[Cite as *Sliwinski v. Village at St. Edward*, 2010-Ohio-3006.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

MARY S. SLIWINSKI	C. A. No. 24967
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
THE VILLAGE AT ST. EDWARD	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellee	CASE No. CV 2006 10 6432

DECISION AND JOURNAL ENTRY

Dated: June 30, 2010

CARR, Judge.

{¶1} Appellant, Mary Sliwinski, as executrix of the estate of her late mother, appeals from a judgment of the Summit County Court of Common Pleas that dismissed her wrongful death and medical malpractice action against appellee, the Village at St. Edward. This Court reverses and remands.

I.

{¶2} During December 2005, Ms. Sliwinski's mother, Alice Sekerak, suffered a stroke and was admitted to the Village at St. Edward ("St. Edward"), a nursing home, for rehabilitation after she was released from the hospital. Shortly after Ms. Sekerak was admitted to St. Edward, she began suffering chronic diarrhea that resulted in dehydration, which ultimately caused her death less than three months later. Ms. Sliwinski filed this action against St. Edward and Dr. Robert Norman, Ms. Sekerak's attending physician, alleging that they had been professionally

negligent in their care and treatment of Ms. Sekerak and that their negligence had caused her death.

{¶3} Shortly after the trial court denied its motion for summary judgment, St. Edward filed a demand that Ms. Sliwinski dismiss her claims against it and a notice of its intention to file a "good faith" motion pursuant to R.C. 2323.42. Through its "good faith" motion and its argument at the hearing, St. Edward maintained that Ms. Sliwinski lacked a good faith basis to continue prosecuting her action against it. Its argument focused on the opinion of Ms. Sliwinski's expert that Ms. Sekerak's death had resulted from dehydration. The dehydration had been caused by diarrhea that was a side effect of the drug Metformin, which had been prescribed by her physician to treat her diabetes. St. Edward maintained that, according to Ms. Sliwinski's own expert, it was the negligence of the doctor that had caused Ms. Sekerak's death. Therefore, St. Edward maintained that Ms. Sliwinski did not have expert testimony to establish that Ms. Sekerak's death had been caused by any negligence on the part of St. Edward.

{¶4} Ms. Sliwinski pointed to additional expert testimony to establish a basis for her position that the negligence of St. Edward had also contributed to her mother's death. The trial court agreed with St. Edward that Ms. Sliwinski did not have expert testimony to establish that Ms. Sekerak's death was proximately caused by the negligence of St. Edward. It concluded that she lacked a good faith basis to continue her action against St. Edward and dismissed her claims and determined that St. Edward was entitled to an award of attorney fees and court costs.

{¶5} In addition to a prior appeal to this Court and other trial court proceedings that are not relevant to this appeal, Ms. Sliwinski eventually dismissed her claims against Dr. Norman without prejudice. The trial court held a hearing and later awarded St. Edward $15,000 in attorney fees and court costs pursuant to R.C. 2323.42.

{¶6} Ms. Sliwinski appeals from the dismissal of her claims against St. Edward, as well as the award of attorney fees and costs. Although she lists four assignments of error in the Statement of Assignments of Error at the beginning of her brief, she does not separately argue those assigned errors. Instead, she argues three "issues" in the body of her brief and those are the arguments to which St. Edward responded. Therefore, for ease of discussion, this Court will construe Ms. Sliwinski's three issues as her assignments of error and will address them out of order.

II.

ASSIGNMENT OF ERROR III

> "THE TRIAL COURT IMPROPERLY DISMISSED ALL COUNTS AGAINST DEFENDANT [ST. EDWARD] PURSUANT TO AN R.C. 2323.42 MOTION: THE TRIAL COURT IGNORED EXPERT TESTIMONY OF PROXIMATE CAUSATION; THE TRIAL COURT IGNORED EVIDENCE AND DID NOT MAKE REQUISITE FINDINGS PURSUANT TO R.C. 2323.42(B), ESPECIALLY THAT DEFENDANT WAS NOT FORTHCOMING WITH DISCOVERY."

{¶7} Ms. Sliwinski's third assignment of error is that the trial court erred by dismissing her claims against St. Edward pursuant to R.C. 2323.42. This Court agrees.

{¶8} R.C. 2323.42 authorizes the trial court to award attorney fees and court costs to a defendant in a civil action based on medical, dental, optometric, or chiropractic claims if the court finds that the plaintiff lacked a "reasonable good faith basis" for continuing to prosecute an action against that defendant. Although R.C. 2323.42 does not explicitly authorize the trial court to dismiss a plaintiff's claims, and Ms. Sliwinski challenged its authority to do so at the hearing on the motion, she has not raised that issue on appeal.

{¶9} Ms. Sliwinski did challenge the trial court's "jurisdiction" to dismiss her claims pursuant to R.C. 2323.42 through a separate, original action in this Court. This Court dismissed

Ms. Sliwinski's petition for a writ of prohibition, concluding that the trial court had subject matter jurisdiction when it dismissed her claims and proceeded to award attorney fees and court costs, and the Ohio Supreme Court affirmed this Court's decision. See *State ex rel. Sliwinski v. Burnham Unruh*, 118 Ohio St.3d 76, 2008-Ohio-1734. Although the Supreme Court's opinion suggests that R.C. 2323.42 authorizes a trial court to dismiss a plaintiff's claim, that was not the actual issue before the Court. See *State ex rel. Sliwinski*, at ¶17-18. The sole issue in Ms. Sliwinski's prohibition action was whether the trial court lacked subject matter jurisdiction over this case, not whether it had properly exercised that jurisdiction by dismissing Ms. Sliwinski's claims pursuant to R.C. 2323.42. See *State ex rel. Scott v. Cleveland*, 112 Ohio St.3d 324, 2006-Ohio-6573, at ¶16; *Pratts v. Hurley*, 102 Ohio St.3d 81, 2004-Ohio-1980, at ¶10-12 (clarifying the distinction between a court's subject matter jurisdiction over a case and its authority to exercise the subject matter jurisdiction conferred upon it).

{¶10} Even if this Court assumes that R.C. 2323.42 authorizes a trial court to dismiss claims against a medical malpractice defendant, the defendant must first establish to the court:

> "that there was *no reasonable good faith basis* upon which the plaintiff asserted the claim in question against the moving defendant or that, at some point during the litigation, the plaintiff lacked a good faith basis for continuing to assert that claim[.]" (Emphasis added). R.C. 2323.42(C).

{¶11} This Court reviews the trial court's interpretation of a statute as a matter of law under a de novo standard of review. *State v. Consilio*, 114 Ohio St.3d 295, 2007-Ohio-4163, at ¶8. St. Edward's motion and the trial court's decision incorrectly focused on whether Ms. Sliwinski could ultimately prevail on her claim that negligence by St. Edward had proximately caused Ms. Sekerak's death. This Court will not review the record to determine whether Ms. Sliwinski had sufficient expert testimony to prevail on her claims against St. Edward because that was not the question before the trial court under R.C. 2323.42. This was not a motion for

summary judgment asserting that Ms. Sliwinski lacked sufficient expert testimony to prevail on her claims; it was a motion under R.C. 2323.42 that alleged a lack of good faith. The sole issue before the trial court was whether Ms. Sliwinski had "no reasonable good faith basis" for continuing to prosecute her medical malpractice claim against St. Edward.

{¶12} R.C. 2323.42 does not define the term "reasonable good faith basis." In construing the meaning of this term, this Court's primary concern is the legislature's intent in enacting R.C. 2323.42. See, e.g., *State ex rel. Russell v. Thornton*, 111 Ohio St.3d 409, 2006-Ohio-5858, at ¶11. "Determining this intent requires us to read words and phrases in context and construe them in accordance with rules of grammar and common usage." Id.

{¶13} The primary definition of "reasonable" in Black's Law Dictionary is "[f]air, proper, or moderate under the circumstances." Black's Law Dictionary (8 Ed.Rev.2004) 1293. "Good faith" is defined to include "[a] state of mind consisting in []honesty in belief or purpose[.]" Id. at 713. A "basis" is "an underlying condition." Id. at 161. Therefore, the ordinary meaning of a "reasonable good faith basis" is an honest belief in an underlying condition that is fair and proper under the circumstances.

{¶14} In a similar setting, courts have looked to whether a plaintiff had a "reasonable good faith basis" for prosecuting a civil action to determine whether sanctions were warranted under Fed.R.Civ.P. 11. See, e.g., *Carney-Dunphy v. Title Co. of Jersey & Chicago Title Ins. Co.* (June 30, 2009), D. N.J. No. 07-3972; *Barrett v. Tallon* (C.A. 10, 1994), 30 F.3d 1296, 1301-1302. These cases emphasized that Fed.R.Civ.P. 11 does not impose sanctions merely because a plaintiff prosecutes a "weak" claim or one that is ultimately unsuccessful. *Carney-Dunphy*. Instead, the rule was intended to discourage the filing of "frivolous, unsupported, or unreasonable claims." Id. A claim is based on a reasonable good faith basis if the plaintiff

reasonably believes that it is well grounded in law and fact. Id.; *Barrett v. Tallon*, at 1301. It is reasonable to conclude that R.C. 2323.42 was likewise intended to discourage plaintiffs from prosecuting medical malpractice claims that are not reasonably based on law and fact, or are essentially groundless, not every claim that may be difficult to prove or may not ultimately prevail.

{¶15} A review of the evidence presented to the trial court on this issue reveals that Ms. Sliwinski filed this action against St. Edward and continued to prosecute it because she had an honest belief, based on the medical records and the opinion of her medical and nursing experts, that St. Edward had been negligent in its care of Ms. Sekerak and that its negligence had contributed to her death.

{¶16} Ms. Sliwinski's medical expert was Dr. Richard Huntley. At the time of his deposition in July 2007, Dr. Huntley had been practicing medicine for 20 years and was board-certified in internal medicine in Connecticut. At that time, Dr. Huntley sat on the board of one nursing home and was the medical director of another. The majority of his medical practice was devoted to treating private patients, approximately 50 of whom were nursing home patients at the time of his deposition.

{¶17} Dr. Huntley opined that Ms. Sekerak's death had been caused by dehydration due to prolonged diarrhea. In his opinion, the diarrhea had been caused by Ms. Sekerak's continued use of the drug Metformin, which had been prescribed to treat her diabetes, as well as a diuretic that had been prescribed to treat her high blood pressure. Dr. Huntley further opined that her death had resulted "from abysmal medical care on the part of the nursing home and the doctor" and that her death was "completely preventable."

{¶18} St. Edward had supported its motion by pointing to evidence that Ms. Sekerak's physician had prescribed the medications and the nursing home staff had no authority to discontinue administering a patient's medications without a physician's order. As Dr. Huntley explained, however, Ms. Sekerak's death could have been prevented in several ways: by discontinuing the medications that were causing her diarrhea, by treating the diarrhea, and/or by treating the resulting dehydration that actually caused her death.

{¶19} Dr. Huntley testified that there were "many lost opportunities" in which the nursing home staff could have intervened to prevent Ms. Sekerak's death, primarily by better communicating to her doctor the obvious symptoms of her ongoing diarrhea and her increasing problem with dehydration. To begin with, Dr. Huntley opined that the nursing home staff had failed in its obligation to record Ms. Sekerak's daily bowel movements. Therefore, they had failed to communicate to her doctor that she began suffering from diarrhea shortly after her admission in December 2005 and that the diarrhea continued for over two months. Diarrhea is a known side effect of the drug Metformin, but the nurses' inadequate documentation did not communicate the problem to her doctor. Dr. Huntley emphasized that, according to Ms. Sekerak's medical records, even if the nursing home staff had informed her doctor that she had numerous instances of diarrhea, they had not fully informed him about the extent of her diarrhea or its consequence, which was severe dehydration.

{¶20} Dr. Huntley pointed to numerous symptoms of Ms. Sekerak's dehydration, which should have been obvious to the nursing home staff, that the nurses failed to adequately monitor, document, and/or otherwise bring to the attention of her treating physician: (1) her weight declined by more than ten pounds during her two-month stay, despite the fact that she was eating every day, yet she was not weighed on a daily or weekly basis to closely monitor the weight loss;

(2) her blood pressure, which was being treated with medication due to its once-elevated level, was not monitored regularly despite the fact that it appeared to have been declining during her stay and was so low on February 23 that she collapsed; and (3) there was a notation more than one month before her death that she had poor skin turgor, an obvious sign that she was already suffering from dehydration, but the records do not indicate that her skin turgor was ever assessed again after that.

{¶21} Given all of Ms. Sekerak's symptoms of dehydration, both Dr. Huntley and Mary Taylor, a registered nurse and licensed nursing home administrator, opined that it is standard practice for a nursing home staff to carefully monitor and document all of the potential symptoms of dehydration, as well as the patient's daily fluid intake and loss, so that the patient's condition would be communicated to the treating physician. Despite all of the symptoms of dehydration that Ms. Sekerak exhibited, the staff at St. Edward did not monitor and record her symptoms or her fluid intake and loss. Both Dr. Huntley and Ms. Taylor opined that the staff at St. Edward failed to sufficiently monitor and document Ms. Sekerak's dehydration symptoms and, therefore, had inadequately communicated her worsening condition to her doctor.

{¶22} Dr. Huntley opined that Ms. Sekerak's death could have been prevented by various acts of intervention as late as a few days before her death by discontinuing the Metformin, by treating her diarrhea, and/or by rehydrating her either by intravenous fluids or by increasing the fluids that she was taking by mouth. Dr. Huntley opined that Ms. Sekerak had not received adequate fluids while she was a patient at St. Edward. Records revealed that she had been eating, yet still losing weight, and had asked for additional fluids, apparently attempting to rehydrate herself. Ms. Taylor testified that the nursing home staff could have increased Ms. Sekerak's oral fluid intake without an order from the doctor.

{¶23} The evidence before the trial court demonstrated that Ms. Sliwinski's professional negligence claims against St. Edward were reasonably based on law and fact. Therefore, St. Edward failed to establish that she had no reasonable good faith basis for continuing to prosecute her claims against it. The trial court erred in dismissing Ms. Sliwinski's claims against St. Edward pursuant to R.C. 2323.42 and in awarding court costs and attorney fees. The third assignment of error is sustained.

ASSIGNMENT OF ERROR I

> "IN A SUIT FOR WRONGFUL DEATH AND MALPRACTICE BROUGHT PURSUANT TO R.C. 3721.17, IT IS ERROR FOR A TRIAL COURT TO STATUTORILY EXCLUDE FROM EVIDENCE THE RESULTS OF AN OHIO DEPARTMENT OF HEALTH INVESTIGATION RESULTING FROM A COMPLAINT AGAINST A NURSING HOME.

{¶24} Ms. Sliwinski's first assignment of error is that the trial court erred in excluding from evidence the results of an Ohio Department of Health investigation of St. Edward. In fact, the order to which she refers was a discovery order in which the trial court denied a motion to compel answers to deposition questions. Any ruling on the admissibility of this evidence will not take place, if at all, until trial. Consequently, the first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "IT IS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO ORDER THE PRIOR PROVISION AND DEPOSITION OF PLAINTIFF EXPERTS AS A CONDITION OF THE DEPOSITION OF THE DEFENDANT[S'] EXPERTS[.]"

{¶25} Ms. Sliwinski's second assignment of error is that the trial court erred in ordering that her expert be deposed before the defendants' experts. As the depositions of the experts have already taken place and Ms. Sliwinski has failed to demonstrate that there is any relief that this Court could grant her, this issue is moot. The second assignment of error is overruled.

III.

{¶26} Ms. Sliwinski's third assignment of error is sustained. Her first and second assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is reversed and the cause is remanded for proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

DONNA J. CARR
FOR THE COURT

DICKINSON, P. J.
CONCURS

BELFANCE, J.
CONCURS IN PART, AND DISSENTS IN PART, SAYING:

{¶27} Although I agree with the majority's disposition of Ms. Sliwinski's second and third assignments of error, I would reach the merits of her challenge to the trial court's denial of her motion to compel discovery.

{¶28} During discovery, Ms. Sliwinski deposed several St. Edward nurses who were involved in caring for her mother, Ms. Sekerak. During her counsel's examination of several of St. Edward's nurses, he asked questions that related to an Ohio Department of Health investigation of St. Edward that was conducted shortly before Ms. Sekerak's death and had been prompted by a complaint about the quality of care that she was receiving. Counsel for St. Edward repeatedly objected to the questions and instructed the witnesses not to answer them. Therefore, Ms. Sliwinski was unable to elicit from these witnesses any information pertaining to the complaint investigation, including statements that these witnesses made to the health department investigators about St. Edward's treatment of Ms. Sekerak.

{¶29} Ms. Sliwinski filed a motion with the trial court to compel these witnesses to answer questions about the health department complaint investigation. St. Edward responded in opposition, maintaining that the health department investigation report was not admissible evidence. St. Edward pointed to R.C. 3721.02(E). R.C. 3721.02, which was originally enacted to provide for state inspection and licensing of nursing homes and other facilities, was amended in November 2002 to add section (E), which provides that "the results of an inspection or investigation of a home ***, including any statement of deficiencies and all findings and deficiencies cited in the statement on the basis of the inspection or investigation, shall be used solely to determine the home's compliance with this chapter" and are not admissible in any court

proceedings except actions instituted by government departments or agencies or an administrative appeal by the health department.

{¶30} The trial court concluded that the health department investigation report was inadmissible in this case under R.C. 3721.02(E) and, solely on that basis, denied Ms. Sliwinski's motion to compel the discovery. Ms. Sliwinski's argument is two-fold: (1) the trial court erred in ruling that the report was inadmissible and (2) it erred in denying her motion to compel witnesses to answer deposition questions about the report.

{¶31} Although it is not entirely clear whether a health department investigation conducted in response to a complaint that a patient is receiving substandard care falls within the purview of R.C. 3721.02, which pertains to routine licensing inspections of nursing homes, the issue of report's admissibility at trial is not ripe for appellate review. At this juncture, the trial court has merely made a preliminary ruling that the investigation report is inadmissible. The trial court and the parties will have the opportunity to revisit this evidentiary issue if and when it is fully developed within the context of trial. See *State v. White* (1982), 6 Ohio App.3d 1, 4.

{¶32} The other issue raised through Ms. Sliwinski's first assignment of error, whether the trial court erred in denying her motion to compel discovery, is properly before us in this appeal. Based on its conclusion that the health department investigation report was inadmissible, the trial court refused to allow Ms. Sliwinski to depose St. Edward's employees about any information pertaining to the investigation. Ms. Sliwinski's right to discovery of information pertaining to the investigation, however, does not hinge on the ultimate admissibility of the investigation report.

{¶33} "Ohio policy favors the fullest opportunity to complete discovery." *Stegawski v. Cleveland Anesthesia Group, Inc*. (1987), 37 Ohio App.3d 78, 85. Civ.R. 26(B)(1) provides, in relevant part:

> "Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action ***. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. "

There is no legal authority for treating information related to an investigation conducted pursuant to R.C. Chapter 3721 any differently from other information sought pursuant to Civ.R. 26. During questioning of several witnesses who were directly involved in the treatment of Ms. Sekerak, counsel asked about their involvement in the health department investigation and/or statements that they made during the investigation. Counsel for St. Edward instructed the witnesses not to answer any questions about the investigation. Even if the investigation report is not admissible, there is no legal authority to suggest that statements made by St. Edward staff about the nursing home's treatment of Ms. Sekerak would be inadmissible in this case simply because the statements were made during a health department investigation. Because Ms. Sliwinski's questioning of St. Edward's employees about the health department investigation was reasonably calculated to lead to the discovery of admissible evidence, the trial court erred in denying her motion to compel.

{¶34} For these reasons, I would sustain Ms. Sliwinski's first assignment of error to the extent that it challenges the trial court's denial of her motion to compel discovery. Thus, even assuming the report was inadmissible, Ms. Sliwinski was entitled to seek information that was reasonably calculated to lead to the discovery of admissible evidence. Ms. Sliwinski's motion to compel discovery, although it focused on the admissibility of the investigation report, also

demonstrated that her questioning of St. Edward's employees about the health department investigation was reasonably designed to lead to the discovery of admissible evidence.

APPEARANCES:

JOHN WOOD, Attorney at Law, for Appellant.

STEVEN J. HUPP, and BRET C. PERRY, Attorneys at Law, for Appellee.