

[Cite as *Chinnock v. Renaissance Ctr.*, 2015-Ohio-768.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101442

WILLIAM F. CHINNOCK

PLAINTIFF-APPELLANT

vs.

RENAISSANCE CENTER, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-805105

BEFORE: Celebrezze, A.J., S. Gallagher, J., and E.A. Gallagher, J.

RELEASED AND JOURNALIZED: March 5, 2015

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FRANK D. CELEBREZZE, JR., A.J.:

{¶1} Appellant William F. Chinnock, pro se, brings this appeal challenging the grant of summary judgment terminating his complaint for medical malpractice. He also takes issue with the trial court's decision denying him leave to propound additional interrogatories and denying his motion to stay the case for 24 months. After a thorough review of the record and law, we affirm the trial court's grant of summary judgment.

I. Factual and Procedural History

{¶2} On April 17, 2013, appellant filed a complaint for medical malpractice against Dr. Bill C. Costaras, Renaissance Center for Comprehensive and Cosmetic Dentistry, and Bill C. Costaras, D.D.S., L.L.C. (collectively the "Renaissance" appellees), and Dr. Christopher A. Thompson and Northcoast Endodontic Specialists (collectively the "Northcoast" appellees). Service was perfected, and a litigation schedule was set: "paper discovery" was to be completed by November 10, 2013; depositions were to be completed by January 22, 2014; appellant's expert report was due January 22, 2014; appellees' expert reports were due March 21, 2014; and dispositive motions were due by April 14, 2014.

{¶3} A discovery dispute arose when appellant propounded a second set of interrogatories seeking information from appellees regarding their 18 asserted defenses. On October 29, 2013, after substantial briefing, the trial court denied appellant leave to file additional interrogatories. Appellant requested that the court amend its entry to include "no just reason for delay" language, which was unopposed and granted on December 11, 2013. Appellant then filed an appeal to this court seeking review on January 6, 2014.

{¶4} On February 4, 2014, this court dismissed the appeal for lack of a final, appealable order, and the case was remanded to the trial court. On February 7, 2014, and February 13, 2014, appellees each filed a separate "motion to dismiss and/or motion for summary judgment."

There, they argued that appellant failed to timely offer an expert report. As a result, appellant could not make a prima facie case of medical malpractice. Appellant sought additional time to respond to the motions on March 4, 2014, which the trial court granted. On March 21, 2014, appellees also sought additional time to file expert reports citing appellant's lack of compliance with the court's schedule as a reason.

{¶5} Appellant responded to the motions to dismiss on March 31, 2014, arguing there was no outstanding court schedule for the filing of expert witness reports because the appeal filed in January divested the trial court of jurisdiction and voided the pretrial schedule set by the court.

Appellant also responded by filing a motion to stay proceedings to mitigate damages until completion of a 24-month therapy program recommended by his physician. The Northcoast appellees also filed a supplementary motion for summary judgment on April 17, 2014.

{¶6} On May 1, 2014, the trial court granted appellees' motions to dismiss and/or for summary judgment without indicating which was being granted. It simply stated that the motions were well-taken. The court denied appellant's motions as moot and also denied the Northcoast appellees' supplemental summary judgment motion as moot.

{¶7} Appellant filed the instant appeal raising three errors for review:

- I. The trial court committed reversible error as a matter of law by granting summary judgment against plaintiff for the reason that he failed to file an expert witness report because there was no court order in existence directing him to file an expert report.
- II. The trial court committed reversible error as a matter of law by denying plaintiff's Motion for Discovery of Documents and granting defendant's Motion for a Protective Order based upon their claim of "excessive discovery" in violation of the Ohio mandatory "balancing competing interest" test.
- III. The trial court committed reversible error as a matter of law and an abuse of discretion because uncontroverted evidence verifies that granting plaintiff's

Motion to Mitigate Damages will continue to mitigate damages and avoid avoidable consequences without prejudice to either party.

II. Law and Analysis

A. Dismissal

{¶8} The trial court granted the motions filed by appellees titled “motion to dismiss and/or motion for summary judgment” finding them “well taken.” Appellees did not rely on a specific provision of Civ.R. 12 in their motions to dismiss, and the court did not indicate whether it was disposing of the case by dismissal pursuant to Civ.R. 12 or summary judgment pursuant to Civ.R. 56.

{¶9} In substance, the motions sought dismissal or summary judgment based on a failure to timely file an expert report or, in the alternative, an order precluding appellant from calling any expert witnesses. Because appellees had already filed answers and the pleading stage was closed, this court will assume that appellees’ motions were premised on Civ.R. 12(C) rather than Civ.R. 12(B). This rule provides: “*After the pleadings are closed* but within such times as not to delay the trial, any party may move for judgment on the pleadings.” (Emphasis added.) Civ.R. 12(C). The trial court could not have decided the motions in appellees’ favor based on Civ.R. 12(C) because review of issues in this context are limited to the pleadings and any documentation attached thereto. *Curtis v. Ohio Adult Parole Auth.*, 10th Dist. Franklin No. 04AP-1214, 2006-Ohio-15, ¶ 24. Whether appellant had timely submitted an expert report goes beyond the pleadings and is an inappropriate argument for a motion to dismiss or for judgment on the pleadings. Therefore, the issue raised by appellees was inappropriate for dismissal pursuant to

Civ.R. 12. This leaves summary judgment as the sole means left to the trial court to dispose of the litigation.¹

B. Summary Judgment

{¶10} Summary judgment, according to Civ.R. 56(C), is appropriate only when there is no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and the evidence is such that reasonable minds can come to only one conclusion when viewing the evidence in a light most strongly in favor of the nonmoving party, that conclusion is adverse to that party. *Temple v. Wean United, Inc.*, 50 Ohio St.2d 317, 327, 364 N.E.2d 267 (1977). This court reviews summary judgment de novo, or without deference to the trial court's decision. *Brewer v. Cleveland City Schs.Bd. of Edn.*, 122 Ohio App. 3d 378, 383, 701 N.E.2d 1023 (8th Dist.1997).

{¶11} Appellant argues the trial court erred when it summarily terminated his case based on the faulty reasoning that he failed to comply with a void pretrial schedule. He claims there was no valid schedule set at the time of the grant of summary judgment.

{¶12} “There is a basic due process right that “defense counsel be afforded the reasonable opportunity to prepare his case.” *State v. Sowders*, 4 Ohio St.3d 143, 144, 4 Ohio B. 386, 447 N.E.2d 118 (1983). Nevertheless, the court retains control over the disposition of its trial docket * * *.” *Ingram v. Davis*, 8th Dist. Cuyahoga No. 101087, 2014-Ohio-4387, ¶ 16, quoting *State v. Schwarzman*, 8th Dist. Cuyahoga No. 100337, 2014-Ohio-2393, ¶ 3.

{¶13} The trial court set a pretrial schedule in accordance with Loc.R. 21:

For the purpose of insuring the readiness of cases for pretrial and trial, the following procedure shall be in effect. Within ninety (90) days after suit is filed,

¹ Civ.R. 41(B)(1) provides for dismissal based on a plaintiff's failure to timely litigate the case after it is filed, but the motions did not argue this point and the court did not provide notice as required by the rule.

the case shall be set by the Court for a Case Management Conference to establish case management procedures to prepare the case for an effective final pretrial. At that time the Court will take appropriate action on the service, leaves to plead, time limitations for discovery, scheduling a date for the pretrial hearing and any other steps warranted under the circumstances.

{¶14} At the time appellant filed his notice of appeal on January 6, 2014, only 16 days remained before his expert report was due. The case was stayed while on appeal, and the appellate decision did not change in any way the posture of the case. Appellant certainly exceeded 16 days after the case was reactivated before the court granted summary judgment on May 1, 2014. Further, appellant did not seek leave from the court for an extension of time to file an expert report or for the court to clarify the pretrial schedule in light of the interlocutory appeal.

{¶15} A stay of the case pending appeal does not per se void a discovery schedule. The timely prosecution of a case is in the hands of the plaintiff at this stage of the litigation. C.P.Sup.R. 6(A) “contemplates that the burden is upon the plaintiff to prosecute his case and do all things necessary to make it ready for trial assignment.” *Korodi v. Minot*, 89 Ohio App.3d 90, 93, 623 N.E.2d 627 (10th Dist.1993). If appellant was unsure of the pretrial schedule, the onus was on him to seek clarity. Appellant let almost four months pass after appellees raised the issue without addressing these concerns. Appellant had numerous options including dismissing his case without prejudice, seeking an extension, seeking a status conference, or filing an expert report. Instead, appellant sought a two-year stay for an unrelated reason.

{¶16} Turning to the merits of appellees’ motions, they assert that expert testimony of a breach of the standard of care and causation linking that breach to appellant’s injuries are required in this case. Appellant alleges in his complaint that appellees committed dental malpractice in the performance of a root canal and treatment immediately thereafter, which caused him to suffer a heart attack.

{¶17} Four elements are necessary to prevail on a medical malpractice claim: “(1) the medical professional owed a duty to the patient (2) the medical professional breached this duty; (3) the breach was a proximate cause of the patient’s injuries; and (4) damages.” *Hogrefe v. Mercy St. Vincent Med. Ctr.*, 6th Dist. Lucas No. L-13-1265, 2014-Ohio-2687, citing *Miller v. Defiance Regional Med. Ctr.*, 6th Dist. Lucas No. L-06-1111, 2007-Ohio-7101, ¶ 12. Generally, expert medical testimony is required to establish the standard of care owed by a medical professional and also that a breach of that standard of care proximately caused the damages that resulted. *Click v. Georgopoulos*, 7th Dist. Mahoning No. 08 MA 240, 2009-Ohio-6245, ¶ 20, 28. Exceptions not relevant here exist where such testimony is not required when the breach of the standard of care and resultant damages are obvious and require no specialized knowledge.

{¶18} Here, appellant argued that doctors failed to properly instruct him on the need to have his root canal capped, which resulted in a heart attack. Appellant failed to offer any evidence on the standard of care or how the damages suffered resulted from that breach apart from conclusory statements in his complaint and affidavit of merit filed with it. This is insufficient to escape summary judgment. *McAlpine v. St. Vincent Charity Hosp.*, 8th Dist. Cuyahoga No. 75509, 1999 Ohio App. LEXIS 6077, *6-7 (“Because the plaintiff failed to provide expert medical testimony necessary to establish negligence and the causal link between the claimed negligence and his alleged injuries, there were no genuine issues of material fact as to the allegations of malpractice and/or negligence.”); *Berlocker-Carlo v. Tower*, 8th Dist. Cuyahoga No. 65972, 1994 Ohio App. LEXIS 3331, *6 (July 28, 1994) (“[W]here the plaintiff fails to present competent expert testimony based on reasonable probability that (1) a physician breached the medical standard of care; and (2) this breach constituted the direct and proximate cause of plaintiff’s injury, the grant of summary judgment to defendant physician is proper.”).

C. Discovery Determination

{¶19} Appellant argues in his second assignment of error that the court erred in denying his motion to propound more than 40 interrogatories. He insists that this court address this assigned error even if summary judgment was affirmed.

{¶20} Discovery issues are ordinarily reviewed for an abuse of discretion. *Tracy v. Merrell Dow Pharmaceuticals, Inc.*, 58 Ohio St.3d 147, 151-152, 569 N.E.2d 875 (1991). Further, “courts have broad discretion over discovery matters.” *State ex rel. Citizens for Open, Responsive & Accountable Govt. v. Register*, 116 Ohio St.3d 88, 2007-Ohio-5542, 876 N.E.2d 913, ¶ 18.

{¶21} Civ.R. 33(A) provides, in pertinent part, “[a] party shall not propound more than forty interrogatories to any other party without leave of court.” The rule goes on to set forth requirements a party must fulfill before propounding additional interrogatories: “Upon motion, and for good cause shown, the court may extend the number of interrogatories that a party may serve upon another party.”

{¶22} Here, appellant initially propounded 40 interrogatories. Thereafter, he did not seek leave of court before propounding additional interrogatories. He contemporaneously sought leave and served the additional interrogatories. That is reason enough to deny leave.

{¶23} Also, a party must establish that good cause exists to seek additional interrogatory answers. It is then within the trial court’s discretion to grant leave to serve additional interrogatories. Appellant argued below that he did not expect appellees to raise 18 defenses to his claims, which made additional interrogatories necessary. This argument made below is belied by appellant’s own arguments on appeal.

{¶24} Before this court, appellant raises the new argument that his second set of interrogatories were not, in substance, interrogatories, but requests for documents. In the numerous responses to appellees' motions, appellant always referred to the discovery issue as involving interrogatories. This new argument, raised for the first time on appeal, only serves to demonstrate that appellant had alternative means to obtain the information requested. He could have used requests for documents rather than interrogatories. He also could have obtained answers from the parties through deposition. Appellant's justification for propounding additional interrogatories was insufficient in the eyes of the trial court, and that decision is not an abuse of discretion.

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

D. Stay Pending Rehabilitation

{¶26} Appellant finally argues that the trial court erred when it failed to stay the case pending his completion of a 24-month therapy regime recommended by his doctor. Appellant sought the delay as a motion for the mitigation of his own damages. This fact does not change the analysis of the denial of the motion as a denial of a motion for a 24-month continuance.

{¶27} "It is well-settled law in Ohio that the granting or denial of a continuance of a matter is entrusted to the sound discretion of the trial court." *State v. Unger*, 67 Ohio St.2d 65, 423 N.E.2d 1078 (1981), at the syllabus. This court will not reverse that determination unless there has been an abuse of that discretion. *Id.* at 67. An abuse of discretion is connoted by an arbitrary, unreasonable, or unconscionable decision. *State v. Montgomery*, 61 Ohio St.3d 410, 413, 575 N.E.2d 167 (1991).

{¶28} "Because there is no bright line test for determining when an abuse of discretion occurs in the context of the denial of a motion for continuance, the Supreme Court has adopted a

balancing approach.”” *Snyder v. Waldron*, 4th Dist. Athens No. 12CA9, 2013-Ohio-3416, ¶ 42, quoting *In re Shepherd*, 4th Dist. Highland No. 97CA941, 1998 Ohio App. LEXIS 2194 (May 11, 1998). The *Unger* court set forth the factors that should be balanced when deciding such a motion:

[T]he length of the delay requested; whether other continuances have been requested and received; the inconvenience to litigants, witnesses, opposing counsel and the court; whether the requested delay is for legitimate reasons or whether it is dilatory, purposeful, or contrived; whether the defendant contributed to the circumstance which gives rise to the request for a continuance; and other relevant factors, depending on the unique facts of each case.

(Citations omitted.) *Unger* at 67-68. “This test requires the trial court to weigh any potential prejudice to the [requesting party] against the court’s right to control its docket and the public’s interest in the prompt and efficient dispatch of justice.” *Snyder* at ¶ 42, citing *Unger* at 67.

{¶29} Appellant requested a 24-month continuance to engage in a cardiovascular therapy program. Appellant premised his motion on the mitigation of his damages, which would benefit all parties. He claims the evidence of benefits that would enure to all parties is uncontroverted, and therefore the trial court erred in denying his motion. However, that is only one factor the court may consider.

{¶30} Looking to the other factors, the prejudice to appellant in denying his motion would be certain interruptions to his rehabilitation program and the additional stress of litigation.

That could be a significant detriment. But, as the Ohio Supreme Court has instructed, this must be balanced against the right of the court to control its docket and public interests for prompt and efficient justice.

{¶31} Appellees also have a significant interest in the prompt resolution of the case, and the stress of continued litigation impacts them as well. The length of the requested delay was

substantial. A two-year delay represents a considerable inconvenience to other litigants. There is no evidence that the requested continuance was contrived for purposes of delay. Appellant has also sought additional time to respond to a few pleadings, but there was no history of delay in the proceedings below.

{¶32} One additional factor comes into play here. This was the first filing of appellant's claims against appellees, and he could have sought a voluntary dismissal of his case and refiled it at any time within one year. R.C. 2305.19(A) provides:

In any action that is commenced or attempted to be commenced, if in due time a judgment for the plaintiff is reversed or if the plaintiff fails otherwise than upon the merits, the plaintiff * * * may commence a new action within one year after the date of the reversal of the judgment or the plaintiff's failure otherwise than upon the merits or within the period of the original applicable statute of limitations, whichever occurs later.

{¶33} Examining all these factors, this court cannot say that the trial court abused its discretion in denying a 24-month continuance. Therefore, appellant's third assignment of error is overruled.

III. Conclusion

{¶34} The trial court did not err in granting summary judgment where appellant failed to offer expert testimony in a medical malpractice action. The court also did not err in denying appellant leave to propound additional interrogatories or in denying appellant a 24-month continuance.

{¶35} This cause is affirmed.

It is ordered that appellees recover from appellant 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.

FRANK D. CELEBREZZE, JR., ADMINISTRATIVE JUDGE

SEAN C. GALLAGHER, J., and
EILEEN A. GALLAGHER, J., CONCUR