

ORIGINAL

IN THE SUPREME COURT OF OHIO

CASE NO. 2012-0797

APPEAL FROM THE COURT OF APPEALS
NINTH APPELATE DISTRICT
SUMMIT COUNTY, OHIO
CASE NO. CA 25602

LARRY J. MORETZ, et al.,
Plaintiff-Appellee,

vs.

KAMEL F. MUAKKASSA, M.D., et al.,
Defendants-Appellants.

**BRIEF OF AMICUS CURIAE, OHIO ASSOCIATION OF CIVIL TRIAL ATTORNEYS
URGING REVERSAL ON BEHALF OF DEFENDANTS-APPELLANTS ON
PROPOSITION OF LAW IV**

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STATEMENT OF FACTS

This case arises out of a medical malpractice case litigated and tried to a jury in Summit County. The Ohio Association of Civil Trial Attorneys (“OACTA”) respectfully submits the following amicus curiae brief in support of the Defendant-Appellant’s Proposition of Law IV, and asks this Court to reverse the Ninth Appellate District’s decision on that point of law.

OACTA incorporates by reference the Statement of Facts included in Defendant-Appellant Muakkassa’s memorandum. For the purposes of this amicus brief, OACTA highlights the following facts and procedural history.

According to the proffered evidence by Defendant-Appellant Muakkassa,¹ the Plaintiff-Appellee was charged \$129,873.86 for the medical treatment which he claimed was related to his medical malpractice action. Of that \$129,873.86, the medical providers accepted as payment in full \$30,842.77 from Plaintiff-Appellee’s healthcare insurer. It appears that \$40,749.29 of the medical bills either were not submitted to the healthcare insurer for payment, or those bills had not been paid by the healthcare insurer. The Plaintiff-Appellee paid \$162.00 towards the medical bills. Of the bills paid by the healthcare insurer, \$58,168.81 of the original billed amount was reduced, or “written off.” Thus, this necessarily means that, under O.R.C. §1751.60, \$58,168.81 of the claimed medical bills in this case are nothing more than phantom damages, as the Plaintiff-Appellee will never have to pay that amount back to anyone.

On July 6, 2010, the Plaintiff-Appellee filed a motion in limine with the trial court, seeking the exclusion of evidence or argument “which suggests that the amounts accepted for payment by [Plaintiff-Appellee’s] medical providers are evidence of the reasonable value of medical services occasioned by his injuries.” Plaintiff-Appellee contended that Defendant-

¹ A summary of the amounts billed, and the amounts accepted for payment, as well as copies of the bills themselves that included all of this information, was attached to Defendant-Appellant’s Brief in Opposition to Plaintiff’s Motion in Limine Concerning Reasonable Value of Medical Bills, filed with the trial court on July 8, 2010.

Appellant could not rely upon O.R.C. §2317.421 because that statute “provides a presumption for the reasonableness of charges, not the reasonableness of insurance payments or writeoffs.” Plaintiff-Appellee further contended that the Defendant-Appellant had no evidence, outside of the bills themselves, to provide a foundation for whether the amounts accepted for payment were the reasonable value of the services provided. Plaintiff-Appellee argued that the bills themselves were not competent evidence, and expert testimony was required to explain the amount accepted for payment.

On July 8, 2010, Defendant-Appellant responded to the Plaintiff-Appellee’s motion in limine. Defendant-Appellant relied upon the *Robinson* and *Jaques* decisions, which clearly direct that juries should receive both the amount of the original bills and the amounts accepted for payment, and the jury can decide whether to award the full amount billed, the amount paid, or some amount in between. *Jaques v. Manton*, 125 Ohio St. 3d 342, 345, 2010-Ohio-1838, 928 N.E.2d 434. Defendant-Appellant pointed to the bills themselves as evidence of the write offs, which showed the amounts accepted for payment, as well as the original amounts billed. These are the same bills that had been exchanged by the parties in discovery, thus meaning the bills had been served on both parties as required by O.R.C. §2317.421.

On July 12, 2010, the trial court granted the Plaintiff-Appellee’s motion in limine. The trial court reasoned that O.R.C. §2317.421 did not apply to “write off” amounts, and that expert testimony was necessary to introduce such evidence. With respect to the write off amounts, the trial court specifically stated that “allowing a defendant to present, without evidence, that a write-off amount is reasonable ‘violates the purpose and spirit of the collateral source rule.’”

The case proceeded to trial on July 12, 2010, and resulted in a verdict for the Plaintiff-Appellee. Only the original amount billed for medical treatment was presented to the jury, and

that was the amount awarded by the jury for compensatory damages. Thus, the Plaintiff-Appellee's verdict included a windfall of \$58,168.81.

Defendant-Appellant took a timely appeal to the Ninth District. On February 4, 2011, Defendant-Appellant filed his merit brief, and assignment of error number 5 concerned the write off issue. Defendant-Appellant again relied upon *Robinson* and *Jaques*, and again noted that the same medical bills Plaintiff-Appellee relied upon to show the total amount billed also show the amounts accepted for payment, and the write off amounts.

On March 21, 2012, the Ninth District affirmed the trial court's decision on this assignment of error. The appellate panel decided that "the reasonable cost of any given medical procedure is generally beyond the knowledge or experience possessed by lay persons," thus requiring expert testimony. *Moretz v. Muakkassa*, 9th Dist. No. 25602, 2012-Ohio-1177, at ¶36. The Ninth District went on to opine that "there is no presumption or shortcut available to allow [write off] evidence to be introduced without a proper foundation." *Id.* at ¶42.

ARGUMENT

PROPOSITION OF LAW NO. IV: 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 v. Manton*, 125 Ohio St. 3d 342, and has, Consequently, Redefined the Collateral Source Rule as Set Forth By This Court.

The Ninth District's decision in this case has already generated confusion among trial courts across Ohio. See *Brown v. Black*, Williams C.P. No. 11 CI 070 (June 27, 2012); *Gamble v. Ruby*, Franklin C.P. No. 08CVC-08-12380 (Jan. 29, 2010); *Jenkins v. Disabato*, Stark C.P. No. 2011 CV 727 (Dec. 21, 2011); *Yeoman v. Clark*, Cuyahoga C.P. No. CV 11-751485 (Feb. 29, 2012); *Ohlson v. M. Bjorn Peterson Transportation*, Summit C.P. No. CV 2006-05-3285 (April 12, 2007). This Court is now presented with the opportunity to enter this fray in its infancy, and

avert the uncertainty and inconsistency in the application of *Robinson v. Bates* in Ohio's lower courts.

I. The plain and intended meaning of *Robinson* and *Jaques* is that juries may consider the amount accepted for payment and the amount billed both as factors in determining the reasonable value of a plaintiff's medical bills.

In 2006, this Court decided *Robinson v. Bates*, 112 Ohio St. 3d 17, 2006-Ohio-6362, 857 N.E.2d 1310, a case that has served as a model for other jurisdictions across the country grappling with the issue of permitting juries to consider reductions, or "write offs," of medical bills in personal injury actions when determining the reasonable value of medical services. See, e.g., *Howell v. Hamilton Meats & Provisions*, 257 P.3d 1130 (Cal. 2011); *Stanley v. Walker*, 906 N.E.2d 852 (Ind. 2009); *Martinez v. Milburn Enterprises*, 233 P.3d 205 (Kan. 2010); *Haygood v. De Escabedo*, 356 S.W.3d 390 (Tex. 2011). The rule of law on this issue set forth in *Robinson v. Bates* is straightforward:

The jury may decide that the reasonable value of medical care is the amount originally billed, the amount the medical provider accepted as payment, or some amount in between.

112 Ohio St. 3d at 24.

The holding of *Robinson* was confirmed by this Court in *Jaques v. Manton*, 125 Ohio St. 3d 342, 2010-Ohio-1838, 928 N.E.2d 434. The *Jaques* case was born out of confusion in Ohio's lower courts in the application of *Robinson* in the context of cases arising under O.R.C. §2315.20, which codified the collateral source rule. In the time between the *Robinson* decision and the *Jaques* decision, there were numerous conflicting decisions among Ohio trial courts as to whether *Robinson* was limited to pre- O.R.C. §2315.20 cases. In *Jaques*, this Court definitively put this issue to rest, again noting that "write off" amounts are not a collateral source, and as such, are not subject to either the common law collateral source rule or O.R.C. §2315.20.

Jaques, supra.

The Ninth District has now read a new requirement into the holdings of *Robinson* and *Jaques*. The *Muakkassa* Court concluded that because the Defendant-Appellant only offered the bills themselves as evidence of the amount accepted for payment by the medical providers, this was insufficient foundation to admit those amounts into evidence at trial. The appellate court specifically found that this Court “did not address the question at issue in this case, that is, how to lay a foundation for such evidence.” *Muakkassa*, supra.

However, as Defendant-Appellant argued to the trial court and the Ninth District, this Court has in fact answered this very question. This Court has repeatedly held 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.” *Robinson*, 112 Ohio St. 3d at 19 (citing *Wagner v. McDaniels* (1984), 9 Ohio St.3d 184, 9 OBR 469, 459 N.E.2d 561, and *De Tunno v. Shull*, 166 Ohio St. 365, 143 N.E.2d 301 [2 Ohio Op. 2d 281]); *Jaques*, 125 Ohio St. 3d at 343 (emphasis added). Thus, these cases have all directed that expert testimony is not required to lay a foundation for the admission of the medical bills. The bills themselves are prima facie evidence.

The *Robinson* and *Jaques* decisions are not as complicated as the Ninth District and other lower courts have made them out to be. The directives are really quite simple. Juries in personal injury cases are to be given the total amount billed for medical services, and the amount accepted for payment, and juries can decide which number is the reasonable value of the services. The parties can certainly choose to present other evidence, including expert testimony, to bolster their position,² but *Robinson* and *Jaques* do not impose such a requirement.

² Nothing prevents Plaintiffs from asking the treating doctor questions about how the total amount billed is calculated, if Plaintiffs seek to argue that the total amount billed is the reasonable value of the medical services

II. O.R.C. §2317.421 permits defendants to introduce the medical bills as prima facie evidence of reasonableness of the write-off amounts.

O.R.C. §2317.421, on its face, says that “such bill or statement shall be prima-facie evidence of reasonableness only if *the party* offering it delivers a copy of it, or the relevant portion thereof, to the attorney of record for each adverse party not less than five days before trial.” (emphasis added) Thus, O.R.C. §2317.421 is not solely for the use of plaintiffs in tort cases, and Defendant-Appellant should have been permitted to use the same bills as the Plaintiff-Appellee in this case.

The Indiana Supreme Court, in following the *Robinson* decision, explained how the *Robinson* rule should operate in Indiana courts as follows:

Given the current state of the health care pricing system where, to repeat, authorities suggest that a medical provider's billed charges do not equate to cost, the jury may well need the amount of the payments, amounts billed by medical service providers, and other relevant and admissible evidence to be able to determine the amount of reasonable medical expenses. To assist the jury in this regard, a defendant may cross-examine any witness called by the plaintiff to establish reasonableness. The defendant may also introduce its own witnesses to testify that the billed amounts do not represent the reasonable value of services. Additionally, the defendant may introduce the discounted amounts into evidence to rebut the reasonableness of charges introduced by the plaintiff. We recognize that the discount of a particular provider generally arises out of a contractual relationship with health insurers or government agencies and reflects a number of factors - not just the reasonable value of the medical services. However, we believe that this evidence is of value in the fact-finding process leading to the determination of the reasonable value of medical services.

Stanley v. Walker, 906 N.E.2d 852, 858 (Ind. 2009)(emphasis added).

It should be further noted that Indiana's Evidence Rule 413 mirrors Ohio's O.R.C. §2317.421, in that both permit the bills themselves to be offered as prima facie evidence of

provided.

reasonableness. The Indiana Supreme Court's interpretation of *Robinson* is consistent with this Court's holdings in *Robinson* and *Wagner*. Defendants may call witnesses to testify that the billed amounts do not represent the reasonable value of services, but are not required to do so. Instead, defendants can introduce the reduced or discounted amounts as a factor for juries to consider in determining the reasonable value of medical services. This is part and parcel of the *Robinson* and *Jaques* decisions. The Ninth District's decision in this case misconstrues this point, and creates an unworkable framework for *Robinson* and *Jaques* to be applied in trial courts.

III. Evidence Rule 106's "Rule of Completeness" permits defendants to introduce the complete bill at trial, including the amounts accepted for payment.

Evidence Rule 106 codifies the common-law "rule of completeness." *State v. Matthews*, 2nd Dist. Case No. 24233, 2011-Ohio-5066 (citing *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 172, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988)³). Evidence Rule 106 directs as follows:

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which is otherwise admissible and which ought in fairness to be considered contemporaneously with it.

Under this rule, an adverse party may introduce any other document or part thereof "when one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through presentation of another portion." *Beech Aircraft*, 488 U.S. at 172 (citing 7 Wigmore, *Evidence* (Chadbourn Rev.1978) 653, Section 2113).

Plaintiffs who introduce only portions of medical bills at trial are misleading juries, and distorting the facts presented to the juries. Ohio tort law defines economic losses as "expenditures." O.R.C. §2315.18(A)(2)(b). O.R.C. §2315.18(D)(2) directs that juries in tort

³ Ohio's Evidence Rule 106 and Federal Rule of Evidence 106 are identical except that the federal rule does not include the phrase "which is otherwise admissible."

cases are to be given general interrogatories in order to specify “the portion of the total compensatory damages that represents damages for economic loss.” Quite obviously, “expenditures” do not constitute write off amounts. Thus, under this framework, it is misleading for plaintiffs to submit redacted or incomplete medical bills that do not show the amounts accepted for payment by the medical providers.

In terms of the fairness invoked by Evidence Rule 106, it is unquestionably unfair to not permit defendants to present the whole picture that is encompassed by the plaintiff’s medical bills. By not allowing the jury to consider the write off amounts in this case, the trial court permitted the Plaintiff-Appellee to recover \$58,168.81 in inflated, phantom damages. The Plaintiff-Appellee’s medical providers are not entitled to collect that money from the Plaintiff-Appellee under Ohio law. O.R.C. §1751.60. Thus, the Defendant-Appellant has been saddled with an inflated judgment against him, without the opportunity to present the jury with the full story that is permitted by *Robinson* and *Jaques*.

Furthermore, submitting only the charged amount, and not the amount accepted for payment, to the jury for consideration turns the “made whole” doctrine upside down. The “made whole” doctrine seeks to make a plaintiff “whole” by reimbursing the plaintiff for real expenses incurred. See generally, *N. Buckeye Educ. Council Group Health Benefits Plan v. Lawson*, 103 Ohio St. 3d 188, 2004-Ohio-4886, 814 N.E.2d 1210. The “made whole” doctrine does not sanction windfalls for plaintiffs.

Therefore, just as this Court reasoned in *Robinson* and again in *Jaques*, defendants are entitled to introduce the complete copies of the plaintiffs’ medical bills if and when plaintiffs seek to introduce incomplete or partial copies of the plaintiffs’ medical bills at trial. No expert testimony is required under Evidence Rule 106. By granting the Plaintiff-Appellee’s motion in

limine in this case, the trial court prohibited Defendant-Appellant from invoking Evidence Rule 106 at trial. The jury was left with a misleading and incomplete picture of the Plaintiff-Appellee's claimed "economic loss" in this case, as the \$58,168.81 written off from the Plaintiff-Appellee's medical bills do not constitute an "expenditure."

CONCLUSION

The *Muakkassa* Court's decision has surgically removed all of the teeth from *Robinson* and *Jaques* by erecting a wall that is practically impossible for defendants to climb. Think about what the Ninth District is now requiring defendants to do. Defendants in the Ninth District now must try to find a medical expert who is willing to come into court and testify that the fees they charge patients are unreasonable. In the context of Medicare or Medicaid recipients, defendants would have to find a medical expert to testify that the amount accepted for payment—which would be far less than fifty cents on the dollar in those cases—is more reasonable than the amount charged. To find a doctor willing to testify that the reasonable value of his or her services is actually less than half of the amount that was billed to the patient is a daunting task, to say the least.

The *Muakkassa* case threatens to derail every personal injury trial where the Ninth District's approach is followed. Since the *Robinson* decision was announced, the majority of personal injury trials have utilized stipulations regarding the admission of the medical bills, which include the amount billed and the amount accepted for payment. Plaintiffs' attorneys have agreed to stipulate to the amount accepted for payment in return for defense attorneys stipulating to the admissibility of the medical bills or the amount billed. Absent such agreements, personal injury trials will be much longer, as they will now involve testimony from one or more records custodians regarding the authenticity of the bills, and expert testimony regarding the amount

accepted for payment. Subrogated insurers, as well as Medicare and Medicaid, will no longer be able to sit on the sidelines and participate by stipulation. Representatives of such parties will be called to testify as to the reasonableness of their payments to the plaintiffs' medical providers.

None of this is necessary. This Court can quickly address this issue before it can affect a large number of cases. This case affords the Court the opportunity to speak to the lower courts' renewed confusion regarding *Robinson* and *Jaques*, and ensure that the lower courts are applying this Court's precedent as intended.

Accordingly, OACTA urges the Court to reverse the order of the Ninth District Court of Appeals, at least as to Proposition of Law IV, and direct the trial court, at a minimum, to grant a new trial as to damages, and to specifically permit the Defendant-Appellant to introduce evidence of the amounts accepted for payment by the Plaintiff-Appellee's medical providers.

Respectfully submitted,



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