

ORIGINAL

No. 12-0797

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**In the Supreme Court of Ohio**

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

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

Plaintiffs-Appellees

v.

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

Defendant-Appellant

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**MERIT BRIEF OF DEFENDANT-APPELLANT  
KAMEL MUAKKASSA, M.D.**

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

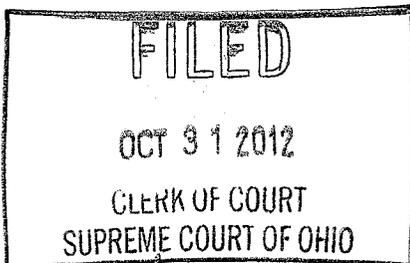
David M. Todaro, Esq.  
126 N. Walnut Street  
Wooster, Ohio 44691

*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. STATEMENT OF THE CASE**

**A. Introduction**

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

The erroneous rulings throughout the Trial Court level and within the Ninth District's Decision have unjustifiably and unprecedentedly imposed liability upon an individual who had no "hands-on" involvement in the alleged negligent events at issue. Both the Trial Court and the Ninth District relied upon legally and factually flawed grounds to hold Dr. Muakkassa responsible for injuries that occurred during a surgery performed completely by another physician. The responsible physician who actually performed the surgery at issue settled with Appellees and then Appellees continued to pursue Dr. Muakkassa even though he did not perform any of the surgery. Any injuries in this case could not have logically been caused by anything Dr. Muakkassa did or did not do because Dr. Muakkassa was not an acting participant in the surgery at issue. Yet, Dr. Muakkassa was subjected to a trial full of multiple errors that the Ninth District erroneously affirmed relying upon obvious misinterpretations and misapplications of Ohio's Civil and Evidentiary Rules.

This Court should reverse the Ninth District's Decision for two reasons: (1) in order to correct the Ninth District's erroneous holdings and restore the proper application of Ohio's Civil and Evidentiary rulings; and (2) reverse the injustice suffered by Dr. Muakkassa and prevent

further injustices from occurring in the future to litigants as a result of the Ninth District's misinterpretation and misapplication of Ohio's Civil and Evidentiary Rules.

**B. Procedural History**

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 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 this 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) in 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 requirement on the basis that “there is no surprise,” which is not an exception within Civ. R. 32(A). Consequently, Plaintiffs were erroneously permitted to mention Dr. Dennis during Opening Statements.

On July 13, 2010, 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 (Docket. No. 76).<sup>1</sup> At the same time, Appellees filed six other depositions. Dr. Muakkassa renewed his objection to the untimely filing of Dr. Dennis’ trial deposition and also 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). Appellees’ counsel’s response to the untimely filing of all of the depositions was:

Your Honor, I would just say, we’re just – **since we were put on notice that [the filing] ought to be done, we did it to protect the Court and ourselves.**

(Emphasis Added). (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).

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

Then, the Trial Court proceeded to explain why the filing requirements of Civ. R. 32(A) applied to Dr. Dennis' trial testimony and not the other depositions contemporaneously filed by Appellees:

**...Rule 32(A) says every 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 rule contemplates the use of the deposition as the witness' testimony, and so certainly that applies to Dr. Dennis, Dr. Dennis' video and/or typed deposition transcript, but I don't think the case law supports that the use of a transcript – that any transcript must be filed a day before trial when it is not intended to be presented as the witness' testimony in substance ...**

(Emphasis Added). (Tr. 111-112).

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). The Trial Court effectively ignored the mandatory filing requirement of Civ. R. 32(A). More specifically, the Trial Court eliminated the "good cause" exception for the late filing of a deposition as set forth in Civ. R. 32(A).

Also during Appellees' case-in-chief, the jury was erroneously precluded from considering evidence of any amounts "written-off" for the medical bills as full payment. Pursuant to this Court's authority in *Jaques v. Manton*, 125 Ohio St. 3d 342, 928 N.E.2d 434, 2010-Ohio-1838, Dr. Muakkassa had an absolute right to offer evidence of "write-offs." All that Dr. Muakkassa was required to do was to submit Appellees' medical bills with the "write-off" amount reflected therein for the jury's consideration.

The issue pertaining to the "write-offs" of Appellees' medical bills was first raised in Appellees' Motion in Limine Concerning Reasonable Value of Medical Bills filed on July 6,

2010 (Docket No. 60). On July 9, 2010, Dr. Muakkassa filed his Brief in Opposition, relying upon this Court's *Jaques* Decision for the position that evidence of "write-offs" is admissible to show the value of medical expenses. (Docket No. 70). On July 12, 2010, the Trial Court granted Appellees' Motion in Limine Concerning Reasonable Value of Medical Bills. In its Order, the Trial Court erroneously concluded, contrary to the *Jaques* Decision, that the admission of evidence of "write-offs" of medical bills is contingent upon the laying of a foundation through expert testimony that establishes "reasonableness." (Docket No. 71).

The Trial Court relied upon a Summit County Common Pleas Order that pre-dated this Court's Decision in *Jaques*. See *Ohlson v. M. Bjorn Peterson Transportation, Inc., et al.*, Summit County Common Pleas Case No. 2006-05-3285. Then, this issue was revisited by the Trial Court on the first day of trial. Once again, the Trial Court improperly precluded Dr. Muakkassa from presenting evidence of "write-offs" of medical bills. (Tr. 2).

Then, during Dr. Muakkassa's case-in-chief, Appellees' counsel cross-examined Dr. Muakkassa's expert, Dr. Mark R. McLaughlin, and in doing so, utilized two illustrations (Nos. 83.1 and 83.4) taken directly from a medical textbook. (Tr. 455-460). Appellees' counsel extracted illustrations directly from the medical textbook entitled "Spine Surgery Techniques, Complications, Avoidance and Management." (*Id.*). 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 medical 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 medical textbook itself. (Tr. 455-460). Dr. McLaughlin actually testified that Mr. Moretz had a neurogenic cyst as opposed to a congenital anterior sacral meningocele as depicted in the textbook illustration.

When the Trial Court addressed the admission of Appellees' exhibits, Appellees offered Exhibit No. 36, i.e. purportedly one of the illustrations taken directly from the medical textbook depicting a congenital anterior sacral meningocele. (Tr. 520). However, Appellees' counsel never identified Exhibit No. 36 as being either Illustration No. 83.1 or No. 83.4, which was supposedly used during Dr. McLaughlin's cross-examination. Then, Appellees' counsel incorrectly claimed that Exhibit No. 36 was the drawing that came out of the medical textbook that Dr. McLaughlin indicated was representative of the cyst that Dr. 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). Once again, Dr. McLaughlin disagreed that the medical textbook illustration was consistent with what he believed Mr. Moretz had, i.e. a neurogenic cyst and not a congenital anterior sacral meningocele.

Dr. Muakkassa objected to the admission of Exhibit No. 36 on the basis that illustrations taken directly from a medical textbook constitute inadmissible hearsay pursuant to Evid. R. 803(18), Ohio's newly enacted evidentiary rule on the use of Learned Treatises at trial. (Tr. 520-522). At this time, the Trial Court held its ruling on the admission of Appellees' Exhibit No. 36 in abeyance.

Subsequently, the Trial Court admitted Exhibit No. 36 over Dr. Muakkassa's objection. (Tr. 587-588). The Trial Court erroneously concluded 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). In allowing the admission of a medical textbook illustration into evidence and for the jury's consideration, the Trial Court relied upon the Ninth District's Decision in *Robertson v. McCue*, 9<sup>th</sup> Dist. No. 19539, 2000 WL 14118 (Jan. 5, 2000). However,

the *Robertson* Decision was released six years before Evid. R. 803(18) was enacted in 2006. Thus, in admitting into evidence as a trial exhibit a portion of a medical textbook, the Trial Court relied upon a case that predated the very evidentiary rule that now explicitly prohibits the admission of a Learned Treatise as a trial exhibit.

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." (Docket No. 53). Since Appellees' expert, Dr. Dennis, had multiple claims of medical negligence against Dr. Muakkassa, Dr. Muakkassa was entitled to a narrative jury interrogatory under Civ. R. 49(B), which would identify the manner in which Dr. Muakkassa was negligent.

More specifically, in addressing his narrative jury interrogatory with the Trial Court, Dr. Muakkassa established that it was justified in light of Appellees' several separate and distinct allegations of negligence, i.e. (1) Dr. Muakkassa did not scrub in for the surgery; (2) Dr. Muakkassa did not use magnification or loupes nor recommended that Dr. Williams do so; (3) Dr. Muakkassa did not use nerve stimulation nor recommended that Dr. Williams do so; (4) Dr. Muakkassa should have used the posterior approach rather than anterior approach; and (5) Failure of physicians to communicate. (Tr. 499). It is worth noting that the Trial Court acknowledged that an interrogatory pursuant to Civ. R. 49 is mandatory, but 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). This ruling was inconsistent with the multiple opinions of medical negligence as expressed by Appellees' own expert witness.

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.<sup>2</sup>

On August 10, 2010, Dr. Muakkassa filed a Motion for New Trial And/Or JNOV. (Docket No. 96). Dr. Muakkassa claimed that he was entitled to a new trial due to several irregularities in the Trial Court's proceedings. More specifically, the basis for Dr. Muakkassa's Motion For New Trial And/Or JNOV was that the trial testimony of Appellees' only expert, Dr. Dennis, should have been stricken because his deposition testimony was not timely filed pursuant to Civ. R.32(A). Consequently, Appellees were unable to prove a prima facie case for medical negligence without the requisite expert testimony and, thus, Dr. Muakkassa was entitled to a verdict in his favor as a matter of law.

On August 25, 2010, the Trial Court conducted a hearing on Appellees' Motion for Prejudgment Interest. Just prior to the Hearing, the Trial Court orally denied Dr. Muakkassa's Motion for New Trial And/Or JNOV. The Trial Court's Order was journalized on August 31, 2010. (Docket No. 110).

On September 24, 2010, Dr. Muakkassa filed a Notice of Appeal to the Ninth District Court of Appeals challenging the numerous erroneous rulings made by the Trial Court. (Docket No. 118). 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. (Appx. 4-33).

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<sup>2</sup> The Trial Court erroneously calculated Appellees' total award of \$953,858.08 by calculating prejudgment interest on the jury's verdict (reduced by \$39,600 to conform to the statutory cap) without first applying a setoff of \$195,400 from Dr. Williams' settlement. (Appx. 30).

For instance, the Ninth District completely ignored the mandatory nature of Civ. R. 32(A) by outrightedly excusing Appellees from its filing requirements and allowing for the untimely filing of Appellees' expert's deposition. (Appx. 7-9). In its Decision, the Ninth District acknowledged that the only exception to Civ. R. 32(A) is that a party may file a deposition late only upon a showing of "good cause." (Appx. 7). Yet, the Ninth District never addressed the "good cause" exception. Instead, the Ninth District shifted the burden upon Dr. Muakkassa to demonstrate either "surprise" or "prejudice" as a result of Appellees' **admitted** failure to file Dr. Dennis' deposition pursuant to Civ. R. 32(A). (Appx. 8-9). 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 in deliberations, the Ninth District completely ignored this Court's adoption of Evid. R. 803(18) – Ohio's Learned Treatise rule. (Appx 12-16). 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 for the jury's consideration.

Additionally, the Ninth District properly recognized that Appellees used the textbook illustrations for demonstrative purposes. (Appx 13-14). Yet, the Ninth District affirmed the erroneous admission of demonstrative evidence taken directly from a medical textbook in contravention of Evid. R. 803(18). It also recognized that Evid. R. 803(18) allows for a "visual presentation" of a portion of a Learned Treatise. (Appx. 15). However, the Ninth District quoted Evid. R. 803(18) and its explicit preclusion of admitting portions of a Learned Treatise: "If admitted, the statements may be read into evidence **but may not be received as exhibits.**" (Appx. 12)(Emphasis Added). The Ninth District completely ignored this portion of Evid. R.

803(18) by admitting into evidence as a trial exhibit a demonstrative illustration taken directly from a medical textbook intended to be used as a visual presentation.

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. 9-11) Not only did the Ninth District redefine Civ. R. 49(B), its Decision is internally inconsistent. For example, although the Ninth District recognized that Appellees' expert, Dr. Dennis, opined as to "at least" three separate allegations of negligence, it erroneously determined that a narrative jury interrogatory on these three separate allegations was not warranted pursuant to Civ. R. 49(B). (Appx. 4; 9-11). Interestingly, despite the Ninth District's own admission of the three ways Dr. Muakkassa was allegedly negligent, the Ninth District failed to recognize that there were actually a total of five allegations of negligence pursued by Appellees. More reason to justify a narrative jury interrogatory pursuant to Civ. R. 49(B).

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 improperly 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. 19-23). The Ninth District improperly held that even though a plaintiff benefits from a rebuttal presumption that the submittal of medical bills is evidence of the reasonable value of medical services rendered and no expert testimony is necessary, the defendant does not benefit from the same rebuttal presumption from submitting medical bills that reflect the "write-offs." (*Id.*) In other words, the Ninth District's Decision treats plaintiffs and defendants differently with respect to the presentation of medical bills as evidence. Basically, the Ninth District failed to follow this Court's precedent in the *Jaques* Decision.

Dr. Muakkassa is now requesting that this Court reverse this matter in order to correct the obvious legal errors committed by the Ninth District that will have grave ramifications if allowed to stand as legal precedents. The Ninth District issued a Decision that is undoubtedly inconsistent with Ohio's Civil and Evidentiary Rules and this Court's precedents and, therefore, this Court should restore the proper guidelines upon which Ohio litigants must follow.

## **II. STATEMENT OF THE FACTS**

For a number of years, 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). A subsequent bone scan ordered by Mr. Moretz's family physician, Dr. Kontak, revealed that the mass was pushing against Mr. Moretz's bladder and rectum. (Exhibit No. 10). Consequently Dr. Kontak referred Mr. Moretz to Dr. Muakkassa, a neurosurgeon. (Tr. 196).

Dr. Muakkassa saw Mr. Moretz on June 8, 2005. During this 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 of June 19, 2005 demonstrated a "huge presacral cystic mass with bony defect in the anterior sacrum." (Exhibit D). The MRI of June 19, 2005 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, i.e. no surgery or surgery consisting of either a posterior or an anterior approach. 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). Dr. Muakkassa would have explained to Mr. Moretz the surgical

risks of loss of bowel and bladder function, as well as the risks of infection, bleeding, paralysis and meningitis. (Tr. 280-281, 289-290).

In his discussions about the indications for surgery, Dr. Muakkassa discussed with Mr. Moretz the option of doing nothing if he could live with the pain and urinary hesitation problems. Since the mass was grapefruit-size and it was directly impacting his bladder and rectum, Mr. Moretz decided to proceed with surgery to be performed in Akron. (Tr. 283-289). Dr. Muakkassa informed Mr. Moretz that he was referring him to Dr. Williams, a general surgeon, in order to further discuss the surgical approach. Dr. Muakkassa's office made the arrangements for Mr. Moretz to see Dr. Williams. (Tr. 292-295).

At this office visit, Dr. Williams discussed the surgery. (Exhibit 15). Since Dr. Muakkassa had never done this type of surgery to remove such a mass before, 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 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 recalled seeing the stump from what appeared to be the meningocele. Dr. Muakkassa made sure that

there was no leakage of CNS fluid. 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 on October 5, 2005, Mr. Moretz was discharged home urinating with the assistance of a Foley catheter. (Exhibit 8). Subsequently, 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).

### 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)**

A. **Neither Appellees, The Trial Court, Nor The Ninth District Deny That Appellees Failed To Comply With Civ. R. 32(A) When They Failed To File Their Expert's Deposition**

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.*, 48 Ohio App. 3d 167, 548 N.E.2d 1319 (11<sup>th</sup> Dist. 1988); *In the Matter of the Estate of Pavolko*, 7<sup>th</sup>

Dist. No. 93 C.A. 181, 1995 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).**

When Appellees ultimately filed Dr. Dennis' transcript, Appellees' counsel **admitted** that they did so only after it was brought to their attention the day before in Dr. Muakkassa's objection. (Tr. 110). Appellees' counsel stated on the record that they filed Dr. Dennis' transcript because it came to their attention the day before that they were required to do so pursuant to Civ. R. 32(A). However, ignorance of the law does not constitute excusable neglect as to justify the failure to comply with Civ. R. 32(A). See *Katko v. Modic* (1993) 85 Ohio App. 3d 834, 621 N.E. 2d. 809.

Appellees were bound by Civ. R. 32(A) to timely file Dr. Dennis' deposition. In fact, by Appellees' own admission, they were in noncompliance of the mandatory filing requirements of Civ. R. 32(A). Appellees should not have been granted special or preferential treatment for failing to comply with Civ. R. 32(A). Policy and good common sense mandated that the Trial Court and the Ninth District should have refused to recognize ignorance of the law as an excuse for Appellees' noncompliance. If the Ninth District's holding is allowed to stand, the Civil Rules would effectively be rendered meaningless. Therefore, this Court should hold that the

Trial Court abused its discretion in failing to exclude the trial testimony of Dr. Dennis and that it was error for the Ninth District to affirm this abuse of discretion.

Moreover, 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), whereas, the other depositions did not have to be filed because they were going to be used for cross-examination purposes. (*Id.*). The Trial Court abused its discretion in failing to follow its own reasoning and allowing the admission of Dr. Dennis' trial testimony in violation of Civ. R. 32(A). Consequently, the Ninth District erroneously affirmed the Trial Court's failure to enforce Civ. R. 32(A) which imposes a mandatory duty upon litigants to timely file depositions intended to be used at trial.

**B. Appellees Failed To Demonstrate Any "Good Cause" For Their Noncompliance With 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 only after Dr. Muakkassa raised his objection the day before. Once again, ignorance of the law is no excuse for Appellees' noncompliance with Civ. R. 32(A). *Katko*, supra.

In addressing Appellees' failure to timely file Dr. Dennis' deposition transcript, the Trial Court neither mentioned nor ruled upon the "good cause" exception in Civ. R. 32(A). The Trial Court erroneously allowed 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 Trial Court could justify excusing Appellees from the mandatory filing requirements of Civ. R. 32(A). Therefore, the Trial Court should have enforced Civ. R. 32(A) and excluded Dr. Dennis' trial testimony accordingly.

Similarly, the Ninth District completely ignored the requisite "good cause" aspect of Civ. R. 32(A) despite the fact that it actually acknowledged that the only exception to untimely filing a deposition is proof of "good cause:"

**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.**

(Appx. 7).

Despite this explicit recognition of the "good cause" exception to Civ. R. 32(A), the Ninth District's Decision is completely devoid of any "good cause" analysis either factually or legally. At no point in its Decision did the Ninth District mention or rule upon the "good cause" exception of Civ. R. 32(A). The Ninth District's Decision is completely devoid of any mentioning of the "good cause" exception of Civ. R. 32(A). Basically, the Ninth District eliminated the "good cause" requirement of Civ. R. 32(A) for the failure to timely file a deposition to be used at trial. Instead, the Ninth District essentially focused upon Dr. Muakkassa's conduct as opposed to Appellees' mandatory duty under Civ. R. 32(A) to file Dr. Dennis' videotaped deposition.

In its Decision, the Ninth District failed to address the Eleventh District's Decision in *Creak*, supra which is undoubtedly applicable to the factual and legal issues of this case. Admittedly, one of the issues in the *Creak* case pertained to a deponent's failure to sign a deposition pursuant to Civ. R. 30. However, the Eleventh District **also** held that the Plaintiff failed to comply with the filing requirement of Civ. R. 32(A) when she delayed "the filing of the deposition without leave of Court until the day of trial." *Id.* at ¶2:

**... appellant filed the deposition on the day of the trial, and failed to show good cause for doing so. Appellant's error in not filing timely is also fatal to her appeal.**

*Id.* at ¶2 (Emphasis Added).

This case is identical to the scenario in the Eleventh District's *Creak* case, i.e. (1) Appellees untimely filed the deposition of Dr. Dennis on the second day of trial; (2) Appellees did not obtain leave of Court to untimely file Dr. Dennis' deposition; and (3) Appellees failed to show "good cause" for the delay. See *Creak* at ¶2. The Ninth District should have followed the holding in the *Creak* case and the mandatory language of Civ. R. 32(A) and held that the Trial Court abused its discretion in allowing Appellees to present the trial testimony of their only expert, since Appellees failed to comply with 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 by the Ninth District. This finding did not constitute the "good cause" exception of Civ. R. 32(A). The Ninth District effectively excused Appellees from the mandatory filing requirement of Civ. R. 32(A) and the "good cause" exception. Consequently, the Ninth District has completely redefined Civ. R. 32(A) by eliminating the "good cause" exception of Civ. R. 32(A).

**C. Appellees' Noncompliance With Civ. R. 32(A) With Respect To The Trial Video/Deposition Warranted A Directed Verdict In Favor Of Dr. Muakkassa**

The proper exclusion of Dr. Dennis' trial testimony pursuant to Civ. R. 32(A) would have required the Trial Court to direct a verdict in favor of Dr. Muakkassa. To prevail on a medical malpractice claim, a plaintiff must present expert testimony to prove the elements of such a claim. *Bruni v. Tatsumi* (1976) 46 Ohio St. 2d 127, 346 N.E. 2d 673. Without the trial testimony of Dr. Dennis, Appellees' only expert, Appellees would have been unable to prove their medical malpractice action against Dr. Muakkassa. Consequently, the Trial Court would have been compelled to enter a directed verdict in Dr. Muakkassa's favor.

Since the Trial Court abused its discretion in failing to exclude the trial testimony of Dr. Dennis, the Ninth District should have held that Dr. Dennis' trial testimony should have been stricken and, consequently, judgment should have been entered in favor of Dr. Muakkassa.

**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 holding that the Trial Court abused its discretion and the Ninth District erred in allowing the admission of Exhibit No. 36, 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) that allows the use of medical textbooks at the time of trial. However, Evid. R. 803(18) explicitly precludes that a learned treatise can be **admitted** as a trial 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) precludes the admission of a Learned Treatise as an exhibit. Evidence Rule 803(18) does not distinguish between what portions of a Learned Treatise can be

used during trial. What Evid. R. 803(18) explicitly prohibits is the actual admission into evidence of any portion of a Learned Treatise. 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 a clear abuse of discretion for the Trial Court to admit Exhibit No. 36 as an exhibit in violation of Evid. R. 803(18). As a result of the Trial Court's error in admitting Exhibit No. 36, the jury was improperly permitted to review and consider an illustration that Appellees were attempting to establish as representative of Mr. Moretz's condition. Dr. Muakkassa was prejudiced because the jury was erroneously allowed to consider this inadmissible evidence which Dr. Muakkassa adamantly disputed was reflective of Mr. Moretz's condition.

The Ninth District's Decision is both factually and legally inconsistent. The Ninth District acknowledged that Evid. R. 803(18) allows for the "visual presentation" of medical literature and that the illustration taken directly from a textbook at issue herein was used as "demonstrative evidence" by Appellees. (Appx 13-15). Yet, the Ninth District somehow took the grand leap of holding that such "demonstrative evidence" is admissible into evidence. The simple fact is that the medical textbook illustration was not evidence and should not have been admitted as a trial exhibit and given to the jury. This is why Evid. R. 803(18) allows for the use of textbooks/learned treatises during trial but does not allow them to be admitted into evidence and sent to the jury for its consideration during deliberations.

Apparently, the only way the Ninth District could justify the admission of the illustration of a congenital anterior sacral meningocele taken directly from a medical textbook as a trial exhibit was to find that it did not constitute a "statement" as contemplated by Evid. R. 803(18). Appx. 15). Unfortunately, both the Trial Court and the Ninth District failed to acknowledge that

the well-known adage that “a picture is worth one thousand words” or Ivan Turgenev’s passage that “a picture shows me at a glance what it takes dozens of pages of a book to expound.”<sup>3</sup> Undoubtedly, an illustration, like the one erroneously admitted into evidence and given to the jury for its consideration during deliberations, was capable of conveying what many words were incapable of doing.

Without any opposing illustration, the jury was given an actual medical textbook illustration of what Appellees claimed reflected Mr. Moretz’s condition. Dr. Muakkassa’s defense was premised upon the fact that Mr. Moretz did not have a congenital anterior sacral meningocele, but the jury was prejudicially given an illustration of this specific condition. There simply exists no justifiable basis for the Ninth District to find that the illustration at issue did not constitute a statement subject to exclusion under Evid. R. 803(18) where it depicted the actual condition underlying Appellees’ allegations of medical negligence against Dr. Muakkassa.

Next, for the Ninth District to hold that it was not prejudicial to Dr. Muakkassa to have the illustration given to the jury simply makes no sense at all. The jury was given an actual illustration from an authoritative textbook depicting what Appellees’ entire case hinged upon, i.e. that Mr. Moretz had a congenital anterior sacral meningocele. This was a highly contested issue since Dr. Muakkassa adamantly maintained that Mr. Moretz had a neurenteric cyst. It is completely reasonable to conclude that with the only authoritative textbook illustration given to them for deliberations depicting a congenital anterior sacral meningocele, the jurors concluded that this was the condition Mr. Moretz had. Clearly, by providing the jury with the illustration taken directly from a medical textbook, the jurors were allowed to give undue and excessive weight on the illustration and interpret a portion of a Learned Treatise. This was wholly prejudicial to Dr. Muakkassa and explicitly prohibited pursuant to Evid. R. 803(18).

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<sup>3</sup> *Fathers and Sons*, 1862.

It is illogical for the Ninth District to hold that a portion of a Learned Treatise can be extracted from the textbook and then magically lose its status as a Learned Treatise. Without citing any case law or any other legal authority, the Ninth District held that an illustration taken directly from a textbook does not constitute a “statement” within the meaning of Evid. R. 803(18). The Ninth District’s holding is inconsistent both factually and legally. On the one hand, it claims that the illustration is not a statement. Yet, it holds that the illustration depicts an anterior sacral meningocele. Obviously, an illustration, in and of itself, constitutes a “statement” within the meaning of Evid. R. 803(18).

It is worth noting that in allowing the admission of the illustration into evidence, the Trial Court improperly relied upon the Ninth District’s Decision in *Robertson v. McCue*, 9<sup>th</sup> Dist. No. 19539, 2000 WL 14118 (Jan. 5, 2000). (Tr. 587-588). First, the *Robertson* decision predates the enactment of Evid. R. 803(18) which now explicitly prohibits the admission of a learned treatise as an exhibit. Second, the medical illustration at issue in the *Robertson* case was admitted because the witness testified that it accurately depicted the case at hand, whereas, no such testimony was elicited from Dr. McLaughlin. Clearly, Exhibit No. 36 should not have been admitted per the Trial Court’s erroneous reasoning and/or reliance upon the *Robertson* case. By affirming the admission of the illustration into evidence as a trial exhibit, the Ninth District basically adopted the erroneous reliance by the Trial Court upon the *Robertson* case.

Moreover, Exhibit No. 36 was never properly identified or authenticated. Appellees’ counsel purportedly utilized Exhibit No. 36 during Dr. McLaughlin’s cross-examination, but he failed to do any of the following: (1) establish whether Exhibit No. 36 was Illustration No. 83.1 or No. 83.4; (2) mark Exhibit No. 36 as an exhibit when used during Dr. McLaughlin’s cross-examination; and (3) have Dr. McLaughlin confirm that the illustration was an accurate depiction of Mr. Moretz. (Tr. 455-458).

Both the Trial Court and the Ninth District completely ignored the specific dictate of Evid. R. 803(18) that no portion of a Learned Treatise can be admitted into evidence as a trial exhibit and given directly to a jury for its consideration during deliberations. Admittedly, a portion of a Learned Treatise can be used as a “visual presentation” for the jury. By no means does Evid. R. 803(18) allow for the actual admission of a portion of a medical textbook as a trial exhibit.

**Proposition of Law No. 3: The Ninth District’s Decision Disallowing A Jury Interrogatory Regarding Appellees’ 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, Dr. Dennis, 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 R. 49(B) states as follows:

The 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. \* \* \* the interrogatories may be directed to one or more determinative issues whether issues of fact or mixed issues of fact and law.

(Emphasis Added).

This Court has consistently recognized that the duty to submit requested interrogatories to the jury is mandatory. In *Ragone v. Vitali & Bettrami, Jr., Inc.*, 42 Ohio St. 2d 161, 327 N.E.2d 645 (1975). 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.*

Recently, the mandatory nature of Civ. R. 49(A) was addressed by the Second District Court of Appeals in *Stephenson v. Upper Valley Family Care, Inc.*, 2<sup>nd</sup> Dist. No. 2009 CA 38, 2010-Ohio-4390 and *Plavecski v. Cleveland Clinic Foundation*, 192 Ohio App. 3d 533, 2010-Ohio-6016. In *Stephenson*, the Second District remanded the case for a new trial solely upon the amount of damages because the defendants did not request a narrative interrogatory detailing the injuries found to have been proximately caused. *Stephenson* at ¶43-55. Similarly, the Eighth District in *Plavecski* held that in the absence of narrative interrogatories detailing the jury's findings, it could not test the jury's verdict on the issue of proximate cause. *Plavecski* at pg. 12, 17.

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 Trial Court refused to submit Dr. Muakkassa's proposed narrative jury interrogatory and the Ninth District's affirmance of the Trial Court ruling was that both Courts 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).

Clearly, the Ninth District agrees that if there were truly more than one allegation of negligence against Dr. Muakkassa, a narrative jury interrogatory would have been warranted. However, despite acknowledging that there were at least three (3) allegations of medical negligence, the Ninth District incorrectly held that one was not warranted in this case because “the Moretzes’ allegations boil down to one act of negligence.” (Appx. 11). What is glaringly missing from the Ninth District’s Decision is any specific reference to Appellees’ own expert’s trial testimony which included more than three claims of negligence.

It was Appellees’ expert, not Dr. Muakkassa, who had multiple claims of negligence against Dr. Muakkassa. 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. Accordingly, Dr. Muakkassa was prejudiced and, thus, denied a fair trial.

**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 v. 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 Trial Court and the Ninth District ruled that Dr. Muakkassa would 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." (Docket No. 71 and Tr. 2; Appx. 19-23 respectively). However, this Court's Decision in *Jaques* **does not** require that the admission of evidence of "write-offs" of medical bills is contingent upon laying a foundation with expert testimony. To the contrary, just like a plaintiff can submit medical bills into evidence without expert testimony, a defendant can similarly submit evidence of "write-offs" without the need of an expert witness.

Prior to addressing the *Jaques* Decision, Dr. Muakkassa must first address the inconsistency of the Trial Court and the Ninth District's rulings. On the one hand, they allow the admission of Appellees' medical bills because Dr. Dennis opined that they were "necessary" and "reasonable." On the other hand, the Trial Court and the Ninth District Court held that evidence of "write-offs" of these **same** medical bills was inadmissible because there was no expert testimony that the "write-offs" were "necessary" and "reasonable." Clearly, these holdings are inconsistent because whether we are talking about the admission of all of the medical bills or the "write-offs" of the medical bills, we are talking about the **same medical bills**. Appellees should not have had the benefit of presenting to the jury evidence of the medical bills that they claimed were reasonable while Dr. Muakkassa was prohibited from presenting evidence of "write-offs" of those same medical bills.

At trial, Dr. Muakkassa did not intend to offer expert testimony in order to contest the total amount of the medical bills. Once the necessity and reasonableness of the medical bills were accepted by the Trial Court, Dr. Muakkassa intended to simply subtract from the entire medical bills the amount of “write-offs.” This did not require an expert witness to do so. More importantly, this Court in *Jaques* never held that Dr. Muakkassa was required to lay a foundation with 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.*

Even before this Court’s Decision in *Jaques*, this Court explicitly held that either the medical bills or the amount actually paid can be submitted into evidence in order to prove the reasonableness of the medical services. In *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.2d 1310, this Court held:

We first consider what evidence a jury may consider in evaluating the reasonable value of medical expenses. In personal-injury cases, an injured party is entitled to recover necessary and reasonable expenses arising from the injury. Since those expenses include the reasonable value of the medical care required to treat the injury, the question is raised as to how to determine the reasonable value of the medical care. In *Wagner*, we 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.”** Thus, either the bill itself or the amount actually paid can be submitted to prove the value of medical services.

*Robinson*, supra at 19. (Emphasis Added).

Undoubtedly, this Court in both *Robinson* and *Jaques* never held that expert testimony was required in order to lay a foundation for the admission of “write-offs” of medical bills. The Ninth District clearly misinterpreted and misapplied this Court’s precedent and R.C. 2317.421. The Ninth District erroneously held that plaintiffs and defendants should be treated differently with respect to the admission of medical bills and the amount “written-off” from those medical bills. R.C. 2317.421 does not make such a distinction. In fact, R.C. 2317.421 affords both parties the same opportunity to simply admit into evidence the medical bills and “write-offs:”

Bill or statement shall be prima-facie evidence of the 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.

Clearly, R.C. 2317.421 allows a defendant to introduce evidence of “write-offs” in exactly the same manner in which a plaintiff introduces evidence of the medical bills themselves. The Ninth District erred in judicially creating a different burden of proof for a defendant that simply does not exist in either this Court’s precedents or R.C. 2317.421 itself. Simply put, there exists no legal authority upon which the Ninth District could require a defendant to lay a foundation with expert testimony in order to submit evidence of “write-offs.”

There can be no question that this Court and the General Assembly intended to facilitate the process of presenting evidence of both medical bills and “write-offs.” The purpose of R.C. 2317.421 is to eliminate the unnecessary burden and expenses of retaining expert witnesses to merely testify as to what is reflected in the medical bills. If the Ninth District’s Decision is allowed to stand, defendants will be prejudicially treated differently in presenting evidence of “write-offs.” It will be more cumbersome and expensive for defendants if they are required to retain expert witnesses to testify as to the “write-offs” reflected in the medical bills.

Under the *Jaques* Decision, since Appellees were permitted to offer evidence of the original medical bills, Dr. Muakkassa should have been permitted to respond with evidence of the “write-offs” of those medical bills. By precluding Dr. Muakkassa from offering evidence of the “write-offs,” the jury was denied the opportunity to hear competent evidence that would have affected their deliberations with respect to Appellees’ alleged damages.

#### IV. CONCLUSION

Dr. Muakkassa did not perform the surgery that is the subject of this lawsuit and, therefore, there cannot logically exist any legal or factual reason to impose liability upon him for injuries caused at the hands of another physician. 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 essentially adopting the Trial Court’s erroneous rulings, misstatements of law and facts and its flawed reasoning. In doing so, the Ninth District has set forth law that is in direct conflict with the Civil and Evidentiary Rules and legal precedents with respect to the mandatory filing requirements for depositions, the proper use of Learned Treatises, the duty to give a narrative jury interrogatory and the admission of evidence of “write-offs” of medical bills.

Left undisturbed, the Ninth District’s misinterpretation and misapplication of Civ. R. 32(A), Evid. R. 803(18), Civ. R. 49(B) and this Court’s Decision in *Jaques* will continue to cause confusion and conflicts among Ohio’s trial and appellate courts. The likelihood of continued and unnecessary confusion caused by the Ninth District is, therefore, highly probable.

Of importance, the effect of the Ninth District’s Decision is not limited to the parties of this case. Rather, the Decision of the Ninth District, if left intact, will have a resounding effect on all litigants and courts throughout Ohio. Reversal of the Ninth District’s Decision is justified

because this case has clearly caused confusion and uncertainty on the manner in which jury trials should be conducted.

Finally, 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 reverse the Ninth District's Decision so that similarly situated litigants can be guaranteed fair trials.

Respectfully submitted,

*Douglas G. Leak by SAJ per auth.*

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Douglas G. Leak (0045554)  
(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*

**PROOF OF SERVICE**

A copy of the foregoing was served on October 31, 2012 pursuant to Civ.R. 5(B)(2)(c) by mailing it by United States mail to:

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

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

*Attorneys for Plaintiffs-Appellees*

Anne Marie Sferra, Esq.  
Bricker & Eckler LLP  
100 South Third Street  
Columbus, OH 43215

*Counsel for Amici Curiae, Ohio Hospital Association, Ohio State Medical Association, and Ohio Osteopathic Association*

Jamey T. Pregon, Esq.  
Lynnette Dinkler, Esq.  
Dinkler Pregon LLC  
2625 Commons Blvd., Suite A  
Dayton, OH 45431

*Attorneys for Amicus Curiae, Ohio Association of Civil Trial Attorneys*

Thomas E. Szykowny, Esq.  
Vorys, Sater, Seymour and Pease LLP  
52 East Gay Street  
Columbus, OH 43216-1008

*Counsel for Amici Curiae Ohio Insurance Institute and Property and Casualty Insurance Association of America*

  
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Douglas G. Leak

ORIGINAL

IN THE SUPREME COURT OF OHIO

LARRY J. MORETZ, et al.,

Appellees,

v.

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

Appellant.

12-0797

On Appeal from the Summit County Court  
of Appeals Ninth District  
Case No. CA-25602

**NOTICE OF APPEAL 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](mailto: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](mailto: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*

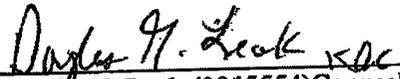
FILED  
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SUPREME COURT OF OHIO

**Notice of Appeal of Defendant-Appellant**  
**Kamel Muakkassa, M.D. et al.**

Defendant-Appellant Kamel Muakkassa, M.D. hereby gives notice of appeal to the Supreme Court of Ohio from the decision rendered by the Summit County Court of Appeals, Ninth District, entered in Court of Appeals Case No. 25602 on March 21, 2012.

This case is one of public and great general interest that warrants a review by the Ohio Supreme Court. A Memorandum in Support of Jurisdiction is being filed contemporaneously with this Notice of Appeal.

Respectfully submitted,



Douglas G. Leak (0045554) Counsel of Record  
[dleak@ralaw.com](mailto:dleak@ralaw.com)

ROETZEL & ANDRESS, LPA  
1375 E. 9th Street, Suite 900  
Cleveland, OH 44114  
Telephone: (216) 623-0150  
Facsimile: (216) 623-0134 (fax)



STACY DELGROS (0066923) *AD*  
[sdelgros@ralaw.com](mailto: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*

**CERTIFICATE OF SERVICE**

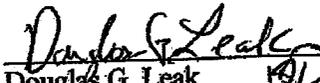
This is to certify that a true copy of the foregoing was mailed by regular U.S. Mail this 7<sup>th</sup> day of May, 2012 to the following:

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 190

[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.

C.A. No.     25602

Appellees / Cross-appellants

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 Moretz's 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 Moretzes 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 Moretzes 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 Moretzes 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 Moretzes and Dr. Muakkassa traveled to Baton Rouge, Louisiana, to videotape the deposition of Dr. Dennis. Dr. Muakkassa was not surprised at trial that the Moretzes 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 Moretzes’ 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 Moretzes 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 Moretzes 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 Moretzes' 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 Moretzes 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 Moretzes 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 Moretzes 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 Moretzes 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 Moretzes 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.