

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Peter L. Moran, Esq., Administrator of
the Estate of Richard L. Elzay, Deceased

Appellee/Cross-Appellant

Court of Appeals No. L-11-1281

Trial Court No. CI0200907447

v.

Mercy St. Vincent Medical Center, et al.

Appellants/Cross-Appellees

DECISION AND JUDGMENT

Decided: January 25, 2013

* * * * *

Kyle A. Silvers, for appellee/cross-appellant.

Timothy D. Krugh, James E. Brazeau and Jason M. Van Dam,
for appellants/cross-appellees.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, which denied appellants' motion for summary judgment in the underlying medical malpractice and wrongful death suit, resulting in the case proceeding to trial. Following jury trial, a verdict in favor of appellee was rendered. Appellants' subsequent Civ.R. 59

motion for a new trial was denied. This appeal ensued. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶ 2} Appellants, Mercy St. Vincent Medical Center and Kristen Tennant (“Mercy” and “Tennant”), set forth the following two assignments of error:

The trial court erred in denying summary judgment to appellants because Dr. Sobel’s causation testimony was not inconsistent or contradictory as a matter of law.

The trial court erred in excluding two rebuttal witnesses because their testimony was not cumulative and it would not have unduly delayed the trial.

{¶ 3} The following facts are relevant to this appeal. On November 26, 2008, Richard Elzay (“decedent”) was admitted to Mercy suffering from angina. A brief hospital stay to treat the condition was anticipated. Upon admission, an IV was placed in decedent’s right arm. The utilization of the IV was routine under the circumstances. Several days later, decedent notified Tennant, the Mercy nurse responsible for his care at that time, that the IV cap had fallen onto the floor. Rather than fully replace the potentially compromised IV with a new IV, Tennant swabbed the affected area, replaced the fallen cap, and left the original IV in place.

{¶ 4} Subsequent to this incident, decedent developed a critical wound infection at the site of the right arm IV. Decedent developed sepsis, endocarditis, and passed away several weeks later from complications caused by the infection. A medical malpractice

and wrongful death action was subsequently filed against appellants, alleging that deviations in the standard of IV care proximately caused decedent's infection and death.

{¶ 5} Following several years of litigation in the matter, appellants filed for summary judgment. In support, appellants submitted the affidavit of nonparty expert witness Dr. Sobel. Dr. Sobel specifically swore in the affidavit, in relevant part, "It is my opinion to a reasonable medical probability that Kristen M. Tennant, R.N.'s nursing care and treatment of Mr. Elzay was not a proximate cause of any of the injuries alleged in plaintiff's complaint or amended complaint, including Mr. Elzay's death." However, in direct contrast to the affidavit proclamation on causation, during his prior deposition testimony regarding whether Tennant erred in replacing the IV cap rather than removing and replacing the entire affected IV, Dr. Sobel conversely testified, "Do I think it could have contributed to -- do I think that replacing the cap could have caused it? It could have caused it."

{¶ 6} Faced with a motion for summary judgment on behalf of Mercy and Tennant supported by a nonparty expert witness affidavit contradicting earlier deposition testimony of that expert on causation, the trial court concluded it would be improper to grant summary judgment under these facts and circumstances. On January 18, 2011, the trial court held, in relevant part, in denying summary judgment, "The court finds that the affidavit of Dr. Sobel and the deposition testimony implicitly create a question of credibility with respect to Dr. Sobel's testimony, and, therefore, it would be inappropriate to grant summary judgment on that issue."

{¶ 7} Summary judgment was denied and no voluntary settlement was reached. On June 27, 2011, the case proceeded to trial. On June 28, 2011, appellants requested permission to call three previously undisclosed rebuttal witnesses. These witnesses were all Mercy nurses who had provided care to decedent during his hospitalization. However, none of these rebuttal witnesses possessed any recollection of the decedent or any recollection of the care they provided to decedent. Accordingly, the trial court permitted the live testimony of one of the three witnesses and denied the live testimony of the other two witnesses. The trial court concluded that allowing the live testimony of each of these three similarly situated witnesses would have been cumulative resulting in unnecessary delay. In addition, notably, the records of the care provided to decedent by the additional two witnesses who were not permitted to furnish live testimony were already in possession of the jury and available to them.

{¶ 8} On June 30, 2011, the jury unanimously found Tennant and Mercy negligent in the care of decedent. The jury further concluded that this negligence proximately caused his death. Based upon these holdings, the jury awarded \$600,000 in compensatory damages to appellee. On July 15, 2011, appellants filed a Civ.R. 59 motion for new trial alleging reversible prejudice in the denial of live testimony from two of the three nurse rebuttal witnesses. On September 1, 2011, the motion was denied. The trial court emphasized that none of the rebuttal witnesses, the one permitted to testify or the two not permitted to testify, possessed any actual recollection of decedent or of the care that they provided to him. Accordingly, the trial court held that the denial of such

testimony could not have constituted prejudice to appellants so as to have prevented appellants from having a fair trial. This appeal ensued.

{¶ 9} In the first assignment of error, appellants assert that the trial court erred in denying their motion for summary judgment. In support, appellants contend that Dr. Sobel did not testify inconsistent with his affidavit. Rather, appellants assert, Dr. Sobel merely, “conceded the obvious.” We do not concur.

{¶ 10} The transcript of the deposition testimony clearly reflects Dr. Sobel’s substantive concerns regarding the standard of IV care tendered to decedent by Tennant. Dr. Sobel stated at one point regarding the IV care, “You know, as a Monday quarterback would, oh, of course you better replace it.” It was not replaced.

{¶ 11} Upon further questioning, Dr. Sobel significantly conceded, “I’m not sure what I would have done. Do I think it could have contributed to-- do I think that replacing the cap could have caused it? It could have caused it.”

{¶ 12} Despite his prior deposition testimony reflecting causation concerns and equivocation by Dr. Sobel with respect to Tennant’s standard of IV care, Dr. Sobel subsequently unequivocally attested his affidavit, “It is my opinion to a reasonable medical probability that Kristen M. Tennant, R.N.’s nursing care and treatment of Mr. Elzay was not a proximate cause of any of the injuries alleged in plaintiff’s complaint or amended complaint, including Mr. Elzay’s death.” This sweeping conclusion forecloses proximate cause attributable to the care provided by Tennant. It is clearly and fundamentally incongruous with Dr. Sobel’s prior deposition testimony. In his

deposition, Dr. Sobel clearly conceded that Tennant's standard of IV care of the decedent could have caused the adverse outcome.

{¶ 13} We are guided in our consideration of the merits of appellants' first assignment of error by the recent, highly relevant Supreme Court of Ohio case of *Pettiford v. Aggarwal*, 126 Ohio St.3d 413, 2010-Ohio-3237, 934 N.E.2d 913. In its consideration of the propriety of summary judgment when a nonparty medical malpractice expert witness gives deposition testimony that is inconsistent with a subsequent summary judgment affidavit of that witness, the court stated in pertinent part, "If an affidavit of a movant for summary judgment is inconsistent with the movant's former deposition testimony, summary judgment may not be granted in the movant's favor." Consistent with this principle, the court similarly held that an affidavit in support of a nonmoving party inconsistent with prior testimony likewise cannot be construed as creating a genuine issue of material fact so as to prevent summary judgment in favor of the moving party. *Pettiford*, ¶ 38.

{¶ 14} We find that the pertinent principles set forth in *Pettiford* are controlling in this case. We find that the causation deposition testimony of Dr. Sobel was clearly and materially inconsistent with his subsequent affidavit in support of summary judgment. As such, summary judgment could not be granted to appellants. The denial of summary judgment was proper. Wherefore, we find appellants' first assignment of error not well-taken.

{¶ 15} In appellants' second assignment of error, they maintain that the trial court abused its discretion in denying their Civ.R. 59 motion for a new trial. In support, appellants rely upon Ohio caselaw upholding the principle that a party is prejudiced when a trial court refuses to permit the calling of rebuttal witnesses who are the only witnesses with the knowledge and capability of testifying about the relevant events at issue. *Phung v. Waste Mgt.*, 71 Ohio St.3d 408, 644 N.E.2d 286 (1994). In addition, a party may be found to have been prejudiced by a trial court's refusal to permit the calling of rebuttal witnesses with the knowledge necessary to furnish testimony that directly rebuts the opponent's witnesses. *Klem v. Consolidated Rail Corp.*, 191 Ohio App.3d 690, 2010-Ohio-3330, 947 N.E.2d 687 (6th Dist.).

{¶ 16} We do not concur in appellants' contention that the trial court's disputed decision to permit the calling of only one of three analogous rebuttal witnesses is comparable to or controlled by the above-cited cases. In contrast to the scenarios facing the court in *Phung* and *Klem*, none of the three rebuttal witnesses in the instant case had any recollection of the decedent, the dates in question, or any recollection of IV care furnished to the decedent. As such, we are not persuaded that these witnesses actually possessed any requisite knowledge so as to furnish substantive testimony capable of rebutting the opposing party's witnesses.

{¶ 17} Our review of a trial court's disputed judgment on a Civ.R. 59 motion for a new trial is conducted pursuant to the abuse of discretion standard. An abuse of discretion connotes more than a mere error of law or judgment. It mandates

demonstration that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1985).

{¶ 18} In applying these controlling principles to this case, we find no objective or persuasive evidence in support of the notion that the trial court's determination to allow only one of the three proposed rebuttal witnesses to testify was in any way arbitrary, unreasonable or unconscionable. The record clearly reflects that these witnesses possessed no actual recollection of decedent, of the care they provided to him, or of any of the specific events relevant to this case. Accordingly, the trial court acted well within its discretion in permitting only one of these three similarly situated witnesses to give live testimony. We find appellants' second assignment of error not well-taken.

{¶ 19} Lastly, we will consider appellee/cross appellant's assertion on cross-appeal that the trial court erred in denying the motion for prejudgment interest against appellants.

{¶ 20} In order to warrant an award of prejudgment interest, R.C. 1343.03 requires sufficient evidence to demonstrate that the party against whom prejudgment interest is sought failed to act in good faith.

{¶ 21} We find that rejections of demands submitted by appellee during litigation and appellants' decision to not submit settlement offers to appellee may reflect stringent tactical positions, but it does not constitute objective evidence of a failure to act in good faith in the course of this case so as to justify an award of prejudgment interest. We find appellee/cross appellant's assignment of error on cross-appeal not well-taken.

{¶ 22} Wherefore, we find substantial justice has been done in this matter. The judgment of the Lucas County Court of Common Pleas is affirmed. Appellants and appellee are ordered to pay equal shares of the cost of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

Arlene Singer, P.J.

Thomas J. Osowik, J.
CONCUR.

JUDGE

JUDGE

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
