[Cite as *Schultz v. Duffy*, 2010-Ohio-1750.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93215

RONALD SCHULTZ, ET AL.

PLAINTIFFS-APPELLANTS/
CROSS-APPELLEE

vs.

DANIEL H. DUFFY, JR., ET AL.

DEFENDANTS-APPELLEES/
CROSS-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas

Case No. CV-603908

BEFORE: Stewart, J., Gallagher, A.J., and Dyke, J.

RELEASED: April 22, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting

brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

MELODY J. STEWART, J.:

{¶ 1} Plaintiffs-appellants, Ronald and Linda Schultz [1] ("Schultz"), appeal from jury verdicts in Ronald's medical malpractice action against defendant-appellee/cross-appellant, Daniel Duffy, Jr., and his personal injury action against defendant-appellee, Richard West. Schultz alleged that Duffy negligently rendered chiropractic care and that West negligently struck Schultz's vehicle. West conceded liability and the cases were tried together. A jury found that Duffy did not violate the applicable standard of care and the court entered a defense verdict. The jury ordered West to pay Schultz damages totaling $10,000. In this appeal, Schultz claims that the court erred by (1) granting a motion in limine that prevented his expert witness from testifying, (2) giving an incomplete jury instruction on proximate causation, and (3) violating the collateral source rule by permitting the introduction of evidence of medical bills and expenses. Duffy offers a contingent assignment of error complaining that the court erred by denying his motion for a directed

[1]At no point did Schultz list Linda's name in the caption of the complaint — a violation of Civ.R. 10(A) that could have been grounds for dismissal. See, e.g., *State ex rel. Sherrills v. State* (2001), 91 Ohio St.3d 133, 2001-Ohio-299, 742 N.E.2d 651. The defendants did not seek her dismissal. However, none of the arguments specifically reference Linda, so we refer to the plaintiffs collectively as "Schultz."

verdict. We find no merit to either aspect of Schultz's appeal and affirm; Duffy's cross-appeal is moot.

{¶ 2} Schultz does not question the adequacy of the evidence supporting the jury's verdict nor does he question the amount of damages awarded, so we state the underlying facts in summary form. Schultz several times received treatment from Duffy, a chiropractic doctor, for neck complaints. During one of those sessions, Duffy manipulated Schultz's neck, allegedly causing a "snap" and severe pain that Schultz alleged required surgery. About four months after this surgery, West and Schultz were involved in a motor vehicle accident that reinjured Schultz's neck. Schultz endured several more surgeries that failed to alleviate his constant pain.

{¶ 3} Schultz brought suit against Duffy alleging that Duffy negligently examined, diagnosed, and treated him; he brought suit against West alleging that West negligently operated his vehicle. The jury returned an interrogatory finding that Duffy did not breach the applicable standard of care, so the court entered judgment for Duffy on the malpractice claim. West, having admitted liability, was held liable for economic damages of $4,000, non-economic damages of $4,500, and loss of consortium in the amount of $1,500.

I

{¶ 4} The first assignment of error is that the court erred by refusing to allow Michael Eppig, M.D., a surgeon who performed three surgeries on Schultz, to testify as an expert witness. Duffy filed a motion in limine to exclude Eppig's testimony on grounds that Eppig failed to file an expert report as required by Loc.R. 21.1 of the Court of Common Pleas of Cuyahoga County. The court granted the motion in limine without opinion. Schultz concedes that he filed the report out of rule, but maintains that there would have been no prejudice from allowing admission of the report because he had previously identified Eppig as a potential witness.

{¶ 5} Schultz did not proffer Eppig's testimony at trial, and has therefore waived the right to raise any error relating to the motion in limine on appeal.

{¶ 6} "An order granting or denying a motion in limine is a tentative, preliminary or presumptive ruling about an evidentiary issue that is anticipated." *State v. Grubb* (1986), 28 Ohio St.3d 199, 203, 503 N.E.2d 142. A party that has been prohibited from introducing evidence because of a ruling in limine must "seek the introduction of [that] evidence by proffer or otherwise in order to enable the court to make a final determination as to its admissibility and to preserve any objection on the record for purposes of appeal." Id.; *Garrett v. Sandusky*, 68 Ohio St.3d 139, 141, 1994-Ohio-485, 624 N.E.2d 704.

{¶ 7} *Grubb* is consistent with Evid.R. 103(A), which requires any claim of error relating to the exclusion of evidence to (1) affect a substantial right of

the party and (2) the substance of the excluded evidence must be made known to the court by proffer or should be apparent from the context within which questions were asked. *Orbit Electronics, Inc. v. Helm Instrument Co., Inc.*, 167 Ohio App.3d 301, 2006-Ohio-2317, 855 N.E.2d 91, at ¶24.

{¶ 8} An adequate offer of proof must tell the court the legal theory for admissibility and what a witness was expected to testify to or what the evidence would have proven or tended to prove. *State v. Darrah*, 12th Dist. No. CA2006-09-109, 2007-Ohio-7080, at ¶22; *Moser v. Moser* (1991), 72 Ohio App.3d 575, 580, 595 N.E.2d 518. "'An appellate court need not review the propriety of [a decision on a motion in limine] unless the claimed error is preserved by an objection, proffer, or ruling on the record when the issue is actually reached and the context is developed at trial.'" *Grubb*, 28 Ohio St.3d at 203, quoting Palmer, Ohio Rules of Evidence Rules Manual (1984) 446.

{¶ 9} Schultz did not proffer the substance of Eppig's testimony, so we have no basis for reviewing the court's decision to exclude that testimony.

{¶ 10} Responding to the waiver issue, Schultz makes the argument that he was excused from the obligation to proffer any evidence because the ruling on the motion in limine was the "law of the case" issued by the originally-assigned judge, thus preventing the visiting judge assigned to preside at trial from revisiting that ruling. He claims that a judge assigned to preside over a trial must give deference to decisions made by the

originally-assigned judge, so that an objection and proffer at trial would have been pointless.

{¶ 11} Although judges assigned to preside over trials may in practice decline to disturb rulings made by the originally-assigned judge, the law of the case doctrine is not a legal basis for so doing. In *Hopkins v. Dyer*, 104 Ohio St.3d 461, 2004-Ohio-6769, 820 N.E.2d 329, the supreme court stated:

{¶ 12} "The law of the case is a longstanding doctrine in Ohio jurisprudence. 'The doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and reviewing levels.' The doctrine is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution. *It is considered a rule of practice, not a binding rule of substantive law*." Id. at ¶15, quoting *Nolan v. Nolan* (1984), 11 Ohio St.3d 1, 3, 462 N.E.2d 410 (emphasis added).

{¶ 13} Contrary to Schultz's contention, there is no rule of court that prohibits a visiting judge assigned to preside over a trial from revisiting rulings in limine made by the originally-assigned judge. As a matter of *practice* in this county, visiting judges assigned for the purpose of presiding over trial almost always decline to revisit pretrial evidentiary rulings because the timing of their assignment is such that their first exposure to the case occurs when the parties

appear fully prepared to commence trial — their lack of familiarity with the case would make any reconsideration of the originally-assigned judge's pretrial rulings problematic. While visiting judges are not forbidden from reconsidering interlocutory rulings made by the originally-assigned judge, they very sensibly defer to pretrial rulings. But that deference should not be confused with saying that all pretrial rulings are inviolable.

{¶ 14} Until a case is final and appealable, all orders entered by the court are interlocutory orders. Although not expressly incorporated in the Rules of Civil Procedure, it is well-accepted that a court may entertain a motion for reconsideration of interlocutory orders. See *Mahlerwein v. Mahlerwein*, 160 Ohio App.3d 564, 2005-Ohio-1835, 828 N.E.2d 153, at ¶20 ("Interlocutory orders are subject to change and may be reconsidered upon the court's own motion or that of a party."); *Nayman v. Kilbane* (1982), 1 Ohio St.3d 269, 271, 439 N.E.2d 888. Any order that can be reconsidered is plainly not a final order that would be subject to the law of the case doctrine.

{¶ 15} No matter how futile Schultz thought a renewed argument might have been, his obligation to proffer the substance of Eppig's testimony remained. Indeed, this case demonstrates why there is a proffer requirement — the malpractice issues relating to examination, diagnosis, and treatment required an application of specific facts to the relevant standard of care. Regardless of whether Schultz thought that it would be futile to renew his

objection to the ruling in limine, his failure to proffer the substance of Eppig's testimony, leaves us with no way of knowing the basis for Eppig's opinion that Duffy violated the standard of care, and thus whether the exclusion of Eppig's testimony might have violated a substantial right. Lacking a record on which to find that Schultz suffered prejudice from the ruling barring Eppig from testifying as an expert witness, we find that Schultz waived the right to appeal from the court's ruling in limine.

II

{¶ 16} The second assignment of error relates solely to West and complains that the court erred by allowing collateral source information to go to the jury (the defense verdict for Duffy obviated the need to consider damages).

{¶ 17} Schultz does not state exactly what collateral source information went to the jury. App.R. 16(A)(7) states that the brief of the appellant must contain "[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies." We may disregard any assignment of error that fails to conform to App.R. 16(A). See App.R. 12(A)(2); *Hawley v. Ritley* (1988), 35 Ohio St.3d 157, 159, 519 N.E.2d 390.

{¶ 18} In any event, West claims that during closing argument he said that "all of the medical care and treatment bills incurred as a result of the

automobile accident should be considered by the jury" and that he "never moved to exclude evidence of write-offs or other insurance payments." West Appellee Brief at 14-15. Schultz does not dispute West's statement, but merely responds by saying that he will not "waste this court's time" with further arguments in support of the assignment of error and requested that upon remand, we make clear that "the total value and billed amount of services can be considered by the jury." Appellant's Reply Brief at 8. By all appearances, Schultz has pointed to no claim of error.

III

{¶ 19} The third assignment of error is that the court erred by responding to the jury's request for a rereading of the proximate cause instruction by reading only a portion of the proximate cause instruction. Schultz maintains that the portion of the charge read to the jury was beneficial to Duffy at his (Schultz's) expense.

{¶ 20} We can summarily overrule this assignment of error because any error in rereading only a portion of the proximate cause instruction would be harmless given that the jury returned an interrogatory finding that Duffy had not been negligent. That finding made it unnecessary for the jury to consider the issue of proximate causation. See *Cogswell v. Clark Retail Ent., Inc.*, 11th Dist. No. 2003-G-2519, 2004-Ohio-5640, at ¶21.

{¶ 21} Moreover, we note that Schultz failed to object to the court's partial reading of the proximate cause instruction. Civ.R. 51(A) states that a party "may not assign as error the giving or the failure to give any instruction unless the party objects before the jury retires to consider its verdict." Schultz did not object after the court finished rereading the instruction, so he has waived the right to assign this as error.

{¶ 22} Finally, the court only read a portion of the proximate cause instruction because the jury said that the portion that the court had reread to them was all that it required.

{¶ 23} When a jury requests further instruction or clarification of instructions previously given, a trial court may exercise its discretion in determining the appropriate response. *State v. Carter* (1995), 72 Ohio St.3d 545, 651 N.E.2d 965.

{¶ 24} After instructing the jury, among other things, that "[c]ausation is established when the injury is the natural and foreseeable result of the act," the court asked the jurors, "[d]o you want me to reread to you more than one proximate cause and intervening and superseding causes? Do you want me to reread those or not or you got what you need?" A juror responded, "I think we have what we need." The court replied, "[g]ood. Then I won't. You can continue with your deliberations."

{¶ 25} The quoted transcript excerpts show that the jurors were not looking for a rereading of the entire proximate cause instruction. In its discretion, the court determined that a partial rereading of the proximate cause instruction was sufficient, and that determination was not arbitrary given the juror's comment that "I think we have what we need." No abuse of discretion has been shown.

Judgment affirmed.

It is ordered that defendants-appellees recover of plaintiffs-appellants their 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 Cuyahoga County Court of Common Pleas 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.

MELODY J. STEWART, JUDGE

SEAN C. GALLAGHER, A.J., and
ANN DYKE, J., CONCUR

KEY WORDS:
93215

Motion in limine; proffer; App.R. 16(A)(7); jury instructions; rereading