

[Cite as *Zydowicz v. Addesso*, 2009-Ohio-3465.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92040

LISA ZYDOWICZ

PLAINTIFF-APPELLANT

VS.

JACLYN ADDESSO

DEFENDANT-APPELLEE

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-625554

BEFORE: Kilbane, P.J., Stewart, J., and Jones, J.

RELEASED: July 16, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) 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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Lisa Zydowicz (Zydowicz), appeals the decision of the trial court to allow the expert of appellee, Jaclyn Addesso (Addesso), to testify even though she failed to meet the expert report deadline established by the court. After a review of the record and pertinent law, we affirm.

{¶ 2} The facts giving rise to this appeal are as follows.

{¶ 3} On May 29, 2007, Zydowicz filed suit against Addesso for injuries sustained in a motor vehicle accident. Addesso stipulated her negligence, leaving damages as the only issue in dispute. On August 21, 2007, the trial court held a case management conference to establish a litigation schedule. The order read as follows,

**“CMC HELD ON 08/21/2007. DATES ARE SET AS FOLLOWS:
DISCOVERY SHALL BE COMPLETED ON OR BEFORE
11/21/2007; PLAINTIFF’S EXPERT REPORT MUST BE
SUBMITTED ON OR BEFORE 12/21/2007; DEFENDANT
SHALL SUBMIT EXPERT REPORTS ON OR BEFORE
01/21/2008; DISPOSITIVE MOTIONS MUST BE SUBMITTED
ON OR BEFORE 12/28/2007; SETTLEMENT CONFERENCE
SCHEDULED FOR 01/10/2008 at 3:00. FINAL PRETRIAL
SCHEDULED FOR 02/07/2008 at 3:00; AND TRIAL**

SCHEDULED FOR 02/27/2008 at 9:00.”

{¶ 4} Zydowicz submitted an expert report from John H. Nickels, M.D. (Dr. Nickels), within the deadline established by the trial court. Addesso failed to produce her expert report within the deadline. On February 20, 2008, Zydowicz conducted the trial deposition of Dr. Nickels. Addesso's counsel failed to note the deposition on her calendar and did not appear.

{¶ 5} On February 25, 2008, Addesso notified Zydowicz that she had retained Duret S. Smith, M.D. (Dr. Smith) as a defense expert. Addesso faxed the expert's report to Zydowicz's counsel that same day.

{¶ 6} On February 26, 2008, Addesso filed a motion to continue the trial date. On February 27, 2008, all parties arrived for trial, at which time the trial judge granted the motion for a continuance and rescheduled the trial for May 5, 2008.

{¶ 7} On April 23, 2008, the parties conducted the trial deposition of Dr. Smith. On April 30, 2008, Zydowicz filed a motion in limine arguing that Dr. Smith should not be allowed to testify because he was not identified as an expert by the court's deadline. The case did not proceed to trial on May 5, 2008. On May 9, 2008, the trial court denied Zydowicz's motion in limine, referred the case to nonbinding arbitration, and again rescheduled the trial for June 23, 2008.

{¶ 8} The case did not proceed to trial on June 23, 2008. The trial court rescheduled the trial for the third and last time for August 13, 2008. The trial

commenced on August 14, 2008, and the following day the jury returned a verdict in favor of Zydowicz in the amount of \$13,500.

{¶ 9} Zydowicz filed the instant appeal, asserting one assignment of error for our review.

“THE TRIAL JUDGE ABUSED HIS DISCRETION, TO THE CONSIDERABLE DETRIMENT OF PLAINTIFF-APPELLANT, BY ALLOWING DEFENDANT-APPELLEE TO IDENTIFY AND PRESENT A NEW EXPERT IN VIOLATION OF LOCAL RULE 21.1 AND PRINCIPLES OF FUNDAMENTAL FAIRNESS.”

{¶ 10} Zydowicz argues that Addesso should not have been permitted to identify and obtain an expert report after the trial deposition of Dr. Nickels had already been taken. Zydowicz argues that she was prejudiced because at the time the testimony of Dr. Nickels was taken, she was unaware there would be a contradicting expert.

{¶ 11} Loc.R. 21.1(B) of the Cuyahoga County Common Pleas Court specifically, states:

“A party may not call on a non-party expert witness to testify unless a written report has been procured from the witness and provided to opposing counsel. It is counsel’s responsibility to take reasonable measures, including the procurement of supplemental reports, to insure

that each report adequately sets forth the non-party expert's opinion. However, unless good cause is shown, all supplemental reports must be supplied no later than (30) days prior to trial."

{¶ 12} The Ohio Supreme Court has held that the trial court has considerable discretion in applying Loc.R. 21.1. *Pang v. Minch* (1990), 53 Ohio St.3d 186, 194, 559 N.E.2d 1313. This court may only reverse the trial court's determination on these issues when it has abused its discretion. *Id.*, citing *Paugh and Farmer, Inc. v. Menorah Home for Jewish Aged* (1984), 15 Ohio St.3d 44, 472 N.E.2d 704. "The term 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.

{¶ 13} The primary purpose of Loc.R. 21.1 is to prevent surprise testimony. *Eastman v. Hirsh*, Cuyahoga App. No. 90081, 2008-Ohio-3042, at _32; *Djukic v. Turner*, Cuyahoga App. No. 88849, 2007-Ohio-4433, at ¶13, citing *Jones v. Murphy* (1984), 12 Ohio St.3d 84, 86, 465 N.E.2d 444. The trial court may allow expert testimony to be admitted at trial even when a party has failed to comply with the local rule, so long as the opposing party is not prejudiced by its admission. *Id.* at ¶33. The trial court has the discretion to determine whether a party has been prejudiced by noncompliance with the rule. *Id.*

{¶ 14} A review of the record in this case demonstrates that Zydowicz was not prejudiced by Addesso's failure to comply with the local rule. First, the record indicates that Addesso did not receive all requested medical records by the discovery deadline. Although discovery was to be completed by November 21, 2007, Addesso filed a motion for continuance of the settlement conference on January 9, 2008, informing the trial court that Zydowicz had failed to produce all requested medical records. In the absence of these records, it would have been nearly impossible for Addesso to obtain an expert report by the trial court's deadline of January 21, 2008.

{¶ 15} At the final pretrial held on February 7, 2008, the trial court determined Addesso should be allowed to procure an expert report, even though it was past the deadline established at the case management conference. However, the trial court did sanction Addesso for failing to comply with Loc.R. 21.1 by not allowing Addesso to conduct an independent medical examination. On February 12, 2008, Addesso retained Dr. Smith to review Zydowicz's medical records.

{¶ 16} On February 20, 2008, Zydowicz conducted the trial deposition of her expert. Although Zydowicz was aware from conversations during the final pretrial that Addesso may obtain an expert, she had not been informed that Dr. Smith had been retained. On February 25, 2008, Addesso forwarded her expert report to opposing counsel. On February 26, 2008, Addesso requested a

continuance of the trial in order to depose the newly acquired expert. The trial court granted the request. Ultimately, the trial did not go forward until August 14, 2008.

{¶ 17} Based on this time line, we cannot find that the trial court abused its discretion. Zydowicz conducted the deposition of her expert after discussions at the final pretrial indicating Addesso may be obtaining her own expert. Zydowicz was able to fully question Addesso's expert at the trial deposition. Approximately six months had elapsed between Zydowicz receiving Dr. Smith's report and the case proceeding to trial. Further, if Zydowicz found it necessary, she could have provided supplemental testimony from her own expert. It is within the trial court's discretion to determine what sanctions should be imposed for failure to comply with Loc.R. 21.1. *Pang* at 194. In this case, the trial court determined the appropriate sanction for Addesso's failure to comply with the local rule was the denial of her request to conduct an independent medical examination on Zydowicz.

{¶ 18} Zydowicz received Addesso's expert report on February 25, 2008. The trial did not go forward until August 14, 2008. This provided Zydowicz with nearly six additional months to reschedule Dr. Nickels for a second deposition. If the trial court did not grant such a lengthy continuance, perhaps our conclusion would have been different.

{¶ 19} Zydowicz determined cost to be a prohibitive factor in deposing Dr.

Nickels a second time; however, Zydowicz never filed a motion to shift the cost of the potential second deposition to Addesso. As it is in the trial court's discretion to determine sanctions for failing to comply with Loc.R. 21.1, had Zydowicz filed a motion to order Addesso to pay for Dr. Nickel's second deposition, the trial court may have alleviated the financial burden on Zydowicz.

{¶ 20} Based upon the lengthy trial continuance, we cannot conclude the trial court abused its discretion.

{¶ 21} Appellant's assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

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.

MARY EILEEN KILBANE, PRESIDING JUDGE

MELODY J. STEWART, J., and
LARRY A. JONES, J., CONCUR