[Cite as *Damario v. Shimmel*, 2008-Ohio-5582.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 90760 and 90875

MARK A. DAMARIO, ET AL.

PLAINTIFFS-APPELLEES/
CROSS-APPELLANTS

vs.

JAMES SHIMMEL, JR.

DEFENDANT-APPELLANT/
CROSS-APPELLEE

JUDGMENT:
AFFIRMED (NO. 90760);
REVERSED AND REMANDED IN PART
(NO. 90875)

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-607117

BEFORE: McMonagle, J., Sweeney, A.J., and Stewart, J.

RELEASED: October 30, 2008

JOURNALIZED:

[Cite as *Damario v. Shimmel*, 2008-Ohio-5582.]

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[Cite as *Damario v. Shimmel*, 2008-Ohio-5582.]

CHRISTINE T. McMONAGLE, J.:

{¶ 1} In case number 90760, defendant James Shimmel, Jr., appeals the following: the judgment of the trial court denying his motion to compel production of medical records; the judgment of the trial court denying his request to exclude the expert opinions of Dr. Theresa Ruch; the trial court's ruling overruling his objections at trial to the testimony of Dr. Ruch; and the trial court's ruling denying his motion to grant a directed verdict.

{¶ 2} In case number 90875, plaintiff June Kleinsorge appeals the trial court's judgment denying her motion for prejudgment interest and granting Shimmel's motion to quash her subpoena for the claims file of Shimmel's insurer, Esurance. The cases have been consolidated on appeal.

{¶ 3} On May 30, 2006, Kleinsorge was involved in a motor vehicle accident with Shimmel. Specifically, Kleinsorge was a passenger in a vehicle driven by plaintiff Mark Damario.[1] Damario was pulling a trailer from the rear of his vehicle, and Shimmel rear-ended the trailer, causing damage to both the trailer and the rear of Damario's vehicle.

{¶ 4} Kleinsorge was treated later on the day of the accident in the emergency room, where she complained of neck and elbow pain. She was diagnosed with an acute neck strain and left wrist sprain as a result of the

[1]Damario settled prior to trial.

accident. X-rays taken at the hospital revealed disc degeneration at C6-7. The medical record from the emergency room indicated that Kleinsorge had a fall "in the last three months."

{¶ 5} On June 1, 2006, Kleinsorge's attorney notified Esurance (Shimmel's insurance company) of Kleinsorge's injuries. Kleinsorge received treatment for her injuries at Beachwood Orthopedic Associates, a pain management group. By the end of July 2006, most of her injuries had resolved except for her neck pain and numbness and tingling down her left arm to her hand.

{¶ 6} In September 2006, Kleinsorge saw Dr. Teresa Ruch, a neurosurgeon. After examining Kleinsorge and reviewing a cervical MRI, Dr. Ruch informed Kleinsorge that surgery was advisable because the injury was causing her spinal cord to be impinged, which was gradually causing loss of the use of her left hand. The record indicates that Esurance was notified of Dr. Ruch's advisement and was provided medical documentation. The surgery was performed on December 20, 2006.

{¶ 7} Kleinsorge filed this action on November 14, 2006.[2] Discovery issues arose during the pendency of the case. In particular, on August 10, 2007, Kleinsorge sought to compel documentation and appropriate answers to her

[2]At the time this action was commenced, Shimmel was incarcerated on an unrelated matter.

discovery request.[3] On September 7, Kleinsorge filed another motion to compel Shimmel to submit to deposition and for attorney fees. On September 14, after a hearing on discovery issues, the court granted the motion to compel and set forth detailed discovery orders. Part of the court's orders required Shimmel to be available for deposition; the court reserved ruling on Kleinsorge's motion for attorney fees, dependent upon whether Shimmel presented himself.

{¶ 8} On September 17, Kleinsorge filed an "offer of medical expenses as prima facie evidence." The offer consisted of her bills for treatment she received at the emergency room on the day of the accident, subsequent treatment at Beachwood Orthopedics, with Dr. Ruch, and the surgery.

{¶ 9} On September 19, Shimmel offered Kleinsorge his policy limits of $25,000, which she refused.

{¶ 10} On September 21, Shimmel filed a "motion to compel plaintiffs to provide authorization to obtain medical records and bills that are causally or historically related." In this motion, Shimmel sought records relative to treatment Kleinsorge obtained for a fall approximately three months before the accident, records and billing statements relative to treatment from Kaiser

[3]An initial motion to compel was filed by Kleinsorge on July 30, 2007. The record demonstrates that Kleinsorge sought discovery from Shimmel on May 25 and June 1, 2007. On July 2, 2007, Kleinsorge's counsel sent a letter to Shimmel's attorney indicating that Kleinsorge's discovery request was outstanding. Shimmel responded to the discovery request on July 26, 2007, and Kleinsorge's motion to compel was denied as moot.

Permanente four years before the accident, and records and statements relative to her treatment at the hospital after the accident.

{¶ 11} The court granted the motion in part and denied it in part. Specifically, the court agreed that Shimmel was entitled to Kleinsorge's Kaiser Permanente records relative to her fall months before the accident at issue, but found that she had "provided defendant Shimmel with sufficient releases."[4] The court further found that Shimmel was entitled "to obtain all billing statements for treatment related to the subject motor vehicle accident, including itemizations of amounts accepted as payment in full and any 'write offs' or adjustments[,]" and ordered Kleinsorge to execute authorizations in that regard.

{¶ 12} On October 2, Shimmel filed a motion to continue the November 5 trial date. As cause, Shimmel stated that he was set to be released from prison on December 18, and wished to attend, and participate in, the trial. The motion was denied.

{¶ 13} Prior to trial, Shimmel filed a motion to exclude opinions of Dr. Ruch that were not raised in any report or were not stated within a reasonable degree of medical certainty. Shimmel also filed a motion in limine to exclude records and bills from Beachwood Orthopedics. The court denied both motions.

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[4]The record indicates that Kleinsorge executed the relevant releases on September 14, 2007.

{¶ 14} The case was subsequently reassigned to a visiting judge, and proceeded to a jury trial on November 5. The jury returned a verdict in favor of Kleinsorge for $100,000. Kleinsorge subpoenaed Esurance's claim file, and Shimmel filed a motion to quash the subpoena. Kleinsorge filed a motion for prejudgment interest, and a hearing was held. The court granted Shimmel's motion to quash and denied Kleinsorge's motion for prejudgment interest.

SHIMMEL'S APPEAL - CASE NO. 90760

{¶ 15} Shimmel presents four assignments of error for our review. The first three assignments relate to the court's ruling on a discovery issue and the inclusion of testimony at trial. We review these issues under an abuse of discretion standard. (See, e.g., *Renfro v. Black* (1990), 52 Ohio St.3d 27, 32, 556 N.E.2d 150; *Wolnik v. Matthew J. Messina, DDS, Inc.*, Cuyahoga App. No. 88139, 2007-Ohio-1446, ¶15.) A court abuses its discretion when it acts unreasonably, unconscionably, or arbitrarily. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 16} In his first assignment of error, Shimmel contends that the trial court erred in denying his motion to compel production of Kleinsorge's medical records.

{¶ 17} We note that the court granted the motion in part and denied it in part. Specifically, the court found that Shimmel was entitled to Kleinsorge's

Kaiser Permanente records relative to her fall months before the accident at issue, but found that she had "provided defendant Shimmel with sufficient releases."

{¶ 18} Shimmel has not detailed exactly which medical records he believes he was entitled to and did not receive. That notwithstanding, a review of the record demonstrates that Kleinsorge provided authorization for release of her records relative to her treatment for her injuries from the accident. Moreover, she also provided a release for her records for treatment she received at Kaiser Permanente for injuries she sustained approximately three months prior to the accident when she fell against a banister.

{¶ 19} To the extent that Shimmel believes he was entitled to Kleinsorge's medical records from Kaiser Permanente dating back to four years before the accident (as was requested in his motion to compel, but not addressed by the trial court), we disagree. The evidence in the record suggests that Kleinsorge did not previously have problems (even after her fall against the banister) with the areas affected by the accident. Thus, Shimmel's request for records from four years before the accident was for records that were irrelevant and privileged, and, therefore, was not warranted.

{¶ 20} Further, the trial court found that "as to defendant Shimmel's request for any relevant billing records from the Lake Hospital System, plaintiff

Kleinsorge does not directly address this issue in her brief in opposition[,]" and ordered her to provide a release in that regard. Although Kleinsorge did not address this issue in her brief in opposition, on September 17, prior to Shimmel filing his motion to compel, Kleinsorge filed an "offer of medical expenses as prima facie evidence." The documentation Shimmel sought was provided in that filing. Shimmel did not file a subsequent motion to compel stating that he still did not have the information he sought.

{¶ 21} In light of the above, Shimmel's first assignment of error is overruled.

{¶ 22} For his second assigned error, Shimmel argues that the trial court erred in denying his motion in limine to exclude the expert opinions of Dr. Ruch that allegedly were not contained in any report or medical records.[5]

{¶ 23} First, Shimmel states that "[i]n this case, Kleinsorge did not produce an expert report from Dr. Ruch." The record belies this contention. Specifically, early on in the litigation, at a pretrial conference held on May 31, 2007, the court noted that "plaintiffs have already produced expert reports." Moreover, exhibit G to Kleinsorge's motion for prejudgment interest indicates that Dr. Ruch's December 26, 2006 operative note and February 12, 2007 medical report were provided on February 19, 2007, to Esurance, Shimmel's insurer.

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[5]Shimmel objected during Dr. Ruch's trial testimony, thus preserving the issue for appeal. See *Stevens v. Provitt*, Trumbull App. No. 2002-T-0076, 2003-Ohio-7226,¶39.

{¶ 24} Shimmel further argues that "Dr. Ruch's office notes do not causally relate Kleinsorge's injuries to the motor vehicle accident." Dr. Ruch's office note from her first visit with Kleinsorge states that Kleinsorge was seeking treatment because of pain in her neck and weakness in her left arm and hand as a result of the accident. In her report, Dr. Ruch also detailed Kleinsorge's injuries and treatments, and concluded that "the accident probably did cause the injury because she had no pain before and she has pain after."

{¶ 25} Finally, Shimmel's argument that Dr. Ruch's trial testimony, office notes, report, and deposition testimony were inconsistent, raises the issue of weight, not admissibility. See *Ulrich v. Pumroy* (July 25, 1988), Montgomery App. No. 10694.

{¶ 26} In light of the above, the trial court did not abuse its discretion by denying Shimmel's request to exclude Dr. Ruch's testimony. The second assignment of error is overruled.

{¶ 27} In his third assignment of error, Shimmel contends that the trial court erred by overruling his objections at trial to Dr. Ruch's testimony, because some of her opinions were not stated within a reasonable degree of medical certainty.

{¶ 28} Specifically, Shimmel challenges Dr. Ruch's testimony that there is a seven percent chance that the performed surgery can affect the surrounding

discs, usually within seven to 15 years later. Shimmel also challenges Dr. Ruch's testimony that "it is possible that [Kleinsorge] could have a problem later on down the line."

{¶ 29} "Expert medical testimony must be excluded if it is not stated in terms of probability – an event or result that is more likely than not to occur." *Wissing v. D.F. Electronics, Inc.* (Sept. 26, 1997), Hamilton App. No. C-960915, at 12. "An event is probable if there is a greater than fifty percent likelihood that it produced the occurrence at issue." *Stinson v. England* (1994), 69 Ohio St.3d 451, 633 N.E.2d 532, paragraph one of the syllabus.

{¶ 30} Although Dr. Ruch's testimony on the above-mentioned two points was not to the required medical certainty, in view of the other testimony and evidence, it was harmless error. In particular, Dr. Ruch also testified that it was her opinion, within a reasonable degree of medical probability, that Kleinsorge has "some permanence to her injury," that being pain.

{¶ 31} In regard to future treatment, Kleinsorge's counsel suggested to the jury, in both opening statement and closing argument, that Kleinsorge needed to be compensated for her pain. In regard to future surgery, Kleinsorge's counsel admitted during closing argument that "we don't know" whether that will become a reality, and stated that he was "not interested in speculating about that[,] *** [t]hat's not why we are here." Counsel then went on to suggest what

he believed a fair amount of damages would be,[6] including for future pain, but not the possibility of surgery.

{¶ 32} Moreover, the court instructed the jury on future damages as follows:

{¶ 33} "Note that the plaintiff, June Kleinsorge, claims that she will incur future pain and expense. As to such claim, no damage has been found, except that which is reasonably certain to exist as a proximate result of the incident of negligence which is the subject of this lawsuit. In regard to these claims of future pain and expense, you must not speculate. The law deals in probabilities and not mere possibilities. In determining future damage, you may consider only those things that you do find from the evidence are reasonably certain to continue. Reasonably certain means probable. That is, more likely to occur than not."

{¶ 34} The admission of the testimony at issue was error, but, on this record, harmless.

{¶ 35} Accordingly, the third assignment of error is overruled.

{¶ 36} For his fourth assigned error, Shimmel contends that the trial court erred by denying his motion for a directed verdict.

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[6]Counsel suggested $308,000; the jury awarded $100,000.

{¶ 37} Civ.R. 50(A)(4), governing directed verdicts, reads, in part, as follows:

{¶ 38} "When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue."

{¶ 39} A motion for a directed verdict presents questions of law, not of fact, even though it is necessary to review and consider evidence. *O'Day v. Webb* (1972), 29 Ohio St.2d 215, 280 N.E.2d 896. Thus, we review a motion for a directed verdict upon a de novo standard of review. *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm.*, 76 Ohio St.3d 521, 1996-Ohio-298, 668 N.E.2d 889.

{¶ 40} Shimmel argues that he was entitled to a directed verdict on Kleinsorge's claim for relief relative to expenses incurred in treatment at Beachwood Orthopedics. According to Shimmel, Kleinsorge failed to link her treatment at Beachwood Orthopedics to the accident "because she failed to provide any expert testimony relating records and bills from [there] to the subject accident." Shimmel relies on Dr. Ruch's testimony that she did not review any record other than her own in support of his argument.

{¶ 41} This court addressed this issue in *Bacsa v. Mayo's Pub Bar* (Feb. 19, 1998), Cuyahoga App. No. 72234, citing R.C. 2317.421, which provides:

{¶ 42} "In an action for damages arising from personal injury or wrongful death, a written bill or statement, or any relevant portion thereof, itemized by date, type of service rendered, and charge, shall, if otherwise admissible, be prima-facie evidence of the reasonableness of any charges and fees stated therein for medication and prosthetic devices furnished, or medical, dental, hospital, and funeral services rendered by the person, firm, or corporation issuing such bill or statement, provided, that such bill or statement shall be prima-facie evidence of reasonableness only if the party offering it delivers a copy of it, or the relevant portion thereof, to the attorney of record for each adverse party not less than five days before trial."

{¶ 43} In *Bacsa,* the plaintiff was injured in a bar fight and brought a civil assault action against the aggressor, the bar, and its owners. The trial court denied the plaintiff's request to introduce his medical bills, and the jury awarded him approximately 25 percent of the actual expenses incurred.

{¶ 44} On appeal, the aggressor argued that the trial court properly excluded the bills because the plaintiff did not present testimony that the treatment he received was reasonably necessary for his injuries and the plaintiff's own testimony was insufficient to prove the reasonableness of the

treatment. This court reversed, citing R.C. 2317.421 and *Wagner v. McDaniels* (1984), 9 Ohio St.3d, 459 N.E.2d 561.

{¶ 45} In *Wagner*, the Ohio Supreme Court held that "[p]roof of the amount paid or the amount of the bill rendered and of the nature of the services performed constitutes prima facie evidence of the necessity and reasonableness of the charges for medical and hospital services." Id. at paragraph one of the syllabus. (See, also, *Wood v. Elzoheary* (1983), 11 Ohio App.3d 27, 462 N.E.2d 1243, wherein this court held that proof that medical care was reasonably necessary for identified injuries may not require expert testimony when that treatment is a matter of common knowledge.)

{¶ 46} In *Basca,* in reversing the trial court's ruling excluding the plaintiff's medical bills, this court found that the plaintiff's "testimony that his wrist and nose were injured from an assault in a bar and the steps he took for treatment [was] sufficient to support his claimed injuries and the treatment received." Id. at 5.

{¶ 47} Similarly, in this case, Kleinsorge specifically testified that she went to Beachwood Orthopedics because of the injuries she sustained in the accident with Damario. That testimony was sufficient to support her claimed injuries and the treatment she received. Moreover, on September 17, 2007, well in

advance of five days before trial, Kleinsorge filed an "offer of medical expenses as prima facie evidence" under R.C. 231.421.

{¶ 48} In light of the above, Shimmel's fourth assignment of error is overruled.

KLEINSORGE'S APPEAL - CASE NO. 90875

{¶ 49} For her first assigned error, Kleinsorge contends that the trial court abused its discretion by denying her motion for prejudgment interest, because it failed to follow statutory and case law in making its ruling. For her second assignment of error, Kleinsorge contends that the trial court abused its discretion by granting Shimmel's motion to quash the subpoena for the claims file.

{¶ 50} R.C. 1343.03 provides that prejudgment interest may be awarded in the following instance:

{¶ 51} "If, upon motion of any party to a civil action that is based on tortious conduct, that has not been settled by agreement of the parties, and in which the court has rendered a judgment, decree, or order for the payment of money, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case[.]" R.C. 1343.03(C).

{¶ 52} The purpose of prejudgment interest is to encourage prompt settlement and to discourage defendants from frivolously opposing and prolonging suits for legitimate claims between injury and judgment. *Royal Elec. Constr. Corp. v. Ohio State Univ.*, 73 Ohio St.3d 110, 116, 1995-Ohio-131, 652 N.E.2d 687. Further, prejudgment interest does not punish the party responsible for the underlying damages, but acts as compensation, serves to make the aggrieved party whole, and compensates for the lapse of time between accrual of the claim and judgment. Id. In order to award prejudgment interest, a trial court must find that the party required to pay the judgment failed to make a good faith effort to settle the case, and the party to whom the judgment is to be paid did not fail to make a good faith effort to settle the case. *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 658, 1994-Ohio-324, 635 N.E.2d 331.

{¶ 53} The Ohio Supreme Court has developed a standard to be used for deciding whether an award of prejudgment interest is warranted. To be considered are whether the party against whom an award is sought: 1) fully cooperated in discovery proceedings, 2) rationally evaluated its risks and potential liability, 3) did not unnecessarily delay the proceedings, and 4) made a good faith settlement offer or responded in good faith to an offer from the other party. Id., citing *Kalain v. Smith* (1986), 25 Ohio St.3d 157, 495 N.E.2d 572, syllabus.

{¶ 54} The party seeking prejudgment interest bears the burden of proof. *Moskovitz* at 659. The party must present persuasive evidence of an offer to settle that was reasonable when "considering such factors as the type of case, the injuries involved, applicable law, defenses available, and the nature, scope and frequency of efforts to settle. Other factors * * * include responses – or lack thereof – and a demand substantiated by facts and figures." Id. A subjective claim of lack of good faith will usually not be sufficient. Id. "Even though the burden of a party seeking an award is heavy, the burden does not include the requirement that bad faith of the other party be shown[.] * * * A party may have failed to make a good faith effort to settle even though he or she did not act in bad faith." Id.

{¶ 55} The determination to award prejudgment interest rests within the trial court's sound discretion, and will not be reversed absent a clear abuse of such discretion. *Scioto Mem. Hosp. Assn., Inc. v. Price Waterhouse*, 74 Ohio St.3d 474, 479, 1996-Ohio-365, 659 N.E.2d 1268. *Kalain* at 159. Abuse of discretion is an attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable. *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87, 482 N.E.2d 1248.

{¶ 56} In *Moskovitz*, the Ohio Supreme Court stated that "[o]ften, the only way for a party to prove another party's failure to make a good faith effort to

settle is by obtaining the claims file of an insurer." Id. at 661. In *Moskovitz*, the Court further stated that "[i]n *Peyko* [*v. Frederick* (1986)], supra, 25 Ohio St.3d 164, 25 Ohio B. Rep. 207, 495 N.E.2d 918, paragraphs one and two of the syllabus, this court held that:

{¶ 57} '1. When a plaintiff, having obtained a judgment against a defendant, files a motion for prejudgment interest on the amount of that judgment pursuant to R.C. 1343.03(C), the plaintiff, upon a showing of "good cause" pursuant to Civ.R. 26(B)(3), may have access through discovery to those portions of the defendant's insurer's "claims file" that are not shown by the defense to be privileged attorney-client communications.

{¶ 58} '2. If the defense asserts the attorney-client privilege with regard to the contents of the "claims file," the trial court shall determine by in camera inspection which portions of the file, if any, are so privileged. The plaintiff then shall be granted access to the non-privileged portions of the file.'" *Moskovitz* at 660.

{¶ 59} An appellate court's standard of review on most evidentiary matters is abuse of discretion. See *Petro v. N. Coast Villas Ltd.* (2000), 136 Ohio App.3d 93, 96, 735 N.E.2d 985. Accordingly, we generally apply an abuse of discretion standard when reviewing a trial court's decision to quash a subpoena. Id.

{¶ 60} In this case, at the hearing on Kleinsorge's motion for prejudgment interest, prior to ruling on the motion, the trial court granted Shimmel's motion to quash Kleinsorge's subpoena for Esurance's claim's file, stating that the issue was "moot."

{¶ 61} Upon review, the court abused its discretion by quashing the subpoena. As previously discussed, the claims file is discoverable in this instance and sometimes is the only way for a party to prove the other party's lack of good faith in settling a claim. The court based its decision to deny the motion for prejudgment interest on the fact that the case had been pending for only one year, which it did not deem to be unreasonable. That fact, however, is not determinative as to whether prejudgment interest should have been awarded. Kleinsorge has at least made an arguable claim for prejudgment interest and she should be afforded Esurance's claims file for advancement of her motion.

{¶ 62} Accordingly, Kleinsorge's second assignment of error is well taken and her first assignment of error is moot.

CONCLUSION

{¶ 63} The four assignments of error presented by Shimmel are overruled and the trial court's judgments in Case. No. 90760 are affirmed. Kleinsorge's first assignment of error is moot; Kleinsorge's second assignment of error is well

taken, and Case No. 90875 is reversed and remanded, upon that issue, so that Kleinsorge can have access to the claims file relevant to this case, after which, a new hearing on her motion for prejudgment interest shall be had.

It is ordered that Kleinsorge recover from Shimmel the costs herein taxed.

The court finds there were reasonable grounds for these appeals.

It is ordered that a special mandate be sent to said 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.

CHRISTINE T. McMONAGLE, JUDGE

JAMES J. SWEENEY, A.J., and
MELODY J. STEWART, J., CONCUR