

ORIGINAL

# IN THE SUPREME COURT OF OHIO

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Case No. 2012-0797

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Larry J. Moretz, et al.,

Plaintiff-Appellee,

v.

Kamel Muakkassa, M.D., et al.,

Defendants-Appellants.

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

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## BRIEF OF AMICUS CURIAE THE OHIO ASSOCIATION FOR JUSTICE IN SUPPORT OF THE APPELLEE

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## STATEMENT OF INTEREST

The Ohio Association for Justice is Ohio's largest professional association of attorneys who focus their practices on serving the injured and otherwise disadvantaged. Our members' clients have been injured in accidents, by medical errors, or are involved in transactions with parties with greater bargaining power.

Larry and Nicole Moretz fit these latter two categories. Mr. Moretz is a young man who suffers incontinence and impotence as a result of medical mistakes. He and Mrs. Moretz are also consumers of health insurance. The only reason that insurance adjustments<sup>1</sup> have become an issue in this case is that the Moretzes *paid for them in advance*. The suggestions that an injured person receives a "windfall," claims "phantom damages," or otherwise misleads a jury are inaccurate, and offensive.

Health insurance is expensive. Most private insurance is purchased with funds deducted from employee paychecks, and some degree of matching funds from his or her employer. It is not unusual for premiums to cost from six to ten thousand dollars per year, per family. One of the principal selling points of private insurers is their bargaining power. Every time a private health insurance company holds out its ability to negotiate payment rates with networks of medical providers, it is selling its bargaining power. This bargaining power is an integral part of the product purchased, at great expense, by those with the foresight to buy it.

Insurance adjustments are an essential benefit of this bargain. "Write offs" are rarely a matter of charity, but instead are the benefit of the bargain struck between health insurance companies and their consumers. Nothing purchased is a windfall.

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<sup>1</sup> Amicus submits that the term "write off" is less descriptive of the discrepancy between the amounts billed by medical providers, and the amounts paid for their services.

But, what the Appellant and his Amici argue for *is* a windfall. It is not luck for an injured person's purchase of insurance to result in an adjustment of the medical bills. But it is purely accidental whether a tortfeasor injures someone with health insurance, or without. The positions urged by the Appellant and his Amici, on Proposition of Law No. IV, would shift the benefit of an injured person's bargain to the tortfeasor.

OAJ advocates not only for the injured and disadvantaged, but also for the health of the civil justice system. The wake of this Court's decision in *Robinson v. Bates* has been rough. While procedural missteps in this case will likely keep this Court from reaching Proposition No. IV, it is good that this Court is aware of the need for continuing examination of how the matter of the amounts billed vs. amounts paid plays out at trial. When the *Jaques* case was argued in 2010, five Justices of this Court asked explicitly how the *Robinson* ruling was to play out at trial. Justice Lundberg-Stratton also raised concerns in her part concurrence/part dissent in *Robinson*. Contrary to Amicus OACTA's assertion that this Court can address the issue in its "infancy," controversies surrounding the implications of *Robinson* have been raging in the lower courts.

OAJ's interests here are to give voice to the injured, and to inform this Court of the larger issues surrounding the evidentiary import of insurance adjustments. It is not possible to talk about what insurance adjustments mean to reasonable value, yet somehow *not* talk about insurance. Once trial courts and juries are talking about health insurance, there is no collateral source rule any more, neither by common law nor by the present statute. The benefit of the insured person's bargain with his or her health insurance providers is paid for with plaintiffs' own money. It is a matter of contract. To pass this benefit over to tortfeasors is both economically inefficient, and morally wrong.

## STATEMENT OF THE CASE AND FACTS

In addition to the Appellees' statements of the case and facts, Amicus adds that the amounts billed/amount paid issue was the subject of the Appellant's fifth assignment of error in the Court of Appeals. While this was the first, and initially only, issue accepted by this Court, Appellant has prioritized its importance to this case behind three other issues. Moreover, Appellant failed to preserve the issue at trial.

This case concerns three evidentiary issues (Propositions I, II, and IV) and one jury instruction issue (Proposition III). Neither the Appellant nor any of his Amici ever mention the standard of review for any of them. Every one of the matters accepted for review is committed to the discretion of the trial court. No Amicus supporting the Appellant has addressed any issue other than Proposition IV, neither in the merit briefs nor the jurisdictional memoranda.

It is imperative that this Court review the trial transcript for this point: Counsel for the Appellant never made *any* argument to the jury about damages. Nor did the Appellant renew his objection at trial to the trial court's ruling against him on the billed/paid issue. Further, the jury actually deliberated with un-redacted medical bills and records, including billing and payment information, in the room with them.

As set forth in detail below, the posture of this controversy is that the Appellant did not identify the billed v. paid issue as primary in the Court of Appeals, in this Court, or even at trial when it was necessary to preserve the issue. Consequently, the Appellant has no argument to be found in this record that the trial court's ruling on insurance adjustments kept substantial justice from being done. Simply put, the insurance adjustment issue cannot support reversal of this case.

## LAW AND ARGUMENT

This case raises an issue of public and great general interest, wrapped in a procedural posture that precludes review of it.

### I. ALL PROPOSITIONS OF LAW ACCEPTED ARE REVIEWABLE ONLY FOR AN ABUSE OF DISCRETION.

Propositions of Law I, II, and IV concern evidentiary rulings:

The admission of evidence is within the discretion of the trial court. **The trial judge is in a significantly better position to analyze whether testimony or evidence is relevant or irrelevant and the impact of the evidence on the jury;** thus the court's decision will be reversed only upon a showing of an abuse of discretion. [Emphasis added.]

*Banford v. Aldrich Chem. Co.*, 126 Ohio St. 3d 210, 218, 2010-Ohio-2470, 932 N.E.2d 313, citing *State ex rel. Elsass v. Shelby Cty. Bd. of Comms.*, 92 Ohio St.3d 529, 533, 2001-Ohio-1276, 751 N.E.2d 1032 (2001), and *Renfro v. Black*, 52 Ohio St.3d 27, 31, 556 N.E.2d 150 (1990). See also *Beard v. Meridia Huron Hosp.*, 106 Ohio St. 3d 237, 238, 2005 Ohio 4787, 834 N.E.2d 323.

Just last week, this Court reaffirmed that “a **trial court is in the best position** to make evidentiary rulings and that an appellate court should not substitute its judgment for that of the trial judge absent an abuse of discretion.” *Branch v. Cleveland Clinic Found.*, \_\_ Ohio St. 3d \_\_, Slip Opinion No. 2012-Ohio-5345, at ¶¶ 17-18 (no abuse of discretion in a medical malpractice trial when the trial judge made “tough” decisions on three evidentiary issues, emphasis added).

This Court's standard for abuse of discretion is prohibitive of appellate review: “Abuse of discretion’ implies that the court acted in an unreasonable, arbitrary, or unconscionable manner. **The abuse of discretion must materially prejudice a party**

**in order for the trial court's decision to be reversed.”** *Banford*, 126 Ohio St. 3d at 218, citing *Krischbaum v. Dillon*, 58 Ohio St.3d 58, 66, 567 N.E.2d 129 (1991). See also *State ex rel. Sartini v. Yost*, 96 Ohio St.3d 37, 2002-Ohio-3317, 770 N.E.2d 584.

In this case, no evidentiary errors were made. But the second part of the standard, as enunciated by this Court in *Banford*, is independently fatal to Appellant's claims for review. Dr. Muakkassa (deceased) cannot establish that he was materially prejudiced by any of the evidentiary issues he has brought to this Court.

This Court has been very clear that a reversal is not justified by an evidentiary error, standing alone. There must also be a demonstrable, prejudicial impact on the jury's findings:

**"Generally, in order to find that substantial justice has been done to an appellant so as to prevent reversal of a judgment for errors occurring at the trial, the reviewing court must not only weigh the prejudicial effect of those errors but also determine that, if those errors had not occurred, the jury or other trier of the facts would probably have made the same decision."**

*O'Brien v. Angley*, 63 Ohio St. 2d 159, 164-165, 407 N.E.2d 490; 117 Ohio Op.3d 98 (1980)(on admission of evidence in "learned treatises"), quoting *Hallworth v. Republic Steel Corp.*, 153 Ohio St. 349, 91 N.E. 2d 690 (1950), and citing Civ. R. 61, R.C. 2309.59, Annotation, 60 A.L.R. 2d 77, Sections 2, 10.

It is not enough to demonstrate a technical error, even if the Appellant could. The complaining party must show *also* a prejudicial effect that likely swayed the trier of fact. "An improper evidentiary ruling constitutes reversible error only when the error affects the substantial rights of the adverse party or the ruling is inconsistent with substantial justice." *Proctor v. Fry*, 5th Dist. No. 07CA70, 2008-Ohio-2169, ¶30.

Under *Banford* and *O'Brien*, where the complaining party cannot show a difference in the outcome attributable to the claimed error, there can be no reversal. Absent a showing that the outcome would have been different, substantial justice has been done. For this Court to issue a ruling in a case where substantial justice has already been afforded to the complaining party would be equivalent to rendering an advisory opinion.

The standard of review for an allegedly erroneous jury instruction is also abuse of discretion, also with the focus on whether the complaining party's substantial rights were affected:

Our standard of review when it is claimed that improper jury instructions were given is to consider the jury charge as a whole and determine whether the charge misled the jury **in a manner affecting the complaining party's substantial rights**. ... The discretion of the trial court will not be disturbed on appeal absent an abuse of discretion. [Emphasis added.]

*Columbus Steel Castings Co. v. King Tool Co.*, 10th Dist. Nos. 11AP-351, 11AP-355, 2011-Ohio-6826, ¶15, citing *Dublin v. Pewamo Ltd.*, 194 Ohio App. 3d 57, 2011-Ohio-1758, ¶28, 954 N.E.2d 1225, and *Kokitka v. Ford Motor Co.*, 73 Ohio St.3d 89, 93, 1995-Ohio-84, 652 N.E.2d 671 (1995).

“The discretion of a trial court is one of the keystone principles of our judicial system.” *Davis v. Immediate Medical Servs.*, 80 Ohio St. 3d 10, 21, 1997-Ohio-363; 684 N.E.2d 292 (1997)(J. Lundberg-Stratton, dissenting.) It is also where this Court's review must begin here. Evidentiary issues are not litigated in a vacuum, but in the courtroom, with the jury nearby. The trial judge is far better situated to judge the impacts, if any, of her rulings upon the jury. While the point is entirely missed by the Appellant and his Amici, this case cannot be reversed because substantial justice was done.

**II. NO ABUSE OF DISCRETION IS FOUND ON THE RECORD AS TO ANY ISSUE WITHIN ANY PROPOSITION OF LAW.**

Appellant cannot prove either of the elements he must prove to merit reversal.

Dr. Muakkassa cannot demonstrate any evidentiary error, or that an erroneous instruction was given. If he could, he could not demonstrate prejudice, *i.e.*, that he has not been afforded substantial justice.

**A. The Trial Court did not Abuse its Discretion by Allowing the Filing and Use of a then Five Day Old Transcript.**

Appellant's first Proposition of Law is on its face an issue that affects Appellant individually, but is not a matter of public or great general interest. In sum, the witness testimony at issue was taken just five days prior to the scheduled trial. No party had any illusions: this witness was the Plaintiff's expert on standard of care and proximate cause. Appellant's argument is that the Appellee deserved a dismissal on technical grounds for the transcript not having been filed before trial. The testimony was taken five days before trial, and transcribed one business day before it.

Let it not be forgotten that this case is about a man who has lost bladder, bowel, and sexual function. Appellant's argument is that Dr. Muakkassa was entitled to a "gotcha" destruction of the Moretzes' rights. Such a ruling would have been so ghastly a technical disposition of this case as to undermine public confidence in the functioning of the civil system.

It would have been an abuse of discretion for the trial court *not* to permit the filing and use of the transcript. "... [W]e hasten to emphasize -indeed re-emphasize - that it is a fundamental tenet of judicial review in Ohio that courts should decide cases on the merits. [cite omitted]. Judicial discretion must be carefully -- and cautiously --

exercised before this court will uphold an outright dismissal of a case on purely procedural grounds." *Reichert v. Ingersoll*, 18 Ohio St. 3d 220, 222, 480 N.E.2d 802; 18 Ohio B. Rep. 281(1985).

Dr. Muakkassa has argued in the trial court, the Court of Appeals, and now in this Court that Civ. R. 32(A) must operate like a spring-loaded trap. Appellant never made any argument that he was prejudiced by the use at trial of a deposition of the Plaintiff's expert in this malpractice action. "The spirit of the Civil Rules is the resolution of cases upon their merits, not upon pleading deficiencies. Civ. R. 1(B) requires that the Civil Rules shall be applied 'to effect just results.'" *Peterson v. Teodosio*, 34 Ohio St. 2d 161, 175, 297 N.E.2d 113, 63 Ohio Op. 2d 262 (1973).

Dr. Muakkassa's First Proposition, if adopted, would eviscerate Ohio trial courts' discretion. It is directly contrary to this Court's frequent admonitions that cases are to be decided on their merits, not technicalities. This case concerns the right to a day in court of a married couple. Mr. Moretz has been incontinent and impotent. Appellant's First Proposition is beyond misguided. It is derogatory of justice on the merits.

**B. The Trial Court did not Abuse its Discretion by Allowing the Jury to Review a Demonstrative Exhibit Taken from a Learned Treatise.**

OAJ incorporates by reference the Appellee's argument as to the Second Proposition of Law. There was never any dispute that the illustration admitted to the jury was in any way inaccurate. Appellant never proffered an alternative. Dr. Muakkassa has divested himself of the opportunity to argue any prejudicial impact of the admission of Exhibit 36--assuming arguendo that the admission was erroneous. This Proposition of Law provides no basis for reversal.

**C. Taken as a Whole, the Jury Charge was Proper.**

OAJ incorporates by reference the Appellee's argument as to the Third Proposition of Law. The legal inquiry here is whether the instructions "misled the jury in a manner affecting the complaining party's substantial rights." *Columbus Steel Castings Co.*, 2011-Ohio-6826, ¶15. For the reasons already stated by the Appellee, there was no error in the instructions. Had there been, no reviewing Court could reasonably conclude that the jury was so misled as to affect Dr. Muakkassa's substantial rights. The jury charge provides no basis for reversal.

**D. The Lower Courts Correctly Recognized Appellant's Burden to Establish Foundation for Insurance Adjustment Evidence, and to Present Expert Testimony Sufficient to Render Such Evidence Intelligible.**

There is a dispositive threshold issue as to Proposition IV. Counsel for Dr. Muakkassa made no argument at trial concerning damages whatsoever. Further, Appellant did not make any objection during trial on the billed/paid issue. "Ohio law is clear ... that a ruling on a motion *in limine* may not be appealed and that objections ... must be made during the trial to preserve evidentiary rulings for appellate review." *Gable v. Vill. of Gates Mills*, 103 Ohio St. 3d 449, 456, 2004-Ohio-5719; 816 N.E.2d 1049.

Appellant neither preserved the record, nor identified damages as a jury issues:

Parties must decide their issues, incorporate them into their strategy, **and be responsible** for the results: " 'Parties, through their counsel, are responsible for shaping the trial through the issues they select for resolution; ... we [may not] allow an opposing party to bear the loss caused by poor litigation of the trial by counsel for the party responsible.' " [Emphasis added.]

*Dardinger v. Anthem Blue Cross & Blue Shield*, 98 Ohio St. 3d 77, 97, 2002-Ohio-7113, 781 N.E.2d 121, quoting *Turner v. Cent. Local School Dist.*, 85 Ohio St.3d 95, 99, 1999-Ohio-207, 706 N.E.2d 1261(1999)(plurality opinion), and *Hill v. Urbana*, 79 Ohio St.3d 130, 141, 1997-Ohio-400, 679 N.E.2d 1109 (1997)(Moyer, C.J., dissenting).

Appellant has no colorable argument that the trial court's decision on the amounts billed and paid caused any prejudice, as required under *Banford* and *O'Brien*. If damages were at issue to Appellant, they would have been argued at trial. Second, it is the Appellant's own error not to have recorded his objection at trial on the judge's ruling on the Motion in Limine. Appellant is not entitled to shift that loss to the Appellee. Third, Appellant glosses over the fact that the jury actually had complete billing information showing insurance adjustments. Appellant has no complaint that substantial justice was not done *on issues he did not raise* at trial. This case sits in procedural posture that cannot present the fourth Proposition of Law as a justiciable issue.

Assuming, arguendo, that this Court should reach the Appellant's fourth Proposition, this Court will find that the trial Court's ruling was correct, and correctly affirmed by the Ninth District Court of Appeals.

**1. *Appellant's Assertion that the Court of Appeals' Decision is Contrary to Jaques is Wrong.***

The Appellant and his Amici insist that the Ninth District's decision is contrary to this Court's precedent. They argue that *Robinson* and *Jaques* have erected a per se rule that both the amounts charged, and the amounts paid are admissible. Appellants are misstating this Court's prior holdings.

As stated by this Court in *Jaques v. Manton*, 125 Ohio St.3d 342, 2010-Ohio-1838, 928 N.E.2d 434:

Because R.C. 2315.20 does not prohibit evidence of write-offs, the **admissibility of such evidence is determined under the Rules of Evidence**. A plaintiff is entitled to recover the reasonable value of medical expenses incurred due to the defendant's conduct. *Robinson* at P 7, 17, citing *Wagner*, 9 Ohio St.3d 184, 9 OBR 469, 459 N.E.2d 561. **The reasonable value may not be either the amount billed by medical providers or the amount accepted as full payment.** *Id.* at P 17. "Instead, the reasonable value of medical services is a matter for the jury to determine from all relevant evidence." [Emphasis added.]

*Jaques*, at ¶ 15. Neither the Appellant nor his Amici acknowledge or account for this holding. At the oral argument in *Jaques*, Justices Pfeifer, Lanzinger, Cupp, O'Connor, and Chief Justice Moyer asked questions directly aimed at determining how *Robinson* works at trial. This Court determined that certain concerns were "not unfounded," but not directly at issue in *Jaques*. Appellant's statements, and those of his Amici, that the Ninth District's ruling conflicts with *Jaques* are fantasy. This Court in *Jaques* acknowledged evidentiary issues, but deferred deciding them. This is a different case.

Neither *Robinson* nor *Jaques* dispensed with the rules of evidence, nor any other aspect of trial procedure. Instead, the central issue of *Robinson v. Bates*, 112 Ohio St. 3d 17, 2006-Ohio-6362, 857 N.E. 2d 1310 was what evidence is probative of the reasonable value of an injured person's medical expenses: "We first consider what evidence a jury may consider in evaluating the **reasonable value** of medical expenses." *Id.* at ¶ 7 (emphasis added), citing *Wagner v. McDaniels*, 9 Ohio St.3d 184, 186, 459 N.E.2d 561, 9 Ohio B. Rep. 469 (1984)(holding "proof of the amount paid or the amount of the bill rendered and of the nature of the services performed constitutes prima facie evidence of the reasonableness of the charges for medical and hospital services").

In this case, a physician offered opinion testimony that the amounts billed by Mr. Moretz's treating physicians were reasonable. This is not a matter within the knowledge

of lay persons, for the reasons well explained by the Ninth District Court of appeals in this case. The Appellant never offered a contrary expert opinion.

This Court should examine Plaintiff's Exhibit 1, the medicals specials package that was actually provided to the jury in this case to illustrate the issue. Here is a brief sampling of the notations in these records wherein one would have to look for adjustment information:

C/M CONTRACTUAL	PAY/ADJ AMOUNT
PAYMENTS	Total Insurance Payments/Adjustments
ADJUSTMENTS	PMT - CS
CLAIM NEEDS AD	COPAY CASH
SUMMACARE ADJUS	PMT - SU
SUMMACARE PAYMENT	ADJ - SU
INS PAYMENT	Adjustment ... IAD
CASH PAYMENT	SUMMA CARE was billed ... BN
W1 W/O SUMMA	CO-INSURANCE

Each of these terms appears multiple times throughout Mr. Moretz's billing information.

Two things are clear:

- These terms are not self explanatory. Someone competent to explain what these notations mean would have to provide that explanation to the trier of fact. Their meaning is beyond the comprehension of lay persons.
- The adjustment information is inextricable from the insurance payment information.

In neither *Robinson* nor *Jaques* was this kind of information on the record.

Nothing here was "written off." The adjustments in this case appear throughout the records, side by side with insurance payment information. Here Amicus OAJ differs

somewhat with the Appellee: there is no one competent to discuss insurance adjustments, while avoiding the topic of health insurance. It cannot be done. What these things mean to the "reasonable value" of the services is the central issue of *Robinson*. Neither the Appellant nor his many Amici explain--or can explain--how to connect adjustments to reasonable value, but avoid discussing health insurance. Under R.C. § 2315.20(A), so long as the insurance is subrogated, it cannot be disclosed to the jury. Appellant is welcome to explain how one can discuss insurance adjustments, but not discuss insurance. Neither Appellant nor his Amici have done so.

Amicus OACTA proffers that the adjustments are in the neighborhood of fifty-eight thousand dollars. That is about 6% of the jury verdict in this case. As stated above, there is no reason on this record to believe that this issue enflamed the jury's sensibilities--particularly when Counsel for the Appellant did not preserve the issue, nor make *any argument* about damages. Further, OACTA does not describe how it arrived at that figure by reviewing the documents with adjustment notations stated above. Here is the intractable problem: how does OACTA's number relate to reasonable value? There is simply no way to build a bridge from insurance adjustments to the reasonable value of medical expenses ***without discussing health insurance***.

This Court frequently states that trial courts are best situated to determine evidentiary issues. In addition to the trial court in this case, one other Ohio trial court has grappled with the expert testimony issue, and analyzed it as follows:

In this case, the parties do not dispute that Ohlson complied with the statute and is therefore entitled to the presumption that the charges are reasonable or that Peterson is entitled to present evidence challenging the bills' reasonableness. ... At issue here, is the method by which Peterson may do this. Ohlson asserts that without expert testimony, Peterson may not submit to the jury an alternative amount as "reasonable."

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

To allow Peterson to present the amount accepted as full payment without evidence that this amount is reasonable, violates the purpose and spirit of the collateral source rule. *Robinson*, supra at \*P83-84. The collateral source rule applies to prevent a defendant-tortfeasor from benefitting from an agreement between a plaintiff's healthcare provider and insurer.

*Ohlson v. Peterson*, Summit C.P. No. CV 2006-05-3285 (Apr. 12, 2007).<sup>2</sup> Lay persons are not competent to evaluate this difference without the assistance of an expert on the reasons why one amount is charged, but a different amount is paid. To put a numerical discrepancy in front of the jury, with no explanation, then to ask the jury which one is the "reasonable value" is simply to ask the jury to speculate.

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

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<sup>2</sup> Exhibit A, attached

The parties in *Robinson* stipulated what the difference was between the amounts of the medical expenses as billed, and the amounts accepted in payment. *Id.*, 112 Ohio St.3d 17 at ¶3. That means that this Court could not, in *Robinson*, consider a record on which the plaintiff *objected* to the introduction of the lesser amount on evidentiary grounds. But Ohio trial courts are confronted with these issues daily. Several have held that evidence of an insurance adjustment is evidence of an insurance benefit.<sup>3</sup>

This Court perceived that *Robinson* did not present a collateral source issue. But even the Appellant, in the very language of his Proposition of Law, understands that this is a collateral source issue. Once insurance adjustments to medical bills are introduced, the damage to the collateral source rule is done. Evidence of an insurance adjustment is evidence of insurance. Once insurance adjustments come in, R.C. § 2315.20(A) is a dead letter.

It is not a matter of debate whether the Ninth District's ruling in this case conflicts with *Robinson*, and *Jaques*. The *Jaques* Court wrestled with the question of how this is to play out at trial, but did not rule on the issue. Appellants' Amicis' repetitive statements to the contrary do not change this fact. In *Jaques*, this Court expressly reserved evidentiary issues for another day. *Jaques* at ¶ 15. Assuming, arguendo, that the fourth Proposition of Law (1) was preserved for review, and (2) presents a justiciable question, this case presents the issue that *Jaques* did not.

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<sup>3</sup> See trial court opinions collected as Exhibit B, attached.

## **2. *The Evidentiary Issues Created by Robinson are Intractable***

It comes to this: it is not possible to discuss insurance adjustments without discussing insurance. Appellee's position is consonant with evidentiary rules and other trial procedure. Appellants and their Amici have no rebuttal.

### **a. Foundation**

Several Amici have argued that the evidentiary presumption afforded by R.C. § 2317.421 cuts both ways. The argument is that so long as an itemization is turned over at least five days prior to trial, both parties should get the benefit of a presumption that the information in the records is probative of the reasonable value of the expenses.

One problem with this reasoning is that if everyone has a presumption, then no one has a presumption.

There is a fundamental difference between a plaintiff's itemization, and any itemization derived from billing notations like those iterated above. There is exactly one number on any given medical bill that ties the value of the service to the service itself. That number is the amount billed. The source of that number is known; it is the physician. The foundation of that number is clear; it is the physician's own valuation of her services. The amount billed is the product of a doctor's, or other provider's experience as to what is reasonable value. It is also the product of her informed perspective as the actual provider of the service.

As shown above, the other notations in a typical specials package do not explain themselves. They do not connect themselves to any particular alternative theory of "reasonable value." Any attempt to explain the simple fact that there is a difference at all would require discussion of insurance, in violation of Ohio's collateral source statute.

The amount billed is understandable. The amount paid is not, without a discussion of the plaintiff's health insurance. This discussion turns a two day trial into a four day trial.

Appellant and his Amici imagine a parade of horrors, where doctors will be required to testify on reasonable value, contrary to R.C. § 2317.421. First, the statute applies to the numbers written by the physicians, for the reasons stated above. The alternative numbers are not written by the providers, but are instead the product of the deal struck between the health insurer and the provider network. The statute eliminates foundation concerns on the amounts billed because the foundation is contained within the doctors' own valuation. Rebuttal evidence is based on an entirely different foundation, and is therefore outside the ambit of R.C. § 2317.421.

Second, R.C. § 2317.421 dispenses with the need to gather testimony only on the authenticity of the bills. ***It is silent as to the necessity of the charges***, an issue that must be worked through in every single injury trial. Indeed, where the defense is that a plaintiff's injury was caused by something other than the alleged tort, the proximate cause of the injuries is often the central issue of the trial. This means that every single provider who wrote a bill is an essential witness as to the *necessity* of the medical services. Amici paint a picture of legions of medical providers being forced to render opinions on reasonable value. But every single one of those same providers is already on the witness list every time a defendant disputes proximate cause. Defendants are not required to stipulate as to proximate cause, and plaintiffs cannot be coerced to concede on reasonable value. Indeed, where, as here, a plaintiff's own dollars have purchased the billed v. paid controversy, to pass that benefit to the tortfeasor is an outrage.

## b. Rule 403 Undue Prejudice

Several Ohio trial courts have ruled that *Robinson* evidence is more prejudicial than probative on the issue of reasonable value. Amicus OACTA's contention that this issue is in its "infancy" is a falsification. Attached are several trial court opinions dating from both before and after *Jaques*.<sup>4</sup> It is undeniable that *Robinson* and *Jaques* have caused widespread complication and confusion in the lower courts. These decisions meet the three part test erected by this Court for overruling precedent, stated in *Westfield v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, 797 N.E.2d 1256, paragraph one of the syllabus.

One of Appellants' Amici observes that the Supreme Court of Indiana has taken Indiana's courts down the same path by following *Robinson*. The Supreme Court of Illinois has thoroughly considered these issues, and declined to follow *Robinson*:

Other courts have held that defendants may not introduce the amount paid by a third party to assist the jury in determining reasonable value. For instance, in *Leitinger*, the Supreme Court of Wisconsin found that allowing defendants to introduce this evidence would undermine the collateral source rule: "If evidence of the collateral source payments were admissible, even for consideration of the reasonable value of the medical treatment rendered, a plaintiff's recovery of medical expenses would be affected by the amount actually paid by a collateral source for medical services." [cite omitted.] The court further considered the defendant's argument that it should be allowed to introduce the amount of the paid bill if it did not divulge the source of the payments. The court disagreed: "Although claiming that the evidence assists the fact-finder in determining the reasonable value of the medical treatment and does not limit or reduce the damages, **[the defendant], in essence, is seeking to do indirectly what it cannot do directly**, that is, it is seeking to limit [the plaintiff's] award for expenses for medical treatment by introducing evidence that payment was made by a collateral source." [cite omitted.] Moreover, the court shared the concern expressed by the South Carolina Supreme Court..., that this unexplained evidence would confuse the jury, **and any attempt by plaintiff to explain the compromised payment would lead to the existence of a collateral source.** [cite omitted] See also *Papke*, 738 N.W.2d at 536 ("when establishing the

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<sup>4</sup> Appendix C, attached.

reasonable value of medical services, defendants in South Dakota are currently prohibited from introducing evidence that a plaintiff's award should be reduced because of a benefit received wholly independent of the defendants"); *Radvany v. Davis*, 262 Va. 308, 310, 551 S.E.2d 347, 348 (2001) (amounts paid by insurance carrier not admissible on question of reasonable value of medical services); *Bynum*, 106 Haw. at 94, 101 P.3d at 1162; *Goble v. Frohman*, 848 So. 2d 406, 410 (Fla. App. 2003) ("To challenge the reasonableness or necessity of the medical bills, [the defendant] could have introduced evidence on the value of or need for the medical treatment. As stated in *Gormley [v. GTE Products Corp.]*, 587 So. 2d 455, 457 (Fla. 1991) 'there generally will be other evidence having more probative value and involving less likelihood of prejudice than the victim's receipt of insurance-type benefits"). Chief Justice McMorrow expressed a similar concern in her dissent in *Arthur*, arguing that allowing the defense to bring out that the full billed amount had not been paid would compromise the protections of the collateral source rule and that "[a]llowing evidence of both the billed and discounted amounts compromises the collateral source rule, confuses the jury, and potentially prejudices **both parties** in the case." *Arthur*, 216 Ill. 2d at 98 (McMorrow, C.J., dissenting).

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

*Wills v. Foster*, 229 Ill. 2d 393, 417-418 (Ill. 2008). When *Robinson* evidence is allowed, the jury has no rational mechanism by which to evaluate the "reasonable value" of medical care. Between the options presented (amount charged, or amount accepted), in the absence of some explanation for the difference between the two, jurors could only guess. The difference between what medical providers bill and what they accept, may be relevant to the question of reasonable value. But there is no way to invite the jury to make a reasonable choice between these alternatives without an expert explanation of where the numbers come from.

Colorado courts have declined to follow *Robinson* after consideration of

*Robinson's* implications:

Some courts have concluded that the common law collateral source rule does not apply to written-off expenses because the rule "excludes only 'evidence of benefits paid by a collateral source.'" *Robinson v. Bates*, 112 Ohio St. 3d 17, 2006 Ohio 6362, 857 N.E. 2d 1195, 1200 (Ohio 2006) (quoting *Wentling v. Med. Anesthesia Servs., P.A.*, 237 Kan. 503, 701 P.2d 939 (1985)); see also *Moorhead v. Crozer Chester Med. Ctr.*, 564 Pa. 156, 765 A.2d 786, 791 (Pa. 2001) ("The collateral source rule does not apply to the illusory 'charge' [of written-off amount] since that amount was not paid by any collateral source.").

However, our supreme court has explained that the common law Colorado collateral source rule excludes from consideration "compensation or indemnity received by an injured party from a collateral source." ... "[I]t is clear that a payment is more than the act of remitting money. In this case, the contractual discount constitutes a 'payment made' on [the plaintiff's] behalf because remittance of the discounted amount discharged [the plaintiff's] obligation to his medical providers for treatment.", approved, 901 So. 2d 830 (Fla. 2005).

Additionally, in Colorado

**a benefit that is directed to the injured party should not be shifted so as to become a windfall for the tortfeasor. If the plaintiff was himself responsible for the benefit, as by maintaining his own insurance or by making advantageous employment arrangements, the law allows him to keep it for himself.** If the benefit was a gift to the plaintiff from a third party or established for him by law, he should not be deprived of the advantage that it confers.

*Crossgrove v. Wal-Mart Stores, Inc.*, 280 P.3d 29, 33 (Colo. Ct. App. 2010), quoting Restatement (Second) of Torts § 920A cmt. b (1979), affirmed by *Wal-Mart Stores, Inc. v. Crossgrove*, 2012 CO 31, 276 P.3d 562, ¶1 (Colo. 2012). See also *Rhetoric, Reality, and the Wrongful Abrogation of the Collateral Source Rule in Personal Injury Cases*, 31 Rev. Litig. 99 (clarifying "windfall").

The *Robinson* and *Jaques* approach is supported by neither workability nor equity. The experiment of trying to discuss insurance adjustments without discussing insurance fails every time it is tried. Once a jury hears that there is a difference

between what is billed, and what is paid, they rightly infer health insurance. The effect is to hand the benefit of the injured person's bargain to the tortfeasor.

**3. Jaques and Robinson are Inconsistent with Subsequent Precedent.**

Last year, this Court pronounced judgment in *King v. ProMedica Health Sys.*, 129 Ohio St. 3d 596, 2011-Ohio-4200, 955 N.E.2d 348. This Court held:

Therefore, we hold that R.C. 1751.60(A) applies only when a provider seeks payment from a health-insuring corporation's **insured** with which the provider has entered into a contract. [Emphasis added.]

*Id.* at 599 (rejecting the position that health providers are barred from seeking payment from additional sources, other than the insured). Several of the Amici for the Appellant have made the point that R.C. § 1751.60(A) implies that when a plaintiff's insurance pays some of her medical expenses, the plaintiff is no longer liable for the balance.

Similarly, at page 8 of the hospital associations' brief, these Amici state, "Because neither the plaintiff **nor anyone else** has to pay the amount written off a medical bill, a plaintiff suffers no actual or direct pecuniary loss of this amount." (Emphasis added.)

Counsel for several of these same Amici, in *King*, sang a different tune:

The Ohio Hospital Association ("OHA"), Ohio State Medical Association ("OSMA"), Ohio Osteopathic Association ("OOA"), and Ohio Association of Health Plans ("OAHP") (collectively "Amici") urge the Court to reverse the decision ... which precludes Ohio's health care providers' from seeking **payment for health care services from all available insurers when a patient has multiple insurers ... . If such decision is allowed to stand, Ohio's health care providers no longer will be able to do what they have historically done under Ohio law-obtain reimbursement for medical services from all potentially liable payors.** [Emphasis added.]

Brief of hospital Amici in *King*, p. 1.

Amici are missing how *King* affects *Robinson*. *Robinson* speaks of the “amounts accepted as **full payment**.” *Id.*, at Syllabus 1. This phrase recurs seven times throughout the *Robinson* opinion. This Court just said, in *King*, that providers are free to pursue full payment from multiple insurers. Thus, the fact that one insurer paid one amount says **nothing** about what the provider accepted as “full payment.”

The Hospital Amici made it very clear in *King* that they need the opportunity to pursue all potential sources of payment, and that this is what they have done historically. This Court decided *King* in a manner that accommodates those concerns. Now for whatever reason, these same Amici say that “no one else” is going to pay the balance created by an insurance adjustment. That is untrue, and directly contrary to the position taken by these same Amici for other purposes.

After *King*, there is no doubt that payment by one source of health insurance does not equal the “amount accepted as full payment.” That was the issue in *King*. For every other case involving injuries, the “amount accepted” is now subject to billing to as many insurance companies as the providers can find. The Amici themselves have established that they do not secure payment from one source of insurance, then stop. In this case, the Appellees’ billing records indicate payment by one or more private health insurer. They do not state the “amounts accepted as full payment.” In the absence of some statement by the providers that they accepted the amounts shown as payment in full, there is no evidence on this record, or any other, that fits within *Robinson*’s terms. If *King* has not superseded *Robinson*, *King* has lain bare what is required of a defendant in a civil case to establish the amounts accepted as full payment.

## CONCLUSION

Appellant and his Amici have had to reach past numerous procedural omissions to get to the Court of Appeals' holding on reasonable value evidence. Appellant did not preserve the issue. Even if he had, he has no argument that the billed v. paid issue influenced the outcome of this case, when he presented no argument on damages to the jury. This Court has enunciated the abuse of discretion standard for very good reasons. The fact that neither the Appellant nor his Amici ever acknowledge the standard of review betrays the central procedural fact of this case: Proposition of Law No. IV is not properly presented for this Court's review.

Ohio's consumers of health insurance may have to wait for another day to redress the inequities and uncertainties created by this Court's decision in *Robinson*. Respectfully, the notion that insurance adjustments are not subject to the collateral source rule is now well tested, with disastrous results. Appellant and his Amici are fighting hard to keep their windfall. The term "write off" tends to trivialize the issue. No injured person seeks illusory or "phantom" damages. They seek only to keep the benefit of their bargain, earned through their own purchase dollars.

Appellant wants to keep the benefit of the Moretz's bargain for himself. The collateral source rule has disallowed this in the American system for over a hundred years. It is not possible to speak of amounts billed and amounts accepted, then try to make any connection to "reasonable value" without discussing where these numbers come from. They come from health insurance. Asking a jury to consider the amount billed, and the amount accepted in full payment, but not the amount *paid* is like asking them to consider the number ten minus the number four, but not the number six.

There is no abuse of discretion on any issue presented by any of the Appellants' Propositions of Law. Assuming this Court reaches the issue, Proposition of Law IV provides no basis for reversal. This Court should AFFIRM the decision of the Ninth District Court of Appeals in this case.

Respectfully Submitted,

  
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## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief of Amicus Curiae Ohio Association for Justice were served upon each of the following on this 30th Day of November, 2012:

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## APPENDIX

**A:** *Ohlson v. Peterson*, Summit C.P. No. CV 2006-05-3285 (Apr. 12, 2007)

**B: Cases finding that Evidence of an Insurance Adjustment is Evidence of a Benefit:**

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

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

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

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

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

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

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

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

**C: Cases Barring *Robinson* Evidence on Other Evidentiary Grounds**

*Jenkins v. Disabato*, Stark C.P. No. 2011 CV 727 (12/21/11)

*Gamble v. Ruby*, Franklin C.P. No. 08CVC-08-12380 (1/29/10)

*Lopez v. Morris*, Lucas C.P. No. CR0201101936 (8/21/12)

*Yeoman v. Clark*, Cuyahoga C.P. No. CV-11-751485 (2/29/12)

*King v. Cooper*, Lake C.P. No. 10 CV 01132 (2/14/12)

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

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

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

DANIEL M. HERRIGAN  
IN THE COURT OF COMMON PLEAS  
SUMMIT COUNTY, OHIO

2007 APR 12 PM 12: 58

JOHN D. OHLSON )  
SUMMIT COUNTY )  
CLERK OF COURTS )  
Plaintiffs, )

CASE NO. CV 2006-05-3285

JUDGE ELINORE MARSH STORMER

v. )

M. BJORN PETERSON )  
TRANSPORTATION, INC., et al. )

Order Granting Plaintiff's  
Motion in Limine

Defendants. )  
)

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

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

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



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

*Wagner*, supra at paragraph one of the syllabus. R.C. 2317.421 provides that:

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

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

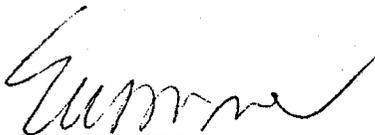
In *Robinson v. Bates*, supra, the Ohio Supreme Court held that both the original amount charged and the amount accepted as full payment may be considered by the jury. However, this case is distinguishable from *Robinson* where the parties stipulated to both types of bills and the court permitted them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

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

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

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

**IT IS SO ORDERED.**

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JUDGE ELINORE MARSH STORMER

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

STATE OF OHIO }  
CUYAHOGA COUNTY } SS.

IN THE COURT OF COMMON PLEAS  
CASE NO. CV-07-629522

DOMINIQUE LOCOCO,  
Plaintiff(s),

- vs -

HEATHER A. LOPRICH,  
Defendant(s).

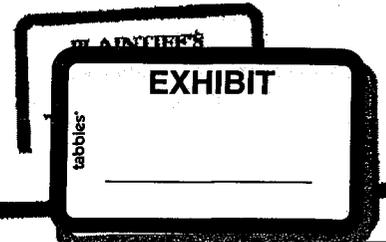
JOURNAL ENTRY AND OPINION

JOAN SYNENBERG, JUDGE:

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

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

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



### Law and Analysis

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

#### The Collateral Source Rule

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

The intent of the rule is to "prevent[] the jury from learning about a plaintiff's income from a source other than the tortfeasor so that a tortfeasor is not given an advantage from third-party payments to the plaintiff." *Id.* The policy behind the rule is simple: "[A] defendant wrongdoer should not . . . get the benefit of payments that come to the plaintiff from a 'collateral source.'" *Pryor*, 23 Ohio St.2d at 107-108.

#### *Robinson v. Bates*

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

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

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

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

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

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

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

*(A) In any tort action, the defendant may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the damages that result from an injury, death, or loss to person or property that is the subject of the claim upon which the action is based, except if the source of collateral benefits has a mandatory self-effectuating federal right of subrogation, a contractual right of subrogation, or a statutory right of subrogation or if the source pays the plaintiff a benefit that is in the form of a life insurance payment or a disability payment. However, evidence of the life insurance*

payment or disability payment may be introduced if the plaintiff's employer paid for the life insurance or disability policy, and the employer is a defendant in the tort action.

(B) If the defendant elects to introduce evidence described in division (A) of this section, the plaintiff may introduce evidence of any amount that the plaintiff has paid or contributed to secure the plaintiff's right to receive the benefits of which the defendant has introduced evidence.

(C) A source of collateral benefits of which evidence is introduced pursuant to division (A) of this section shall not recover any amount against the plaintiff nor shall it be subrogated to the rights of the plaintiff against a defendant. [Emphasis added].

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

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

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

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

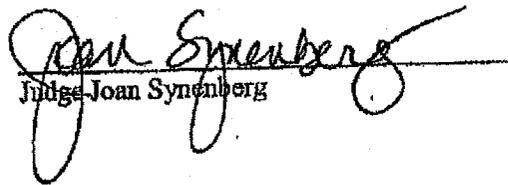
jury to deduce the amount of benefits paid – would violate both the letter and the intent of R.C. § 2315.20.

Conclusion

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

Defendant's cross-motion in limine is denied.

IT IS SO ORDERED.

  
Judge Joan Synenberg

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**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

SCOTT A. KUCHTA  
Plaintiff

BRIAN L. MERCHANT, ET AL  
Defendant

Case No: CV-07-637839

Judge: JUDITH KILBANE-KOCH

**JOURNAL ENTRY**

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

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

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

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

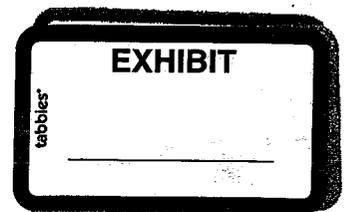
*Judith Kilbane Koch*

Judge Signature

10/09/2008

10/07/2008

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**IN THE COURT OF COMMON PLEAS  
CUYAHOGA COUNTY, OHIO**

THERESA A. WELSH  
Plaintiff

EILEEN M. SUDBURY  
Defendant

Case No: CV-08-657562

Judge: EILEEN T GALLAGHER

**JOURNAL ENTRY**

P1 THERESA A WELSH MOTION FOR PROTECTIVE ORDER AND MOTION IN LIMINE NICHOLAS J SCHEPIS 0001423, FILED 11/05/2008, IS GRANTED.

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

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

Judge Signature

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# IN THE COURT OF COMMON PLEAS CUYAHOGA COUNTY, OHIO

IVY KISSLING  
Plaintiff

JESSICA OHLER ET AL  
Defendant

Case No: CV-08-653636

Judge: EILEEN T GALLAGHER

## JOURNAL ENTRY

PI IVY KISSLING MOTION IN LIMINE REGARDING COLLATERAL BENEFITS. THOMAS J SHEEHAN 0069601, FILED 10/03/2008, IS GRANTED.

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

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

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

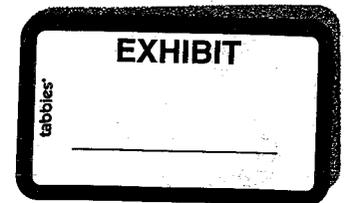
D1 JESSICA OHLER MOTION IN LIMINE AND OPPOSITION BRIEF TO PTLFS. MOTION IN LIMINE JOSEPH R TIRA 0008523, FILED 10/30/2008, IS DENIED.

Judge Signature

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IN THE COURT OF COMMON PLEAS OF ALLEN COUNTY, OHIO

**ELOISE M. VERHOFF,**

Plaintiff[s]

-v-

**HOPE E. DILLER,**

Defendant[s]

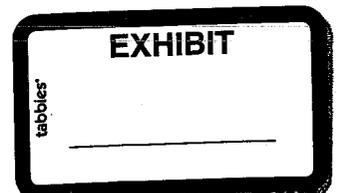
CASE NO. CV2007 1278

JUDGMENT ENTRY  
MOTION IN LIMINE

\*\*\*\*\*

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

The collateral-source rule, identified in *Pryor v. Webber* (1970), 23 Ohio St.2d 104, 263 N.E.2d 235, is an exception to the general rule that, in a tort action, the measure of damages is that which will compensate and make the plaintiff whole. *Robinson v. Bates*, 112 Ohio St.3d 17, 2006 -Ohio- 6362, at ¶ 11, citing *Pryor*, at 107, 263 N.E.2d 235. "Under the collateral-



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

Effective April 7, 2005, the General Assembly passed R.C. 2315.20 , entitled "Introduction of evidence of collateral benefits in tort actions." Am.Sub. S.B. No. 80 (2005). Since the injury in the instant case occurred on September 24, 2007, the statute applies. This statute allows the defendant in any tort action to introduce "evidence of any amount payable as a benefit to the plaintiff as a result of the damages that result from an injury \* \* \*." (Emphasis added.) The Ohio Supreme Court in *Robinson*, *supra*, said that in light of the legislative history under R.C. 2315.20, it is clear that the General Assembly intended to limit the collateral-source rule in Ohio. *Robinson*, at ¶14. The purpose of this statute was to set forth Ohio's

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

R.C. 2315.20 states:

"(A) In any tort action, the defendant may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the damages that result from an injury, death, or loss to person or property that is the subject of the claim upon which the action is based, **except** if the source of collateral benefits has a mandatory self-effectuating federal right of subrogation, a contractual right of subrogation, or a statutory right of subrogation or if the source pays the plaintiff a benefit that is in the form of a life insurance payment or a disability payment. However, evidence of the life insurance payment or disability payment may be introduced if the plaintiff's employer paid for the life insurance or disability policy, and the employer is a defendant in the tort action.

"(B) If the defendant elects to introduce evidence described in division (A) of this section, the plaintiff may introduce evidence of any amount that the plaintiff has paid or contributed to secure the plaintiff's right to receive the benefits of which the defendant has introduced evidence.

"(C) A source of collateral benefits of which evidence is introduced pursuant to division (A) of this section shall not recover any amount against the plaintiff nor shall it be subrogated to the rights of the plaintiff against a defendant." [Emphasis added]

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

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

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

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

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

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

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

To avoid the creation of separate categories of plaintiffs based on individual insurance coverage, we decline to adopt a categorical rule. Because different insurance arrangements exist, the fairest approach is to make the defendant liable for the reasonable value of plaintiff's medical treatment. Due to the realities of today's insurance and reimbursement system, in any given case, that determination is not necessarily the amount of the original bill or the amount paid. Instead, the reasonable value of medical services is a matter for the jury to determine from all relevant evidence. [...]

The jury may decide that the reasonable value of medical care is the amount originally billed, the amount the medical provider accepted as payment, or some amount in between. Any difference between the original amount of a medical bill and the amount accepted as the bill's full payment is not a "benefit" under the collateral-source rule because it is not a payment, but both the original bill and the amount accepted are evidence relevant to the reasonable value of medical expenses.

*Id.* at ¶ 17-18. See, also, *Salvatore v. Findley*, 10th Dist. No. 07AP-793, 2008 -Ohio- 3294

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

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

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

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

make the reduced payment. Under R.C. 2315.20, if that other source has a mandatory self-effectuating federal right of subrogation, a contractual right of subrogation, or a statutory right of subrogation or if the source pays the plaintiff a benefit that is in the form of a life insurance payment or a disability payment, the evidence is not be permitted.

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

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

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

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

"[...] [I]n this day and age of managed care and discounting of medical bills by insurers, the amount reimbursed often has little relation to the actual cost of the services. However, the actual amount billed is more reflective of the actual value of the services rendered, which juries often use as a benchmark in deciding the seriousness of the injuries. [...] [C]laiming the plaintiff incurred only [a reduced amount] in treatment distorts the degree of medical care and physical damages actually incurred by the plaintiff and could diminish the seriousness of the plaintiff's injuries.

"[...]"

"The majority's decision creates confusion by creating a grey area for judges instructing juries in considering medical damages. The majority holds the defendant liable for the "reasonable value of plaintiff's medical treatment" but gives no direction as to what that means-how does the jury weigh the amount billed, the amount paid, or "some amount in between"? What are the factors they may use to consider this issue? Then the majority further confuses the matter by saying that the General Assembly should resolve this issue, which it just decided was a jury question."

Evid. R. 403(A) provides:

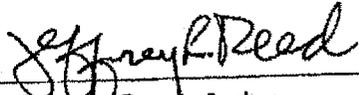
Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

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

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

Plaintiff's motion in limine is sustained.

March 24, 2009

  
\_\_\_\_\_  
Jeffrey L. Reed, Judge

cc SIFERD  
TAYLOR

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

Motions, Pleadings and Filings

Court of Common Pleas of Ohio,  
Summit County  
Joshua HERRON, Plaintiff,

v.

Robyn J. ANDERSON, et al., Defendants.  
No. CV 2007-04-2600.  
March 18, 2008.

Order

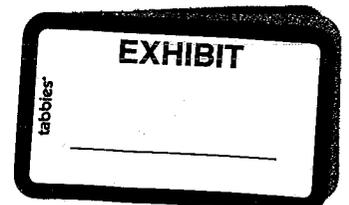
Judy Hunter, Judge.

This matter comes before the Court on Plaintiff's Motion in Limine and Defendants' Motion to Compel Discovery. The Court has been advised having reviewed the Motions, response and reply briefs, and applicable law. Upon review, the Court finds Plaintiff's Motion in Limine well taken and it is granted. Conversely, the Court finds Defendant's Motion to Compel Discovery not well taken and it is denied.

#### LAW AND ANALYSIS

Plaintiff Joshua Herron initially brought suit against the Defendant Robyn Anderson for the personal injury and property damage related to a motor vehicle accident that occurred on January 10, 2007 in the City of Cuyahoga Falls, Ohio and also against the Defendant Sonnenberg Mutual Insurance Co. under Plaintiff's policy of uninsured/underinsured benefits related to said injuries. Both Plaintiff and Defendant Sonnenberg have settled their respective personal injury/property damage suit and subrogation cross-claim against Ms. Anderson. This matter is set for trial on the remaining uninsured/underinsured issue on April 28, 2008. The parties have briefed the *Robinson v. Bates* issue herein as required by the Court.

In *Robinson v. Bates*, 112 Ohio St. 3d 17 (Ohio 2006), the Ohio Supreme Court reaffirmed the general premise that collateral-source rule is an exception to the general rule that in a tort action, the measure of damage is that which will compensate and make



the plaintiff's whole. *Robinson*, 112 Ohio St.3d at 21. Under the collateral-source rule, a plaintiff's receipt of benefits from sources other than a wrongdoer is deemed irrelevant and immaterial on the issue of damages in a personal injury case. *Id.* The rule prevents the jury from learning about a plaintiff's income from a source other than the tortfeasor so that a tortfeasor is not given an advantage from third-party payments to the plaintiff *Id.*

Ultimately, the Ohio Supreme Court held in *Robinson* that "[t]he jury may decide that the reasonable value of medical care is the amount originally billed, the amount the medical provider accepted as payment, or some amount in between. Any difference between the original amount of a medical bill and the amount accepted as the bill's full payment is not a benefit under the collateral-source rule because it is not a payment, but both the original bill and the amount accepted are evidence relevant to the reasonable value of medical expenses." *Id.* at 23. However, the Ohio Supreme Court noted that the above holding was limited to personal injuries that preceded the implementation of R.C. 2305.20, effective April 7, 2005. *Id.* at 20, foot-note one. Furthermore, the Court noted that, in light of the legislative history, the General Assembly clearly intended to limit the collateral source rule in Ohio by its passage of R.C. 2305.20 *Id.* at 22.

At issue herein is the application of the above statute in relation to the holding in *Robinson* vis-à-vis the collateral-source rule. In pertinent part, R.C. 2315.20 (A) states that "[i]n any tort action, the defendant may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the damages that result from an injury, death, or loss to person or property that is the subject of the claim upon which the action is based, except if the source of collateral benefits has a mandatory self-effectuating federal right of subrogation, a contractual right of subrogation, or a statutory right of subrogation or if the source pays the plaintiff a benefit that is in the form of a life insurance payment or a disability payment."

In the case at hand, both parties agree that Plaintiff's health insurance carrier, United Health Care, a non-party herein, has a contractual right of subrogation against Plaintiff. As this right of subrogation is an exception to Defendant's right to introduce evidence of any amount payable under R.C. 2315.20(A) above, the Court finds Plaintiff's Motion in Limine is well taken. Although Defendant asserts that it is entitled to introduce evidence of the "write-off" amounts from said medical bills, the Court finds said amounts would be in direct contravention of the inherent meaning and intent of the above statute.<sup>FN1</sup> To permit the same would give the jury the necessary information to make the logical deduction that the total billed amount less the write-off amount equals the amount paid, the latter amount, clearly not permitted by said statute.

FN1. It is the duty of courts, in the interpretation of statutes, unless restrained by the letter, to adopt that view which will avoid absurd consequences, injustice, or great inconvenience, as none of these can be presumed to have been within the legislative intent *Moore v Given* (1884), 39 Ohio St. 661, 664 cited in *Hill v Micham* (1927), 116 Ohio St. 549, 553

Wherefore, in the case herein, where the personal injury occurred after April 7, 2005, and where the Plaintiff's health insured has a contractual right of subrogation, the Defendant is not permitted to introduce evidence of the amount payable or the write-off amount for said medical bills. As such, the Court finds Plaintiff's Motion in Limine well taken and it is granted. Defendant is precluded from referencing or introducing at trial any evidence regarding health insurance benefits received as a result of the accident at issue, including the amounts of contractual write-offs or adjustments from Plaintiff's health insurance. Conversely, the Court finds Defendant's Motion to Compel Discovery not well taken and it is denied Defendant is not entitled to receive medical authorizations from the Plaintiff relating his medical records and invoices related to the injuries herein.

So Ordered.

<<signature>>

JUDGE JUDY HUNTER

cc: Attorney Robert Foulds

Attorney Tack Morrison Jr.

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

Motions, Pleadings and Filings ([Back to top](#))

- [2007 WL 4619405](#) (Trial Pleading) Separate Answer of Sonnenberg Mutual Insurance Company Incorrectly Named As Western Reserve Group With Cross-Claim Against Co-Defendant Robyn J. Anderson (May 14, 2007)

- [2007 WL 4619404](#) (Trial Pleading) Complaint (Apr. 4, 2007)

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MONTGOMERY CO. OHIO

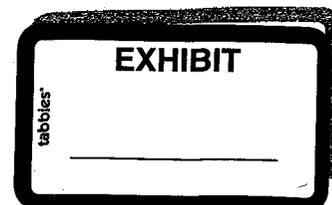
**IN THE COMMON PLEAS COURT OF MONTGOMERY COUNTY, OHIO  
CIVIL DIVISION**

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

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

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

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



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

In any tort action, the Defendant may introduce evidence of any amount payable as a benefit to the Plaintiff as a result of the damages that result from an injury, death, or loss to person or property that is the subject of the claim upon which the action is based, *except* if the source of collateral benefits has a mandatory self-effectuating federal right of subrogation, *a contractual right of subrogation, or a statutory right of subrogation* \* \* \*. (emphasis added).

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

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

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

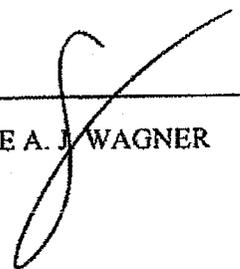
Defendant argues that R.C. 2315.20 does not prevent evidence of the "write offs" because the *Robinson* Court determined that the "write offs" were not a collateral benefit and R.C. 2315.20 prohibits evidence of "collateral benefits." But, even if the "write offs" are not a collateral benefit, when a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

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

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

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

SO ORDERED.

  
\_\_\_\_\_  
JUDGE A. J. WAGNER

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

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**Sidney A. Bieser**

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**Attorney for Defendant**  
**Erie Insurance Company**

Tina M. Looney, Bailiff (937) 225-4409

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SUMMIT COUNTY  
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMMIT

STEPHANIE MASAVEG-BARRY )

Plaintiff )

-vs- )

KELLY STEWART )

Defendant )

CASE NO. CV 2007 08 5997

JUDGE SPICER

ORDER

This matter is before the Court upon Plaintiff's Motion *in Limine* regarding collateral benefits filed March 25, 2008. Defendant files a brief in opposition. Plaintiff files a reply and additional authority in support. The Court deems all matters submitted and will proceed to consider the issues and applicable law.

Plaintiff brings this action for personal injury arising out of injuries alleged to have arisen out a motor vehicle accident that occurred on August 29, 2008. Plaintiff claims to have sustained injuries to her neck, left shoulder and back. Following the accident, Plaintiff treated with the following: her primary care physician, Thomas Mandat, M.D., Jon Wronko, D.C., and Vernon Patterson, D.O. at Horizon Orthopedics. Plaintiff also had an MRI. Plaintiff's health care expenses of the foregoing totaled \$4,883.00. Of that amount, Plaintiff's private health care insurer, United Healthcare, paid \$929.54, to which they have a subrogated interest. Plaintiff's automobile insurer, Progressive, paid \$2,025.00, for which they have a subrogated amount.

EXHIBIT

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Plaintiff seeks to preclude Defendant from introducing the amounts paid by United Healthcare and Progressive into evidence. Plaintiff also seeks to exclude the introduction of the amounts "written off" by her health care professionals.

Defendant states that it does not dispute that the collateral source rule applies to this case, but argues that the Ohio Supreme Court decision in *Robinson v. Bates* (2006), 112 Ohio St. 3d 17, held that the collateral source rule does not apply to write-offs of expenses that were never paid, such as in this case.

At issue herein is the application of R.C. 2305.20(A), which became effective on April 7, 2005, in relation to the holding in *Robinson v. Bates*. Plaintiff submits a recent decision of Judge Judy Hunter, *Herron v. Anderson*, Summit C.P. Case No. CV 2007 044 2600, which the Court finds well reasoned. In particular, the Court concurs with Judge Hunter's decision at page 3:

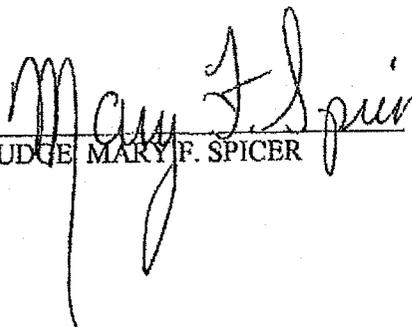
"Although Defendant asserts that it is entitled to introduce evidence of the "write-off" amounts from said medical bills, the Court finds said amounts would be in direct contravention of the inherent meaning and intent of the above statute [R.C.2305.20(A)]. To permit the same would give the jury the necessary information to make the logical deduction that the total billed amount less the write-off amount equals the amount paid, the latter amount, clearly not permitted by statute."

Thus, in this case, this Court likewise finds as the personal injury occurred after April 7, 2005, and Plaintiff's health insured has a contractual right of subrogation, the Defendant is not permitted to introduce evidence of the subrogated amount or the write off amount for said medical bills.

COPY

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

It is so Ordered.

  
JUDGE MARY F. SPICER

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

JD:leeb  
07-5997

IN THE COURT OF COMMON PLEAS  
STARK COUNTY, OHIO

LESA JENKINS, et al.,

) CASE NO. 2011 CV 727  
)  
)

PLAINTIFF(S),

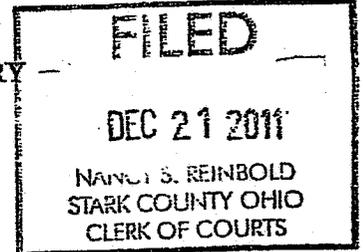
) JUDGE FORCHIONE  
)  
)

VS.

) JUDGMENT ENTRY  
)  
)

JUDITH DISABATO,

DEFENDANT(S).



This matter comes on for consideration on the Plaintiff's Motion in Limine to Exclude Evidence of Any and All Payments made by Collateral Sources filed on the 1st day of December, 2011. The issue in this case is: whether evidence of the "written off" amount of medical bills or the difference between the amount billed and the amount accepted as full payment by providers, should be permitted into evidence.

A) Background

This issue of write-offs and billings has created various interpretations, opinions, and rulings that have befuddled the legal community in a way not seen since *Scott-Pontzer*. It's not just that the Court needs to determine the application of *Robinson v. Bates*, 2006 (112 Ohio St.3d 17) and *Jaques v. Manton*, 125 Ohio St.3d 342, but this Court must also consider the added expenses, uncertainty, disruption, prejudice and relevancy affecting civil trials in conducting its analysis. More importantly, the court must construe the rulings in accordance with O.R.C. 2317.421, 2315.20(A) and Ohio Evidence Rules 401, 402, 403 and 411.



Since *Robinson* and *Jaques*, the courts, attorneys, litigants and all clerks' offices have seen the practical effects of these rulings. Additional time and resources are spent on the gathering of records, trying to decipher insurance payment records, and reconciling provider bills with insurance statements. This extra paperwork for the litigants and providers in the Court seems to create for potential confusion in the courtroom, as an inordinate amount of time will be spent on these issues before and during trial. Furthermore, these issues lead to discovery disputes, with the Defense claiming that the Plaintiff is not forwarding them this information, the Plaintiff saying it is not getting the information from the doctors, the doctors invoking HIPPA law, all which leads to a legal quagmire.

B. History

To begin, in *Robinson v. Bates*, the Ohio Supreme Court held unequivocally that amounts written off by medical providers are not "collateral benefits" and that the collateral source rule does preclude admission into evidence of the reduced amount that a provider accept as full payment. In *Jaques v. Manton*, 125 Ohio St.3d 342, the Ohio Supreme Court was then asked to determine the effect of R.C. 2315.20 on their holding in *Robinson v. Bates* that the amount accepted by a medical provider as full payment for treatment of the plaintiff is admissible in a personal injury action, even when the amount is less than the amount originally billed.

However, in *Jaques*, the Court of Appeals erroneously relied on R.C. 2315.20 in holding that evidence of write-offs is inadmissible. R.C. 2315.20(A) provides:

"in any tort action, the Defendant may introduce evidence of any amount payable as a benefit to the Plaintiff as a result of the damages that result from the injury, death or loss to person or property that is the subject of the claim upon which the action is based, except if the source of collateral benefits has \*\*\* a contractual right of subrogation \*\*\*".

*Jaques* argued that R.C. 2315.20, not *Robinson*, controls the issue, and that the statute compels the Court to hold that evidence of write-offs is no longer admissible. However, the *Jaques* Supreme Court disagreed. They held that the general collateral-source rule in R.C. 2315.20 must apply before the subrogation exceptions of the statute can apply. The *Jaques* court held the general collateral source rule pertains only to "evidence of any amount payable as a benefit to the plaintiff".

The *Jaques* court further found that R.C. 2315.20(A) is not a per se bar to introduction of write-off evidence. The *Jaques* court stated directly that "the admissibility of *Robinson* evidence is to be determined under the Rules of Evidence". *Jaques* makes it clear that its holding does not mean that insurance adjustment evidence must always be admitted.

"Instead, the reasonable value of medical services is a matter for the jury to determine from all *relevant* evidence..." *Jaques, supra*.

While holding that the new statute does not negate *Robinson*, the *Jaques* Court acknowledged that the rules of evidence are still in effect and still govern the admissibility of "write-off" evidence.

C. Application of Write-Offs

While the *Robinson* court found such a "write-off" information to be relevant, it avoided the most critical questions: How will the Defendant explain the discrepancy between the Plaintiff's provider's charge and what insurance companies have accepted as payments; what standards will they use; are the standards the same for all plaintiffs; do they factor in the nature of the plaintiff's injuries; and, do they consider the fact that the plaintiff's injuries may be permanent? Without evidence of insurance payments to explain this difference, a jury determining the reasonable value of medical services can only be confused, or assume that some collateral source was responsible for the payment.

D. Relevancy

A motion in limine is designed "to avoid the injection into a trial if a potentially prejudicial matter which is not relevant is inadmissible." *Rinehart v. Toledo Blade Co.* (1985), 21 Ohio App.3d 274, 278. Ev.R. 401 defines "relevant evidence" as:

"evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

The issue presented by the instant motion is confusing to this Court, the Plaintiff, the Defendant, and undoubtedly to the jury. Meanwhile, the 800 pound gorilla in the courtroom is insurance, and other courts continue to treat it as if it has nothing to do with the Plaintiff's case. This lack of transparency leaves the jury miffed. As Justice Stratton pointed out in her concurring/dissenting opinion in *Bates*:

"...In this day and age of managed care and discounting of medical bills by insurers, the amount reimbursed often has little relation to the actual cost of the services. However, the actual amount billed is more reflective of the actual value of the services rendered, which juries often use as a benchmark in deciding the seriousness of the injuries,...claiming the plaintiff incurred only a reduced amount in treatment distorts the degree of medical care and physical damages incurred by the plaintiff and could diminish the seriousness of the plaintiff's injuries..."

"(...)

"The majority's decision creates confusion by creating a gray area for judges instructing juries in considering medical damages. The majority holds the defendant liable for the "reasonable value of plaintiff's medical treatment", but gives no direction as to what that means - how does the jury weigh the amount billed, the amount paid, or "some amount in-between"? What are the factors they must use to consider that issue? Then the majority further confuses the matter by saying that the general assembly should resolve this issue, which just decided was a jury question".

It is the opinion of this court that the real subject matter of this debate is what is relevant evidence pursuant to Ohio Ev.R. 402, which provides:

"all relevant evidence is admissible, except where otherwise provided by...statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio."

Even if the Court were to determine the write-offs as relevant under Ohio Ev.R. 402, the inquiry does not end. The write-offs must fit within the parameters set forth in Ev.R. 403.

Ev.R. 403 provides:

"although relevant, evidence is not admissible if its probative value is substantial outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading of the jury".

E. Effect of O.R.C. 2317.421

Neither the Supreme Court in *Robinson* or *Jaques*, nor the relevant Ohio statutes, prohibit the introduction of bills for actual medical, hospital, dental, medication, etc. incurred as prima facie evidence of the reasonable and necessities of the bills.

Under Ohio R.C. 2317.421, a personal injury or wrongful death action, it states in pertinent part:

"in an action for damages arising from personal injury or wrongful death, a written bill or statement or any relevant portion thereof, itemized by date, type of service rendered, and charge, shall, if otherwise admissible, be prima facie evidence of the reasonableness of any charges and fees stated therein for medication and prosthetic devices furnished, or medical, dental, hospital and funeral services provided by the person, a firm, or corporation issuing such bill or statement, provided, that such bill or statement shall be prima facie evidence of reasonableness only if the party offering it delivers a copy of it, or the relevant portion thereof, to the attorney of record for each adverse party not less than five days before trial."

In this Court's opinion, the introduction of the original bills not only provides prima facie evidence of the reasonableness and necessity of those bills and the treatment of the injured person, they are also prima facie evidence of the nature and extent of the injuries, as well as future

permanency of the injury and the pain and suffering or lack thereof that the plaintiff is going to endure.

At the same time, the amount accepted by the provider as to any particular service is a negotiated amount between the insurer, HMO, and the provider for payment for certain types of medical treatment, or medications, or hospital stays. Unfortunately, the Plaintiff is not a participant in these negotiations. *Dimitroff v. Grishcow* (Franklin C.P. 1/5/09), Case No. 2007- CVA-01-103, unreported.

In *Robinson*, the Ohio Supreme Court held that both the original amount charged and the amount accepted as full payment may be considered by the jury. However, in *Robinson*, the parties stipulated to both type of bills and the Court permitted them both to be considered. Here, we do not have that distinction. *Robinson* failed to provide guidance and left the trial courts to wander aimlessly in hopes of determining how the jury is to determine or evaluate the reasonable value of the medical care. *Robinson* proposes that each side is going to provide their own medical bills, which dictate the amounts charged or amounts accepted. In the absence of some explanation for the difference between the two, the juries only have one option - to guess. The difference between the medical provider's bills and what they accept, may be relevant as to the question of the reasonable value. But there is no way to invite the jury to make a reasonable choice between these alternatives unless there is an expert to explain how these numbers were calculated.

We already know by statute that the Plaintiff has complied by forwarding its medical bills, which are prima facie reasonable. Following *Robinson*, the Defendant would then have to hire someone, presumably an expert, to determine what the reasonable value of the medical care is. This may then place the Plaintiff in the position that it may have to hire its own expert to determine the

reasonable value of the medical care. The jury is now going to be more confused because the focus of the case is no longer on the Plaintiff's injuries, but instead, the actual litigation now turns on the "reasonable value of the medical care". Furthermore, this creates additional costs for both Plaintiff and Defense attorneys for expert fees, costs which are normally passed on to their clients. It's this Court's opinion that jurors will either generally disregard the expert's testimony anyway once it's revealed that the experts have been paid an exorbitant sum for their testimony, or in the alternative, split the difference since they will have no idea what to do. To allow this to become a battle of the experts is not only prejudicial to the Plaintiff, but confuses the jury even more.

F. Collateral Source Rule's Dilemma

Because the introduction of any difference between amounts charged and amounts billed will deprive the Plaintiffs of the protection of the collateral source rule, the only two fair options are that all insurance be discussed with the jury, or that no insurance be discussed with the jury. The collateral source rule and Ohio Rule 4.11 strongly suggests the latter.

Therefore, not only does the Defendant bear the burden of rebutting the presumption afforded by R.C. 2317.421, but the Defendant must also comply with this collateral source statute. Defendant's problem is that there is no way to explain insurance adjustments without talking about insurance. This introduction of a "write-off" amount will only confuse the jury or strongly suggest insurance in contravention of R.C. 2315.20(A). Evidence of insurance may be more prejudicial than probative.

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

There is no evidence, nor was any before the Supreme Court in *Robinson* or *Jaques*, how these amounts of payments were calculated. This Court would bet that if it asked one hundred doctors or administrators of hospitals if the amounts paid to them reflected a fair and reasonable amount of the service provided, the Court would receive a resoundingly negative response from all of them. *Dimitroff*, supra. It is clear to the Court that there is always going to be a conflict between the medical providers and HMOs and insurers on the reasonable terms of medical and hospital costs. Medical providers, HMOs, and insurers want to keep the costs low, and obviously the doctors and administrators are attempting to make a profit. None of these interests has anything to do with the Plaintiff's injuries, or pain and suffering; allowing this information to be presented to a jury seems fundamentally unfair.

G. Conclusion

After a thorough discussion of the "write-off" issue, under Ev.R. 401, 402, 403(A), evidence of any amount "written off" is inadmissible. Exclusion is mandatory because the probative value of any written off amount is substantial outweighed by:

Unfair prejudice: Only the Plaintiff will effectively lose the protection of the Collateral Source Rule, while the Defendant's liability insurance remains unknown to the jury (Ohio Ev.R. 411).

Confusion of the Issues/Misleading the Jury: The jury must decide the "reasonable value of medical expenses" as between the amount charged to the amount accepted. Without consideration of the Plaintiff's insurance, there is no rational explanation for the discrepancy. A jury can only guess or infer the existence of insurance.

*Robinson* and *Jaques* place the jury in the unenviable position of operating rudderless in an attempt to determine the reasonable value of medical expenses. Meanwhile, no type of measuring

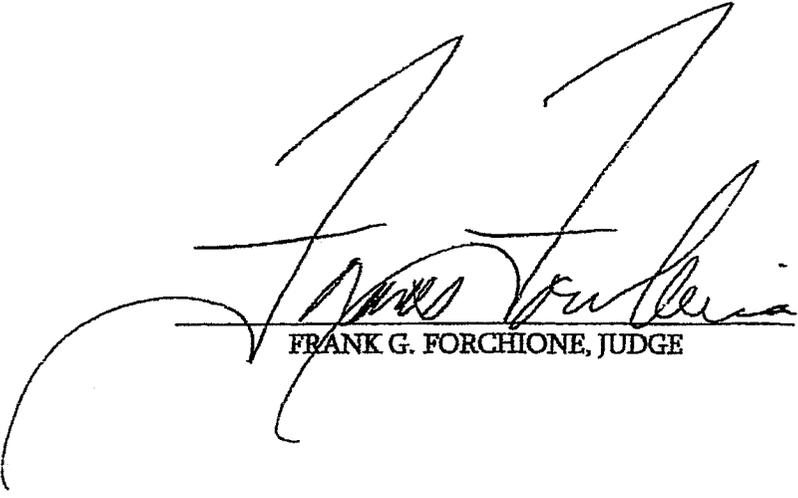
stick is provided. The jury has to guess at a value. The Plaintiff has complied with the statute and has established the reasonableness of the bills. The Defendant's only option is to confront the reasonableness of such bills through a battle of the experts.

At the same time, this country currently is torn over the issue of healthcare reform. The Court believes if it simply sends two sets of figures back to the jury, deliberations would dissolve into a debate over personal feelings on healthcare and national healthcare reform and inflame the passions of the jurors. This takes the focus away from the facts of the case, and the jury's duty, is prejudicial to the Plaintiff, and violates the Rule of Completeness reflected in Ev.R. 106 and the Common Law, as well as Ev.R. 403.

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

For the reasons stated, the Court grants the Plaintiff's Motion in Limine and this Court bars the introduction of payment by any collateral source toward medical expenses incurred by the Plaintiff.

IT IS SO ORDERED.



FRANK G. FORCHIONE, JUDGE

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO  
CIVIL DIVISION

LOVE GAMBLE,

Plaintiff,

vs.

RICKY RUBY, et al.,

Defendant.

Case No. 08CVC-08-12380

(JUDGE FRYE)

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FRANKLIN CO. OHIO

**JOURNAL ENTRY**  
**REGARDING MOTION TO DETERMINE THE APPLICATION OF**  
**ROBINSON V. BATES TO THE PRESENT ACTION**  
(Motion Filed May 26, 2009)

This is a personal injury action arising from an automobile accident. Currently, trial is scheduled for February 22, 2010.

On May 26, 2009 plaintiff requested the court determine the application of the ruling in *Robinson v. Bates* (2006), 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.2d 1195 to the present action. That motion was opposed by defendant State Farm Mutual Automobile Insurance Company ("State Farm") on June 12, 2009 and plaintiff filed a Reply Memorandum on June 22, 2009. On September 15, 2009, at the suggestion of the court, plaintiff filed an itemization of bills, with the caveat that the itemization was not a factual or legal stipulation.

The court views the ultimate question as whether the write-offs by medical providers are "amount[s] payable as a benefit to the plaintiff" under R.C. 2315.20. If so, the write-offs are not admissible to prove the reasonableness and necessity of charges rendered for medical and hospital care. If not, they are admissible to prove the reasonableness and necessity of charges rendered for medical and hospital care.

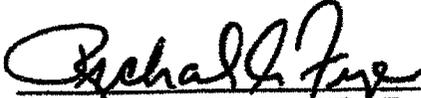
After re-reviewing *Robinson v. Bates* and its progeny, the court is not persuaded that the Supreme Court of Ohio would determine that the difference between an original medical bill and the amount accepted as full payment for the bill is an "amount payable as a benefit to the plaintiff" under R.C. 2315.20.

Accordingly, the medical providers' write-offs/acceptance of sums less than the full "original" charges will be allowed into evidence so that the jury can determine the reasonable value of medical services provided to the plaintiff.

However, admissibility is dependent upon a proper foundation first being presented to explain what write-offs are, why they occur, and satisfying the court that the probative value of such evidence is not outweighed by the potential for confusing or for misleading the jury contrary to Evid. R. 403. A foundation may be laid in one of two ways: first, testimony of a medical doctor explaining the write-offs and opining as to the reasonableness of the amount originally billed and the amount actually paid, and saying in substance the original charges were unreasonable; or second, testimony of some other knowledgeable witness explaining why medical providers write-off or write-down original charges for bills that are partially paid by insurance companies, the commercial reasons therefore, why amounts ultimately paid and accepted are evidence of "reasonableness" rather than merely a symptom of larger market forces in the healthcare industry unrelated to the reasonableness of charges for care to a specific, individual patient.

Given the intensity of the national discussion over the last year about national healthcare "reform," the court believes that merely submitting two sets of figures to the jury will invite speculation, political arguments among jurors, violate the rule of "completeness" reflected in Evid. R. 106 and the common law, and violate Evid. R. 403.

**IT IS SO ORDERED.**

  
RICHARD A. FRYE, JUDGE

FILED  
LUCAS COUNTY

2012 AUG 21 A 11: 25

COMMON PLEAS COURT  
BERNIE SULLIVAN  
CLERK

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

Josephine Lopez,

Plaintiff,

vs.

Mark W. Morris, et al.,

Defendants.

\*

\* Case No. CR0201101936

\* OPINION AND JOURNAL ENTRY

\* Hon. Myron C. Duhart

\*

\*

\*

This personal-injury case is before the Court on the motion in limine filed by the plaintiff, Josephine Lopez. Upon review of the pleadings, affidavit of the defendant, memoranda and attachments of the parties, and applicable law, the Court finds that it should grant the motion.

**I. BACKGROUND**

For the sole purpose of ruling on the instant motion, the Court finds the following facts. Ms. Lopez sustained injuries in an automobile collision as a result of the negligence of defendant Mark Morris. She made an underinsured motorist claim against defendant Allstate Insurance Company ("Allstate"). Ms. Lopez brought this action against Mr. Morris, Allstate and others to recover compensation for her injuries.

Ms. Lopez filed the instant motion in limine in which she seeks to "exclude

evidence of any and all payments provided by collateral sources." (Motion Brief p.1.) Mr. Morris and Allstate oppose the motion.

**II. DISCUSSION**

**A. MOTION IN LIMINE STANDARD**

A motion in limine is designed "to avoid the injection into a trial of a potentially prejudicial matter which is not relevant and is inadmissible." *Reinhart v. Toledo Blade Co.*, 21 Ohio App.3d 274, 278, 487 N.E.2d 920 (1985). The court, in *Riverside Methodist Hosp. Assn. v. Guthrie*, 3 Ohio App.3d 308, 444 N.E.2d 1358 (1982), articulated a two-step procedure for deciding these motions:

*First*, a consideration of the motion in limine as to whether any reference to the area in question should be precluded until admissibility can be ascertained during trial. *Second*, at the time when the party desires to introduce the evidence which is the subject of the motion in limine, there must be a second hearing or determination by the trial court as to the admissibility of the evidence, which is then determined by the circumstances and evidence adduced in the trial and the issues raised by the evidence. (Emphasis added.) *Guthrie* at 310.

A motion in limine is, "a precautionary request, directed to the inherent discretion of the trial judge \* \* \*." *State v. Spahr*, 47 Ohio App.2d 221, 353 N.E.2d 624 (1976), paragraph one of the syllabus.

The sustaining of a motion in limine does not determine the admissibility of the evidence to which it is directed. Rather it is only a preliminary interlocutory order precluding questions being asked in a certain area until the court can determine from the total circumstances of the case whether the evidence would be admissible. Palmer, Ohio Rules of Evidence Rules Manual 446 (1984), cited with approval in *State v. Grubb*, 28 Ohio St.3d 199, 201, 503 N.E.2d 142 (1986).

**B. APPLYING THE STANDARD**

In particular, Ms. Lopez asks the Court to preclude Allstate and Mr. Morris from

mentioning and/or introducing any evidence of any medical-care provider's "acceptance of discounted payments as full payment for [medical] services when such discounted payments are solely the result of a purchased discount contract/agreement between the [medical-care] provider and the insurer." (Motion Brief pp.1-2.) Allstate and Mr. Morris counter that the Supreme Court of Ohio has ruled that such information is proper and admissible, in *Jaques v. Manton*, 125 Ohio St.3d 342, 2010-Ohio-1838, 928 N.E.2d 434, and *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.2d 1195.

Ohio courts traditionally have followed the so-called collateral-source rule. *Jaques* at ¶1. The rule prevents personal-injury litigants from presenting evidence of payments made to benefit the plaintiff from any source other than the tortfeasor. *Id.* The General Assembly has enacted R.C. 2315.20<sup>1</sup> which largely neutralizes the impact of the collateral-source rule. *Id.* Nonetheless, "[a] plaintiff is entitled to recover *reasonable medical expenses* incurred for injuries caused by the tortious conduct of a defendant." *Id.* at ¶5, citing *Robinson v. Bates*, 112 Ohio St.3d

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<sup>1</sup> In pertinent part the statute reads as follows:

"(A) In any tort action, the defendant may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the damages that result from an injury, death, or loss to person or property that is the subject of the claim upon which the action is based, except if the source of collateral benefits has a mandatory self-effectuating federal right of subrogation, a contractual right of subrogation, or a statutory right of subrogation or if the source pays the plaintiff a benefit that is in the form of a life insurance payment or a disability payment. However, evidence of the life insurance payment or disability payment may be introduced if the plaintiff's employer paid for the life insurance or disability policy, and the employer is a defendant in the tort action.

"(B) If the defendant elects to introduce evidence described in division (A) of this section, the plaintiff may introduce evidence of any amount that the plaintiff has paid or contributed to secure the plaintiff's right to receive the benefits of which the defendant has introduced evidence.

"(C) A source of collateral benefits of which evidence is introduced pursuant to division (A) of this section shall not recover any amount against the plaintiff nor shall it be subrogated to the rights of the plaintiff against a defendant.

"\* \* \*"

17, 2006-Ohio-6362, 857 N.E.2d 1195, at ¶7. By enacting R.C. 2317.421,<sup>2</sup> the General Assembly has addressed "reasonable medical expenses." *Robinson v. Bates*, at ¶9. See also *Moretz v. Muakkassa*, 9th Dist. No. 25602, 2012-Ohio-1177, at ¶39, following *Robinson*. Ordinarily, courts require parties medical expenses with expert testimony. *Moretz v. Muakkassa, supra*, 2012-Ohio-1177, at ¶41. However, under the statute, a plaintiff's "[p]roperly submitted medical bills are *rebuttable evidence of reasonableness*." (Emphasis added.) *Robinson v. Bates*, at ¶9. Once the plaintiff creates the presumption of reasonableness, the defendant may rebut that presumption by presenting evidence that the amount billed is not reasonable. *Jaques v. Manton*, 125 Ohio St.3d 342, 2010-Ohio-1838, 928 N.E.2d 434, at ¶5. The *Jaques* court held that "[b]oth the original medical bill rendered and the amount accepted as full payment are admissible to prove the reasonableness and necessity of charges rendered for medical and hospital care." *Id.* at ¶15, quoting *Robinson* at ¶17. Courts refer to this difference between the original amount of a medical bill and the amount accepted by the medical provider as the bill's full payment as the so-called "write-off." *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.2d 1195, at ¶10. "[T]he *reasonable value* of medical services is a matter *for the jury to determine* from *all relevant evidence*." (Emphasis added.) *Jaques* at ¶15, quoting *Robinson* at ¶17. See also *Moretz v. Muakkassa*, 9th Dist. No. 25602, 2012-Ohio-1177, at ¶40, following and explaining *Jaques* and *Robinson*.

Thus, "the admissibility of [write-off] evidence is determined under the *Rules of Evidence*." (Emphasis added.) *Jaques* at ¶15. "Despite the \* \* \* holding in *Jaques* that [write-off]

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<sup>2</sup>R.C. 2317.421 reads in pertinent part as follows:  
 "In an action for damages arising from personal injury or wrongful death, *a written bill or statement, or any relevant portion thereof, itemized by date, type of service rendered, and charge, shall, if otherwise admissible, be prima-facie evidence of the reasonableness* of any charges and fees stated therein \* \* \*." (Emphasis added.)

evidence is relevant and admissible, there is no presumption or shortcut available to allow such evidence to be introduced without a *proper foundation*." (Emphasis added.) *Moretz v. Muakkassa, supra*, 2012-Ohio-1177, at ¶42. When a plaintiff creates the presumption of reasonable medical expenses by presenting proper medical bills, the defendant must present "competent expert [medical] testimony" to rebut the presumption. *Id.*

Based on the foregoing, the Court will order the parties to make no mention or presentation of write-offs or other similar items until a proponent makes a proper proffer at trial.

**JOURNAL ENTRY**

The Court hereby ORDERS that the plaintiff's motion in limine is granted. The Court further ORDERS that the parties to make no mention or presentation of write-offs or other similar items until a proponent makes a proper proffer at trial.

8/17/12

Myron C. Duhart  
Myron C. Duhart, Judge

Distribution: Guy T. Barone  
Ian R. Luschin  
Thomas M. Coughlin, Jr.

IN THE COURT OF COMMON PLEAS  
CIVIL DIVISION  
CUYAHOGA COUNTY, OHIO

BRIAN YEOMAN

Plaintiff

v.

BARBARA CLARK

Defendant

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CASE NO. CV 11-751485

JUDGE MICHAEL K. ASTRAB

OPINION and JUDGMENT ENTRY

*Michael K. Astrab, Judge:*

On or about January 31, 2012 Plaintiff Brian Yeoman filed a *Motion in Limine to Exclude Evidence of Payments Made by Collateral Source and Write-Offs or Insurance Adjustments*, seeking an Order from this Court prohibiting the introduction of any evidence or testimony primarily relating to payments received by the Plaintiff from Medical Mutual insurance company, and/or any references or other information that evidence to the trier of fact that the Plaintiff had health insurance.

The Plaintiff, in his motion and reply brief, is of the position that Ev.R. 403 trumps recent case law promulgated by the Supreme Court of Ohio regarding "write off" evidence in personal injury matters. Defendant posits that the Supreme Court decisions at issue are controlling and that evidence of the write-offs should be put in front of the jury for purposes of determining the reasonable cost of the medical care provided to the Plaintiff following his unfortunate meeting with the Defendant.

The debate between Plaintiff and Defendant in this matter is of seemingly great contention amongst attorneys and courts in Ohio. For a brief history, we first turn to the common law collateral source rule, which was established in Ohio by the Supreme Court decision of *Pryor v. Weber* (1970), 23 Ohio St.2d 104, wherein it was held that a plaintiff's receipt of benefits from third party sources (ie medical insurance) was irrelevant and immaterial to the issue of damages. The rule prevented the jury from learning about a plaintiff's third-party income so that the tortfeasor would not be given an advantage from the jury removing that income from consideration. See, *Pryor*, 23 Ohio

St.2d at 103. The gist of the collateral source rule was to ensure that a plaintiff was fully compensated and "made whole" by the tortfeasor. *Id.* at 104.

In 2005, the collateral source rule was statutorily abrogated by R.C. 2315.20, the substantive portions of which state as follows:

- (A) In any tort action, the defendant may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the damages that result from an injury, death, or loss to person or property that is the subject of the claim upon which the action is based, except if the source of collateral benefits has a mandatory self-effectuating federal right of subrogation, a contractual right of subrogation, or a statutory right of subrogation or if the source pays the plaintiff a benefit that is in the form of a life insurance payment or a disability payment. However, evidence of the life insurance payment or disability payment may be introduced if the plaintiff's employer paid for the life insurance or disability policy, and the employer is a defendant in the tort action.
- (B) If the defendant elects to introduce evidence described in division (A) of this section, the plaintiff may introduce evidence of any amount that the plaintiff has paid or contributed to secure the plaintiff's right to receive the benefits of which the defendant has introduced evidence.

Clearly, however, the General Assembly allowed for exceptions with regard to third parties holding subrogation rights over the injured parties. The issue of what constitutes a "benefit" soon rose to the forefront of the arguments. Of two primary cases argued by the parties in this action, the first came in 2006 in the form of **Robinson v. Bates** (2006), 112 Ohio St.3d 17, a case that did not specifically address the provisions of R.C. 2315.20 due to the fact that the injuries at issue accrued prior to the enactment of the legislation. The Syllabus of that decision stated:

1. Both an original medical bill rendered and the amount accepted as full payment are admissible to prove the reasonableness and necessity of charges rendered for medical and hospital care. (*Wagner v. McDaniels* (1984), 9 Ohio St.3d 184, 9 OBR 469, 459 N.E.2d 561, followed.)

2. Any difference between an original medical bill and the amount accepted as full payment for the bill is not a "benefit" under the collateral-source rule. 112 Ohio St.3d at 18.

The "write-off" issue is the primary point of contention in the Motion at issue herein. Speaking to write-offs, the Supreme Court rationalized that

[t]he written-off portion of a medical bill differs from the receipt of compensation or services addressed in *Pryor*. The collateral-source rule excludes only 'evidence of benefits *paid* by a collateral source'...because no one pays the write-off, it cannot possibly constitute *payment* of any benefit from a collateral source...Because no one pays the negotiated reduction, admitting evidence of write-offs does not violate the purpose behind the collateral-source rule. The tortfeasor does not obtain a credit because of payments made by a third party on behalf of the plaintiff. *Id.* at 22-23 (emphasis in original), quoting *Wentling v. Med. Anesthesia Servs., PA* (1985), 237 Kan. 503, 515.

The **Robinson** Court thus allowed exactly what the Defendant in this case hopes to present to the trier of fact – evidence showing that the Plaintiff received a write-off from his medical insurance carrier with regard to the medical treatment for the injuries at issue herein. It must be pointed out that the **Robinson** decision was written with regard to a case where each amount (actual vs. billed) was stipulated to by the parties and presented in that form to the jury. In the case at bar, no such stipulation exists.

A much more recent case is also cited by the parties. *Jaques v. Manton* (2010), 125 Ohio St.3d 342, re-visited the **Robinson** decision in light of R.C. 2315.20. The **Jaques** Court held that "the statute does not address evidence of such write-offs by medical providers, and, therefore, our holding in **Robinson** controls." 125 Ohio St.3d at 342.

The Court went into a detailed history of the arguments with regard to collateral sources and opined on the concerns of the plaintiff in that matter, which are the same concerns present before this Court today:

If a jury knows both the gross amount billed by a medical provider and the amount by which that provider agreed to reduce the bill, *Jaques* contends, the jury will deduce that the plaintiff had insurance coverage and apply simple subtraction to determine the collateral benefit...[W]e see no indication of those concerns in the language of the statute...A write-off indicates only that the provider accepted less than the amount originally billed for its services. While this may typically occur due to an insurance agreement, that is certainly not always the case. R.C. 2315.20 does not indicate a legislative intent to bar such evidence... 'whether plaintiffs should be allowed to seek recovery for medical expenses as they are originally billed or only for the amount negotiated and paid by insurance is for the General Assembly to determine.' *Id.* at 345, quoting *Robinson*, 112 Ohio St.3d at 23.

The **Jaques** Court, however, did not make this rule absolute. The very next paragraph leaves an "out" of sorts for the trial court, stating that "[b]ecause R.C. 2315.20 does not prohibit evidence of write-offs, the admissibility of such evidence is determined under the Rules of Evidence." *Id.*

The Plaintiff herein would have this Court look to Ev.R. 403 for guidance. Ev.R.403(A) provides that "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Clearly the evidence of write-offs in this matter is relevant (per Ev.R.401, "relevant" evidence is 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."). The question that this Court must face is whether or not to seemingly circumvent the Supreme Court of Ohio through the utilization of the Rules of Evidence.

Justice Pfeifer's dissent in **Jaques** is insightful:

R.C. 2315.20(A) answers the question before us: evidence of the amount payable may not be introduced, because the 'source of collateral benefits has a...contractual right of subrogation.' **Jaques** did not negotiate the write-off; neither did Manton. The provider of **Jaques**' medical care did not initiate the lesser payment. Who is left to be the source of the collateral benefits? It can only be **Jaques**' insurance company. It initiated and negotiated the write-off, and it has a contractual right of subrogation. Accordingly, evidence of the collateral benefits may not be introduced. It's not a very difficult question.

Justice Lundberg Stratton issued a concurring/dissenting opinion in **Robinson** that also addresses the issue at hand:

As the majority discussed, in this day and age of managed care and discounting of medical bills by insurers, the amount reimbursed often has little relation to the actual cost of the services. However, the actual amount billed is more reflective of the actual value of the services rendered, which juries often use as a benchmark in deciding the seriousness of the injuries. For example, a plaintiff incurs a medical bill for \$10,000 for medical care after a car accident. \*26 The \$10,000 bill is settled for \$2,000. However, claiming the plaintiff incurred only \$2,000 in treatment distorts the degree of medical care and physical damages actually incurred by the plaintiff and could diminish the seriousness of the plaintiff's injuries. 112 Ohio St.3d at 25-26.

IN THE COURT OF COMMON PLEAS  
LAKE COUNTY, OHIO

FILED

KEITH A. KING, et al.

2012 FEB 14 AM 8:55 CASE NO.: 10 CV 001132

Plaintiffs,

MAUREN G. KELLY JUDGE EUGENE A. LUCCI

-vs-

LAKE CO.  
CLERK OF COURT  
ORDER

JOHN A. COOPER, et al.

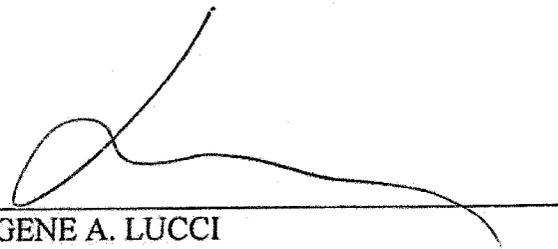
Defendants.

This matter is before this Court upon Plaintiffs' Motion in Limine re: Contractual Insurance "Write-offs".

Upon consideration, this Court finds said Motion well taken. Defendants are hereby precluded from referencing or introducing at trial any evidence regarding collateral source benefits received by the Plaintiff, including the amounts of contractual write-offs or adjustments.

Therefore, Plaintiffs' Motion in Limine re: Contractual Insurance "Write Offs" is hereby GRANTED.

IT IS SO ORDERED.



EUGENE A. LUCCI

cc: Mark A. DiCello, Esq.  
Joseph H. Wantz, Esq.

RECEIVED

FEB 15 2012

In the interest of full disclosure, Justice Lundberg Stratton did not dissent with the primary holding of the decision, in that evidence of write-offs can be introduced. Her point of contention was with the amount of recovery allowed to the plaintiff. This Court includes her words not to open up an argument regarding her position but to highlight the confusion and contention that exists even between members of the Supreme Court of Ohio with regard to collateral benefits and 2315.20.

A decision whether or not to admit evidence rests in the sound discretion of trial court, and will not be disturbed absent an abuse of that discretion. *See, Wightman v. Consolidated Rail Corp.* (1999) 86 Ohio St.3d 431. In the instant matter this Court is presented with a clear dilemma with regard to the admissibility of the write-off evidence. The Defendant's position that there is are "clear holdings" of the Supreme Court of Ohio and that this Court is bound to follow those holdings is misplaced. It is the position of this Court that there is an inherent conflict between R.C. 2315.20 and the *Robinson/Jaques* decisions, alluded to by the Supreme Court itself. The fact that the *Jaques* Court specifically stated that the admission of evidence of write-offs is to be undertaken in light of the Rules of Evidence is controlling to this Court. Evidence of write-offs is *evidence* and therefore this Court can determine whether or not Ev.R. 403 prohibits the admission.

The Court believes that, as echoed by other Judges in other courts, that the fact that write-off evidence will surely place in the minds of jurors an implication, if not an outright admission by omission, that insurance was held by the Plaintiff in this matter. There is clearly a subrogation agreement in place. R.C. 2315.20 forbids the introduction of evidence of third party payments when such an agreement is in place. The Court is of the position that the write-off evidence, if admitted, will lead to all three prongs of Ev.R. 403(A) being implicated. The evidence is clearly relevant. However, the Plaintiff's right to be made whole could be prejudiced through the disclosure of the write-off evidence in that the jury could very well become confused as to who is the responsible party and to whether or not the Defendant should be held to a lesser degree of responsibility because the Plaintiff had the foresight to maintain health insurance coverage. This Court wants this case tried on evidence that clearly shows that the Plaintiff was injured and that he incurred a set financial obligation as a result of the injuries. The fact that the jury could

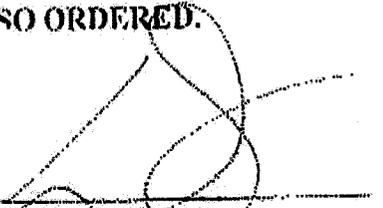
minimize his pain and suffering, or minimize the extent of actual injury, by introduction of the evidence of write-off, is a very real concern to this Court. The danger exists, in this Court's opinion, for the potential of a juror or jurors seeing a significant reduction in the medical bills and then drawing an inference that the medical procedures were unnecessary or that the injuries were exaggerated by the Plaintiff.

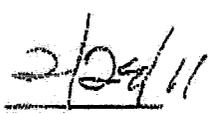
Generally, an assignee or subrogee of a claim stands in place of an assignor or subrogor and succeeds to all his rights and remedies. *Sec. Inter. Ins. Exchange of the Chicago Motor Club v. Wagstaff* (1945), 144 Ohio St. 457. By allowing only the itemized bills of the Plaintiff to be admitted showing the full amounts billed, the subrogor will be made whole, should the jury award damages in an adequate amount, and the Plaintiff will be able to present to the jury the full extent of the financial damage that he incurred as a result of the Defendant's negligence.

It is this Court's position that the exclusion of the write-off evidence pursuant to Ev.R.403(A) is proper in this matter and, as such, **GRANTS** the Plaintiff's Motion in Limine as to the following, subject to reconsideration at trial should the situation so warrant:

1. All collateral source information, including health benefits received by the Plaintiff and the amount the Plaintiff's health insurance company paid any healthcare provider are to be excluded from discussion or presentation;
2. Any and all insurance adjustment amounts or amounts written off by the third party insurance company are to be excluded from discussion or presentation;
3. Defendant and/or her attorney(s) are prohibited from mentioning or introducing evidence that the Plaintiff had health insurance that paid certain of his medical expenses or from mentioning the source of such payments and the amounts written off thereon by Plaintiff's health insurance company.

IT IS SO ORDERED.

  
JUDGE MICHAEL R. ASTRAB

  
DATE

**CERTIFICATE OF SERVICE**

A copy of the foregoing was sent via facsimile and First-Class U.S. Mail, postage pre-paid, this 29<sup>th</sup> Day of February, 2012, upon the following individual(s):

Scott A. Spero, Esq.  
526 Superior Avenue (East), Suite 440  
Cleveland, Ohio 44114-1900  
**Attorney for the Plaintiff**

And

Patrick M. Roche, Esq.  
600 Superior Avenue (East), Suite 1200  
Cleveland, Ohio 44114  
**Attorney for the Defendant**

  
\_\_\_\_\_  
**JUDGE MICHAEL K. ASTRAB**

  
\_\_\_\_\_  
**DATE**

COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO  
CIVIL DIVISION

FILED  
COMMON PLEAS COURT  
FRANKLIN COUNTY, OHIO  
2009 JAN -5 PM 12:55

Lorraine A. Dimitroff, et al.,

Plaintiff,

-vs-

Bryan T. Grishcow, D O, et al.,

Defendant.

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CLERK OF COURTS

CASE NO. 07CVA-01-103

JUDGE CONNOR

DECISION AND ENTRY

Rendered this 5<sup>th</sup> day of January, 2009.

CONNOR, JUDGE

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

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

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

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

EXHIBIT

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

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

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

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

R.C. 2315.20 states in pertinent part as follows: "In any tort action, the defendant may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the damages that result from an injury, death, or loss to person or property that is the subject of the claim upon which the action is based, except if the source of collateral benefits has a mandatory self-effectuating federal right of subrogation, a contractual right of subrogation, or a statutory right of subrogation or if the source pays the plaintiff a benefit that is in the form of a life insurance payment or a disability payment. However, evidence of the life insurance payment or disability payment may be introduced if the plaintiff's employer paid for the life insurance or disability policy, and the employer is a defendant in the tort action."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

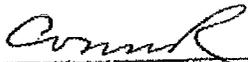
And in this way the plaintiff would receive a full and fair determination by a Jury as to the nature and extent of his/her injuries but without incurring a windfall as to what the actual payment of actual medical costs.

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

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

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

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

  
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JOHN A. CONNOR, JUDGE.

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LORAIN COUNTY COURT OF COMMON PLEAS  
LORAIN COUNTY, OHIO

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

Date 08/26/08

Case No. 08CV154436

GEORGE RIVERA  
Plaintiff

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

VS

LILLIAN I URBANSKY  
Defendant

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

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

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

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

R.C. 2315.20 states in relevant part:

"[T]he defendant may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the damages that result from an injury, death, or loss to person or property that is the subject of the claim upon which the action is based, except if the source of collateral benefits has a \* \* \* contractual right of subrogation \* \* \*." (Emphasis added.)

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

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

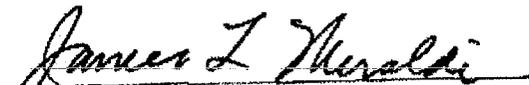




decipher insurance payment records, and reconciling provider bills with insurance statements. This extra paper work for the litigants, the providers, and the courts seems to create a potential for confusion in the courtroom with an inordinate amount of time spent on these issues before trial and during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

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

VOL \_\_\_\_ PAGE \_\_\_\_

  
James L. Miraldi, Judge

cc:

JEREMY M BURNSIDE  
JOSEPH T JOSEPH  
MICHAEL J SPETRINO



FILED  
LUCAS COUNTY

IN THE COURT OF COMMON PLEAS, LUCAS COUNTY, OHIO

Rachel Goney, et al.,

Plaintiffs,

vs.

Ryan Hill,

Defendant.

\* COMMON PLEAS COURT No. CI 06-5002  
\* BERNIE QUILTER  
\* CLERK OF COURTS

Judge Gary Cook

JOURNAL ENTRY

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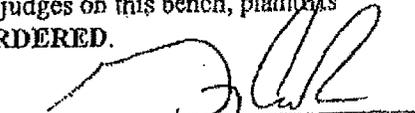
This case is before the Court on plaintiffs' motion in limine. A memorandum in opposition has been filed and the case is now decisional. Upon review of the pleadings, applicable law and arguments of counsel, the Court finds the motion should be granted.

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

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

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

Dated: 5-7-08

  
\_\_\_\_\_  
Gary G. Cook

