[Cite as *Martin v. Am. Natl. Property & Cas. Co.*, 2010-Ohio-3370.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

JAMES E. MARTIN, et al.,	:	
Plaintiffs-Appellants,	:	CASE NO. CA2009-11-282
	:	O P I N I O N
- vs -		7/19/2010
	:	
AMERICAN NATIONAL PROPERTY AND CASUALTY COMPANY, et al.,	:	
	:	
Defendants-Appellees.	:	

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2008 06 2909

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RINGLAND, J.

{¶1} Plaintiffs-appellants, James and Susan Martin, appeal the damage award in a personal injury action from a decision of the Butler County Court of Common Pleas.

{¶2} This case arose from an automobile accident which occurred on July 2, 2006. James Martin was a passenger in a van driven by his son when the vehicle was struck from behind by a vehicle driven by Brandon Nichols. Nichols was insured by Nationwide Insurance with a policy limit of $12,500 per person. The Martins had an underinsured motorist policy from appellee, American National Property & Casualty with

a limit of $100,000. Although James Martin declined medical attention at the scene of the accident, he later sought treatment for aggravation of a pre-existing back condition. Nationwide tendered its policy limits in February 2009.

{¶3} Payments were made on James Martin's medical expenses by the self-funded Employee Benefit Plan provided by Susan Martin's employer, Good Samaritan Hospital, and administered by Humana. James Martin's medical expenses totaled $23,949.03. However, the employer received a discount, paying a total of $10,663.84. The remaining $13,285.19 was written-off. James Martin brought suit against several parties, including Nichols and American National, for his injuries. Susan Martin also brought a claim for loss of consortium. On or about August 22, 2009, only weeks before trial, Nichols admitted liability. Settlement negotiations were unsuccessful with American National and the case on appellants' underinsured coverage proceeded to trial.

{¶4} Prior to trial, the parties filed pretrial motions regarding the admissibility of appellant's medical expenses and the "write-off." The trial court ruled that the amount of the "write-off" could be introduced at trial. The jury returned a verdict in favor of appellants, awarding James Martin $25,663.84. Specifically, the jury awarded $10,663.84 for past medical expenses and $15,000 for pain and suffering. The jury awarded $0.00 for Susan Martin's loss of consortium claim.

{¶5} Appellants requested that the court re-submit the zero loss of consortium award, which was denied by the trial court. Appellants then filed a motion for new trial on Susan Martin's claim as well as a motion for prejudgment interest from the date of the automobile accident. The trial court overruled appellants' motions. Appellants timely appeal, raising four assignments of error.

{¶6} Assignment of Error No. 1:

{¶7} "THE TRIAL COURT ERRED BY INSTRUCTING THE JURY AS PROVIDED IN ROBINSON V. BATES."

{¶8} In the first assignment of error, appellants argue that the trial court erred by allowing evidence of the "write-off" amount to be admitted at trial. Appellants argue that the evidence violates Ohio's Tort Reform Statute.

{¶9} In *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, the Ohio Supreme Court found 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 ¶17. *Robinson* predated the effective date of Ohio's collateral source statute. Id. at fn. 1.

{¶10} The collateral source statute provides:

{¶11} "(A) In any tort action, the defendant may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the damages that result from an injury, death, or loss to person or property that is the subject of the claim upon which the action is based, except if the source of collateral benefits has a mandatory self-effectuating federal right of subrogation, a contractual right of subrogation, or a statutory right of subrogation or if the source pays the plaintiff a benefit that is in the form of a life insurance payment or a disability payment. However, evidence of the life insurance payment or disability payment may be introduced if the plaintiff's employer paid for the life insurance or disability policy, and the employer is a defendant in the tort action.

{¶12} "(B) If the defendant elects to introduce evidence described in division (A) of this section, the plaintiff may introduce evidence of any amount that the plaintiff has paid or contributed to secure the plaintiff's right to receive the benefits of which the defendant has introduced evidence.

{¶13} "(C) A source of collateral benefits of which evidence is introduced

pursuant to division (A) of this section shall not recover any amount against the plaintiff nor shall it be subrogated to the rights of the plaintiff against a defendant." R.C. 2315.20.

{¶14} Appellants argue that *Robinson* has been superseded by R.C. 2315.20, providing that evidence of write-offs is no longer admissible.

{¶15} Recently in *Jaques v. Manton*, 125 Ohio St.3d 342, 2010-Ohio-1838, the Ohio Supreme Court reconsidered *Robinson*'s applicability under R.C. 2315.20, which is dispositive of the issue at bar. *Jacques* at ¶1. In *Jaques*, the court found that *Robinson* remains controlling and concluded that R.C. 2315.20 has no effect on the admissibility of write-offs. Id. at ¶11. Like the case at bar, Jaques was injured in an auto accident. Id. at ¶2. Jaques filed a personal injury action against Manton to recover for injuries he sustained in the accident. Id. Jaques received medical treatment for his injuries totaling $21,874.80. Id. at ¶3. Jaques' treatment was covered by his personal insurance policy provided by Medical Mutual and the medical providers accepted reduced amounts totaling $7,483.91 as full payment for the treatment pursuant to agreements with Medical Mutual. Id.

{¶16} The Supreme Court reasoned that with R.C. 2315.20 "[t]he General Assembly has expressly established that evidence of collateral benefits is admissible. The statute does include exceptions, however, including when the source of the payment has a contractual right of subrogation." *Jacques* at ¶9. However, "[t]he general collateral-source rule in R.C. 2315.20 must apply before the subrogation exception of the statute can apply. The general rule pertains only to 'evidence of any amount payable as a benefit to the plaintiff.' * * * Our common-law analysis from *Robinson* applies equally in the context of the statute." Id. at ¶11.

{¶17} "Both versions of the collateral-source rule are concerned with actual

payments made by third parties to the benefit of the plaintiff, but the focus of the statute is to prevent a double-payment windfall for the plaintiff, while the focus of the common-law rule was to prevent the defendant from escaping the full burden of his tortious conduct. Write-offs are amounts not paid by third parties, or anyone else, so permitting introduction of evidence of them allows the fact-finder to determine the actual amount of medical expenses incurred as a result of the defendant's conduct. This result supports the traditional goal of compensatory damages—making the plaintiff whole." Id. at ¶12.

{¶18} "We are required to apply the plain language of a statute when it is clear and unambiguous. * * * A write-off indicates only that the provider accepted less than the amount originally billed for its services. While this may typically occur due to an insurance agreement, that is certainly not always the case. R.C. 2315.20 does not indicate a legislative intent to bar such evidence. As we stated in *Robinson*, * * * 'whether plaintiffs should be allowed to seek recovery for medical expenses as they are originally billed or only for the amount negotiated and paid by insurance is for the General Assembly to determine.'" (Internal citations omitted.) *Jacques* at ¶14.

{¶19} "Because R.C. 2315.20 does not prohibit evidence of write-offs, the admissibility of such evidence is determined under the Rules of Evidence. A plaintiff is entitled to recover the reasonable value of medical expenses incurred due to the defendant's conduct. The reasonable value may not be either the amount billed by medical providers or the amount accepted as full payment. 'Instead, the reasonable value of medical services is a matter for the jury to determine from all relevant evidence. Both 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.'" *Jacques* at ¶14, citing *Robinson* at ¶7, 17.

{¶20} Based upon the Supreme Court's decision in *Jaques*, we find no error by

the trial court in this case. Evidence of the write-off was admissible at trial. Appellants' first assignment of error is overruled.

{¶21} Assignment of Error No. 2:

{¶22} "THE TRIAL COURT ERRED BY REFUSING TO RETURN THE VERDICT GRANTING SUSAN MARTIN $0.00 FOR FURTHER DELIBERATION."

{¶23} In their second assignment of error, appellants argue that the zero damages awarded for Susan Martin's loss of consortium claim was unsupported by the evidence and the trial court should have required the jury to award a damage amount commensurate with her loss. Appellants urge that James Martin became withdrawn and inactive following the accident, and Susan Martin testified that due to his injuries she "lost her best friend."

{¶24} Generally, the assessment of damages lies within the province of the jury. *Weidner v. Blazic* (1994), 98 Ohio App.3d 321, 334. A jury is free to accept or reject any or all of the testimony of any witness, including testimony of an expert witness. Id. at 335. Moreover, even when the evidence is undisputed, the jury possesses the inherent right to reject the evidence presented. *Krauss v. Kilgore* (July 27, 1998), Butler App. No. CA97-05-099, 1998 WL 422068, *15. "A jury is free to reject any evidence and is not required to accept evidence simply because it is uncontroverted, unimpeached or unchallenged." Id. at 6, citing *Ace Steel Baling Inc. v. Porterfield* (1969), 19 Ohio St.2d 137, 138. Damage awards in personal injury actions are particularly within the province of the jury and neither a reviewing court nor a trial court can substitute its judgment for that of the jury. *Litchfield v. Morris* (1985), 25 Ohio App.3d 42, 44.

{¶25} In *Botts v. Tibbs* (May 24, 1999), Butler App. No. CA98-06-125, 1999 WL 326166, this court upheld a similar award of zero damages on a loss of consortium claim. Mr. Botts was injured in an auto accident and the appellee admitted liability. Id. at

*1. In addition to Mr. Botts' personal injury claim, Mrs. Botts brought a loss of consortium claim. Id. Like this case, the jury entered judgment in favor of Mr. Botts' claim, but awarded zero damages to Mrs. Botts on her claim for loss of consortium. Id. at *3. This court affirmed, reasoning "it is clear that her damages were not proven to the satisfaction of the jury. Appellants did not present the jury any evidence of monetary loss Phyllis Botts suffered as a result of her husband's accident, as it was established at trial that appellant retired from his ministry as a result of his heart attack in 1995, not as a result of the injuries he suffered in the accident. Moreover, we find that it remained within the jury's prerogative to disbelieve or reject testimony about how the accident and appellant's subsequent injuries affected appellants' marriage." Id. at *4.

{¶26} Appellants urge that Susan Martin's testimony was "uncontroverted" and requires a damage award. However, as this court found in *Botts*, the jury has no obligation to accept Susan Martin's statements. Similarly, appellants presented no evidence of any monetary loss to Susan Martin based upon James Martin's injuries. Moreover, at trial Susan Martin revealed during cross-examination that her husband had suffered from depression before the accident and she solicited medical advice regarding his depression two months before the accident occurred.

{¶27} Appellants reference this court's decisions in *Kubilus v. Owens*, Butler App. No. CA2007-03-065, 2008-Ohio-3728; and *Acton v. Ventling* (June 27, 1994), Butler App. No. CA93-05-088, urging that a zero damage verdict is manifestly against the weight of the evidence. Both *Kubilus* and *Acton* involved zero-damage awards for an injured party's pain and suffering despite uncontroverted evidence. *Kubilus* at ¶12. Under such circumstances, a zero damage award is against the manifest weight of the evidence. Id. The issue at bar does not involve an award for the injured party's pain and suffering. Instead, appellants question the award in the context of a loss of

consortium claim which, as discussed above, does not require the jury to return a damage award. See *Botts*.

{¶28} After review of the record, we decline to substitute our judgment for that of the jury with respect to the loss of consortium claim. *Botts* at *5. Because the jury's verdict was not against the weight of the evidence, the trial court did not abuse its discretion by denying appellants' request to resubmit the jury's verdict on the loss of consortium claim for further deliberation.

{¶29} Appellants' second assignment of error is overruled.

{¶30} Assignment of Error No. 3:

{¶31} "THE TRIAL COURT ERRED BY OVERRULING PLAINTIFF'S MOTION FOR A NEW TRIAL."

{¶32} In their third assignment of error, appellants restate their arguments from the first and second assignments of error. For the reasons stated under our analysis of appellants' previous assignments of error, the trial court did not err by overruling the motion for new trial. Appellants' third assignment of error is overruled.

{¶33} Assignment of Error No. 4:

{¶34} "THE TRIAL COURT ERRED BY OVERRULING PLAINTIFF'S MOTION FOR PREJUDMENT INTEREST."

{¶35} In their final assignment of error, appellants argue the trial court erred by overruling the motion for prejudgment interest. Appellants argue that interest should be calculated from the date of the accident.

{¶36} The right to recover interest is governed by R.C. 1343.03. The applicable subsection of R.C. 1343.03 depends upon whether the cause of action lies in tort or contract. *Lehrner v. Safeco Ins./Am. States Ins. Co.*, 171 Ohio App.3d 570, 2007-Ohio-795, ¶72. R.C. 1343.03(A) provides in pertinent part, "when money becomes due and

payable upon any * * * instrument of writing * * * and upon all judgments * * * for the payment of money arising out of tortious conduct or a contract or other transaction, the creditor is entitled to interest at the rate per annum determined pursuant to section 5703.47 of the Revised Code * * *." Alternatively, R.C. 1343.03(C)(1) states in part, "[i]f, 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 * * *."

{¶37} In *Hance v. Allstate*, Clermont App. No. CA2008-10-094, 2009-Ohio-2809, this court stated that "an action by an insured against his or her insurance carrier for payment of [underinsured motorist] benefits is a cause of action sounding in contract, rather than tort, even though it is tortious conduct that triggers applicable contractual provisions." Id. at ¶8, citing *Hofle v. General Motors Corp.*, Warren App. No. CA2002-06-062, 2002-Ohio-7152, ¶8. See, also, *Landis v. Grange Mutual Ins. Co.*, 82 Ohio St.3d 339, 1998-Ohio-387. This is based on the fact that the underinsured motorist benefit claim arises out of the insurance contract between the parties. *Landis* at 341. Accordingly, R.C. 1343.03(A) controls in this matter.

{¶38} Yet in this case, the trial court applied R.C. 1343.03(C) in denying prejudgment interest. The trial court in this case issued an oral decision on appellants' motion for interest. In denying interest, the trial court indicated that the R.C. 1343.03(C) "good faith" standard was applicable. Specifically, the court stated, "this Court has awarded in the past when it is appropriate -- when there has been a bad faith effort to

settle the case * * *."

{¶39} R.C. 1343.03(A) instead requires the court to determine when the "money becomes due and payable." *Hance* at ¶17. "Whether the prejudgment interest in this case should be calculated from the date coverage was demanded or denied, from the date of the accident, from the date at which arbitration of damages would have ended if [the insurer] had not denied benefits, or some other time based on when [the insurer] should have paid [the insured] is for the trial court to determine." *Landis* at 342. Once the date is determined by the trial court, an award of prejudgment interest is mandatory beginning on that date. *Hance* at ¶16.

{¶40} While alluding to the "good faith" standard of R.C. 1343.03(C), the trial court also made findings relating to when the money became "due and payable." In rendering its decision, the trial court recognized that delay in this case resulted from the tortfeasor. Specifically, the tortfeasor did not admit liability for more than three years after the accident and only a few weeks before trial commenced. Until that time, fault remained disputed in the case and, as a result, it was unclear whether American National would be required to furnish damages for pain and suffering pursuant to the underinsured motorist policy. Further, American National acknowledged underinsured coverage throughout the proceedings and, if the tortfeasor was determined to be liable, Mr. Martin would be entitled to damages for pain and suffering under the policy. *Hance* at ¶18. In this regard, after the tortfeasor's liability had been determined, American National attempted to settle the matter, but could not reach an agreement with appellants before trial. Id. We construe these findings by the trial court to support a determination that the money became "due and payable" upon judgment. See id. at

¶24.[1] These findings support the denial of prejudgment interest under R.C. 1343.03(A).

{¶41} Accordingly, although we find that the trial court applied the incorrect standard, the decision to deny prejudgment interest was proper. See *Reynolds v. Budzik* (1999), 134 Ohio App.3d 844, 847; *State ex rel. Carter v. Schotten*, 70 Ohio St.3d 89, 92, 1994-Ohio-37. Appellants' fourth assignment of error is overruled.

{¶42} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.

1. In *Hance*, the trial court and this court reviewed the provisions of the insurance contract in considering when the money became "due and payable." Id. at ¶21-23. The insurance contract between American National and appellants was not submitted in this case and was not included in the record.