[Cite as *Curtis v. Cent. Ohio Neurological Surgeons, Inc.*, 2009-Ohio-6770.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Craig A. Curtis et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 09AP-58 (C.P.C. No. 06CVA02-2391)
Central Ohio Neurological Surgeons, Inc. et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on December 22, 2009

Leeseberg & Valentine, *Gerald S. Leeseberg* and *Susie L. Hahn*; *Wolske & Associates*, *Co., LPA,* and *Walter J. Wolske*, for appellants.

Kitch Drutchas Wagner Valitutti & Sherbrook, *John S. Wasung*, *Susan Healy Zitterman* and *David T. Henderson*, for appellees.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} Craig and Mary Curtis ("appellants") are appealing from an adverse verdict in their medical malpractice case. They assign four errors for our consideration:

> I. THE TRIAL COURT ERRED AS A MATTER OF LAW BY PERMITTING APPELLEES' EXPERT WITNESS TO PRESENT TESTIMONY AT TRIAL THAT MATERIALLY CHANGED HIS PRIOR DEPOSITION TESTIMONY.

> II. THE TRIAL COURT ERRED AS A MATTER OF LAW BY PERMITTING THE ADMISSION OF TESTIMONY THAT WAS MATERIALLY INCONSISTENT FROM PRIOR SWORN TESTIMONY WITHOUT PRIOR NOTICE TO THE OPPOSING PARTY.
>
> III. THE TRIAL COURT ERRED AS A MATTER OF LAW BY RULING [THAT] APPELLANTS "OPENED THE DOOR" TO THE INTRODUCTION OF THE MATERIALLY INCONSISTENT TESTIMONY BY APPELLEES.
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> IV. APPELLANTS WERE PREJUDICED BY THE IMPROPER MATERIAL CHANGE IN THE TESTIMONY OF APPELLEES' EXPERT, AND THE OUTCOME OF THE TRIAL WAS NEGATIVELY AFFECTED.

{¶2} Since all four assignments of error involve common issues, we address them together.

{¶3} As with all medical malpractice actions, the outcome of the trial was heavily dependent upon the weighing of conflicting expert testimony to establish or refute that the physician or physicians accused of medical malpractice performed below the standard for medical care in the community.

{¶4} Counsel for appellants supported their case with the testimony of Glenn A. Tung, M.D., an expert in neurology. Counsel for appellees, William Zerick, M.D., and Central Ohio Neurological Surgeons, Inc., supported their case with the testimony of Chris Kazmierczak, M.D. Each expert was deposed prior to trial. Both Dr. Kazmierczak and Dr. Tung were asked to testify as to their conclusions regarding compression of the spinal cord of Craig Curtis, and as to whether or not Dr. Zerick had performed below the standard of care in his treatment for Craig Curtis.

{¶5} This matter began when Curtis' family physician referred him to Dr. Zerick for evaluation of head and neck pain and for weakness and numbness in his left arm.

After reviewing Curtis' MRI, Dr. Zerick found a cervical stenosis between vertebrae C5-6 and C6-7. Dr. Zerick offered surgery to Curtis as one option for alleviating the pain, and Curtis opted to proceed with the surgery. The first such procedure (anterior cervical discectomy, and fusion at the C5-6, C6-7 levels) took place on September 12, 2005. Because of numerous complications, Curtis underwent four additional surgeries (five in total, including interbody arthrodesis of C5-6 and C6-7, and anterior plate fixation of C5, C6 and C7) over the next two weeks.

{¶6} Immediately following the first surgery, Curtis became incontinent, and began developing a weakness on his left side which required a second surgery later that day: Dr. Zerick removed the plate and bone grafts placed during the first surgery, and discovered an epidural hematoma pressing on the spinal cord, which he removed. Later that day, after Curtis developed weakness in his legs, Dr. Zerick ordered another MRI, which revealed another hematoma. This required a third surgery on still the same day.

{¶7} The following day, Curtis complained of tightness in his throat, and increased weakness and tingling in his left arm. Another MRI revealed that there was still some degree of compression on the spinal cord, but Dr. Zerick felt that Curtis' overall condition was improving, and that additional recovery time was a better alternative to subjecting him to a fourth spinal surgery immediately. Over the next ten days, Curtis' condition improved somewhat, but he was still experiencing fluctuating weakness in his extremities. After another MRI revealed spinal cord compression and another hematoma, Dr. Zerick performed a fourth surgery on September 23, 2005. An MRI confirmed that the fourth surgery was also unsuccessful, but after a fifth surgery, which involved an anterior and posterior approach, the hematoma did not return.

{¶8} On February 21, 2006, appellants filed a medical malpractice suit against Dr. Zerick and his medical group, alleging that the doctor failed to correctly diagnose and treat the epidural hematomas that required additional surgeries. The parties conducted roughly two years worth of discovery, and the matter was tried before a jury beginning on August 25, 2008. During appellees' direct examination of appellees' expert, Dr. Kazmierczak, counsel for appellants objected to testimony which was seen as inconsistent with Dr. Kazmierczak's deposition testimony. The trial court sustained the objection in part, but warned counsel for appellants that counsel could open the door for the allegedly inconsistent testimony if counsel pursued certain inquiries. Counsel for appellants inquired and the trial judge then allowed Dr. Kazmierczak to give a complete explanation of his opinions, some of which seemed inconsistent with his deposition testimony.

{¶9} The jury reached a verdict of no liability for the appellees. Appellants filed a motion for JNOV and new trial, which the trial court denied on December 15, 2008. The primary or sole issue in this appeal is the trial court's decision(s) allowing the appellees' expert to allegedly change his testimony at trial.

{¶10} Appellants do not specifically set forth a proposed standard of review in their brief. However, counsel alleges the trial court erred "as a matter of law," suggesting a review de novo. Although typically questions of law do garner de novo review on appeal, these assignments of error, all four of which are essentially the same, concern evidentiary (or discovery) rulings. It is well established that the admission of evidence is generally within the sound discretion of the trial court, and we may reverse only upon a showing that the trial court abused its discretion. See, e.g., *Peters v. Ohio*

State Lottery Comm. (1992), 63 Ohio St.3d 296, 299. To the extent that appellants assign error to the trial court's handling of discovery issues—e.g., whether and what, if any, sanctions the court should impose upon a party that has allegedly violated Civ.R. 26(E)—the trial court is ordinarily vested with broad discretion over these matters as well; thus, we review the entire case for abuse of discretion. See *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St.3d 254, 1996-Ohio-159, syllabus; see also *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 86. An abuse of discretion is more than an error of law or judgment, or a difference of opinion; rather, it implies that the trial court acted arbitrarily, unreasonably, or unconscionably. *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222; *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Therefore, to warrant reversal, appellants must demonstrate that the trial court's decision permitting the testimony in question was unreasonable, arbitrary, or unconscionable. See *Nakoff; Huffman*, supra; see also *Rigby v. Lake Cty.* (1991), 58 Ohio St.3d 269, 271.

{¶11} "Discovery" is the process that usually follows the filing of a complaint (and answer), when both parties are required to disclose to each other information, documents, and evidence that relates to the issues in the litigation. See generally Black's Law Dictionary (8th Deluxe ed.2004) 498. Interrogatories, requests for production of documents, requests for admissions, and depositions are all examples of discovery, and the discovery process is more or less regulated by the trial court in accordance with the Rules of Civil Procedure. See id; see also Civ.R. 26-37.

{¶12} As they relate to discovery, one of the primary purposes of the Rules of Civil Procedure is to "eliminate surprise" to either party at trial or to avoid hampering either party in preparing its claim or defense for trial. *Jones v. Murphy* (1984), 12 Ohio

St.3d 84, 87 (Brown, J., dissenting)). To this end, the civil rules endeavor to establish a method or procedure for conducting discovery, "which mandates a free flow of accessible information between the parties upon request, and which imposes sanctions for failure to timely respond to reasonable inquiries." *Jones* at 86.

{¶13} One example of how the civil rules are intended to eliminate surprise is found in Civ.R. 26(E), which provides specific instances when a party who has already given a complete response to a discovery request has a further obligation to supplement his or her response: (1) anytime the respondent learns the identity of any person whom they expect to call as a witness at trial, they have a duty to disclose that information to the other party; or (2) if, after providing a discovery response, the respondent later learns that his or her response was incorrect, they have a duty to correct the previous response.

{¶14} In this case, appellants argue that, at trial, Dr. Kazmierczak—an expert testifying on behalf of Dr. Zerick—changed his response to a question regarding spinal cord compression which he rendered previously in his deposition. If that were the situation, then the defense would have had a duty to notify appellants of the change in accordance with Civ.R. 26(E). The defense did not so notify appellants of any alleged change in Dr. Kazmierczak's testimony, and therefore appellants argued to the trial court that the expert's testimony should be excluded. Such a remedy is permissible under the civil rules, however, the exclusion of testimony is perhaps the most extreme remedy, and it must be exercised with caution. See, e.g., Civ.R. 37; cf. *Huffman* at 86 (quoting Civ.R. 1(B)) ("These rules shall be construed and applied to *effect just results* by *eliminating*

delay, unnecessary expense and all other impediments to the expeditious administration of justice.") (Emphasis added.)

{¶15} The crucial factor(s) in determining what, if any, sanction is appropriate when a litigant deviates from the rules governing discovery is whether the other side was prejudiced, and to what degree—i.e., was the opposing party surprised, and if so, did the surprise amount to such a level that allowing the evidence to be admitted would be unjust or unfair? See *Huffman* at 85. And even in situations where the opposing party is visibly surprised, exclusion of the evidence is only a proper sanction when the issue is material, vis-à-vis could affect the outcome of the trial. See id; see also Civ.R. 37.

{¶16} Here, the issue on which appellants claim that they were unfairly surprised was collateral; it had little, if anything, to do with the ultimate issue in the case, which is whether Dr. Zerick deviated from the applicable standard of care in failing to diagnose and treat Curtis' spinal cord compression. The alleged change in Dr. Kazmierczak's testimony concerned only whether he believed that there was visible spinal cord compression, based on an MRI conducted on September 13, 2005. Dr. Kazmierczak's opinion on this issue could be viewed as irrelevant, based on the fact that Curtis underwent additional procedures to alleviate spinal cord compression which was present after September 13. In addition, on cross-examination, Dr. Kazmierczak acknowledged the inconsistency between one of his statements in his deposition and his direct examination testimony. He explained that the inconsistency was simply a mistake, which he made because he did not have the MRI films in front of him at the time he made the statement in his deposition.

{¶17} Further, Dr. Kazmierczak testified that Dr. Zerick's treatment was not below the standard of care at any time. Dr. Tung, the expert for appellants, testified that Dr. Zerick did not deviate from the standard of care until after the point in time central to the alleged change in Dr. Kazmierczak's testimony. Dr. Tung testified that it was reasonable to let Curtis heal for a period of time and to let his medical picture clarify before performing a fourth surgery, especially a fourth surgery immediately after the three surgeries in rapid succession.

{¶18} Under the circumstances, the trial court could not be seen as abusing its discretion by permitting Dr. Kazmierczak to give a complete explanation of his findings. This is especially so where the trial court indicated a willingness to limit Dr. Kazmierczak's testimony as to the issues pertaining to the alleged inconsistency, but appellants' counsel pursued questions which the trial court viewed as opening the door to the allegedly inconsistent testimony. Appellants' counsel hoped to strengthen his case by eliciting the testimony, but was warned of the trial court's willingness to allow Dr. Kazmierczak to explain changes in his opinion if the inquiry proceeded.

{¶19} As a result, we overrule the first, second and fourth assignments of error.

{¶20} In the third assignment of error, appellants argue that the trial court erred by finding that they "opened the door," which allowed Dr. Kazmierczak to change his testimony. Appellants' counsel's desire to turn Dr. Kazmierczak into an additional expert supporting his case is understandable, but counsel was on notice that additional inquiry on the topics would result in Dr. Kazmierczak being allowed to give complete responses to any questions and to have his testimony be fully developed on redirect examination. Appellants' counsel's choice to continue the inquiry did, in fact, "open the door" to a full

development of Dr. Kazmierczak's testimony, some of which apparently was not beneficial to appellants in light of the jury's verdict.

{¶21} Again, the trial court did not abuse its discretion in permitting the complete testimony of Dr. Kazmierczak. The third assignment of error is overruled.

{¶22} Having overruled all assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

KLATT and McGRATH, JJ., concur.

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