COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

KATHLEEN JOHNSON, Individually And as Executor of the ESTATE OF JEAN MARILYN SNOOK, Deceased	:	**CASE NO. 2012 CVA 01125**
Plaintiff	:	
vs.	:	**Judge McBride**
CARESPRING HEALTH CARE MANAGEMENT, LLC, et al.,	:	**DECISION/ENTRY**
Defendants	:	

Schachter, Hendy & Johnson, PSC, Penny Unkraut and Jay R. Vaughn, counsel for the plaintiff Kathleen Johnson, individually and as executor of the Estate of Jean Marilyn Snook, 909 Wright's Summit Parkway, Suite 210, Ft. Wright, Kentucky 41011.

Rendigs, Fry, Kiely & Dennis, LLP, Paul W. McCartney, counsel for defendants Eastgate Health Care Center, Inc. d/b/a Eastgatespring of Cincinnati and Carespring Health Care Management, LLC, 600 Vine Street, Suite 2650, Cincinnati, Ohio 45202.

Lindhorst & Dreidame Co., LPA, Michael F. Lyon and Laurie A. McClusky, counsel for defendants Shachi Singh, M.D. and Ambalika Care, Inc., 312 Walnut Street, Suite 3100, Cincinnati, Ohio 45202.

This cause is before the court for consideration of a motion in limine filed by the plaintiffs and a motion in limine filed by defendants Shachi Singh, M.D. and Ambalika Care, Inc.

The court scheduled and held a hearing on these issues on September 16, 2013. At the conclusion of that hearing, the court took the issues raised by the motions in limine under advisement.

Upon consideration of the motion, the record of the proceeding, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

FACTS OF THE CASE

The decedent Jean Snook was transferred from Bethesda Hospital to Eastgatespring of Cincinnati on June 10, 2011. Snook's discharge form from Bethesda Hospital specified that she was to be given Coumadin on the evening of her discharge and thereafter. It is alleged that the nurse at Eastgatespring failed to transfer nine of Snook's required medications to the medical administration record at the time of admission. During a care conference with Snook's family on July 7, 2011, one of the decedent's daughters asked why her mother was not receiving Coumadin. After discussion with the staff, Dr. Singh ordered that Snook receive Coumadin. On July 11th, Snook suffered an ischemic stroke.

I. MOTION IN LIMINE REGARDING AMOUNTS ACCEPTED AS PAYMENT IN FULL

A motion in limine is a precautionary request, directed to the inherent discretion of the trial judge, to limit the examination of witnesses or the admission of certain evidence.[1] " * * * [A] motion in limine, if granted, is a tentative, interlocutory, precautionary ruling by the trial court reflecting its anticipatory treatment of the evidentiary issue."[2]

Pursuant to R.C. 2317.421:

> "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 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."

"A plaintiff is entitled to recover reasonable medical expenses incurred for injuries caused by the tortious conduct of a defendant."[3] " 'Proof of the amount paid or the amount of the bill rendered and of the nature of the services performed constitutes prima facie evidence of the necessity and reasonableness of the charges for medical

[1] *State v. Grubb* (1986), 28 Ohio St.3d 199, 201, 503 N.E.2d 142, quoting *State v. Spahr*, 47 Ohio App.2d 221, 353 N.E.2d 624 (Ohio App. 2nd Dist., 1976).
[2] Id. at 201-202.
[3] *Jaques v. Manton* (2010), 125 Ohio St.3d 342, 928 N.E.2d 434, 2010-Ohio-1838, ¶ 5, *Robinson v. Bates* (2006), 112 Ohio St.3d 17, 857 N.E.2d 1195, 2006-Ohio-6362, at ¶ 7, citing *Wagner v. McDaniels* (1984), 9 Ohio St.3d 184, 9 OBR 469, 459 N.E.2d 561.

and hospital services.'"[4] " 'Thus, either the bill itself or the amount actually paid can be submitted to prove the value of medical services.'"[5]

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.' "[6] In examining that common law rule, the Ohio Supreme Court has held that " '[b]ecause no one pays the write-off, it cannot possibly constitute *payment* of any benefit from a collateral source.'"[7] As such, the court has held that the common-law collateral source rule does not preclude introducing evidence of write-offs.[8] Furthermore, when addressing R.C. 2315.20, a statute which generally provides that evidence of collateral benefits is admissible unless the source of the payment has a contractual, statutory, or federally-mandated subrogation right, the Ohio Supreme Court again held that evidence of write-offs was not precluded and " '[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.'"[9]

The plaintiffs argue that the defendant cannot present statements containing the amount accepted as full payment without presenting expert testimony to support the conclusion that said amount is reasonable. The plaintiffs rely on the case of *Moretz v. Muakkassa* (March 21, 2012), 9th Dist. No. 25602, 2012-Ohio-1177, in support of this argument. In the *Moretz* case, the trial court excluded evidence of amounts written off

[4] Id., quoting *Wagner* at paragraph one of the syllabus.
[5] Id., quoting *Robinson* at ¶ 7.
[6] Id. at ¶ 7, quoting *Robinson* at ¶ 11.
[7] Id. at ¶ 8, quoting *Robinson* at ¶ 16.
[8] Id.
[9] Id. at ¶ 15, quoting *Robinson* at ¶ 17.

by the medical providers because the defendant failed to offer any expert testimony on the issue of the reasonable value of the medical services rendered.[10] The appellate court affirmed, concluding that "[a]s the reasonable value of medical services is outside the common knowledge of laymen, expert testimony is necessary as a foundation for presentation of this evidence to the jury."[11] The court noted that, while R.C. 2317.421 codifies a rebuttable presumption that the amounts charged are evidence of the reasonable value of medical services rendered, thus obviating the need for plaintiffs to present expert testimony on that issue, there is no corresponding "presumption or shortcut available to allow" evidence of write-offs without a proper foundation.[12]

Currently, the Ninth District Court of Appeals is the only appellate court in Ohio that has chosen to impose this requirement on defendants. In the *Jaques* case, as set forth above, the Ohio Supreme Court held that "either the bill itself or the amount actually paid can be submitted to prove the value of medical services." The court did not state in *Robinson* or *Jaques* that a defendant would be required to present expert testimony supporting the notion that the amount actually paid constitutes the reasonable value of the medical care provided. In fact, in *Robinson*, the court explicitly states that "the original medical bill rendered and the amount accepted as full payment for medical services should have been admitted *pursuant to R.C. 2317.421*." (emphasis added) The *Moretz* holding represents a significant departure from available precedent from the Ohio Supreme Court and this court does not find its reasoning to be persuasive. As such, this court declines to adopt the reasoning set forth in the *Moretz* case and will not require expert testimony to be presented in support of the write-off amounts.

[10] *Moretz v. Muakkassa* (March 21, 2012), 9th Dist. No. 25602, 2012-Ohio-1177, at ¶ 40.
[11] Id. at ¶ 41, citing Evid.R. 702(A).
[12] Id. at ¶¶ 41-42.

The *Moretz* case is currently on appeal to the Ohio Supreme Court and oral arguments were heard on April 9, 2013. As of the date of this decision, the court has yet to issue its ruling on the *Moretz* appeal. Should the Ohio Supreme Court choose to adopt the reasoning of the Ninth District Court of Appeals or some modified version thereof, obviously this court's holding in the present decision, which is only an interlocutory ruling, will be vacated and this court will follow the directive of the Ohio Supreme Court.

The plaintiffs' final argument in support of their motion in limine is that allowing the jury to receive evidence of the amounts written off in this case would be unduly prejudicial to the plaintiffs and would lead to confusion of the issues and misleading the jury. The plaintiffs argue that evidence of the write-offs should be excluded under Evidence Rule 403.

"Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[13] Generally, relevant evidence is admissible and evidence that is not relevant is inadmissible.[14]

Evidence Rule 403 provides as follows:

> "(A) Exclusion mandatory
>
> Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.
>
> (B) Exclusion discretionary

[13] Evid.R. 401.
[14] Evid.R. 402.

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence."

The court finds that neither subsection of Evidence Rule 403 applies to preclude the introduction of the write-offs as evidence in this case. The write-off amounts do not present any danger of unfair prejudice, confusion of the issues, or of misleading the jury. Furthermore, there is no concern of undue delay or cumulative evidence.

The issue of write-offs being permissible evidence is well-settled in Ohio law and the plaintiffs offer no new argument which would demonstrate that admitting evidence of the write-offs would mislead the jury or cause confusion of the issues, nor have the plaintiffs offered any reasonable argument that admission of write-offs is unduly prejudicial.

Therefore, the plaintiffs' motion in limine is not well-taken and is hereby denied.

II. MOTION IN LIMINE REGARDING ADMISSIBILITY OF 42 CFR 483.40

The plaintiffs seek to admit into evidence at trial the text of 42 CFR 483.40 in support of establishing a relevant standard of care for Dr. Shachi Singh. The defendants Ambalika Care, Inc. and Dr. Singh seek a preliminary ruling excluding the introduction of said federal regulation into evidence.

The plaintiffs allege that Dr. Singh fell below the standard of care when she violated 42 CFR 483.40(b) which states as follows:

> "(b) Physician visits. The physician must—

> (1) Review the resident's total program of care, including medications and treatments, at each visit required by paragraph (c) of this section;
>
> (2) Write, sign, and date progress notes at each visit; and
>
> (3) Sign and date all orders with the exception of influenza and pneumococcal polysaccharide vaccines, which may be administered per physician-approved facility policy after an assessment for contraindications."

Specifically, in their Complaint, the plaintiffs allege that Dr. Singh was negligent in failing to review the plaintiff's total program of care, including medications, as required by 42 CFR 483.40(b)(1).[15]

The Ohio Supreme Court has stated that "violation of an administrative rule may be admissible as evidence of negligence."[16]

In the case of *Kinn v. HCR ManorCare* (Sept. 20, 2013), 6th Dist. No. L-12-1215, 2013-Ohio-4086, the appellant argued that the trial court erred in excluding testimony regarding various state and federal statutes and regulations.[17] The appellant argued that these regulations were probative of the standard of care imposed on hospice providers.[18] The appellate court held that such testimony was properly excluded due to its likelihood of confusing the jury.[19] The court noted that the appellant's expert acknowledged that the defendant complied with all applicable statutes and regulations.[20] The court held that "[a]llowing [the expert] to use the statutes and regulations to explain the standard of care would have misled the jury by inviting them

[15] Complaint at ¶ 59.
[16] *Chambers v. St. Mary's School* (1998), 82 Ohio St.3d 563, 568, 697 N.E.2d 198.
[17] *Kinn* at ¶ 48.
[18] Id.
[19] Id. at ¶ 51.
[20] Id.

to conclude that the applicable statutes and regulations were actually violated despite [the expert's] statement to the contrary."[21]

This case suggests that, had the expert testified that the regulations were, in fact, violated by the hospice provider, the expert would have been permitted to discuss the regulation as part of the discussion of the standard of care.

In the case at bar, Dr. Singh testified in her deposition that she was aware of the standards set forth in 42 CFR 483.40. Therefore, the court finds it possible at the very least that questioning of the witnesses could be permitted regarding compliance with the regulation in order to establish a standard of care. However, what has not been brought to this court's attention at this time is testimony from one of the plaintiffs' experts opining that Dr. Singh failed to comply with any specific provision of 42 CFR 483.40 and explaining exactly how Dr. Singh failed to comply with that regulation.

In her deposition, when asked about the program of care, Dr. Singh stated as follows:

> "Q. * * * when you see the resident on one of those required visits every 30 the first 90, for example, as the attending physician you have to review the resident's total program -- program of care?
>
> A. Yes. We review the medication order, which is written by the nursing home, we go through that, any particular labs we order we go through that, we ask the vitals, how are they doing, we go see the patient, talk to them. If there is any family member available we talk to them, yes.
>
> Q. Okay. Do you also review, for example, the -- any of the plans of care that have been put together by the nursing home for your patient?
>
> A. Yes. There is a plan of care by, like, the rehab medicine, if they're having rehab, the physical medicine, occupational

[21] Id.

> medicine – occupational therapist, speech therapist, those we review.
>
> Q. And when you see your patient in the nursing home you have access to their medical chart, correct?
>
> A. Yes.
>
> Q. Okay. So in addition to being able to look at the physician order or the medication list you can also look at the MAR, the Medication Administration Record?
>
> A. Yes, but it is not accessible all the time because it is with the nurses."[22]

As this case currently stands before the court, the plaintiffs have failed to make clear to the court through the presentation of evidence what part of the decedent's "total program of care" Dr. Singh failed to review and what authority (expert testimony, etc.) provides that said document, chart, record, etc., is part of the "total program of care" as that term is used in 42 CFR 483.40.

The plaintiffs did file a supplement with regard to this issue which included portions of the deposition of Dr. Richard Dupee.[23] Dr. Dupee states in pertinent part as follows when discussing 42 CFR 483.40:

> "Q. * * * What do those guidelines mean for physicians practicing in nursing homes?
>
> A. The guidelines which were established by a panel of experts * * * I think, to define the responsibilities that either a physician or a nurse or a facility have in providing reasonable and safe care for a patient.
>
> So particularly for physician services, this basically outlines our responsibility as physicians when we supervise * * * the medical care of a patient who is admitted to a facility such as Eastgate. So that basically means, and very importantly,

[22] Deposition of Shachi Singh at pgs. 40-42.
[23] Plaintiffs' Supplemental Motion Regarding Admissibility of 42 CFR 483.40, Exhibit 1.

> understanding why the patient was admitted to the facility in the first place.
>
> Now how do you do that? And that's implicit in these guidelines. You review the hospitalization, you review what happened, you review the medications, and you ensure that the comorbidities that were dealt with at the hospital continue to be cared for and treated. And you make certain that the medications that were reconciled on discharge from the hospital are made available to the patient. And the failure to do that is that we call a deviation from standard of care."[24]

Dr. Dupee's testimony regarding what he believes to be *implicit* in the federal regulations does not satisfy the standard of expert testimony which would permit the use of this regulation at trial to establish that Dr. Singh fell below the standard of care as set forth in the regulation. Dr. Dupee's discussion regarding the specific requirements of reviewing hospitalization, reviewing what happened, etc., is not set forth anywhere in the text of 42 CFR 483.40. Dr. Dupee, as a medical expert, is certainly permitted to testify that he feels that the actions of Dr. Singh fell below the standard of care in his opinion. However, what is at issue here is whether 42 CFR 483.40 may be used at trial to establish that standard of care. This testimony does not demonstrate or clarify for the court what precise portion of 42 CFR 483.40 the plaintiffs' expert states was violated by Dr. Singh and how Dr. Singh's action or inaction violated the specific language set forth therein. This is the type of testimony that would be required before this court can make a finding that this particular federal regulation is relevant to the case at bar and may be used at trial.

Based on the above analysis, the court finds that the plaintiffs have failed to demonstrate that 42 CFR 483.40 can be used in the present case to establish the requisite standard of care and, as a result, Dr. Singh's motion in limine on this issue is

[24] Id.

well-taken and is hereby granted. As this is merely a motion in limine, this is only a tentative, preliminary ruling. If the plaintiffs wish to present further argument on this issue they will be permitted to do so; however, the plaintiffs will be expected to state specifically what provision of 42 CFR 483.40(b) was violated in the case at bar and to provide the court with expert testimony which specifically states that said provision of the regulation was violated and explains how that specific provision was violated by Dr. Singh.

IT IS SO ORDERED.

DATED:_____ _____
Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 2nd day of October 2013 to all counsel of record and unrepresented parties.

_____
Administrative Assistant to Judge McBride