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OHIO SUPREME COURT SAYS MEDICAL EXPENSE WRITE-OFFS ARE ADMISSIBLE EVEN AFTER R.C. 2315.20

By Shawn M. Blatt, Esq.



The Ohio Supreme Court has now finally confirmed that medical expense write-offs are admissible, even after the passage of R.C. 2315.20.

The court has now held that write-offs are admissible to prove the reasonable value of medical expenses in a personal injury case. *Jaques v. Manton*, 2010-Ohio-1838. In its original ruling in *Robinson v. Bates*, 112 Ohio St.3d 17, the Court held that both the initial amount billed and the actual amount accepted in full payment (including the amount charged off) were admissible to determine the reasonable value of medical expenses in a personal injury claim.

Plaintiffs argued that introducing evidence of write-offs violated the “collateral source rule,” i.e., the common law rule that prohibited any evidence that a loss had been paid by insurance. In *Robinson v. Bates*, the Supreme Court held that write-offs were not “payments by insurance,” and thereby did not violate the collateral source rule. As a result, the write-offs were admissible and the jury could consider both the original bill and the lesser amount accepted as full payment to determine the “reasonable value” of the medical treatment.

After *Robinson v. Bates* was decided, the Ohio General Assembly passed Ohio Revised Code 2315.20, a law that attempted to change the collateral source rule. That statute allowed a defendant to introduce evidence that medical bills were paid by insurance, unless the insurer had a contractual right of subrogation. Since almost every medical

payment made by an insurance company carries with it a contractual right of subrogation, the new law did not significantly change the old rule; evidence of insurance payments was still prohibited. Plaintiff’s attorneys argued that the new law superseded the Court’s holding in *Robinson v. Bates* and that the new statute prohibited the introduction of any write-offs.

The Supreme Court has now rejected that argument. In *Jaques*, the plaintiff wanted to introduce bills for medical services of \$21,874. The medical care providers accepted \$7,483 as full payment of those bills and charged off the rest. The defendant wanted to introduce evidence that the actual value of the services was \$7,483 and that \$14,390 was charged off. The trial court refused to allow in evidence of the write-offs, and the jury was only able to consider the original amount billed. The jury awarded the plaintiff \$25,000 in damages, which included \$15,500 for medical bills.

The Ohio Supreme Court reconfirmed its findings in *Robinson v. Bates*, noting that evidence of a write-off does not constitute a payment of any benefit from a collateral source. “Because no one pays the write-off, it cannot possibly constitute payment of any benefit from a collateral source.” *Id.* at par. 8, quoting *Robinson*. The court noted that the statute only applies to prohibit the introduction of an actual payment of a bill. Write-offs are amounts not paid by third parties or anyone else, and allowing the introduction of write-offs allows the jury to decide the actual amount of medical expenses incurred as a result of the defendant’s conduct. The court noted that applying this approach supports the goal of civil compensatory damages, i.e., making the plaintiff whole.

This decision has now finally laid to rest the dispute over write-offs of medical expenses. A number of districts, including the Sixth District (Toledo, Lucas County) and Eighth District (Cleveland, Cuyahoga County) Courts of Appeals, prohibited the introduction of any evidence of write-offs. Now a jury will be entitled to hear both the original amount billed and the amount written off (i.e., the amount actually accepted as full payment).

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Obviously, this decision confirming *Robinson v. Bates* will limit damage awards by reducing medical bills down to those amounts actually paid by the insurer. It should be noted that this does not mean actual evidence of the payment of insurance will be introduced. Rather, it will simply be an acknowledgement that the actual amount “accepted as full payment” was substantially less than the initial amount billed. The discounts that exist are normally substantial, and this will go a long way in reducing jury verdicts where there are large bills for diagnostic procedures and hospitalizations.

OHIO SUPREME COURT SAYS AUTO POLICY COVERS ATTORNEY’S FEES

By Shawn M. Blatt, Esq.



The Ohio Supreme Court has ruled that an auto policy covers claims for attorney’s fees, even where the attorney’s fees were based on, and arose directly out of an award of punitive damages.

In *Neal-Pettit v. Lahman*, 2010-Ohio-1829, the Ohio Supreme Court examined whether an auto liability policy covered an award of attorney’s fees in a case that included an award of punitive damages. The insured was sued for bodily injuries she caused in an accident that occurred when she was intoxicated and fleeing the scene of a previous collision. The jury returned a verdict against the insured for compensatory damages in the amount of \$113,800, punitive damages in the amount of \$75,000, and attorney fees in amount of \$46,825. The award of attorney’s fees was made solely because the jury found that the insured had acted with malice, which was the basis for awarding punitive damages.

The insurer argued that its policy did not cover attorney’s fees because it only agreed to pay damages that an insured was legally obligated to pay because of “bodily injury sustained by any person.” The insurer argued that the attorney’s fees were not because of “bodily injury” sustained by the plaintiff. The insurer argued that attorney’s fees were awarded as a result of punitive damages and are, therefore, derivative damages and not damages themselves. The Ohio Supreme Court rejected these arguments and held that the insurance policy’s general coverage of damages because of “bodily injury” included the attorney’s fees.

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ATTORNEY'S FEES**

Continued

The Court noted that, although the attorney's fees were awarded as a result of the punitive damage award, the attorney's fees also stemmed from the underlying bodily injury and, as a result, were incurred "because of the bodily injury." The Court noted that the policy did not limit coverage to damages **solely** because of bodily injury. As a result, it found that the attorney's fees fell within the general definition of damages as set forth in the policy.

The insurance policy also excluded coverage for "punitive or exemplary damages, fines or penalties." The insurer argued that because the attorney's fees were granted as a result of punitive damages, they were therefore derivative of and identified with punitive damages and fell within the exclusion for exemplary damages, fines or penalties. The Supreme Court rejected that argument as well, noting that attorney's fees are distinct from punitive damages and, therefore, the term "punitive" or "exemplary" damages does not clearly and unambiguously include attorney's fees. In addition, the Court noted that if the insurer wanted to directly exclude attorney's fees it should have expressly said so. The Ohio Supreme Court also rejected the argument that public policy of the state of Ohio prohibits coverage for attorney's fees.

General auto policies and commercial general liability policies that broadly define the scope of coverage, (and do not expressly exclude attorney's fees), will likely cover an award of attorneys fees. This potential coverage is significant because businesses and contractors are constantly confronted with lawsuits that include claims of consumer fraud under the Ohio Consumer Sales Practices Act. That Act provides for an award of attorney's fees. Unless the contract of insurance specifically excludes attorney's fees, it is likely that a court will determine that attorney's fees are covered. While the language of each contract of insurance may be unique, this case indicates that general language will not be enough to avoid coverage for attorney's fees.

**INSURER REQUIRED TO FILE COUNTERCLAIM
TO PROTECT SUBROGATION**

By Shawn M. Blatt, Esq.



Many times, insurers will be included in personal injury lawsuits for the purpose of protecting their subrogation rights and will be named as either defendants or involuntary plaintiffs. The Hamilton County Court of Appeals, First Appellate District, recently held that an insurer was required to plead a counterclaim to preserve a subrogation right against its insured. In *Whitaker, et al. v. Jones, et al.*, an insurer was named as a defendant for underinsured motorist coverage. In its answer to the complaint, the insurer also pleaded a subrogation cross-claim against the tortfeasor who caused the accident but did not file a counterclaim. The plaintiff put forth evidence during trial of medical bills that were paid by the insurance company and for which the insurance company had an undisputed right of subrogation.

In a post-trial hearing, the insurer moved for an order that it to be reimbursed for medical expenses payments it had made to the plaintiffs pursuant to its right of subrogation. The trial court granted that order.

The Court of Appeals held that the court had no authority to grant such an order because the insurer had not filed a counterclaim. The insurer had apparently failed to present any interrogatory to the jury to have judgment granted on its behalf. In addition, it had also failed to file a compulsory counterclaim and, thus, the trial court could not grant judgment in favor of the insurance company against the plaintiff-insured for the amount of the subrogated medical payments. The counterclaim was compulsory, i.e., any claim against the plaintiff for recovery of the medical bills award had to be made or it would be lost. Because the counterclaim was not filed, the insurance company had no right to recover directly against the plaintiff.

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