

ORIGINAL

IN THE SUPREME COURT OF OHIO  
CASE NO. 12-0797

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

LARRY J. MORETZ, et al.  
Plaintiffs-Appellees

v.

KAMEL MUAKKASSA, M.D., et al.  
Defendant-Appellant.

**BRIEF OF AMICUS CURIAE, SUMMIT COUNTY ASSOCIATION FOR JUSTICE,  
URGING AFFIRMANCE ON BEHALF OF PLAINTIFFS-APPELLEES, LARRY J.  
MORETZ AND NICOLE J. MORETZ**

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## STATEMENT OF FACTS

The Summit County for Justice adopts and incorporates, as if fully set forth herein, the "Statement of Facts" written in the Merit Brief of Appellees, Larry J. Moretz and Nicole J. Moretz, and the Amicus Curiae, Ohio Association for Justice's, Brief in Support of Affirmance and Appellees.

## LAW AND ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Before and during the trial, both parties moved for the admission or exclusion of certain evidence. However, the Summit County Association for Justice focuses the issues in its Brief on Appellant's Propositions of Law Three and Four.

The Summit County Association for Justice urges affirmance on behalf of the Appellees. In so doing, this Amicus Curiae adopts the arguments and law set forth in the Merit Brief of the Appellee and the Brief of the Amicus Curiae, the Ohio Association for Justice filed in this case.

### **REJECTION OF PROPOSITION OF LAW NO. 3: The Ninth District's Decision Disallowing A Jury Interrogatory Regarding Appellees' Multiple Claims Of Negligence Is Legally And Factually Flawed, Is Internally Inconsistent And Contradictory, Is In Direct Conflict With Decisions Rendered By This Court And Other Appellate Courts Throughout Ohio And Effectively Renders Civ. R. 49(B) Meaningless.**

Appellant argues that the trial court committed reversible error in failing to adopt and present, to the jury, Appellant's proposed jury interrogatory regarding negligence. The Summit County Court of Common Pleas judge refused to submit Appellant's proposed detailed and narrative jury interrogatory regarding the Appellees' sole claim of medical negligence against Dr. Muakkassa. The Ninth District Court of Appeals affirmed the trial court's decision, The Ninth District Court of Appeals held the trial court did not abuse its discretion and correctly applied the OJI recommended jury instructions to this case.

The Summit County Association for Justice urges this Court to reject Appellant's Proposition of Law. The Summit County Association for Justice agrees with the Summit County Common Pleas Court and the Ninth District Court of Appeals. The jury interrogatory, as presented to the jury, was proper.

#### **A. Controlling precedent supports the jury interrogatory, as given, and rejection of Appellant's proposed jury interrogatory.**

Subject to the abuse of discretion standard, a trial court may admit or reject a proposed jury interrogatory. The drafters of Ohio Jury Instructions [OJI] concluded that having a jury report findings of particular facts that constitute a lack of ordinary care imposes a difficult and unfamiliar obligation. The OJI drafters reasoned that imposing this duty on the jury revives a troublesome problem of code pleading and special verdicts. OJI CV 101.41 at p. 18.

As to its argument that Appellant was entitled to have the jury in Moretz's case count the ways that he was negligent, Appellant has apparently either overlooked or ignored the controlling precedent of *Freeman v. Norfolk & Western Ry. Co.*, 69 Ohio St.3d 611, 635 N.E.2d 310 (1994). The *Freeman* case stemmed from a collision in which an automobile collided with a Norfolk & Western train, injuring Darla Freeman. In her case, Freeman alleged negligence by the railroad and its engineer in six different ways. At trial, the railroad demanded an interrogatory that asked the jurors to "state the particulars of the Railway's negligence." See *Freeman* at 611-612. The *Freeman* trial court refused.

In the *Freeman* appeal, the question before this Court was whether the trial court erred when it refused to submit Norfolk & Western's requested interrogatory. This Court found that the trial court did not commit error.

**B. Ohio Rule of Civil Procedure 49(B) supports the trial court's rejection of Appellant's proposed jury interrogatory.**

This Court based its *Freeman* decision upon established Ohio law, which is that a court shall submit interrogatories to a jury upon a party's request, but in the form dictated by the trial court, not the party; the trial court "retains discretion to reject interrogatories that are inappropriate in form or content." *Freeman*, 69 Ohio St.3d at 613, (citing *Ragone v. Vitali & Beltrami, Jr., Inc.*, 42 Ohio St.2d 161, 327 N.E.2d 645 (1975), at Syllabus para. 1). A trial court

is not a mere conduit that must submit to a jury all interrogatories that a party may propose. See *Ragone*, 42 Ohio St.2d at 165.

Ohio Rule of Civil Procedure 49(B) embodies this principle in its first paragraph:

(B) General verdict accompanied by answer to interrogatories. The court shall submit written interrogatories to the jury, together with appropriate forms for a general verdict, upon request of any party prior to the commencement of argument. Counsel shall submit the proposed interrogatories to the court and to opposing counsel at such time. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the interrogatories shall be submitted to the jury in the form that the court approves. The interrogatories may be directed to one or more determinative issues whether issues of fact or mixed issues of fact and law.

Civ.R. 49(B), emphasis added; see also the 1970 Staff Notes to Civ.R. 49: (“The court has the right to approve the form of the interrogatories in order that the occasion for possible error may be reduced.” (Emphasis added.))

A trial court has discretion to “reject a proposed interrogatory that is ambiguous, confusing, redundant, or otherwise legally objectionable.” *Freeman*, 69 Ohio St.3d at 613, (citing *Ramage v. Cent. Ohio Emergency Serv.*, 64 Ohio St.3d 97, 592 N.E.2d 828 (1992), at Syllabus para. 3). See also *Ragone*, 42 Ohio St.2d at 165. Ohio has also long disfavored evidentiary or probative interrogatories that are not directed to testing the jury’s general verdict. See Civ.R. 49, at 1970 Staff Notes (citing *Davison v. Flowers*, 123 Ohio St. 89, 95-96, 174 N.E. 137 (1930)). See also *Freeman*, 69 Ohio St.3d at 613; *Ragone*, 42 Ohio St.2d at 168.

**C. Appellant did not properly draft his proposed jury interrogatory.**

Simply put, Appellant did not properly draft his proposed jury interrogatory. This Court illustrated this “faulty drafting” defect in the *Freeman* case.

In order to be valid, an interrogatory must be properly drafted; in other words, it 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.*” *Freeman*, 69 Ohio St.3d at 614, citations omitted.

Without dispute, an interrogatory may request that a jury specify the way or ways in which a defendant was negligent. *See Freeman*, 69 Ohio St.3d at 615 (citing *Ragone*, 42 Ohio St.2d at 168). However, an interrogatory is improper if it is not drafted in such a way that it evokes a finding on a determinative issue, rather than an evidentiary one. *Id.*

In *Freeman*, multiple theories of negligence were viable, and any one or a combination of a number of which would have established the railroad’s liability. *See Freeman*, 69 Ohio St.3d at 615-616.

The fault in Appellant’s drafting in this case is that he wanted to ask the jury to pick one, and only one: “[s]tate the respect in which you find Kamel Muakkassa was negligent.” *See Merit Brief of Appellant* at p. 22. A properly drafted interrogatory, according to *Freeman*, would have been “state the respects in which you find Kamel Muakkassa was negligent.”

In comparison and as further explanation of the importance of careful drafting, the *Ragone* case provides an example of a properly drafted interrogatory. In the second paragraph of the syllabus, the *Ragone* Court laid out the following as the proper form and sequence of questions for a multi-part interrogatory that seeks to winnow out the grains of liability from a bushel of potential theories of negligence: (1) Do you find by a preponderance of the evidence that the defendants was negligent? (2) If your answer to (1) is “Yes,” state in what respects the defendant was negligent; and (3) If your answer to (1) is “Yes,” do you find by a preponderance of the evidence that this negligence was a proximate cause of the injury sustained by the plaintiff? *See Ragone*, 42 Ohio St.3d 161, at Syllabus para. 2.

Instead, the way that Appellant drafted its requested interrogatory seems calculated not to determine his liability, but to muddle it and potentially invite error. Had the trial court submitted this interrogatory to the jury, it would have abused its discretion.

**D. Appellant makes faulty assertions in his Merit Brief.**

Finally, Appellant made faulty assertions in his Merit Brief. For instance, at page 22 of its Brief, Appellant cited to *Ragone* at 42 Ohio St.2d at 168 to support the following statements: “A narrative jury interrogatory on negligence is a legally proper and mandatory inquiry about factually determinative issues. \*\*\* Such an interrogatory properly elicits a statement of facts from which a conclusion of negligence or no negligence is drawn and further tests the correctness of the general verdict form from a legal standpoint.” Merit Brief of Appellant, at 22 (citations omitted). However, in *Ragone*, this Court did not hold that a jury interrogatory that calls for a narrative statement of facts is at all proper. The portion of *Ragone* to which Appellant seems to refer was a long quotation from *Bradley v. Mansfield Rapid Transit*, 154 Ohio St. 154, 93 N.E.2d 672 (1950), which this Court included as part of its exposition on Ohio’s law on jury interrogatories before the enactment of the Ohio Rules of Civil Procedure. See *Ragone*, 42 Ohio St.3d at 168-169.

Appellant also incorrectly insinuates that jury interrogatories are required for all cases, and cites to *Stephenson v. Upper Valley Family Care*, 2d Dist. No. 2009 CA 38, 2010-Ohio-4390, and *Plavecski v. Cleveland Clinic Found.*, 192 Ohio App.3d 533, 2010-Ohio-6016, 949 N.E.2d 1007, as authority. See Merit Brief of Appellant, at 23. However, the primary question before the appellate court in *Stephenson* had nothing to do with jury interrogatories. Instead, the “primary contention on appeal is that the trial court erred in permitting Defendants to present evidence during the retrial that their breach of the standard of care did not cause him to suffer

*any reduced life expectancy.*” *Stephenson*, ¶ 1. The case had been retried because the trial court granted a new trial (and the court of appeals agreed), based on the trial court’s determination that the first verdict was too low. *See Stephenson*, ¶¶ 9, 12. Instead, the *Stephenson* court noted that “Civ.R. 49(A) requires the use of a general verdict, by which the jury finds generally in favor of the prevailing party,” and that under the two-issue rule, in the absence of jury interrogatories, a general verdict disposes of all of the issues before a jury. *See Stephenson* at ¶¶ 43, 48-50.

In *Plavecski*, the appellate court merely noted that “In the absence of interrogatories detailing the jury’s findings, we cannot determine whether the jury concluded that Plavecski had the epidemic strain of C.diff. bacteria.” *Plavecski* at ¶ 26. The *Plavecski* court was not even presented with an assignment of error addressing jury interrogatories.

**REJECTION OF APPELLANT'S PROPOSITION OF LAW NO. 4: The Ninth District's Decision Requiring That Evidence Of "Write-Offs" Of Medical Bills Be Supported By Expert Testimony Is In Direct Conflict With This Court's Decision In Jacques v. Manton, 125 Ohio St. 3d 342, 2010-Ohio-1838, 928 N.E. 2d 434 And Has, Consequently, Redefined The Collateral Source Rule As Set Forth By This Court.**

AND

**ALTERNATE PROPOSITION OF LAW NO. 4: The introduction of evidence, in the form of medical bills, of the amounts that a plaintiff's medical providers have accepted as full payment for their services to the plaintiff is not sufficient by itself to overcome the presumption created by R.C. 2317.421, that a plaintiff's medical bills are prima facie proof of the reasonable and necessary costs of the plaintiff's treatment. The presumption can only be overcome through the introduction of competent expert testimony that meets the requirements of Evid.R. 702.**

The Summit County Association for Justice urges this Court to reject Appellant's Proposition of Law No. 4 and affirm the Ninth District Court of Appeal's decision, adopting the following Proposition of Law:

The introduction of evidence, in the form of medical bills, of the amounts that a plaintiff's medical providers have accepted as full payment for their services to the plaintiff is not sufficient by itself to overcome the presumption created by R.C. 2317.421, that a plaintiff's medical bills are prima facie proof of the reasonable and necessary costs of the plaintiff's treatment. The presumption can only be overcome through the introduction of competent expert testimony that meets the requirements of Evid.R. 702.

1. **The procedural background of this evidentiary issue must be reviewed.**

The final evidentiary ruling raised in this appeal is the issue regarding Appellees' motion in *limine* concerning the reasonable value of medical bills. The fourth evidentiary ruling concerned the trial court's grant of the Appellees' motion in *limine* regarding the admission of medical bills and the evidence of the reasonableness, without an evidentiary foundation, by Appellant. Although the trial court granted the motion in *limine*, Appellant failed to introduce or proffer any evidence concerning the reasonable value of the medical bills during the trial, including but not limited to any testimony, expert or otherwise, on this issue. Therefore, the

Summit County Court of Common Pleas did not revisit the issues (presented by Appellant's motion in *limine*) after the trial began. The next time Appellant raised the issue was after the jury returned its verdict and judgment was entered for Appellees.

The Ninth District Court of Appeals upheld the Summit County Court of Common Pleas decision to grant the motion in *limine* concerning the reasonable value of the medical bills. Appellant waived any error by failing to proffer the proposed evidence. In fact, Appellant presents no evidence anywhere in the record as to what the proposed write-offs would have been, had the testimony been allowed. During trial, Appellant never tried to admit the write-offs as a business record or any other exception to the hearsay rule. Appellant never asked any of the four doctors (Muakkassa, Williams, Dennis, and McLaughlin) who testified in this case about the reasonable value of the write-offs. Appellant elected not to introduce or proffer any evidence concerning the reasonable value of the medical bills during the trial. Appellant's failure to introduce or proffer evidence in this regard during trial is a waiver of this issue on appeal.

**2. Motions in limine result in preliminary rulings and, in and of themselves, do not preserve evidentiary issues for appeal.**

A motion in *limine* is a preliminary request for the trial court to rule on the admissibility of certain evidence. *Cementech, Inc. v. City of Fairlawn*, 160 Ohio App. 3d 450 (2005). 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.

**3. No confusion exists regarding how to determine the reasonableness and necessity of medical bills in a case.**

No one should be confused about how to determine how much of a plaintiff's medical costs are reasonable and necessary. Since June 1, 1970, Ohio Revised Code section 2317.421 has provided clear guidance on this issue:

2317.421 Prima-facie evidence of the reasonableness of medical bills.

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 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.*

R.C. 2317.421 (emphasis added).

This code section provides that a party's bills provide prima facie evidence—a rebuttable presumption—of the reasonable costs of the necessary services, and that the other side may present evidence to rebut it.

Appellant and its many Amici Curiae would have the Court to believe that real debate exists as to the quantum of evidence that a defendant must present in order to rebut R.C. 2317.421's presumption.

The alleged debate is illusory. Long-standing evidentiary principles require that when a defendant seeks to introduce into evidence the amounts a plaintiff's medical providers cuts their fees or made "write-offs" to conform to their contracts with a plaintiff's medical insurers, the defendant cannot do so merely by handing the jury a stack of the plaintiff's medical bills and telling them to do some math. See *Jaques v. Manton*, 125 Ohio St. 3d 342 (2010), ¶ 15. Instead, a defendant must lay a proper foundation for the write-offs.

Since medical billing has become so complex as to be incomprehensible to the average consumer—and therefore the average juror—longstanding principles of evidence require expert testimony to assist a jury in deciphering the bills and explaining the relationship (if it actually exists) between the amount the provider billed, the amount the provider accepted from the plaintiff's insurance company, and the amount the provider may yet require the plaintiff to pay, in order to determine the reasonable cost of the plaintiff's care.

Interestingly, this particular code section is not entirely limited to personal injury and other tort litigation. It is true that, in the personal injury litigation, this usually means the plaintiff presents the bills and is entitled to the presumption, if Ohio Revised Code section 2317.421 is followed, and the burden shifts to the defendant to rebut this presumption. However, this Court should be aware that bills are the subject of other actions, including but not limited to collection actions. For example, in the case of a hospital or physician seeking to collect its unpaid bill from a patient or other responsible party, the hospital or physician is able to use this code section. The hospital or physician, if following the statute, has the presumption, and then the patient must rebut the presumption. Why is it that the law is unclear only when the patient is a plaintiff?

4. **Robinson and Jacques have been interpreted by some court, resulting in unfair and uneven application of their propositions of law.**

*Robinson v. Bates* has been unfairly and unevenly applied, however. Patients being sued by hospitals to collect unpaid medical bills have generally not been allowed, in order to prove that the full amount sought is not the reasonable cost of the hospital's services, to introduce evidence that the hospitals have written off portions of patient bills or accepted less than the full amount from patients' insurance companies. See *The Union Hosp. v. Campbell*, 1<sup>st</sup> Dist. No. C-110285, 2012-Ohio-1909; *Miami Hosp. v. Middleton*, 2d Dist. No. 24240, 2011-Ohio-5069.

The exception is *Akron Gen. Med. Ctr. v. Welms*, 160 Ohio Misc.2d 1, 2010-Ohio-5539, 937 N.E.2d 1106 (Portage C.P.), in which Akron General Medical Center sued its patient for unpaid hospital bills connected to two hospitalizations for the same general condition. The Common Pleas Court allowed the patient to use the write-offs the hospital had applied to his bills for the first hospitalization (during which he had health insurance) to show that the unexpurgated bills from his second, uninsured hospitalization did not reflect the reasonable cost of his care.

**5. Each party, including Appellant, in a case must follow the applicable evidentiary law and steps for admission of evidence at trial.**

Ohio Revised Code section 2317.421 establishes a presumption that medical bills are *prima facie* evidence that the bills are reasonable. See *Wood v. Elzoheary*, 11 Ohio App.3d 27, 462 N.E.2d 1243 (8th Dist. 1983). Under Ohio Rule of Evidence 301, presumptions do not shift the burden of proof onto the opposite party, but impose upon it a burden of going forward with evidence to rebut the presumption. See *Evans v. Nat'l Life and Accident Ins. Co.*, 22 Ohio St.3d 87, 90, 488 N.E.2d 1247 (1986).

Determinations of admissibility, relating to relevancy of the evidence, are subject to well-known legal guidelines in Ohio. Since July 1, 1980, Ohio Rules of Evidence 401 and 402 have demand that evidence must be relevant to be admissible.

**RULE 401. Definition of "Relevant Evidence"**

"Relevant evidence" means 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.

**RULE 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible**

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, 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. Evidence which is not relevant is not admissible.

Evid. R. 401 & 402.

Admittedly, any written document purporting to show how much a person was billed for medical costs would be relevant.

But the analysis doesn't end there. Even without touching on any analysis of medical bills as hearsay, or in the light of authentication or the best evidence rule, Ohio Rule of Evidence 403 mandates that evidence must be excluded, even if it is relevant, if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. It expressly provides:

RULE 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Undue Delay

(A) *Exclusion mandatory. 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.*

(B) *Exclusion discretionary. Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence.*

Evid. R. 403(emphasis added).

When it comes to a statement of medical write-offs, the danger of confusion of the issues or of misleading the jury is high, as the courts in Ohio and other states have stated. For example, the Supreme Court of Indiana case, *Stanley v. Walker*, 906 N.E.2d 852 (Ind. 2009), held that the measure of damages cannot be only full recovery of medical expenses billed to the plaintiff, but nor could it be only the recovery of the amount the plaintiff actually paid. *See Stanley*, 906 N.E.2d at 856-857. "This," the Supreme Court of Indiana said, "is especially true given the current state of health care pricing. The complexities of health care pricing structures make it difficult to determine whether the amount paid, the amount billed, or an amount in between represents the reasonable value of medical services." *Stanley*, 906 N.E.2d at 857.

The Supreme Court of Indiana explained that while hospitals once billed insured and uninsured patients similarly, after the birth of managed care, insurers began demanding large discounts. By the end of the last decade, the Supreme Court of Indiana noted, insurers generally were paying about 40 cents per dollar of billed charges, and hospitals were accepting those amounts as full payment. In the meantime, the connection between actual costs and hospital charges became tenuous at best, and completely nonexistent in many instances. *Id.* (citing Mark A. Hall & Carl E. Schneider, *Patients As Consumers: Courts, Contracts, and the New Medical Marketplace*, 106 Mich. L.Rev. 643, 663 (2008) & The Lewin Group, *A Study of Hospital Charge Setting Practices* (2005)). “Thus, based on the realities of health care finance, we are unconvinced that the reasonable value of medical services is necessarily represented by either the amount actually paid or the amount stated in the original medical bill.” *Stanley*, 906 N.E.2d at 857.

Just this year, the Cleveland Plain Dealer echoed the *Stanley* Court’s assessment of the morass of modern medical billing in a two-day, four-story package of news stories printed in May and September 2012 and titled “Medical billing, a world of hurt.” *See, e.g.*, Dave Davis, “Medical billing, a world of hurt: Patients confused about hospital charges for doctors visits,” *Plain Dealer* (September 22, 2012).

In 2008, the Allen County Court of Common Pleas considered the question, and found that the introduction of “write-off” evidence would be more prejudicial than probative. The court stated:

**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 legal gymnastics involved only serves to continue the charade that insurance has nothing to do with the case.**  
[Emphasis added.]

\*\*\*[quoting Justice Lundberg-Stratton's concurrence/dissent in Robinson]

Neither Bates nor R.C. 2315.20 *mandates* (emphasis by the court) introduction of "write-offs." ... 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 write-offs in this case will not be permitted.

*Verhoff v. Diller*, Case No. CV2007-1278, pp. 8-9 (Allen C.P. March 24, 2008).

The potential for confusion of the issues that would result by allowing a jury to guess the "reasonable value," as between the amounts charged, and the amounts accepted, was also a great concern to the Franklin County Common Pleas Court in *Dimitroff v. Grishcow*:

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 ...

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.

\*\*\*

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 resoundingly 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 actual injury or lack thereof incurred by the injured person.

\*\*\*

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.

*Dimitroff v. Grishcow*, Case No. 07CVA-01-103 (Franklin C.P. Jan. 5, 2009).

In *Rivera v. Urbansky*, the Lorain County Court of Common Pleas has held similarly:

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.

*Rivera v. Urbansky*, Case No. 08CV154436 (Lorain C.P. Aug. 26, 2008).

Likewise, the Lucas County Court of Common Pleas has explained:

After careful consideration, this Court finds that the difference in the amount billed and the 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.

*Goney v. Hill*, Case No. CI 06-5002 (Lucas C.P. May 7, 2008).

Finally, the disconnection between the reasonable value of medical care and the amount billed, charged, or written off is illustrated by the Ohio Insurance Institute, which called medical

bills “the *hypothetical amounts* the patient would have been charged in the absence of insurance coverage.” See *Amicus Curiae* Brief of Ohio Insurance Institute and Property and Casualty Insurance Association of America, at 4.

**6. Complexity relating to evidence requires expert testimony.**

Due to the complexity of medical billing and ordinary people’s inability to understand their own bills (much less someone else’s!), Ohio’s long-standing evidentiary precedents require expert testimony to decipher them. “Unless a matter is within the comprehension of a layperson, expert testimony is necessary. Evid. R. 702 and 703.” *Ramage v. Central Ohio Emer. Servs.*, 64 Ohio St.3d 97, 102, 592 N.E.2d 828 (1992).

Some subjects are inherently beyond the ken of the average juror, and require illumination by an expert who the court finds meets the standards of Evid.R. 702. See, e.g., *Ramage*, 64 Ohio St.3d at 102.; *White v. Leimbach*, 131 Ohio St.3d 21, 2011-Ohio-6238, 959 N.E.2d 1033 (plaintiff required to present expert testimony in lack of informed consent cases); *State v. Hartman*, 93 Ohio St.3d 274, 284, 754 N.E.2d 1150 (2001) (expert testimony necessary to make fingerprint comparisons).

This Court surely never intended that *Robinson* would be used to invite jurors to make *guesses* about the reasonable value of anything. However, without a competent explanation of the numbers, jurors have no rational mechanism by which to determine reasonable value; if given only the amount charged and the amount accepted, without any explanation for the difference between the two, jurors can only scratch their heads and guess.

No juror can make a reasonable choice between these alternatives without an expert explanation of from where the numbers come:

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 benefitting from an agreement between a plaintiff's healthcare provider and insurer. [cite omitted].

*Ohlson v. Peterson*, CV 2006-05-3285 (Summit C.P. 4/12/07). See also *Gamble, infra* (holding that either doctor opinion testimony, or that of someone else knowledgeable in the valuation of medical bills will be required to give a competent opinion).

Without expert testimony on how to evaluate the difference between the amounts billed and the amounts accepted, defendants should not present *Robinson* evidence at all.

Again, the ultimate issue is reasonable value. Lay persons are not qualified by anything to look at the bills, look at the adjustments, and opine on "reasonable value." It is not self-explanatory why one amount is charged, but a different amount is accepted. To put a numerical discrepancy between the amount billed and the amount accepted in front of the jury, then to ask the jury which one represents the reasonable value of the medical care, is simply to ask the jury to guess.

**7. This expert testimony requirement is fair.**

Appellant cries unfairness. However, it is not now---and never has been--unfair to require that only one party to a lawsuit present expert testimony; such situations have long existed in Ohio law.

For example, in eminent domain actions, any government entity that files suit to take a person's real property is required by Ohio Revised Code section to have an appraisal of the

property performed. Ohio Revised Code. Chapter 4763 defines an “appraisal” as an analysis, opinion, or conclusion relating to the nature, quality, or value of a piece of real estate. See R.C. 4763.01(A), and sets out requirements for Ohio’s certification and licensing of real estate appraisers. The Ohio General Assembly has, therefore, required government entities to hire a state-licensed appraiser to provide an expert opinion on a piece of real estate’s fair market value when a government agency wants to take it through the eminent domain process.

The property owner, however, is not required to hire its own licensed appraiser to testify about the property’s value; instead, property owners are specifically permitted to offer *their own opinion* of the property value, even though they could not otherwise be qualified as an expert. See *City of Cincinnati v. Banks*, 143 Ohio App.3d 272, 291, 757 N.E.2d 1205 (1<sup>st</sup> Dist. 2001). See also *Smith v. Padgett*, 32 Ohio St.3d 344, 347, 513 N.E.2d 737 (1987); *Tokles & Son, Inc. v. Midwestern Indemn. Co.*, 65 Ohio St.3d 621, 605 N.E.2d 936 (1992), at Syllabus para. 2.

Similarly, Ohio Revised Code section 2323.42 and Ohio Rule of Civil Procedure 10(D)(2) together operate to require a plaintiff in a medical malpractice case to obtain, before filing the complaint, an expert opinion in the form of an affidavit from at least one separate medical professional to show that the plaintiff’s case has merit. The defendant is not required to hire any expert to file an answer or as any other prerequisite for his or her or its position and defense.

**8. Ohio courts Court predicted further study of the billing issues and evidence.**

Ohio’s courts recognized, even before the *Robinson* decision, that defendants could incur extra expense and trouble to use write-offs to reduce jury awards. *Moretz*’ appellate ruling, then, should not have come as a surprise. As the Fourth District wrote, in *Gustin v. Chaney*, 4th Dist. No. 05CA7, 2006-Ohio-2546, ¶ 18, *affirmed*, 112 Ohio St.3d 102, 2006-Ohio-6509, 858 N.E.2d

368, “we note that even if the evidence of a plaintiff’s total medical bills is admitted into evidence, recovery of the full amount of those charges is not guaranteed. A defendant may still present evidence to rebut the reasonableness of the billed charges, which could substantially reduce a plaintiff’s recovery. While this process may be time consuming and unwieldy, in the absence of a statutory limitation on the collateral source rule, it is necessary.”

**9. The Rule of Completeness is not violated.**

Ohio Association of Civil Trial Attorneys *amicus curiae*’s argument that failure to hand jurors documents showing write-offs, without explanation, would violate the Rule of Completeness is misplaced. Introduction of any evidence of a plaintiff’s “write-offs” without expert testimony to explain it would serve only to confuse a jury and would be inherently unfair.

Ohio Rule of Evidence 106 and Federal Rule of Evidence 106 are nearly identical. The principle behind both evidentiary rules is that “when one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through presentation of another portion, the material required for completeness is *ipso facto* relevant, and therefore admissible under Rules 401 and 402.” See *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 172, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988).

The *Beech Aircraft* case stemmed from an accident in which a U.S. Navy flight instructor and her pupil were killed during a training flight. At issue in the case was a letter written by the flight instructor’s husband, John Rainey, who was himself a Navy flight instructor, which challenged the Judge Advocate General’s conclusion that the crash resulted from pilot error. Beech Aircraft successfully introduced only those portions of Rainey’s letter that supported the pilot error theory, and successfully prevented Rainey’s counsel from introducing the remaining portions of Rainey’s letter that detailed why he believed a faulty aircraft caused the accident,

which would have been damning to Beech Aircraft's defense. This exclusion created so distorted and prejudicial an impression with the jury that the Court of Appeals reversed, and the Supreme Court of the United States. *See Beech Aircraft*, 488 U.S. at 171-172.

This Court knows that the Rule of Completeness is predominantly a rule of *timing*, not admissibility, and it does not automatically make every document in a single file—such as documents showing subsequent write-offs to an original bill—admissible. *See, e.g., United States v. Costner*, 684 F.2d 370, 373 (6th Cir. 1982). The codified Rule 106 allows a party to introduce evidence “that ought, in fairness, to be considered *contemporaneously* with a writing or recorded statement introduced by the other party. There is ‘no valid basis for a per se rule that all documents contained in agglomerated files must be admitted into evidence merely because they happen to be physically stored in the same file.’ \*\*\* Further, under Rule 106, the party seeking to have a document introduced for the sake of completeness must request that the new document be introduced at the time of introduction of the allegedly incomplete document.” *Jamison v. Collins*, 291 F.3d 380, 387 (6th Cir. 2002), citations omitted.

Introduction of the allegedly completing documents is also not automatic. “[T]he adverse party is not automatically entitled to have the entire document introduced into evidence simply by requesting it. Instead, before the statement will be introduced, the adverse party has the burden of showing that the additional parts are relevant to the portion which has already been introduced.” *State v. Williams*, 115 Ohio App.3d 24, 41, 684 N.E.2d 358 (11th Dist. 1996) (citing *State v. Holmes*, 77 Ohio App.3d 582, 602 N.E.2d 1197 (11<sup>th</sup> Dist. 1991)). *See also State v. Reiner*, 89 Ohio St.3d 342, 358, 731 N.E.2d 662 (2000). “The Rule does not require introduction of portions of a statement that are neither explanatory of nor relevant to the passages that have been admitted.” *United States v. Soures*, 736 F.2d 87, 91 (2d Cir. 1984).

Write-offs cannot be automatically admissible as *prima facie* proof of the reasonable value of a provider's services, as the Supreme Court of Indiana correctly held in the *Stanley* case. In the first place, most providers do not afford them to uninsured patients; instead, they demand the full, billed amount from the patient. Then, the amount of a patient's bill that the provider is willing to "write off" is not the same from patient to patient. Instead, it is determined by the insurance company that covers the patient, and it may not be consistent to that insurance company; in other words, the write-off may differ from one patient to another, depending on the patient's particular coverage plan.

#### **IV. Conclusion**

The Summit County Association for Justice takes a particular interest in this appeal, in part for the fact that this particular case originated in its backyard, the Summit County Court of Common Pleas, and appellate issues decided by the Ninth District Court of Appeals. The custom and practice of these courts concern many cases in this appellate district. The standards for evidence are consistent in our local trial courts and fair to all litigants, with the affirmance of *Moretz v. Muakkassa*.

This Amicus Curiae urges the rejection of all of Appellant's Propositions of Law, in particular Propositions Three and Four, and argues that this Court should affirm the Ninth District Court of Appeals decision and adopt the following proposition of law:

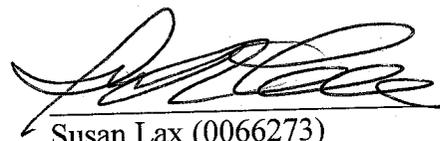
ALTERNATE PROPOSITION OF LAW NO. 4: The introduction of evidence, in the form of medical bills, of the amounts that a plaintiff's medical providers have accepted as full payment for their services to the plaintiff is not sufficient by itself to overcome the presumption created by R.C. 2317.421, that a plaintiff's medical bills are prima facie proof of the reasonable and necessary costs of the plaintiff's treatment. The presumption can only be overcome through the introduction of competent expert testimony that meets the requirements of Evid.R. 702.

This proposition of law accurately sets forth the rule of law to be applied to any and all parties who address these issues in our trial courts.

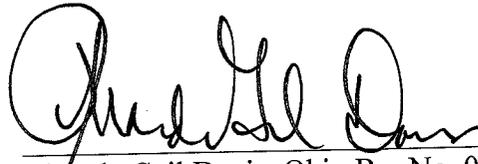
This Court should note that this Amicus Curiae gave considerable thought to additional arguments relating to *Robinson* and *Jacques* being reversed. However, in the end, the Summit County Association for Justice argues that fair application of the case decisions, statutes, and court rules will dictate just results for all litigants.

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**CERTIFICATE OF SERVICE**

Pursuant to Supreme Court of Ohio Rules of Practice, I certify that a copy of the foregoing was delivered by regular U.S. Mail Delivery on November 30, 2012 to:

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