[Cite as *Anthony v. Andrews*, 2009-Ohio-6378.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

REBECCA ANTHONY,	:	**O P I N I O N**
Plaintiff-Appellee,	:	
		CASE NO. 2008-P-0091
- vs -	:	
ANNETTE L. ANDREWS, M.D., et al.,	:	
Defendants-Appellants.	:	

Civil Appeal from the Portage County Court of Common Pleas, Case No. 2007 CV 0691.

Judgment: Reversed.

Susan E. Petersen, Petersen & Ibold, Inc., 401 South Street, Bldg. 1-A, Chardon, OH 44024 (For Plaintiff-Appellee).

Clifford C. Masch and *Brian D. Sullivan*, Reminger & Reminger Co., L.P.A., 1400 Midland Building, 101 Prospect Avenue, West, Cleveland, OH 44115 (For Defendants-Appellants).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Annette L. Andrews, M.D., appeals the Judgment Entry of the Portage County Court of Common Pleas, in which the trial court sanctioned her in the aggregate amount of $1,475.75 for failure to proceed in good faith at a mediation conference. For the following reasons, we reverse the decision of the trial court.

{¶2} Plaintiff-appellee, Rebecca Anthony, filed a complaint for medical malpractice against defendants-appellants, Dr. Annette Andrews and Total Lifetime Care Medical Affiliates, Inc. Mediation was scheduled for June 26, 2008.

{¶3} On June 27, 2008, the trial court, acting sua sponte, after what the court characterized as "the combined failure of Defendants' counsel *** and their insurance representative *** to negotiate in good faith at the Mediation Conference held on June 6, 2008," ordered Andrews to show cause why judgment should not be granted in favor of plaintiff or in the alternative for not levying attorney fees and costs against her.

{¶4} On August 4, 2008, the trial court found that Andrews' "counsel and insurance representative failed to obtain the requisite consent of their physician-client to even initiate mediation and/or settle the instant matter." Moreover, "90 minutes after the [mediation] session began, [Andrew's] counsel informed Mediator Richard J. Steinle that Dr. Andrews would not give her consent to settle the instant matter nor had she ever given them consent to do so."

{¶5} The trial court concluded that Andrews had shown good cause "as to why this cause should not be dismissed." However, the court found that she failed to show good cause why the sanction of fees and costs should not be assessed against her. The court further ordered Anthony to submit an itemized account of her actual expenses incurred by attending the mediation and a statement as to the time expended by her attorney in attending and traveling to and from the conference, at the hourly rate charged by the firm.

{¶6} Andrews subsequently filed a Motion for Reconsideration, while Anthony filed a Submission of Fees and Expenses pursuant to the trial court's order.

{¶7} On September 4, 2008, the trial court, upon review of Anthony's itemized account and statement, concluded the sanction of $1,250, representing attorney's fees, was reasonable and necessary. Further, the court concluded that the sanction of $225.75, representing Anthony's lost income and expenses in attending the proceeding, was reasonable and necessary. The court ordered that the aggregate amount of the sanction, $1,475.75, was to be paid to Anthony's counsel by Andrews.

{¶8} Andrews timely appeals and raises the following assignment of error:

{¶9} "The trial court incorrectly sanctioned defendants for failing to allegedly participate in good faith in a court ordered mediation conference."

{¶10} The decision to impose sanctions is left to the discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *State ex rel. Fant v. Sykes* (1987), 29 Ohio St.3d 65. An abuse of discretion occurs when a decision is unreasonable, arbitrary, or unconscionable. *State ex rel. Worrell v. Ohio Police & Fire Pension Fund*, 112 Ohio St.3d 116, 2006-Ohio-6513, at ¶10 (citation omitted).

{¶11} In her sole assignment of error, Andrews argues that the trial court incorrectly sanctioned her for failing to participate in good faith in a court ordered mediation.

{¶12} Andrews contends that the communication made during the mediation was privileged and thus, protected from disclosure. We agree.

{¶13} In general, it is within the discretion of the trial court to promote and encourage settlements to prevent litigation. *Rulli v. Fan Co.*, 79 Ohio St.3d 374, 376, 1997-Ohio-380. Pursuant to R.C. 2710.01(A), mediation "means any process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute." "Mediation is, by its very

nature, a voluntary process." *U. S. Bank Natl. Assn. v. Morales*, 11th Dist. No. 2009-P-0012, 2009-Ohio-5635, at ¶23. The Supreme Court of Ohio has held that "[w]e are fully aware that we cannot order the parties to settle: we can only order the parties to accept the opportunity that we are providing to facilitate serious, realistic efforts to finally resolve the issues that separate them. If mediation does not produce settlement, we will assume our responsibility to finally resolve the matter." *DeRolph v. State*, 93 Ohio St.3d 628, 631, 2001-Ohio-1896.

{¶14} Mediation communications are privileged against disclosure pursuant to R.C. 2710.03. Moreover, a "mediation party may refuse to disclose, and may prevent any other person from disclosing, a mediation communication." R.C. 2710.03(B)(1). Andrews maintains that she did not waive her privilege or consent to disclosure of any confidential mediation discussions.

{¶15} Anthony argues that no mediation took place due to Andrews' lack of settlement authority and therefore, privilege is not applicable. However, even if no actual "mediation" took place as Anthony alleges, the statute provides that certain communications made pursuant to a mediation are still considered "mediation communications".

{¶16} R.C. 2710.01(B) defines a "mediation communication" as "a statement, whether oral, in a record, verbal or nonverbal, that occurs during a mediation **or** is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator." (Emphasis added).

{¶17} There are exceptions to mediation communications privilege which include: "a written agreement evidenced by a record signed by all parties to the agreement"; "communication *** made during a session of a mediation that is open"; "an

imminent threat or statement of a plan to inflict bodily injury or commit a crime of violence"; "[a] plan, attempt to commit, or commit a crime or to conceal an ongoing crime or ongoing criminal activity"; "communication *** sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice filed against a mediator *** or complaint of professional misconduct or malpractice filed against a mediation party, nonparty participant, or representative of a party based on conduct occurring during a mediation *** or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party." R.C. 2710.05(A)(1)-(7). The communication used to sanction Andrews does not meet any of the exceptions.

{¶18} In the instant case, Andrews was sanctioned for failure to proceed in good faith to reach a compromise agreement. In reaching its decision, the trial court reasoned that "[a]pproximately 90 minutes after the session began, [Andrew's] counsel informed Mediator Richard J. Steinle that Dr. Andrews would not give her consent to settle the instant matter nor had she ever given consent to do so." Furthermore, the court stated that Andrew's "counsel and insurance representative had more than 5 months to obtain the consent of their client to proceed in good faith which is the requirement of this Court."

{¶19} The conference with the parties and the mediator had been in session for 90 minutes, the communication that "Andrews would not give her consent to settle" was made "for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator", thus, protected "mediation communication" under statute. R.C. 2710.01(B).

{¶20} Anthony further maintains that the mediator was allowed to issue a report pursuant to "Ohio Revised Code 2710.06(B)(1)" and "the information relied upon by the court in issuing its award of sanctions did not fall within the purview of a 'privileged mediation communication.'"

{¶21} Anthony is correct in that a mediator is allowed to present the court with a mediation report; however, according to the statute, a mediator may only disclose the following: "(1) Whether the mediation occurred or has terminated, whether a settlement was reached, and attendance; (2) A mediation communication as permitted by *** the Revised Code; [and] (3) A mediation communication evidencing abuse, neglect, abandonment, or exploitation of an individual to a public agency responsible for protecting individuals against abuse, neglect, abandonment, or exploitation." R.C. 2710.06(B)(1)-(3).

{¶22} The privileged mediation communication that Andrews would not give her consent to settle was not permitted to be disclosed in the mediator's report. The mediator was only allowed to disclose whether the mediation had occurred or terminated, the statute does not permit for the reasoning to be disclosed. The statute also expressly provides a privileged communication disclosed by a mediator "shall not be considered by a court, administrative agency, or arbitrator." R.C. 2710.06(C).

{¶23} While we appreciate the trial court's frustration, the court cannot rule based on mediation communication or an improper mediation report. The issuance of sanctions based on privileged mediation communication was an abuse of discretion.

{¶24} For the foregoing reasons, the Judgment Entry of the Portage County Court of Common Pleas, sanctioning Andrews in the aggregate amount of $1,475.75 for

failure to proceed in good faith at a mediation conference, is reversed. Costs to be taxed against appellee.

COLLEEN MARY O'TOOLE, J., concurs in judgment only,

TIMOTHY P. CANNON, J., concurs with Concurring Opinion.

TIMOTHY P. CANNON, J., concurring.

{¶25} I concur with the opinion of the majority.

{¶26} I write separately to further address the contention in appellants' first issue for review, at paragraph A 1. Therein, appellants claim: "Neither Local Rule 23.01 Nor the Court's Scheduling Order Require a Party to Make a Monetary Offer of Settlement at Mediation." I would specifically agree with this contention.

{¶27} There is no obligation to make an offer of settlement. At the conclusion of the case, if it is determined that refusal to make an offer is a decision made in bad faith, the law allows for a penalty in the form of prejudgment interest to be awarded.

{¶28} According to the record before us, a status conference was held on January 18, 2008. According to the magistrate's order, appellants' counsel apparently did not appear. At this status conference, the magistrate's order directed that the case was to be set for mediation June 26, 2008. A mediation notice dated the same day as the order was sent by the court mediator, Richard Steinle. That notice set forth the obligations of each party for purposes of the mediation hearing. There is nothing in the record before us to establish that appellants failed to fulfill any of the obligations in that

notice. The parties were bound to appear with individuals having full authority to settle. The appellants complied with this requirement; they did appear. There has been a great deal of focus on the fact that Dr. Andrews "refused" to waive a "consent to settle" provision that she had with her insurance carrier. I do not understand how this is any different than a party simply refusing to make an offer of settlement. The "consent to settle" provision is a benefit to the physician for which the physician presumably pays a premium. To require the physician to waive this provision in the event the court orders mediation is tantamount to requiring a defendant to make an offer. If Dr. Andrews had no insurance and refused to make an offer to settle, there would not be an issue. Dr. Andrews should not be penalized for having the "consent to settle" provision in her policy.

{¶29} There has been some suggestion that counsel was obligated to inform everyone that his client had not waived this provision prior to the mediation. However, there should be no more obligation on counsel to make this disclosure than if there was no insurance, and the defendant did not intend to make an offer. There are many times when counsel does not anticipate a mediation will do much good, but a settlement nevertheless is achieved. Attending the mediation should be encouraged regardless of what a party may think. Even if it does not immediately result in a settlement, it may make settlement more likely later in the case because the parties have been exposed to each other's claims and positions. Appellee's contention that appellants somehow obtained an advantage by hearing her side of the case is not necessarily true. In the mediation setting, the opposing side is only going to hear what you want them to hear.