[Cite as *Aubry v. Univ. of Toledo Med. Ctr.* , 2012-Ohio-1313.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Lawrence Aubry et al.,	:	
Plaintiffs-Appellants,	:	
		No. 11AP-509
v.	:	(C.C. No. 2007-05814)
The University of Toledo Medical Center f/k/a Medical University of Ohio at Toledo,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on March 27, 2012

Lafferty Gallagher & Scott LLC, Thomas W. Gallagher, and *Joseph S. Hartle*, for appellants.

Michael DeWine, Attorney General, and *Brian M. Kneafsey, Jr.*, for appellee.

APPEAL from the Court of Claims of Ohio.

BROWN, P.J.

{¶ 1} Plaintiffs-appellants, Lawrence Aubry and his wife, Joyce Aubry (collectively "appellants"), appeal from the May 11, 2011 judgment entry of the Court of Claims of Ohio overruling their objections to and adopting the February 10, 2011 magistrate's decision.[1]

{¶ 2} In May 2006, appellant's physician, Dr. G. Mark Seal, recommended that appellant undergo a "green-light" laser procedure to treat his ongoing urinary problems. On June 19, 2006, Dr. Ranko Miocinovic, a surgical resident employed by defendant-

[1] As used herein, "appellant" shall refer to Lawrence Aubry.

appellee, University of Toledo Medical Center, performed the procedure under the supervision of Dr. Seal, who was not employed by appellee. The procedure caused permanent damage to appellant's urinary system, leaving him totally incontinent of urine.

{¶ 3} Appellant filed a medical malpractice action in the Court of Claims against appellee arising from Dr. Miocinovic's alleged negligence in performing the procedure. Appellant's wife asserted a claim for loss of consortium.

{¶ 4} Appellant and his wife filed similar claims in the Lucas County Court of Common Pleas against Dr. Seal, Dr. Miocinovic, and appellee. Dr. Miocinovic was granted immunity from personal liability due to his employment with appellee. Dr. Seal was not entitled to personal immunity because he was not employed by appellee. Dr. Seal ultimately settled the case for $295,000, and appellants thereafter dismissed the common pleas action.

{¶ 5} Meanwhile, the Court of Claims bifurcated the issues of liability and damages. Following the liability trial, the court entered judgment for appellants, finding that the care and treatment provided by Dr. Miocinovic, under the direction and supervision of Dr. Seal, fell below the accepted standard of care. The court thereafter set the case for trial on damages. On appellee's motion, the court issued an amended judgment entry, pursuant to R.C. 2307.23, apportioning liability for appellant's injury equally between Drs. Miocinovic and Seal. Appellants thereafter filed a motion for partial summary judgment, arguing that appellee was not entitled to set off appellants' settlement with Dr. Seal against appellee's share of appellants' damages. The court denied appellants' motion, and the case thereafter proceeded to the damages trial.

{¶ 6} Following the damages trial, a court magistrate, on February 10, 2011, issued a decision recommending judgment for appellants in the amount of $25. More particularly, the magistrate found that the evidence established total compensatory damages of $675,000, including $250,000 for appellant's past and future pain and suffering, $150,000 for appellant's past and future loss of enjoyment of life, $150,000 for appellant's wife's loss of consortium, $61,000 for appellant's past medical expenses, and $75,000 for appellant's future medical expenses. The magistrate concluded that the $400,000 non-economic damage award to appellant must be capped at $250,000, pursuant to R.C. 3345.40(B)(3), and that no similar reduction was required in the award

to appellant's wife. The magistrate further concluded that appellants' award must be further reduced by 50 percent, pursuant to R.C. 2307.23, to account for the negligence attributable to Dr. Seal. Finally, the magistrate concluded that, pursuant to R.C. 3345.40(B)(2), the $295,000 appellants received in settlement of their claim against Dr. Seal must be deducted from their award against appellee. The magistrate thus found that appellants were entitled to a net monetary award of $0, notwithstanding their filing fee of $25.

{¶ 7} Pursuant to Civ.R. 53, appellants filed three objections to the magistrate's decision. Appellants first argued that the magistrate erroneously awarded compensatory damages of only $675,000, as the sum of actual damages found by the magistrate totaled $686,000. Appellants next asserted that the magistrate erred in applying the R.C. 3345.40(B)(3) cap on non-economic damages to the entire $400,000 non-economic damage award to appellant because appellee's apportioned share of the non-economic damages, $200,000, was less than the $250,000 threshold. Finally, appellants maintained that the magistrate erred in reducing their award against appellee by the amount of their settlement with Dr. Seal.

{¶ 8} By judgment entry issued May 11, 2011, the trial court sustained appellants' first objection and modified the magistrate's decision to reflect a total compensatory damage award of $686,000. The court overruled appellants' second and third objections, concluding, respectively, that the magistrate properly applied the R.C. 3345.40(B)(3) cap on non-economic damages to the entire $400,000 non-economic damage award and properly reduced appellants' award by the amount of their settlement with Dr. Seal pursuant to R.C. 3345.40(B)(2). With the modification to the total compensatory damage award, the court adopted the magistrate's decision.

{¶ 9} Appellants timely appeal, setting forth two assignments of error for review:

> I. THE TRIAL COURT ERRED BY INCORRECTLY APPLYING THE CAP ON NON-ECONOMIC DAMAGES FOUND IN R.C. 3345.40(B)(3) WHEN NO ONE PERSON'S AWARD EXCEEDED THE STATUTORY MAXIMUM OF $250,000.
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> II. THE TRIAL COURT ERRED IN REDUCING THE AUBRYS' DAMAGES AWARD BY THE AMOUNT OF SETTLEMENT PROCEEDS RECEIVED FROM A NON-

> DEFENDANT JOINT TORTFEASOR, AS SETTLEMENT PROCEEDS ARE NOT A "BENEFIT" UNDER R.C. 3345.40(B)(2), AND APPELLEE WAS FOUND TO BE 50% OR LESS LIABLE FOR THE AUBREYS' INJURIES AND DAMAGES.

{¶ 10} As both of appellants' assignments of error involve the interpretation of R.C. 3345.40, we first set forth the applicable standard of review. Statutory interpretation is a question of law subject to de novo appellate review. *State v. Banks,* 10th Dist. No. 11AP-69, 2011-Ohio-4252, ¶ 13, citing *State v. Certain,* 180 Ohio App.3d 457, 2009-Ohio-148, ¶ 11 (4th Dist.). When conducting such a review, an appellate court does not defer to the trial court's determination. *Akron v. Frazier,* 142 Ohio App.3d 718, 721 (9th Dist.2001), citing *State v. Sufronko,* 105 Ohio App.3d 504, 506 (4th Dist.1995). The primary goal of statutory interpretation is to give effect to the General Assembly's intent in enacting the statute. *Banks* at ¶ 13, citing *State v. Hairston,* 101 Ohio St.3d 308, 2004-Ohio-969, ¶ 11. To determine legislative intent, we first look to the language of the statute. *Hubbell v. Xenia,* 115 Ohio St.3d 77, 2007-Ohio-4839, ¶ 11, citing *State ex rel. Burrows v. Indus. Comm.,* 78 Ohio St.3d 78, 81 (1997). We consider the statutory language in context, construing words and phrases according to the rules of grammar and common usage. *Bartchy v. State Bd. of Edn.,* 120 Ohio St.3d 205, 2008-Ohio-4826, ¶ 16, citing *State ex rel. Stoll v. Logan Cty. Bd. of Elections,* 117 Ohio St.3d 76, 2008-Ohio-333, ¶ 34. If the language is plain and unambiguous and conveys a clear and definite meaning, there is no need to resort to rules of statutory interpretation. *Banks* at ¶ 13, citing *State v. Palmer,* 10th Dist. No. 09AP-956, 2010-Ohio-2421, ¶ 20. A plain and unambiguous statute is to be applied, not interpreted. *Banks* at ¶ 13, citing *Palmer* at ¶ 20.

{¶ 11} In their first assignment of error, appellants contend the Court of Claims erred by applying the R.C. 3345.40(B)(3) cap on non-economic damages to appellants' total non-economic damage award. Appellants argue the court should have first apportioned the damages attributable to appellee and Dr. Seal before applying the statutory cap for non-economic damages. Appellants maintain that using this formula, the $250,000 cap does not apply because appellee's proportionate share of appellants' non-economic damage award, i.e., $200,000, is less than the threshold amount of $250,000.

{¶ 12} R.C. 3345.40 provides, in pertinent part, as follows:

> (B) Notwithstanding any other provision of the Revised Code or rules of a court to the contrary, in an action against a state university or college to recover damages for injury, death, or loss to persons or property caused by an act or omission of [an] employee of the state university or college while acting within the scope of his employment * * * the following rules shall apply:
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> * * *
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> (3) There shall not be any limitation on compensatory damages that represent the actual loss of the person who is awarded the damages. However, except in wrongful death actions brought pursuant to Chapter 2125. of the Revised Code, damages that arise from the same cause of action, transaction or occurrence, or series of transactions or occurrences and that do not represent the actual loss of the person who is awarded the damages shall not exceed two hundred fifty thousand dollars in favor of any one person. The limitation on damages that do not represent the actual loss of the person who is awarded the damages provided in this division does not apply to court costs that are awarded to a plaintiff, or to interest on a judgment rendered in favor of a plaintiff, in an action against a state university or college.

{¶ 13} The plain language of R.C. 3345.40(B)(3) indicates that the $250,000 cap on non-economic compensatory damages pertains only to actions against a state university to recover damages for personal injury caused by an act or omission of the state university or its employee while acting within the scope of his or her employment. In *Oliver v. Cleveland Indians Baseball Co. Ltd. Partnership*, 123 Ohio St.3d 278, 2009-Ohio-5039, a case involving the constitutionality of R.C. 2744.05(C)(1), which contains language identical to that set forth in R.C. 3345.40(B)(3), the Supreme Court of Ohio stated that "R.C. 2744.05(C)(1) places a $250,000 limit on non-economic compensatory damages (those damages that do not represent 'actual loss' to an injured party) awarded *against* political subdivisions." (Emphasis added.) *Id*. at ¶ 4. Applying the court's averment to the identical statutory language at issue here, we conclude that R.C. 3345.40(B)(3) caps only those non-economic damages awarded *against* a state university.

{¶ 14} Here, the Court of Claims determined that appellee was only 50 percent responsible for appellant's injuries; thus, appellee was only 50 percent responsible for appellant's damages, including any non-economic damages. Appellant was awarded a total of $400,000 in non-economic damages. However, pursuant to the 50 percent apportionment of liability, only 50 percent of those damages, or $200,000, were awarded *against* appellee. Pursuant to the plain language of R.C. 3345.40(B)(3), and the court's declaration in *Oliver* regarding the statutory cap, the Court of Claims erred in applying the $250,000 cap to appellant's total non-economic damage award. Because the $200,000 awarded against appellee does not exceed the statutory maximum of $250,000, R.C. 3345.40(B)(3) does not apply. The first assignment of error is sustained.

{¶ 15} Appellants contend in their second assignment of error that the Court of Claims erred in reducing their damage award against appellee by the amount of their settlement with Dr. Seal. The Court of Claims deducted the settlement amount from Dr. Seal from the amount awarded against appellee pursuant to R.C. 3345.40(B)(2). Appellants argue that R.C. 3345.40(B)(2) does not apply to settlements received from non-defendant tortfeasors.

{¶ 16} R.C. 3345.40(B)(2) provides that:

> If a plaintiff receives or is entitled to receive benefits for injuries or loss allegedly incurred from a policy or policies of insurance or any other source, the benefits shall be disclosed to the court, and the amount of the benefits shall be deducted from any award against the state university or college recovered by the plaintiff. No insurer or other person is entitled to bring a civil action under a subrogation provision in an insurance or other contract against a state university or college with respect to such benefits.

{¶ 17} Appellants cite *Vogel v. Wells*, 57 Ohio St.3d 91 (1991), in support of their position that R.C. 3345.40(B)(2) does not authorize a setoff of their settlement with Dr. Seal. In *Vogel,* the plaintiff's decedent was killed in an automobile accident when Wells ran a stop sign, causing her vehicle to collide with the truck in which plaintiff's decedent was a passenger. The plaintiff filed wrongful death and survivorship actions against Wells and the city of Akron.

{¶ 18} Following trial, the jury returned a verdict in favor of the plaintiff and against Akron. The trial court thereafter granted Akron's motion for a collateral source setoff, pursuant to R.C. 2744.05(B), reducing the plaintiff's damage award by the amounts she had received or would receive from the collateral sources of Social Security, veterans' benefits, and gifts from the decedent's father and from his employer, which included payment of funeral expenses.

{¶ 19} At the time *Vogel* was decided, R.C. 2744.05(B) provided that "[i]f a claimant receives or is entitled to receive benefits for injuries or loss allegedly incurred from a policy or policies of insurance or any other source, the benefits shall be disclosed to the court, and the amount of the benefits shall be deducted from any award against a political subdivision recovered by that claimant. No insurer or other person is entitled to bring an action under a subrogation provision in an insurance or other contract against a political subdivision with respect to those benefits."

{¶ 20} The Supreme Court of Ohio held that some of the amounts set off did not fall within the scope of "benefits" as that term was used in R.C. 2744.05(B):

> In order to determine what funds come under the purview of the collateral source setoff provisions of R.C. 2744.05(B), we must first ascertain what the term "benefits" means in relation to the statute. The term "benefits" is nowhere defined in the statute. However, a benefit has been defined elsewhere as "[f]inancial assistance received in time of sickness, disability, unemployment, etc. either from insurance or public programs such as social security." Black's Law Dictionary (6 Ed.1990) 158. Under this definition, which we adopt here, neither the gift from the decedent's employer nor the payment of funeral expenses by the decedent's father constituted benefits under R.C. 2744.05(B), and the court of appeals was correct in restoring these funds to the decedent's estate.

Vogel at 98.

{¶ 21} The statutory language reviewed by the court in *Vogel* (which is now codified at R.C. 2744.05(B)(1)) is nearly identical to that contained in R.C. 3345.40(B)(2), except that R.C. 2744.05(B) applies to political subdivisions while R.C. 3345.40(B)(2) applies to state universities and colleges. *See McMullen v. Ohio State Univ. Hosp.*, 88 Ohio St.3d 332, 343 (2000) ("the language of R.C. 3345.40(B)(2) is virtually identical to that of R.C. 2744.05(B)").

{¶ 22} Applying the *Vogel* court's definition of "benefits" to the instant matter, we find that appellants' settlement with Dr. Seal is not subject to the setoff provision of R.C. 3345.40(B)(2). Appellants' settlement with Dr. Seal does not constitute " '[f]inancial assistance received in time of sickness, disability, unemployment, etc., either from insurance or public programs, such as social security.' " *Vogel* at 98, citing Black's Law Dictionary. Rather, the settlement constituted Dr. Seal's payment for his proportionate share of the total compensatory damage award.

{¶ 23} Due to the similarities in statutory language, we can only conclude that the General Assembly's purpose in enacting R.C. 3345.40(B) is the same as that in enacting R.C. 2744.05(B). In *Menefee v. Queen City Metro*, 49 Ohio St.3d 27, 29 (1990), the Supreme Court of Ohio identified the dual purpose of R.C. 2744.05(B): "[First], [i]t conserves the fiscal resources of political subdivisions by limiting their tort liability. Secondly, it permits injured persons, who have no source of reimbursement for their damages, to recover for a tort committed by the political subdivisions." *Id*. Thus, the dual purpose of R.C. 3345.40(B)(2) is to permit recovery by injured persons for torts committed by a state university while at the same time conserving the fiscal resources of the state university. Here, permitting a setoff of Dr. Seal's settlement from the damages awarded against appellee allows appellee to escape its portion of the liability for appellants' injuries. Although such a practice conserves appellee's fiscal resources, it also prevents appellants from fully recovering for their injuries. We do not believe the General Assembly intended such a result in enacting R.C. 3345.40(B)(2).

{¶ 24} Appellee cites several cases in support of its position that the Court of Claims properly deducted Dr. Seal's settlement from appellants' damage award. In *Yoe v. Ohio Dept. of Agriculture*, Ct. of Cl. No. 2005-09006 (May 7, 2010), plaintiff's decedent was electrocuted while on an amusement park ride. The Court of Claims determined that defendant Department of Agriculture's employees were negligent in failing to discover during their inspection that the ride was not properly grounded, and that such negligence proximately caused the accident. The court awarded the plaintiff over $1 million in damages against the defendant. However, because the plaintiff received more than that amount in settlement proceeds from the owner of the amusement park ride and the county fair board, the court set off the settlement proceeds against the damage award,

reducing the defendant's damage award to zero. The court based the setoff on R.C. 2743.02(D), which states:

> Recoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant. This division does not apply to civil actions in the court of claims against a state university or college under the circumstances described in section 3345.40 of the Revised Code. The collateral benefits provisions of division (B)(2) of that section apply under those circumstances.

{¶ 25} The language in R.C. 2743.02(D) is significantly different from that in R.C. 3345.40(B)(2). R.C. 2743.02(D) provides for a setoff of insurance proceeds, disability awards, or "*other collateral recovery*." (Emphasis added.) R.C. 2743.02(D) does not use the term "benefits" in defining what type of funds may be set off against damages awarded against a state university. The General Assembly acknowledged the distinction between R.C. 2743.02(D) and 3345.40(B)(2), expressly stating in R.C. 2743.02(D) that "[*t*]*his division does not apply to civil actions in the court of claims against a state university or college under the circumstances described in section 3345.40 of the Revised Code. The collateral benefits provisions of division (B)(2) of that section apply under those circumstances."* (Emphasis added.) Had the General Assembly intended that R.C. 3345.40(B)(2) be applied in the same manner as R.C. 2743.02(D), it could have included the same language in R.C. 3345.40(B)(2), particularly in light of the *Vogel* court's definition of the term "benefits." Because the *Yoe* court interpreted a statute with substantially distinguishable language from that at issue in the instant case, *Yoe* does not apply.

{¶ 26} Appellee's citation to *Smith v. Miami Univ.*, Ct. of Cl. No. 2008-10501-AD, 2009-Ohio-2418, is similarly unavailing. There, the plaintiff's laptop was destroyed by water damage caused by the defendant's negligence. The plaintiff sought compensation from the defendant for the total purchase price of the laptop. She acknowledged, however, that she maintained insurance coverage on the laptop with a $500 deductible and that she had received payment from her insurer. The Court of Claims determined that the insurance policy was a "benefit," pursuant to R.C. 3345.40(B)(2), and concluded that the defendant was only responsible for the $500 deductible.

{¶ 27} Unlike *Smith,* the settlement proceeds from Dr. Seal were not collateral benefits received by appellants to compensate them for appellee's negligence. Rather, the settlement proceeds from Dr. Seal were meant to compensate appellants for Dr. Seal's share of the negligence. Because *Smith* is distinguishable from the instant case, it does not apply.

{¶ 28} Appellee also cites *Physicians Ins. Co. of Ohio v. Univ. of Cincinnati Hosp. Aring Neurological Inst.,* 146 Ohio App.3d 685 (10th Dist.2001) in support of its position that the proceeds of the settlement with Dr. Seal constitute "benefits" under R.C. 3345.40(B)(2). In *Physicians,* Tracy Ashcraft was admitted to the University of Cincinnati Hospital ("UCH") for evaluation of treatment options for epileptic seizures. Two UCH neurologists pinpointed the areas of Ashcraft's brain purportedly causing the problem. A neurosurgeon, Dr. Yeh, removed the portions of Ashcraft's brain designated by the UCH neurologists. Despite the surgery, Ashcraft's seizures returned.

{¶ 29} Ashcraft filed a medical negligence claim against Dr. Yeh in federal court and a medical negligence claim against UCH in the Court of Claims. A jury rendered a multi-million dollar verdict against Dr. Yeh. Dr. Yeh's professional liability insurer paid the full amount owed on the judgment. The insurer filed an action for contribution in the Court of Claims against UCH, alleging that UCH's neurologists were joint tortfeasors with Dr. Yeh and were proportionately liable in contribution. This court found that the insurer's action to recover the portion of the damages it paid on behalf of Dr. Yeh, and Dr. Yeh's "loss," arising from the allegedly tortious conduct of the UCH employees, fell within the ambit of R.C. 3345.40(B). Thus, this court determined that the question to be resolved was whether the limitations set forth in R.C. 3345.40(B)(2) applied to preclude the insurer's recovery from UCH.

{¶ 30} This court noted that, in a professional liability insurance policy, the insurer agrees to pay damages which the insured may become obligated to pay because of injury to a third party resulting from professional services rendered by the insured, and that the "benefits" of such a policy, as that term is used in R.C. 3345.40(B)(2), are the insurer paying the amount of damages arising out of the liability of the insured for professional negligence. We further noted that the benefit under the professional liability insurance policy between the insurer and Dr. Yeh was the insurer's payment of the damages Dr. Yeh

was obligated to pay under the court judgment arising from Ashcraft's medical negligence against Dr. Yeh.

{¶ 31} Accordingly, this court found R.C. 3345.40(B)(2) applicable because the insurer's case involved a cause of action against a state university to recover the "loss" to its insured, Dr. Yeh, attributable to the negligence of UCH's employees. We stated that payment of the amount for which UCH is or may be liable is part of the "benefit" Dr. Yeh received under the insurer's professional liability policy. In other words, we determined that the act of paying the judgment for which the insured, Dr. Yeh, was legally obligated to pay was a benefit to him, since he was not required to pay the judgment out of his own personal assets. The benefit to Dr. Yeh was the indemnity that his own insurance company provided him, and it was a benefit between an insurer and its insured. The decision does not address whether the money received by the injured party, Ashcraft, pursuant to the jury verdict against Dr. Yeh, constituted a "benefit" to Ashcraft under R.C. 3345.40(B)(2), and, as such, has no application to the instant matter.

{¶ 32} Similarly, *Mitchel v. Borton*, 70 Ohio App.3d 141 (6th Dist.1990) does not support appellee's contention that the setoff of the settlement proceeds from Dr. Seal was proper. We note initially that *Mitchel* did not address the setoff of settlement proceeds from a joint tortfeasor. Rather, the plaintiff in *Mitchel* received sick pay benefits from her employer while she was off work recovering from injuries she sustained as a result of the defendants' negligence. The court found that the sick pay benefits constituted "benefits" under R.C. 2744.05 and held that the trial court properly set them off from the award against the political subdivision. In so holding, the court reasoned that the purpose behind R.C. 2744.05 was to protect political subdivisions from excessive damage awards which are ultimately paid by the taxpayers. *Id*. at 146, citing *Grange Mut. Cas. Co. v. Columbus*, 49 Ohio App.3d 50, 54 (10th Dist.1989).

{¶ 33} The settlement proceeds appellants received from Dr. Seal are not akin to sick pay benefits an injured party receives from his or her employer. Sick pay benefits compensate an employee for time off work. Collecting lost wages from a political subdivision when sick pay benefits are received would likely result in the plaintiff being compensated twice for his or her lost wages. Here, appellants' attainment of full recovery from appellee for its proportionate share of the damages would not result in a double

recovery. Under the apportioned liability scheme employed in this case, appellee and Dr. Seal are liable only for their proportionate share of the damages.

{¶ 34} Accordingly, because the settlement proceeds appellants received from Dr. Seal do not fall within the scope of "benefits," as that term is used in R.C. 3345.40(B)(2), appellee was not entitled to a setoff of any of the amounts appellants received in settling with Dr. Seal, and the Court of Claims erred in doing so. The second assignment of error is sustained.

{¶ 35} Having sustained both of appellants' assignments of error, we hereby reverse the judgment of the Court of Claims of Ohio and remand this matter for further proceedings in accordance with law and consistent with this decision.

Judgment reversed;
cause remanded.

SADLER and CONNOR, JJ., concur.
