IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Darren Washington	:	
	:	
v.	:	No. 2371 C.D. 2010
	:	Argued: June 6, 2011
Lindsay Klieforth, Jermaine Ashford and SEPTA	:	
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	:	
Appeal of: Lindsay Klieforth	:	

BEFORE: **HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge**
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE P. KEVIN BROBSON, Judge (P.)

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE BROBSON **FILED:** July 12, 2011

Appellant Lindsay Klieforth (Klieforth) appeals from an order of the Court of Common Pleas of Philadelphia County (trial court), dated July 20, 2010. The trial court denied Klieforth's post-trial motions requesting a new trial and entered judgment in favor of Darren Washington (Washington) against Klieforth only. For the reasons that follow, we affirm.

On March 10, 2006, Washington was a passenger on a SEPTA bus travelling westbound on Gay Street in West Chester, Pennsylvania. With his stop approaching, Washington stood and walked toward the front of the SEPTA bus to exit. As the SEPTA bus proceeded in the far right lane, a vehicle, owned and operated by Klieforth, entered Gay Street from a side street and travelled across four lanes of traffic, intersecting with the path of the SEPTA bus. The driver of the SEPTA bus applied the brakes and blew the horn, but he was unable to avoid

colliding with the rear of Klieforth's vehicle. As a result of the collision, Washington was thrown from a standing position onto the floor of the SEPTA bus. An ambulance arrived shortly thereafter, and Washington was taken to a hospital. At the hospital, Washington complained of severe pain in his back and legs and received an injection in his back.

Suit was commenced against Klieforth and SEPTA in January 2008, and the case was assigned to compulsory arbitration in January 2009. Following a $50,000 arbitration verdict in favor of Washington, Klieforth appealed and demanded a jury trial, which the trial court conducted from March 10, 2010 to March 12, 2010.

At the trial, the jury heard testimony regarding the nature and extent of Washington's injuries. The trial court summarized the totality of the testimony as follows:

> The jury heard testimony from [Washington] and from all medical witnesses that between the date of the accident and the time of trial, Washington treated with . . . numerous . . . doctors, several pain management facilities, participated in several courses of physical therapy and chiropractic modalities, underwent objective testing (MRI and EMG), and received several epidural and steroidal injections in his back as well as other medications.

(Trial court opinion at 2.)

Washington testified that he did not return to work between the date of the accident and the date of the trial. Washington explained that the pain in his back prevented him from doing physical activities, including rotating, bending, lifting, or lengthy periods of sitting. Washington further explained that he continues to suffer "aching, throbbing, constant pain . . . like a toothache . . . it[']s

there and it[’]s not going away . . . it[’]s just constant . . . the aching and the numb feeling.” (Trial court transcript, March 10, 2010, at 68.)

Washington then presented the video deposition of Dr. Arthur Lerner, a doctor of internal medicine, who treated Washington from March 13, 2006 to June 26, 2006, examined Washington in September 2009, and reviewed Washington’s medical records. Dr. Lerner concluded that, as a result of the accident, Washington sustained an “acute cervical/thoracic, lumbar spine strain and sprain,” (Dr. Lerner Dep. at 17), which caused multiple disc bulges and a pinched nerve in Washington’s lower back. (*Id*. at 28-31.) Dr. Lerner opined that Washington’s prognosis is “guarded with a certain degree of disability due to his underlying injuries directly related to the . . . accident.” (*Id.* at 45.)

Klieforth presented the video depositions of four medical experts. Dr. Michael Rosenthal, a specialist in physical medicine and rehabilitation, reviewed Washington’s medical records and EMG reports and concluded that the EMG reports of low back abnormalities were not consistent with Washington’s complaints. Dr. Michael Brooks, a neuroradiologist, reviewed Washington’s MRI films and concluded that there was no cervical or lumbar trauma related to the accident. Dr. Herbert Stein, an orthopedic surgeon, performed a physical examination of Washington and concluded that Washington was fully recovered from the injuries sustained in the accident. Finally, Dr. Nathan Schwartz, an anesthesiologist and specialist in pain management, reviewed Washington’s medical records and concluded that after June 2006, all of Washington’s strains and sprains had resolved. As the trial court aptly stated, “the defense theory was that after three months, none of Mr. Washington’s treatments were medically necessary.” (Trial court opinion at 2.)

At the conclusion of the trial, the jury entered a verdict in favor of Washington, finding that Klieforth was 100% causally negligent and responsible for Washington's injuries. The jury awarded Washington $64,500.99 in economic and non-economic damages. Klieforth then filed post-trial motions requesting a new trial. By order dated July 20, 2010, the trial court denied Klieforth's post-trial motions, granted Washington's petition for delay damages, and entered judgment in the amount of $67,384.83. This appeal followed.

On appeal,[1] Klieforth argues that the trial court abused its discretion or committed an error of law in denying Klieforth's post-trial motions requesting a new trial. Specifically, Klieforth contends, as she did in her post-trial motions, that she is entitled to a new trial because (1) the trial court erred in not ruling on objections to the medical experts' video depositions, and (2) the trial court erred in not precluding evidence and testimony regarding an MRI report produced after the discovery deadline. We address these issues in order.

The parties made numerous objections during the video depositions of the various medical experts. Relevant to this appeal, Klieforth objected on hearsay grounds during the video deposition of Dr. Lerner to Dr. Lerner testifying as to any medical records and/or reports relating to treatment that Washington received after June 26, 2006—the last date that Dr. Lerner treated Washington. (Dr. Lerner Dep. at 26-28.) Additionally, Klieforth objected during the video deposition of Dr. Brooks to Washington's use, during cross-examination of Dr. Brooks, of an MRI report produced after the discovery deadline. (Dr. Brooks Dep. at 56-58.)

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[1] "The decision whether to grant a new trial lies within the trial court's discretion. Therefore, when reviewing an order denying a motion for a new trial, we must determine whether the trial court clearly and palpably abused its discretion or committed an error of law which affected the outcome of the case." *Brinich v. Jencka*, 757 A.2d 388, 395 (Pa. Super. 2000) (citations and quotations omitted), *appeal denied*, 565 Pa. 634, 771 A.2d 1276 (2001).

Klieforth argues that she is entitled to a new trial because the trial court refused to rule on these objections. We disagree.

Rule 103(a)(1) of the Pennsylvania Rules of Evidence provides that an "[e]rror may not be predicated upon a ruling that admits or excludes evidence unless . . . a timely objection . . . appears of record." According to the note accompanying Rule 4017.1(h) of the Pennsylvania Rules of Civil Procedure, Pa. R.C.P. No. 4017.1(h),[2] "[l]ocal rules and practice shall regulate the procedure for handling objections to questions and answers on [video depositions]." Under Local Rule 4017.1(C) of the Philadelphia County Civil Local Rules, Phila. Civ. R. 4017.1(C), "[c]ounsel shall review the transcript together before presentation to the Trial Judge to resolve whatever objections can be resolved. They should present to the judge a list by page and line of the objections that still need rulings." Local Rule 4017.1(C) makes clear, therefore, that the parties must first attempt to resolve any objections to video depositions before presenting them to the trial court. If any objections go unresolved, those objections will not be reviewed by the trial court unless a list, identifying each individual objection by page and line number of the relevant video deposition transcript, is presented to the trial court.

Here, Klieforth requested during the trial—subsequent to Washington's live testimony and prior to Dr. Lerner's video deposition—that the trial court rule on the objections to the medical experts' video depositions. In response, the trial court deferred, and instructed counsel to work out the objections,

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[2] Rule 4017.1(h) of the Pennsylvania Rules of Civil Procedure provides:

> (h) At a trial or hearing that part of the audio portion of a video deposition which is offered in evidence and admitted, or which is excluded on objection, shall be transcribed in the same manner as the testimony of other witnesses. The videotape shall be marked as an exhibit and may remain in the custody of the court.

as is required by Local Rule 4017.1(C).[3] Thereafter, during a lunch recess, counsel reviewed the video depositions and were able to resolve some of the objections, but could not resolve others. When the trial resumed, however, Klieforth made no attempt, either orally or in writing, to present the unresolved objections to the trial court. Klieforth's failure to follow Local Rule 4017.1(C) and present the trial court with a list by page and line of the objections that still needed rulings, therefore, constitutes a waiver of Klieforth's objections. Accordingly, the trial court did not err in not ruling on the objections to the medical experts' video depositions.

Furthermore, even if we assume, *arguendo*, that the trial court did err in not ruling on the objections to the medical experts' video depositions, the trial court's failure to rule on Klieforth's objection to Dr. Lerner's testimony constitutes harmless error because Dr. Lerner's testimony was otherwise admissible. To recapitulate, Klieforth objected on hearsay grounds to Dr. Lerner testifying as to any medical records and/or reports relating to treatment that Washington received

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[3] The following exchange took place at the trial:

> Klieforth's Attorney: We have several objections that we need a ruling on from Your Honor on the videos.
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> . . . .
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> Trial Court: I'm sorry, I don't go over transcripts. You have to work it out.
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> . . . .
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> Trial Court: I never received anything in writing to indicate that there was anything for me to do. What else do you want?
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> Klieforth's Attorney: Well, there are objections all throughout every single video.
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> Trial Court: Well, all three counsel need to work those objections out. That's what we do in every case . . . .

(Trial court transcript, March 10, 2010, at 45-46.) While the trial court did not refer expressly to Local Rule 4017.1(C), it is clear from the above exchange that the trial court was describing the procedures outlined therein.

after June 26, 2006, because Dr. Lerner did not treat Washington beyond that date. Initially, it is important to note that, while Dr. Lerner last treated Washington on June 26, 2006, Dr. Lerner later examined Washington in September 2009 in preparation for his video deposition.

In *Primavera v. Celotex Corporation*, 608 A.2d 515 (Pa. Super. 1992), *appeal denied*, 533 Pa. 641, 622 A.2d 1374 (1993), the Superior Court addressed the extent to which an expert witness may rely on information generated by other professionals who are not subject to cross-examination. The Superior Court stated:

> [T]here is a well-settled exception to the hearsay rule which permits experts to testify regarding reports of others which are not in evidence, but upon which they relied in reaching their professional conclusions. . . .
>
> It is well understood that medical experts are permitted to express opinions which are based, in part, upon reports which are not in evidence, but which are customarily relied upon by experts in the practice of the profession.
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> . . . .
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> The fact that experts reasonably and regularly rely on this type of information merely to practice their profession lends strong indicia of reliability to source material, when it is presented though a qualified expert's eyes.
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> . . . .
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> The above analysis depends, of course, on the expert actually acting as an expert and not as a mere conduit or transmitter of the content of an extrajudicial source. An "expert" should not be permitted simply to repeat another's opinion or data without bringing to bear on it his own expertise and judgment.

Primavera, 608 A.2d at 518-21.

Here, the challenged medical records and reports that Dr. Lerner utilized to formulate his diagnosis and prognosis are the types of information customarily relied upon by doctors in the practice of the medical profession. It is difficult to comprehend how Dr. Lerner could provide an accurate opinion regarding Washington's medical condition without reviewing Washington's full medical history. Furthermore, Dr. Lerner did not merely recite the contents of the objected to medical records and reports in forming his opinion; instead, Dr. Lerner brought to bear his expertise and coupled his review of Washington's medical records and reports with his personal treatment and examination of Washington.[4]

Klieforth argues, next, that she is entitled to a new trial because the trial court erred in not precluding evidence and testimony regarding an MRI report produced after the discovery deadline. Relevant to this appeal, Washington received two MRIs between the date of the accident and the date of the trial—one on April 11, 2006 (2006 MRI),[5] and the other on November 21, 2008 (2008 MRI). The 2008 MRI was performed while Washington received treatment from Jefferson Family Medicine (Jefferson). Washington, however, did not inform his attorney that he had undergone treatment at Jefferson until after the discovery deadline, which was April 23, 2009. Upon learning that Washington received treatment at Jefferson, Washington's attorney immediately requested Washington's medical records from Jefferson. Washington's attorney received the Jefferson

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[4] Interestingly, two of Klieforth's own medical experts, Dr. Stein and Dr. Schwartz, testified at great length concerning the same medical records and reports to which Klieforth objected. Dr. Stein examined Washington on only one occasion, and Dr. Schwartz never examined Washington. Klieforth fails to elaborate why it was proper for Dr. Stein and Dr. Schwartz to testify concerning the offending medical records and reports, but improper for Dr. Lerner to do the same.

[5] The 2006 MRI, taken shortly after the accident, did not reveal any disc bulges in Washington's lower back. (Dr. Brooks Dep. at 67-69; Dr. Lerner Dep. at 59-60.)

medical records on November 2, 2009, and faxed them to Klieforth's attorney the same day. The Jefferson medical records contained a report relating to the 2008 MRI. According to the 2008 MRI report, the 2008 MRI films revealed multiple disc bulges in Washington's lower back. (Reproduced Record (R.R.) at 75a; Dr. Lerner Dep. at 28-29.)

Washington first used the 2008 MRI report during the video deposition of Dr. Lerner, which took place November 5, 2009. While Klieforth objected on hearsay grounds to Dr. Lerner testifying as to any medical records and/or reports regarding Washington's treatment after June 26, 2006, Klieforth made no objection based on the late production of the 2008 MRI report. Both Washington and Klieforth questioned Dr. Lerner regarding the 2008 MRI report, and Dr. Lerner gave his opinions and conclusions. Washington next used the 2008 MRI report during the video deposition of Dr. Brooks, which took place November 12, 2009. It was here that Klieforth first objected to use of the 2008 MRI report on the grounds that it was produced after the discovery deadline. In response to Washington's questioning, Dr. Brooks repeatedly explained that he would not express an opinion regarding the 2008 MRI because he had not independently reviewed the 2008 MRI films. Washington last used the 2008 MRI report during the video deposition of Dr. Rosenthal, which took place November 16, 2009. Klieforth did not object to the use of the 2008 MRI report during Dr. Rosenthal's video deposition. Both Washington and Klieforth questioned Dr. Rosenthal regarding the 2008 MRI report, and Dr. Rosenthal gave his opinions and conclusions.

Klieforth argues that the trial court should have precluded all evidence and testimony regarding the 2008 MRI report because she was prejudiced by its

late production. Klieforth argues that she was prejudiced because neither Dr. Brooks nor Dr. Schwartz had the opportunity to review the 2008 MRI films and make an independent evaluation before their respective video depositions. In so arguing, Klieforth cites *Kemp v. Qualls*, 473 A.2d 1369, 1374 (Pa. Super. 1984), for the proposition that discovery sanctions may be imposed where "the complaining party shows that he has been prejudiced from properly preparing his case for trial as the result of a dilatory disclosure." As to what a court must consider in determining whether to preclude expert testimony as a discovery sanction, Klieforth cites *Gill v. McGraw Electric Company*, 399 A.2d 1095, 1101 (Pa. Super. 1979),[6] which provides the following factors:

> (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified, (2) the ability of that party to cure the prejudice, (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court, and (4) bad faith or willfulness in failing to comply with the court's order.

Klieforth, therefore, contends that the trial court should have precluded all evidence and testimony regarding the 2008 MRI report as a discovery sanction. We disagree.

Initially, it is important to reiterate that Klieforth's only opposition of record to Washington's production of the 2008 MRI report after the discovery deadline was in the form of an objection during Dr. Brooks' video deposition. As

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[6] In *Kaminski v. Employers Mutual Casualty Company*, 487 A.2d 1340, 1344 n.3 (Pa. Super. 1985), the Superior Court, recognizing the addition of subsection (i) to Rule 4019 of the Pennsylvania Rules of Civil Procedure, Pa. R.C.P. No. 4019(i), questioned the continued applicability of *Gill* to situations involving a party's failure to disclose the identity of a witness during discovery. Rule 4019(i) provides for, as a discovery sanction, the mandatory preclusion of the testimony of an undisclosed witness, absent extenuating circumstances. *Kaminski* does not appear to affect the applicability of *Gill* in the present situation.

discussed above, Klieforth failed to present properly to the trial court her objections to the medical experts' video depositions. Furthermore, Rule 4019(a) of the Pennsylvania Rules of Civil Procedure, Pa. R.C.P. No. 4019(a)—concerning discovery sanctions—provides, in pertinent part: "The court may, *on motion*, make an appropriate order . . . ." (Emphasis added.) Here, Klieforth did not file a motion for sanctions, motion in limine, or any other motion concerning Washington's late production of the 2008 MRI report. Accordingly, it does not appear that Klieforth properly raised this issue before the trial court.

Notwithstanding, applying the above factors, the trial court did not err in not precluding evidence and testimony regarding the 2008 MRI report. Here, Klieforth had over four months between the date that the 2008 MRI report was produced and the date of the trial. During that time period, Klieforth did not attempt to cure the prejudice she now claims. For instance, Klieforth could have postponed Dr. Brooks' video deposition—which took place ten days after production of the 2008 MRI report and seven days after Dr. Lerner's video deposition—until Dr. Brooks had the opportunity to review the 2008 MRI report and independently evaluate the 2008 MRI films, but she made no attempt to do so. Similarly, Klieforth could have scheduled Dr. Brooks and Dr. Schwartz to return for a second day of testimony once each doctor had the opportunity to review the 2008 MRI report and/or independently evaluate the 2008 MRI films, but she did not. In fact, Klieforth did not even order the 2008 MRI films until February 8, 2010—over three months after production of the 2008 MRI report.[7]

Moreover, Klieforth delayed until the date of the trial to bring Washington's late production of the 2008 MRI report to the trial court's attention.

[7] The record is unclear as to what use, if any, Klieforth made of the 2008 MRI films.

To reiterate, Klieforth filed no motion for sanctions, no motion in limine, or any other motion concerning production of the 2008 MRI report after the discovery deadline. Had Klieforth filed such a motion shortly after the 2008 MRI report was produced, the trial court could have presumably fashioned a remedy that would have addressed Klieforth's concerns without completely precluding all evidence and testimony regarding the 2008 MRI report. As the Superior Court has stated, "to preclude the testimony of a witness is a drastic sanction, and it should be done only where the facts of the case make it necessary." *Jacobs v. Chatwani*, 922 A.2d 950, 962 (Pa. Super.) (citations and quotations omitted), *appeal denied*, 595 Pa. 708, 938 A.2d 1053 (2007).

Accordingly, we affirm.

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P. KEVIN BROBSON, Judge

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O R D E R

AND NOW, this 12th day of July, 2011, the order of the Court of Common Pleas of Philadelphia County, dated July 20, 2010, is hereby AFFIRMED.

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P. KEVIN BROBSON, Judge