[Cite as *Anderson v. Ohio Bell Tel. Co.*, 2018-Ohio-5237.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 106992 and 107399

JACINDA ANDERSON

PLAINTIFF-APPELLANT

vs.

THE OHIO BELL TELEPHONE COMPANY

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-798525

BEFORE: S. Gallagher, J., Kilbane, P.J., and Blackmon, J.

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SEAN C. GALLAGHER, J.:

{¶1} Jacinda Anderson filed a disability discrimination action against her former employer, The Ohio Bell Telephone Company ("Ohio Bell"), which culminated in a jury finding in favor of Ohio Bell. For the following reasons, we affirm.

{¶2} Anderson worked as a maintenance administrator in a repair center. She handled incoming calls from customers and provided assistance with technical issues relating to telephone service. According to Anderson, in August 2009 she began experiencing chronic and severe pain in her hands and wrists that prevented her from working.[1] She spent days in bed and was unable to care for herself or her child, who was sent to live with Anderson's parents.

[1] Anderson originally filed this action in 2013. In *Anderson v. Ohio Bell Tel. Co.*, 8th Dist. Cuyahoga No. 104858, 2017-Ohio-7318, a decision granting summary judgment in favor of Ohio Bell was reversed based on the appellate determination that a genuine issue of material fact existed on the issue of whether Anderson was "disabled" at the time of her termination.

{¶3} On August 5, Anderson took a leave of absence, but after seven consecutive days, the leave was converted into short-term disability under the terms of Anderson's employment. On August 24, Ohio Bell approved an extension of leave until September 14 based on Anderson's unsupported statements regarding the necessity of surgery. On September 18, having failed to provide medical documentation or to return to work, Anderson was notified that if she failed to return to work by September 23, Ohio Bell would assume that Anderson intended to abandon her employment.

{¶4} In response, Anderson's treating physician faxed Anderson's medical records to Ohio Bell, confirming that Anderson was in pain, but that the physician was unable to diagnose the cause or indicate whether Anderson's condition precluded her from working. Anderson was first treated for carpal tunnel syndrome[2] in both wrists. Nevertheless, Ohio Bell extended the return-to-work date until October 14, a week after Anderson's next scheduled medical appointment. On October 22, after not returning to work or providing Ohio Bell with additional medical documentation, Anderson sent a letter to her human resources representative requesting indefinite leave as a reasonable accommodation for her then undiagnosed condition. On November 5, Anderson's employment was terminated.

{¶5} In January of the next year, Anderson was diagnosed with major depression. Her treating psychiatrist testified that the unexplained pain was consistent with depression and consistent with the symptoms Anderson experienced from August 2009 through January 2010. That testimony was excluded, however, because Anderson did not identify the treating psychiatrist as an expert and her testimony was limited to the treatment provided starting in

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[2] Carpal tunnel syndrome, as defined in this case, is a compression of the median nerve causing parasthesia and pain in the hands — usually the thumb, index finder, and middle finger. Tr. 371:15-19.

January 2010. In fact, the psychiatrist conceded an inability to render an opinion as to Anderson's ability to work in October or September 2009. Tr. 212:15-19, 214:12-17. Further, none of Anderson's medical treating physicians could opine to a reasonable degree of medical certainty that Anderson was unable to work during the August through November time period.

{¶6} Under Ohio law, "'An employer must make reasonable accommodation to the disability of an employee * * *, unless the employer can demonstrate that such an accommodation would impose an undue hardship on the conduct of the employer's business.'" *Camp v. Star Leasing Co.*, 10th Dist. Franklin No. 11AP-977, 2012-Ohio-3650, ¶ 54, quoting Ohio Adm.Code 4112-5-08(E)(1). Thus, in order to prevail on a "failure to accommodate claim," a plaintiff must first demonstrate that he or she is disabled. *Id.*, citing *Shaver v. Wolske & Blue*, 138 Ohio App.3d 653, 663, 742 N.E.2d 164 (10th Dist.2000). At the close of trial, the jury returned a defense verdict specifically finding that Anderson was not disabled as of November 5, 2009. In resolving the dispute in the manner it did, the jury did not consider any other aspect of Anderson's reasonable accommodation claim.

{¶7} Anderson timely appealed the judgment entered in favor of Ohio Bell. Subsequent to the direct appeal, Ohio Bell sought to tax several deposition transcripts as costs in the action as the prevailing party under Civ.R. 54(D). The trial court ultimately awarded $4,776.81 in costs, $1,307.45 of which were stipulated by the parties. Following that decision, Anderson appealed the costs determination. This court sua sponte consolidated the actions for disposition.

{¶8} Anderson first claims the trial court erred by excluding four statements by her treating health care professionals, which are as follows:

Testimony of psychiatrist:

Statement 1:

> Q. And are you aware that a high percentage of patients with depression who seek treatment in a primary care setting report only physical symptoms, which can make depression very difficult to diagnose?
>
> A. That's also correct, yes, absolutely.

Statement 2:

> Q. So Ms. Anderson was reporting from July through November 2009 that she was suffering from chronic back pain, chronic pain in other parts of her body, difficulty concentrating, lack of motivation, all those symptoms are consistent with the diagnosis of major depression, correct?
>
> A. Yes.

Testimony of medical physician:

Statement 3:

> Q. If she was out of work, would there be a need to document a work restriction?
>
> A. No.

Statement 4:

> Q. If someone's job is to type and respond to customer questions and complaints, experiencing severe pain in your hands and your arms would interfere with your ability to do that job, right?
>
> A. Presumably.

{¶9} Neither witness in this case testified as an expert witness under Evid.R. 702. "'[W]here a treating physician has been properly identified as a fact witness prior to trial, the treating physician * * * may not testify as an expert as to the ultimate question' in the case." *State v. Heineman*, 2016-Ohio-3058, 65 N.E.3d 287, ¶ 16 (8th Dist.), quoting *Hurst v. Poelstra*, 2d Dist. Miami No. 94-CA-61, 1995 Ohio App. LEXIS 5812 (Dec. 22, 1995). And under Evid.R. 701, if a witness is not testifying as an expert, the witness's testimony, in the form of opinions, is limited to those opinions that are both rationally based on the perception of the witness and helpful to a clear understanding of the witness's testimony.

{¶10} Accordingly, Anderson's treating health care professionals were limited when testifying to that which they actually perceived. *Djukic v. Turner*, 8th Dist. Cuyahoga No. 88849, 2007-Ohio-4433, ¶ 17 (testimony of treating physician when restricted to the fact of treatment rendered and the dates and charges therefrom, is a fact witness who is permitted to testify without being called as an expert witness). The statements excluded were impermissible expert opinions rendered by fact witnesses. The trial court did not err by excluding those statements.

{¶11} Anderson next claims the jury verdict is against the weight of the evidence because Ohio Bell representatives were unable to explain the legal definition of "disability" under Ohio law.

{¶12} A "disability" is defined as a

> physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or being regarded as having a physical or mental impairment

R.C. 4112.01(A)(13). Anderson has not provided any authority for the proposition that a discrimination claim is proven with evidence that the employer was unaware of the legal definition of "disability" at the time of the alleged discrimination, irrespective of whether the employee is found to be "disabled" as defined by law. App.R. 16(A)(7).

{¶13} It is an unlawful practice "for any employer" to discriminate against a person because of a disability. R.C. 4112.02. In order "to prevail on a failure to accommodate claim, a plaintiff must first demonstrate that he or she is disabled for the purposes of R.C. Chapter 4112." *Star Leasing Co.*, 10th Dist. Franklin No. 11AP-977, 2012-Ohio-3650, at ¶ 54. The jury in this case found that Anderson was not disabled on November 5, 2009. Thus, whether Ohio Bell

correctly applied the legal definition of "disability" in practice is irrelevant to the outcome in this particular case. Anderson's argument to the contrary is overruled.

{¶14} Finally, Anderson challenges the trial court's decision to tax the cost of deposition transcripts filed in the action. After Ohio Bell obtained a verdict in its favor, it sought to tax $6,252.41 as costs — the cost of ten deposition transcripts, the cost of recording two video depositions, and the cost of playing one of the video depositions at trial. Anderson filed a brief in opposition in which she claimed that "costs related to deposition expenses" are generally unrecoverable under *Kava v. Boesch*, 8th Dist. Cuyahoga No. 95018, 2011-Ohio-617, ¶ 23. In the alternative, Anderson also objected to four of the thirteen line items, including the cost of recording and playing video depositions.

{¶15} Before the trial court could conduct an evidentiary hearing on Anderson's opposition, the parties stipulated to the four specific objections raised therein and the parties agreed that the trial court could determine whether the ten deposition transcripts could be taxed as costs under Civ.R. 54(D) and R.C. 2303.21. The trial court awarded the $4,776.81 cost of the ten deposition transcripts by (1) taxing as costs the expenses totaling $3,469.36 incurred for procuring and using the ten deposition transcripts; (2) incorporating the $1,307.45 Anderson stipulated as being taxable as costs,[3] which included the cost Ohio Bell incurred in videotaping Anderson's deposition and the cost of exhibits attached to one of the transcripts; and (3)

[3]The stipulation provided that

> If the Court grants Defendant's Motion to Tax Costs Against Plaintiff Jacinda Anderson (a) Defendant agrees to waive its request for the following costs only: (i) the $1,000.00 incurred to play Plaintiff's video deposition at trial, and (ii) the $475.60 incurred to expedite the transcription of David Anderson's deposition; and (b) Plaintiff agrees to pay the following costs only: (i) the $297.45 Defendant incurred to obtain copy of the exhibit to Dr. Robert Polsky's deposition, and (ii) the $1,010.00 Defendant incurred for videotaping Plaintiff's depositions. These costs should therefore be included as awarded in the Court's ruling on Defendant's motion for costs.

excluding the $1,475.60 in costs Ohio Bell stipulated as being unnecessary, which included the cost of video playback at trial. According to the parties' stipulation, if the trial court determined that Civ.R. 54(D) permitted the award of costs, as is pertinent to this appeal, Anderson agreed to at least pay the stipulated amount. Thus, our review is limited to determining whether Civ.R. 54(D) permitted the taxing of costs in this matter, and if so, whether the remaining portion of the award was proper.

{¶16} The trial court's decision was limited to whether deposition transcripts could be taxed as costs. On that point, however, *Kava* is inapplicable. In *Kava*, it was concluded that expert witness fees; the expert report; the costs for the services of a court reporter for a deposition; and other deposition, photocopying, trial, exhibit, research, or mileage expenses are not recoverable as costs as a matter of law. *Kava* did not declare that taxing transcription costs under Civ.R. 54(D) and R.C. 2303.21 is impermissible.

{¶17} The trial court did not err. Under R.C. 2303.21, when procuring a transcript of a deposition for evidence is necessary in a civil action, the cost of that procurement shall be taxed in a bill of costs. In *Naples v. Kinczel*, 8th Dist. Cuyahoga No. 89138, 2007-Ohio-4851, ¶ 13, it was concluded that a deposition transcript may be taxable as costs pursuant to Civ.R. 54(D) and that there is a presumption in favor of awarding costs to the prevailing party. Once it is determined that the cost sought is allowable, the burden shifts to the objecting party to overcome the presumption in favor of awarding costs. *Id.* at ¶ 6. Anderson has not presented any authority to claim otherwise. App.R. 16(A)(7).

{¶18} Instead, Anderson complains that Ohio Bell cannot demonstrate the necessity of the transcripts at trial because she filed three of the ten transcripts at issue and Ohio Bell could have obtained those once filed. Ohio Bell had filed the remaining seven transcripts used at

various stages of the civil action. Further, Anderson claims that Ohio Bell did not use any of the transcripts as evidence in its case at trial, citing *Kinn v. HCR ManorCare*, 6th Dist. Lucas No. L-13-1016, 2013-Ohio-4085, ¶ 10-11, in support of the proposition that the transcripts taxed as costs must be used at trial.

{¶19} Anderson's reliance on *Kinn* is misplaced; *Kinn* actually supports the trial court's decision. In *Kinn*, it was concluded that deposition transcripts prepared in anticipation of being used for trial are taxable as costs regardless of whether the transcripts are used at trial. *Id.* at ¶ 11. However, the court differentiated between those costs and the costs incurred by a party seeking to have daily trial transcripts prepared. *Id.* at ¶ 16. The daily trial transcripts were deemed to be personal expenses. *Id.* In this case, Ohio Bell did not seek daily trial transcripts to be taxed as costs and *Kinn* is otherwise inapplicable.

{¶20} Contrary to Anderson's arguments, the actual use of, or access to, the deposition transcripts at trial is not a statutory requirement. *See, e.g., id.* at ¶ 11. R.C. 2303.21 is unambiguous: when the transcripts are procured to be used as evidence in "the civil action," the court may tax those expenses as costs. There is no requirement that the deposition transcripts must be introduced as evidence at a trial. *See Vanadia v. Hansen Restoration, Inc.*, 8th Dist. Cuyahoga No. 101033, 2014-Ohio-4092, ¶ 37 (transcripts used to raise and preserve objections to recorded testimony intended to be used at trial properly taxed as costs); *2115-2121 Ontario Bldg., L.L.C. v. Anter*, 8th Dist. Cuyahoga Nos. 98255 and 98296, 2013-Ohio-2993, ¶ 28-29 (transcripts are "necessary" under R.C. 2303.21 because Civ.R. 56(C) requires the transcripts to be presented as evidence); *Brondes Ford, Inc. v. Habitec Sec.*, 2015-Ohio-2441, 38 N.E.3d 1056 (6th Dist.) (transcripts of depositions can be taxed as costs even if no trial is held); *Raab v. Wenrich*, 2d Dist. Montgomery No. 19066, 2002-Ohio-936. *See also Kmotorka v. Wylie*, 6th

Dist. Wood No. WD-11-018, 2013-Ohio-321, ¶ 53-54 (the cost of depositions filed in an action to oppose summary judgment may be taxed as costs). Anderson's argument to the contrary is overruled.[4]

{¶21} We affirm.

It is ordered that appellee recover from appellant 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 common pleas court 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.

SEAN C. GALLAGHER, JUDGE

MARY EILEEN KILBANE, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR

[4] Ohio Bell asked this court to impose sanctions against Anderson for frivolous conduct in filing the current appeal, claiming Anderson's stipulation to $1,307.45 of the $4,776.81 of costs awarded should have precluded the appeal. Although we understand the prevailing party's frustration in having to expend further time and resources defending an appeal, we decline to award sanctions in this case. The stipulation only pertained to approximately one-fourth of the costs awarded. We cannot say that the appeal would have been entirely frivolous.