

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Sharon Yurkowski, Admr., et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 13AP-1049 (Ct. Cl. No. 2007-04311)
University of Cincinnati,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on April 21, 2015

Allen Law Firm, LLC, and Mitchell W. Allen, for appellants.

Mike DeWine, Attorney General, and Anne Berry Strait, for appellee.

APPEAL from the Court of Claims of Ohio

DORRIAN, J.

{¶ 1} Plaintiffs-appellants, Sharon Yurkowski, individually and as administratrix of the estate of Peter J. Yurkowski, in addition to Daniel P. Yurkowski and Cara F. Yurkowski, children of Peter and Sharon Yurkowski (collectively, "appellants"), appeal the November 15, 2013 judgment of the Court of Claims of Ohio in favor of defendant-appellee, University of Cincinnati ("appellee"). For the reasons that follow, we reverse the judgment of the trial court.

I. Facts and Procedural History

{¶ 2} This matter arises from the November 15, 2013 judgment of the Court of Claims of Ohio, which was issued upon remand from our decision in *Yurkowski v. Univ. of Cincinnati*, 10th Dist. No. 11AP-974, 2013-Ohio-242 ("*Yurkowski I*"). As we thoroughly discussed the factual and procedural history of this matter in our prior decision, we adopt such discussion here. See *Yurkowski I* at ¶ 2-14.

{¶ 3} On remand, the case was assigned to a different judge from the one who conducted the trial and entered the judgment that we reviewed in *Yurkowski I*. On June 3, 2013, the trial court filed an entry stating that "the sole issue to be determined by the court on remand is 'whether Dr. Curell's decision to release Peter from [University Hospital] on March 22, 2005 fell below the applicable standard of care,' " and requiring that the parties file a summary of the evidence regarding the issue on remand. (June 6, 2013 Entry, 8, quoting *Yurkowski I* at ¶ 31.) After reviewing the parties' arguments, the trial court, on August 26, 2013, determined that it was unnecessary to hold a new trial or evidentiary hearing to comply with this court's decision. On November 15, 2013, the trial court issued a decision and judgment entry in favor of appellee, finding that appellants failed to prove by a preponderance of the evidence that appellee's actions fell below the standard of care and failed to prove that any alleged failure was the proximate cause of Peter's death.

II. Assignments of Error

{¶ 4} Appellants appeal, assigning the following two errors for our review:

[I.] The Trial Court's finding that Dr. Curell's decision to discharge Peter Yurkowski on March 22, 2005 did not fall below the standard of care is against the manifest weight of the evidence.

[II.] The Trial Court's finding that Dr. Curell's psychopharmacological treatment plan met the standard of care was against the manifest weight of the evidence.

For ease of discussion, we first address appellants' second assignment of error.

III. Second Assignment of Error—Treatment Plan

{¶ 5} In their second assignment of error, appellants assert that the trial court's finding that Dr. James Curell's psychopharmacological treatment plan met the standard of care was against the manifest weight of the evidence. Appellee responds that we previously determined appellants' contentions in our prior decision and, as a result, the law of the case doctrine precludes further review. The trial court in its November 15, 2013 judgment entry stated that "plaintiff has not persuaded the court that Dr. Curell failed to develop the necessary psychopharmacology plan and failed to properly monitor the dispensation of Peter's psychiatric medications after his discharge."

{¶ 6} "The law of the case doctrine provides that 'the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.' " *State v. Harding*, 10th Dist. No. 10AP-370, 2011-Ohio-557, ¶ 16, quoting *Nolan v. Nolan*, 11 Ohio St.3d 1, 3 (1984). *See also Meyer v. Chieffo*, 193 Ohio App.3d 51, 2011-Ohio-1670, ¶ 27 (10th Dist.). "The law of the case doctrine is rooted in principles of res judicata and issue preclusion." *Harding* at ¶ 16, citing *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, ¶ 35.

{¶ 7} In our prior decision, we reviewed appellants' assertion that the trial court's judgment in favor of appellee was against the manifest weight of the evidence. *Yurkowski I* at ¶ 41-58. In our discussion, we reviewed testimony from appellants' expert witness, Dr. Robert Granacher, who opined that "Dr. Curell breached the applicable standard of care in nine separate ways," including multiple critiques related to the psychopharmacological treatment plan prescribed for Peter. *Id.* at ¶ 42. We also reviewed testimony from appellee's expert witness, Dr. Mark Schechter, who "opined that Dr. Curell's psychopharmacologic treatment plan met the standard of care, as he treated Peter's depression and anxiety with appropriate mood stabilizers, anti-depressants and electroconvulsive therapy, and made appropriate medication changes where necessary." *Id.* at ¶ 54. After evaluating the entirety of the record, we concluded that "there was competent, credible evidence which, if believed, would support the trial court's finding that Dr. Curell did not breach the accepted standard of care in his treatment of Peter," and, therefore, the trial court's finding regarding the psychopharmacological plan was not against the manifest weight of the evidence. *Id.* at ¶ 58.

{¶ 8} While appellants are correct that the trial court on remand found that Dr. Curell did not breach the standard of care with regard to the psychopharmacological plan used in Peter's treatment, such findings were outside the scope of our prior remand order. *See Yurkowski I* at ¶ 31, 58; *Day v. Day*, 10th Dist. No. 90AP-745 (May 14, 1991) (Upon partial remand, "[t]he lower court was obligated to accept all other issues previously adjudicated as finally determined."). Nevertheless, since the trial court on remand came to the same conclusion as was previously affirmed by this court in *Yurkowski I*, any error arising from the trial court's redetermination of the issue was harmless. *See Hocker v. Hocker*, 188 Ohio App.3d 755, 2010-Ohio-2835, ¶ 42 (2d Dist.).

{¶ 9} Because, in *Yurkowski I*, we resolved appellants' argument that it was against the manifest weight of the evidence for the trial court to find that Dr. Curell did not breach the standard of care in his treatment of Peter, the law of the case doctrine precludes our review of such issue in the present matter. *Harding* at ¶ 16. Accordingly, we overrule appellants' second assignment of error.

IV. First Assignment of Error—Decision to Discharge

{¶ 10} In their first assignment of error, appellants assert that the trial court erred by finding that they failed to prove breach of the standard of care with regard to Dr. Curell's decision to discharge Peter from University Hospital on March 22, 2005. In the context of suggesting the standard of review to be applied to this case, appellants contend that the trial court's findings with regard to the credibility of the witnesses are not entitled to a presumption of correctness because, on remand, the successor judge entered judgment without having personally observed the witnesses' testimonies, relying only on the transcript of the proceedings before the predecessor judge who conducted the trial. Therefore, appellants argue that this court should apply a *de novo* standard of review. Appellants ask that this court enter judgment in their favor on liability or, in the alternative, remand the case back to the trial court for re-trial. Appellee argues, however, that we should determine whether the trial court's decision is supported by competent, credible evidence.

{¶ 11} The discussion regarding standard of review prompts consideration of the threshold matter of whether a successor judge, on remand, can decide questions involving credibility of witnesses merely by considering the transcript and record of the original trial, where the parties did not stipulate to the trial court proceedings in this manner. Preliminarily, we note that appellee disagrees that the question on remand involved credibility. Appellee argues that: (1) the predecessor judge made a finding with regard to witness credibility which was undisturbed in *Yurkowski I*, and such determination is the law of the case; (2) the question on remand was a matter of law, simply to apply the proper legal standard to the evidence already taken; and (3) credibility of the dueling experts is clear from the transcript. Appellants state, however, as to the remand issue: (1) although much of the same evidence would have been presented, conceding that the substance of the experts' opinions would not have changed, it may have been presented

differently; (2) some additional evidence might have been presented; and (3) the standard of review frames how the trier of fact determines credibility.

{¶ 12} Before proceeding further with this discussion, we determine whether appellants waived consideration of this issue. At the trial level, upon remand, the successor judge asked the parties to file a summary of the evidence regarding the issue on remand. (June 6, 2013 entry.) In response, appellants filed a "Summary of Evidence and Advice on Trial Time" indicating that it was their understanding that both parties were going to provide the court with a "joint statement of facts that would not need to be re-litigated and try to focus the matter of re-trial on those items that did require litigation." (Summary, 1.) Appellants also estimated the amount of time necessary to allocate to retrial and indicated that the case could "be re-tried significantly more quickly than the original trial" because "[b]oth sides have transcripts of the original trial which should allow them to focus the questioning and greatly reduce the time for direct and cross examination." (Summary, 3-4.) On August 26, 2013, the trial court issued an entry indicating that it had determined that it was unnecessary to hold a new trial or evidentiary hearing to comply with this court's instructions from *Yurkowski I*. Although appellants did not file a subsequent objection to the August 26, 2013 entry, it is clear from appellants' "Summary of Evidence and Advice on Trial Time" that they believed a new trial was necessary as to the issue on remand. Therefore, we cannot conclude that appellants waived the issue of whether or not a new hearing was necessary to determine the issue on remand. *Compare Concord Twp. Bd. of Trustees v. Painesville*, 158 Ohio App.3d 719, 2004-Ohio-5461, ¶ 17-18 (11th Dist.) (no error for successor judge to enter judgment on remand without a hearing where "[w]itness credibility was not a central issue" and parties did not file a motion requesting a new trial, the pleadings were devoid of a request for an additional hearing or new trial, and the parties did not file an objection).

{¶ 13} At the appellate level, appellants did not directly allege error for failure to hold a new trial. Rather, as noted above, they argued this point in the context of advocating a de novo standard of review. Appellants also addressed the point during oral argument. In its brief, appellee also did not argue the point directly but responded to appellants' brief by arguing that "[i]n performing this review of the record, Judge

McGrath was in essentially the same position as an appellate court; he deferred to Judge Travis's findings as to the credibility of the witnesses and the weight of their testimony. The finding by Judge Travis that plaintiffs' expert was not credible still stands." (Appellee's brief, 7.) At oral argument, appellee argued that the successor judge correctly "deferred" to the predecessor judge. Both parties agree that the issue of whether or not to hold a new trial as to the issue on remand is a matter of trial court discretion. Taking all this into consideration, although not clearly articulated in their assignment of error, we find appellants did raise the question on appeal.

{¶ 14} Generally, where credibility is a factor, courts have held that it is reversible error for a successor judge in a bench trial, having never observed the testimony of the witnesses, to enter judgment based on a transcript of the proceedings. *See Welsh v. Brown-Graves Lumber Co.*, 58 Ohio App.2d 49 (9th Dist.1978), syllabus ("Where a judge resigns prior to rendering a judgment, the parties cannot stipulate that a successor judge render a judgment on the transcript of the trial proceedings when witness credibility is a factor."); *Arthur Young & Co. v. Kelly*, 68 Ohio App.3d 287, 295 (10th Dist.1990) ("Where credibility is involved, a fair hearing requires the trier of fact to observe the testimony."); *Vergon v. Vergon*, 87 Ohio App.3d 639, 643 (8th Dist.1993) ("successor judge cannot render a judgment on the transcript when witness credibility is a factor"); *State v. Adewusi*, 1st Dist. No. C-070270, 2008-Ohio-2055, ¶ 9-11; *State v. Slagle*, 2d Dist. No. 23934, 2012-Ohio-1575, ¶ 40 ("We conclude that a successor judge in a bench trial, absent the consent of the parties, may not render a verdict in a bench trial based solely upon a review of an audiovisual recording of the trial."). *See also Kvinta v. Kvinta*, 10th Dist. No. 99AP-508 (Feb. 22, 2000) (no error where "[c]redibility was not an issue"); *Concord* at ¶ 17; *Stychno v. Stychno*, 11th Dist. No. 97-T-0003 (Aug. 14, 1998) (no abuse of discretion in failing to hold a new hearing where no "crucial issues of credibility"); *Myers v. Wild Wilderness Raceway, L.L.C.*, 181 Ohio App.3d 221, 2009-Ohio-874, ¶ 33 (4th Dist.) (no error where "none of the modifications that the successor judge made to the * * * judgment dealt with matters that depended on assessing the weight and credibility of testimony"). *But see Adkins v. Adkins*, 43 Ohio App.3d 95, 100 (4th Dist.1988) ("While it is always desirable to have the factfinder personally observe the witnesses whose

credibility he or she is called upon to determine, considerations of judicial economy may weigh against the additional delay and expense represented by a new trial.").

{¶ 15} Here, credibility was a central factor in the trial court's determination of the issue on remand: whether appellants established that the decision to discharge Peter was a breach of the appropriate standard of care. We have previously stated that, in a medical malpractice case, " 'whether the defendant has employed the requisite care must be determined from the testimony of experts' " and, therefore, "it is 'within the province of the trier of fact to weigh the medical testimony and to resolve the conflicting opinions.' " *Lips v. Univ. of Cincinnati College of Medicine*, 10th Dist. No. 12AP-374, 2013-Ohio-1205, ¶ 51, quoting *Gordon v. Ohio State Univ.*, 10th Dist. No. 10AP-1058, 2011-Ohio-5057, ¶ 77. Therefore, a determination of credibility is implicit within the analysis of whether a defendant has breached the standard of care in a medical malpractice case since it is the duty of the trier of fact to resolve conflicting medical testimony from expert witnesses.

{¶ 16} While appellee is correct that the predecessor judge made a general finding as to the experts' credibility, we cannot agree that the successor judge merely deferred to the credibility determination of the predecessor judge for two reasons. First, the successor judge expressly found the written testimony of appellee's expert to be more credible than the testimony of appellants' expert. After reciting a detailed summary of the experts' testimonies, the successor judge in the November 15, 2013 decision of the trial court stated, "Based on the foregoing, the court concludes that plaintiff has failed to prove by a preponderance of the evidence that Dr. Curell's actions or inactions fell below the standard of care. The court finds the testimony of Dr. Schecter to be more persuasive and more credible than [sic] that of Dr. Granacher." (Decision at 7.) At no point in its decision did the trial court indicate that its credibility determinations were derived in any way from any prior decision of the trial court. Based upon the foregoing, it is apparent that the trial court independently determined the credibility of the experts based upon the record of their testimonies without deference to the prior findings of the trial court.

{¶ 17} Second, the predecessor judge, in the October 6, 2011 judgment entry of the trial court, made a general finding as to the experts' credibility but did not make a credibility determination regarding the specific issue of whether the decision to discharge Peter was a breach of the standard of care. Because the trial court applied the incorrect

standard of care in evaluating the testimony, it was necessary for the trial court on remand to independently weigh the expert testimony and resolve the conflicting opinions in applying the correct standard. *See Murray* at 113 ("Upon remand from an appellate court, the lower court is required to proceed from the point at which the error occurred."); *Armstrong v. Marathon Oil Co.*, 32 Ohio St.3d 397, 418 (1987), quoting 5 Ohio Jurisprudence 3d (1978) 426, Appellate Review, Section 717 ("It is basic law that an 'action of the Court of Appeals in reversing the cause and remanding the case to the [lower court] for further proceedings has the effect of reinstating the cause to the [lower court] *in statu quo ante*. The cause is reinstated on the docket of the court below in precisely the same condition that obtained before the action that resulted in the appeal and reversal.' "); *Brothers v. Morrone-O'Keefe Dev. Co.*, 10th Dist. No. 05AP-161, 2006-Ohio-1160, ¶ 20-23 (where trial court applied incorrect standard in determining liability, reviewing court must reverse and remand to the trial court to determine weight of the evidence in light of the correct standard). In reviewing the testimony of a witness, the trier of fact may find credible one portion of the witness's testimony while rejecting some or all of the remainder of the testimony. *See State v. Antill*, 176 Ohio St. 61, 67 (1964) (trier of fact "may believe or disbelieve any witness or accept part of what a witness says and reject the rest"); *State v. Shamblin*, 10th Dist. No. 06AP-249, 2006-Ohio-6001, ¶ 22 ("The trier of fact is free to believe or disbelieve all or any of the testimony."); *State v. Jackson*, 10th Dist. No. 11AP-619, 2012-Ohio-2985, ¶ 20; *State v. Wilcox*, 160 Ohio App.3d 468, 2005-Ohio-1745, ¶ 10 (8th Dist.). Therefore, the successor judge was not bound by the general credibility determination of the predecessor judge but was free to accept all or part of the experts' testimonies in light of the correct standard in determining the specific issue on remand.

{¶ 18} Therefore, because the successor judge's findings of fact and conclusions of law as to the question on remand depended on a determination of the credibility of the witnesses, we find that the trial court erred by entering judgment based upon a review of the transcript of expert testimony from the prior trial where the parties did not stipulate to the same. Accordingly, we refrain at this time from considering the merits. Thus, we sustain appellants' first assignment of error. On remand, the trial court must conduct an evidentiary hearing limited only to the determination of the issue of our previous remand:

"[W]hether Dr. Curell's decision to release Peter from UH on March 22, 2005 fell below the applicable standard of care." *Yurkowski I* at ¶ 31.

V. Disposition

{¶ 19} Having overruled appellants' second assignment of error and sustained appellants' first assignment of error, we reverse the judgment of the Court of Claims of Ohio and remand this cause for further proceedings in accordance with law and consistent with this decision.

Judgment reversed; cause remanded.

LUPER SCHUSTER, J., concurs.
KLATT, J., dissents.

KLATT, J., dissenting.

{¶ 20} I would affirm the trial court's judgment in all respects because: (1) appellants never requested or moved for an evidentiary hearing on remand; (2) appellants did not object to the trial court's decision to decide the issue on remand solely on the existing record; (3) appellants did not assign as error the trial court's failure to hold an evidentiary hearing; and (4) appellants do not even argue in their appellate brief that the trial court's failure to hold an evidentiary hearing is a ground for reversal. Therefore, I respectfully dissent.

{¶ 21} This court previously remanded this case to the trial court to decide whether the appellee fell below the standard of care when it discharged appellants' decedent from its psychiatric facility. The judge that heard and decided the original case was no longer with the court. Therefore, a successor judge inherited the case on remand. With the agreement of the parties, the successor judge requested that the parties file a summary of the evidence relating to the issue on remand. (June 6 and August 26, 2013 entries.) This request by the successor judge indicates that he did not necessarily contemplate the need for another evidentiary hearing or additional evidence. In response to the successor judge's request, the appellee filed a pleading entitled "Defendant's Summary of Evidence on Remand that the Discharge Decision was within the Standard of Care." Appellee expressly stated that "there is no need for additional testimony or evidence." The appellants filed what is entitled "Summary of Evidence and Advice on Trial Time." That pleading simply assumes appellants will have the opportunity to present additional

evidence. However, appellants did not request an evidentiary hearing in this pleading. Nor did appellants file any other motion or pleading requesting an evidentiary hearing or the opportunity to submit additional evidence.

{¶ 22} After receiving each parties' summary of evidence, the trial court issued an entry stating it was unnecessary to hold a new trial or evidentiary hearing to comply with this court's remand order. The trial court reached this conclusion because both parties previously submitted expert testimony that addressed the issue the trial court needed to decide on remand, including testimony that evaluated appellee's conduct under the standard of care analysis required by this court in its remand order. Appellants did not: (1) object to this entry; (2) request or move for an evidentiary hearing; or (3) ask for reconsideration of the judge's entry based upon the need to present additional evidence. Given the absence of a motion or specific request for an evidentiary hearing, coupled with the absence of any objection to the procedure employed by the successor judge, I believe appellants waived the argument that the successor judge erred when he failed to hold another hearing. Therefore, I disagree with the majority's decision to reverse and remand the trial court's judgment based upon that alleged error.

{¶ 23} I also note that appellants do not assign as error the successor judge's failure to conduct another evidentiary hearing before entering judgment. Appellants' two assignments of error only contend that the trial court's judgment is against the manifest weight of the evidence. Appellate courts decide assignments of error, not arguments or issues contained in a brief. App.R. 12(A)(1)(b); *In re Estate of Taris*, 10th Dist. No. 04AP-1264, 2005-Ohio-1516, ¶ 5 (this court rules on assignments of error only, and will not address mere arguments). In addition, appellants do not even argue in their appellate brief that the trial court erred by deciding the issue on remand based solely on the existing record. Rather, appellants raise this issue solely in the context of arguing that the successor judge's factual findings should receive no presumption of correctness, thereby suggesting that we should review the trial court's judgment de novo. Therefore, the majority decision reverses the trial court's judgment on a ground not assigned as error or even argued by the appellants.

{¶ 24} For these reasons, I respectfully dissent.
