[Cite as *Lowe v. Univ. Hosp. of Cleveland*, 2002-Ohio-4084.]

COURT OF APPEALS OF OHIO EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 80341

THEODORE E. LOWE, ADMINISTRATOR Plaintiff-appellant vs. UNIVERSITY HOSPITALS OF CLEVELAND, et al. Defendants-appellees	:	JOURNAL ENTRY and OPINION
DATE OF ANNOUNCEMENT OF DECISION	:	AUGUST 8, 2002
CHARACTER OF PROCEEDING	:	Civil appeal from Cuyahoga County Common Pleas Court Case No. CV-407,213
JUDGMENT	:	REVERSED AND REMANDED
DATE OF JOURNALIZATION	:	

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KENNETH A. ROCCO, P.J.:

{¶1} Plaintiff appeals from a common pleas court order granting summary judgment for the defendants. He argues:

{¶2} "I. THE COURT ABUSED ITS DISCRETION WHEN IT ORDERED APPELLANT TO PRODUCE HIS EXPERTS FOR A DISCOVERY DEPOSITION PRIOR TO THE TRIAL DEPOSITION OF ANY OF APPELLEES' EXPERTS, FOUR CALENDAR DAYS LATER (OR TWO BUSINESS DAYS).

{¶3} "II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT PERMITTED APPELLEES TO BYPASS THE RULES OF CIVIL PROCEDURE AND SANCTIONED APPELLANT.

{¶4} "III. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT EXCLUDED THE TESTIMONY OF APPELLANT LOWE'S EXPERT ON STANDARD OF CARE AND GRANTED SUMMARY JUDGMENT, NOT THE LEAST SEVERE SANCTION HAD THERE BEEN SANCTIONABLE CONDUCT BY APPELLANT."

{¶5} We find the common pleas court abused its discretion by excluding the testimony of plaintiff's expert witness. Therefore, we reverse and remand for further proceedings.

PROCEDURAL HISTORY

{¶6} The complaint in this case was filed on May 1, 2000. It alleged that decedent Theodora Lowe was admitted to University Hospitals on March 10, 1997. She had an elevated level of potassium, and was given four doses of Kayexcelate, a potassium binder, to lower it. The last dose was administered at approximately 10:00 p.m. on March 11, 1997.

{¶7} At 6:59 a.m. the following day, Ms. Lowe was found to be unresponsive; emergency cardiopulmonary resuscitation was not successful. Plaintiff, the administrator of her estate, averred that the quantity of Kayexcelate administered to Ms. Lowe was excessive and proximately caused her death.

{¶8} Count I of the complaint alleged that defendant Drs. Steve Kaufman, Cory Stirling, Donald Hrick, Willem H. Boom and Florin Orza were all agents of University Hospitals who provided care to Ms. Lowe. The complaint claimed that each defendant acted negligently and deviated from acceptable standards of care, causing Ms. Lowe to suffer until the time of her death. Count II claimed the defendants' negligence proximately caused the wrongful death of Ms. Lowe and caused her heirs and next of kin to suffer the loss of her support, services, and society, as well as mental anguish, hospital and burial expenses, and other damages. Count III alleged

the hospital was vicariously liable for the negligence of the doctors.

{¶9} Answers were filed by University Hospitals and Drs. Orza, Stirling, and Kaufman; no answer was ever filed by defendants Drs. Hrick and Boom.

{¶10} The court allowed plaintiff until October 10, 2000 to file his expert reports. On October 10, he filed the report of Dr. Stephen R. Payne, M.D. regarding the decedent's life expectancy. Six days later, on October 16, 2000, plaintiff sought leave to file the expert report of Frederick W. Fochtman, Ph.D., which concluded that the amount of the potassium binder administered to the decedent was excessive, and administration of that drug without monitoring the patient was not proper practice. The court granted plaintiff's motion for leave to file this report.

{¶11} All of the defendants moved for summary judgment on the ground plaintiff did not have the requisite expert testimony to establish negligence because Fochtman was not qualified to testify as to the standard of care. Plaintiff then asked for and was given leave to file another expert report from Dr. Payne, this one dated August 6, 1998, which opined that the administration of the dosage of Kayexcelate given to the decedent over a three-hour period without close monitoring of her potassium levels and her cardiac rhythm fell "below the usual standard of medical care." Payne further opined that the decedent "probably died as a result of a cardiac dysrhythmia induced by hypokalemia as a direct and

proximate result of the administration of an excessive amount of Kayexcelate."

{¶12} While the motions for summary judgment were pending, plaintiff dismissed, without prejudice, his claims against Drs. Stirling, Orza and Kaufman, and the court denied as moot the motion for summary judgment filed on their behalf. Thereafter, the court denied the motions for summary judgment filed on behalf of the remaining defendants, University Hospitals and Drs. Boom and Hrick. Trial was scheduled for September 4, 2001.

{¶13} On August 14 and 21, 2001, the remaining defendants all moved to exclude the testimony of plaintiff's experts because the experts had not been made available for discovery depositions. On August 27, 2001, the court denied these motions, "provided that pltf makes all pltf's expert witnesses available for discovery deposition prior to the trial deposition of any deft expert being taken."

{¶14} On August 28, 2001, the court conducted an oral hearing on the record. Based upon the court's oral statement, off the record, that Dr. Payne would not be allowed to testify because he was not made available for deposition before the trial deposition of defendant's expert, defendants orally moved the court to reconsider their motion for summary judgment. They argued that without Dr. Payne's testimony, plaintiff could not succeed on the merits.

{¶15} On September 6, 2001, the court entered the following half-sheet entry:

{¶16} "Δ's oral mtn to reconsider mtn for summ. judg. is granted.

{¶17} "Matter is dismissed w/ prejudice. Written opinion to follow.

{¶18} "FINAL."

{¶19} On October 17, 2001, the court entered its written ruling. The court concluded that it was appropriate to sanction plaintiff by excluding the testimony of Dr. Payne. Because Dr. Payne was the only expert witness plaintiff had named who would testify as to the breach of a standard of care, plaintiff could not prove negligence. Therefore, summary judgment was granted for the defendants.

LAW AND ANALYSIS

{¶20} Appellant's first two assignments of error address the propriety of the court's order compelling him to produce an expert witness for deposition, and sanctioning him for failing to do so. We review these rulings for abuse of discretion. "'The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations.'" *Nakoff v. Fairview Gen. Hosp.* (1996), 75 Ohio St.3d 254, 256. "An abuse of discretion connotes an unreasonable,

arbitrary, or unconscionable decision." *State ex rel. The V Cos. v. Marshall* (1998), 81 Ohio St.3d 467, 469, 692 N.E.2d 198, 201.

{¶21} Under the local rules of practice, each party has an obligation to provide a report to his or her opponent from each expert witness whom the party expects to call at trial.[1] Loc.R. 21.1, Part I(A), of the Cuyahoga County Court of Common Pleas, General Division. Local Rule 21.1 then permits a party to take a discovery deposition of an opponent's expert, "after the mutual exchange of reports has occurred." Id. at Part I(F).

{¶22} A deposition of a non-party witness can be taken with the aid of a subpoena to compel the witness's attendance. Civ.R. 30 and 45. Failure to obey the subpoena may be deemed a contempt of the issuing court by the person subpoenaed. Civ.R. 45(E) and 37(B)(1). Here, appellees did not subpoena Dr. Payne for deposition, or seek an order finding him in contempt. Instead, they sought to sanction appellant for not providing Dr. Payne for deposition.

{¶23} A party generally may not be sanctioned for discovery violations unless he or she has failed to comply with a court order compelling him or her to provide the requested discovery. Civ. R. 37(B)(2). Appellees never filed a motion to compel appellants to

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[1]Notably, this local rule provides for the situation in which a party is unable to obtain a written report from his or her expert witness. Loc.R. 21.1, Part I(C), Cuyahoga County Court of Common Pleas, General Division. Thus, even this rule acknowledges that a party can not control his or her expert witnesses. See discussion infra.

provide Dr. Payne for deposition, with good reason: There is no rule requiring a party to produce an expert witness for deposition, nor is there any rule under which a party may be sanctioned for failing to produce a non-party witness for deposition. *State ex rel. The V Cos. v. Marshall* (1998), 81 Ohio St.3d 467, 469-70, 692 N.E.2d 198, 201; *Randle v. Gordon* (Oct. 29, 1997), Cuyahoga App. No. 52961. Furthermore, it is arbitrary and unreasonable to require a party to provide a non-party witness for deposition because the party has no control over another person.

{¶24} Appellees' reliance on *Nakoff v. Fairview Gen. Hosp.* (1996), 75 Ohio St.3d 254; *Paugh & Farmer, Inc. v. Menorah Home for Jewish Aged* (1984), 15 Ohio St.3d 44; *Jones v. Murphy* (1984), 12 Ohio St.3d 84; and *Perkins v. Ohio Department of Transportation* (1989), 65 Ohio App.3d 487, is misplaced. In each of these cases, the party either failed to identify his or her expert witness or failed to provide an expert report in a timely manner. Here, the expert was identified and a report was provided well in advance of trial. Furthermore, in none of these cases did the exclusion of the expert's testimony completely undermine the party's case, as it did here. The exclusion of the expert testimony in this case effectively resulted in an adverse judgment as a matter of law, a very harsh result which should be reserved for the most egregious cases of discovery abuse. See *Quonset Hut, Inc. v. Ford Motor Co.* (1997), 80 Ohio St.3d 46, 48. Therefore, these cases are inapposite.

{¶25} While professional courtesy and a mutual desire to accommodate busy experts might make it reasonable for parties to schedule expert depositions by agreement, the only means to compel an expert deposition is by subpoena. Therefore, the common pleas court abused its discretion by ordering appellant to produce Dr. Payne for deposition, and by sanctioning him for failing to do so by excluding Dr. Payne's testimony from trial. It follows that the order granting summary judgment to the defendants must be vacated, because the basis for that order has been undermined.

Accordingly, we sustain each of appellant's assignments of error, reverse the common pleas court's judgment and remand for further proceedings.

This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellees his costs herein.

It is ordered that a special mandate be sent to 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.

PRESIDING JUDGE
KENNETH A. ROCCO

MICHAEL J. CORRIGAN, J. and

DIANE KARPINSKI, J. CONCUR

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).

MICHAEL J. CORRIGAN, J., DISSENTING:

I.

{¶26} We review the imposition of discovery sanctions for an abuse of discretion. Instead of applying this deferential standard of review, the majority simply substitutes its judgment for that of the trial court, offering that the exclusion of an expert report "should be reserved for the most egregious cases of discovery abuses," and adding the hitherto unknown requirement that a party seeking to exclude the testimony of a witness must wait until that witness has ignored a subpoena. In light of the facts that show the plaintiff's dilatory discovery actions, I would hold that the trial court did not abuse its discretion in excluding the expert's testimony. I therefore respectfully dissent.

II.

{¶27} Many of those facts that show plaintiff's counsel's dilatory actions were left out of the majority opinion, a reading

of which would leave the impression that counsel simply sought a few, routine extensions. In fact, plaintiff's counsel repeatedly requested leaves, repeatedly failed to meet extended deadlines that were granted as a result of those requested leaves and generally failed to cooperate with defense counsel.

{¶28} For example, plaintiff's counsel, with leave, filed an August, 1998 report of Dr. Payne in December of 2000, sixteen months after the report was completed, three months after the court's original deadline and two months after the extended deadline. Without this report, plaintiff would have been unable to make a prima facie case of medical negligence.

{¶29} Similarly, plaintiff's counsel did not respond to defense counsel's scheduling letters of June 14th, July 2nd, July 19th and July 30, 2001, until August 6th, when she informed the defendants that she was still awaiting responses from her experts.

{¶30} Further still, after a hearing on August 21st regarding defense counsel's motions to exclude the testimony of plaintiff's experts, the court granted the plaintiff's request for leave until the next day (August 22nd) to respond. Despite the fact that the plaintiff did not respond until August 24th, the trial court on that day[2] entered an order that denied the defendants' motions to exclude the plaintiff's expert testimony so long as the plaintiff's

[2] The majority states that the court issued this order on August 27th and this is what the court's journal shows. Lowe's brief makes clear, however, that he was notified of the order on August 24th. (Appellant's Br. at 6.)

experts were deposed before the trial deposition of defendants' expert was taken.

{¶31} Finally, after all of these delays and two days after the court's order, plaintiff's counsel was suddenly able to provide Dr. Payne for deposition. At around noon on August 26th (a Sunday), plaintiff's counsel called defense counsel at home to inform them that Dr. Payne was available at 5:00 that afternoon. Counsel for University Hospital rejected the proposal. Counsel for Doctors Hricik and Boom, who was not home at the time of the call, did not get the message until 5:30 p.m.

III.

A.

{¶32} The dilatory tactics of plaintiff's counsel detailed above are grounds for sanction because a trial court has wide discretion over discovery matters for the benefit of the individual case before it and for increased judicial economy as a whole. See *Abner v. Elliot* (Jul. 20, 1998), Butler App. No. CA98-02-038 (A judge "clearly has the inherent power as trial judge to supervise the proceedings before him to insure an orderly and efficient exercise of jurisdiction. (Citations omitted.) *** The power to supervise proceedings includes the power to supervise discovery. (Citations omitted.)"). Further, this "extensive jurisdiction over discovery" includes the "inherent authority *** to impose sanctions for failure to comply with discovery orders[.]" *State ex rel. Abner v. Elliott*, 85 Ohio St.3d 11, 16, 1999-Ohio-199, 706 N.E.2d

765, 769. See, also, *Nakoff v. Fairview Gen. Hosp.*, 75 Ohio St.3d 254, 1996-Ohio-159, 662 N.E.2d 1, syllabus; *State ex rel. Grandview Hosp. & Medical Center v. Gorman* (1990), 51 Ohio St.3d 94, 554 N.E.2d 1297.

{¶33} In deciding what sanctions to impose,

{¶34} "the court should look to several factors: the *history of the case*; *all the facts and circumstances surrounding the noncompliance*, including the number of opportunities and the length of time within which the faulting party had to comply with the discovery or the order to comply; what efforts, if any, were made to comply; the ability or inability of the faulting party to comply; and such other factors as may be appropriate." *Russo v. Goodyear Tire & Rubber Co.* (1987), 36 Ohio App.3d 175, 521 N.E.2d 1116, paragraph three of the syllabus (emphasis added).

{¶35} Moreover, state and local rules encourage parties to take care of discovery themselves. For example, a Cuyahoga County rule states that, "[c]ounsel are expected to make a timely and good faith effort to confer and agree to schedules for the taking of depositions." Loc.R. 13(B)(1). Further, the local rules require parties, at a case management conference, to set a "definite discovery schedule" and determine a "definite date for exchange of expert witness reports." Loc.R. 21, Part I(D)(2), (4). Also,

before a party may move a trial court for an order to compel discovery, that party first must have made an effort to resolve the dispute with opposing counsel. Civ.R. 37(E).[3]

{¶36} This expected cooperation between counsel and the discretion given to trial courts to regulate discovery make it clear to me that a subpoena is not the only means of procuring the testimony of an expert and, further, that a party may be sanctioned for discovery abuses which are not as "egregious" as ignoring a subpoena.

B.

{¶37} The majority's conclusion that "it is arbitrary and unreasonable to require a party to provide a non-party witness for deposition because the party has no control over another person" is unpersuasive for a number of reasons. First, the court's discovery deadlines here rendered a subpoena unnecessary.

{¶38} Second, particularly in a medical negligence case, in which the plaintiff has the burden of providing an expert to make a prima facie showing, it is neither arbitrary nor unreasonable to sanction the plaintiff for failing (over and over again) to provide that expert for deposition.[4]

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[3] In fact, the trial court below denied a defense motion to compel because the defense had violated Civ.R. 37(E). In that same journal entry (October 25, 2000), the court ordered the plaintiff to comply with discovery by October 31, 2000.

[4] Eight months after the filing of the expert's report and two months after defense counsel's first attempt to schedule his deposition, plaintiff counsel's sudden offer to produce him two

{¶39} Finally, under the majority's no-control-over-another-person rule, it would have been no less arbitrary or unreasonable for the trial court to have excluded Dr. Payne's testimony even if he had ignored a subpoena--because a subpoena issued by the defendants would not have placed him under the control of the plaintiff.

C.

{¶40} Therefore, I would hold that the trial court did not abuse its discretion when, after considering the "history of the case; all the facts and circumstances surrounding the noncompliance, including the number of opportunities and the length of time within which [plaintiff's counsel] had to comply[;]" "what efforts, if any, were made to comply;" and "the ability or inability of [plaintiff's counsel] to comply[;]" it excluded the testimony of Dr. Payne. *Russo*, supra.

IV.

{¶41} Finally, I should note that the trial court's sanction would not have left the plaintiff without recourse. In light of the dilatory tactics undertaken by his attorney, which amounted to

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days after the court notified her of the new deadline strongly suggests that the court's order was reasonable and the plaintiff counsel's delays were unreasonable. The offer also undermines the majority's contention that the plaintiff had no control over Dr. Payne. See *Russo*, supra (among the factors to be considered in leveling a sanction is "the ability or inability of the faulting party to comply[.]").

a failure to prosecute his case, the plaintiff could have sought recovery for malpractice.