

[Cite as *Porrello v. UHHS Richmond Hts. Hosp.*, 2005-Ohio-2454.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 84955

ROBERT PORRELLO,	:	ACCELERATED
	:	
Plaintiff-Appellant	:	
	:	JOURNAL ENTRY
vs.	:	and
	:	OPINION
UHHS RICHMOND HEIGHTS	:	
HOSPITAL, ET AL.,	:	
	:	
Defendant-Appellee	:	

DATE OF ANNOUNCEMENT
OF DECISION : MAY 19, 2005

CHARACTER OF PROCEEDING : Civil appeal from
Common Pleas Court
Case No. 498361

JUDGMENT : AFFIRMED.

DATE OF JOURNALIZATION :

APPEARANCES:

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For defendant-appellee: Susan M. Reinker, Esq.
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MICHAEL J. CORRIGAN, J.:

{¶ 1} This case came to be heard upon the accelerated calendar pursuant to App.R. 11.1 and Loc.R. 11.1, the record from the Cuyahoga County Court of Common Pleas, the briefs and oral arguments of counsel. Plaintiff Robert Porrello brought suit against defendant Thomas Warren, D.O., alleging that Warren failed to diagnose and treat a heart condition. Porrello had been admitted to a hospital emergency room with chest pains after eating a heavy meal and Warren, a gastroenterologist on call, was consulted by telephone. The cardiac tests administered at the emergency room did not indicate a heart problem, and the emergency room physician assured Warren over the telephone that he did not believe that Porrello's complaints were cardiac-related. Treatment for gastrointestinal problems only partially alleviated Porrello's pain. Four hours later, when Porrello's condition persisted, Warren went to the hospital and consulted a cardiologist. They had Porrello transferred to another institution for a catheterization. Porrello was later found to have been suffering a heart attack and sustained permanent damage to his heart.

{¶ 2} The court granted Warren's motion for summary judgment on grounds that Porrello did not submit evidence to establish that Warren's care fell below the recognized standard. That judgment was correct.

{¶ 3} Porrello based his claim on Warren's failure to diagnose his heart condition with information that he received over the

telephone from emergency room personnel. Porrello's expert, however, conceded that he did not know the substance of the telephone conversations that Warren had with the emergency room personnel. He agreed that whether or not Warren's care was appropriate would depend on what questions were asked and what information had been relayed.

{¶ 4} Evid.R. 703 states:

{¶ 5} "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by him or admitted in evidence at the hearing."

{¶ 6} The expert did not testify at trial (the court played his video taped deposition), so he could not rely on any facts admitted into evidence at trial. This left as a basis for admitting as expert opinion those facts "perceived" by the expert at the time of his deposition.

{¶ 7} We have held that the "perception" of facts must occur first-hand and not be gleaned from other sources. See, e.g., *State v. Withrow* (Sept. 14, 2000), Cuyahoga App. No. 76343 (expert opinion in sexual abuse case inadmissible when the expert relied on information provided by others and not perceived first-hand); *State v. Jones* (1983), 9 Ohio St.3d 123 (excluding expert opinion when that opinion based upon, among other things, reports made by other doctors).

{¶ 8} Without knowing what Warren said to hospital personnel, the expert could only engage in impermissible speculation on what

was said over the telephone. *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 590. Since the expert had no foundation for his opinion¹, Porrello could not as a matter of law establish actionable negligence. See Civ.R. 56.

Judgment affirmed.

It is ordered that appellee recover of appellant their 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.

MICHAEL J. CORRIGAN
JUDGE

JAMES J. SWEENEY, P.J., CONCURS.

SEAN C. GALLAGHER, J., CONCURS
WITH SEPARATE CONCURRING OPINION.

¹ Porrello appended to his brief video deposition testimony from his expert that was not filed with the trial court and not presented in opposition to the motion for summary judgment. We granted Warren's motion to strike that testimony as being outside the record on appeal. See Motion No. 363468.

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).

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 Plaintiff-Appellant :
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SEAN C. GALLAGHER, J., CONCURRING:

{¶ 9} I concur with the majority's conclusion that summary judgment was proper because of the failure to submit evidence that Dr. Warren's actions fell beneath the standard of care, but write separately to express my differing rationale.

{¶ 10} The record reflects that the emergency room physician consulted Dr. Warren by phone at approximately 2:30 a.m.¹ The subject of their conversation, as reflected by Dr. Kahn's March 26, 2004 testimony, was that Dr. Warren was informed that Porrello's symptoms were not cardiac but were rather atypical. Dr. Kahn stated that although several key pieces of information could have been provided to Dr. Warren depending on what questions he might

¹ I note that although Dr. Warren was consulted by phone twice on the night of Porrello's admittance, the doctors physically present and attending Porrello for his original diagnoses were dismissed from this action.

have asked, he is unsure as to the substance of the conversation, responding only, "If it's not in his deposition, I don't know it, and as I'm leafing through, I don't see that was necessarily asked, so I don't know." (Depo. Pg. 81). He added further:

"I can guarantee you I don't know what was said for sure. The question is does anybody remember that for sure. But at least in the deposition when he was questioned on these issues, it isn't clear what kind of questions were asked and what kind of answers were given."

(Depo. pgs. 81-82.)

{¶ 11} Although the majority cites *State v. Withrow* (Sept. 14, 2000), Cuyahoga App. No. 76343, *Withrow* assigned error in the court's failure to qualify as an expert a psychologist who conceded that her opinion was based on information provided by the victim and her mother, not on facts or data perceived by her or admitted into evidence at the hearing. The majority further asserts that Evid.R. 703 requires that the information used by an expert be admitted into evidence. Evid.R. 703 states, "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by him or admitted in evidence at the hearing." It is clear from certain portions of Dr. Kahn's deposition that he had at least some portion of Dr. Warren's deposition to review before rendering his opinion. The problem faced by this court is that the full transcript of any of the proceedings is completely lacking from the record.

{¶ 12} The failure to file a full transcript of Dr. Kahn's deposition for our review in accord with App.R. 9(B) makes it

impossible for us to review the full, actual opinion. When the transcript or portion thereof necessary for the termination of an assigned error is omitted, a reviewing court must presume the validity of the proceedings below. See *Hartt v. Munobe*, 67 Ohio St.3d 3, 7, 1993-Ohio-177.