[Cite as *Adae v. State*, 2013-Ohio-23.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Cynthia A. Adae et al.,	:	
Plaintiffs-Appellees,	:	
v.	:	No. 12AP-406 (Ct. of Cl. No. 2007-08228)
State of Ohio et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees,	:	
University of Cincinnati,	:	
Defendant-Appellant.	:	

D E C I S I O N

Rendered on January 8, 2013

Rourke & Blumenthal, LLP, and *Kenneth S. Blumenthal*; *Kirby, Thomas, Brandenburg & D'amico, LPA*, and *Michael R. Thomas*, for plaintiffs-appellees.

Michael DeWine, Attorney General, and *Anne Berry Strait*, for defendant-appellant.

APPEAL from the Court of Claims of Ohio.

PER CURIAM.

{¶ 1} Defendant-appellant, University of Cincinnati ("appellant" or "UC"), appeals the Court of Claims of Ohio's judgment in favor of plaintiffs-appellees, Cynthia A. Adae and Howard R. Adae (collectively, "appellees"), on their claims for medical malpractice and loss of consortium. For the following reasons, we affirm.

I. BACKGROUND

{¶ 2} On June 28, 2006, Mrs. Adae reported to the Clinton Memorial Hospital Regional Health System ("CMH") After Hours Care Clinic with back and chest pain. A doctor concluded that Mrs. Adae was at high risk for Acute Coronary Syndrome ("ACS") and transferred her to the CMH emergency room. According to the Emergency Services Record, Mrs. Adae reported that she had been experiencing pain intermittently for two or three weeks, that the pain sometimes started in her back and sometimes started in her chest, that the pain sometimes increased with heavy breathing, that the pain sometimes radiated down her left arm, and that she had had a fever as high as 103 to 104 degrees. In the emergency room, Mrs. Adae's temperature was 99.3, her heart rate was 140, and her blood pressure and blood sugar were elevated. The emergency room physician, David C. Lee, M.D., ordered medication, a series of diagnostic tests, and blood cultures, and he admitted Mrs. Adae to the hospital for further observation and testing, in order to rule out myocardial infarction and ACS. Dr. Lee listed "infectious etiology" in his differential diagnoses.

{¶ 3} Upon Mrs. Adae's admission to CMH, Maisha Pesante, M.D., a CMH employee and first-year resident in the UC family practice residency program, took Mrs. Adae's history and conducted a physical examination. Mrs. Adae's temperature, heart rate, and blood pressure remained elevated. In her treatment plan, Dr. Pesante listed ruling out ACS.

{¶ 4} Jennifer Bain, M.D., came on duty as an attending physician during the morning of June 29, 2006. Dr. Bain, an employee of UC, recorded her suspicion that Mrs. Adae's chest pain was musculoskeletal. Dr. Bain noted that Mrs. Adae's EKG, cardiac enzymes, and blood tests, with the exception of her elevated blood sugar, were normal. She ordered a CT scan of Mrs. Adae's chest to rule out the possibility of an aneurism, a CT scan of her abdomen to evaluate her liver, additional lab work, and thyroid testing, possibly to be performed on an outpatient basis.

{¶ 5} Mrs. Adae was discharged at approximately 5:00 p.m. on June 29, with instructions to follow up with her primary care physician, Leah Avera, M.D., within one

week. Mrs. Adae's Discharge Summary, signed by Dr. Pesante, states, in part, "it just seems like [Mrs. Adae's] problem may have more so been either some kind of infectious process or possibly a thyroid abnormality."

{¶ 6} On July 1, 2006, Mr. Adae telephoned Dr. Avera about Mrs. Adae's hospitalization and relayed that Mrs. Adae was suffering from continuing pain. Upon Dr. Avera's recommendation, Mr. Adae transported his wife to the Middletown Regional Hospital ("MRH") emergency room, where Mrs. Adae was seen by Tao Nguyen, M.D. At MRH, CT scans were taken of Mrs. Adae's chest and head, which produced a negative result for pulmonary embolism, but revealed a sinus infection. Although Dr. Nguyen requested copies of Mrs. Adae's medical records from CMH, CMH's records department was closed for the weekend. Dr. Nguyen discussed Mrs. Adae's case with Dr. Avera and instructed Mrs. Adae to follow up with Dr. Avera on Monday, July 3. Mrs. Adae was discharged with a prescription for pain medication.

{¶ 7} Also on July 1, three days after her discharge from CMH, the CMH laboratory reported to the resident on duty that Mrs. Adae's blood cultures were showing "gram positive cocci in clusters." The following day, the laboratory reported to Dr. Pesante that Mrs. Adae's blood cultures were positive for staphylococcus aureus, a type of bacterial infection. Neither the resident on duty on July 1 nor Dr. Pesante contacted Dr. Bain or the attending physician on-call about Mrs. Adae's blood culture results. The trial court found it unclear whether any CMH employee attempted to contact appellees or Dr. Avera. Dr. Avera testified, however, that, had she learned of the positive blood culture results, she would have immediately admitted Mrs. Adae to the hospital and would have "empirically started her on antibiotics and then attempted to find the source of the infection." (Dr. Avera Deposition 26.)

{¶ 8} Mrs. Adae was unable to secure an appointment with Dr. Avera until Wednesday, July 5, 2006. On the evening of July 4, 2006, Mrs. Adae began to experience flu-like symptoms, numbness and weakness in her extremities, and slurred speech. Mrs. Adae also fell at least once and dropped things several times that evening. By the time of her appointment with Dr. Avera, Mrs. Adae could barely walk. Dr. Avera noted that Mrs. Adae's blood sugar was extremely elevated, and she believed that Mrs.

Adae was suffering from diabetic ketoacidosis. Accordingly, Dr. Avera sent Mrs. Adae to MRH for admission.

{¶ 9} At MRH, Mrs. Adae's symptoms progressed to paralysis of her lower extremities. An MRI of Mrs. Adae's back revealed a spinal epidural abscess, a rare, infectious disease process that, left untreated, results in neurological deficits, progressive paraplegia, and death. This diagnosis was made approximately one week after Mrs. Adae initially reported to CMH. On the morning of July 6, 2006, Mrs. Adae underwent neurosurgery, described as a decompressive laminectomy of T1-T6 with the evacuation of the epidural abscess. She remained hospitalized until July 18, 2006. As a result of the delay in diagnosis, Mrs. Adae was rendered an incomplete paraplegic and has suffered the loss of her bladder and bowel functions.

{¶ 10} In October 2007, appellees filed a medical malpractice action in the Clinton County Court of Common Pleas against CMH and several of the resident physicians employed in its family practice residency program.[1] Appellees also initiated this Court of Claims action against UC, based on the care rendered by its employee, Dr. Bain, in her role as attending physician for the family practice residency program at CMH.[2] Appellees alleged that Dr. Bain was negligent in failing to order appropriate testing to determine the cause of Mrs. Adae's symptoms, in ignoring Mrs. Adae's self-reported fever, and in discharging Mrs. Adae before obtaining the results of her blood cultures. In the Court of Claims, appellees alleged that Dr. Bain's negligence was the sole proximate cause of their damages. In its answer, UC asserted, among other defenses, that others' conduct caused and/or contributed to appellees' damages.

{¶ 11} The Court of Claims stayed appellees' action pending the resolution of the Clinton County proceedings, which terminated after appellees entered into a settlement agreement with CMH and its insurer for $2 million. Thereupon, the Court of Claims reactivated and bifurcated this case. The Court of Claims conducted a trial as to liability from August 23 to 25, 2010. At the close of trial, appellees moved for a partial directed

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[1] Although appellees also initially named Dr. Avera, Dr. Nguyen, and MRH as defendants, those defendants were ultimately dismissed.

[2] Appellees originally named CMH and Dr. Pesante as defendants in the Court of Claims, but the court sua sponte dismissed those defendants via a Pre-Screening Entry.

verdict, as to UC's affirmative defense of apportionment of liability to non-parties. They argued that UC failed to present any competent evidence from which the court could assign a percentage of liability to any non-party. On June 1, 2011, the Court of Claims found in favor of appellees on the question of liability. The court specifically found that UC was liable for the care rendered by Dr. Bain and that "Dr. Bain's negligence [was] the sole proximate cause of [Mrs. Adae's] outcome." Having concluded, based on the evidence, that Dr. Bain's negligence was the sole proximate cause of appellees' damages, the court denied appellees' motion for a partial directed verdict as moot.

{¶ 12} On April 6, 2012, after a damages trial, the Court of Claims entered judgment in favor of appellees in the amount of $3,311,761.84. The court noted that, at the time of trial, the parties contemplated that any award of damages would be reduced by the amount of appellees' settlement with CMH pursuant to R.C. 3345.40(B)(2). Nevertheless, the Court of Claims held that recent authority from this court precluded a setoff of the settlement amount. UC filed a timely notice of appeal.

II. ASSIGNMENTS OF ERROR

{¶ 13} UC presently asserts the following assignments of error:

> 1. The Court of Claims erred in finding that the $2 million settlement received by the Adaes from [CMH] was not a benefit subject to the setoff requirement of R.C. 3345.40(B)(2).
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> 2. The Court of Claims erred in finding that the Adaes had presented evidence sufficient to sustain their burden of proof as to the necessity and cost of their proposed life care plan, because the [Adaes'] witness, Carole A. Miller, M.D., was not qualified under Evid.R. 702(B) to testify as an expert witness in that regard.
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> 3. The Court of Claims erred in awarding damages for lost income because the [Adaes] failed to produce sufficient evidence to support their claim.

Notably, UC does not assign as error the trial court's findings of liability or that Dr. Bain's negligence was the sole proximate cause of appellees' damages.

III. DISCUSSION

A. First Assignment of Error

{¶ 14} UC's first assignment of error involves a question of statutory interpretation, namely interpretation of R.C. 3345.40(B)(2). Statutory interpretation is a question of law that we review de novo. *Aubry v. Univ. of Toledo Med. Ctr.*, 10th Dist. No. 11AP-509, 2012-Ohio-1313, ¶ 10, citing *State v. Banks*, 10th Dist. No. 11AP-69, 2011-Ohio-4252, ¶ 13. The primary goal of statutory interpretation is to determine and give effect to the General Assembly's intent in enacting the statute. *Id.* To determine legislative intent, we first consider the statutory language in context, construing the words and phrases according to 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 statutory language is plain and unambiguous, a court may not resort to rules of statutory interpretation, but must apply the statute as written. *Banks* at ¶ 13, citing *State v. Palmer*, 10th Dist. No. 09AP-956, 2010-Ohio-2421, ¶ 20, *rev'd on other grounds*, 131 Ohio St.3d 278, 2012-Ohio-580.

{¶ 15} R.C. 3345.40(B)(2) limits tort damages recoverable against a state university or college and 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 the state university or college itself, by an act or omission of any trustee, officer, or employee of the state university or college while acting within the scope of his employment or official responsibilities * * *, the following rules shall apply:
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> * * *
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> (2) 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.

{¶ 16} There is no dispute that this action falls within the parameters of R.C. 3345.40(B), as an action against a state university to recover damages for injury or loss caused by an act of a university employee, within the scope of her employment. Rather, the parties' dispute centers around the applicability of the setoff rule in R.C. 3345.40(B)(2). The trial court concluded that the settlement proceeds from CMH and its insurer did not constitute "benefits" and that UC was, therefore, not entitled to a setoff under R.C. 3345.40(B)(2). UC now argues that the trial court erred by concluding that the settlement proceeds are not "benefits."

{¶ 17} In general, the appropriate measure of damages in a tort action is that which will make the plaintiff whole. *See Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, ¶ 11, citing *Pryor v. Webber*, 23 Ohio St.2d 104, 107 (1970). As a corollary, the state has a legitimate interest in preventing double recoveries by tort victims. *McKinley v. Ohio Bur. of Workers' Comp.*, 170 Ohio App.3d 161, 2006-Ohio-5271, ¶ 18 (4th Dist.), citing *Holeton v. Crouse Cartage Co.*, 92 Ohio St.3d 115, 121-22 (2001). Under the common-law collateral-source rule, evidence of compensation a plaintiff received from collateral sources was not admissible to diminish the damages a tortfeasor was required to pay for his negligent act. *Pryor* at paragraph two of the syllabus. Accordingly, under the collateral-source rule, a plaintiff who has, for example, had his medical expenses paid by another may still recover full damages for those expenses from a defendant who is liable for the plaintiff's injury. *Id*. at 108, quoting 2 Harper and James, *The Law of Torts*, Section 25.22 at 1343. " 'To this extent, [the] plaintiff may get double payment on account of the same items.' " *Id*. In this way, the collateral-source rule operated as an exception to the traditional measure of damages and " 'prevent[ed] the jury from learning about a plaintiff's income from a source other than the tortfeasor' " so that a tortfeasor would not be given an advantage from third-party payments to the plaintiff. *Jaques v. Manton*, 125 Ohio St.3d 342, 2010-Ohio-1838, ¶ 7, quoting *Robinson* at ¶ 11.

{¶ 18} State legislatures, including the General Assembly, have wrestled with statutory approaches to the collateral-source rule in the evolving landscape of tort law. *See* Hanson, *Ohio's Collateral Source Rule Following Robinson v. Bates and the Enactment of Ohio Revised Code Section 2315.20*, 40 U.Tol.L.Rev. 711, 720-21 (2009). Since *Pryor*, which defined the Ohio collateral-source rule, the General Assembly has enacted many statutes to limit the effect of the rule. Among the earliest of those statutes were former R.C. 2743.02(B), former R.C. 2744.05(B)(1), and R.C. 3345.40(B)(2), which generally provide that the state, political subdivisions, and state universities and colleges are not responsible for certain damages paid by a collateral source.[3] Currently, in non-medical-malpractice cases against private defendants, R.C. 2315.20(A) provides that a "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," unless the collateral source has a right of subrogation. Unlike R.C. 3345.40(B)(2), which limits damages by creating a statutory right to setoff of "benefits * * * from a policy or policies of insurance or any other source," R.C. 2315.20 addresses the admissibility of evidence.

{¶ 19} The primary question here is whether the proceeds from appellees' settlement with CMH constitute "benefits" under R.C. 3345.40(B)(2). In concluding that they did not, the Court of Claims relied on this court's recent decision in *Aubry*, which addressed the statutory language of R.C. 3345.40(B)(2). This court premised its *Aubry* decision upon the Supreme Court of Ohio's interpretation of the term "benefits" in R.C. 2744.05(B). *See Vogel v. Wells*, 57 Ohio St.3d 91 (1991).

{¶ 20} In *Vogel*, the plaintiff filed wrongful death and survivorship actions against Wells and the city of Akron, arising out of an automobile accident that resulted in the death of the plaintiff's decedent. After the jury returned a verdict in favor of the plaintiff and against Akron, the trial court granted a setoff and reduced the jury's damage award by amounts that the plaintiff received or would receive from Social

[3] While R.C. 3345.40(B)(2) and 2744.05(B)(1) contain the "benefits" language quoted above, former R.C. 2743.02(B), currently R.C. 2743.02(D), more broadly states that awards against the state "shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant."

Security, veterans' benefits, and gifts from the decedent's father and employer, including the payment of funeral expenses. The court premised the setoff on former R.C. 2744.05(B), which provided as follows:

> "If 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 such benefits."

(Emphasis added.) *Vogel* at 97-98. On appeal, the Ninth District Court of Appeals concluded that Akron was not entitled to a setoff of amounts the plaintiff received from the decedent's employer and father, and the court restored those amounts to the judgment.

{¶ 21} The Supreme Court, in *Vogel*, expressly adopted a definition of the word "benefits" to be used with respect to R.C. 2744.05(B). In determining whether the trial court properly set off amounts received by the plaintiff, the Supreme Court stated, at 98, as follows:

> 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.

(Emphasis added.)

{¶ 22} In *Aubry*, this court applied the Supreme Court's adopted definition of "benefits" to the statutory language in R.C. 3345.40(B)(2), which is identical to the statutory language at issue in *Vogel*. *Aubry* involved medical malpractice claims arising out of a surgical procedure performed by an employee of the University of Toledo Medical Center, under the supervision of a doctor who was not a university employee. The appellants filed an action in the Court of Claims against the University of Toledo Medical Center, arising out of its employee's negligence, and filed similar claims in the Lucas County Court of Common Pleas against the supervising doctor. The appellants settled their common pleas court case for $295,000. The Court of Claims subsequently entered judgment in favor of the appellants and apportioned liability for appellants' damages equally between the two doctors. In its final judgment, the Court of Claims deducted the $295,000 settlement from the portion of the total damages apportioned to the University of Toledo Medical Center. This court reversed with respect to the setoff after concluding that the settlement proceeds did not meet the *Vogel* definition of "benefits." Because the settlement proceeds were not "benefits," they were not subject to setoff under the statute. *Aubry* at ¶ 34.

{¶ 23} UC makes several arguments in its attempt to avoid application of *Aubry* here. For example, it argues that the proceeds of appellees' settlement with CMH constitute "benefits," even under the *Vogel* definition. UC also argues that, to the extent *Aubry* can be read to hold that settlement proceeds with non-party tortfeasors are not "benefits" for purposes of R.C. 3345.40(B)(2), *Aubry* is wrongly decided and should be overruled. Finally, UC argues that this case is factually and/or procedurally distinguishable from *Aubry*.

{¶ 24} We first reject UC's argument that the CMH settlement proceeds are "benefits" under the definition set forth in *Vogel*. Mixing the *Vogel* definition with the statutory language of R.C. 3345.40(B)(2), UC contends that the settlement payment was " '[f]inancial assistance received in time of sickness, disability, unemployment, etc.' " from insurance or from "any other source." UC maintains that use of the phrase "any other source" in R.C. 3345.40(B)(2) precludes the restriction of "benefits" to payments from insurance or public programs, such as Social Security. It contends that the

definition of "benefits" adopted in *Vogel* ignores the statutory language stating that benefits may arise from "insurance *or any other source*." (Emphasis added.) Former R.C. 2744.05(B), at issue in *Vogel*, contained language identical to the "any other source" language in R.C. 3345.40(B)(2), however, and the Supreme Court adopted a definition of "benefits" that limited them to payments from insurance or public programs. A different definition must come from the Supreme Court itself; we continue to rely on *Vogel*.

{¶ 25} UC also argues that *Aubry* is distinguishable from this case or, alternatively, that we should limit or overturn *Aubry*. It maintains that, unlike in *Aubry*, a refusal to set off appellees' settlement proceeds from CMH would result in appellees receiving a double recovery. With no setoff in *Aubry*, the plaintiffs were entitled to recover $337,500 from the defendant, in addition to the $295,000 settlement from the other alleged tortfeasor, which amounted to less than the $675,000 in total damages calculated by the Court of Claims. Here, with no setoff, appellees are entitled to recover the full $3,311,761.84 judgment from UC and are entitled to retain the $2 million settlement from CMH, for a total recovery of approximately $5.3 million, well in excess of the total damages determined by the Court of Claims.

{¶ 26} UC argues that *Aubry*, by its terms, does not apply where the plaintiff would receive a double recovery. UC relies on a statement in relation to the *Aubry* defendant's reliance on *Mitchel v. Borton*, 70 Ohio App.3d 141 (6th Dist.1990). In *Mitchel*, the court found that sick pay received by a public-employee-plaintiff fell within the collateral-source rule in R.C. 2744.05. *Mitchel*, however, was decided prior to the Supreme Court's decision in *Vogel*. Nevertheless, this court also distinguished the sick pay benefits in *Mitchel* from the settlement proceeds in *Aubry*. We noted that, unlike in *Mitchel*, where recoupment of lost wages in addition to the sick pay received would likely result in double compensation, the plaintiffs in *Aubry* would not reap a double recovery because the University of Toledo Medical Center and the non-party doctor were liable only for their proportionate share of the damages "[u]nder the apportioned liability scheme employed in this case." *Id*. at ¶ 33. That statement, however, is mere dicta, as our ultimate holding in *Aubry* was that "the settlement proceeds appellants

received * * * do not fall within the scope of 'benefits,' as that term is used in R.C. 3345.40(B)(2)." *Id*. at ¶ 34.

{¶ 27} The question of statutory interpretation is a question of law. *Id*. at ¶ 10. Both *Aubry* and this case, as well as *Vogel*, involve interpretations of identical statutory language. Interpretation of the plain statutory language does not depend upon the facts or procedural history of a given case, and the meaning of the language does not change based on the effect of its application. Accordingly, we discern no basis for diverging from this court's very recent holding in *Aubry* based on factual and/or procedural differences between *Aubry* and this case.

{¶ 28} Beyond this court's express application of the *Vogel* definition to R.C. 3345.40(B)(2), the potential for a double recovery, in and of itself, does not mandate a setoff. With respect to R.C. 2744.05(B), the Supreme Court of Ohio has held that "a collateral benefit is deductible only to the extent that the loss for which it compensates is actually included in the [judgment from which a setoff is sought]." *Buchman v. Bd. of Edn. of Wayne Trace Local School Dist.*, 73 Ohio St.3d 260, 269 (1995). It is the defendant's burden to prove the extent to which it is entitled to a setoff. *Id*. at 270. "The law precludes an off-set without proof of a double recovery (i.e., that the [judgment] includes the amounts paid by collateral sources)." *Baker v. Cleveland*, 8th Dist. No. 93952, 2010-Ohio-5588, ¶ 53. The record here contains no evidence from which we could determine, without speculation, what portion of the settlement proceeds duplicated amounts included in the Court of Claims' judgment. The settlement agreement includes no admission of liability by CMH and no allocation of the settlement funds to specific damages. Furthermore, because the trial court found UC solely responsible for appellees' damages, a finding that UC did not appeal, UC is responsible only for damages that the court found stemmed from the negligence of its employee.

{¶ 29} Finally, UC argues that the *Aubry* decision is simply wrong, to the extent it creates an exclusion of settlements with non-party tortfeasors from the definition of "benefits," as the General Assembly's clear intent in enacting R.C. 3345.40(B)(2) was to abrogate the collateral-source rule and to prevent plaintiffs from collecting double recoveries from public funds. The collateral setoff requirements applicable to claims

against state universities or colleges, under R.C. 3345.40(B)(2), differ from the setoff requirements applicable to claims against other state entities. R.C. 2743.02(D), for example, provides that "[r]ecoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant." The General Assembly expressly recognized the difference between R.C. 2743.02(D) and 3345.40(B)(2) by including within R.C. 2743.02(D) that it does not apply to civil actions against a state university or college because "[t]he collateral benefits provisions of division [R.C. 3345.40(B)(2)] apply under those circumstances." Had the General Assembly intended that the collateral recoveries subject to setoff under those statutes were co-existent, the exception in R.C. 2743.02(D) would be rendered meaningless. Accordingly, we reject UC's argument that *Aubry* is contrary to clear legislative intent.

{¶ 30} Based on this court's recent precedent in *Aubry*, we conclude that appellees' settlement proceeds from CMH do not fall within the scope of "benefits," under R.C. 3345.40(B)(2). The Supreme Court has expressly adopted a definition of the term "benefits" in the context of identical statutory language, and this court has applied that definition to R.C. 3345.40(B)(2). Absent contrary direction from the Supreme Court of Ohio or a statutory amendment by the General Assembly, *Aubry* compels the conclusion that no setoff was permitted in this case. For these reasons, we overrule UC's first assignment of error.

B. Second Assignment of Error

{¶ 31} In its second assignment of error, UC argues that the Court of Claims erred by finding sufficient evidence regarding the necessity and cost of appellees' life-care plan because appellees' witness, Carole A. Miller, M.D., was not qualified under Evid.R. 702(B) to offer expert testimony in that regard. Specifically, UC argues that Dr. Miller was not qualified to testify about the necessity of various components of appellees' proposed life-care plan (specifically, the amount of in-home care required), about what Mrs. Adae will need to maintain a good quality of life, and about Mrs. Adae's life expectancy. Although UC frames its second assignment of error as contesting the

sufficiency of the evidence, its sole argument is that the Court of Claims erred by admitting Dr. Miller's testimony under Evid.R. 702(B).

{¶ 32} Under Evid.R. 702(B), a witness may testify as an expert if the witness's testimony relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception among lay persons; the witness is qualified as an expert by specialized knowledge, skill, experience, training or education regarding the subject of the testimony; and the witness's testimony is based on reliable scientific, technical or other specialized information. The witness "need not have complete knowledge of the field in question, as long as the knowledge he or she possesses will aid the trier of fact in performing its fact-finding function." *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, ¶ 13, citing *State v. Baston*, 85 Ohio St.3d 418, 423 (1999). The determination of whether a witness possesses the necessary knowledge, skill, experience or training to testify as an expert is left to the trial court's discretion. *Campbell v. The Daimler Group, Inc.*, 115 Ohio App.3d 783, 793 (1oth Dist.1996), citing *Scott v. Yates*, 71 Ohio St.3d 219 (1994). A court's determination of whether a witness is qualified to testify as an expert will not be reversed absent an abuse of discretion. *Scott* at 221. Abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 33} Dr. Miller's credentials are undisputed. She is a faculty member of the Department of Neurological Surgery at The Ohio State University Medical Center and is a board-certified physician, with 40 years of experience in neurosurgery and 45 years of experience in treating patients with injuries similar to Mrs. Adae's. Dr. Miller previously testified that, although she does not manage patients with spinal cord injuries, she regularly sees patients at the Spine Center with a range of spine problems and peripheral nerve lesions. She testified that "I know the kinds of struggles and the difficulties that patients who have spinal cord injuries and who have this level of disability have" because "I see them all the time." (Dec. 21, 2011 Dr. Miller Deposition 56.) Dr. Miller also testified that she has reviewed life-care plans on many previous occasions. UC contends that Dr. Miller lacked specialized knowledge, skill, experience,

training or education in managing long-term physical problems or rehabilitation of patients with spinal cord injuries and that she was, therefore, unqualified to testify about the reasonableness or medical necessity of the various components of appellees' proposed life-care plan.

{¶ 34} "Under Ohio law, any doctor licensed to practice medicine is competent to testify on medical issues." *Schooley v. Ohio Dept. of Rehab & Corr.*, 10th Dist. No. 05AP-823, 2006-Ohio-2072, ¶ 13, citing *Canady v. Dept. of Rehab. & Corr.*, 10th Dist. No. 93AP-596 (Nov. 2, 1993), and *Rouse v. Riverside Methodist Hosp.*, 9 Ohio App.3d 206 (10th Dist.1983). In *Rouse*, at 212, this court stated that the witness, a pathology specialist, was not precluded from testifying that medical bills were the direct result of excess radiation. The fact that the witness's specialty was pathology, rather than radiation, affected only the weight to be given the doctor's testimony, not its admissibility.

{¶ 35} Upon review, we conclude that the trial court did not abuse its discretion by admitting or relying upon Dr. Miller's testimony regarding the reasonableness and necessity of the life-care plans admitted into evidence. As a licensed physician, Dr. Miller was competent to testify on medical issues. *See Schooley*. The trial court could easily have concluded that Dr. Miller's extensive experience dealing with patients suffering from spinal cord injuries, despite her lack of day-to-day management of patient care or rehabilitation, constituted specialized knowledge that would assist the court in its fact-finding functions. Moreover, the trial court was in a position to weigh Dr. Miller's testimony, as it was subject to vigorous cross-examination by UC's counsel.

{¶ 36} For similar reasons, we conclude that the trial court did not abuse its discretion by admitting Dr. Miller's opinion that Mrs. Adae would have a normal life expectancy if she receives appropriate medical care. Dr. Miller noted that Mrs. Adae is not obese, has her diabetes well-controlled, and has only mild hypertension. She emphasized that appropriate medical care is essential for avoiding complications that might be related to her spinal cord injury and urinary dysfunction. In addition to Dr. Miller's testimony, the trial court admitted into evidence a mortality table, which is generally admissible in evidence upon the issue of a plaintiff's life expectancy. *See, e.g.,*

Wood v. Penwell, 10th Dist. No. 84AP-132 (Nov. 1, 1984). Again, Dr. Miller's testimony was subject to cross-examination, and the trial court was presented with contradictory opinions from UC's expert witness, Michael Yaffe, M.D. The court was able and entitled to assess and weigh the differing opinions regarding Mrs. Adae's life expectancy. Because we discern no error in the trial court's admission of expert testimony by Dr. Miller, we overrule UC's second assignment of error.

C. Third Assignment of Error

{¶ 37} In its third and final assignment of error, UC claims that the Court of Claims erred by awarding damages for lost income because the record lacked sufficient evidence upon which the court could base such an award. Sufficiency is " ' "a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law." * * * In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law.' " *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶ 11, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997), quoting *Black's Law Dictionary* 1433 (6th Ed.1990). The standard for review of the sufficiency of the evidence in a civil case is whether the verdict could reasonably be reached from the evidence. *In re J.B.*, 10th Dist. No. 08AP-1108, 2009-Ohio-3083, ¶ 20, citing *Brooks-Lee v. Lee*, 10th Dist. No. 03AP-1149, 2005-Ohio-2288, ¶ 19.

{¶ 38} R.C. 3345.40(A)(2)(a)(i) defines "actual loss" as including "[a]ll wages, salaries, or other compensation lost by an injured person as a result of the injury, including wages, salaries, or other compensation lost as of the date of a judgment and *future expected lost earnings* of the injured person." (Emphasis added.) The measure of damages for impairment of earning capacity is the difference between what the plaintiff was capable of earning before her injury and what she is capable of earning thereafter. *Ratliff v. Colasurd*, 10th Dist. No. 98AP-504 (Apr. 27, 1999), citing *Deyo v. Adjutant General's Dept.*, 10th Dist. No. 93API12-1667 (Aug. 16, 1994).

{¶ 39} Predictions about future-earning capacity are necessarily somewhat speculative. *See Andler v. Clear Channel Broadcasting, Inc.*, 670 F.3d 717, 726 (6th

Cir.2012), citing *Eastman v. Stanley Works*, 180 Ohio App.3d 844, 2009-Ohio-634 (10th Dist.). An exact calculation of what the plaintiff could have earned but for her injury is not required; the plaintiff must prove damages with reasonable certainty. *Andler* at 726; *Eastman* at ¶ 24. When calculating earning capacity, experts often consult actuarial tables, Bureau of Labor Statistics figures or other averages along with the plaintiff's historical earnings. *Andler* at 728. *See also Taylor v. Freedom Arms, Inc.*, 5th Dist. No. CT2008-0071, 2009-Ohio-6091, ¶ 16. In *Andler*, at 728, the Sixth Circuit explained that concern over an economist's use of Bureau of Labor Statistics averages suggested "a confusion of the concepts of lost earnings and lost earning capacity," noting that lost-earning capacity does not necessarily rely on the plaintiff's historical earnings. For example, a plaintiff who is unemployed or underemployed at the time of injury may nevertheless recover damages for lost-earning capacity. *Id*. at 727.

{¶ 40} Mrs. Adae worked on the family farm from 1978 until her injuries, although she was never paid a wage or salary. Although Mrs. Adae has resumed limited work in the roadside farm market, she cannot contribute to the farming operations to the extent she previously did. To establish Mrs. Adae's lost-earning capacity, appellees presented the expert testimony of economist David W. Boyd, Ph.D. Dr. Boyd testified that the present value of Mrs. Adae's lost-earning capacity was $284,459.73, and the trial court awarded that value for Mrs. Adae's reduced-earning capacity.

{¶ 41} In his analysis of Mrs. Adae's earning capacity, Dr. Boyd relied on reports that, prior to her injury, Mrs. Adae worked ten hours per day, six or seven days per week on the farm, and that, since her injury, she has been limited to working four and one-half hours per day. In his calculations, Dr. Boyd assumed, for purposes of Mrs. Adae's pre-injury earning capacity, that Mrs. Adae worked ten hours per day, five days per week, fifty weeks per year. For purposes of her post-injury earning capacity, Dr. Boyd assumed Mrs. Adae was capable of working four and one-half hours per day, five days per week, fifty weeks per year. UC has not contested Dr. Boyd's reliance on those reports or assumptions as to Mrs. Adae's working hours.

{¶ 42} Dr. Boyd testified that he calculated Mrs. Adae's reduced-earning capacity by using the average hourly wage published by the United States Bureau of Labor Statistics for Ohio farm, nursery, and greenhouse workers and laborers. That wage was $10.43 per hour in 2007. Dr. Boyd stated that his analysis is not necessarily based on an assumption that Mrs. Adae was being paid as a farm worker, but on the assumption that her earning capacity is captured by the average wages of farm workers reported by the Bureau of Labor Statistics. According to Dr. Boyd, that methodology is standard in cases with individuals, such as Mrs. Adae, who are not paid a wage for their work. He testified that, although Mrs. Adae did not directly collect a wage, there is, nevertheless, value to her work and that she had a capacity to earn income. Dr. Boyd stated that $10.43 per hour, as reported by the Bureau of Labor Statistics, represents the minimum value of Mrs. Adae's lost-earning capacity.

{¶ 43} UC contends that, to prove lost income and earning capacity, appellees were required to present evidence of lost earnings to the farming operations because Mrs. Adae was not an hourly worker and did not receive a salary. Appellees did not present the farm's financial statements, but we do not find the absence of such statements fatal to appellees' entitlement to damages for loss of earning capacity. Rather, the trial court was entitled to weigh Dr. Boyd's expert opinion, informed by UC's cross-examination of Dr. Boyd. Upon review, we conclude that the trial court was entitled to rely on Dr. Boyd's expert testimony as to Mrs. Adae's lost-earning capacity and that Dr. Boyd's testimony constituted sufficient evidence to support the trial court's award of damages. Accordingly, we overrule UC's third assignment of error.

IV. CONCLUSION

{¶ 44} Having overruled each of UC's assignments of error, we affirm the judgment of the Court of Claims of Ohio.

Judgment affirmed.

KLATT, BRYANT and TYACK, JJ., concur.