dr. Dennis' trial video/deposition when it made a distinction between Dr. Dennis' deposition and those of the other witnesses. (Tr. 111-112). Since Dr. Dennis' deposition was being offered as substantive evidence, it had to be filed pursuant to Civ. R. 32(A).

The only exception to Civ. R. 32(A) that permits the untimely filing of a deposition is the showing of "good cause" by the noncomplying party. In this case, Appellees offered the Trial Court with no "good cause" as to why they should have been excused from the procedural requirement to timely file Dr. Dennis' trial video/deposition pursuant to Civ. R. 32(A). Instead, the only reason Appellees gave the Trial Court for the untimely filing of Dr. Dennis' deposition transcript on the second day of trial was that the Civ. R. 32(A) requirement came to their attention after Dr. Muakkassa raised his objection the day before.

In addressing Appellees' failure to timely file Dr. Dennis' deposition transcript, the Ninth District neither mentioned nor ruled upon the "good cause" exception in Civ. R. 32(A). The Ninth District erroneously affirmed the presentation of Dr. Dennis' trial testimony on the sole basis that Dr. Muakkassa was not "surprised." (Tr. 15-16). This finding did not constitute "good cause" by which the Ninth District could justify excusing Appellees from the mandatory filing

requirements of Civ. R. 32(A). Therefore, the Ninth District has redefined Civ. R. 32(A) by eliminating the “good cause” exception of Civ. R. 32(A).

**Proposition of Law No. 2: The Ninth District’s Decision Allowing For the Admission Of A Portion Of A Medical Textbook As A Trial Exhibit Is Both Legally And Factually Flawed, In Direct Conflict With Evid. R. 803(18) And The End Result Will Be Uncertainty Throughout Ohio As To The Proper Use of Learned Treatises**

This Court need not look any further than the explicit language of Evid. R. 803(18) in recognizing that the Ninth District erroneously affirmed the admission into evidence of an illustration taken directly from a Learned Treatise. In 2006, Ohio added the Learned Treatise exception to the Hearsay Rule in Evid. R. 803(18). However, Evid. R. 803(18) explicitly precludes that a Learned Treatise can be admitted as an exhibit: “If admitted, the statements may be read into evidence but **may not be received as exhibits.**” (Emphasis added). The explicit language of Evid. R. 803(18) prohibits the admission of a Learned Treatise as a trial exhibit. The reasoning behind this preclusion is to prevent the trier of fact from giving excessive weight or attempting to interpret the treatise by itself. Staff Notes to Evid. R. 803(18).

In this case, it was clear error for the Ninth District to affirm the admission of an illustration taken directly from a medical textbook as an exhibit in violation of Evid. R. 803(18). By affirming the Trial Court’s error in admitting a portion of a Learned Treatise, the Ninth District has erroneously provided legal authority allowing a jury to improperly review and consider a Learned Treatise during its deliberations.

**Proposition of Law No. 3: The Ninth District’s Decision Disallowing A Jury Interrogatory Regarding Plaintiffs’ Multiple Claims Of Negligence Is Legally And Factually Flawed, Is Internally Inconsistent And Contradictory, Is In Direct Conflict With Decisions Rendered By This Court And Other Appellate Courts Throughout Ohio And Effectively Renders Civ. R. 49(B) Meaningless**

Since Appellees’ expert had multiple claims of negligence, Dr. Muakkassa submitted Interrogatory (B) which requested the jury to “[s]tate the respect in which you find Kamel

Muakkassa was negligent.” The Trial Court refused to give the jury this Interrogatory despite the mandatory requirement to do so pursuant to Civ. R. 49(B). Civil Rule 49(B) states that a court **shall** submit written interrogatories to the jury that are directed to one or more determinative issues.

This Court has consistently recognized that the duty to submit requested interrogatories to the jury is mandatory. In *Ragone v. Vitali & Bettrami, Jr., Inc. (1975)*, 42 Ohio St. 2d 161, 327 N.E.2d 645. In *Ragone*, this Court expressly approved special interrogatories which ask the jury to state the specific respects in which they found the defendant was negligent. *Ragone, supra.*, paragraph two of the Syllabus. A narrative jury interrogatory on negligence is a legally proper and mandatory inquiry about factually determinative issues. *Id.* at 168. Such an interrogatory properly elicits a statement of facts from which a conclusion of negligence or no negligence is drawn and further tests the correctness of the general verdict form from a legal standpoint. *Id.*

In this case, Dr. Muakkassa’s proposed Interrogatory (B) was a legally proper inquiry about factually determinative issues concerning Dr. Dennis’ multiple claims of negligence against Dr. Muakkassa. The jury interrogatory was not confusing or misleading and, thus, the Trial Court had a mandatory duty under Civ. R. 49(B) to submit it to the jury.

The only basis upon which the Ninth District affirmed the Trial Court’s refusal to submit Dr. Muakkassa’s proposed narrative jury interrogatory was that it erroneously believed that there was only one allegation of negligence against Dr. Muakkassa. However, Dr. Dennis set forth several separate ways in which Dr. Muakkassa was allegedly negligent: (1) Dr. Muakkassa failed to scrub in; (2) Dr. Muakkassa failed to use magnification or loupes or advise Dr. Williams to do so; (3) Dr. Muakkassa failed to use nerve stimulation or advise Dr. Williams to do so; (4) Dr. Muakkassa should have used a posterior approach rather than an anterior approach; and (5) Failure of physicians to communicate. (Tr. of Dr. Dennis, pg. 31-36).

Based upon Appellees' multiple claims of negligence, Dr. Muakkassa had an absolute right pursuant to Civ. R. 49(B) to test the jury's verdict with his proposed narrative interrogatory. Dr. Muakkassa was unable to fully test the jury's general verdict in favor of Appellees with a proper inquiry into the jury's findings. However, the Ninth District eliminated the mandatory requirement to provide a narrative jury interrogatory and, consequently, this Court should accept jurisdiction in order to correct this obvious error.

**Proposition of Law No. 4: The Ninth District's Decision Requiring That Evidence Of "Write-Offs" Of Medical Bills Be Supported By Expert Testimony Is In Direct Conflict With This Court's Decision In *Jaques vs. Manton*, 125 Ohio St. 3d 342, 2010-Ohio-1838, 928 N.E. 2d 434 And Has, Consequently, Redefined The Collateral Source Rule As Set Forth By This Court**

The Ninth District erroneously ruled that Dr. Muakkassa was not be permitted to present evidence of "write-offs" of medical bills on the basis that Dr. Muakkassa was required to present expert testimony on the "reasonableness" of the "write-offs." (Appx. 1-2; Tr. 2). However, this Court's recent case of *Jaques* does not require that the admission of evidence of "write-offs" of medical bills is contingent upon expert testimony.

As to the *Jaques* Decision, this Court made it abundantly obvious that evidence of "write-offs" is admissible even in the absence of expert testimony. This Court concluded that it is ultimately the jury's responsibility to decide whether to award the full amount billed, the amount paid or some amount in between as damages in a malpractice action. *Jaques, supra.*, at ¶ 15. Therefore, "both the original medical bill rendered and the amount accepted as full payment are admissible." *Id.*

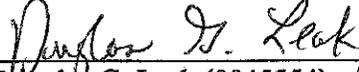
In accordance with the *Jaques* Decision, since Appellees offered evidence of the original medical bills, Dr. Muakkassa should have been permitted to respond with evidence of the "write-offs" of those medical bills without the need of expert testimony. This Court should accept

jurisdiction over this matter in order to address the Ninth District's unjustifiable expansion of the *Jaques* Decision.

#### IV. CONCLUSION

Dr. Muakkassa did not perform the surgery that is the subject of this lawsuit. Yet, the Trial Court committed numerous errors that prejudicially allowed a jury to return a verdict against Dr. Muakkassa. Then, the Ninth District issued its Decision that is in conflict with the Civil and Evidentiary Rules and legal precedents with respect to the mandatory filing requirements for depositions, the admission of Learned Treatises, the duty to give a narrative jury interrogatory and the collateral source rule. Undoubtedly, the Ninth District's Decision is full of legal and factual inconsistencies that deserves this Court's jurisdiction. The Ninth District has improperly set forth new law that has effectively caused uncertainty in the manner in which jury trials should be conducted. This Court has the opportunity to correct the injustice caused by the Ninth District's erroneous affirmance of a jury verdict against a physician who had no hands-on involvement in the surgery at issue. The Ninth District relied upon legally flawed analyses and conclusions in order to achieve the result it desired. Accordingly, this Court should accept jurisdiction and allow this appeal to proceed so that the important legal issues presented can be reviewed on the merits and reconciled with the existing law in Ohio.

Respectfully submitted,

  
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Douglas G. Leak (0045554) *KJO*  
(COUNSEL OF RECORD)  
Roetzel & Andress, LPA  
One Cleveland Center, Ninth Floor  
1375 East Ninth Street  
Cleveland, OH 44114  
Phone: (216) 623-0150  
Fax: (216) 623-0134  
*Attorney for Defendant-Appellant*

**CERTIFICATE OF SERVICE**

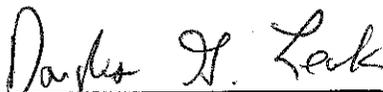
This is to certify that a copy of the foregoing was mailed by regular U.S. Mail this 7<sup>th</sup> day of May, 2012 to the following:

Mark D. Amaddio, Esq.  
55 Public Square, Suite 850  
Cleveland, Ohio 44114

David M. Todaro, Esq.  
126 N. Walnut Street  
Wooster, Ohio 44691

Mark S. Fusco, Esq.  
Walter & Haverfield, LLP  
1301 E. 9th Street; Suite 3500  
Cleveland, Ohio 44114

*Attorneys for Plaintiffs-Appellees*

  
\_\_\_\_\_  
Douglas G. Leak 

[Cite as *Moretz v. Muakkassa*, 2012-Ohio-1177.]

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF SUMMIT    )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

LARRY J. MORETZ, et al.  
  
Appellees / Cross-appellants

C.A. No.     25602

v.

KAMEL F. MUAKKASSA, M.D., et al.  
  
Appellants / Cross-appellees

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No.    CV-2007-03-2157

DECISION AND JOURNAL ENTRY

Dated: March 21, 2012

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DICKINSON, Judge.

INTRODUCTION

{¶1} Following surgery to remove a large, fluid-filled mass in his pelvis, Larry Moretz found that he had lost all control of his bowels and bladder and all sexual function. He and his wife sued his neurosurgeon and general surgeon. The general surgeon, Gary Williams, settled before trial. The Moretzs prosecuted their medical malpractice claims against the neurosurgeon, Kamel Muakkassa, arguing that he violated the standard of care by failing to scrub in on the surgery and failing to use magnification and/or nerve stimulation to help locate and protect nerves during the procedure. The parties do not dispute that Mr. Moretz's injuries are permanent or that they were caused by the surgery, but Dr. Muakkassa has argued that the injuries were not caused by any deviation from the standard of care. Following a jury verdict of \$995,428 against him, Dr. Muakkassa appealed and the Moretzs cross-appealed. This Court affirms in part because the trial court (1) exercised proper discretion in determining there was

good cause to permit a later filing of the Moretz's expert's deposition under Rule 32(A) of the Ohio Rules of Civil Procedure, (2) correctly refused to submit a narrative jury interrogatory, (3) properly determined that Evidence Rule 803(18) would not operate to exclude a medical illustration taken from a textbook, (4) properly admitted Mr. Moretz's medical bills and expert testimony about their reasonableness, and (5) properly excluded evidence of write-offs from medical bills in the absence of a proper foundation and because (6) Dr. Muakkassa did not demonstrate prejudicial error in the trial court's exclusion of evidence about Dr. Williams's settlement, (7) Section 1343.03(C) of the Ohio Revised Code is not unconstitutional, and (8) the trial court properly exercised discretion in determining that Dr. Muakkassa did not make a good faith effort to settle the claims against him. This Court reverses the judgment in part and remands this matter for recalculation of prejudgment interest because the trial court should have calculated interest on the verdict after it was reduced by the amount of Dr. Williams's settlement.

#### BACKGROUND

{¶2} At the time of the surgery, Mr. Moretz was 36 years old, married, and the father of a two-year-old daughter. He had normal sensation and sexual function and normal bowel and bladder function. After experiencing acute abdominal pain and some constipation and hesitancy with urination, he sought treatment for his symptoms. A radiology report revealed a grapefruit-sized mass near his tailbone, and he was referred to Dr. Muakkassa for treatment of an anterior sacral meningocele. Mr. Moretz testified that his doctors told him he had a hole in his tailbone and the fluid around his spinal cord had forced its way out through the hole to form a pouch created by the membrane surrounding the spinal cord. He was told that the large, fluid-filled cyst was pressing on his bladder and other organs, causing his symptoms. Dr. Muakkassa advised

him to see Dr. Williams, a general surgeon, to discuss whether the cyst could be removed laparoscopically.

{¶3} The parties agree that Mr. Moretz had a large cyst located near the end of his spinal cord, but they disagree about whether it was a meningocele or a neurenteric cyst. The Moretzes' neurosurgery expert, Gary Dennis, described the cyst as an anterior sacral meningocele, which he explained is an "outpouching" of the meninges, or covering of the spinal cord, filled with cerebral spinal fluid. Dr. Muakkassa and his neurosurgery expert, Mark McLaughlin, however, testified that the cyst was not a meningocele, but a neurenteric cyst, which is associated with spinal abnormalities, but does not have nerve tissue in it. Dr. McLaughlin explained that a neurenteric cyst is "really more of a digestive [system] abnormality" that typically would be removed by a general surgeon rather than a neurosurgeon.

{¶4} Dr. Williams and Mr. Moretz testified consistently about the surgical plan. According to them, if Dr. Williams was unable to remove the cyst with a less invasive laparoscopic approach, he would switch to an open incision and provide access through the abdomen to the cyst. Then, Dr. Muakkassa would remove the cyst from the tip of the spinal cord and seal it off.

{¶5} Dr. Muakkassa and his expert, Dr. McLaughlin, testified that Dr. Muakkassa did not violate the standard of care in his treatment of Mr. Moretz. Dr. Muakkassa testified that he did not scrub in for Mr. Moretz's procedure because it was unnecessary. He said that he entered the surgical suite several times in order to consult with Dr. Williams. He described his involvement as checking to see that Dr. Williams located the cyst and properly closed it off to avoid a leak of cerebral spinal fluid. He said that he was not specifically looking for nerves because there are no nerves in that area, but if there had been any there, he would have seen

them. He described the surgery as removal of a cyst in the abdominal cavity, not neurosurgery. Dr. Muakkassa testified that Dr. Williams appropriately performed the surgery. He said the injuries occurred because the pressure of the cyst over time had caused damage to the nerves so that they could not endure the normal stretching required to access the cyst during surgery, resulting in a loss of function.

{¶6} After the jury returned a verdict against Dr. Muakkassa, he moved to apply the statutory cap for non-economic damages and a statutory set-off for the amount paid by Dr. Williams in settlement. The Moretzes opposed the motion for a set-off of the amount paid by Dr. Williams and moved for prejudgment interest. The trial court reduced the verdict by \$39,600 to bring the noneconomic damages element in line with the cap, then calculated prejudgment interest before applying a set-off for the prior settlement. The trial court entered judgment for the Moretzes in the amount of \$953,858.08 and ordered Dr. Muakkassa to pay costs.

#### CIVIL RULE 32(A)

{¶7} Dr. Muakkassa's first assignment of error is that the trial court incorrectly permitted the Moretzes to present expert witness testimony via a videotape deposition that was not timely filed as required by Rule 32(A) of the Ohio Rules of Civil Procedure. He has argued that they failed to show good cause for the delay in filing the deposition and, had the deposition been excluded for violation of the rule, Dr. Muakkassa would have been entitled to a directed verdict.

{¶8} Under Rule 32(A) of the Ohio Rules of Civil Procedure, "[e]very deposition intended to be presented as evidence must be filed at least one day before the day of trial or hearing unless for good cause shown the court permits a later filing." The duty is mandatory, but the Rule allows the trial court to permit a later filing if it determines there is good cause to do so.

In this case, the Moretztes did not file the transcript of the videotaped deposition of their medical expert, Dr. Gary C. Dennis, until the second day of trial, after Dr. Muakkassa had objected to its use. The trial court overruled the objection, permitting the use of the deposition despite the “technical noncompliance” with Rule 32(A) because Dr. Muakkassa was not surprised that the Moretztes intended to introduce it as evidence at trial.

{¶9} The 1970 Staff Notes to Civil Rule 32 indicate that the requirement of filing the deposition the day before trial is designed to put opposing parties on notice that the deposition might be used in evidence. In this case, there was no need to put Dr. Muakkassa on notice that Dr. Dennis’s deposition might be used in evidence at trial. On June 11, 2010, one month before trial, the Moretztes filed a “Notice of Videotaped Trial Testimony of Gary C. Dennis, M.D.” that provided that “[t]he videotaped trial testimony will be used as evidence in the trial of this matter.” Five days before trial, on July 7, 2010, lawyers for the Moretztes and Dr. Muakkassa traveled to Baton Rouge, Louisiana, to videotape the deposition of Dr. Dennis. Dr. Muakkassa was not surprised at trial that the Moretztes intended to use the videotaped deposition of his expert rather than calling Dr. Dennis live. In fact, Dr. Muakkassa had been aware of that for at least a month since he had received the notice of deposition. Furthermore, it is not clear from the record that the transcript could have been filed the day before trial as Rule 32(A) requires, given that it was taken in Louisiana on the Wednesday before a Monday trial date.

{¶10} Dr. Muakkassa has not explained to this Court how he was prejudiced by the trial court’s admission of the deposition. There is no argument that he was surprised or somehow handicapped in his trial preparation due to the fact that the deposition had not been filed one day before the start of the trial. His only argument is that, because Dr. Dennis was the Moretztes’ only medical expert, Dr. Muakkassa would have been entitled to a directed verdict if the

deposition had been excluded. One would guess that, if the trial court had sustained the objection to the use of the deposition, the Moretzes would have moved heaven and earth to secure Dr. Dennis's live testimony before resting their case. In any event, Rule 32 was not designed to facilitate a technical victory by avoiding a decision on the merits. In this situation, the trial court exercised proper discretion in determining there was good cause to "permit[ ] a later filing." Civ. R. 32(A). Dr. Muakkassa's first assignment of error is overruled.

#### JURY INTERROGATORY

{¶11} Dr. Muakkassa's second assignment of error is that the trial court incorrectly refused to give a narrative jury interrogatory he requested. Dr. Muakkassa proposed a jury interrogatory that, in the event the jury found negligence, would have asked the jury to "[s]tate the respect in which you find Kamel Muakkassa was negligent." The trial court acknowledged the mandatory language of Civil Rule 49(B), but, citing *Freeman v. Norfolk & Western Railway Company*, 69 Ohio St. 3d 611 (1994), rejected the interrogatory, ruling that it was not appropriate because only one act of negligence was alleged. In response to Dr. Muakkassa's argument that the Moretzes had alleged multiple acts of negligence, the trial court determined that they all boiled down to criticizing Dr. Muakkassa for failing to scrub in to the surgery.

{¶12} Rule 49(B) of the Ohio Rules of Civil Procedure provides that a trial court "shall submit written interrogatories to the jury, together with appropriate forms for a general verdict, upon request of any party prior to the commencement of argument. . . . [T]he interrogatories shall be submitted to the jury in the form that the court approves [and] . . . may be directed to one or more determinative issues whether issues of fact or mixed issues of fact and law." "While it is mandatory that the court submit to the jury properly drafted interrogatories, the trial court retains discretion to reject interrogatories that are inappropriate in form or content." *Freeman v. Norfolk*

& *W. Ry. Co.*, 69 Ohio St. 3d 611, 613 (1994). “A court may reject a proposed interrogatory that is ambiguous, confusing, redundant, or otherwise legally objectionable.” *Id.*

{¶13} “The purpose of an interrogatory is to ‘test the jury’s thinking in resolving an ultimate issue so as not to conflict with its verdict.’” *Freeman v. Norfolk & W. Ry. Co.*, 69 Ohio St. 3d 611, 613 (1994) (quoting *Riley v. Cincinnati*, 46 Ohio St. 2d 287, 298 (1976)). “Proper jury interrogatories must address determinative issues and must be based upon trial evidence.” *Ramage v. Cent. Ohio Emergency Servs. Inc.*, 64 Ohio St. 3d 97, 107 (1992). Interrogatories that ask for conclusions that are not legitimate issues are improper. *Freeman*, 69 Ohio St. 3d at 614. The Ohio Supreme Court has held that, “[w]hen only one act of negligence is alleged against a defendant, an interrogatory asking the jury to specify the manner in which the defendant was negligent is improper.” *Id.*

{¶14} The trial court told Dr. Muakkassa that it would reject his interrogatory for two reasons: (1) all allegations of negligence were dependent upon his failure to scrub in to the surgery, and (2) the narrative form was likely to confuse the jury. At trial, the Moretz’s medical expert, Dr. Dennis, testified that Dr. Muakkassa violated the applicable standard of care in the treatment of Mr. Moretz in three ways: (1) failure to scrub in to the procedure; (2) failure to use magnification via a microscope or telescopic glasses called Loupes; and (3) failure to use neurophysiological monitoring or nerve stimulation to help locate nerves to avoid injury during the procedure. He testified that these failures proximately caused Mr. Moretz’s injuries.

{¶15} According to Dr. Dennis, Dr. Muakkassa “agreed to operate on Mr. Moretz, but, unfortunately, he never did.” Dr. Dennis testified that Dr. Muakkassa fell below the standard of care because he “did not use the techniques that ordinarily he would have used if he were doing the procedure himself to be certain that nerves were not being injured and nerves were being

identified and protected.” He explained that with a large mass that has been growing since birth, it is very difficult to see and identify normal nerves because they “are often plastered to the outside of a big cyst like that[.]” He criticized Dr. Muakkassa for failing to “get into the field himself and use his expertise . . . the way that a neurosurgeon would[.]” Dr. Dennis’s testimony framed magnification and nerve stimulation as methods a neurosurgeon of ordinary skill would use to protect against nerve damage during this type of procedure. When asked if Dr. Muakkassa “ever even attempt[ed] to look for any nerves[.]” Dr. Dennis responded, “he didn’t scrub in so - not that I could determine.” Dr. Dennis testified that Dr. Muakkassa’s failures to scrub in, use magnification, and monitor the nerves proximately caused Mr. Moretz’s injury because “[Dr. Muakkassa] was not there physically in the field able to identify the nerves for Dr. Williams.”

{¶16} Dr. Muakkassa testified that he did not need to look for nerves because there are no nerves in that area of the body. He also testified that the nerves involved in this injury are large enough to have been seen with the naked eye even from where he was standing without scrubbing in. There is no evidence that Dr. Muakkassa could have used either magnification or nerve stimulation techniques without scrubbing in to the procedure. As the evidence suggests that Dr. Muakkassa was criticized for not physically participating in the surgery, which would have allowed him to use magnification and nerve stimulation techniques to avoid injury to the nerves responsible for controlling bowel, bladder, and sexual function, the trial court correctly determined that the Moretz’s allegations boil down to one act of negligence. Therefore, the proposed narrative interrogatory would not have been appropriate in this case. *Freeman v. Norfolk & W. Ry. Co.*, 69 Ohio St. 3d 611, 614 (1994). Dr. Muakkassa’s second assignment of error is overruled.

EVIDENCE RULE 803(18)

{¶17} Dr. Muakkassa's third assignment of error is that the trial court violated Rule 803(18) of the Ohio Rules of Evidence by incorrectly allowing the jury to consider during deliberations an illustration taken from a learned treatise. He has argued that, as hearsay that fell within that exception, it was admissible for use during expert testimony, but was not permitted to be sent back with the jury for deliberations. The Moretzes have argued that Rule 803(18) does not apply to exhibit 36 and Dr. Muakkassa failed to show how he was materially prejudiced by its being sent back with the jury.

{¶18} Under Rule 803(18) of the Ohio Rules of Evidence, "statements contained in [a] published treatise[ ] . . . [regarding] history, medicine, or other science or art" may be admissible "[t]o the extent [they are] called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination" provided the treatise is "established as a reliable authority by the testimony or admission of the witness or by other expert testimony[.]" "If admitted, the statements may be read into evidence but may not be received as exhibits."

{¶19} Exhibit 36 is a medical illustration described as "a congenital anterior sacral meningocele." It is a photocopy of page 1157, Figure 83.1, from the second edition of a medical textbook entitled, "Spine Surgery Techniques, Complication, Avoidance and Management." Dr. Muakkassa's expert, Dr. McLaughlin, testified that he is familiar with the book and that he read the chapter regarding anterior sacral meningoceles several times in preparation for his trial testimony. He agreed the text is authoritative and that the relevant chapter is "excellent." Dr. McLaughlin testified that the illustration was an accurate depiction of what can occur with an anterior sacral meningocele. He testified, however, that he did not agree that Mr. Moretz had an anterior sacral meningocele or that the liquid inside the cyst was cerebral spinal fluid. He testified that Mr. Moretz had a neurenteric cyst, which can look very similar to an anterior sacral

meningocele, but does not involve the nervous system. The trial court admitted exhibit 36 over Dr. Muakkassa's hearsay objection, noting that the fact that the illustration came from a medical textbook does not change the fact that it is an artistic rendering of human anatomy.

{¶20} Evidence may not be admitted unless it is first properly authenticated via "evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid. R. 901(A). Dr. McLaughlin met that requirement by testifying that the illustration was an accurate depiction of an anterior sacral meningocele. The next question is whether the illustration of the meningocele is relevant evidence. Evidence Rule 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." Although the medical illustration at issue did not directly meet this test, a tangible "object may be relevant because it is 'substantive' evidence or it may be relevant because it is 'illustrative' of facts or opinions testified to by a witness." *State v. Hoffmeyer*, 9th Dist. No. 23712, 2008-Ohio-2311, at ¶ 27 (quoting 2 George E. Dix et al., McCormick on Evidence § 212, at 3 (Kenneth S. Broun ed. 2006)).

{¶21} Tangible objects used demonstratively "are relevant if they aid the trier [of fact] in understanding the witness's testimony, which itself makes a fact of consequence more or less probable." 2 George E. Dix et al., McCormick on Evidence § 212, at 3 (Kenneth S. Broun ed. 2006)). If the object played no part in the events underlying the litigation, "[i]ts source and how it was created may be of no significance whatever." *Id.* at § 214, at 15. "Instead, the theory justifying its admission is that the item is a fair and accurate representation of relevant testimony or documentary evidence otherwise admitted in the case. Typically a [ ] [visual] aid will be identified by a witness, during the witness's testimony, as a substantively correct representation

of something the witness once perceived and is now describing.” *Id.* This Court has held that “[d]emonstrative evidence is admissible to illustrate a witness’s testimony.” *State v. McCollough*, 9th Dist. No. 2764, 1993 WL 290204 at \*2 (Aug. 4, 1993). The Ohio Supreme Court has held that “[s]ending properly admitted evidence into jury deliberations rests within the sound discretion of the trial judge.” *State v. McGuire*, 80 Ohio St. 3d 390, 396 (1997).

{¶22} A properly authenticated medical illustration of the human anatomy discussed by medical experts can be helpful to the jury in understanding the issues in a medical malpractice case. Here the Defendant’s own expert vouched for the accuracy of this depiction of the anomalous anatomical condition the plaintiff sought to prove that he had. As the exhibit was authenticated and relevant, it was admissible at the discretion of the trial court unless prohibited by some other rule or statute. Evid. R. 402.

{¶23} At common law, “[m]edical books or treatises, even though properly identified and authenticated and shown to be recognized as standard authorities on the subjects to which they relate, [were] not admissible in evidence to prove the truth of the statements therein contained.” *Hallworth v. Republic Steel Corp.*, 153 Ohio St. 349, paragraph two of the syllabus (1950). The common law later evolved to allow parties to use a learned treatise for the limited purpose of impeaching the credibility of an expert who had either relied on it or acknowledged it as authoritative in the field. *Stinson v. England*, 69 Ohio St. 3d 451, 458 (1994). In 1998, Ohio codified that concept in Evidence Rule 706. In 2006, the Supreme Court repealed Evidence Rule 706 when it adopted Rule 803(18), patterned after the federal rule, to allow statements in learned treatises to be used as substantive evidence rather than restricting their use to impeachment and rehabilitation.

{¶24} This exception to the hearsay rule is primarily aimed at passages in treatises containing “theories and opinions” of the author “representing inductive reasoning.” See *Piotrowski v. Corey Hosp.*, 172 Ohio St. 61, 69 (1961) (explaining bases for the exclusion of learned treatises including lack of certainty regarding opinions and conclusions asserted in treatises and the inability to cross-examine the authors). Although an illustration in a textbook could include “statements” of the type Rule 803(18) was meant to address, exhibit 36 does not. Exhibit 36 is more similar to a photograph or map properly admitted if authenticated and relevant to the claims or defenses of either party. The identity of the artist who created the depiction is not of interest to the court. There is no need for cross-examination. We agree with the commentator on the Ohio Rules of Evidence who has written that the restriction in Evidence Rule 803(18) against taking learned treatises into the jury room “should not be read so broadly as to preclude the proponent from presenting the evidence in the form of a visual presentation where the presentation assists the jurors in evaluating and understanding the material.” Glen Weissenberger, *Ohio Evidence*, § 803.224, at 183 (2011).

{¶25} Dr. Muakkassa has not argued that the author of the textbook made any “statements” in this illustration of a type Rule 803(18) was intended to address. He has argued only that, because it comes from a learned treatise, it is hearsay subject to that exception. To the extent that the author of the treatise “asserted” anything through the illustration, it was only that the illustration accurately depicted an anterior sacral meningocele. See Evid. R. 801(A), (C). Dr. Muakkassa’s own expert witness adopted that “assertion” as his own. The illustration is not hearsay, and Rule 803(18) should not operate to exclude the illustration from the jury’s consideration during deliberations. In this case, the treatise was not taken into the jury room to be potentially misconstrued by jurors interpreting a medical textbook without the help of an

expert. Dr. Muakkassa did not dispute the accuracy of the medical illustration or the author's basis for drawing it a certain way. In fact, his own expert vouched for the accuracy of it. Hearsay was Dr. Muakkassa's only basis for objecting to the jury considering the exhibit during deliberations. The trial court properly determined that Evidence Rule 803(18) would not operate to exclude the illustration.

{¶26} Dr. Muakkassa has argued that he was prejudiced because the admission of the exhibit made it more likely the jury would give undue weight to the theory that Mr. Moretz had a meningocele rather than a neurenteric cyst. There is no evidence to suggest the admission of the exhibit prejudiced Dr. Muakkassa. The illustration did not tend to prove that Mr. Moretz had a meningocele.

{¶27} Dr. Muakkassa has also argued exhibit 36 was not properly identified and authenticated because the Moretz's lawyer failed to mark the exhibit while cross-examining Dr. McLaughlin and failed to establish which of two drawings he later marked as exhibit 36. If Dr. Muakkassa's lawyer felt there was some confusion about which illustration had been marked as exhibit 36, he did not raise that objection with the trial court when that confusion could have been eliminated, even though they twice discussed whether exhibit 36 should be admitted into evidence. This Court will not consider his argument for the first time on appeal. See *State v. Williams*, 51 Ohio St. 2d 112, paragraph one of the syllabus (1977). Dr. Muakkassa's third assignment of error is overruled.

#### EVIDENCE OF CO-DEFENDANT'S SETTLEMENT

{¶28} Dr. Muakkassa's fourth assignment of error is that the trial court incorrectly refused to allow him to present evidence of the fact that Dr. Williams, a witness at the trial, had been named as a co-defendant, but had settled the Moretz's claims against him before trial. Dr.

Muakkassa has argued that he should have been permitted to introduce evidence of the settlement between Dr. Williams and the Moretztes in order to prove that Dr. Williams was biased against him. He has argued that “Dr. Williams was very angry at Dr. Muakkassa for his failure to settle this case and then being drawn back into the case to testify[.]” which resulted in “some very damaging testimony against Dr. Muakkassa” on cross-examination.

{¶29} Under Rule 408 of the Ohio Rules of Evidence, evidence of the settlement of a claim is inadmissible to prove liability or invalidity of the claim or its amount, but the rule “does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness[.]” The Moretztes moved in limine to exclude any mention of their settlement with Dr. Williams. The trial court granted the motion on the record prior to opening statements, but limited the scope of the ruling so that the jury could understand Dr. Williams’s relationship to the case. The court permitted Dr. Muakkassa to elicit testimony about the fact that Dr. Williams had performed the surgery, had been named as a defendant in the case, and that, at the time of trial, he was no longer a defendant.

{¶30} At trial, Dr. Muakkassa called Dr. Williams as a witness. Dr. Muakkassa asked him whether he realized that, in deposition, the Moretztes’ medical expert had said that Dr. Williams had deviated from the standard of care in his treatment of Mr. Moretz. Dr. Williams testified that he was aware of that and that he did not agree with that assessment. Dr. Muakkassa then asked two leading questions that made it clear to the jury that Dr. Williams had been a defendant in the lawsuit until he had settled the claim. Dr. Muakkassa’s two questions were “you chose apparently at some point in time not to proceed to trial to defend yourself?” and “you were dismissed from this case I believe last year, 2009?” Dr. Williams responded affirmatively

to both questions. Dr. Muakkassa did not seek to introduce any further evidence regarding Dr. Williams's settlement.

{¶31} Even if this Court could find error in the trial court's ruling, Dr. Muakkassa has not pointed to any "damaging testimony" in the record nor explained how introducing further evidence about the settlement would have helped him avoid whatever prejudice he believes he suffered. App. R. 16(A)(7). Dr. Muakkassa has not affirmatively demonstrated prejudicial error. *See* Civ. R. 61; App. R. 16(A)(7); *Cardone v. Cardone*, 9th Dist. No. 18349, 1998 WL 224934 at \*8 (May 6, 1998). His fourth assignment of error is overruled.

#### EVIDENCE OF MR. MORETZ'S MEDICAL BILLS

{¶32} Dr. Muakkassa's fifth assignment of error is in two parts. He has seemingly argued that the trial court incorrectly admitted Mr. Moretz's medical bills without competent evidence regarding the necessity and reasonableness of the charges. He has also argued that the trial court incorrectly excluded evidence of the write-offs of the medical bills without expert testimony regarding reasonableness.

{¶33} In considering the first part of this assignment of error, it is unclear whether Dr. Muakkassa intended to argue that the medical bills were inappropriately admitted and/or that the trial court should have excluded the testimony of Dr. Dennis regarding those bills. In any event, his argument appears to be limited to questioning the competence of the evidence tending to show the medical charges were reasonable.

{¶34} Section 2317.42.1 of the Ohio Revised Code provides that an itemized "written bill or statement" shall be "prima-facie evidence of the reasonableness of any charges and fees stated therein" provided the fees are for medication or services as described in the statute and the bills are delivered to all adverse parties not less than five days before trial. Compliance with the

statute creates a rebuttable presumption of the reasonableness of all charges reflected in the qualifying medical bills. *Stiver v. Miami Valley Cable Council*, 105 Ohio App. 3d 313, 320 (2d Dist. 1995); *see also Jaques v. Manton*, 125 Ohio St. 3d 342, 2010-Ohio-1838, at ¶ 5. The parties agree that the Moretztes met the requirements of the statute in this case. Thus, the medical bills were prima facie evidence of the reasonableness of the charges reflected in the bills.

{¶35} In addition to the presumption triggered by compliance with the statute, the Moretztes offered further evidence of the reasonableness of the charges. On direct examination, Dr. Dennis considered exhibit one, which was identified as a compilation of Mr. Moretz's medical bills with a summary sheet on top that was prepared by his lawyer. Dr. Dennis testified that the charges were reasonable and necessary. On cross-examination, he testified that he had not considered each line on each bill, but had relied on the accuracy of the summary sheet to support his opinion that the bills reflected reasonable and necessary charges for medical services rendered to Mr. Moretz due to the injuries received via Dr. Muakkassa's alleged deviation from the standard of care. Dr. Dennis offered a competent expert opinion regarding the reasonableness of the charges for the services rendered. Dr. Muakkassa's cross-examination may have affected the credibility of that opinion, but that goes only to the weight and not the admissibility of the evidence. *See Segedy v. Cardiothoracic & Vascular Surgery of Akron Inc.*, 182 Ohio App. 3d 768, 2009-Ohio-2460, at ¶ 18 (9th Dist. 2009).

{¶36} The second part of Dr. Muakkassa's fifth assignment of error is that the trial court incorrectly excluded evidence of the medical providers' write-offs of the medical bills. In personal injury cases, "[a] plaintiff is entitled to recover the reasonable value of medical expenses incurred due to the defendant's conduct." *Jaques v. Manton*, 125 Ohio St. 3d 342, 2010-Ohio-1838, at ¶ 15. The reasonable cost of any given medical procedure is generally

“beyond the knowledge or experience possessed by lay persons.” Evid. R. 702(A). Therefore, although medical bills are evidence of what the provider charged for each service, expert testimony would be required to prove the reasonableness of those charges.

{¶37} The General Assembly created a shortcut for proving the reasonableness of medical charges in a personal injury or wrongful death case via the rebuttable presumption created by compliance with Section 2317.42.1. The defendant may then present contrary evidence to challenge the reasonableness of the charges. *Robinson v. Bates*, 112 Ohio St. 3d 17, 2006-Ohio-6362, at ¶ 9. Because plaintiffs are not always responsible for paying the total amounts charged by their medical providers, questions have developed regarding how defendants might rebut the presumption of reasonableness created by Section 2317.42.1. Frequently, plaintiffs are able to settle their medical bills for less than the full amount, especially if they have health insurance. If the plaintiff had secured health insurance coverage prior to being injured by a defendant’s negligence, then, generally speaking, the insurance company will have negotiated with the providers for a reduced rate. In that case, the plaintiff and/or his employer pays insurance premiums and, when bills are issued for care received, the insurance company and plaintiff together pay the provider something that is often significantly less than the amount billed. The provider then writes off the difference, accepting the reduced rate as payment in full. Usually, the insurance contract will also include a subrogation clause that entitles the insurance company to recover from the plaintiff any payments it made on his behalf in the event that the plaintiff recovers those costs from a negligent third party who caused the injuries.

{¶38} The collateral source rule has been described 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.” *Roberts v. State Farm Mut. Auto. Ins. Co.*,

155 Ohio App. 3d 535, 2003-Ohio-5398, at ¶ 69 (2d Dist.) (quoting *Carville v. Estate of Phillips*, 2d Dist. No. 99CA52, 2000 WL 1209272 at \* 2 (Aug. 25, 2000)). The collateral source rule “is an exception to the general rule that in a tort action, the measure of damages is that which will compensate and make the plaintiff whole.” *Robinson v. Bates*, 112 Ohio St. 3d 17, 2006-Ohio-6362, at ¶ 11. “Through this exception, the plaintiff is allowed to receive more than the amount of damages [ ]he actually incurred.” *Roberts*, 2003-Ohio-5398, at ¶ 69. The purpose of the collateral source exception to the general rule of tort damages is to ensure that “benefits the plaintiff receives from a source wholly independent of the wrongdoer [do] not benefit the wrongdoer by reducing the amount of damages that a plaintiff might otherwise recover from him.” *Id.* The rationale is that a negligent defendant should not reap the advantage created by a plaintiff’s foresight in securing insurance or other sources of benefits to help cover the cost of injuries caused by the defendant. *Robinson*, 2006-Ohio-6362, at ¶ 11. “As an evidentiary rule, the collateral source rule bars the introduction into evidence of collateral payments to the plaintiff in order to prevent the jury’s consideration of such payments in determining the amount of damages.” *Roberts*, 2003-Ohio-5398, at ¶ 69 (quoting *Carville*, 2000 WL 1209272 at \*2).

{¶39} In 2005, the General Assembly adopted a statute essentially limiting the collateral source rule to sources of benefits that carry a right of subrogation. Under Section 2315.20(A) of the Ohio Revised Code, a defendant may introduce evidence of collateral source benefits to the plaintiff only if the source of those benefits does not have a right of subrogation. Thus, the General Assembly determined that, if the plaintiff will have to reimburse his insurance carrier under a subrogation clause, then the jury should not learn of the collateral benefit. Instead, the jury will hear only the amounts charged for each service and, if the judgment includes those charged amounts, it will be the plaintiff rather than the defendant who reaps the benefit of any

amounts written off by his health care providers. Five years after the codification of the rule, the Ohio Supreme Court held that “the statute does not address evidence of . . . write-offs by medical providers[.]” *Jaques v. Manton*, 125 Ohio St. 3d 342, 2010-Ohio-1838, at ¶ 1. Under *Jaques*, “evidence of write-offs is admissible to show the reasonable value of medical expenses.” *Id.* at ¶ 16.

{¶40} In this case, the trial court excluded evidence of the amounts written off by medical providers due to a lack of foundation, not because of the collateral source rule. Dr. Muakkassa sought to offer evidence of the amounts written off of the medical bills in order to prove that the reasonable value of the medical services was less than the amounts the providers charged. He did not, however, offer any expert testimony on the issue of the reasonable value of the medical services rendered. “[T]he reasonable value of medical services is a matter for the jury to determine from all relevant evidence.” *Jaques v. Manton*, 125 Ohio St. 3d 342, 2010-Ohio-1838, at ¶ 15 (quoting *Robinson v. Bates*, 112 Ohio St. 3d 17, 2006-Ohio-6362, at ¶ 17). In *Jaques*, the Ohio Supreme Court held that, regardless of the collateral source rule and any applicable subrogation rights, write-offs by medical providers are relevant evidence bearing on the reasonable value of medical services. *Id.* at ¶ 16. *Jaques*, however, did not address the question at issue in this case, that is, how to lay a foundation for such evidence.

{¶41} As the reasonable value of medical services is outside the common knowledge of laymen, expert testimony is necessary as a foundation for presentation of this evidence to the jury. *See* Evid. R. 702(A). For plaintiffs seeking to present amounts charged as evidence of the reasonable value of medical services rendered, the General Assembly has codified a rebuttable presumption in that regard, obviating the need for expert testimony. R.C. 2317.42.1. Under the statute, in the absence of contrary evidence, the amount charged will be sufficient to prove the

reasonable value of the medical services. Defendants seeking to introduce evidence of write-offs do so in an effort to contradict that statutory presumption.

{¶42} Defendants offer evidence of write-offs in hopes that juries will determine the reasonable value of the medical services was actually equal to the amount charged minus the amount written off by the provider. See *Evans v. Thobe*, 195 Ohio App. 3d 1, 2011-Ohio-3501, at ¶ 18 (2d Dist). Despite the Ohio Supreme Court's holding in *Jaques* that such evidence is relevant and admissible, there is no presumption or shortcut available to allow such evidence to be introduced without a proper foundation. As Dr. Muakkassa offered evidence of the amounts written off by Mr. Moretz's medical providers as evidence to contradict the statutory presumption of reasonableness of the charges, the trial court correctly excluded the evidence in the absence of competent expert testimony. Dr. Muakkassa's fifth assignment of error is overruled.

#### CUMULATIVE EFFECT OF TRIAL ERRORS

{¶43} Dr. Muakkassa's sixth assignment of error is that the trial court denied him a fair trial through the cumulative effect of the trial court's errors. As this Court has identified no trial error, this assignment of error is overruled.

#### PREJUDGMENT INTEREST

{¶44} Dr. Muakkassa's seventh assignment of error is that the trial court incorrectly awarded prejudgment interest. He has argued that the prejudgment interest statute is unconstitutional, the Moretzses failed to satisfy their burden to prove they were entitled to prejudgment interest, and the trial court abused its discretion in calculating the interest. Under Section 1343.03(C) of the Ohio Revised Code, following a judgment, decree, or order for the payment of money in a civil action based on tortious conduct, a party may move for prejudgment

interest. If the trial court determines at a subsequent hearing “that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case,” then it shall order prejudgment interest. R.C. 1343.03(C)(1).

#### Constitutionality of Section 1343.03(C)

{¶45} Dr. Muakkassa has argued that the prejudgment interest statute is unconstitutional because it violates the right to trial by jury and the equal protection clause. His arguments are brief and do not cite either the state or federal constitution. It appears he has argued that the statute violates the right to a jury trial because it abrogated the common law right to have the jury make prejudgment interest determinations and the statute punishes defendants for exercising their right to go to trial.

{¶46} The Ohio Supreme Court has ruled that “Section 1343.03(C) does not infringe upon a party’s right to a jury trial.” *Galayda v. Lake Hosp. Sys. Inc.*, 71 Ohio St. 3d 421, 427 (1994) (quoting *Kalain v. Smith*, 25 Ohio St. 3d 157, 160 (1986)). Although the statute has been amended several times over the intervening years, the substance of the section applicable to Dr. Muakkassa’s arguments remains the same today. The Ohio Supreme Court has ruled that imposing a requirement of a “good faith effort to settle” does not force a defendant to forgo the right of having a jury determine the existence of his liability in a tort action. *Id.* (quoting *Kalain*, 25 Ohio St. 3d at 160). Although a defendant who chooses to try his case risks the possibility that he may ultimately be found liable for a larger total judgment under Section 1343.03(C), the statute “in no way precludes a defendant from insisting on exercising his right to trial by jury nor does it ‘create a financial barrier that prevents a . . . party from taking his case to a jury.’” *Id.* (quoting *Kuenzer v. Teamsters Union Local 507*, 66 Ohio St. 2d 201, 203 (1981)). The Supreme

Court determined that an award of prejudgment interest under the statute is compensatory rather than punitive. *Id.* “Where a defendant benefits monetarily as a result of failing to negotiate possible settlement in good faith, R.C. 1343.03 does not constitute a penalty, but, to the contrary, is wholly compensatory, and indeed equitable, in nature.” *Id.* at 428.

{¶47} The Ohio Supreme Court has also held that Section 1343.03(C) does not violate the Due Process Clause of the Ohio Constitution. *Galayda v. Lake Hosp. Sys. Inc.*, 71 Ohio St. 3d 421, 428 (1994) (citing Ohio Const. Art. I § 16). The Supreme Court agreed “with the overwhelming weight of authority that prejudgment interest statutes are rationally related to the legitimate goals of encouraging prompt resolution of disputes, and ensuring prompt payment of compensation to parties injured by tortious conduct.” *Id.* To the extent that Dr. Muakkassa has argued that Section 1343.03(C) is unconstitutional, this assignment of error is overruled.

#### Award of Prejudgment Interest

{¶48} As part of his seventh assignment of error, Dr. Muakkassa has argued that the Moretzes failed to satisfy their burden of proof under Section 1343.03(C). The Ohio Supreme Court has written that the prejudgment interest statute “was enacted to promote settlement efforts, to prevent parties who have engaged in tortious conduct from frivolously delaying the ultimate resolution of cases, and to encourage good faith efforts to settle controversies outside a trial setting.” *Kalain v. Smith*, 25 Ohio St. 3d 157, 159 (1986). “A party has not ‘failed to make a good faith effort to settle’ under R.C. 1343.03(C) if he has (1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party.” *Id.*

{¶49} The Supreme Court has also written that, “[i]f a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer.” *Kalain v. Smith*, 25 Ohio St. 3d 157, 159 (1986). It has also issued a caveat that “the ‘good faith, objectively reasonable belief’ language of *Kalain* must be ‘strictly construed so as to carry out the purposes of R.C. 1343.02.’” *Galayda v. Lake Hosp. Sys. Inc.*, 71 Ohio St. 3d 421, 428 (1994) (quoting *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St. 3d 638, 659 (1994)). In *Galayda*, the Ohio Supreme Court held that a trial court correctly awards prejudgment interest if “a defendant ‘just says no’ [to settlement discussions] despite a plaintiff’s presentation of credible medical evidence that the defendant physician fell short of the standard of professional care required of him, . . . it is clear that the plaintiff has suffered injuries, and . . . the causation of those injuries is arguably attributable to the defendant’s conduct.” *Id.* at 429.

{¶50} The prejudgment interest statute uses mandatory language. “Therefore, if a party meets the four requirements of the statute, the decision to allow or not allow prejudgment interest is not discretionary. What is discretionary with the trial court is the determination of lack of good faith.” *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St. 3d 638, 658 (1994). Thus, “[w]e review a trial court’s determination regarding whether a party made a ‘good faith effort’ to settle for an abuse of discretion.” *Kane v. Saverko*, 9th Dist. No. 23908, 2008-Ohio-1382, at ¶ 9.

{¶51} In this case, the Moretzes alleged that, despite mounting evidence against him, Dr. Muakkassa failed to make any settlement offer over the course of this lengthy litigation in the face of settlement overtures from the Moretzes. There was evidence that, in May 2009, the Moretzes provided both defendants with a settlement package and demand in preparation for mediation. There was also evidence that they settled with Dr. Williams at the mediation

conference and tried to discuss settlement with Dr. Muakkassa as late as the final pretrial and again on the day of the prejudgment interest hearing.

{¶52} Dr. Muakkassa has argued that the evidence introduced at the prejudgment interest hearing established that he had a good faith, objectively reasonable belief that he had no liability. Therefore, he did not need to make a settlement offer in order to avoid paying prejudgment interest under Section 1343.03(C). The trial court determined that “Dr. Muakkassa did not engage in a good faith effort to settle this case.” The trial court indicated that its assessment was based on testimony from the hearing indicating that “Dr. Muakkassa and his insurer made a decision at the beginning of this litigation to proceed to trial, and no offer of settlement, however small, would be entertained.” The court pointed to testimony of Dr. Muakkassa’s insurance adjuster, Linda Gorjup, indicating that the insurance company would not have offered even one dollar to settle this case, even if Dr. Muakkassa had consented to settle. Ms. Gorjup testified that she attended the mediation conference because the court had ordered it, but she did not participate in any settlement negotiations at any time during the pendency of this litigation.

{¶53} The Moretzes have argued that Ms. Gorjup’s “cavalier attitude” at the hearing may have influenced the trial court’s opinion of the reasonableness of the insurer’s belief that Dr. Muakkassa had no liability for Mr. Moretz’s injuries. The Moretzes argued that the insurer’s position was largely based on online medical research conducted by Ms. Gorjup, who has no medical training. Ms. Gorjup testified that she considered reviews of the case by the defense lawyer and several medical panels and she concluded that the case was defensible. She testified that, although the company reserved a million dollars for the case based on damages alone, she did not think a jury would find that Dr. Muakkassa had proximately caused Mr. Moretz’s injuries

because Dr. Muakkassa did not perform the surgery. Given that the allegations against Dr. Muakkassa were based entirely on what he had failed to do while Dr. Williams performed the surgery, the trial court could have reasonably concluded that a firm no-liability position was not objectively reasonable under the circumstances.

{¶54} Experts on both sides agreed that Mr. Moretz's injuries are permanent and that they were caused by the surgery. Dr. Williams testified at deposition that, before the surgery, he believed the two would be co-surgeons participating in the procedure together. Dr. Muakkassa admitted at his deposition that he did not scrub in or make any effort to locate any nerves at any time during the surgery. Although he testified at deposition that Dr. Williams never asked him to scrub in, Dr. Williams later testified at his deposition that he had invited Dr. Muakkassa to scrub in during the procedure.

{¶55} Through depositions taken nearly two years before the trial, the Moretzses developed some credible medical evidence that Dr. Muakkassa fell short of the standard of care in his treatment of Mr. Moretz, that Mr. Moretz suffered serious permanent injuries, and that the causation of those injuries was arguably attributable to Dr. Muakkassa's conduct. *See Galayda v. Lake Hosp. Sys. Inc.*, 71 Ohio St. 3d 421, 428 (1994). At the prejudgment interest hearing, the trial court heard evidence tending to show that, while the Moretzses made various attempts at initiating settlement discussions and successfully settled with a co-defendant, Dr. Muakkassa steadfastly refused to make any offer of settlement. *See id.* This Court cannot say that the trial court improperly exercised its discretion in determining that Dr. Muakkassa did not make a good faith effort to settle the claims against him. To the extent that assignment of error number seven addressed the basis for the trial court's determination that prejudgment interest should be awarded, it is overruled.

## Calculation of Prejudgment Interest

{¶56} The last part of Dr. Muakkassa's seventh assignment of error is that the trial court incorrectly calculated prejudgment interest by basing it on the amount of the verdict before applying the statutory set-off for the amount of his co-defendant's settlement. Under Section 2307.28, the effect of the Moretz's settlement agreement with Dr. Williams was to reduce the claim against Dr. Muakkassa by the amount Dr. Williams paid in settlement. Section 1343.03(C) of the Ohio Revised Code does not address the effect that statutory set-offs have on the calculation of prejudgment interest. The question is whether a trial court must calculate prejudgment interest before or after it reduces the verdict by the amount of a settlement paid by a co-defendant.

{¶57} At common law, injured parties had a right to prejudgment interest because "if reparation for the injury is delayed for a long time by the wrong-doer, the injured party can not be made whole unless the damages awarded include compensation, in the nature of interest, for withholding the reparation which ought to have been promptly made." *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St. 3d 638, 656 (1994) (quoting *The Lawrence RR Co. v. Cobb*, 35 Ohio St. 94, 98-99 (1878)). The Supreme Court has explained that, in addition to encouraging good faith efforts to settle cases in order to conserve judicial resources, "[Section] 1343.03(C), like any statute awarding interest, has the additional purpose of compensating a plaintiff for the defendant's use of money which rightfully belonged to the plaintiff." *Musisca v. Massillon Cmty. Hosp.*, 69 Ohio St. 3d 673, 676 (1994) (citing *West Virginia v. United States*, 479 U.S. 305, 310 n.2 (1987)). Section 1343.03(C) is not punitive. The Ohio Supreme Court has held that the practice of disgorging the benefit a defendant gains from delaying plaintiff's recovery is

“wholly compensatory, and indeed equitable, in nature.” *Galayda v. Lake Hosp. Sys. Inc.*, 71 Ohio St. 3d 421, 428 (1994).

{¶58} In this case, the trial court indicated that it calculated prejudgment interest on the verdict before applying the set-off in order to prevent Dr. Muakkassa from benefitting from his co-defendant’s good faith settlement efforts. If prejudgment interest is calculated before the set-off is applied, however, then the plaintiff receives a windfall. *See Mowery v. Welsh*, 9th Dist. No. 22849, 2006-Ohio-1552, at ¶ 34 (construing R.C. 1343.03(A)). A plaintiff is not entitled to prejudgment interest on money previously received via settlement because he was not deprived of the beneficial use of that money while the defendant delayed judgment. In keeping with the purposes of the statute discussed above, we hold that a trial court must first apply the statutory set-off under Section 2307.28 before calculating prejudgment interest under Section 1343.03(C). To the extent that Dr. Muakkassa’s seventh assignment of error addressed the trial court’s calculation of prejudgment interest, it is sustained.

#### THE MORETZES’ ASSIGNMENT OF ERROR ON CROSS-APPEAL

{¶59} The Moretzs’ assignment of error on their cross-appeal is that the trial court incorrectly granted a set-off under Section 2307.28 of the Ohio Revised Code because Dr. Muakkassa did not plead it as an affirmative defense and failed to support his motion with evidence. Section 2307.28 provides that the effect of a release or covenant not to sue or not to enforce judgment given to one of two or more people for the same injury or loss to person or property, is that it reduces the settling plaintiffs’ claim against the remaining defendants and releases the settling defendant from all liability for contribution to any other tortfeasor.

{¶60} Following the verdict in this case, Dr. Muakkassa moved the trial court to reduce the jury’s award of noneconomic damages to the statutory cap of \$500,000 and to further reduce

the verdict by the amount Dr. Williams paid in settlement. The parties agreed to submit the issue on the briefs, and Dr. Muakkassa did not submit any evidentiary materials in support of his motion. The trial court granted the set-off. The Moretzes have cross-appealed, arguing that the trial court incorrectly granted the set-off because Dr. Muakkassa waived it by failing to plead it as an affirmative defense. They have also argued that Dr. Muakkassa failed to carry his burden of proof on the issue. The Moretzes did not make either of these two arguments to the trial court. This Court will not consider these arguments for the first time on appeal. *Eisenbrei v. Akron*, 9th Dist. No. 25788, 2011–Ohio–5777, at ¶ 12 (citing *Thrower v. Akron Dep't of Public Hous. Appeals Bd.*, 9th Dist. No. 20778, 2002–Ohio–3409, at ¶ 20). The Moretzes' assignment of error is overruled.

#### CONCLUSION

{¶61} Dr. Muakkassa's first through sixth assignments of error are overruled. His seventh assignment of error is sustained to the extent that it addressed the trial court's calculation of prejudgment interest. The remainder of his seventh assignment of error is overruled. The Moretzes' assignment of error is overruled. The judgment of the Summit County Common Pleas Court is reversed, in part, and this matter is remanded for a recalculation of prejudgment interest consistent with this opinion.

Judgment affirmed in part,  
reversed in part,  
and remanded.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

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CLAIR E. DICKINSON  
FOR THE COURT

MOORE, J.  
CONCURS.

CARR, P. J.  
CONCURRING IN PART, AND DISSENTING IN PART.

{¶62} I concur in all of the majority opinion except for the third and seventh assignments of error. With respect to the third assignment of error, I concur in judgment only on the basis that if there was any error, it was harmless. I respectfully dissent in regard to the seventh assignment of error on the basis that the trial court did not err in calculating prejudgment interest prior to applying the set-off from Dr. Williams' settlement.

APPEARANCES:

DOUGLAS G. LEAK, Attorney at Law, for Appellant / Cross-appellees.

THOMAS A. TREADON, Attorney at Law, for Appellant / Cross-appellees.

MARK D. AMADDIO, Attorney at Law, for Appellees / Cross-appellants.

DAVID M. TODARO, Attorney at Law, for Appellees / Cross-appellants.

MARK S. FUSCO, Attorney at Law, for Appellees / Cross-appellants.