[Cite as *Safkow v. Scheiben*, 2001-Ohio-3255.]

STATE OF OHIO, COLUMBIANA COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

ANDREW A. SAFKOW, ET AL.	)	CASE NO. 99 CO 79
	)	
PLAINTIFFS-APPELLANTS	)	
	)	
VS.	)	O P I N I O N
	)	
KELLY A. SCHEIBEN	)	
	)	
DEFENDANT-APPELLEE	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas, Columbiana County, Ohio Case No. 99 CV 00296

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiffs-Appellants

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For Defendant-Appellee:

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JUDGES:
Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Joseph J. Vukovich

Dated: May 7, 2001

WAITE, J.

{¶1} This timely appeal arises out of a jury verdict in favor of Appellee, Kelly Scheiben, in a personal injury action. Appellants, Andrew and Ann Safkow, allege that the Columbiana County Court of Common Pleas allowed improper hearsay opinions of non-testifying experts to be admitted into the record. The record reveals that Appellants failed to object to the alleged hearsay in a timely manner and with specificity, did not request a limiting instruction at the time the evidence was introduced, questioned witnesses about the alleged hearsay and used the objectionable evidence in their closing argument. Since any alleged errors have been waived, the judgment of the trial court is hereby affirmed.

{¶2} Appellee and Appellant Andrew Safkow ("Safkow") were involved in an automobile accident on February 5, 1995. Safkow and his wife filed a previous complaint in Columbiana County Court of Common Pleas arising out of this accident, which was dismissed without prejudice on April 30, 1999. Appellants refiled their complaint on May 27, 1999. The complaint alleged bodily injury due to negligence and contained a separate claim for loss of consortium.

{¶3} A jury trial was held on November 1-2, 1999. During trial, the judge permitted Appellee's attorney to question Safkow about medical treatment he received from Dr. Palutsis at the Carnation Clinic in Alliance, Ohio. (11/1/99 Tr. p. 210).

Over Appellants' general objection, the court allowed the questioning. (Tr. p. 211). Appellee then offered into evidence a document purportedly created by Dr. Palutsis which stated that Safkow had "S-I joint arthritis." (Tr., Def. Exh. 5). Appellee questioned Safkow about treatment he received at the Cleveland Clinic (Tr. p. 214) and offered into evidence a document from the Cleveland Clinic which diagnosed Safkow as having a degenerative disc disease. (Tr., Def. Exh. 7).

{¶4} At trial, Appellee introduced into evidence the video deposition testimony of Dr. Dennis Glazer. In the deposition, Dr. Glazer made reference to the opinions of Dr. Palutsis and the Cleveland Clinic. (Tr. pp. 427-429). Appellants did not raise any objections to the aforementioned testimony or documents during the deposition or at the time the video was introduced into evidence at trial.

{¶5} The jury returned a unanimous general verdict in favor of Appellee, which was recorded by Judgment Entry on November 16, 1999. Appellants filed this timely appeal on December 14, 1999.

{¶6} Appellants' sole assignment of error consists of the following:

{¶7} "THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF PLAINTIFF/APPELLANTS, ANDREW A. SAFKOW, ET AL., IN ALLOWING APPELLEE TO INTRODUCE INTO EVIDENCE INADMISSIBLE HEARSAY OPINIONS OF NON-TESTIFYING EXPERTS."

{¶8} Appellants allege that the trial court committed reversible error by allowing Def. exhibits 5 (the report of Dr. Palutsis) and 7 (the Cleveland Clinic report) to go to the jury. Appellant cites *Mason v. Labig* (June 29, 1989), Greene App. No. 87-CA-91, unreported, for the proposition that hearsay opinions of expert witnesses not subject to cross-examination should be excluded at trial.

{¶9} *Mason* involved a negligence claim against a chiropractor. During trial, the plaintiff's expert witness was questioned about the opinions of two other non-testifying doctors who disagreed with the plaintiff's expert. Plaintiff's counsel objected, but the trial court permitted the questioning for the limited purpose of determining whether plaintiff's expert agreed with the opinions of the other doctors. *Id.* at *13.

{¶10} The *Mason* court held that the cross-examination was improper. *Id.* at *14. The court held that the plaintiff was also prejudiced by the testimony because it bore directly on the issue of causation. The court reasoned that the hearsay testimony may have tipped the scales in the defendant's favor by essentially having two extra defense experts presenting their opinions without ever being subject to cross-examination. *Id.*

{¶11} Based on the above, a cursory review of the matter would lead us to believe that *Mason* should apply. In response

to Appellants' contentions, Appellee argues that Appellants' assignment of error is moot because it only addresses the damages element of their case rather than the issue of liability. Appellee asserts that the jury found that she was not liable, and that any errors relating to the extent of Safkow's injuries are harmless because the jury never reached the issue of damages.

{¶12} Appellee's argument on this point is not persuasive. The elements of a negligence cause of action are: "(1) a duty or obligation on the part of [defendant] to protect [plaintiff] from injury; (2) a breach of that duty; and (3) an injury proximately resulting from that breach." *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 142. Appellants' assignment of error directly addresses the causation element of their case. *Mason, supra,* Greene App. No. 87-CA-91, unreported, at *14. The two exhibits in question, assuming that they are hearsay, supported a finding that Safkow's condition was pre-existing thus, Appellee could not have caused his injuries. Appellants' assignment of error cannot be labeled as moot when it goes directly to the essential elements of the case.

{¶13} Moving on to the substance of the appeal, Appellee next maintains that Def. exhibits 5 and 7 fell under the hearsay exception found in Evid.R. 803(6), referring to records kept in the course of regularly conducted business, citing *Peters v. Ohio Lottery Commission* (1992), 63 Ohio St.3d 296, in support.

There was no foundation laid by the custodian of the medical reports that the reports were created according to the regular business practices of the doctors involved, which is a requirement of Evid.R. 803(6). *Id.* Therefore, Evid.R. 803(6) does not apply.

{¶14} Appellee also contends that Appellants waived any objection to the hearsay error when Safkow voluntarily testified about the information contained in the two reports. (Tr. p. 210). Appellee further contends that some of the medical expenses claimed by Safkow arose out of referrals by Dr. Palutsis and the Cleveland Clinic. Safkow testified as to physical therapy sessions allegedly prescribed by the Cleveland Clinic without testifying as to the medical reasons for recommending those sessions. (Tr. p. 215). Appellee argues that at minimum she was permitted to impeach Safkow by referencing the diagnoses of Dr. Palutsis and the Cleveland Clinic.

{¶15} As to these issues, the record supports Appellee's arguments. Although evidentiary rulings are typically reviewed only for abuse of the trial court's discretion, "[e]rrors relating to the trial court's admission of hearsay must be viewed in the light of Evid.R. 103(A) and the standard established in Crim.R. 52(A), providing that such errors are harmless unless the record demonstrates that the errors affected a party's substantial right." *State v. Sorrels* (1991), 71 Ohio

App.3d 162, 165. Evid.R. 103(A) requires that a timely and proper objection be made to an erroneous ruling which admits evidence in order to preserve the error for review. Civ.R. 32(B) requires that any objections to receiving a deposition into evidence must be made prior to the time the deposition is submitted in evidence. Civ.R. 32(D)(3)(b) also requires that a party make objections to errors occurring at the deposition or else the errors are waived. At no time during the deposition of Dr. Glazer do Appellants object to Def. exhibits 5 or 7 or the diagnoses of Dr. Palutsis or the Cleveland Clinic. The deposition was also introduced into evidence at trial without objection. Thus, Appellants have waived any errors pertaining to the aforementioned evidence contained in Dr. Glazer's report.

{¶16} The trial transcript indicates that Appellee questioned Safkow about his visits to Dr. Palutsis and to the Cleveland Clinic, at least in part, in order to impeach his credibility as to the extent of his medical bills and the reasons for those bills. (Tr. p. 215). Evidence which otherwise appears to be impermissible hearsay is often permissible for purposes of impeachment. *State v. Reeves* (1998), 130 Ohio App.3d 776, 778; *State v. McNeill* (1998), 83 Ohio St.3d 438, 449; *State v. Watson* (1991), 61 Ohio St.3d 1, 6.

{¶17} Appellants raised only a general objection to Appellee's line of questioning of Safkow concerning the medical

reports of Dr. Palutsis and the Cleveland Clinic, rather than raising a specific hearsay objection as required by Evid.R. 103(A). The trial court may have concluded that the medical reports could be used for impeachment purposes. Appellants did not request limiting instructions be given to the jury at the time their objections were overruled or at any time before the jury retired for deliberations. The jury was therefore free to consider the evidence for any purpose, and Appellants' failure to specify their objection or request a limiting instruction constitutes a waiver of any error on appeal. *State v. Davis* (1991), 62 Ohio St.3d 326, 339; *State v. Perry* (1992), 80 Ohio App.3d 78, 83-84; *State v. Watson* (1991), 61 Ohio St. 1, 6.

{¶18} Furthermore, Appellants made use of the information in the two medical reports during their own closing argument and during cross-examination of both Safkow and Dr. Glazer. (Tr. pp. 225, 440-441, 514). Cross-examination of a witness about evidence concerning which a party has previously objected constitutes a waiver of any error in the initial allowance of such evidence. *State v. Bolton* (May 30, 2000), Columbiana App. No. 98 CO 33, unreported. Use of evidence in closing arguments constitutes a waiver of any right to claim prejudice involving the introduction of that evidence at trial. *State v. Perry* (Nov. 25, 1998), Miami App. No. 97 CA 61, unreported.

{¶19} Assuming, arguendo, that Appellants are correct that the evidence contained in Def. exhibits 5 and 7 was inadmissible

hearsay when it was used to show that Safkow actually had arthritis or some other pre-existing degenerative condition, Appellants waived any claim of error by: (1) failing to object with specificity to the evidence; (2) failing to object in any fashion during the deposition of Dr. Glazer; (3) questioning Safkow and Dr. Glazer about the contents of the reports; (4) referring to the contents of the reports during closing arguments; and (5) failing to request limiting instructions at any time where the evidence was properly admitted for impeachment purposes.

{¶20} Appellants raise an additional argument which is somewhat disjointed. Appellants allege that the trial court contradicted itself when it sustained their objections to Def. exhibits 5 and 7 made during the deposition of Dr. Everett, but allowed the same evidence in the deposition of Dr. Glazer. (See 11/1/99 Judgment Entry ruling on all of Appellants' objections in the depositions). What Appellants do not recognize, however, is that during Dr. Glazer's deposition (held on March 10, 1998) Appellants did not raise an objection to the line of questioning concerning the reports from Dr. Palutsis and the Cleveland Clinic. (3/10/98 Depo. pp. 22-24). The Everett deposition which was held on October 26, 1999, over a year and a half later, contains such objections. Appellants do not explain how objections made in October, 1999, can preserve for review an alleged error committed 18 months earlier without objection.

Further, Appellants overlook the fact that they failed to object at trial when Dr. Glazer's deposition was presented to the jury. Objections to videotaped testimony must be made before trial or prior to actual presentation to the jury. Failure to do so constitutes a waiver of any errors relating to the admission of the testimony. *Vargo v. Travelers Ins. Co.* (1987), 34 Ohio St.3d 27, 32; *Summers v. Conrad* (1999), 134 Ohio App.3d 291, 298; Sup.R. 13(A)(15). Once again, it appears that Appellants' actions or lack thereof have waived this error on appeal.

{¶21} After the testimony about the medical reports became part of the record, the admission of the reports themselves merely resulted in cumulative evidence entering the record, which constitutes harmless error. *St. Paul Fire & Marine Ins. Co. v. Battle* (1975), 44 Ohio App.2d 261, 268.

{¶22} For the reasons stated above, Appellants' assignment of error is found to be without merit, and the jury verdict is affirmed.

Donofrio, J., concurs.

Vukovich, P.J., concurs.