

ORIGINAL

CASE NO. 12-0797

**IN THE SUPREME COURT OF OHIO**

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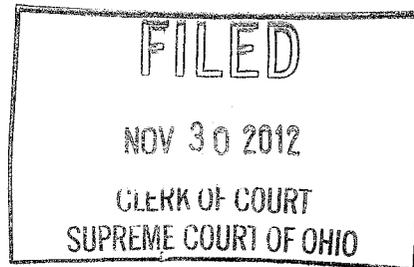
**APPEAL FROM COURT OF APPEALS  
NINTH APPELLATE DISTRICT  
SUMMIT COUNTY, OHIO  
CASE No. CA-25602**

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**LARRY J. MORETZ, et al.**  
Plaintiff-Appellees

v.

**KAMEL MUAKKASSA, M.D.**  
Defendant-Appellant



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**PLAINTIFFS-APPELLEES LARRY AND NICOLE MORETZES' MERIT BRIEF**

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## **I. STATEMENT OF THE CASE**

### **A. Introduction**

This case arises from a surgery that took place on September 28, 2005. Appellee, Larry Moretz, was referred to neurosurgeon Kamel Muakkassa, M.D. by his family doctor. (Tr.196). Larry had normal neurologic function before the surgery. (Tr. 178, 181). Dr. Muakkassa determined that Larry had an anterior sacral meningocele, a cyst within the nervous system. This is a neurological condition. Dr. Muakkassa met with Mr. and Mrs. Moretz and explained that he would be doing the surgery with the assistance of general surgeon, Gary Williams, M.D. Surgery was scheduled on September 28, 2005. Consent forms were signed for both doctors to perform the surgery. Dr. Williams agreed to proceed with the surgery with the understanding that Dr. Muakkassa would assist with the removal of the meningocele cyst within the nervous system. Dr. Williams understood he would open, do the manipulation of the tissues to expose the meningocele, and Dr. Muakkassa would scrub in and surgically remove the meningocele. When Dr. Williams exposed the meningocele he asked Dr. Muakkassa to scrub into the surgery. (Tr. 551, 552). At the point the meningocele was exposed, Dr. Williams asked Dr. Muakkassa to “scrub in” because he expected Dr. Muakkassa to physically participate in removing the meningocele from Larry’s nervous system. He said, “Hey, why don’t you scrub in?” Dr. Muakkassa refused. Dr. Williams has no idea why Dr. Muakkassa refused to scrub in. (Tr. 583). Dr. Williams completed the surgery with the advice and consent of Dr. Muakkassa. (Tr. 572).

Mr. Moretz woke up after surgery, impotent and incontinent because the neurosurgeon he hired, Appellant Kamel Muakkassa, M.D. failed to perform the neurosurgical aspects of the surgery, which would have allowed him to use neurosurgical techniques to avoid injury to the nerves responsible for controlling bowel, bladder, and sexual function. Mr. Moretz had an office

visit with Dr. Williams a few weeks after the surgery. Dr. Williams told Mr. Moretz that Dr. Muakkassa did not scrub into the surgery. This is the first time Mr. Moretz learned that Dr. Muakkassa did not scrub in to the surgical procedure.

Mr. Moretz had numerous appointments with urologists, neurologists and both surgeons who participated in the surgery. All Doctors agree that Mr. Moretz lost all bladder, bowel, and sexual function as a result of the surgery of September 28, 2005. Defense expert Dr. Mark McLaughlin testified multiple nerves were damage during the surgery. (Tr. 469). Dr. McLaughlin agrees Mr. Moretz has a permanent loss of bowel, bladder, and sexual function as a result of the injuries sustained during the surgery. (Tr. 469, 470). Dr. Muakkassa testified Mr. Moretz suffered injuries and damages as a result of the surgery. (Tr. 349). Dr. Williams agrees Mr. Moretz had bowel, bladder and sexual dysfunction as a result of the surgery. (Tr. 576).

Mr. Moretz filed suit against Dr. Williams and Dr. Muakkassa. The case was referred to mediation. Dr. Muakkassa's insurance representative, Linda Gorjub from Pro Assurance, Dr. Muakkassa's liability insurance company, attended the mediation. Pro Assurance reserved the Moretz case at one million dollars based on the injuries and damages sustained by Mr. and Mrs. Moretz. (See defense motion to supplement record w/ PJI hearing P 21, 25, 37). Despite this reserve, Pro Assurance decided not to make an offer of settlement or even participate at the mediation. Dr. Williams settled at mediation. Dr. Williams was dismissed from the case on May 27, 2009, over one year before trial.

A Summit County jury returned a verdict in favor of Mr. and Mrs. Moretz in the amount of \$995,428.73. This verdict was reduced by \$39,600.00 pursuant to the statutory cap and further reduced by \$195,400.00 as a set-off due to the settlement with the co-defendant.

Dr. Muakkassa appealed to the Summit County Court of Appeals on September 24, 2010.

On March 21, 2012 the Court of Appeals ruled in the Moretz's favor on all issues except for a slight recalculation of prejudgment interest. On May 7, 2012 Dr. Muakkassa appealed to this Court. On May 13, 2012 Dr. Muakkassa died. On July 25, 2012 the Court accepted jurisdiction on Proposition of Law No. IV. On August 6, 2012 Appellant filed a Motion for Reconsideration to accept jurisdiction on Proposition of Law Nos. I, II, and III. On September 21, 2012 this Court ruled the Appeal was accepted on Propositions of Law Nos. I, II and III.

**B. Procedural history**

This case began on March 16, 2007 when Larry and Nicole Moretz ("Appellees") filed a medical negligence Complaint against Kamel F. Muakkassa, M.D., Gary B. Williams, M.D., and Gary B. Williams, M.D., Inc. Dr. Williams and Gary B. Williams, M.D., Inc. filed their Answer on April 18, 2007 and Dr. Muakkassa filed his Answer on April 20, 2007. The case was referred to mediation and Dr. Williams settled the claim. Dr. Williams was dismissed on May 27, 2009, over one year before trial.

Dr. Muakkassa's defense counsel and liability insurance representative attended the mediation but chose not to participate. Pro Assurance valued and reserved the Moretz case at one million dollars based on its investigation into the injuries sustained by Mr. and Mrs. Moretz. (See defense motion to supplement record w/ PJI hearing P 21, 25, 37). Despite this reserve Pro Assurance decided to go to trial. Pro Assurance would not have settled this case for any amount, not \$100,000, not \$10,000 or even one dollar. (See defense motion to supplement record w/ PJI hearing P 35, 37, 51). Pro Assurance never would have settled this case for any number. (See defense motion to supplement record w/ PJI hearing P 35, 37, 51).

At trial, the Appellees testified on their own behalf and presented videotaped trial testimony of expert witness, Dr. Gary Dennis. The Appellant, Dr. Muakkassa testified, as did

former defendant, Dr. Gary Williams, and Appellants' expert witness, Dr. Mark McLaughlin. On July 19, 2010, the jury returned a verdict in favor of Appellees in the amount of \$995,428.73. The Trial Court reduced the verdict by \$39,600 pursuant to the statutory cap on pain and suffering and further reduced the verdict by \$195,400 as a set-off due to the settlement with Dr. Williams. The Trial Court, after a hearing, awarded prejudgment interest to the Appellees.

Dr. Muakkassa appealed to the Summit County Court of Appeals on September 24, 2010. On March 21, 2012 the Court of Appeals ruled in the Moretz's favor on all issues except for a slight recalculation of prejudgment interest. The ruling is as follows:

The Summit County Court of Appeals affirms in part because the trial court (1) exercised proper discretion in determining there was good cause to permit a later filing of the Moretz's expert's deposition under Rule 32(A) of the Ohio Rules of Civil Procedure, (2) correctly refused to submit a narrative jury interrogatory, (3) properly determined that Evidence Rule 803(18) would not operate to exclude a medical illustration taken from a textbook, (4) properly admitted Mr. Moretz's medical bills and expert testimony about their reasonableness, and (5) properly excluded evidence of write-offs from medical bills in the absence of a proper foundation and because (6) Dr. Muakkassa did not demonstrate prejudicial error in the trial court's exclusion of evidence about Dr. Williams's settlement, (7) Section 1343.03(C) of the Ohio Revised Code is not unconstitutional, and (8) the trial court properly exercised discretion in determining that Dr. Muakkassa did not make a good faith effort to settle the claims against him. This Court reverses the judgment in part and remands this matter for recalculation of prejudgment interest because the trial court should have calculated interest on the verdict after it was reduced by the amount of Dr. Williams's settlement. (See Appellate Court Judgment Entry).

On May 7, 2012 Dr. Muakkassa appealed to this Court. On May 13, 2012 Dr.

Muakkassa died. On July 27, 2012 this Court accepted the appeal on Proposition of Law No. IV only. On September 21, 2012 this Court granted the Appellant Motion for Reconsideration and accepted the appeal on Propositions of Law Nos. I, II, and III. On October 31, 2012 the Merit Brief of Defendant-Appellant Kamel Muakkassa, M.D. was filed.

The first evidentiary ruling is the subject of Proposition of Law No. I. The Appellate Court upheld the Trial Court's ruling allowing Appellees' introduction of the video trial testimony of their expert witness, Dr. Gary Dennis. The videotaped trial testimony was properly noticed and Appellant's counsel was present and cross-examined the witness. The sole objection to the use of the videotape was it was not filed with the Trial Court in a timely manner. The Appellant was not prejudiced. Had the objection been sustained the plaintiffs would have called Dr. Gary Dennis to testify in person.

The second evidentiary ruling is the subject of Proposition of Law No. II. The Appellate Court upheld the Trial Court's admitting an illustration of a meningocele, Exhibit 36, into evidence. The illustration came from an authoritative treatise but contained no text. The Appellate Court found the Trial Court, within her sound discretion, admitted Exhibit 36 into evidence reasonably concluding that its admission was appropriate.

The third ruling is the subject of Proposition of Law No. III. The Appellate Court upheld the Trial Court's refusal to submit an improper narrative jury interrogatory regarding the Appellees' sole claim of medical negligence against Dr. Muakkassa. The jury interrogatory used for negligence and proximate cause was taken directly from OJI.

The final evidentiary ruling is the subject of Proposition of Law No. IV. The Appellate Court upheld the Trial Court's ruling granting Appellees' Motion *in Limine* Concerning the Reasonable Value of Medical Bills. The Trial Court granted the Motion, but it did not preclude

the Appellant from introducing evidence concerning the reasonable value of medical bills or the write-offs. The Appellant failed to present expert testimony on this issue even though he called a billing specialist in his case in chief, Joanne Smith. She was qualified. She had the credentials, knowledge and experience to discuss this issue and admit the reasonable value of medical bills or write-offs as evidence for the jury's consideration. Appellant failed to raise the issue of the reasonable value of medical bills or write-offs with this billing specialist, therefore, it was waived. The Appellant failed to present expert testimony on this issue even though he called a billing specialist in his case in chief, Joanne Smith. (Tr. 351). Ms. Smith was deposed before trial. At trial, defense counsel questioned Mrs. Smith regarding Dr. Muakkassa's billing procedures. (Tr. 351-363). Ms. Smith had special knowledge of Summa Care, the Moretzes' health insurance company involved in this case. Her job description was to take care of all special requests from health care insurance companies, all denials from health care insurance companies, and any adjustments to the medical bill. This testimony verifies defense counsel had an appropriate witness to discuss the write-offs on the medical bills in this case.

Defense counsel had a witness that was qualified to discuss the reasonable value of the medical bills and write-offs in this particular case and with this particular health care insurance company. The witness testified at trial. Defense counsel qualified her as a billing specialist and laid a foundation that she was familiar with Summa Care and its billing procedures including adjustments to the medical bills at issue in this trial. Counsel chose not to ask her about the reasonable value of the medical bills and write-offs.

The reasonable value of the medical bills and write-offs were not addressed because the case was tried on liability and proximate cause. The defense never addressed the economic or non-economic damages in this case. This case was tried on liability and proximate cause, not

damages. Appellant failed to raise the issue of the reasonable value of medical bills or write-offs with this billing specialist; therefore, it is waived as to this trial.

## II. STATEMENT OF FACTS

The Defendant-Appellant claims “[a]ny injuries in this case could not have logically been caused by anything Dr. Muakkassa did or did not do because Dr. Muakkassa was not an acting participant in the surgery at issue. (Appellant brief at Page 1). This is a blatant misrepresentation of the facts of this case. Dr. Muakkassa was an active participant in Larry Moretz’s surgery.

Dr. Muakkassa was consulting, evaluating and advising Dr. Williams during Larry’s surgery. The trial testimony proved that Dr. Muakkassa was an active participant in the Larry’s surgery. Dr. Muakkassa testified he was there to make sure the meningocele cyst was closed. (Tr. 336). The anesthesia team listed Dr. Muakkassa as a surgeon of record in this case. (Tr. 142, 162,163). Dr. Muakkassa admits he was a consulting surgeon during the Moretz surgery. (Tr. 161, 164). Dr. Muakkassa was evaluating Larry Moretz during the surgery. (Tr. 175). When Dr. Muakkassa was in the operating room looking into the operative field he made sure it was safe for Dr. Williams to proceed and do what he was doing. (Tr. 175, 176). Dr. Muakkassa assisted Dr. Williams by looking for nerves in the surgical field. (Tr. 181, 182).

The defense expert, Dr. McLaughlin, testified Dr. Muakkassa was in the operating room as an advisor. (Tr. 339). Dr. McLaughlin agrees the operative record names Dr. Muakkassa as a surgeon. (Tr. 425). Dr. McLaughlin testified Dr. Williams was correct to assume Dr. Muakkassa may scrub in to the Moretz surgery at some point. (Tr. 439). Dr. McLaughlin would have scrubbed into the Moretz surgery if he had been involved in the case. (Tr. 435). Dr. Muakkassa was an advisor to Dr. Williams during the surgery. (Tr. 437). Dr. Muakkassa was evaluating what was going on during Larry's surgery. (Tr. 439, 440). Dr. Muakkassa was looking into the surgical field assuring that it was safe for Dr. Williams to proceed and do what he was doing.

(Tr. 440). Dr. McLaughlin told the jury Dr. Muakkassa should have scrubbed in when asked by Dr. Williams. (Tr. 465). Dr. McLaughlin testified if Dr. Muakkassa refused to scrub in it would be a violation of the standard of care. (Tr. 465, 475). Dr. McLaughlin testified it is a deviation from the standard of care to tell the patient that you were going to do their surgery and allow someone else to do it. (Tr. 465).

The medical record verifies that Dr. Williams and Dr. Muakkassa would be co-surgeons in the Moretz case. (Tr. 582). Dr. Williams testified he and Dr. Muakkassa worked together during the Moretz surgery. (Tr. 542). Dr. Muakkassa assisted Dr. Williams with the surgical technique used during the surgery. Dr. Muakkassa assured Dr. Williams the surgical technique was appropriate. (Tr. 550, 552). Dr. Muakkassa served as a consulting surgeon in the operating room. (Tr. 581). Dr. Williams performed the surgery with the advice and counsel of Dr. Muakkassa. (Tr. 572). Dr. Williams and Dr. Muakkassa were the surgical team that participated in the surgery. (Tr. 573). Dr. Muakkassa advised Dr. Williams on the neurological aspects of the surgery. (Tr. 573). Dr. Muakkassa advised Dr. Williams the surgery was going fine. (Tr. 573, 574). Dr. Muakkassa was present and observing the procedure at crucial times relative to the removal of the meningocele. (Tr. 584).

Defense counsel Mr. Treadon admitted during trial Dr. Muakkassa was an active participant in the Moretz surgery. Counsel stated:

“The point is we can talk about co-surgeons, we can talk about communication all we want. The truth of the matter is, on September 28, 2005, Dr. Muakkassa was in the operating room, gowned and masked when the crucial part of this surgery was done.” (Tr. 652). “At the critical point of the procedure, Dr. Muakkassa is there. He says, "I don't see any nerves because I don't believe there's any nerves there. We're not anywhere near the spinal cord. The spinal

cord is up here." (Indicating.) So nobody sees any nerves." (Tr. 663).

This is not a surgery performed completely by another physician. This surgery was performed with the advice and consent of Dr. Muakkassa acting as a consulting surgeon. At trial, all parties, witnesses and both counsel agreed Dr. Muakkassa was an "active participant" in the surgery.

In his brief Appellant understates the injuries resulting from the surgery. He also misquotes the trial record. Appellant states that post-operatively Mr. Moretz had difficulty voiding....Subsequently, Mr. Moretz had neurapraxia involving his bladder and rectum, which is a mild type of focal nerve lesion which causes certain deficits. Mr. Moretz's bladder was not functioning and he was diagnosed with a neurogenic bladder and impotence. (Appellant brief at Page 13 referencing TR. 83-84).

At Pages 83 and 84 of the transcript Mrs. Moretz is discussing her husband's injuries. Mrs. Moretz is not a doctor. She is a school teacher. She is not qualified to give medical diagnosis. She also did not provide the testimony attributed to her in the Appellant's brief. Her testimony is as follows:

Q. Okay. Now let's talk a little bit about after the surgery. What was Larry's condition right after the surgery?

A. Like what?

Q. Was he in pain?

A. Oh, yes.

Q. Was anything working? Were any of his three systems working?

A. No.

Q. And what I mean by "three systems," of course, the bladder, the bowel -- let's just

talk about that. And this is right after the surgery.

A. Right.

Q. Was anything working?

A. No.

Q. Okay. Currently what's Larry's current condition regarding his bowel function?

A. He has to wear Depends. He has to catheterize.

Q. And we're just talking about his bowel.

A. Oh, sure.

Q. That's okay. It's okay. I know you're nervous.

A. He has –

THE COURT: There are some tissues.

THE WITNESS: Thank you.

A. He has no control over them at all.

BY MR. AMADDIO:

Q. Does he often soil himself?

A. Yes.

Q. What's Larry's current condition regarding his bladder function?

A. He has to catheterize about four or five times a day.

Q. And that's a process in which he literally drains the urine from your bladder, correct?

A. Yes.

Q. Again, I know this is private, but because of the injuries I need to ask you a couple of more questions about your sex life since the surgery, is that okay?

A. Yeah.

Q. What is Larry's current condition regarding his sexual function?

A. He can't get an erection. Sorry.

Q. It's okay. Take your time.

A. Nothing -- you know, we haven't had sex since the operation and --

(TR P 83 L 2 to 85 L 1).

Appellant has misrepresented the testimony at pages 83 and 84 of the trial transcript. Appellant has misrepresented the injuries suffered by Mr. Moretz as a result of the surgery. Mr. Moretz's injuries are significant and devastating. Mr. Moretz has lost all bowel, bladder and sexual function.

All witnesses who testified at trial, including the defense expert, agree Mr. Moretz lost bladder, bowel, and sexual function as a result of the surgery of September 28, 2005. No one testified that the injuries occurred "subsequent" to the surgery. Defense expert Dr. Mark McLaughlin testified multiple nerves were damaged during the surgery. (Tr. 469). Dr. McLaughlin agrees Mr. Moretz has a permanent loss of bowel, bladder, and sexual function as a result of the injuries sustained during the surgery. (Tr. 469, 470). Dr. Muakkassa agrees Mr. Moretz suffered injuries and damages as a result of the surgery. (Tr. 349). Dr. Williams testified Mr. Moretz had bowel, bladder and sexual dysfunction as a result of this surgery. (Tr. 576). Since trial, Mr. Moretz had had numerous surgeries including a permanent colostomy. He has attempted to regain the lost function to his systems. Despite the numerous procedures Mr. Moretz has not regained these functions. His damage is permanent. His additional medical bills expended and lost wages since the trial are in excess of \$500,000.00.

### III. LAW AND ARGUMENT

#### A. THE TRIAL COURT PROPERLY ALLOWED THE SUBMISSION OF VIDEOTAPED TRIAL TESTIMONY

The Trial Court did not abuse her discretion by allowing the Moretzes to present expert witness testimony via videotape. Dr. Muakkassa was not prejudiced by the Trial Court's admission of the deposition. The Court of Appeals correctly pointed out "if the trial court had sustained the objection to the use of the deposition, the Moretzes would have moved heaven and earth to secure Dr. Dennis's live testimony before resting their case." (Appellate Court decision at ¶10).

The purpose of the filing requirement in Civil Rule 32 is to put opposing parties on notice that the deposition testimony might be used in evidence. Dr. Muakkassa was on notice that Dr. Dennis's videotaped trial testimony would be used in evidence at trial. One month before trial, the Moretzes filed a "Notice of Videotaped Trial Testimony of Gary C. Dennis, M.D." that provided notice to Dr. Muakkassa of the use of the videotaped trial testimony as evidence in the trial. Five days before trial the lawyers traveled to Louisiana to videotape the deposition of Dr. Dennis. Dr. Muakkassa was not surprised at trial that the Moretzes intended to use the videotaped deposition of his expert rather than calling Dr. Dennis live. Dr. Muakkassa was not prejudiced by the use of the videotaped trial testimony of Dr. Dennis.

The Appellate Court agreed and held "Rule 32 was not designed to facilitate a technical victory by avoiding a decision on the merits. In this situation, the trial court exercised proper discretion in determining there was good cause to permit a later filing. Civ. R. 32(A). Dr. Muakkassa's first assignment of error is overruled." (Appellate Court decision at ¶10).

The admission of evidence is within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St. 3d 173. The standard of review for admissibility of evidence is abuse of

discretion. *See, Peters v. Ohio State Lottery Comm.* (1992), 63 Ohio St. 3d 296. An “abuse of discretion” means more than an error of law or judgment. Rather, an abuse of discretion means that the court’s decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, citing *State v. Adams* (1980), 62 Ohio St. 2d 151.

The Appellant failed to prove the Trial Court’s decision to allow the videotaped testimony was unreasonable, arbitrary, or unconscionable. The Trial Court acted reasonably when she allowed the trial testimony to be submitted via videotape.

**B. APPELLANT FAILED TO DEMONSTRATE THE ADMISSION OF EXHIBIT 36 WAS AN ABUSE OF DISCRETION AND/OR THAT HE WAS MATERIALLY PREJUDICED THEREBY**

Appellant argues the Trial Court committed reversible error when she admitted into evidence a copy of an illustration of a cyst, Exhibit 36, to which his own expert referred when testifying on his behalf. The illustration originated in an authoritative text authored by Dr. Benzel. (Tr. 455-456). Appellant’s expert witness, Dr. Mark McLaughlin, testified Exhibit 36 is an illustration of a typical anatomic scenario regarding a congenital anterior sacral meningocele. (Tr. 457). Exhibit 36 was, therefore, properly identified and authenticated.

Appellant argues Dr. Muakkassa and Dr. McLaughlin dispute Mr. Moretz had a sacral meningocele. Dr. Muakkassa testified on cross that Mr. Moretz had a meningocele. (Tr. 347). Dr. McLaughlin testified the surgical approach and the standard of care in this case is the same whether it is a sacral mass or sacral meningocele. (Tr. 428). Dr. McLaughlin identified the mass as a neurenteric cyst. (Tr. 387). When he was discussing exhibit 36 Dr. McLaughlin stated the drawing depicted an anterior sacral meningocele. He then agreed that a neurenteric cyst can look “very similar” to the anterior sacral meningocele depicted in exhibit 36. He testified:

Q. And this text that you indicated was authoritative at figure 83.1 has what they call an illustration of a typical anatomic scenario regarding a congenital anterior sacral meningocele,

correct?

A. Yes.

Q. And in this authoritative text don't they show nerve roots here stretched over the sac?

A. Yes, they do.

Q. You wouldn't disagree that that is what can occur, do you?

A. No, that is what can occur. And a neurenteric cyst can look very similar to that. (Tr. 457-458).

The admission of Exhibit 36 was proper and appropriate. Exhibit 36 is a copy of an illustration of a meningocele. The treatise from where the illustration originated was not admitted into evidence. No text was admitted into evidence. The only thing admitted into evidence was a copy of the illustration of the meningocele.

Dr. Muakkassa has argued since exhibit 36 comes from a learned treatise, it is hearsay subject to that exception. The illustration contained in exhibit 36 accurately depicts an anterior sacral meningocele. Dr. McLaughlin agrees the illustration contained in exhibit 36 accurately depicts an anterior sacral meningocele. (Tr. 457). Dr. McLaughlin believes Mr. Moretz had a neurenteric cyst, not a sacral meningocele. He then testified a neurenteric cyst can look "very similar" to the anterior sacral meningocele depicted in exhibit 36.

The Appellant argues without an opposing illustration, the jury was given an actual medical textbook illustration of what Appellees claimed reflected Mr. Moretz's condition. This argument fails in two ways. First, Appellants failed to introduce a drawing of their version of Mr. Moretz's condition so they cannot now complain the jury failed to get it. Second, their expert testified a neurenteric cyst can look "very similar" to the anterior sacral meningocele depicted in exhibit 36, so there was no abuse of discretion in allowing the jury to see it.

“The illustration is not hearsay, and Rule 803(18) should not operate to exclude the illustration from the jury’s consideration during deliberations. In this case, the treatise was not taken into the jury room to be potentially misconstrued by jurors interpreting a medical textbook without the help of an expert. Dr. Muakkassa did not dispute the accuracy of the medical illustration or the author’s basis for drawing it a certain way. In fact, his own expert vouched for the accuracy of it. Hearsay was Dr. Muakkassa’s only basis for objecting to the jury considering the exhibit during deliberations. The trial court properly determined that Evidence Rule 803(18) would not operate to exclude the illustration.” (Appellate Court decision at ¶25).

The admission of evidence is within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St. 3d 173. The standard of review for admissibility of evidence is abuse of discretion. *See, Peters v. Ohio State Lottery Comm.* (1992), 63 Ohio St. 3d 296. An “abuse of discretion” means more than an error of law or judgment. Rather, an abuse of discretion means that the court’s decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, citing *State v. Adams* (1980), 62 Ohio St. 2d 151.

“[A]n abuse of discretion involves far more than a difference in ...opinion... The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an “abuse” in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of the will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.” *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St. 3d 83, 87, 482 N.E. 2d 1248, quoting *State v. Jenkins* (1984), 15 Ohio St. 3d 164, 222, 473 N.E. 2d 264.

This Court has held that “[s]ending properly admitted evidence into jury deliberations rests within the sound discretion of the trial judge.” *State v. McGuire*, 80 Ohio St. 3d 390, 396 (1997). Here the Appellant’s own expert vouched for the accuracy of this depiction of the anomalous anatomical condition the plaintiff sought to prove that he had. As the exhibit was

authenticated and relevant, it was admissible at the discretion of the trial court unless prohibited by some other rule or statute. Evid. R. 402. (Appellate Court decision at ¶22).

Again, the Appellant failed to show the Trial Court's decision to admit the drawing contained in exhibit 36 was unreasonable, arbitrary, or unconscionable. The Trial Court acted reasonably when she allowed the admission of exhibit 36 into evidence.

**C. THE TRIAL COURT PROPERLY EXCLUDED THE PROPOSED NARRATIVE JURY INTERROGATORY PROPOSED BY THE APPELLANT**

The Appellant claims the Trial Court incorrectly refused to give a narrative jury interrogatory he requested. The proposed jury interrogatory was “[s]tate the respect in which you find Kamel Muakkassa was negligent.” Appellant argues more than one negligent act was alleged by plaintiffs. Appellant argues failure to scrub in, use magnification, and use nerve stimulation were separate acts of negligence. The evidence proved Dr. Muakkassa did not perform the neurosurgical aspects of the surgery, which would have allowed him to use neurosurgical techniques to avoid injury to the nerves responsible for controlling bowel, bladder, and sexual function. The Trial Court correctly determined that the Moretzes’ allegations boiled down to one act of negligence which was failing to use neurosurgical techniques to avoid injury to nerves controlling bowel, bladder, and sexual function.

The Court of Appeals held:

[t]here is no evidence that Dr. Muakkassa could have used either magnification or nerve stimulation techniques without scrubbing in to the procedure. As the evidence suggests that Dr. Muakkassa was criticized for not physically participating in the surgery, which would have allowed him to use magnification and nerve stimulation techniques to avoid injury to the nerves responsible for controlling bowel, bladder, and sexual function, the trial court correctly determined that the Moretzes’ allegations boil down to one act of negligence. Therefore, the

proposed narrative interrogatory would not have been appropriate in this case. (Appellate Court decision at ¶16).

A jury interrogatory may be directed to one or more determinative issues, whether issues of fact or mixed issues of fact and law. Ohio R.Civ.P. 49(B). The purpose of this rule is to allow a trial court to review the answers to the interrogatories in conjunction with the general verdict to determine if any inconsistencies exist. *Id.* The function of a jury interrogatory is to test the correctness of a general verdict by asking the jury to disclose its opinion on determinative issues in a case based upon trial evidence. *Cincinnati Riverfront Coliseum, Inc. v. McNulty, Inc.* (1986), 28 Ohio St.3d 333, 336-337. A trial court is not required under all circumstances to submit a proposed interrogatory to the jury. A trial court has discretion to reject interrogatories if they do not refer to a determinative issue or they are ambiguous, confusing, incomplete, redundant, or otherwise legally objectionable. *Ramage v. Central Ohio Emergency Service, Inc.* (1992), 64 Ohio St.3d, 97, 107-108. A trial court's decision to admit or reject a proposed jury interrogatory is reviewed under the abuse of discretion standard. *Freeman v. Norfolk & Western Ry. Co.* (1994), 69 Ohio St.3d, 611, 614.

The court in *Ramage* reviewed a trial court's rejection of a jury interrogatory that asked the jury to "[s]tate below specifically the manner in which defendants . . . were negligent in the care and treatment of the plaintiff. . . ." *Id.* at 106. The trial court's rejection of the interrogatory was upheld because only one act of negligence was alleged against the defendants who sought the interrogatory. The court explained that the interrogatory had no function since the determinative issues and the issues submitted to the jury for its verdict were identical. *Id.* at 108. This holding is consistent with the procedure established by the Supreme Court before the adoption of the Civil Rules. See *Bradley v. Mansfield Rapid Transit, Inc.* (1950), 154 Ohio St.

154, 160 (holding that defined proper interrogatories are those that will lead to “findings of such a character as will test the correctness of the general verdict returned and enable the court to determine, as a matter of law, whether such verdict shall stand”). A properly drafted interrogatory must elicit a statement of facts from which a conclusion of negligence or no negligence may be drawn. An interrogatory that is merely probative or evidentiary in nature, and does not touch on an ultimate issue is improper. *Id.* at 161. A trial court properly refuses to submit interrogatories that are improper in form or content. For example, an interrogatory that inquires only whether there was actual notice is improper when the plaintiff may prove actual or constructive notice. *Riley v. Cincinnati* (1976), 46 Ohio St.2d, 287, 299. Likewise, an interrogatory that asks for a conclusion that is not a legitimate issue is improper. A court may properly reject an interrogatory that asks whether a defendant physician was a hospital employee, when the hospital’s liability depends on the acts and status of its nurses, not those of the doctor. *Ramage* at 108.

The structure of Civil Rule 49 places the burden on the parties themselves to propose proper interrogatories. If a trial court rejects a proposed interrogatory, a party may re-submit the interrogatory in an amended form. *Riley*, 46 Ohio St.2d at 289. Civil Rule 49 does not obligate a trial court to actively assist a party in reformulating improper interrogatories. The court’s duty is to submit proper interrogatories and reject them for proper reasons. *Cincinnati Riverfront Coliseum v. McNulty* (1986), *supra*.

In *Moretz*, the Appellant was given the opportunity to revise his proposed interrogatory but insisted on an all or nothing approach. The Appellant had the obligation to more carefully tailor his proposed interrogatory and his failure to do so prohibits him from assigning the Trial Court’s decision as error.

The Trial Court properly exercised her discretion to keep out the narrative jury interrogatory proposed by the Appellant. The issue is whether the Trial Court abused her discretion in excluding the jury interrogatory. This is a far more limited inquiry than suggested by the Appellant.

Dr. Muakkassa's negligence was his failure to perform the neurosurgical aspects of the surgery. This would have allowed him to use neurosurgical techniques to avoid injury to the nerves responsible for controlling bowel, bladder, and sexual function. The physician who conducted the procedure, Dr. Williams, testified he was not qualified to perform neurosurgery and was not trained in the treatment of meningoceles. (Tr. 571, 572). Dr. Williams testified he and Appellant were a team and "[i]f there was something he should be doing in Larry's case from a neurological standpoint, that Dr. Muakkassa would let him know." (Tr. 573). Dr. Williams also testified that a surgeon cannot touch the surgical field unless he "scrubs in," and proper medical technique requires a surgeon to "scrub in" before touching the surgical field. (Tr. 578). In fact, he asked Appellant to scrub in as he was beginning to expose the meningocele. (Tr. 578-579). Dr. Williams' request to Appellant was based upon his understanding that Appellant "would be scrubbing in" and the patient understood Appellant was going to scrub in and participate. (Tr. 578).

The Appellant's expert, Dr. Mark McLaughlin, conceded on cross-examination the medical record established Appellant and Dr. Williams would be working together on the surgery, "It doesn't say co-surgeon there, but it gives the impression that he will be available if there is a problem or they – there is something that needs to be done with the spinal cord or the nervous system." (Tr. 429). Dr. McLaughlin also conceded, in reviewing Appellees' trial Exhibit 12, that Dr. Williams needed to coordinate the surgery schedule with Dr. Muakkassa's

schedule so that they could both be present during the surgery. (Tr. 431). This testimony is consistent with the consent form signed by Mr. Moretz before surgery. The consent form contains both doctors' names as surgeons. (Tr. 432). The anesthesia record reflects that both Dr. Williams and Dr. Muakkassa were listed as surgeons for the procedure. (Tr. 434, 435). The Appellant's expert, Dr. McLaughlin conceded if he were involved in Mr. Moretz's surgery that it was more likely than not, that he would have scrubbed in to assist. (Tr. 435). Dr. McLaughlin testified if Dr. Muakkassa refuse to scrub in it would be a violation of the standard of care. (Tr. 465, 475). Dr. McLaughlin testified it is a deviation from the standard of care to tell the patient that you were going to do their surgery and allow someone else to do it. (Tr. 465).

The testimony of Dr. Williams and Dr. McLaughlin illustrate Dr. Muakkassa's negligence was his failure to perform the neurosurgical aspects of the surgery which would have allowed him to use neurosurgical techniques to avoid injury to the nerves responsible for controlling bowel, bladder, and sexual function. The negligent act was Appellant's failure to perform the neurosurgical aspects of the surgery as he promised the general surgeon and Mr. Moretz. This resulted in nerve damage to Mr. Moretz and the horrible injuries that will affect him for the rest of his life.

The drafters of Ohio Jury Instructions likewise recognized "[t]he troublesome problem of an interrogatory requiring a narrative report that amounts to a separate finding of particular facts." OJI CV 101.41. The drafters concluded that having a jury report findings of particular facts that constitute a lack of ordinary care imposes a difficult and unfamiliar obligation. There will always be cases of failure to use ordinary care in which jurors, like judges and lawyers, find it impossible to state separately all the particular facts and circumstances involved. The drafters concluded that "[i]mposing this duty to delineate the particular facts and expansion of the rules

beyond the determinative issues and revives a troublesome problem of code pleading and special verdicts.” OJI CV 101.41 at p. 18.

The jury interrogatories crafted by the Ohio Judicial Conference and set forth in OJI Chapter 417.17 are required in all medical negligence cases. These interrogatories are directed to negligence, proximate cause, economic loss, non-economic loss, past and future damages. OJI CV 417.17. The Ohio Judicial Conference’s creation of these uniform jury interrogatories was necessary to alleviate the problem of the patchwork of interrogatories in use throughout the State. These uniform jury interrogatories do not include an interrogatory asking the jury to specifically determine the negligent act.

The jury interrogatory crafted by the Ohio Judicial Conference required in all medical negligence cases is as follows:

**CV 417.17 Interrogatories (claims arising on and after 4/11/03) [Rev. 10-11-08]**

**WAS THE DEFENDANT NEGLIGENT AND DID THAT NEGLIGENCE DIRECTLY AND PROXIMATELY CAUSE ANY (INJURY) (DAMAGES) TO THE PLAINTIFF? (See OJI 417.17).**

The jury interrogatories in the Moretz case conformed verbatim to these interrogatories provided by OJI for medical negligence cases. The Trial Court properly exercised her discretion to keep out the narrative jury interrogatory proposed by the Appellant.

**D. APPELLANT’S PROPOSITION OF LAW NO. 4 IS BASED ON A MISSTATEMENT OF THE TRIAL COURT’S RULING, LACKS MERIT, AND WAS NOT PROPERLY PRESERVED ON APPEAL**

- 1. The Ninth District Court of Appeals Properly Upheld the Trial Court’s Decision to Grant the Motion in *Limine* Regarding the Evidence of “Write-offs” of Medical Bills Unless Supported by Expert Testimony.**

Dr. Muakkassa argues that the Court of Appeals improperly upheld the Trial Court's ruling granting the motion in *limine*. A motion in *limine* is a preliminary request for the trial court to exclude certain evidence. *Cementech, Inc. v. City of Fairlawn* (2005), 160 Ohio App. 3d 450. Accordingly, a party who has been restricted from introducing evidence by means of a motion in *limine* must seek to introduce the evidence by proffer or otherwise at trial to preserve the issue on appeal. *Cementech, Inc. v. City of Fairlawn, supra*; *State v. Wright*, 9<sup>th</sup> Dist. No. 22314, 2005-Ohio-2158. The Supreme Court of Ohio has long held this to be true:

[I]t is incumbent upon a party who has been temporarily restricted from introducing evidence by virtue of a motion in *limine*, to seek the introduction of the evidence by proffer or otherwise in order to enable the court to make a final determination as to its admissibility and to preserve any objection on the record for purposes of appeal. ... Because the record indicates that the appellant failed to proffer any evidence allegedly excluded by the trial court, [appellant] has waived his right to argue this issue on appeal.

*Garrett v. City of Sandusky* (1994), 68 Ohio St.3d 139 at 141 (citing to *State v. Grubb* (1986), 28 Ohio St.3d 199).

Here, Appellant failed to proffer any testimony or other evidence he apparently wanted to introduce to establish what he believes was the reasonable value of the medical services provided to Larry Moretz. Appellant has therefore failed to properly preserve this error for appeal, and this Court has nothing to review with regard to this issue.

Larry and Nicole Moretz supplied copies of the bills for medical treatment to opposing counsel several times during discovery and one final set of medical bills five days before trial. Pursuant to O.R.C. Section 2317.421, the medical bills were presumed to be reasonable. The Appellant never provided copies of write-offs he intended to present as evidence to Larry and Nicole Moretz.

O.R.C. Section 2317.421 directs that the medical “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.” The Appellant along with all those who submitted Amicus Curiae briefs argue that the Appellant should be afforded the same opportunity as the Appellee by O.R.C. Section 2317.421 to introduce the amount accepted for payment or the write-offs. However, the Appellant cannot rely upon O.R.C. Section 2317.421 for two reasons. First, O.R.C. Section 2317.421 provides a presumption for the reasonableness of charges, not the reasonableness of insurance payments or write-offs. Second, even if the statute did extend so far as to include write-offs, the Appellant did not comply with the statute by providing copies of write-offs or copies of bills accepted for payment to opposing counsel five days before the trial. At no time during discovery did Appellant provide copies of write-offs or copies of bills accepted for payment to the Appellees. Therefore, the Appellant failed to establish prima facie evidence of the presumption of reasonableness with regard to the write-offs.

Appellant never produced the write-offs during discovery and never proffered any expert or lay testimony relating to the write-offs during the trial. Consequently, there is no evidence of testimony concerning the write-offs in the record in the case of *Moretz et al v. Muakkassa*.

2. **The Trial Court Properly Permitted Dr. Dennis to Testify as to the Reasonableness and Necessity of Appellee’s Treatment and Medical Bills.**

Appellant argues specifically that the trial court abused its discretion when it allowed Appellees’ expert witness, Dr. Dennis, to testify about the necessity and the reasonableness of Larry Moretz’s treatment and medical bills. Appellant however totally ignores the statute governing the submission of medical bills at trial:

In an action for damages arising from personal injury or wrongful death, a written bill or statement, or any relevant portion thereof, ...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 rendered by the person, 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.

Ohio Revised Code §2317.421 (Anderson 2010).

There is no dispute that Appellees provided opposing counsel with a copy of the summary and bills more than five days before trial. The charges and fees stated were therefore *prima-facie* evidence of reasonableness. As was noted in *Robinson v. Bates* (2006), 112 Ohio St. 3d 17, written bills are deemed by statute to be rebuttable evidence of the reasonableness of medical expenses. As such, Larry Moretz's medical bills themselves constitute rebuttable evidence of the reasonableness of Larry Moretz's medical expenses.

In this case, the bills were attached to a summary. Appellees' expert witness, Dr. Dennis, testified that he understood that the front sheet was a summary of all of the treatment that had been provided to Larry Moretz by various providers. Dr. Dennis testified that he reviewed the records in relationship to the treatment. Based on his understanding that the front sheet accurately summarized the attached invoices, he testified that the services and invoices were reasonable and necessary. (Dr. Dennis Dep. Tr. 43-44). Appellant had the opportunity to, and did, cross examine Dr. Dennis on whether he reviewed the bills and to what extent he reviewed them. Appellant also had the opportunity to present his own expert to introduce evidence as to the reasonableness and necessity of the treatment and charges. Appellant chose not to.

Further, Dr. Dennis testified that based on the summary of the bills, to which the underlying bills were attached, the treatment was necessary and reasonable. Any concern

Appellant had that Dr. Dennis did not appropriately review each bill, could be addressed on cross-examination because what Appellant is really arguing about is the weight of the evidence and Dr. Dennis' credibility, not the admissibility of the bills. Credibility and weight of evidence are within the province of the jury. *Turner v. Turner* (1993), 67 Ohio St. 3d 337; *Riley v. Northeast Family Health Care*, 9<sup>th</sup> Dist. No. 17814; 1997 WL 177675.

The reasonable value of medical services is a matter for the jury to determine from all of the relevant evidence and that's precisely what happened here. The trial court properly allowed Dr. Dennis' testimony about the bills and services and properly allowed the bills and summary to be admitted into evidence.

**3. Appellant was not Precluded from Introducing Evidence of Write-Offs.**

Appellant also argues that the Trial Court abused her discretion by precluding him from introducing evidence of write-offs. Appellant, however, mischaracterizes the Trial Court's order. Contrary to Appellant's statement that he was precluded from introducing evidence of write-offs, the Trial Court did not preclude Appellant from presenting evidence of the reasonableness of the write-offs. Rather, the Trial Court precluded Appellant from presenting evidence of the reasonableness of the write-offs without expert testimony in support of the evidence.

The Trial Court Judge told defense counsel prior to the trial "so assuming you have expert testimony available to support the reasonableness of that, then you can present the evidence." (Tr. 6). The Appellant failed to present expert testimony on this issue even though he called a billing specialist in his case in chief, Joanne Smith. (Tr. 351). Ms. Smith was identified on the witness list and was deposed before trial. At trial, defense counsel questioned the billing specialist on Dr. Muakkassa's billing procedures. (Tr. 351-363). In fact, this billing specialist

had special knowledge of Summa Care, the Moretzes health insurance company that paid the medical bills in this case. Her job description was to take care of all special requests from insurance companies and all denials from insurance companies, and any adjustment that was not correct. This testimony is key to whether defense counsel had an appropriate witness to discuss the write-offs on the bills in this case. When being questioned about a specific Summa Care bill at issue in the trial, Ms. Smith testified as follows:

Q. Okay. Was this bill then brought to your attention when -- on December 14<sup>th</sup> SummaCare was billed, and then below that it indicates billed in error. Can you explain how that all occurred?

A. Yes. It would have been transmitted to SummaCare via electronic transmission, presented for payment, and then on or about December 21st, maybe a couple days before that, I remember that SummaCare had requested additional documentation in order to process the charge since this is a miscellaneous code that doesn't have any specific description to it.

Q. All right. And were you personally involved in that?

A. In that part of it, yes, because --

Q. Yes, ma'am.

A. -- because that was my job at that time to take care of all special requests from insurance companies and all denials from insurance companies, and any adjustment that was not correct I was going to deal with that. (Tr. 356-357).

Defense counsel had an expert witness that was qualified to discuss the medical billing write-offs in this particular case and with this particular medical insurance company. This would allow the defense to argue the reasonable value of medical services in the Moretz case. This witness testified at trial. Defense counsel qualified her as a billing specialist. However, defense

counsel chose not to ask her about the \$132,069.13 in medical bills, \$58,168.86 in write-offs, \$73,900.27 amount accepted by the medical providers, or the reasonable value of medical services. She was qualified. She had the credentials, knowledge and experience to discuss this issue. Defense counsel was a veteran of many medical negligence cases. He did not discuss the write-offs or the reasonable value of medical services with her because damages were not an issue in this case for the defense. All witnesses agreed Mr. Moretz had significant injuries and damages as a result of the surgery. The total damages in this case were going to be significant. The liability insurance company reserved the case at one million dollars. This case was tried by the Appellant on liability and proximate cause, not on damages. Appellant failed to raise the issue of the reasonable value of medical bills or write-offs with this billing specialist, therefore, it is waived.

The evidence of the reasonable value of medical bills, write-offs and the amount accepted is contained in plaintiffs' Exhibit 1 and was admitted as evidence and sent to the jury for review during deliberations. Counsel for the Appellant could have simply calculated the reasonable value of medical bills or write-offs contained in the exhibit and presented them to the billing expert. This was not done because the Appellant's case was tried on liability and proximate cause. The defense never once addressed the economic or non-economic damages in this case, not even during summation. The damages returned by the jury in this verdict were within \$4,571.27 of the reserve set by the Defendant's liability insurance company. The reserve was \$1,000,000.00. The verdict was \$995,428.73. The difference is \$4,571.27. The reserve set by the Defendant's liability insurance company was remarkably accurate.

The Brief of Amici Curiae, Ohio Hospital Association, Ohio State Medical Association, Ohio Osteopathic Association, American Insurance Association, and Ohio Alliance for Civil

Justice In Support of Appellant states on page 8, "it is unnecessary and unreasonable to require an expert to testify as to the amount of payment made or accepted for medical treatment, as the amount of payment made or accepted is not a matter beyond the knowledge or experience possessed by lay persons. All that is needed is simple factual testimony to establish that the plaintiff was charged for the services rendered and payment in the amount of "\$XXX" was made and accepted as full payment." However, the Appellant never attempted to get this simple factual testimony from his medical bill expert witness. Nor did the Appellant attempt to proffer this simple factual testimony from a lay witness in order preserve the testimony for appeal. Again the Appellant did nothing during this trial with regard to damages.

Appellant had the perfect opportunity to present evidence of write-offs and the reasonable value of medical services provided, and abide by the Trial Court's decision requiring expert testimony by obtaining testimony from the medical bill expert he had on the stand. The Appellant could have proffered testimony from a lay witness. However, the Appellant chose not to obtain any testimony regarding the write-offs and the reasonable value of medical services provided from the medical bill expert or a lay witness because the Appellant's strategy throughout the entire trial was to argue only liability and proximate cause, not damages. Now, the Appellant argues the Trial Court denied him the opportunity during trial to present and support the write-offs and the reasonable value of medical services provided. The trial record proves Appellant was not precluded from presenting this evidence.

Evidence Rule 103(A)(2), states in pertinent part: "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and \* \* \* [i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the court." The purpose of this rule is to enable a reviewing court to determine whether

the determination by the trial court is prejudicial. *State v. Hipkins* (1982), 69 Ohio St.2d 80. "[I]n the absence of a proffer, the exclusion of evidence may not be assigned as error." *Id.*, quoting *Pokorny v. Local 310* (1973), 35 Ohio App.2d 178, reversed on other grounds, 38 Ohio St.2d 177, 311 N.E.2d 866; but see, *State v. Gilmore* (1986), 28 Ohio.St.3d 190 (modifying *Hipkins* by holding that "a party is not required to proffer excluded evidence in order to preserve any alleged error for review if the substance of the excluded evidence is apparent to the court from the context within which questions were asked").

In *State v. Grubb* (1986), 28 Ohio St.3d 199, the Supreme Court of Ohio held that at trial it is incumbent upon a party who has been restricted from presenting evidence, to seek the introduction of the evidence by proffer or otherwise in order to enable the court to make a final determination as to its admissibility and to preserve any objection on the record for purposes of appeal.

In *Moretz*, the Appellants failed to create a record on appeal of this issue as they failed to proffer to the Trial Court the substance of the evidence they sought to admit. *Sutherland v. Nationwide Gen. Ins. Co.* (1994), 96 Ohio App.3d 793. See also *Gordon Proctor v. William Jamieson, et al.*, 2001 Ohio 2187. We have nothing in the record to decide this issue. Rather, we are left with only Appellant's unfounded assertions in their brief concerning the write-offs and the reasonable value of medical services.

Appellant relies on the Ohio Supreme Court's decision in *Jacques v. Manton* (2010), 125 Ohio St. 3d 342. The *Jacques* decision, however, only addresses the issue of whether write-offs can be introduced as evidence of the reasonable value of medical services. *Jacques* does not address whether the evidence may be presented without expert testimony. However, the Court's decision in *Jacques* did mandate the admissibility of write-offs is subject to the rules of evidence.

Another case, however, does address this issue of expert testimony. In *Ohlson v. M. Bjorn Peterson Transportation, Inc., et al.*, Summit County Common Pleas Court Case No. 2006-05-3285, the Court held that a party may not present evidence of write-offs without expert testimony as to the fairness or reasonableness of the third party payer amounts.

Neither *Robinson* nor *Jacques* hold that defendants automatically get to introduce the write-offs to the jury. What the decisions do in fact state is the jury may hear evidence of write-offs only after admissibility is determined by the Rules of Evidence.

The admission of evidence is within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St. 3d 173. The standard of review for admissibility of evidence is abuse of discretion. See, *Peters v. Ohio State Lottery Comm.* (1992), 63 Ohio St. 3d 296. An “abuse of discretion” means more than an error of law or judgment. Rather, an abuse of discretion means that the court’s decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, citing *State v. Adams* (1980), 62 Ohio St. 2d 151.

In *Moretz*, the Ninth District Court of Appeals upheld the Trial Court’s ruling that in order to present evidence of write-offs it would require testimony from a knowledgeable witness to explain the reasonableness of the write-offs. This would mean the witness would have to explain things like what write-offs are, why medical providers write off original charges after medical bills are partially paid by insurance companies, the commercial reasons for such write-offs, and why the amount ultimately paid is evidence of “reasonableness” of this particular patient. The Ninth District Court of Appeals upheld the Trial Court’s ruling that expert testimony is required because the reasonable value of medical services is clearly outside the common knowledge of laymen.

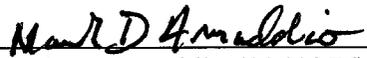
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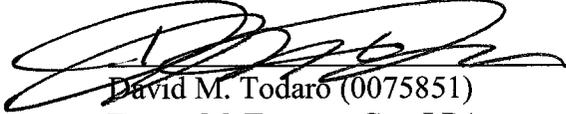
Here, there was no abuse of discretion by the Trial Court. The Trial Court in no way precluded the Appellant from presenting evidence of write-offs by requiring expert testimony. Clearly, the evidence of write-offs could have come in by way of the medical bill expert who testified for the Appellant. What actually precluded the Appellant from presenting evidence of write-offs was the Appellant's own trial strategy.

#### IV. CONCLUSION

For the reasons discussed above, this Court should affirm the Appellate Court decision.

Respectfully submitted

  
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## CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing PLAINTIFFS-APPELLEES LARRY AND NICOLE MORETZES' MERIT BRIEF by first class U.S. mail, postage prepaid, this 30<sup>th</sup> day of November, 2012 upon the following counsel.

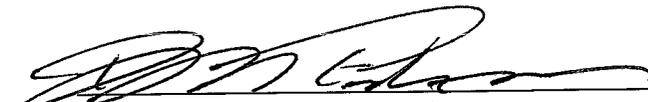
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