[Cite as *Miles v. Cleveland Clinic Health Sys. - E. Region*, 2023-Ohio-2582.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

ROBYN D. MILES, ADMINISTRATOR, ET AL.,	:	
	:	
Plaintiffs-Appellants,	:	No. 112025
v.	:	
CLEVELAND CLINIC HEALTH SYSTEM-EAST REGION, ET AL.,	:	
Defendants-Appellees.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: REVERSED AND REMANDED
RELEASED AND JOURNALIZED: July 27, 2023

Civil Appeal from the Cuyahoga County Court of Common Pleas
Case No. CV-19-912724

Appearances:

The Mellino Law Firm, LLC, Christopher M. Mellino, and Calder Mellino; Flowers & Grube, Louis E. Grube, Paul W. Flowers, and Melissa A. Ghrist, *for appellants* Robyn D. Miles, Individually and as Administrator of the Estate of Sydney Mariah Perryman.

Hanna, Campbell & Powell, LLP, Douglas G. Leak, Michael Ockerman, and W. Bradford Longbrake, *for appellees* Nathaniel Pavkov, D.O. and DHSC, LLC d.b.a. Affinity Medical Center and Affinity Medical Center.

Reminger Co., LPA, Erin Siebenhar Hess, Brian D. Sullivan, Jessica O. Hamad, and Brianna M. Prislipsky, *for appellee* Michelle F. Wallen, D.O.

KATHLEEN ANN KEOUGH, P.J.:

{¶ 1} Robyn D. Miles, individually and as administrator of the estate of Sydney Mariah Perryman ("appellants"), appeal from the trial court's judgment entries that (1) denied their motion to substitute their standard-of-care expert, and (2) granted summary judgment in favor of defendants-appellees, Michelle F. Wallen, D.O. ("Wallen"), Nathaniel Pavkov, D.O. ("Pavkov"), and DHSC, LLC d.b.a. Affinity Medical Center, and Affinity Medical Center ("Affinity") (collectively "appellees"). For the reasons that follow, this court reverses the trial court's judgments and remands for further proceedings.

I. Procedural Background

{¶ 2} In 2015, Sydney Perryman passed away at South Pointe Hospital. In 2016, appellants filed a complaint asserting claims for wrongful death, medical negligence, and loss of consortium against the Cleveland Clinic's nursing staff and the emergency department physicians.[1] *See Miles v. Cleveland Clinic Health System-East Region, et al.*, Cuyahoga C.P. No. CV-16-870818. Appellants also asserted claims of vicarious liability against the Cleveland Clinic for the nurses it employed and the doctors it contracted with to staff its emergency department, including Wallen and Pavkov.[2] In November 2018, appellants voluntarily dismissed their complaint without prejudice, but in March 2019, they refiled the instant

[1] Appellants named the Cleveland Clinic Health System-East Region d.b.a. South Pointe Hospital and the Cleveland Clinic Foundation as defendants in the complaint, but they are not parties to this appeal.

[2] Appellants alleged that Affinity employed Pavkov.

complaint against the same defendants asserting the same claims and causes of action against them.

{¶ 3} In November 2019, appellants identified Dr. Gary Harris M.D. ("Dr. Harris") as their only emergency medicine standard-of-care expert and provided appellees with his expert report. During Dr. Harris's March 10, 2021 deposition, he stated that he is "in the full-time practice of emergency medicine, and [has] been for 44 and a half years." (Dr. Harris deposition tr. 54.) He explained, however, that in May or June 2020, he had to take a temporary sabbatical leave from the practice of medicine due to a series of medical issues and the Covid-19 pandemic. He stated that he remained "on staff at a number of places," and he "hopefully [would] be back to work very soon." *Id.* at tr. 56. At the time of his deposition, "the only thing holding [him] back [from returning to work was] the Achilles tendon injury." *Id.* at tr. 59. Dr. Harris stated that he could not "say for sure" when he would return to work but opined that it would "probably [be] a couple months more. I'm making great progress with it." *Id.* At the time of Dr. Harris's deposition, trial was approximately seven months away, scheduled for October 18, 2021.

{¶ 4} On April 30, 2021, Wallen moved for summary judgment, contending that appellants could not support their emergency medical negligence action without any qualified or competent expert testimony as required by Evid.R. 601. Specifically, she contended that Dr. Harris admitted during his deposition that he currently did not devote "at least one-half of his or her professional time to the active clinical practice in his or her field of licensure." Accordingly, Wallen maintained

that she was entitled to judgment as a matter of law because Dr. Harris did not currently meet the active-clinical-practice requirement of Evid.R. 601. Pavkov and Affinity joined in, adopted, and incorporated Wallen's motion for summary judgment.

{¶ 5} Appellants opposed appellees' motion, contending that summary judgment was not proper because a temporary leave in active clinical practice was insufficient to disqualify a witness from providing standard-of-care testimony at trial. In support, appellants cited to the Ohio Supreme Court's decision in *Celmer v. Rodgers*, 114 Ohio St.3d 221, 2007-Ohio-3697, 871 N.E.2d 557, in which the plurality opinion created an exception to Evid.R. 601's active-clinical-practice requirement. In *Celmer*, the plurality stated that the "general rule" is that an expert must meet the requirements of Evid.R. 601[(B)(5)(b)] at the time the expert's testimony is offered at trial, but an exception existed in the case due to the defense's conduct in stalling the proceedings. *Id.* at ¶ 26-27. The plurality recognized that plaintiff's expert satisfied the requirements of Evid.R. 601 at the time the cause of action accrued, at the time of filing suit, during the first three years of litigation, and when trial was originally scheduled to have commenced, but due to the defense's delay tactics, the expert was no longer qualified under Evid.R. 601's present-tense requirement "at the time of trial." *Id.* at ¶ 26. Accordingly, the plurality held that in this instance the trial court had discretion to permit the witness to testify as an expert at trial. *Id.* at syllabus.

{¶ 6} Appellants maintained that based on his deposition testimony and subsequent affidavit, Dr. Harris could be qualified to testify as trial, or alternatively, the *Celmer* holding granted the trial court discretion to allow Dr. Harris to testify. Accordingly, appellants argued that the trial court should deny summary judgment and allow the case to proceed on the merits.

{¶ 7} In their reply, appellees contended that appellants' reliance on *Celmer* and its progeny was misplaced and did not change the fact that Dr. Harris was not *currently* engaged in the active clinical practice of emergency medicine at the time of deposition and filing for summary judgment. In support, appellees directed the trial court to Dr. Harris's deposition testimony that at the time, he was not engaged in active clinical practice due to various health issues and the Covid-19 pandemic.

{¶ 8} In October 2021, Wallen, without leave of court, filed a supplemental reply in support of her motion for summary judgment and attached the Ohio Supreme Court's then newly released decision of *Johnson v. Abdullah*, 166 Ohio St.3d 247, 2021-Ohio-3304, 187 N.E.3d 463, in which the court declined to extend the exception created in *Celmer*, but continued to follow the "general rule" identified in *Celmer* that "the [expert] witness must meet the active-clinical-requirement of Evid.R. 601 *at the time the testimony is offered at trial*." (Emphasis added). *Id.* at ¶ 24. In her supplemental reply, Wallen advanced that *Johnson* supported her summary judgment motion and further explained why the trial court should not apply the *Celmer* exception to the case.

{¶ 9} In response, appellants contended that *Johnson* had no application because the *Johnson* expert at the time of trial devoted 90 percent of his time to an executive position. Appellants maintained that even if *Johnson* applied, "the issue is whether Dr. Harris meets the 50 [percent] requirement at the time he testifies at trial." According to appellants, granting appellees judgment as a matter of law at this stage of the proceeding was improper. Nevertheless, because trial was now rescheduled for September 2022 and to prevent any further delay, appellants moved the trial court to substitute Dr. Harris as its emergency medicine standard-of-care expert with Dr. Mark X. Cicero. Appellants attached Dr. Cicero's expert report to their motion to substitute.

{¶ 10} Appellees opposed the motion to substitute, contending that the deadline to produce expert reports had passed and granting appellants' motion to substitute "would derail the entire litigation schedule for this matter, at the prejudice and cost of the defense." Appellees requested instead that the trial court grant their motion for summary judgment because appellants failed to present a "prima facie case of medical malpractice" due to Dr. Harris's purported inability to satisfy the requirements of Evid.R. 601.

{¶ 11} On March 11, 2022, the trial court denied appellants' motion to substitute its expert witness, finding that "pursuant to Civ.R. 26(B)(7)([b]) and

Loc.R. 21.1(A), the deadline to produce expert reports had passed."[3] The court also issued a written decision granting appellees summary judgment. Despite citing *Johnson* and stating the "general rule" about an expert's competency "at the time the testimony is offered at trial," the trial court found that "plaintiff's expert, Dr. Harris, is not qualified to offer standard-of-care opinions under R.C. 2743.43 and Evid.R. 601." The court stated that "[a]bsent expert opinion, Plaintiff is not able to present evidence in support of its medical malpractice claims." Accordingly, the trial court concluded that appellees were entitled to judgment as a matter of law.

{¶ 12} Appellants now appeal, raising two assignments of error, which will be addressed out of order.

II. Summary Judgment

{¶ 13} In their second assignment of error, appellants contend that the trial court erred in determining that their expert, Dr. Harris, failed to the meet the requirements of Evid.R. 601 because he had to take a temporary medical leave, and thus, in granting summary judgment in favor of appellees as a result.

{¶ 14} We review the trial court's decision on a motion for summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). Summary judgment is appropriate when, construing the evidence most strongly in favor of the nonmoving party, (1) there is no genuine issue of material

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[3] At the time of the trial court's ruling, the Court of Common Pleas of Cuyahoga County had repealed Loc.R. 21.1. Former Loc.R. 21.1(B) (expert witnesses) and Civ.R. 26(B)(7)(b) are substantially the same. *See Holly v. Greater Cleveland Regional Transit Auth.*, 2022-Ohio-3236, 199 N.E.3d 13, ¶ 3, fn.1 (8th Dist.) (noting former Loc.R. 21.1 was repealed in 2021).

fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can only reach a conclusion that is adverse to the nonmoving party. *Zivich v. Mentor Soccer Club*, 82 Ohio St.3d 367, 369-370, 696 N.E.2d 210 (1998).

{¶ 15} The party moving for summary judgment bears the burden of demonstrating that no material issues of fact exist for trial. *Dresher v. Burt*, 75 Ohio St.3d 280, 292-293, 662 N.E.2d 264 (1996). The moving party has the initial responsibility of informing the trial court of the basis for the motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential elements of the nonmoving party's claims. *Id.* After the moving party has satisfied this initial burden, the nonmoving party has a reciprocal duty to set forth specific facts by the means listed in Civ.R. 56(C) showing that there is a genuine issue of material fact. *Id.*

{¶ 16} When appellees moved for summary judgment, Evid.R. 601(B)(5)(b) required that an expert witness who will testify "on the issue of liability in any medical claim" must devote "at least one-half of his or her professional time to the active clinical practice in his or her field of licensure."[4] In *Johnson*, 166 Ohio St.3d

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[4] In response to the *Johnson* decision, the Ohio Commission on the Rules of Practice and Procedure in Ohio Courts proposed a change to Evid.R. 601(B)(5)(b). The proposed amendment was to provide clarification that an expert witness must be in active clinical practice at "either the time the negligent act is alleged to have occurred or the date the claim accrued." After revisions and public comments, the Ohio Supreme Court accepted the amendment and filed it with General Assembly.

On July 1, 2023, the proposed amendment to Evid.R. 601(B)(5)(b) became effective. The rule now provides that "[a] person giving expert testimony on the issue of

427, 2021-Ohio-3304, 187 N.E.3d 463, the Ohio Supreme Court declined to expand the *Celmer* exception, but expressly reiterated the general rule that "the witness must meet the active-clinical-practice requirement of Evid.R. 601 *at the time the testimony is offered at trial*." (Emphasis added.) *Id.* at ¶ 20, citing *Celmer*, 114 Ohio St.3d 221, 2007-Ohio-3697, 871 N.E.2d 557, at ¶ 27. In both *Johnson* and *Celmer*, the challenge to the expert witness's qualifications occurred during trial following defense counsel's voir dire of the expert.

{¶ 17} When appellees filed for summary judgment, trial was scheduled to begin on October 18, 2021, and when the trial court granted summary judgment, trial had been continued at Wallen's request to September 12, 2022. Nevertheless, the trial court determined that appellees were entitled to judgment as a matter of law because, at the time of appellees' motion for summary judgment, Dr. Harris *currently* did not satisfy the requirements of Evid.R. 601(B)(5)(b). Essentially, the trial court prematurely determined that Dr. Harris would not be qualified or competent to testify as an expert under Evid.R. 601 "at the time of trial." This

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liability in any medical claim [is qualified to testify if that person] devotes at least one-half of his or her professional time to the active clinical practice in his or her field of licensure, or to its instruction in an accredited school*, at either the time the negligent act is alleged to have occurred or the date the claim accrued*." (Emphasis added). *See also* Evid.R. 1102(Y) (The amendments to Evid.R. 601, "filed by the Supreme Court with the General Assembly on January 10, 2023 and refiled on April 27, 2023 shall take effect on July 1, 2023. They govern all proceedings in actions brought after they take effect and also all further proceedings *in actions then pending*, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies." (Emphasis added.))

determination was not a proper understanding or application of the rule or law as it read at the time, and thus, constitutes reversible error. *Johnson* at ¶ 38 (no court has discretion to misapply the law).

{¶ 18} Moreover, construing the evidence in favor of appellants, a genuine issue of material fact exists as to whether Dr. Harris would be qualified to provide expert testimony pursuant to Evid.R. 601(B)(5)(b). In his deposition, Dr. Harris stated that he was taking steps to return to active clinical practice and was making great progress in his recovery from his Achilles injury. In his affidavit attached to appellants' brief in opposition to summary judgment, he averred that he "intend[ed] to return to active clinical practice as soon as possible." Appellants thus satisfied their reciprocal burden of setting forth specific facts by the means listed in Civ.R. 56(C) showing that there is a genuine issue of material fact — whether Dr. Harris would meet the Evid.R. 601 requirement.

{¶ 19} In their reply brief, appellees did not provide any evidence disputing either of Dr. Harris's statements. Rather, appellees maintained that Evid.R. 601 uses the present-tense requirement to describe when a person is competent to give medical testimony as an expert. Thus, appellees maintained that when Dr. Harris gave his deposition testimony, he was not competent to provide such testimony and that summary judgment was therefore proper. Accepting and adopting appellees' argument would require that an expert must be uninterruptedly engaged in active-clinical practice at all times during the pendency of an action. This application would preclude anyone from taking a temporary leave of absence for any number of

reasons, including maternity or paternity leave, a sabbatical, or in this case, a global pandemic. Based on the *Johnson* holding and recent change in Evid.R. 601's requirements, such strict application was not intended. Even Justice Cupp, who dissented in *Celmer*, finding no exception to Evid.R. 601, recognized that he would "not conclude that a temporary absence of short duration, such as a sabbatical, would automatically render an otherwise qualified medical expert incompetent to testify." *Celmer*, 114 Ohio St.3d 221, 2007-Ohio-3697, 871 N.E.2d 557, at ¶ 35 (Cupp, J., dissenting).

{¶ 20} Accordingly, we find that at a minimum, an issue of fact remained whether Dr. Harris would meet the requisite qualifications under Evid.R. 601 at the time his testimony is offered at trial. Based on the foregoing, the trial court erred in granting summary judgment in favor of appellees. Appellants' second assignment of error is sustained.

III. Substitution of Expert

{¶ 21} In their first assignment of error, appellants contend that the trial court erred in denying their motion to substitute their standard-of-care expert, who could not work due to a series of unforeseen medical issues. Even though the rules of evidence have been amended, which appears to have rendered this issue moot, this court exercises its discretion to briefly address this assignment of error.

{¶ 22} The trial court denied appellants' motion finding that "pursuant to [Civ.R. 26(B)(7)(b)] and [former Loc.R.] 21.1(A), the deadline to produce expert reports have passed."

{¶ 23} The decision to grant or deny a party's motion to substitute its expert witness is reviewed for an abuse of discretion. *180 Degree Solutions LLC v. Metron Nutraceuticals, LLC*, 8th Dist. Cuyahoga No. 109986, 2021-Ohio-2769, ¶ 57 (review of a trial court's decisions regarding discovery matters, motions in limine, and the admissibility of expert testimony is for an abuse of discretion), citing *Penix v. Avon Laundry & Dry Cleaners*, 8th Dist. Cuyahoga No. 91355, 2009-Ohio-1362, ¶ 30 ("It is well established that a trial court enjoys considerable discretion in the regulation of discovery proceedings."). An abuse of discretion occurs when the decision is unreasonable, arbitrary, or unconscionable or there is no sound reasoning process that would support the decision. *AAAA Ents., Inc. v. River Place Community Urban Redevelopment Corp.*, 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

{¶ 24} Our review of the record reveals that Wallen was afforded a great amount of discretion throughout the proceedings, yet when appellants faced a potentially case-ending technical hurdle, no discretion was afforded to them. "It is a fundamental tenet of judicial review that cases should be decided on the merits[,]" rather than procedural niceties and technicalities. *DeHart v. Aetna Life Ins. Co.*, 69 Ohio St.2d 189, 192, 431 N.E.2d 644 (1982). Judicial discretion must be carefully and cautiously exercised before upholding any outright dismissal of claims on purely procedural grounds. *Id.*

{¶ 25} In this case, the trial court granted Wallen two extensions of time to file her pathology expert report— the report was originally due on January 17, 2020, but not filed until May 26, 2020. Additionally, Wallen requested and received a

continuance of trial on three occasions. Trial was originally scheduled for August 4, 2020. On May 29, 2020, Wallen filed a notice of conflict of trial because another previously scheduled trial was postponed due to the Covid-19 pandemic. Appellees requested a continuance of trial "given these unique and unprecedented circumstances." On June 19, 2020, the trial court cancelled trial and rescheduled it until October 18, 2021.

{¶ 26} Although the parties previously advised the trial court that all expert reports had been exchanged, on November 30, 2020, Wallen requested the trial court to extend the discovery cutoff deadline because of difficulties encountered "due to the Covid-19 pandemic and its impact on the medical community and its personnel." The trial court granted Wallen's request and extended the discovery deadline until September 1, 2021, which was six weeks prior to the rescheduled October 18, 2021 trial date.

{¶ 27} On September 8, 2021, Wallen again requested a continuance of trial due to a conflict with another trial that was subsequently scheduled in common pleas court. Despite the fact that trial in this case was rescheduled on June 19, 2020, which was prior to the trial scheduled in the conflicting case (scheduled on April 21, 2021), the trial court again granted Wallen's request and rescheduled trial until September 12, 2022.

{¶ 28} The record demonstrates that the two-year delay in trial is solely attributable to Wallen. And it cannot go unnoticed that Wallen's justifications in seeking her initial trial continuance and then an extension with discovery cut-off

was partly due to these "unique and unprecedented times," as a result of the "Covid-19 pandemic" and its "impact on the medical community and personnel." The trial court granted Wallen's requests, yet when appellants were faced with obstacles with their medical expert due to the Covid-19 pandemic, the trial court did not afford appellants the same latitude. Accordingly, it appears that the trial court acted arbitrarily in its consideration of requests by the parties that resulted or could have resulted in a delay of the proceedings.

{¶ 29} Moreover, appellants' request in seeking substitution of its expert was appropriate and arguably timely. At the time of appellees' motions for summary judgment, the Evid.R. 601 exception created in *Celmer* was still controlling law that appellants relied on as authority and argued for its application in defense of summary judgment. Appellants contended that under the *Celmer* exception, Dr. Harris satisfied the requirements of Evid.R. 601 at the time the cause of action accrued, at the time of filing suit, and during the first five years of litigation. Additionally, appellants argued that the delays in this case were attributable to appellees. However, when the Ohio Supreme Court issued its decision in *Johnson* declining to extend *Celmer*, appellants' defense to summary judgment was arguably removed. Although it appears from the record that the exception in *Celmer* may have very well presented itself in this case and could be applicable, appellants sought to substitute Dr. Harris for another expert, who had already issued an expert report, so that the purported Evid.R. 601 impediment with their medical claim would be avoided and no further delay would occur.

{¶ 30} Appellees opposed appellants' motion, contending that the discovery deadline had passed and granting a substitution would be prejudicial — it "would derail the entire litigation schedule for this matter, at the prejudice and cost of the defense." On appeal, appellees reiterate and support their position with case law that upheld the trial court's decision to exclude untimely disclosed expert witnesses due to surprise and delay of the proceedings. *See, e.g., Vaught v. Cleveland Clinic Found.*, 98 Ohio St.3d 485, 2003-Ohio-2181, 787 N.E.2d 631.

{¶ 31} The situation before this court, however, is not one where appellees were unduly prejudiced or surprised by appellants' request to substitute their expert. Appellees' justification for summary judgment was premised entirely on appellants' purported inability to produce medical expert testimony to support their medical claim. And when the Ohio Supreme Court decided *Johnson* during the middle of litigation and declined to extend the *Celmer* exception to the general rule, appellants for the first time sought relief from the trial court to triage its case from being dismissed on a procedural deficiency that, quite frankly, was not even ripe for dismissal because Dr. Harris's competency to testify at trial pursuant to Evid.R. 601 was yet to be determined. Moreover, as previously discussed, any "derailment in the entire litigation schedule" had previously been at Wallen's requests.

{¶ 32} Considering the amount of discretion afforded to Wallen throughout the proceedings in her requests for extensions to file her expert report and for discovery, and then her request to continue trial on three occasions, leads this court to conclude that the trial court acted unreasonably and arbitrarily in denying

appellants' motion to substitute its emergency medicine standard-of-care expert. Accordingly, appellants' first assignment of error is sustained.

{¶ 33} Judgment reversed and remanded.

It is ordered that appellants recover from the named appellees, Michelle F. Wallen, D.O., Nathaniel Pavkov, D.O., and DHSC, LLC dba Affinity Medical Center, and Affinity Medical Center, the 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.

KATHLEEN ANN KEOUGH, PRESIDING JUDGE

EMANUELLA D. GROVES, J., and
MICHAEL JOHN RYAN, J., CONCUR