

[Cite as Yoe v. Cleveland Clinic Found., 2003-Ohio-875.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 81335

EVELYN YOE, ET AL.	:	JOURNAL ENTRY
	:	AND
Plaintiffs-appellants	:	OPINION
	:	
-vs-	:	
	:	
CLEVELAND CLINIC FOUNDATION	:	
	:	
Defendant-appellee	:	

DATE OF ANNOUNCEMENT
OF DECISION:

FEBRUARY 27, 2003

CHARACTER OF PROCEEDING:

Civil appeal from the
Court of Common Pleas
Case No. CV-407132

JUDGMENT:

Affirmed.

DATE OF JOURNALIZATION:

APPEARANCES:

For Plaintiffs-Appellants:

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ANN DYKE, P.J. :

{¶1} Plaintiffs-appellants, Evelyn and Richard Yoe ("appellants") appeal from the judgment of the trial court which, after a jury trial, found in favor of defendant-appellee The Cleveland Clinic Foundation ("CCF") in a medical malpractice action. For the reasons set forth below, we affirm.

{¶2} Mrs. Yoe filed a complaint on April 28, 2000 against CCF claiming medical malpractice as a result of two surgeries performed by employees of CCF. Mr. Yoe filed a claim for loss of consortium. On August 28, 2001, during the course of discovery, the appellants filed a motion to compel discovery and to conduct an in camera review of records of an unknown patient who was allegedly operated on during and immediately following Mrs. Yoe ' s surgical procedure by the same doctor, Dr. Appell. CCF filed a brief in opposition to the motion to compel. On September 12, 2001, the trial court denied appellants ' motion. The matter proceeded to a jury trial on April 17, 2002. The apposite facts follow.

{¶3} In 1981, Mrs. Yoe developed urinary incontinence when she laughed, sneezed or coughed and, as a result wore sanitary pads to keep herself dry. Her condition worsened over the years and by 1989, she underwent a surgical procedure called a "urethopexy," commonly referred to as a "bladder neck suspension," to correct the problem. Despite the surgery and the temporary relief it provided, her incontinence recurred within a few months. Mrs. Yoe continued to seek treatment including non-surgical collagen injections, and was eventually referred to a specialist, Dr. Wokoff. Dr. Wokoff recommended that Mrs. Yoe seek treatment from Dr. Appell, who was performing "sling

procedures" to cure female urinary incontinence. Dr. Appell, a board certified urologist, subspecialized in voiding dysfunctions in female urology, and performed approximately five hundred urological surgeries each year. In addition to Dr. Appell's extensive surgical and clinical practice, he had extensively researched, taught and written in his field of study. At the time Mrs. Yoe visited Dr. Appell in 1996, she suffered from stress and urge incontinence.

{¶4} In March of 1997, Mrs. Yoe underwent urodynamic testing which revealed that Mrs. Yoe had significant intrinsic sphincteric deficiency and hypermobility of the juncture between the bladder and the urethra. Dr. Appell recommended, and on May 14, 1997 performed, pubovaginal sling surgery, a relatively new surgical procedure intended to correct female incontinence. The purpose of the sling procedure is to control incontinence by applying the right amount of tension in the area beneath the bladder neck and the urethra. The amount of tension necessary to correct incontinence becomes a medical judgment, dependent upon many factors, including the patient's medical history and anatomy, and prior surgeries, such as a hysterectomy or bladder neck surgery.¹ Dr. Appell's success rate in correcting female incontinence was between eighty-five and ninety percent, but he admitted at trial that there are instances in which results are not ideal even in ideal circumstances.

{¶5} The "sling procedure" is performed by many surgeons, each of whom may employ a different technique in achieving the desired result. Further, while one surgeon

¹The record demonstrates that Mrs. Yoe previously had both a hysterectomy and bladder neck surgery.

may perform the surgery in the same manner on all of his or her respective patients, differing results may occur.

{¶6} In this case, Dr. Appell explained the technique he generally employs, which is to tie the sling and then inspect the movement of the anterior vaginal wall. Even a slight movement in the vaginal wall indicates that the suture does not have to be tied any more tightly. This process is called the "vaginal wink." Following the surgery, Mrs. Yoe's incontinence was not resolved and, in fact, she suffered from urinary retention. Dr. Appell recommended that Mrs. Yoe undergo a urethrolisis to loosen the sling, which he determined to be tied too tightly. After the second procedure, Mrs. Yoe still suffered from incontinence and to date suffers from total urinary incontinence.

{¶7} At trial, appellants presented the expert testimony of Dr. Kriegler, who stated that Dr. Appell's use of the "vaginal wink" was an indicator that the suture was tied too tightly. CCF presented the expert testimony of Dr. Hadley, who stated that Dr. Appell's sling procedure did not deviate from the standard of care owed to Mrs. Yoe, and rebutted Dr. Kriegler's opinion regarding the vaginal wink and suture tension.

{¶8} Following trial, the jury found in favor of CCF. Appellants assert two assignments of error for our review.

{¶9} "I. The trial court erred when it failed to conduct an in camera inspection of surgical records from the from the Cleveland Clinic Foundation which were needed to challenge the credibility of Dr. Appell's testimony concerning his activities as Evelyn Yoe's surgeon on May 14, 1997."

{¶10} Mrs. Yoe contends that, prior to denying her motion to compel surgical records detailing Dr. Appell's surgical schedule on May 14, 1997, the trial court should have conducted an in camera inspection of the medical records in question. We disagree.

{¶11} A trial court has broad discretion in controlling the discovery process. See, e.g., *BFI Waste Systems of Ohio v. Garfield Hts.* (1994), 94 Ohio App.3d 62, 75, citing *Stegawski v. Cleveland Anesthesia Group, Inc.* (1987), 37 Ohio App.3d 78. The complaining party must establish a clear and prejudicial abuse of discretion that materially prejudices the party. *O'Brien v. Angely* (1980), 63 Ohio St.2d 159. Absent an abuse of discretion, an appellate court may not overturn the trial court's ruling on discovery matters. *Feichtner v. Cleveland* (1994), 95 Ohio App.3d 388, 397 citing *Vinci v. Ceraolo* (1992), 79 Ohio App.3d 640.

{¶12} "Abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. The Supreme Court of Ohio has explained this standard as follows:

{¶13} "An abuse of discretion involves far more than a difference in ***opinion***. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such a determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87.

{¶14} Further, a party is not entitled, as a matter of right, to an in camera hearing when privilege is asserted.² “Before engaging in an in camera review to determine whether privilege is applicable, ‘the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person’ that in camera review of the materials is outweighed by other rights.” *State v. Hoop* (1999), 134 Ohio App.3d 627 citing *United States v. Zolin* (1989), 491 U.S. 554; *United States v. Rainone* (C.A.7 1994), 32 F.3d 1203, certiorari denied; *Alex v. United States* (1995), 515 U.S. 1102; and *United States v. Romano* (1997), 46 M.J. 269.

{¶15} During the discovery phase of litigation, appellants sought medical records of individuals who were operated on by Dr. Appell on May 14, 1997. Appellants intended to prove that Dr. Appell was operating on more than one patient simultaneously, thus breaching a standard of care owed to Mrs. Yoe. While appellants were provided with The Clinic’s Operating Room Schedule for May 14, 1997, they nonetheless filed a motion to compel the medical records of non-party patients.

{¶16} In its brief in opposition to appellants’ motion to compel, CCF argued that such records could not be disclosed because of the physician-patient privilege. They further argued that disclosure of the Clinic’s Operating Room Schedule provided the information which appellants sought, and therefore, obviated any justification for disclosure of non-party patients’ medical records.

²Pursuant to R.C. 2317.02 (B), privileged physician-patient “communication” includes medical records. *State v. Bourdess*, (Oct. 7, 1999), Cuyahoga App. No. 74842. Further, information placed in hospital records by a physician is privileged. *State v. Webb* (1994), 70 Ohio St.3d 325.

{¶17} In this case, appellants have failed to demonstrate that their need for non-party patients' records outweighed the non-party patients' privacy interests. The appellants aver that those records were necessary to challenge the credibility of Dr. Appell. However, the record demonstrates that appellants were provided with the Clinic's Surgery Room Schedule, which contained information regarding Dr. Appell's exact whereabouts on May 14, 1997. At trial, appellants conducted an exhaustive cross-examination of Dr. Appell based on the surgery room schedule and had ample opportunity to challenge him on any alleged time discrepancies between Mrs. Yoe's surgery and surgeries on other patients that same day.

{¶18} We cannot say that the trial court acted unreasonably, arbitrarily or unconscionably by not conducting an in camera inspection of the medical records in question. Having access to information from sources other than non-party patient records, and an opportunity to cross-examine Dr. Appell regarding his surgery schedule on the day of Mrs. Yoe's surgery, appellants have failed to demonstrate material prejudice. We therefore overrule this assignment of error.

{¶19} "II. The jury's verdict in favor of the Cleveland Clinic Foundation is against the manifest weight of the standard of care evidence adduced in the case."

{¶20} A judgment supported by some competent, credible evidence going to the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279. The weight to be give the evidence and the credibility of the witnesses are primarily for the finder of fact. *Id.* It is the duty of this court to determine if the jury clearly

lost its way and created such a manifest injustice that the verdict must be vacated and a new trial ordered. *C.E. Morris*, supra.

{¶21} Within this assignment of error, appellants concede that CCF's expert witness opinion testimony provided competent, credible evidence to support the jury finding in this case. (Pltfs. Brief p. 23). They contend, however, that there is no factual basis to support the opinions, therefore necessitating a reversal on the weight of the evidence. CCF responds that a factual basis exists and that the jury resolved any factual discrepancies in their favor with regard to the standard of care. We agree.

{¶22} First, we find that the record contains ample factual basis to support expert opinions presented on behalf of CCF. (T. 194, 259-260, 274-278, 330-331). Appellants presented an expert witness who opined that there was a breach of the standard of care by Dr. Appell because he chose to employ the sling procedure when operating on Mrs. Yoe. However, the mere fact that physicians may employ different techniques in performing surgery does not suggest that the physician abandoned the appropriate standard of care owed to a patient. CCF's expert witnesses, Dr. Hadley and Dr. Appell testified in this regard and acknowledged that surgical techniques, although different, may be deemed reasonable (T. 194-195). Having reviewed the record, we cannot find that the jury clearly lost its way but instead find that the jury acted within its province in weighing the evidence properly before them.

Judgment affirmed.

It is ordered that appellee recover of appellants its 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.

FRANK D. CELEBREZZE, JR., J., AND

JAMES J. SWEENEY, J., CONCUR.

ANN DYKE
JUDGE

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).