

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Pedro J. Fernandez,	:	
	:	No. 03AP-1018
Plaintiff-Appellant,	:	(C.P.C. No. 00CVA09-8357)
v.	:	
	:	(REGULAR CALENDAR)
Ohio State Pain Control Center et al.,	:	
	:	
Defendants-Appellees.	:	

O P I N I O N

Rendered on December 14, 2004

Pedro J. Fernandez, pro se.

Reminger & Reminger, and Amy S. Thomas, for appellees.

APPEAL from the Franklin County Court of Common Pleas.

PETREE, J.

{¶1} Plaintiff-appellant, Pedro J. Fernandez, appeals from a judgment of the Franklin County Court of Common Pleas which granted summary judgment for defendants, Ohio State Pain Control Center and Dr. Steven Severyn. For the reasons that follow, we affirm the judgment of the trial court.

{¶2} On September 19, 2000, plaintiff filed a complaint in the Franklin County Court of Common Pleas, alleging damages resulting from the named defendants' medical treatment of plaintiff. Plaintiff named Dr. Severyn, the Ohio State Pain Control Center, Dr. Nestor Narcelles, Dr. Michael Stanek, and Dr. Michael Orzo as defendants. Plaintiff alleged that he suffered personal injury as a result of the named defendants' negligence.

In addition, plaintiff alleged that the defendants "depart[ed] from the treatment requested without express consent or knowledge of plaintiff." (Sept. 19, 2000 Complaint.)

{¶3} On December 15, 2000, defendants Ohio State Pain Control Center, Dr. Narcelles, Dr. Severyn, and Dr. Stanek filed a motion for summary judgment. On January 17, 2001, the trial court granted the motion for summary judgment, finding that plaintiff had failed to submit competent medical expert testimony establishing the necessary elements of the medical negligence claim alleged in the complaint. On December 19, 2000, Dr. Orzo filed a motion for summary judgment. On February 16, 2001, the trial court granted summary judgment for Dr. Orzo, finding that the court was without jurisdiction as to the claims against Dr. Orzo. On March 16, 2001, plaintiff appealed to this court from the trial court's rulings.¹

{¶4} In *Fernandez I*, plaintiff argued, inter alia, that the trial court erred when it granted defendants' motion for summary judgment. Regarding this argument, this court determined that the trial court had correctly granted summary judgment for the defendants as to the claim of medical malpractice. Also, this court determined that the trial court properly ordered the dismissal of the claims against Dr. Orzo, and that the trial court correctly granted summary judgment for Dr. Narcelles and Dr. Stanek. However, this court found that "[a] complete granting of summary judgment for the Ohio State Pain Control Center and Dr. Severyn was not appropriate." *Id.* Not only had plaintiff alleged negligent care in his complaint, he also alleged that he received a treatment that he did not agree to receive. This court accordingly reversed the summary judgment for the Ohio

¹ A more detailed procedural history of this case can be found in *Fernandez v. Ohio State Center for Pain Control* (Oct. 23, 2001), Franklin App. No. 01AP-330 ("*Fernandez I*").

State Pain Control Center and Dr. Severyn "with respect to an informed consent theory only," and remanded the case for further appropriate proceedings. *Id.*

{¶5} Upon remand, the remaining parties in the action, plaintiff and defendants Dr. Severyn and Ohio State Pain Control Center, recommenced discovery. On November 27, 2002, defendants filed a motion for summary judgment. Plaintiff filed a cross-motion for summary judgment. The trial court denied both motions. Both parties filed motions for reconsideration. On September 11, 2003, the trial court denied plaintiff's motion to reconsider, granted defendants' cross-motion for reconsideration, and granted defendants' November 27, 2002 motion for summary judgment. On September 26, 2003, plaintiff filed a motion for a new trial and a motion for the trial court judge to "voluntarily recuse himself from this case and also from any other actions, past present and future in which the plaintiff is a named party." Plaintiff appeals from the September 11, 2003 judgment and asserts the following seven assignments of error:

I. THE COURT ERRED WHEN SEPTEMBER 11TH 2003 GRANTED DEFENDANTS-APPELLEES MOTION FOR SUMMARY JUDGMENT BASED ON THE SAME EVIDENCE AND SAME GROUNDS THAT WERE PRESENT IN THE RECORD WHEN PLAINTIFF-APPELLANT WAS GRANTED AN APPEAL BY THIS COURT OF APPEALS OCTOBER 23RD 2001 AT WHICH TIME THIS COURT OF APPEALS ISSUED A DECISION [SIC] AND JUDGMENT IN FAVOR OF THE PLAINTIFF, OVERTURNING THE SUMMARY JUDGMENT DECISION [SIC] AND ENTRY BY THE LOWER COURT IN FAVOR OF DEFENDANTS. THE SAME JUDGE PATRICK M. McGRATH, ISSUED BOTH LOWER COURT JUDGMENTS.

II. THE COURT ERRED WHEN DENYING PLAINTIFF-APPELLANT'S [SIC] MOTION TO COMPEL ORDERING DEFENDANTS-APPELLEES TO SUBMIT RELEVANT RECORDS AND EVIDENCE IN A FASHION THAT IS

CONSIDERED BY PLAINTIFF-APPELLANT AS AN OBSTRUCTION OF JUSTICE.

III. THE COURT PRESIDED BY JUDGE PATRICK McGRATH ERRED WHEN IT ACTED IN A PREJUDICE MANNER THAT DAMAGED THE WELL BEING AND INTEREST OF PLAINTIFF WHEN IGNORING PLAINTIFF-APPELLANT PROPERLY SUPPORTED MEDICAL CONDITION, DISPLAYING AT THE SAME TIME AN INDOLENT, PERVERSE AND CRUELLY [SIC] CONDUCT IMPROPER OF A JUDGE IN A COURT OF LAW.

IV. COURT ERRED WHEN OBSTRUCTING DUE PROCESS OF DISCOVERY ACCORDING TO THE RULES OF PRACTICE OF THE COURT OF COMMON PLEAS AND THE OHIO RULES OF CIVIL PROCEDURE, GRAVELY AND SEVERELY AFFECTING AND DAMAGING THE SUBSTANTIVE RIGHTS OF THE PLAINTIFF.

V. THE COURT ERRED WHEN JUDGE PATRICK M. McGRATH GRANTED A CONTINUANCE (S) REQUESTED BT [SIC] DEFENDANT-APPELLEES NOTWITHSTANDING THE FIRM OPPOSITION [SIC] EXPRESSED BY PLAINTIFF DUE TO THE FRIVUOLOUS [SIC] REASONS ADDUCED BY DEFENDANTS-APPELLEES ATTORNEY THUS UNNECESSARILY DELAYING DUE PROCESS OF THE LAW.

VI. THE COURT ERRED WHEN CONSISTENLY [SIC], IN THE DECISSIONS [SIC] AND ENTRIES ISSUED BY JUDGE PATRICK M. McGRATH DENYING PLAINTIFF-APPELLANT AND DEFENDANT-APPELLEES MOTIONS FOR SUMMARY JUDGMENT, A LENGTHY EXPLANATION WAS INCLUDED FOR THE DEFENDANTS-APPELLEES ADVANTAGE AND BENEFIT OUTLINING WHAT WAS TO BE CONSIDERED SUFFICIENT GROUNDS BY THE COURT IN ORDER FOR DEFENDANTS-APPELLEES TO OBTAIN A FAVORABLE DECISSION [SIC] AND ENTRY [SIC] DISREGARDING THE NEW EVIDENCE SUBMITTED BY THE PLAINTIFF-APPELLANT THUS ALLOWING THE PROCESS TO CONTINUE FURTHER AND IN DOING SO SEVERELY DAMAGING PLAINTIFF-APPELLANT'S SUBSTANTIVE RIGHTS AND INTEREST.

VII. THE COURT ERRED WHEN DISREGARDING THE NEW EVIDENCE SUBMITTED BY THE PLAINTIFF-APPELLANT AMONG SUCH EVIDENCE IT WAS A PROPERLY AUTHENTICATED LETTER/REPORT WRITTEN AND SIGNED BY DEFENDANT STEVEN A. SEVERYN IN WHICH HE ACKNOWLEDGED HAVING RENDERED TO PLAINTIFF-APPELLANT A DIFFERENT MEDICAL TREATMENT CONSTITUTING BY ITSELF MORE THAN SUFFICIENT PROOF AND GROUNDS TO FULLY SUPPORT PLAINTIFF-APPELLANT'S CLAIM AND COMPLAINT OF HAVING RECEIVED A NON CONSENTED TO MEDICAL TREATMENT THAT RESULTED IN THE DAMAGES SET FORTH BY THE PLAINTIF-APPELLANT [SIC] IN THE ORIGINAL COMPLAINT FOR WHICH PLAINTIFF-APPELLANT SEEKS RESTITUTION AND COMPENSATION, THUS AGAIN UNNECESSARILY DELAYING DUE PROCESS OF THE LAW. WHILE AT THE SAME TIME, ALSO ALLOWING AGAIN THE PROCESS TO CONTINUE FURTHER INSTEAD OF GRANTING THE PLAINTIFF-APPELLANT'S PROPERLY SUPPORTED MOTION FOR SUMMARY JUDGMENT.

{¶6} By his first assignment of error, plaintiff argues that the trial court erred when it granted summary judgment in favor of defendants. Appellate review of a lower court's granting of summary judgment is de novo. *Hahn v. Satullo*, 156 Ohio App.3d 412, 2004-Ohio-1057, at ¶33. "De novo review means that this court uses the same standard that the trial court should have used, and we examine the evidence to determine whether as a matter of law no genuine issues exist for trial." *Brewer v. Cleveland City Schools Bd. of Edn.* (1997), 122 Ohio App.3d 378, 383, citing *Dupler v. Mansfield Journal Co., Inc.* (1980), 64 Ohio St.2d 116, 119-120, certiorari denied (1981), 452 U.S. 962, 101 S.Ct. 3111.

{¶7} Summary judgment is proper when a movant for summary judgment demonstrates that: (1) no genuine issue of material fact exists; (2) the movant is entitled to judgment as a matter of law; and (3) reasonable minds could come to but one

conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made, that party being entitled to have the evidence most strongly construed in its favor. Civ.R. 56; *State ex rel. Grady v. State Emp. Relations Bd.* (1997), 78 Ohio St.3d 181, 183.

{¶8} In *Fernandez I*, this court held that the trial court correctly granted summary judgment for defendants as to the claim of medical negligence. Regarding the consent issue, this court held that "[t]he error committed by the trial court was a legal error of not recognizing the informed consent theory contained in the complaint and of not applying a different legal analysis to the informed consent theory." This court accordingly reversed the judgment of the trial court, in part, and remanded the case to the trial court for further appropriate proceedings.

{¶9} Unfortunately, the language of *Fernandez I* was imprecise as to whether the trial court had erred with respect to its assessment of a lack of informed consent claim or a lack of consent claim. Specifically, despite this court's use of the term "informed consent" in *Fernandez I*, it appears that this court was assessing plaintiff's claim as a lack of consent claim rather than a lack of informed consent claim. Nevertheless, whether we find that plaintiff originally asserted a lack of consent claim or a lack of informed consent claim, that determination is inconsequential in the final analysis. We find that plaintiff failed to present the expert testimony necessary to prevail in a lack of informed consent case, and that he clearly consented to the trigger-point injections thereby precluding a lack of consent claim.

{¶10} From a careful reading of plaintiff's merit brief and reply brief in this appeal, we conclude that plaintiff essentially argues that he consented to an injection consisting of

only anesthetic but did not consent to the inclusion of any additional substance in the injection. Plaintiff argues that he was not aware of the chemical composition of the trigger-point injections that he received and therefore he did not consent to the treatment. Specifically, plaintiff contends that he did not know that additional substances (not just an anesthetic) would be included in the injections, and had he known this he would not have consented to the injections.

{¶11} We recognize that this court, in *Fernandez I*, stated the following:

* * *The complaint filed by Mr. Fernandez clearly alleges that he was administered several shots of steroids instead of the anesthesia he had agreed to receive. This allegation does not present the issue of whether the treatment he received was negligent—below the standard of care. Instead, this allegation presents the issue of whether or not Mr. Fernandez consented to the medical treatment he received. The issue of informed consent does not require expert testimony, especially where the difference between the treatment received and the treatment expected by the patient are as clearly different as here.

{¶12} It is true that a determination of whether a patient consents to a treatment does not necessarily require expert testimony. Plaintiff's October 31, 2002 deposition indicates that he consented to trigger-point injections. Thus, on remand, it was established that plaintiff consented to the trigger-point injections. Plaintiff argues that he consented to an injection that contained only anesthetics. Indeed, in his deposition, plaintiff repeatedly stated that he consented to anesthetic injections; however, he also stated that anesthetic injections were also referred to as trigger-point injections.

{¶13} Plaintiff's argument in this appeal could be viewed as an assertion that his consent was subject to a specific condition—that he receive only anesthetics in the injections, regardless of whether the injection was called a trigger-point injection or an

anesthetic injection. As stated above, the evidence clearly indicates that plaintiff consented to trigger-point injections. However, we find no evidence in the record indicating that plaintiff explicitly conditioned his consent to the injections on the use of anesthetics only and no other substance. Thus, assuming plaintiff asserted a lack of consent claim, that claim necessarily fails because it was established that plaintiff consented to the trigger-point injections, which were also referred to as anesthetic injections, and because he did not condition his consent to the injection on the use of anesthetics and no other substance.

{¶14} Even though plaintiff cannot prevail under a lack of consent claim, that does not, in itself, preclude him from recovering under a lack of informed consent theory. We recognize that this court, in *Fernandez I*, remanded the case to the trial court "with respect to an informed consent theory only." However, even assuming, arguendo, that plaintiff asserted a lack of informed consent claim, that claim fails for lack of sufficient expert testimony. In Ohio, the tort of lack of informed consent is established when:

- (a) The physician fails to disclose to the patient and discuss the material risks and dangers inherently and potentially involved with respect to the proposed therapy, if any;
- (b) the unrevealed risks and dangers which should have been disclosed by the physician actually materialize and are the proximate cause of the injury to the patient; and
- (c) a reasonable person in the position of the patient would have decided against the therapy had the material risks and dangers inherent and incidental to treatment been disclosed to him or her prior to the therapy.

Nickell v. Gonzalez (1985), 17 Ohio St.3d 136, syllabus.

{¶15} In a lack of informed consent case, "expert testimony is required to establish what the claimed undisclosed material risks and dangers associated with a surgical procedure are, and if disputed, whether those particular undisclosed risks did in fact materialize and cause the patient's injuries. These issues are beyond the knowledge of the lay person and require expert testimony." *Valerius v. Freeman* (Oct. 19, 1994), Hamilton App. No. C-930658. Plaintiff contends:

The non-consented to inclusion of additional medicaments, (steroids) out of the want and will of The Ohio State Center for Pain Control Inc. and employees was the direct and proximate cause of injury and pain and no other circumstance as properly recognized by this Appeals Court October 23rd 2001, had the Plaintiff received only the anesthetic injections requested no additional injury would have taken place diminishing the chances for the Plaintiff's recovery.

(Plaintiff's brief, at 16-17.) Plaintiff has not established proximate causation by expert medical testimony, as required under the *Nickell* test. The trial court correctly determined that a claim for lack of informed consent failed for want of the requisite expert testimony.

{¶16} Therefore, regardless of whether plaintiff has asserted a lack of consent claim or a lack of informed consent claim, no genuine issue of material fact remained to be litigated in this case, and construing the evidence most strongly in favor of plaintiff, defendants were entitled to judgment as a matter of law. Based on the foregoing, we conclude that the trial court did not err in granting summary judgment in favor of defendants. Accordingly, we overrule plaintiff's first assignment of error.

{¶17} We will address plaintiff's second, third, and fourth assignments of error together, as they present interrelated issues. By his second assignment of error, plaintiff argues that the trial court erred when it denied his motion to compel discovery. Under his

third assignment of error, plaintiff asserts that the trial court committed error in regard to plaintiff's deposition that occurred at the office of defense counsel. In his fourth assignment of error, plaintiff asserts that the trial court obstructed due process and violated his substantive rights through its decisions relating to discovery.

{¶18} "A trial court may exercise broad discretion in the regulation of discovery." *A.O. Smith Corp. v. Perfection Corp.*, Franklin App. No. 03AP-266, 2004-Ohio-4041, at ¶15, citing *513 East Rich Street Co. v. McGreevy*, Franklin App. No. 02AP-1207, 2003-Ohio-2487. An abuse of discretion " 'connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.' " *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157. A trial court's decision to grant or deny a motion to compel is within its broad discretion and will not be reversed absent an abuse of discretion. *513 East Rich Street Co.*, at ¶10.

{¶19} We find no abuse of discretion by the trial court regarding plaintiff's deposition, nor do we find that the trial court abused its discretion in denying plaintiff's motions to compel discovery. In the trial court's September 13, 2002 order and entry of continuance, the court stated, in relevant part, "The new trial date is December 16, 2002 at 10:30 am. It was also agreed that plaintiff will attend the next scheduled deposition at defense counsel's office, and that best efforts will be used to schedule it by agreement of the parties." We find no abuse of discretion by the trial court on the issue of where plaintiff's deposition occurred, especially considering that it appears from the record that the parties agreed that the deposition would occur at the office of defense counsel. Therefore, we overrule plaintiff's third assignment of error.

{¶20} On April 25, 2002, plaintiff filed two motions to compel discovery pursuant to Civ.R. 37. The trial court determined that the April 25, 2002 motion was moot because defendants had served plaintiff with the requested discovery. On May 8, 2002, plaintiff filed two more motions to compel discovery, arguing that the responses to the interrogatories were either evasive or incomplete, and requested the trial court to issue an order compelling defendants to "properly and fully" answer the interrogatories. The trial court denied these motions to compel discovery, finding no basis for plaintiff's assertion that the responses to the interrogatories were incomplete and/or vague. Plaintiff moved for reconsideration of the trial court's decision to deny plaintiff's motions to compel discovery. The trial court subsequently denied plaintiff's motion for reconsideration. As stated above, a trial court has broad discretion in its regulation of discovery. We find no indication that the trial court abused this discretion in regard to the denial of plaintiff's motions to compel, and therefore overrule plaintiff's second assignment of error.

{¶21} Under his fourth assignment of error, plaintiff states that "[t]his assignment of error has been already addressed in the assignment of error 2 in this Brief," and he also asserts general allegations that the trial court improperly processed the case with respect to discovery. These general allegations are unsubstantiated by the record, and, as such, are wholly without merit. Consequently, we overrule plaintiff's fourth assignment of error.

{¶22} By his fifth assignment of error, plaintiff argues that the trial court erred when it granted multiple motions for continuance of defendants. Specifically, plaintiff argues that the trial court erred "when granting the first continuance and all subsequent continuances." (Plaintiff's brief, at 22.) The decision to grant or deny a continuance is left

to the broad, sound discretion of the trial court, and that decision will not be reversed absent an abuse of discretion. *Scott v. Scott*, Franklin App. No. 03AP-411, 2004-Ohio-1405, at ¶34, citing *State v. Unger* (1981), 67 Ohio St.2d 65.

{¶23} On August 1, 2002, counsel for defendants Dr. Severyn and Ohio State Pain Control Center filed a motion for continuance of the trial court date, which was set for September 23, 2002. It was not unreasonable for the trial court to grant this continuance on the basis that defense counsel would be unavailable for trial due to a scheduled vacation. On July 11, 2003, after multiple continuances, the trial court set the trial date for January 26, 2004. The last motion for continuance by defendants was granted in view of defendant Dr. Severyn's deployment outside the country for military service. Plaintiff's arguments to the contrary, we find no abuse of discretion by the trial court with respect to the continuances. Thus, we overrule plaintiff's fifth assignment of error.

{¶24} Under his sixth assignment of error, plaintiff seems to argue that the trial court erroneously provided the defendants with preferential treatment. Plaintiff essentially alleges that the trial court judge was biased and prejudiced. According to plaintiff's reply brief, his sixth assignment of error does not relate to whether the trial court judge should have disqualified himself from this case. Whether or not plaintiff is arguing on appeal that the trial court judge should have disqualified himself, he is arguing that the trial court's decisions and/or judgments were erroneous due to the bias and prejudice of the judge. In support of his argument, plaintiff alleges preferential treatment and "coaching" in favor of defense counsel. This court stated in *Polivka v. Cox*, Franklin App. No. 02AP-1364, 2003-Ohio-4371, at ¶29:

If plaintiff believed the trial judge was biased or prejudiced against him, his remedy was to file an affidavit of prejudice with the clerk of the Ohio Supreme Court. R.C. 2701.03 "provides the exclusive means by which a litigant may claim that a common pleas judge is biased and prejudiced." *Jones v. Billingham* (1995), 105 Ohio App.3d 8, 11, 663 N.E.2d 657. Only the Chief Justice of the Ohio Supreme Court or his designee has the authority to determine a claim that a common pleas court judge is biased or prejudiced. *Beer v. Griffith* (1978), 54 Ohio St.2d 440, 441-442, 377 N.E.2d 775. Thus, an appellate court is without authority to pass upon issues of disqualification or to void a judgment on the basis that a judge should be disqualified for bias or prejudice. *Id.*; *State v. Ramos* (1993), 88 Ohio App.3d 394, 398, 623 N.E.2d 1336. * * *

{¶25} Therefore, plaintiff's arguments relating to the alleged bias and prejudice of the trial court judge are not properly before this court because this court does not have the authority to assess plaintiff's claim that the trial court judge was biased or prejudiced. Even if we had the authority to make that determination, we would find plaintiff's allegations to be without merit. Accordingly, plaintiff's sixth assignment of error is overruled.

{¶26} Plaintiff's seventh assignment of error asserts that the trial court erroneously failed to consider evidence submitted by plaintiff in relation to the summary judgment determination. Essentially, plaintiff argues that the evidence he submitted demonstrated that plaintiff received a treatment different than the treatment he consented to. We agree with the defendants when they state in their brief, "[t]his assignment of error merely reargues Plaintiff's contention that the trial court erred in granting summary judgment to Defendants and erred in not granting his Motion for Summary Judgment." (Defendant's brief, at 29.) As discussed above, the trial court did not err when it granted summary

judgment in favor of defendants. Therefore, we overrule plaintiff's seventh assignment of error.

{¶27} For the foregoing reasons, plaintiff's seven assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

LAZARUS, P.J., and KLATT, J., concur.
