[Cite as *Oyer v. Adler*, 2015-Ohio-1722.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

JOE OYER, et al.,	:	
Plaintiffs-Appellees,	:	Case No. 13CA3405
v.	:	DECISION AND
ROGER T. ADLER, M.D., et al.,	:	JUDGMENT ENTRY
Defendants-Appellants.	:	RELEASED 05/01/2015

APPEARANCES:

Karen L. Clouse and Gerald J. Todaro, Arnold Todaro & Welch Co., LPA, Columbus, Ohio, for appellants Harmeet Chawla, M.D. and Eye Specialists, Inc.

James S. Savage, Anspach Meeks Ellenberger, LLP, Columbus, Ohio, for appellees Joe and Elaine Oyer.

Hoover, P.J.

{¶ 1} Defendants-appellants, Harmeet Chawla, M.D. and Eye Specialists, Incorporated, appeal the jury verdict and several pre and post-trial judgments of the Ross County Court of Common Pleas, in a medical negligence action filed by plaintiffs-appellees Joe and Elaine Oyer. For the following reasons, we affirm the judgment of the trial court, in part, reverse the judgment of the trial court, in part, and we remand this case for proceedings consistent with this opinion.

I. FACTS & PROCEDURAL HISTORY

{¶ 2} On May 13, 2009, appellee Joe Oyer visited appellant, Eye Specialists, Incorporated, dba Eye Specialists of Ohio, an ophthalmology practice owned by appellant Harmeet Chawla, M.D. Mr. Oyer was examined by employee-physician, Roger Adler, M.D. Mr. Oyer described a rapid deterioration of the vision in his right eye; however, there is some dispute

over whether Mr. Oyer reported worsening vision over the course of a few days or over the course of a week. On the day of his initial examination Mr. Oyer could not see straight ahead and could only count fingers in his peripheral vision with his right eye. Dr. Adler's examination revealed a detached retina, with macula-off, fluid bullous, and fixed folds.[1] Dr. Adler informed Mr. Oyer that the detached retina would not heal itself and discussed the risks, benefits, and alternatives to surgery to re-attach the retina.

{¶ 3} Mr. Oyer returned to Eye Specialists of Ohio on May 15, 2009, for surgery. Dr. Chawla re-examined the eye and agreed with the prior diagnosis of retina detachment with macula-off. Dr. Chawla then performed a posterior vitrectomy with scleral buckling to re-attach the retina to the right eye.

{¶ 4} Following the first surgery, Mr. Oyer's retina was re-attached and his right eye was able to recover useful vision of 20/70 and 20/60 over the course of several weeks. However, in mid-July 2009, Mr. Oyer indicated that his vision in his right eye had been like looking through a veil for a period of several days. On July 23, 2009, Dr. Adler diagnosed a recurrent retinal detachment with macula-off the right eye.

{¶ 5} On July 27, 2009, Dr. Chawla attempted his second posterior vitrectomy to re-attach the retina to the right eye. However, during the course of the surgery Mr. Oyer suffered a choroidal hemorrhage of the eye and surgery was aborted. Dr. Chawla immediately referred Mr. Oyer to the Cleveland Clinic.

{¶ 6} A retinal specialist at the Cleveland Clinic made further attempts to re-attach the retina and to restore vision to the right eye. However, Mr. Oyer's vision remains severely diminished; especially his depth perception and peripheral vision.

[1] There was competing testimony at trial regarding whether it was possible for the detached retina to be bullous and have fixed folds at the same time.

{¶ 7} Appellees commenced this action on October 7, 2010.[2] The lawsuit initially named Dr. Adler as a defendant in addition to the appellants, but he was dismissed pursuant to stipulation on October 2, 2012. Appellees alleged that Dr. Chawla was negligent in the performance of the surgical procedures on Mr. Oyer's right eye to repair the retinal detachment with macula-off, and that such negligence caused permanent loss of vision. The appellees further alleged that the Eye Specialists of Ohio was negligent in credentialing Dr. Chawla to perform the procedure, that the appellants failed to obtain Mr. Oyer's informed consent prior to surgery, and that Mrs. Oyer was entitled to damages for loss of consortium.

{¶ 8} The case proceeded to trial on May 20, 2013. Nancy Holekamp, M.D., an ophthalmologist and retinal specialist from St. Louis, Missouri, testified as an expert witness for the appellees. Dr. Holekamp noted that she reviewed the medical records; deposition testimonies of Dr. Chawla, Dr. Adler, and Mr. Oyer; as well as certain other exhibits. Ultimately, Dr. Holekamp opined that Dr. Chawla's care fell below the applicable standard of care in performing the surgical procedures on Mr. Oyer for a multitude of reasons. The defense attempted to discredit Dr. Holekamp by offering competing testimony from Dr. Chawla regarding the standard of care. However, the jury returned a verdict in favor of the appellees. In response to interrogatories, the jury found deviations from the standard of care as follows: (1) Dr. Chawla lacked proper training and qualifications to perform the procedures in question; (2) Dr. Chawla performed the procedures incorrectly; and (3) the appellants kept poor medical records. The jury also determined that the appellants' negligence caused Mr. Oyer to suffer permanent vision loss in his right eye and awarded him damages of $195,000, with $150,000 representing non-

[2] The appellees' initial complaint was filed on October 10, 2010. However, the appellees filed an amended complaint with leave of court on November 16, 2011, adding additional claims for relief.

economic loss and $45,000 being awarded for medical expenses. The jury awarded $0 to Mrs. Oyer on her loss of consortium claim.

{¶ 9} Following trial, appellants filed a motion for judgment notwithstanding the verdict ("motion for JNOV"), arguing that appellees' expert, Dr. Holekamp, failed to express her opinions regarding the causation of Mr. Oyer's injuries to the required greater than 50% probability. The appellants had made nearly identical arguments previously, once in a motion to exclude proximate cause testimony of plaintiffs' expert filed in October 2012 following the deposition of Dr. Holekamp, once in a motion in limine to exclude proximate cause testimony of plaintiffs' expert filed just prior to commencement of trial, and in a motion for directed verdict made during trial. The trial court overruled each motion, including the motion for JNOV.

{¶ 10} Meanwhile, appellees filed a post-trial motion for pre-judgment interest. The trial court held an evidentiary hearing on the motion. The trial court announced its decision from the bench on the day of the hearing and also journalized its decision on August 29, 2013, finding in favor of the appellees and granting pre-judgment interest in the amount of $17,934.66.

{¶ 11} It is from the jury verdict, judgment on the motion for JNOV, and judgment on pre-judgment interest that the appellants now appeal.

II. ASSIGNMENTS OF ERROR

{¶ 12} Appellants assign three errors for our review:

First Assignment of Error

> THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO FIND THAT THE TESTIMONY OF THE PLAINTIFFS' SOLE MEDICAL LIABILITY EXPERT FAILED TO ESTABLISH TO A REASONABLE DEGREE OF MEDICAL PROBABILITY THAT ANY ALLEGED NEGLIGENCE BY APPELLANTS WAS THE PROXIMATE CAUSE OF THE INJURIES ALLEGED.

Second Assignment of Error

> THE TRIAL COURT ERRED AS A MATTER OF LAW IN FAILING TO APPLY THE *ROBINSON V. BATES* RULE REGARDING A PLAINTIFF'S MEDICAL EXPENSES AND FAILING TO ALLOW APPELLANTS TO PRESENT EVIDENCE THAT WOULD ALLOW THE JURY TO CONSIDER BOTH THE AMOUNT CHARGED AND THE AMOUNT ACCEPTED BY THE PROVIDER IN DETERMINING THE AMOUNT TO AWARD FOR THAT ELEMENT OF ECONOMIC LOSS.

Third Assignment of Error

> THE TRIAL COURT ERRED AS A MATTER OF LAW IN AWARDING PREJUDGMENT INTEREST TO PLAINTIFFS AS THE REQUIREMENTS OF R.C. § 1343.03(C) WERE NOT SATISFIED.

III. STANDARD OF REVIEW

A. First Assignment of Error

1. Ruling on motion for directed verdict and motion for JNOV

{¶ 13} A motion for JNOV, like a motion for a directed verdict, tests the legal sufficiency of the evidence. *See Posin v. A.B.C. Motor Court Hotel, Inc.*, 45 Ohio St.2d 271, 275, 344 N.E.2d 334 (1976); *McKenney v. Hillside Dairy Co.*, 109 Ohio App.3d 164, 176, 671 N.E.2d 1291 (8th Dist.1996). Thus, the standard of review when ruling on a motion for JNOV is the same as that used when ruling on a directed verdict motion. *Wagner v. Roche Laboratories*, 77 Ohio St.3d 116, 121, 671 N.E.2d 252 (1996), fn. 2, citing *Gladon v. Greater Cleveland Regional Transit Auth.*, 75 Ohio St.3d 312, 318–319, 662 N.E.2d 287 (1996); *Posin* at 275. If the record contains any competent evidence, when construed most strongly in favor of the nonmoving party, upon which reasonable minds could reach different conclusions, the court must deny the motion. *See Meyers v. Hot Bagels Factory, Inc.*, 131 Ohio App.3d 82, 92, 721 N.E.2d 1068 (1st Dist.1999). Like the directed verdict motion, a JNOV motion also presents a question of law, which we review de novo. *Id.*, citing *Tulloh v. Goodyear Atomic Corp.*, 93 Ohio App.3d 740, 746-747, 639 N.E.2d 1203 (4th Dist.1994).

B. Second Assignment of Error

1. Write-off of medical expenses as evidence of economic loss

{¶ 14} A trial court has broad discretion in the admission or exclusion of evidence, and so long as the court exercises its discretion in line with the rules of procedure and evidence, we will not reverse its judgment absent a clear showing of an abuse of discretion with attendant material prejudice to defendant. *Rigby v. Lake Cty.*, 58 Ohio St.3d 269, 271, 569 N.E.2d 1056 (1991); *State v. Hymore*, 9 Ohio St.2d 122, 128, 224 N.E.2d 126 (1967). A finding that a trial court abused its discretion implies that the court acted unreasonably, arbitrarily, or unconscionably. *Lauer v. Positron Energy Resources, Inc.*, 4th Dist. Washington No. 13CA39, 2014-Ohio-4850, ¶ 9. When applying the abuse of discretion standard, we may not substitute our judgment for the trial court's judgment. *Berk v. Matthews*, 53 Ohio St.3d 161, 169, 559 N.E.2d 1301 (1990).

C. Third Assignment of Error

1. Ruling on motion for prejudgment interest

{¶ 15} Whether a prejudgment interest award is warranted depends on whether a court finds the existence of a good faith effort to settle the case. That finding, and the decision to award prejudgment interest on a tort claim, lies in a trial court's sound discretion and its decision will not be disturbed absent an abuse of that discretion. *See generally Lewis v. Alfa Laval Separation, Inc.*, 128 Ohio App.3d 200, 224, 714 N.E.2d 426 (4th Dist.1998); *Evans v. Dayton Power & Light Co.*, 4th Dist. Adams No. 05CA800, 2006–Ohio–319, ¶ 12; *Rothenbusch-Rhodes v. Mason*, 10th Dist. Franklin No. 02AP1028, 2003–Ohio–4698, ¶ 95.

IV. LAW & ANALYSIS

A. Sufficiency of evidence regarding causation of injuries as result of medical negligence

{¶ 16} In their first assignment of error, appellants contend that the trial court erred in denying their motion for JNOV, or alternatively, motion for directed verdict. Specifically, appellants contend that appellees' sole medical expert, Dr. Holekamp, failed to establish to a reasonable degree of medical probability that Mr. Oyer suffered injury as a proximate result of Dr. Chawla's negligence.

{¶ 17} A successful medical malpractice action requires a plaintiff to present expert testimony that establishes each of the following elements by a preponderance of the evidence: (1) the applicable standard of care; (2) a breach of that standard of care; and (3) that the breach was a proximate cause of the injuries alleged. *See Bruni v. Tatsumi*, 46 Ohio St.2d 127, 346 N.E.2d 673 (1976), paragraph one of the syllabus ("In order to establish medical malpractice, it must be shown by a preponderance of evidence that the injury complained of was caused by the doing of some particular thing or things that a physician or surgeon of ordinary skill, care and diligence would not have done under like or similar conditions or circumstances, or by the failure or omission to do some particular thing or things that such a physician or surgeon would have done under like or similar conditions and circumstances, and that the injury complained of was the direct and proximate result of such doing or failing to do some one or more of such particular things."). "In the context of a medical malpractice action, JNOV is appropriate when the plaintiff fails to present competent expert testimony based upon a reasonable medical probability that the negligent acts of a physician were the direct and proximate cause of the patient's injury." *Lewis v. Nease*, 4th Dist. Scioto No. 05CA3025, 2006-Ohio-4362, ¶ 65, citing *Ramage v. Cent. Ohio Emergency Serv., Inc.*, 64 Ohio St.3d 97, 592 N.E.2d 828 (1992), at paragraph four of the syllabus. Probability has been defined as being more likely than not, or a greater than 50% likelihood that the act produced the injury at issue. *Cooper v. Sisters of Charity of Cincinnati*,

Inc., 27 Ohio St.2d 242, 253, 272 N.E.2d 97 (1971), overruled on other grounds by *Roberts v. Ohio Permanente Med. Group, Inc.*, 76 Ohio St.3d 483, 668 N.E.2d 483 (1996); *Stinson v. England*, 69 Ohio St.3d 451, 455, 633 N.E.2d 532 (1994). The expression of probability "is a condition precedent to the admissibility of expert opinion regarding causation" and thus "relates to the competence of such evidence and not its weight." *Stinson* at 455.

{¶ 18} Here, appellants are not contesting Dr. Holekamp's determination that their actions fell below the applicable standard of care. Rather, appellants contend that Dr. Holekamp did not testify to a reasonable degree of medical probability that Mr. Oyer's failure to regain useful vision was the result of Dr. Chawla's failure to perform the surgical procedures correctly, Dr. Chawla's lack of proper training and qualifications, or the appellants' poor record keeping. Appellants acknowledge Dr. Holekamp's testimony that given the circumstances, there was a 90% success rate that had the procedure been done properly the first time, Mr. Oyer's retina would have remained attached. [*See* Holekamp TT at 39-40.] However, appellants rely upon Dr. Holekamp's testimony that following retina re-attachment there is commonly, in the general population, a 45 to 50% chance that visual acuity to 20/40 or 20/50, what appellants define as usable vision, could be achieved. [*See* Holekamp TT at 50-51.] The appellants then argue that Mr. Oyer's chance of recovering usable vision, the alleged injury in this case, was only between 45 and 50% had the procedure been done properly, and thus, the requisite degree of probability needed to submit the case to the jury had not been met.

{¶ 19} Despite appellants' arguments, our review of the record reveals that Dr. Holekamp did testify that, in her opinion and to a reasonable degree of medical probability, the permanent vision loss in Mr. Oyer's right eye was the direct and proximate result of Dr. Chawla's negligent performance. For instance, Dr. Holekamp testified as follows:

> Savage: Doctor do you have an opinion to [a] reasonable degree of medical probability whether all of these deviations for the standard of care caused Mr. Oyer to lose sight in his eye?
>
> Holekamp: Yes.
>
> Savage: And what is that opinion?
>
> Holekamp: That these deviations for the standard of care were causative.
>
> Savage: And why is it your opinion that they were causative?
>
> Holekamp: I think they caused Mr. Oyer to lose his vision because he in my opinion had a straight forward retinal detachment at presentation and if he had been in the hands of a bona fide retina specialist there would have been a greater than 90% percentage chance he would be seeing out of his eye.
>
> [Holekamp TT at 68-69.]

Later, Dr. Holekamp clarified that had the initial surgery been done properly not only would there have been a 90% chance of retinal re-attachment, but Mr. Oyer also would have achieved fairly good vision in his right eye:

> Savage: Okay, now did you reach an opinion to a reasonable degree of medical probability on whether in the hands of a competent surgeon during the first procedure the retina would remain attached?
>
> Holekamp: Yes.
>
> Savage: And why is that?
>
> Holekamp: Well if the success rate of a surgery to reattach the retina is about 90% percent and the retina stays attached, we know that Mr. Oyer had visual, fairly [good] visual prognosis because on July 14th his vision was 20/70. Now we never

know what the final vision is going to be and it's hard to know what vision is while there [is] still a bubble in your eye, but on July 17th (sic) his vision was 20/70 which means that the porta receptors hadn't deteriorated that much in the detached state and in fact to be about 6 weeks out would be 20/70 makes me think he might have gotten to 20/50 or even 20/40 with more follow-up as the eye recovers more.

Todaro: Objection your honor.

The Court: Overruled.

Savage: If the retina had remained attached after the first surgery, instead of becoming re-detached and necessitating the second surgery, because of the removal of all of the posterior hyaloid during the first surgery, do you have an opinion to [a] reasonable degree of medical probability whether Mr. Oyer today would be able to see in his right eye to 20/60 or 20/70?

Todaro: Objection.

Holekamp: Yes.

Savage: And what is that opinion?

The Court: Overruled.

Holekamp: My opinion is that Mr. Oyer [would] have seen (inaudible) 20/70 is fairly good vision, we consider that a fairly good outcome after a macula off retina detachment, and that July 14th notes tell us that his prognosis would have been favorable had the retina stay hinged. * * *

Savage: Okay. Is there anything else that you would like [to] add with respect to your opinion, that if a qualified retinal surgeon had done the first surgery, that Mr. Oyer in his right eye would see today at least 20/60 or 20/70.

Holekamp: Yes.

Todaro: I'm going to object to new opinions your honor.

The Court: I don't believe that it is a new opinion, go ahead.

Savage: Go ahead.

Holekamp: So it's my opinion that if Mr. Oyer had received surgery by a fellowship trained retina specialist, that there was a 90% percent chance that the retina would have remained attached. Visual acuity doesn't matter if the retina doesn't stay attached. They have to reattach it, and we have evidence from the medical record that he would have seen as well as 20/60, 20/70, and I think that would have been a fairly good outcome for Mr. Oyer.

[Holekamp TT at 77-78, 114-115.]

{¶ 20} The above testimony demonstrates that in the hands of a retina specialist there was a 90% chance that Mr. Oyer's retina would have been successfully re-attached, and more importantly, remained attached after the first surgery. And because Dr. Holekamp was able to observe the medical records for the brief period of time in which Mr. Oyer's retina remained attached following the initial surgery, and because those records indicate that Mr. Oyer's visual acuity was improving and continuing to improve, Dr. Holekamp was able to opine that there was a 90% chance that Mr. Oyer would have achieved at least fairly good vision but for Dr. Chawla's negligence.

{¶ 21} Appellants rely on Dr. Holekamp's testimony that in general, a patient has a 45-50% chance of improved visual acuity following surgery to repair a detached retina with macula off. This reliance is misplaced, however, because Dr. Holekamp had the ability to review Mr. Oyer's progression following his first surgery. Thus, Dr. Holekamp was able to determine that Mr. Oyer was in the class of patients who would have achieved improved visual acuity if the surgery had been done properly and the retina remained attached. Dr. Holekamp made this distinction clear during her redirect examination:

Savage: At 45 to 50% percent probability based on before the surgery.

Holekamp: Yes.

Savage: That's when he is one of the group.

Holekamp: We talked about statistics in a general population, not an individual.

Savage: But we know how he actually did.

Holekamp: We do. At two months he was 20/60, 20/70.

Savage: So he is no longer part of the group before the surgery.

Holekamp: Correct, he's not.

Savage: We don't need to talk about statistics before the surgery for Mr. Oyer because we know how he did six weeks later.

Holekamp: Yes.

[Holekamp TT at 124-125.]

{¶ 22} Thus, construing the evidence most strongly in appellees' favor, we conclude that Dr. Holekamp's testimony did sufficiently establish, to a reasonable degree of medical probability, that Mr. Oyer suffered permanent vision loss as a direct and proximate result of the

appellants' negligence. Accordingly, the trial court did not err in denying appellants' JNOV motion or motion for directed verdict. Appellants' first assignment of error is overruled.

B. Determining fair and reasonable value of medical expenses and admissibility of evidence demonstrating amount of bill written-off

{¶ 23} In their second assignment of error, appellants contend that the trial court erred by prohibiting them from introducing evidence of medical bills that were written-off or adjusted, for the jury's consideration in determining the fair and reasonable value of medical expenses associated with Mr. Oyer's injuries. Appellants argue that the Ohio Supreme Court's decisions in *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.2d 1195, *Jaques v. Manton*, 125 Ohio St.3d 342, 2010-Ohio-1838, 928 N.E.2d 434, and *Moretz v. Muakkassa*, 137 Ohio St.3d 171, 2013-Ohio-4656, 998 N.E.2d 479, support the admission of such evidence for that purpose.[3]

{¶ 24} Prior to trial, appellees filed a motion in limine to exclude evidence of any and all payments or benefits made on behalf of the appellees, including the amounts of contractual write-offs or adjustments made by any health care provider. The appellees argued that any such evidence was not probative of the reasonable value of the medical services provided, would be contrary to R.C. 2315.20 and R.C. 2317.421, and would confuse the jury on the issue of damages. Alternatively, appellees argued that an expert witness was required to introduce and explain evidence regarding contractual write-offs or adjustments. The trial court granted the motion in limine on the basis that expert testimony was required. [Day 1 TT at 11-12.]

[3] "A 'write-off' is the difference between the original amount of a medical bill and the amount accepted by the medical provider as the bill's full payment." *Robinson* at ¶ 10; *see also Jaques* at ¶¶ 5, 14.

{¶ 25} Later, during trial, and just prior to Tina Walters'[4] testimony, there was a renewed discussion between the trial court and the parties regarding the admissibility of evidence showing the amount of medical expenses written-off or adjusted by the Eye Specialists of Ohio. The appellants intended to introduce, through Walters, medical bills showing the amount originally billed for the procedures and the amounts accepted in satisfaction of the invoice. After a lengthy discussion, the trial court ruled that an expert witness was required to introduce evidence regarding contractual write-offs or adjustments. [Day 3 TT at 15.] In doing so, the trial court expressly relied upon *Moretz v. Muakkassa*, 9th Dist. Summit No. 25602, 2012-Ohio-1177, in which the Ninth District Court of Appeals ruled that evidence of the amount written-off or adjusted was not admissible without expert testimony. *Id*. at ¶ 42. However, the trial court acknowledged that the Ohio Supreme Court had accepted *Moretz* for review, and that it was possible that the Supreme Court could very well reverse the decision of the appellate court. [Day 3 TT at 15-16.] In any event, the trial court ruled that only an expert witness, most likely a "physician" unconnected to the proceedings, could testify regarding the reasonableness of the medical expenses and that neither Walters nor any of the physicians associated with Eye Specialists of Ohio could introduce such evidence.

{¶ 26} A plaintiff is entitled to recover reasonable medical expenses incurred for injuries caused by the tortious conduct of a defendant. *Wagner v. McDaniels*, 9 Ohio St.3d 184, 459 N.E.2d 561 (1984). R.C. 2317.421 provides as follows:

> In an action for damages arising from personal injury or wrongful death, a written bill or statement, or any relevant portion thereof, itemized by date, type of service rendered, and charge, shall, if otherwise admissible, be prima-facie evidence of the reasonableness of any charges and fees stated therein for medication and

[4] Walters was the billing manager for Eye Specialists of Ohio at all times pertinent to this case.

> prosthetic devices furnished, or medical, dental, hospital, and funeral services rendered by the person, firm, or corporation issuing such bill or statement, provided, that such bill or statement shall be prima-facie evidence of reasonableness only if the party offering it delivers a copy of it, or the relevant portion thereof, to the attorney of record for each adverse party not less than five days before trial.

Thus, "R.C. 2317.421 makes * * * bills prima facie evidence of the reasonable value of charges for medical services." *Robinson*, 112 Ohio St.3d 17, 2006-Ohio-6362, 857 N.E.2d 1195, at ¶ 9.

{¶ 27} R.C. 2317.421, however, is complicated by the collateral-source rule. This is particularly true under the circumstances of the present case, where the appellants wished to introduce a bill showing the amount originally charged and the amount actually paid in satisfaction of the debt. In *Robinson*, the Ohio Supreme Court explained that the common law collateral-source rule "prevents the jury from learning about a plaintiff's income from a source other than the tortfeasor so that a tortfeasor is not given an advantage from third-party payments to the plaintiff" and works by excluding "evidence of benefits paid by a collateral source." *Id*. at ¶¶ 11, 16. Thus, there was some confusion over whether the collateral-source rule applied to exclude evidence of write-offs. The *Robinson* court ultimately concluded that the common law collateral-source rule did not operate to exclude evidence of write-offs. *Id*. at ¶¶ 1, 16. The Court reasoned that a write-off is not a payment, and thus does not constitute payment of a benefit. *Id*. at ¶ 16. Accordingly, the Court surmised evidence of write-offs can be admitted to help evaluate the reasonable value of medical expenses because the tortfeasor "does not obtain a credit" therefrom. *Id*.

{¶ 28} The *Robinson* decision, however, declined to adopt a categorical rule that the reasonable value of medical services is either the amount billed or the amount paid. *Id*. at ¶ 17. Rather, the Court noted that either the original bill rendered, or the amount actually paid are admissible to prove the value of medical services, and that ultimately, the reasonable value of medical services is a matter to be determined by the jury from all relevant evidence. *Id*. at ¶ 17. "The jury may decide that the reasonable value of medical care is the amount originally billed, the amount the medical provider accepted as payment, or some amount in between. Any difference between the original amount of a medical bill and the amount accepted as the bill's full payment is not a 'benefit' under the collateral-source rule because it is not a payment, but both the original bill and the amount accepted are evidence relevant to the reasonable value of medical expenses." *Id*. at ¶ 18.

{¶ 29} The Ohio Supreme Court, in *Jaques*, revisited its decision in *Robinson* after the enactment of R.C. 2315.20, which mostly abrogated the common law collateral-source rule. *See Jaques*, 125 Ohio St.3d 342, 2010-Ohio-1838, 928 N.E.2d 434, at ¶ 1. In *Jaques*, the Court concluded that the common law analysis set forth in *Robinson* applied equally in the context of R.C. 2315.20 because the statute's "formulation is no different substantively from the common-law rule described in *Robinson* as excluding only 'evidence of benefits paid by a collateral source.' " (Citation omitted.) *Id*. at ¶ 11. Accordingly, the Ohio Supreme Court reaffirmed that " '[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*. at ¶ 15, quoting *Robinson* at ¶ 17.

{¶ 30} Following *Robinson* and *Jaques*, many courts still questioned, however, whether the party offering evidence of write-offs was required to lay a foundation for its admission

through expert testimony. That question was finally resolved by the Ohio Supreme Court in *Moretz*, 137 Ohio St.3d 171, 2013-Ohio-4656, 998 N.E.2d 479.

{¶ 31} As before mentioned, the appellate court in *Moretz* held that expert testimony was required before evidence of write-offs may be admitted. *Id*. at ¶ 92. Specifically, "[t]he [appellate] court held that the presumption of reasonableness for medical bills contained in R.C. 2317.421 does not extend to write-offs, and because the reasonable value of medical services is outside the common knowledge of laypeople, expert testimony is necessary as a foundation for presentation of this evidence to the jury." *Id*., citing *Moretz*, 2012-Ohio-1177, at ¶ 41 (the appellate court decision). The trial court, in the case sub judice, relied upon this reasoning in forming its ruling on the admissibility of the write-off evidence.

{¶ 32} The Ohio Supreme Court disagreed with the appellate court's rationale, however, noting that the General Assembly's use of the phrase "any relevant portion thereof" in R.C. 2317.421 reflected its intention to encompass more than just charges in its presumption of reasonableness. *Id*. at ¶¶ 93-94. Thus, the Ohio Supreme Court concluded that "R.C. 2317.421 obviates the necessity of expert testimony for the admission of evidence of write-offs, reflected on medical bills and statements, as prima facie evidence of the reasonable value of medical services." *Id*. at ¶ 94.

{¶ 33} Here, the write-offs at issue were reflected on the statements from the Eye Specialists of Ohio.[5] Thus, they were a "relevant portion" of the statements and the appellants were entitled to have them admitted under R.C. 2317.421 without expert testimony. We acknowledge that the trial court was put in a tough situation in trying to predict how the Ohio

[5] A version of those statements was submitted to the jury showing only the amount originally billed, but redacting the lesser amount accepted as full-payment. Appellants wished to introduce, but were denied the opportunity absent expert testimony, a non-redacted version of the bill demonstrating the write-offs and adjustments.

Supreme Court would rule in *Moretz*, but we nonetheless conclude that it erred in requiring expert testimony as a foundation of write-off evidence.

{¶ 34} Finally, the appellees contend that the appellants failed to proffer any evidence of the write-offs following the trial court's initial ruling on the motion in limine, and thus waived the issue for purposes of appeal. We disagree.

{¶ 35} Immediately prior to the start of the appellants' case in chief, the trial court reaffirmed its ruling that it would not allow Walters, Dr. Chawla, or Dr. Adler to testify or introduce evidence of write-offs associated with the bills from the Eye Specialists of Ohio; and would only consider such evidence if offered by an expert witness. [Day 3 TT at 14-16.] This was essentially a proffer and denial since the appellants had not retained an expert on medical billing. The next day, after the defense had rested its case and when discussing the admissibility of defense exhibits, the trial court again discussed the admissibility of the medical bills demonstrating the write-off of medical expenses. [Day 4 TT at 4.] While the trial court expressed some concern over its previous rulings requiring an expert to lay a foundation for the admission of write-offs, it again ruled that evidence of the write-offs was not admissible stating that: "You are offering A [the medical bills]. That's overruled." [Day 4 TT at 4.] It is apparent from the foregoing that appellants did proffer the medical bills as evidence, and thus the admissibility issue was properly preserved for appellate purposes. And because we already determined that the trial court erred in ruling that an expert witness was necessary to introduce evidence of write-offs, we sustain appellants' second assignment of error.

C. Good faith effort to settle and award of prejudgment interest

{¶ 36} The appellants argue in their third assignment of error that the trial court erred by granting the appellees' motion for pre-judgment interest. We disagree.

{¶ 37} Recovery of pre-judgment interest for tort claims is covered under the provisions of R.C. 1343.03(C)(1), which states in pertinent part:

> If, upon motion of any party to a civil action that is based on tortious conduct, that has not been settled by agreement of the parties, and in which the court has rendered a judgment, decree, or order for the payment of money, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case, interest on the judgment, decree, or order shall be computed * * *

{¶ 38} In reviewing a motion for pre-judgment interest, "[a] party has not 'failed to make a good faith effort to settle' under R.C. 1343.03(C) if he has (1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party." *Kalain v. Smith*, 25 Ohio St.3d 157, 159, 495 N.E.2d 572 (1986). However, if a defendant has an objectively reasonable, good-faith belief that he has no liability, he need not make any settlement offers at all. *Id*.

{¶ 39} A party must satisfy all four of the *Kalain* requirements-noncompliance with even one factor indicates that the party has failed to make a good faith effort to settle. *See Wagner v. Marietta Area Health Care, Inc.*, 4th Dist. Washington No. 00CA17, 2001-Ohio-2424 (affirming award of prejudgment interest when defendant cooperated in discovery and did not attempt to delay proceedings, but court found she did not rationally evaluate the risks and potential for liability or possess a good faith, objectively reasonable belief that she had no

liability); *Myres v. Stucke*, 11th Dist. Trumbull No. 98-T-0132, 1999 WL 1073683 (Oct. 29, 1999) (trial court erred by denying pre-judgment interest when it concluded that the defendant failed to properly evaluate his risks and potential liability).

{¶ 40} In considering a request for pre-judgment interest, the trial court is not limited to considering the evidence presented at the pre-judgment interest hearing. The court may also review the evidence presented at trial and its prior rulings and jury instructions, especially when considering such factors as the type of case, the injuries involved, applicable law, and the available defenses. *Galmish v. Cicchini*, 90 Ohio St.3d 22, 34, 734 N.E.2d 782 (2000).

{¶ 41} Here, it is undisputed that the appellees made an initial settlement demand of $275,000, and that the appellants failed to respond to the offer for nearly eight months and never made a counter-offer despite appellees notification that they were willing to negotiate down from the initial demand. Appellants contend, however, that their lack of a settlement offer is excused because they rationally evaluated the risks and potential liability and concluded, in good faith, that the case against them was defensible. Specifically, appellants argue that they presented a well-reasoned defense that Dr. Chawla complied with the standard of care, and that the appellees failed to prove to a reasonable degree of medical probability that they were the cause of Mr. Oyer's injuries.

{¶ 42} We disagree that the appellants rationally evaluated their risk and potential liability. First, on the issue of the standard of care, Dr. Holekamp, a well-respected fellowship trained retinal specialist, testified to a multitude of ways in which the appellants had breached the standard of care. Despite this testimony, appellants failed to offer rebuttal testimony from an expert witness. Rather, Dr. Chawla, a general ophthalmologist, was the only witness to testify in support of his belief that he did not deviate from the standard of care. Furthermore, appellants

unsuccessfully raised the causation issue both prior to trial and following the appellees' case in chief, yet these unsuccessful attempts never prompted them to even explore the idea of settlement. Given these circumstances, we cannot say that the trial court abused its discretion in awarding pre-judgment interest in this case. Accordingly, we overrule appellants' third assignment of error. Nevertheless, upon remand of this matter under appellants' second assignment of error, should the damages award change, we order that the amount of pre-judgment interest be adjusted accordingly.

V. CONCLUSION

{¶ 43} The trial court's denial of appellants' motion for JNOV on the basis that the appellees' expert failed to establish beyond a reasonable degree of medical probability that appellants' negligence was the cause of appellees' injuries was not erroneous. Thus, the issue of liability has been firmly established. However, the trial court did abuse its discretion when it prohibited appellants from presenting evidence of write-offs to contest the appellees' medical bills without a foundation of expert testimony on the reasonable value of the medical services rendered. Accordingly, we affirm the judgment of the trial court in part, and reverse the judgment of the trial court in part. This matter is remanded to the trial court for a new trial on damages only. On remand, appellants shall be permitted to argue that the reasonable value of appellee Joe Oyer's medical expenses is the amount equal to the amount paid after write-offs without supporting that argument with expert testimony. Should the amount of damages vary as a result of the new trial, appellees' award of pre-judgment interest should be adjusted accordingly.

JUDGMENT AFFIRMED, IN PART, AND REVERSED, IN PART, AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED, IN PART, AND REVERSED, IN PART, and the CAUSE BE REMANDED to the trial court for further proceedings consistent with this opinion. Appellants and Appellees shall split the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J.: Concurs in Judgment and Opinion.
McFarland, A.J.: Concurs in Judgment Only.

For the Court

By:_____
Marie Hoover, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.