

[Cite as *Gridiron v. Cleveland Clinic Found.*, 2019-Ohio-167.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 107009

JACQUELINE GRIDIRON

PLAINTIFF-APPELLANT

vs.

**THE CLEVELAND CLINIC
FOUNDATION, ET AL.**

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-17-875830

BEFORE: E.T. Gallagher, P.J., Blackmon, J., and Keough, J.

RELEASED AND JOURNALIZED: January 17, 2019

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EILEEN T. GALLAGHER, P.J.:

{¶1} Plaintiff-appellant, Jacqueline Gridiron, appeals from a jury verdict finding that she is not entitled to participate in the Ohio Workers' Compensation Fund for injuries alleged to have been sustained in the course of her employment with defendants-appellees, the Cleveland Clinic Foundation, et al. (the "Cleveland Clinic"). Gridiron raises the following assignment of error for review:

The trial court erred in allowing appellee's expert witness to testify in violation of Cuyahoga County Court of Common Pleas Local Rule 21.1 and Civ.R. 26(E).

{¶2} After careful review of the record and relevant case law, we affirm.

I. Procedural and Factual History

{¶3} This appeal stems from allegations that Gridiron injured her left wrist while acting in the course and scope of her employment as a registered nurse at the Cleveland Clinic. Gridiron complained that her injury occurred on April 18, 2014, when a patient fell backwards onto her wrist as she assisted the patient take his medication. Ultimately, Gridiron filed a workers' compensation claim for her injuries with the Bureau of Workers' Compensation. In March 2015, Gridiron's claim was administratively allowed by a Staff Hearing Officer for the conditions of "dorsal capsular tear and [distal radial ulnar joint] DRUJ effusion of the left wrist."

{¶4} After exhausting its administrative appeals, the Cleveland Clinic filed a notice of appeal with the common pleas court pursuant to R.C. 4123.512. In February 2016, Gridiron filed a notice of voluntary dismissal pursuant to Civ.R. 41(A). Within one year of the voluntary dismissal, Gridiron refiled her petition, arguing that she is "entitled to receive benefits provided by the Workers' Compensation Act of Ohio for her injuries."

{¶5} In March 2018, the matter proceeded to a jury trial. As alleged in her complaint, Gridiron testified that on April 18, 2014, she injured her left wrist in the course and scope of her employment as a registered nurse with the Cleveland Clinic. She stated that her injury occurred while she was administering medication to a patient. Gridiron described the incident as follows:

I sat the patient up to help him be able to take his meds, and he obviously didn't realize my arm was still back there, and when he went to lie down, he went back and flexed my arm backwards and fell on my wrist, or my hand, however you want to say it. My hand went back like this way, flexed backwards. (Indicating.) I just simply said, ow. It was a sharp pain.

{¶6} Following the April 18, 2014 incident, Gridiron completed her shift, but continued to experience pain in her wrist. Gridiron had difficulty using her left hand and experienced worsening pain that “went from [her] wrist to [her] elbow, to [her] shoulder.” Based on the level of pain she was experiencing, Gridiron scheduled a doctor’s appointment for April 22, 2014. Gridiron admitted that she did not mention the April 18, 2014 incident during her initial doctor’s appointment. Following her appointment, Gridiron notified her supervisor of her injury and completed an incident report.

{¶7} Because Gridiron’s wrist pain continued to get worse, she was referred to an orthopaedic consult, Michael W. Walker, M.D., who subsequently referred her to Mark Hendrickson, M.D.

{¶8} Gridiron testified that she described the April 18, 2014 injury to Dr. Hendrickson. Following an unsuccessful course of treatment, Dr. Hendrickson performed surgery on Gridiron’s left wrist to help resolve her persistent pain and discomfort. Gridiron testified that despite her surgery, she continues to have “difficulty with twisting motions” and cannot carry heavy items because of the pressure placed on her wrist.

{¶9} Gridiron stated that she had never been diagnosed with arthritis prior to the April 18, 2014 incident. However, she admitted that she previously experienced discomfort in her left wrist before April 18, 2014. Specifically, she testified that on April 11, 2014, she experienced “symptoms in [her] left wrist” after applying manual pressure on a patient’s wound for an extended period of time. She stated that she did not seek medical treatment at that time because the discomfort did not impair her day-to-day work duties.

{¶10} Dr. Hendrickson testified that he is employed as a staff surgeon at the Cleveland Clinic. He stated that in his experience as a surgeon, he is familiar with the conditions of a

dorsal capsular tear and DRUJ effusion of a wrist. He explained that the distal radial ulnar joint is located at the end of a person's forearm and that a dorsal capsular tear can cause fluid, "which is effusion," around the injured joint area. Dr. Hendrickson testified that he performed a physical examination of Gridiron's left wrist and reviewed the results of an MRI taken on May 15, 2014. Dr. Hendrickson stated that he diagnosed Gridiron with an "injury to the left distal radial ulnar joint with instability, post-injury arthritis that failed conservative treatment." He further stated that Gridiron's MRI report indicated a "dorsal capsular sprain, which is [a] tear, * *

* and then fluid within the distal radial ulnar joint."

{¶11} Dr. Hendrickson stated that his first course of treatment was to place Gridiron in a cast to immobilize her wrist. However, when Gridiron's pain continued, Dr. Hendrickson deemed it was necessary to perform surgery on her left wrist. Ultimately, Dr. Hendrickson opined, within a reasonable degree of medical certainty, that Gridiron's dorsal capsular tear and DRUJ effusion of her left wrist was directly and proximately caused by her April 18, 2014 work injury.

{¶12} The Cleveland Clinic presented the expert testimony of Douglas Gula, D.O. While Gridiron's claim was pending before the Industrial Commission, Dr. Gula performed a medical record review and authored an expert report dated November 23, 2014. Dr. Gula's report was based on his review of the medical records generated by Gridiron's treating physicians, Brandon Griesmer, M.D., Michael Walker, M.D., and Mark Hendrickson, M.D. Dr. Gula also reviewed Gridiron's First Report of Injury Form, the Cleveland Clinic Employee Occupational Injury Event report, and the relevant x-ray and MRI reports related to Gridiron's left wrist injury. In his report, Dr. Gula opined that (1) there was evidence that Gridiron had the condition of a "left wrist sprain, (to the dorsal capsule) as was identified via MRI scan on May

15, 2014”; (2) given inconsistencies in the mechanism of injury, “it cannot be concluded within a reasonable medical probability that the requested condition of left wrist strain was due to a work-related event at the Cleveland Clinic”; (3) the MRI report suggests the abnormalities to Gridiron’s left wrist “are not post-traumatic in origin, but instead reflect age-related chronic arthropathy”; (4) the “medical evidence does not support the requested condition of left wrist traumatic arthropathy was directly caused by the alleged work-related injury of April 18, 2014; (5) the “chondromalacia” of the distal radial ulnar joint “developed over the course of time and are age-related changes”; and (6) the described mechanism of injury would not have resulted in a substantial aggravation of the chronic, age related injuries to Gridiron’s “left distal radial ulnar joint region/left wrist.”

{¶13} At trial, Dr. Gula testified that he is an orthopaedic surgeon and routinely performs independent medical file reviews in his professional capacity. Dr. Gula stated that in forming his medical opinions, it is standard medical practice to rely on the office notes of a patient’s treating physicians, operative reports, and any diagnostic or radiological test results.

{¶14} When questioned about Gridiron’s MRI report, Dr. Gula noted that the report indicated that there was “a small amount of fluid in the distal radial ulnar joint.” He explained that the finding of a small amount of fluid in that region is significant because it indicates that there is “some type of inflammatory process going on,” referred to as “effusion.” Dr. Gula testified that effusion is “a symptom “as opposed to a specific medical condition,” and is “a sign of arthritis involving that region.” Dr. Gula further stated that the MRI report indicated a “mild dorsal capsular edema suggesting extrinsic ligaments or dorsal capsule sprain.”

{¶15} In light of his review of the relevant medical records, Dr. Gula opined that Gridiron has “arthritis of the DRUJ of the left wrist” that “is a chronic long-standing condition that has

developed over the course of time.” He explained that the chronic synovitis mentioned in Dr. Hendrickson’s August 7, 2014 operative report implies effusion of the DRUJ region. However, he opined that effusion, i.e. the inflammation of that area, is related to the arthritic process. Dr. Gula explained:

My opinion is that the effusion of the left wrist is based upon the arthritic change of the DRUJ that was found on April 22nd by Dr. Griesmer with regards to the crepitus that was present, the crepitus and the effusion go together, and if you add the MRI report on top of that, it’s all related to the changes that are present in the DRUJ from an arthritic standpoint.

{¶16} Dr. Gula further opined that the DRUJ effusion was not the result of the alleged April 18, 2014 work injury, but was “related to the chronic synovitis” and the chronic “arthritic change that are present in the DRUJ.”

{¶17} With respect to the condition of dorsal capsular tear, Dr. Gula testified that Gridiron’s accounts of her injury contained numerous inconsistencies regarding the onset of her left wrist pain, the cause of her left wrist pain, and the manner in which she sustained her left wrist injury on April 18, 2014. He stated that Gridiron’s inconsistent description of whether her wrist was hyperextended or hyperflexed, was significant. Dr. Gula explained that “a hyperextension injury or extension of an extremity is not going to cause an injury to the dorsum.”

While he admitted that a hyperflexation injury could cause a dorsal capsular sprain, he opined that Gridiron’s MRI report “is inconclusive with regards to any presence of absence or tear.” Accordingly, Dr. Gula opined that Gridiron “did not sustain a dorsal capsular tear.”

{¶18} During his cross-examination, Dr. Gula admitted that although his expert report commented on “a left wrist sprain, the condition of left wrist traumatic arthropathy, chondromalacia, and arthritis of the wrist,” he did not offer an opinion as to the specific conditions of a dorsal capsular tear or DRUJ effusion. On redirect, however, Dr. Gula testified

that it was his understanding that when he opined in his report that there was evidence that Gridiron had a dorsal capsular sprain, he was offering an opinion in reference to the alleged condition of a capsular tear. He explained that a sprain and a tear are “similar, but not identical,” and that a diagnosis “depends on how much a ligament and/or capsule has been stretched and or torn.” He further indicated that the opinion rendered in his expert report relating to Gridiron’s chronic arthropathy “was part and parcel of the effusion.” As he stated during his direct examination, “arthritic change implies effusion.”

{¶19} At the conclusion of trial, the jury returned a verdict in favor of the Cleveland Clinic, finding that Gridiron was “not entitled to participate in the Worker’s Compensation Fund” for the conditions of “dorsal capsular tear” and “DRUJ effusion left wrist.”

{¶20} Gridiron now appeals from the verdict.

II. Law and Analysis

{¶21} In her sole assignment of error, Gridiron argues the trial court erred by permitting the Cleveland Clinic’s expert witness to offer testimony in violation of Loc.R. 21.1 and Civ.R. 26(E). Gridiron contends that Dr. Gula’s testimony included opinion on issues not previously raised in his expert report.

{¶22} With respect to opinions held by experts, two rules apply: Loc.R. 21.1 of the Court of Common Pleas of Cuyahoga County, General Division, and Civ.R. 26(E).

{¶23} Civ.R. 26(E)(1)(b) requires a party to supplement responses to any questions directly addressed to the subject matter on which an expert is expected to testify. “This duty * * * is necessary because preparation for effective cross-examination is especially compelling where expert testimony is to be introduced.” *Shumaker v. Oliver B. Cannon & Sons, Inc.*, 28 Ohio St.3d 367, 370, 504 N.E.2d 44 (1986), *abrogated on other grounds*; *State v. D’Ambrosio*, 67

Ohio St.3d 185, 616 N.E.2d 909 (1993). The purpose of Civ.R. 26(E)(1)(b) is to prevent “trial by ambush.” *Id.* at 371. Thus, while an opposing party must be adequately informed as to the subject matter about which the expert intends to testify, Civ.R. 26(E) does not require a party to provide detailed information with regard to the basis for an expert’s opinion. *Rush v. Univ. of Cincinnati Physicians, Inc.*, 2016-Ohio-947, 62 N.E.3d 583, ¶ 15 (10th Dist.); *Metro. Life Ins. Co. v. Tomchik*, 134 Ohio App.3d 765, 783, 732 N.E.2d 430 (7th Dist.2000).

{¶24} Loc.R. 21.1(B), which governs the use of expert witnesses and expert reports in Cuyahoga County, further provides, in pertinent part:

A party may not call an expert witness to testify unless a written report has been procured from the witness and provided to opposing counsel. It is counsel’s responsibility to take reasonable measures, including the procurement of supplemental reports, to insure that each report adequately sets forth the expert’s opinion. However, unless good cause is shown, all supplemental reports must be supplied no later than thirty (30) days prior to trial. The report of an expert must reflect his opinions as to each issue on which the expert will testify. An expert will not be permitted to testify or provide opinions on issues not raised in his report.

{¶25} The primary purpose of Loc.R. 21 is to avoid prejudicial surprise, and a court is not required to exclude testimony where there is no evidence of prejudice. *Revilo Tyluka, LLC v. Simon Roofing & Sheet Metal Corp.*, 193 Ohio App.3d 535, 2011-Ohio-1922, 952 N.E.2d 1181, ¶ 48 (8th Dist.); *see also Estate of Preston v. Kaiser Permanente*, 8th Dist. Cuyahoga No. 78972, 2001 Ohio App. LEXIS 4988, 12 (Nov. 8, 2001)

{¶26} A trial court’s decision to admit or exclude evidence, including expert testimony, will not be disturbed absent an abuse of discretion that causes material prejudice. *Krischbaum v. Dillon*, 58 Ohio St.3d 58, 66, 567 N.E.2d 1291 (1991). Similarly, the trial court’s ruling on a Loc.R. 21.1 question is abuse of discretion. *Estate of Preston*, at 11, citing *Nakoff v. Fairview*

Gen. Hosp., 75 Ohio St.3d 254, 662 N.E.2d 1 (1996). Thus, the standard is deferential to the trial court's judgment.

{¶27} We further note that the exclusion of otherwise reliable and probative evidence, however, is an extreme sanction for a discovery violation. *Cucciolillo v. E. Ohio Gas Co.*, 4 Ohio App.3d 36, 446 N.E.2d 175 (7th Dist.1980); *Mulford v. Columbus & S. Ohio Elec. Co.*, 4th Dist. Athens No. CA-1548, 1994 Ohio App. LEXIS 32 (Jan. 12, 1994). Thus, a court should exclude evidence only when clearly necessary to enforce willful noncompliance or to prevent unfair surprise. See *Nickey v. Brown*, 7 Ohio App.3d 32, 454 N.E.2d 177 (9th Dist.1982). In deciding whether to exclude evidence, “the trial court should weigh the conduct of the party offering the expert testimony along with the level of prejudice that the opposing party suffered as a result of the discovery violation.” *Culp v. Olukoga*, 2013-Ohio-5211, 3 N.E.3d 724, ¶ 38 (4th Dist.), quoting *Savage v. Correlated Health Servs.*, 64 Ohio St.3d 42, 591 N.E.2d 1216 (1992).

{¶28} In this case, Dr. Gula and Dr. Henderson testified at trial by video deposition. Thus, the content of their testimony was known to the parties before the trial was held. Prior to trial, Gridiron filed a motion in limine seeking to exclude Dr. Gula's testimony because his expert report “did not contain any opinions regarding whether Gridiron suffered a dorsal capsular tear and DRUJ effusion as a direct and proximate result of her alleged April 18, 2014 work injury.” Over counsel for Gridiron's objection, the trial court permitted the Cleveland Clinic to present Dr. Gula's testimony at trial.

{¶29} On appeal, Gridiron argues the trial court violated the mandates of Civ.R. 26 and Loc.R. 21.1 by allowing Dr. Gula to offer opinions at trial that were not previously raised in his November 23, 2014 expert report. In support of her position, Gridiron refers this court to the

decisions rendered in *Cox v. MetroHealth Med. Ctr. Bd. of Trustees.*, 2012-Ohio-2383, 971 N.E.2d 1026 (8th Dist.), and *O'Connor v. Cleveland Clinic Found.*, 161 Ohio App.3d 43, 2005-Ohio-2328, 829 N.E.2d 350 (8th Dist.).

{¶30} In *Cox*, this court found that a trial court had abused its discretion by allowing a defense expert to offer a new theory of causation based on new information that the expert learned after preparing his expert report and being deposed by the plaintiff. *Cox* at ¶ 37-48. The court held that, in the absence of a supplement to the expert's deposition testimony, the plaintiffs had a reasonable expectation that the defense expert's trial testimony would be consistent with his original responses provided in discovery. *Cox* at ¶ 43. We held that the plaintiffs in *Cox* were "surprised and prejudiced" by the expert's testimony. *Cox* at ¶ 43.

{¶31} In *O'Connor*, this court found a party's failure to disclose a critical new theory by an expert witness to be a violation of Civ.R. 26(E) and Loc.R. 21.1. This court recognized the necessity of supplementing expert testimony, stating that "the introduction of a new theory that has not been disclosed prior to trial 'smacks of ambush' and thwarts an opposing counsel's ability to effectively offer a counter theory or to cross-examine the expert." *Id.* at ¶ 20. This court concluded that the trial court abused its discretion by allowing an expert witness to offer a new opinion on the possible cause of the injury, holding that "[t]he failure to disclose the new theory in either an expert report, as a supplement to [the doctor's] deposition, or by supplementing responses to original interrogatories distorted the level playing field." *Id.* at ¶ 23.

{¶32} After careful review, we find the trial court did not abuse its discretion by allowing Dr. Gula to present an expert opinion at trial concerning the condition of dorsal capsular tear. As stated, Dr. Gula opined in his expert report that the MRI performed on Gridiron's left wrist

suggested that “the claimant had the condition of left wrist sprain (to the dorsal capsule).” In our view, Dr. Gula’s testimony at trial that Gridiron did not sustain a dorsal capsule tear is not inconsistent with the opinion rendered in his expert report. As Dr. Gula stated at trial, a sprain and a tear are similar but not identical. In support of his position that, at the very most, Gridiron exhibited signs of a sprain, Dr. Gula explained that the relevant medical records only indicated the presence of a “dorsal capsule sprain.” There were no references to a dorsal capsular tear in the MRI report or Dr. Hendrickson’s August 7, 2014 operative report. Moreover, there was nothing in the MRI report to suggest that the ligament had been torn or pulled apart completely. In compliance with the applicable rules, we find Dr. Gula’s expert report and his trial testimony each addressed substantial issues before the jury, including the scope of the injury to the dorsal capsule and whether the condition was proximately caused by the alleged work injury on April 18, 2014.

{¶33} In addition, the trial court’s decision to allow Dr. Gula to testify regarding the condition of “DRUJ effusion left wrist” did not unfairly prejudice Gridiron. Gridiron correctly asserts that Dr. Gula’s expert report does not use the term “effusion” or offer an express opinion regarding whether Gridiron was entitled to participate in the workers’ compensation fund for the condition of DRUJ effusion. With that said, however, Dr. Gula consistently opined in his report that Gridiron suffered chronic arthropathy and that the chondromalacia of the distal radial ulnar joint “developed over the course of time and are age-related changes.” At trial, Dr. Gula explained that the term “effusion” refers to the small amount of fluid referenced in the MRI report. Thus, Dr. Gula testified that the “inflammation process going on in the [DRUJ] region” and “effusion” are the “same thing.”

{¶34} Viewing Dr. Gula’s testimony and expert report together, we find Dr. Gula’s failure to use the term “effusion” in his expert report was not done in an effort to mislead. Rather, Dr. Gula’s testimony at trial demonstrates that he considered the fluid inflammation observed in Gridiron’s DRUJ, but ultimately determined the fluid was a symptom of age-related arthritis, as opposed to a specific medical condition. Dr. Gula’s testimony was relevant to the jury’s determination of whether the conditions alleged by Gridiron were caused by the April 18, 2014 incident or were the product of chronic and age-related arthropathy. Accordingly, we find the trial court did not abuse its discretion by permitting Dr. Gula to offer his expert testimony that the abnormalities to Gridiron’s left distal radial ulnar joint are age-related and inconsistent with the reported mechanism of injury.

{¶35} Based on the forgoing, we find this case does not present the type of unfair surprise or trial by ambush envisioned under Civ.R. 26(E) and Loc.R. 21.1. Significantly, Dr. Gula’s testimony at trial did not materially differ from the subject matter of his expert report. Unlike the circumstances presented in *Cox* and *O’Connor*, Dr. Gula’s testimony did not offer a new theory on the cause of the observed injuries, nor did Dr. Gula change his opinion at trial. Rather, Dr. Gula’s expert report and trial testimony consistently offered the same opinion on the issues relating to the extent of Gridiron’s left injury and its likely cause. Exclusion of such testimony is not proper merely because it does not comport with the petitioner’s theory supporting a workers’ compensation claim.

{¶36} Given the nature of the conditions alleged by Gridiron, it was reasonable to anticipate that Dr. Gula would offer testimony concerning the alleged dorsal capsule tear and DJUR effusion in an effort to explain the basis for his conclusion that Gridiron presented with chronic, age-related arthritis in her left wrist that was not caused by the April 18, 2014 work

injury. Accordingly, the trial court did not abuse its discretion by permitting Dr. Gula to offer unfettered testimony at trial concerning his medical opinions in this case.

{¶37} Gridiron's sole assignment of error is overruled.

{¶38} Judgment affirmed.

It is ordered that appellee recover of 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.

EILEEN T. GALLAGHER, PRESIDING JUDGE

PATRICIA ANN BLACKMON, J., and
KATHLEEN ANN KEOUGH, J., CONCUR