

IN THE SUPREME COURT OF OHIO

RICHARD JAQUES, : Case No. 09-0820
: :
Appellee, : On Appeal from the Lucas
: : County Court of Appeals,
v. : Sixth Appellate District
: :
PATRICIA A. MANTON, : Court of Appeals
: : Case No. L-08-1096
Appellant. : :

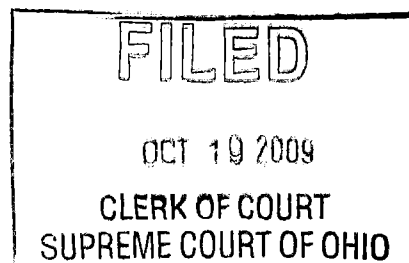
**BRIEF OF AMICI CURIAE, OHIO HOSPITAL ASSOCIATION,
OHIO STATE MEDICAL ASSOCIATION,
AND OHIO OSTEOPATHIC ASSOCIATION,
IN SUPPORT OF APPELLANT PATRICIA A. MANTON**

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STATEMENT OF INTEREST OF AMICI CURIAE

The Ohio Hospital Association, the Ohio State Medical Association, and the Ohio Osteopathic Association participated as amici curiae in *Robinson v. Bates*, 112 Ohio St. 3d 17, 2006-Ohio-6362, and urged the Court: (1) to find that the collateral source rule does not bar evidence of write-offs and (2) to allow evidence of the amount accepted as full payment for medical care to be submitted to the jury. In *Robinson*, this Court held that “[b]oth an original medical bill and the amount accepted as full payment are admissible to prove the reasonableness and necessity of charges rendered for medical and hospital care” and that “any difference between an original [medical] bill and the negotiated amount is not a ‘benefit’ under the collateral-source rule.” *Robinson*, 2006-Ohio-6362, at paragraphs one and two of the syllabus. Less than three years later, the Sixth District’s decision in the instant case improperly ignores the holding in *Robinson* and misconstrues Ohio’s collateral benefit statute applicable in tort actions (R.C. 2315.20).

In essence, the Sixth District’s decision adopts Ohio law as it existed before *Robinson* and before the General Assembly enacted R.C. 2315.20 to limit application of Ohio’s collateral source rule. *Robinson*, 2006-Ohio-6362, at ¶14. More specifically, under this decision only the amount of the original medical bill, and not the written-off amount or the negotiated amount accepted as payment in full, will be presented to the jury. If the Sixth District’s decision is permitted to stand, defendants, including Ohio hospitals and medical providers, will be forced to pay much more than the actual amount accepted as full payment for medical bills. And tort plaintiffs will recover a windfall, as

their economic loss does not include the amount of any write-off.¹ The Ohio Hospital Association (OHA), Ohio State Medical Association (OSMA), and Ohio Osteopathic Association (OOA) (collectively, “Amici”) have a strong interest in enforcing the holding in *Robinson* and allowing juries to consider *all* of the relevant evidence in determining the reasonable value of medical treatment – including any amount written off as a result of negotiated discounts with insurers or others.

The OHA is a private nonprofit trade association established in 1915 as the first state-level hospital association in the United States. For decades, the OHA has provided a mechanism for Ohio's hospitals to come together and develop health care legislation and policy in the best interest of hospitals and their communities. The OHA is comprised of more than one hundred seventy (170) private, state and federal government hospitals and more than forty (40) health systems, all located within the state of Ohio; collectively they employ more than 230,000 employees. The OHA’s mission is to be a membership-driven organization that provides proactive leadership to create an environment in which Ohio hospitals are successful in serving their communities. In this regard, the OHA actively supports patient safety initiatives, insurance industry reform, and tort reform measures. The OHA was involved in the formation of the Ohio Patient Safety Institute² which is dedicated to improving patient safety in the State of Ohio, and created OHA

¹ One hundred percent (100%) of the OHA’s member hospitals have negotiated payment rates with insurance carriers and others, and the negotiated rates vary widely. No less than hundreds of millions of dollars per year are written off in Ohio due to charges negotiated between health care providers and insurance carriers.

² <http://www.ohiopatientsafety.org>

Insurance Solutions, Inc.³ to restore stability and predictability to Ohio's medical liability insurance market.

The OSMA is a non-profit professional association of approximately 20,000 physicians, medical residents, and medical students in the state of Ohio. OSMA's membership includes most Ohio physicians engaged in the private practice of medicine, in all specialties. OSMA's purposes are to improve public health through education, encourage interchange of ideas among members, and maintain and advance the standards of practice by requiring members to adhere to the concepts of professional ethics.

The OOA is a non-profit professional association, founded in 1898, that represents Ohio's 3,400 licensed physicians (DOs), 18 health-care facilities accredited by the American Osteopathic Association, and the Ohio University College of Osteopathic Medicine in Athens, Ohio. Osteopathic physicians make up eleven percent of all licensed physicians in Ohio and twenty-six percent of the family physicians in the state. OOA's objectives include the promotion of Ohio's public health and maintenance of high standards at all osteopathic institutions within the state.

If not reversed, the Sixth District's decision transforms a limited exception in Ohio's collateral source statute (R.C. 2315.20) into a general rule precluding the admissibility of write-offs to prove the reasonableness and necessity of medical charges rendered. Amici urge this Court to reaffirm *Robinson*, and hold that where a plaintiff's insurer has a right to subrogation, R.C. 2315.20 does not preclude evidence of the amount written off of plaintiff's medical bills.

³ <http://www.ohainsurance.com>

STATEMENT OF FACTS

The relevant facts giving rise to the appeal pending before the Court are set forth in Appellant's Merit Brief filed in the Ohio Supreme Court. Those facts are adopted by reference and incorporated herein. For purposes of this Brief of Amici Curiae, the following facts are most significant:

- The case below arose after the decision in *Robinson v. Bates*.
- At trial, Richard Jaques ("Appellee") proffered medical bills for services from various providers totaling \$27,874.80.
- The amount accepted as full payment for Appellee's medical bills was \$7,483.91.
- The trial court precluded Patricia Manton's (Appellant's) proffer of evidence of the amount written off by Appellee's insurer (Medical Mutual), which was affirmed by the Sixth District Court of Appeals.
- Neither Appellee nor his insurer is or ever was responsible for paying the difference between the amount accepted as payment in full for Appellee's medical care and the amount reflected on the original medical bill.

ARGUMENT

This case presents the question of whether this Court's recent and well-reasoned decision in *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, is effectively superseded by R.C. 2315.20. It is not. Even if R.C. 2315.20 is applicable, nothing in this statute changes this Court's fundamental holding in *Robinson* that amounts written off from medical bills are not collateral benefits. Additionally, the subrogation exception in R.C. 2315.20 does not apply to amounts written off because no right of subrogation exists as to write-offs.

Ohio law, the law of other jurisdictions, and public policy all support the conclusion that evidence of write-offs is admissible in determining plaintiff's recoverable damages.⁴

A. **Pursuant to *Robinson*, the Amount Written Off a Medical Bill is not a "Benefit" Under the Collateral Source Rule, and R.C. 2315.20 Does Not Change this Principle**

PROPOSITION OF LAW NO. 1:

Because no one pays the difference between amounts originally billed and amounts accepted as full payment, those amounts are not "benefits" under the collateral source rule. Hence, evidence of such write-offs is not precluded by R.C. 2315.20, and such evidence is admissible on the issue of reasonableness and necessity of charges for medical treatment and hospital care.

The Sixth District ignored *Robinson* and improperly applied Ohio's collateral source statute (R.C. 2315.20) in holding that where a right of subrogation exists, the *only* admissible evidence of the reasonable value of medical services is the amount reflected in a plaintiff's original (undiscounted) medical bill.⁵ This decision was based, in large part, on the Sixth District's erroneous conclusion that *Robinson* was not applicable because the "case arose after the enactment of R.C. 2315.20." *Jaques v. Manton*, 6th Dist. No. L-08-1096, 2009-Ohio-1468, at ¶8. In short, R.C. 2315.20 was not intended to and does not supersede *Robinson*, and nothing in *Robinson* limits its holding — that the difference between the original medical bill and the amount accepted as payment in full *is not a benefit under the collateral source rule* — only to cases involving causes of action accruing prior to April 7, 2005 (i.e., the effective date of R.C. 2315.20).

⁴ In some jurisdictions, the amounts written-off or the amounts accepted as payment in full are not presented to the jury, but are applied by the court post-judgment to offset (or reduce) damages. See *Goble v. Frohman* (Fla. 2005), 901 So.2d 830.

⁵ As this Court has recognized, "[o]riginal bills are certainly evidence of the value that the medical providers themselves place upon their services." *Robinson*, 2006-Ohio-6362, at ¶9.

1. R.C. 2315.20 does not supersede *Robinson*

Robinson was decided on December 20, 2006. After that date, unless *Robinson* is overturned or superseded, Ohio's lower courts are required to apply and follow *Robinson* in all cases where the legal principles addressed in *Robinson* are at issue. See, e.g., *State ex rel. Davis v. Public Emples. Ret. Bd.*, 120 Ohio St. 3d 386, 2008-Ohio-6254, ¶38 ("Under the legal doctrine of stare decisis, courts follow controlling precedent, thereby creating stability and predictability in our legal system.").

The Sixth District erroneously concluded that *Robinson* is not applicable, and that R.C. 2315.20 is controlling, based on the fact that Appellee's "case arose" after the enactment of R.C. 2315.20. *Jaques*, 2009-Ohio-1468, at ¶¶8-9. This reasoning is simply incorrect.

First, there is absolutely nothing in *Robinson* which limits its holding to only cases filed (or cases involving causes of action that accrued) prior to April 7, 2005 (the effective date of R.C. 2315.20). *Robinson* was a landmark decision on an important issue that arises in virtually every personal injury case. In *Robinson*, this Court, undoubtedly aware of the magnitude of its decision, clearly set forth two important rules for Ohio's lower courts and future litigants to follow:

- (1) evidence of both the original medical bill and the amount accepted as full payment are admissible to prove the reasonableness and necessity of charges for medical care, and
- (2) the "difference between the original medical bill and the amount accepted as full payment 'is not a 'benefit' under the collateral source-rule."

Robinson, 2006-Ohio-6362, paragraphs one and two of syllabus. Given the importance of the issues addressed and the ruling in *Robinson*, it defies logic to conclude (as the Sixth District did) that the Court's decision applies only to a limited class of cases —

those arising prior to April 7, 2005 — particularly in the absence of an express limitation to that effect. See *Schlegel v. Li Chen Song* (N.D. Ohio 2008), 547 F. Supp.2d 792, 798-799 (rejecting the argument that *Robinson* does not apply to actions arising after the effective date of R.C. 2315.20).

Second, R.C. 2315.20 was not enacted in an effort to supersede *Robinson*. Although the General Assembly has, from time to time, enacted laws to specifically address court rulings, R.C. 2315.20 (which was adopted approximately 20 months before *Robinson* was decided) was not enacted to address *Robinson*. Rather, R.C. 2315.20 was enacted to set forth “Ohio’s statement of law on the collateral source rule.” *Robinson*, 2006-Ohio-6362, at fn. 1. In adopting R.C. 2315.20, the General Assembly reestablished that the public policy of Ohio is to limit the scope of the collateral source rule.⁶

Third, this Court was not only aware of the (then) new collateral source statute at the time it decided *Robinson*, it expressly addressed the legislative intent behind the statute. The Court concluded that in enacting R.C. 2315.20 “it is clear that the *General Assembly intended to limit the collateral source rule in Ohio . . .*”. *Robinson*, 2006-Ohio-6362, at ¶14 (emphasis added). Under Ohio’s previous collateral source rule, “the plaintiff’s receipt of benefits from sources other than the wrongdoer is deemed irrelevant and immaterial on the issue of damages.” *Robinson*, 2006-Ohio-6362, at ¶11 (citing

⁶ Prior to the enactment of R.C. 2315.20, the General Assembly enacted a collateral source statute applicable to medical malpractice claims. See R.C. 2323.41 (eff. April 11, 2003). Thus, the adoption of R.C. 2315.20 was yet another step in establishing that the public policy of Ohio is to abrogate the common law collateral source rule as adopted in *Pryor v. Webber* (1970), 23 Ohio St. 104, 263 N.E.2d 235, and reaffirmed in *Sorrell v. Thevenir*, 69 Ohio St.3d 415, 1994-Ohio-38. See Am.Sub.S.B. No. 281, 2001 Ohio S.B. 281, Section 3(B)(5)(a). In adopting R.C. 2315.20, the General Assembly again requested that the Court reconsider its decision in *Sorrell v. Thevenir*. See *Robinson*, 2006-Ohio-6362, at ¶14 (citation omitted).

Pryor v. Weber (1970), 23 Ohio St.2d 104, 109, 263 N.E.2d 235). The collateral source rule “prevents the jury from learning about a plaintiff’s income [receipt of benefits] from a source other than the tortfeasor . . .”. *Id.* Thus, in enacting R.C. 2315.20 to limit the collateral source rule, the General Assembly intended to allow evidence previously prohibited by the collateral source rule to be presented to the jury. See *Schlegel*, 547 F.Supp.2d at 799 (“[T]he *Robinson* Court acknowledged that once the statute became effective, the [collateral source] rule would be even more limited than as applied by that court.”)

Despite this Court’s clear holding in *Robinson* — that was not limited in any way to cases arising before R.C. 2315.20 became effective — and this Court’s recognition in *Robinson* that the General Assembly limited the collateral-source rule in Ohio when it enacted R.C. 2315.20, the Sixth District concluded that R.C. 2315.20 *abrogates Robinson* and *expands* the use of the collateral source rule to prevent the jury from having access to evidence of write-offs. Because the Sixth District’s decision is contrary to *Robinson* and the General Assembly’s intent to limit the collateral-source rule, the conclusion that R.C. 2315.20 supersedes *Robinson* is unreasonable and must be reversed.

2. R.C. 2315.20 does not bar evidence of “write-offs” because they are not payable to anyone.

In *Robinson*, this Court opined that in light of R.C. 2315.20’s “legislative history, it is clear that the General Assembly intended to *limit* the collateral-source rule in Ohio,” as other states have done. *Robinson*, 2006-Ohio-6362, ¶14 (emphasis added). In passing this statute, the General Assembly found that “twenty-one states modified or abolished the collateral source rule.” *Id.* Ohio joined this group when it enacted R.C. 2315.20, which provides in relevant part:

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

R.C. 2315.20(A) (emphasis added).

This Court specifically held that "the collateral source rule does not apply to write-offs of expenses never paid." *Robinson*, 2006-Ohio-6362, at ¶16. "Because no one pays the write-off, it cannot possibly constitute *payment* of any benefit from a collateral source." *Id.* at ¶16 (citing *Moorhead v. Crozer Chester Med. Ctr.* (2001), 564 Pa. 156, 765 A.2d 786) (emphasis in original). The Court emphasized this holding by including it in the syllabus: "[A]ny difference between an original medical bill and the amount accepted as full payment for the bill is not a 'benefit' under the collateral-source rule." *Robinson*, 2006-Ohio-6362, at paragraph two of syllabus.

The *Robinson* Court recognized that R.C. 2315.20 permits the introduction of "evidence of any amount *payable* as a benefit to the plaintiff * * * ." *Robinson*, 2006-Ohio-6362, at ¶14 (quoting R.C. 2315.20) (emphasis in original). Because write-offs of medical bills are never *payable* to the plaintiff (or anyone else), the collateral source rule set forth in R.C. 2315.20 is not applicable to write-offs as it only applies to "any amount payable as a benefit to the plaintiff." Thus, R.C. 2315.20 is irrelevant to any amount written off from medical bills, and certainly is not controlling on this issue

It is clear, then, based both on *Robinson* and on the legislative intent underlying R.C. 2315.20, that write-offs are not "benefits" under the collateral source rule in R.C. 2315.20 because they are not *payable* or *paid* to anyone. Because write-offs are not

benefits for purposes of the collateral source rule, R.C. 2315.20 does not preclude evidence of write-offs.

After carefully weighing the policy implications, the *Robinson* Court held that the "fairest approach is to make the defendant liable for the reasonable value of plaintiff's medical treatment." *Robinson*, 2006-Ohio-6362, ¶17. Therefore, "[b]oth the original medical bill rendered and the amount accepted as full payment are admissible to prove the reasonableness and necessity of charges rendered for medical and hospital care." *Id.*

In the present case, although Appellee received an initial bill for \$21,874.80, his insurer paid only \$7,483.91 as payment in full for his medical care. The difference between the original bill and the negotiated charge was "written-off" and is not required to be paid by anyone. As this Court recognized in *Robinson*, neither the plaintiff nor plaintiff's insurer ever was or will be liable for this written-off amount. *Robinson*, 2006-Ohio-6362, at ¶16. Thus, this written-off amount is not a "benefit" as that term is used in the collateral source rule because no one made this payment or is liable to make this payment on behalf of the Appellee. As noted in *Robinson*, because no one pays the negotiated reduction, the "tortfeasor does not obtain a credit because of payments made by a third party on behalf of the plaintiff." *Id.*

In short, the collateral source rule as set forth in R.C. 2315.20 does not change the holding in *Robinson*. Accordingly, Amici urge this Court to hold that the collateral source rule, as codified in R.C. 2315.20, does not bar evidence of the amount written off from a plaintiff's medical bills.

B. No Right of Subrogation Attaches to the Amount Written Off of a Medical Bill

PROPOSITION OF LAW NO. 2:

Even if the Court of Appeals is correct in ignoring *Robinson*, amounts written off are still entirely admissible under R.C. 2315.20 because no contractual right of subrogation can exist for amounts that have never been paid.

R.C. 2315.20 excludes the admission of evidence of amounts payable as benefits to plaintiffs from collateral sources with rights of subrogation. Because a right of subrogation extends only to amounts actually paid by a subrogee, no right to subrogation can exist for amounts that were never paid, and will never be paid, by the subrogee-insurer. See, e.g., *Aetna Ins. Co. v. United Fruit Co.* (1938), 304 U.S. 430, 58 S. Ct. 959, at paragraph five of the syllabus (“insurers * * * were entitled by way of subrogation to no more than the amounts they had paid on their policies”).

The right to subrogate allows an insurance provider and an insured who has been injured by an act of a third party “to agree prior to payment of medical benefits that the insured will reimburse the insurer for any amounts later recovered from such third party, the third party's insurer, or any other person through settlement or satisfaction of judgment upon any claims arising from the third party's act.” *N. Buckeye Educ. Council Group Health Benefits Plan v. Lawson*, 103 Ohio St. 3d 188, 192, 2004-Ohio-4886, ¶15. The right to subrogate extends beyond the insurance context as well, and can arise by contract, through equity, or be statutorily required. *Id.* at ¶17 (quoting *Blue Cross & Blue Shield Mut. of Ohio v. Hrenko*, 72 Ohio St.3d 120, 122, 1995-Ohio-306).

Where a contractual or statutory right of subrogation exists, a subrogee-insurer has a right to reimbursement *only* to the extent that it made payments on the insured's behalf. 22-141 Appleman on Insurance § 141.2[A][1] (“An insurer's right to legal or

conventional subrogation arises only when the insurer has paid the loss"). In other words, the right to subrogate extends only to amounts actually paid in satisfaction of medical bills on behalf of the insured.

This rule of limited recovery also holds true in subrogation contexts other than contractual subrogation. For example, the United States has a federal right of subrogation in the context of Medicare only "to the extent of payment made [by Medicare] * * * for such an item or service." 42 U.S.C. §1395(y)(b)(2)(B)(iv). Similarly, the statute governing Ohio's subrogation right to recover Medicaid payments provides that the department's claim "shall not exceed the amount of medical assistance paid by a department on behalf of the recipient or participant." R.C. 5101.58. Likewise, in the context of underinsured motorist coverage, insurers have a right of subrogation only "to the extent of the payment * * * ." R.C. 3937.18(J).

In contrast, the amount of contractually negotiated write-offs is not required to be paid by anyone, and thus is never subject to a right of subrogation. See *Robinson*, 2006-Ohio-6362, at ¶¶14, 16. Therefore, evidence of the amount written off, \$14,390.89, is admissible because no right of subrogation exists as to this unpaid amount. Thus, the amount written off by providers in the instant case is not subject to the collateral source rule either in its previous form or as set forth in R.C. 2315.20.

This result is consistent with decisions in other jurisdictions, including Florida and Idaho, which are the two states this Court specifically referred to when it stated that the Ohio General Assembly intended to limit the collateral source rule by statute as other states have done. *Robinson*, 2006-Ohio-6362, at ¶14.

For instance, in Florida, collateral sources are admissible to offset damages, except “there shall be no reduction for collateral sources for which a subrogation or reimbursement right exists.” F.S.A. § 768.76. The Supreme Court of Florida, construing its statutory collateral source rule in the context of write-offs, held that because no right of subrogation exists as to written-off contractual discounts, the written-off amount should be set off against an award of compensatory damages. *Goble v. Frohman* (Fla. 2005), 901 So.2d 830, 831-832.

The undiscounted medical bills in *Goble* were nearly \$575,000, but \$150,000 was accepted as full payment pursuant to the HMO’s contract with the medical providers. *Id.* The HMO had a right of subrogation. *Id.* The Court held that no right of subrogation existed as to the “contractual ‘discount’ of over \$400,000, the difference between the amounts billed and the amounts paid.” *Id.* Rather, the “subrogation right [was] limited to the sum * * * that [the HMO] paid under the contracts.” *Id.* at 832. Because no right of subrogation existed as to the written-off amount, the Florida collateral source statute required that the write-off be used to offset damages. *Id.* at 833.

Similarly, Idaho has limited application of its collateral source rule by statute. In Idaho, evidence of collateral source payments is admissible and may offset compensatory damages. I.C. §6-1606. The statute provides, however, that collateral sources (for which offset is permitted) shall not include “federal benefits under which by law must seek subrogation.” *Id.* Construing this statute in the context of Medicare write-offs (for which a federal right of subrogation exists), the Supreme Court of Idaho held that “although a [Medicare] write-off is not technically a collateral source, it is the type of windfall that I.C. §6-1606 was designed to prevent,” and thus “it is not an item of damages for which a

plaintiff may recover because plaintiff has incurred no liability therefore.” *Dyet v. McKinley* (Idaho 2003), 81 P.3d 1236, 1239, 139 Idaho 526.

Following this reasoning, this Court should hold and make clear to Ohio’s lower courts that R.C. 2315.20 does not preclude evidence of the amount written off from the original medical bill, as this is precisely the type of windfall that should not be permitted.

Amici urge this Court to overturn the decision of the Sixth District, to reaffirm *Robinson*, and to hold that R.C. 2315.20 does not bar evidence of the amount written off a plaintiff’s medical bills due to negotiated payments for medical services.

C. Sound Public Policy Requires that a Plaintiff’s Recovery for Medical Expenses Should Take into Account the Amount Written Off of Medical Bills.

In today’s insurance environment, most insurance policies include a contractual right of subrogation. 22-141 Appelman on Insurance § 141.1[C][2] (“most insurance policies include subrogation provisions”). If the existence of a right of subrogation precludes the introduction of evidence of write-offs, then this statutory exception will not only swallow the rule set forth in *Robinson*, but will effectively revert Ohio law back to where it was before *Robinson*, as if *Robinson* was never decided. As set forth above, this result is not compelled by, and is actually inconsistent with, R.C. 2315.20 and its legislative history. Nor is there a good public policy reason for reverting back.

If the Sixth District’s decision is not overturned, then the *only* evidence permitted to establish the “reasonable value” of the medical services rendered in cases involving a right of subrogation is the undiscounted amount of the medical bill. Hence, juries could find it hard to award anything less than this amount (since this is the only evidence they will have), thereby exposing all Ohioans to a risk of higher tort judgments in innumerable personal injury cases. Defendants found negligent will be liable for the undiscounted

amount of medical services even though neither plaintiff nor anyone else is required to pay this amount on behalf of the plaintiff because a lesser, negotiated, amount has been accepted as full payment for the medical care. This potential outcome was specifically recognized and denounced in *Robinson*. *Robinson*, 2006-Ohio-6362, at ¶16-17.

To allow a plaintiff to *only* recover more for medical services than is required in full satisfaction for such medical services is to compensate the plaintiff for a so-called “loss” that never was incurred. See R.C. 2315.18(A)(2) (defining “economic loss” for medical care in tort actions as “all *expenditures* for medical care or treatment . . .”) (emphasis added). Such an outcome would needlessly shift the cost of these phantom losses to defendants and their insurers, grant plaintiffs a windfall at the expense of all Ohioans, and ultimately increase the cost of liability insurance in Ohio.

It is axiomatic that increased risks of exposure to liability lead to increased insurance premiums. See, e.g., *Imperial Fire Ins. Co. v. Coos County* (1894), 151 U.S. 452, 469, 14 S. Ct. 379. If compensatory damage awards for medical expenses do not take into account evidence of the amount written off or accepted as payment in full in cases involving a right of subrogation, then liability insurers and self-insured entities will be held liable for amounts much higher than the amount actually incurred or expended to pay for an injured party’s medical care. The risk of higher tort awards in virtually all personal injury cases will inevitably drive liability insurance premiums upward and lead to increased reserves for insurers and self-insureds.⁷

⁷ The Congressional Budget Office (CBO) recently estimated that the direct costs that medical providers will incur in 2009 for medical malpractice liability (including malpractice insurance premiums, settlements, awards, and administrative costs not covered by insurance) will total approximately \$35 billion, or about 2% of total health care expenditures. Letter from Douglas W. Elmendorf, Director, Congressional Budget

Just a few years ago, Ohio experienced a significant medical malpractice liability insurance crisis. Many carriers left the Ohio market. News stories throughout Ohio featured doctors who were closing their doors, moving to other states, or limiting their practices because they were unable to obtain affordable insurance coverage in Ohio. During this same time, numerous hospitals closed maternity wards and eliminated other patient services.

Fortunately, the dire situation previously facing Ohio's healthcare providers has improved in the last couple of years. Although medical malpractice liability insurance premiums are no longer rising exponentially, the cost of medical malpractice insurance remains high in Ohio, particularly for certain specialists, such as obstetricians.⁸ For example, although medical malpractice insurance premiums are declining, the average annual cost for liability insurance for an obstetrician/gynecologist in Cuyahoga County in 2008 ranged from \$116,891 to \$171,456. *Id.* (In comparison, in North Dakota, annual premiums for an obstetrician ranged from \$27,596 to \$43,989 and in North Carolina from \$41,672 to \$82,083.) It is inevitable that the risk of higher tort judgments in all personal injury cases will lead to higher medical malpractice insurance, moving Ohio backward and undermining the progress that has been made in stabilizing medical malpractice insurance premiums in the past few years.

Office, to Sen. Orrin G. Hatch (Oct. 9, 2009), available at http://www.cbo.gov/ftpdocs/106xx/doc10641/10-09-Tort_Reform.pdf. The CBO estimates that implementing a package of national tort reforms, including collateral source reform, could reduce total national premiums for medical liability insurance by about 10%, thus reducing national health care expenditures by about 0.2%. *Id.* at 2.

⁸ See 2008 Medical Liability Monitor Annual Rate Survey Report (excerpt for Ohio attached as Exhibit A).

This Court's decision will also have a significant impact on self-insured healthcare entities in Ohio. As many as 50% of Ohio hospitals are self-insured for liability risks. When self-insured hospitals are required to increase their reserves for claims (as they would be to account for the increased risk emanating from the Sixth District's decision), they need to reallocate resources. This often means cutting other programs and services offered to patients, employees, and the community at large. It may not be possible for the health care industry to fund the overcompensation of plaintiffs at the same time that it pursues other goals such as caring for the uninsured⁹ and furthering medical research, especially since this overcompensation occurs in the context of a system with limited resources.

A ruling that allows the jury *only* to have evidence of the undiscounted original medical bill, regardless of the amount accepted as full payment, whenever a plaintiff's insurer has a right to subrogation, would create a system in which personal injury plaintiffs receive an unearned windfall at the expense of other Ohioans. Additionally, permitting the original billed amount as the *only* evidence of the reasonable value of the medical services rendered, when an insurer has paid a lower, negotiated amount as payment in full, is misleading because neither the plaintiff nor anyone else was, or ever will be, liable to pay the written-off charges.

Because the Sixth District's decision, if undisturbed, will increase the risk of exposure to larger damage awards and ultimately lead to increased insurance premiums

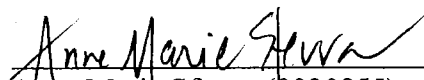
⁹ In 2007, Ohio's 178 hospitals provided more than \$3.5 billion dollars' worth of care, for which no other reimbursement was available, to those who could not pay for medical care. See Ohio Hospital Association, *Community Benefit Report: Good Neighbors* (2009), available at <http://www.ohanet.org/Issue/Community%20Benefit>. This \$3.5 billion total includes \$893 million in care provided to uninsured Ohioans who could not pay for their own care. *Id.* These statistics from 2007 are the most recent available.

(both for medical malpractice insurance and for other types of liability insurance), as well as increased reserves and pay-outs for self-insured entities, sound public policy dictates that a plaintiff's recovery for medical expenses should take into account the amount actually accepted as full payment for medical bills.

CONCLUSION

For all of the foregoing reasons, Amici urge this Court to reverse the Sixth District Court of Appeals' holding that R.C. 2315.20 bars the introduction of evidence of the amount accepted as full payment for a plaintiff's medical treatment whenever a plaintiff's insurer has a right of subrogation. Amici urge this Court to hold that *Robinson* applies to cases enacted after R.C. 2315.20, and to reaffirm its holding in *Robinson* that write-offs are never paid, and thus are outside the ambit of the collateral source rule, including as codified in R.C. 2315.20.

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	<u>SPECIALTY</u>	<u>2007 Rate</u>	<u>2008 Rate</u>	<u>% Change</u>
(Columbia, Dutchess, Greene, Putnam and Ulster Counties)	Internal Medicine	\$19,867	\$19,867	0%
	General Surgery	\$67,349	\$67,349	0%
	OB/Gyn	\$126,173	\$126,173	0%
(Erie and Niagara Counties)	Internal Medicine	\$13,808	\$13,808	0%
	General Surgery	\$46,814	\$46,814	0%
	OB/Gyn	\$87,705	\$87,705	0%
(Livingston, Monroe, Ontario, Seneca, Wayne and Yates Counties)	Internal Medicine	\$8,964	\$8,964	0%
	General Surgery	\$30,389	\$30,389	0%
	OB/Gyn	\$56,930	\$56,930	0%
(Remainder of State)	Internal Medicine	\$12,677	\$12,677	0%
	General Surgery	\$42,976	\$42,976	0%
	OB/Gyn	\$80,510	\$80,510	0%

North Carolina

The Doctors Company

Internal Medicine	\$8,964	\$8,964	0%
General Surgery	\$35,740	\$35,740	0%
OB/Gyn	\$41,672	\$41,672	0%

Medical Assurance Co. (ProAssurance)

Internal Medicine	N/A	\$9,995	---
General Surgery	N/A	\$33,087	---
OB/Gyn	N/A	\$46,942	---

Medical Mutual Insurance Co. of North Carolina

Internal Medicine	\$10,970	\$10,970	0%
General Surgery	\$52,747	\$52,747	0%
OB/Gyn	\$82,083	\$82,083	0%

North Dakota

Midwest Medical Insurance Co.

Internal Medicine	\$6,681	\$6,021	-10%
General Surgery	\$20,044	\$18,063	-10%
OB/Gyn	\$30,623	\$27,596	-10%

Medical Protective

Internal Medicine	---	\$12,770	---
General Surgery	---	\$37,591	---
OB/Gyn	---	\$43,989	---

Ohio

American Physicians Assurance Corp. (APCapital)

(Cuyahoga and Lorain Counties)

Internal Medicine	\$44,467	\$40,020	-10%
General Surgery	\$157,039	\$141,336	-10%
OB/Gyn	\$190,505	\$171,456	-10%

(Ashtabula, Geauga, Lake, Mahoning, Portage and Trumbull Counties)

Internal Medicine	\$39,643	\$35,678	-10%
General Surgery	\$140,002	\$126,002	-10%
OB/Gyn	\$169,837	\$152,854	-10%

(Medina, Stark and Summit Counties)

Internal Medicine	\$24,331	\$20,756	-15%
General Surgery	\$85,927	\$73,335	-15%
OB/Gyn	\$104,239	\$88,963	-15%

(Belmont, Columbiana, Jefferson, Monroe and Washington Counties)

Internal Medicine	\$23,073	\$20,765	-10%
General Surgery	\$81,482	\$73,335	-10%
OB/Gyn	\$98,847	\$88,963	-10%

(Remainder of State)

Internal Medicine	\$20,975	\$18,878	-10%
General Surgery	\$74,075	\$66,668	-10%
OB/Gyn	\$89,861	\$80,875	-10%

EXHIBIT

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	<u>SPECIALTY</u>	<u>2007 Rate</u>	<u>2008 Rate</u>	<u>% Change</u>
(Champaign, Clark, Darke, Greene, Miami, Montgomery and Preble Counties)				
	Internal Medicine	\$18,039	\$15,668	-13%
	General Surgery	\$63,704	\$55,334	-13%
	OB/Gyn	\$77,280	\$67,127	-13%
(Adams, Brown, Butler, Clermont, Clinton, Hamilton, Highland, Jackson, Lawrence, Pike, Ross, Scioto, Vinton and Warren Counties)				
	Internal Medicine	\$14,473	\$13,025	-10%
	General Surgery	\$51,112	\$46,001	-10%
	OB/Gyn	\$62,004	\$55,804	-10%
Medical Assurance Co. (ProAssurance)				
(Rest of State)				
	Internal Medicine	\$18,346	\$17,288	-6%
	General Surgery	\$60,805	\$57,129	-6%
	OB/Gyn	\$86,281	\$81,034	-6%
(Adams, Brown, Butler, Champaign, Clark, Clermont, Clinton, Darke, Greene, Hamilton, Highland, Jackson, Lawrence, Miami, Montgomery, Pike, Preble, Ross, Scioto, Vinton and Warren Counties)				
	Internal Medicine	\$14,100	\$13,304	-6%
	General Surgery	\$45,944	\$43,185	-6%
	OB/Gyn	\$65,051	\$61,113	-6%
(Ashtabula, Geauga, Lake, Mahoning, Portage and Trumbull Counties)				
	Internal Medicine	\$24,290	\$22,866	-6%
	General Surgery	\$81,610	\$76,651	-6%
	OB/Gyn	\$116,003	\$108,922	-6%
(Belmont, Columbiana, Jefferson, Monroe and Washington Counties)				
	Internal Medicine	\$20,893	\$19,679	-6%
	General Surgery	\$69,722	\$65,496	-6%
	OB/Gyn	\$99,019	\$92,986	-6%
(Cuyahoga and Lorain Counties)				
	Internal Medicine	\$25,988	\$24,459	-6%
	General Surgery	\$87,555	\$82,229	-6%
	OB/Gyn	\$124,495	\$116,891	-6%
(Medina, Stark and Summit Counties)				
	Internal Medicine	\$21,743	\$20,475	-6%
	General Surgery	\$72,694	\$68,285	-6%
	OB/Gyn	\$103,265	\$96,970	-6%
Medical Protective				
(Ashtabula, Cuyahoga, Erie, Geauga, Lake, Lorain, Mahoning, Medina, Portage, Stark, Summit, Trumbull and Wayne)				
	Internal Medicine	---	\$25,636	---
	General Surgery	---	\$78,323	---
	OB/Gyn	---	\$123,080	---
(Belmont, Columbiana, Fairfield, Jefferson, Licking, Monroe and Washington Counties)				
	Internal Medicine	---	\$19,226	---
	General Surgery	---	\$58,738	---
	OB/Gyn	---	\$92,303	---
(Brown, Butler, Clermont, Clinton, Darke, Greene, Hamilton, Miami, Montgomery, Preble, Shelby and Warren Counties)				
	Internal Medicine	---	\$13,184	---
	General Surgery	---	\$40,278	---
	OB/Gyn	---	\$63,293	---
The Doctors Company				
(Remainder of State)				
	Internal Medicine	\$20,911	\$20,911	0%
	General Surgery	\$77,371	\$77,371	0%
	OB/Gyn	\$84,353	\$84,353	0%
(Cuyahoga, Lorain, Mahoning, Portage and Trumbull Counties)				
	Internal Medicine	\$27,459	\$27,459	0%
	General Surgery	\$101,596	\$101,596	0%
	OB/Gyn	\$119,917	\$119,917	0%
(Adams, Brown, Butler, Champaign, Clark, Clermont, Clinton, Darke, Fayette, Franklin, Greene, Hamilton, Highland, Jackson, Lawrence, Madison, Miami, Montgomery, Pickaway, Pike, Preble, Ross, Scioto, Vinton and Warren Counties)				
	Internal Medicine	\$15,757	\$15,575	-1%
	General Surgery	\$57,626	\$57,626	0%
	OB/Gyn	\$66,316	\$66,316	0%
(Ashtabula, Columbiana, Geauga, Lake, Medina, Stark and Summit Counties)				
	Internal Medicine	\$24,713	\$24,713	0%
	General Surgery	\$91,441	\$91,441	0%
	OB/Gyn	\$99,691	\$99,691	0%