

[Cite as *Abels v. Ruf*, 2009-Ohio-3003.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

CHERYL ABELS, et al.

C.A. No. 24359

Appellants

v.

WALTER RUF, M.D., et al.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2003-02-0787

Appellees

DECISION AND JOURNAL ENTRY

Dated: June 24, 2009

CARR, Judge.

{¶1} Appellants, Cheryl and James Abels, individually and as parents and next friends of Erin Abels, appeal the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} On February 5, 2003, Mr. and Mrs. Abels filed a complaint alleging medical malpractice against Appellee, Dr. Walter Ruf, arising out of his care and treatment of Mrs. Abels. Mr. Abels alleged a claim for loss of consortium. On March 7, 2003, Dr. Ruf denied the allegations and raised several defenses in his answer. On April 9, 2003, Mr. and Mrs. Abels, individually and as parents and next friends of their minor child Erin, filed an amended complaint, joining Walter R. Ruf, M.D., Inc. as a defendant; adding negligent credentialing and negligent retention claims against newly joined defendants Summa Health Care Systems and Akron City Hospital; and alleging a loss of consortium claim on behalf of the couple's minor

child. On April 29, 2003, Dr. Ruf and his corporation filed separate answers to the amended complaint, denying the allegations and raising several defenses. On May 20, 2003, Summa Health Care System and Akron City Hospital jointly answered the amended complaint, denying the allegations and raising several defenses.

{¶3} Disputes arose during the course of discovery. Summa Health Care System filed a notice of appeal on July 7, 2004, and the trial court stayed further proceedings pending resolution of the appeal. On February 23, 2005, this Court disposed of the appeal. See *Abels v. Ruf*, 9th Dist. No. 22265, 2005-Ohio-719, certiorari denied 106 Ohio St.3d 1462, 2005-Ohio-3490. Additional discovery disputes arose, and Summa Health Care System and Dr. Ruf filed notices of appeal on November 9, 2005, and December 7, 2005, respectively. This Court consolidated the appeals and disposed of them on July 26, 2006. See *Abels v. Ruf*, 9th Dist. Nos. 22959, 23013, 2006-Ohio-3813.

{¶4} On March 31, 2008, Summa Health Care System moved to bifurcate the negligent credentialing and negligent retention claims from the medical malpractice claims. The trial court granted the motion to bifurcate and the matter proceeded to trial before a jury on the plaintiffs' medical malpractice and loss of consortium claims. Dr. Ruf moved for a directed verdict at the conclusion of Mrs. Abels' case-in-chief and again at the conclusion of all the evidence. The trial court denied both motions. At the conclusion of trial, the jury found that Dr. Ruf did not breach the standard of care. Accordingly, the jury did not reach the issue of proximate cause. On July 2, 2008, the trial court entered judgment in favor of Dr. Ruf and against the Abels family. On July 16, 2008, the plaintiffs filed a motion for new trial. Dr. Ruf opposed the motion. On July 25, 2008, the trial court denied the motion for new trial. The Abels family filed a timely appeal, raising two assignments of error for review. Dr. Ruf filed a cross-assignment of error.

II.

ASSIGNMENT OF ERROR I

“THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY PROHIBITING APPELLANT’S EXPERT, DR. KATHLEEN VEREB, A PHYSICIAN BOARD CERTIFIED IN INTERNAL MEDICINE AND A PRACTICING HOSPITALIST, FROM OFFERING STANDARD OF CARE OPINIONS REGARDING THE TREATMENT OF A POST-OPERATIVE INFECTION.”

{¶5} Mrs. Abels argues that the trial court erred by prohibiting Dr. Kathleen Vereb from testifying as an expert and offering her opinion on the issues of the applicable standard of care, breach and proximate cause. This Court disagrees.

{¶6} The issue of the propriety of Dr. Vereb testifying as an expert was raised and resolved numerous times before the trial court. Mrs. Abels challenges the trial court’s May 19, 2008 order denying her motion for reconsideration from and/or clarification of a May 7, 2004 order prohibiting Dr. Vereb from testifying as to her opinion regarding the standard of care provided by Dr. Ruf or any deviation from the standard of care. Mrs. Abels argues that the May 19, 2008 order is “flawed” because she timely identified Dr. Vereb as an expert witness and because Dr. Vereb is competent to testify as an expert in this case. Because Mrs. Abels failed to comply with the trial court’s discovery deadlines and timely identify Dr. Vereb as an expert witness, this Court need not consider whether Dr. Vereb was competent to present expert testimony.

{¶7} This Court has held that “[a] trial court enjoys broad discretion in the regulation of discovery proceedings.” *B.F.G. Employees Credit Union, Inc. v. Kopco & Co.*, 9th Dist. No. 01CA007929, 2002-Ohio-2202, at ¶11; see, also, *Martin v. The Budd Co.* (1998), 128 Ohio App.3d 115, 119. Accordingly, this Court reviews the trial court’s ruling in regard to the management of the discovery process for an abuse of discretion. *Kopco* at ¶11. Notwithstanding

the broad discretion enjoyed by trial courts in the regulation of discovery, they must nevertheless keep the interests of the parties in mind. *Martin*, 128 Ohio App.3d at 119. Moreover, “[t]rial courts have broad discretion in determining the admissibility of expert testimony, subject to review for an abuse of discretion.” *Terry v. Caputo*, 115 Ohio St.3d 351, 2007-Ohio-5023, at ¶16. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. An abuse of discretion demonstrates “perversity of will, passion, prejudice, partiality, or moral delinquency.” *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. *Id.*

{¶8} Mrs. Abels argues that she timely identified Dr. Vereb as an expert witness. The record, however, fails to bear out her assertion. On July 18, 2003, Mrs. Abels filed her first pretrial statement. She identified Dr. David Grischkan as an expert. She noted that she would “almost certainly” call Dr. Vereb, a subsequent treating physician, to testify and that Mrs. Abels’ “subsequent treating physicians shall be called for purposes of fact and expert testimony.” However, she did not expressly identify Dr. Vereb as an expert witness at that time. On November 19, 2003, Mrs. Abels filed her second pretrial statement in which she asserted that she had “already identified Dr. Grischkan as her expert witness in this case.” She further asserted that she expected to call an unidentified economist as an expert witness. In addition, she reserved the right to call “any and all subsequent treating physicians as expert witnesses in this case.” However, she did not expressly identify Dr. Vereb as an expert witness.

{¶9} On March 10, 2004, Mrs. Abels filed a response to Summa Health Care System’s motion in opposition regarding the deposition of Dr. Vereb. In that response, Mrs. Abels argued

that Summa was improperly trying to limit the scope of Dr. Vereb's testimony when it notified plaintiff's counsel in a letter that Dr. Vereb would not be permitted to testify regarding the standard of care of any other physician. Mrs. Abels argued that Dr. Vereb should be permitted to testify in regard to the standard of care (if she had knowledge in that regard), but she did so within the context of her claim against Summa and Akron City Hospital alleging negligent credentialing.

{¶10} On March 30, 2004, Mrs. Abels filed a motion for extension of time in which to disclose her expert witnesses. In that motion, she admitted that she had already disclosed the identity of her expert witness "for the claims asserted against Dr. Ruf." The only expert identified at that time was Dr. Grischkan. Mrs. Abels merely requested more time to locate and identify an expert witness in relation to her negligent credentialing claim.

{¶11} On May 7, 2004, the trial court issued an order prohibiting Dr. Vereb from testifying at trial as to her opinion concerning the standard of care provided by Dr. Ruf or any deviation from the standard of care. On the same day, the trial court issued an order extending the time for Mrs. Abels to disclose expert witnesses until June 18, 2004.

{¶12} On June 28, 2007, Mrs. Abels filed a supplemental response to the motion for summary judgment filed by Summa Health Care System. In that response, she stated that Dr. Vereb would be testifying that Dr. Ruf deviated from the applicable internal medicine standard of care and that Mrs. Abels suffered injury as a direct result of that negligence.

{¶13} On August 23, 2007, the trial court ordered that all discovery be completed by January 4, 2008, and that all expert witnesses be disclosed and made available for deposition prior to that date. The trial court expressly ordered: "No discovery will be permitted after this date."

{¶14} On February 27, 2008, Mrs. Abels moved the trial court to reconsider and/or clarify its May 7, 2004 order in which it prohibited Dr. Vereb from testifying regarding the standard of care provided by Dr. Ruf and any deviation from that standard. On May 19, 2008, the trial court refused to clarify the order, finding that the language was not ambiguous. In addition, the trial court found any reconsideration of the order moot because the motion, which effectively requested that Dr. Vereb be permitted to give expert testimony, was filed after the deadline set for the disclosure of expert witnesses. The trial court stated: “The Court will not add a new expert after the expiration of the deadline and with trial set for June 24, 2008.”

{¶15} On June 9, 2008, Mrs. Abels again moved the trial court to reconsider its order prohibiting Dr. Vereb from testifying as an expert, further requesting that the trial court voir dire Dr. Vereb to determine her competence to testify in that capacity. On June 18, 2008, the trial court denied the second motion for reconsideration, reiterating that Mrs. Abels was effectively requesting to add an expert witness beyond the deadline established by the court. The trial court refused to allow the untimely addition of an expert witness due to the age of the case in the interests of justice and avoiding additional delay.

{¶16} In this case, Mrs. Abels did not expressly identify Dr. Vereb as an expert witness prior to the trial court’s May 7, 2004 order precluding the doctor’s opinion testimony. Mrs. Abels asserts that her subsequent reference to Dr. Vereb in a document filed with the court put Dr. Ruf on notice that she intended to call the doctor as an expert witness. We do not here determine whether such reference to Dr. Vereb might otherwise have constituted proper disclosure of an expert witness because, in this case, Mrs. Abels made no attempt to persuade the trial court to change its prior ruling precluding Dr. Vereb’s expert testimony until after the close of discovery.

{¶17} Furthermore, while the trial court extended the deadline for the disclosure of expert witnesses until January 4, 2008, Mrs. Abels made no attempt to move the trial court to reconsider its May 7, 2004 prohibition until nearly two months after the disclosure deadline had passed. The second request for reconsideration was filed a full five months after the disclosure deadline and a mere fifteen days before the date scheduled for trial. The trial court clearly considered the interests of the parties when it denied Mrs. Abels' second request for reconsideration of the order prohibiting Dr. Vereb's testimony as an expert witness. Given the lengthy extension of time in which to disclose expert witnesses, Mrs. Abels had the opportunity to move the trial court to reconsider its interlocutory prohibition of Dr. Vereb's expert testimony at a time when the trial court could have considered the doctor's competency to testify as an expert. Under the circumstances, however, in light of the age of the case, the parties' interests and the interests of justice, the trial court did not abuse its discretion by refusing to reconsider the issue of Dr. Vereb's competence and permit the disclosure of an additional expert witness beyond the disclosure deadline. Mrs. Abels' first assignment of error is overruled.

ASSIGNMENT OF ERROR II

“THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY PROHIBITING APPELLANT, CHERYL ABELS, FROM IMPEACHING APPELLEE, DR. WALTER RUF, WITH PRIOR INCONSISTENT AND UNTRUTHFUL TESTIMONY AND OTHER MATTERS RELATED TO DR. RUF'S CREDIBILITY.”

{¶18} Mrs. Abels argues that the trial court erred by prohibiting her from impeaching Dr. Ruf with prior inconsistent and untruthful testimony and other matters related to Dr. Ruf's credibility. Specifically, she argues that the trial court erred by prohibiting evidence that Dr. Ruf lied about (1) the termination of his privileges at Akron General Medical Center, (2) the cancellation of his malpractice insurance, and (3) the reason he fired his physician's assistant,

Tonya Babbitt. Mrs. Abels argues that justice requires reversal of the judgment and retrial with instructions that the trial court allow her to impeach Dr. Ruf's credibility with the admission of his prior deposition testimony, his testimony in a case in which he testified as an expert, his termination letter from Akron General Medical Center, and insurance documents relative to the cancellation and loss of his malpractice insurance. This Court finds Mrs. Abels has not preserved the issue for appeal.

{¶19} Prior to trial, Dr. Ruf filed several motions in limine, requesting that the trial court exclude evidence of prior lawsuits filed against him and alleged sexual misconduct by him. Mrs. Abels opposed the motions, arguing that such evidence, including termination of his privileges at a local hospital, the cancellation of his malpractice insurance and his reasons for firing his physician's assistant, was relevant to the issue of Dr. Ruf's credibility. At the commencement of trial, the trial court stated for the record that it had reviewed the motions in limine and directed the parties to "please protect the record since they were motions in limine. The court will certainly address those issues specifically when called."

{¶20} In her case-in-chief, Mrs. Abels called Dr. Ruf as on cross, never inquiring regarding prior lawsuits, the termination of his privileges at Akron General Medical Center, the cancellation of his malpractice insurance, the reason he fired Ms. Babbitt, or any alleged sexual misconduct on his part. Mrs. Abels did not inquire regarding any such issues during cross-examination of Dr. Ruf during his testimony in his own case-in-chief. She did, however, question Dr. Ruf regarding the termination of his teaching privileges at Akron General. The trial court sustained Dr. Ruf's objection to that line of questioning.

{¶21} Mrs. Abels then proffered for the record that she had documentary evidence to show that Dr. Ruf lied about his termination of medical privileges at Akron General, as well as

sworn testimony in another case in which Dr. Ruf allegedly testified that he had been forced to resign his privileges at Akron General. At that time, the trial court attempted to clarify its orders made off the record in regard to the motions in limine, stating:

“The court has no problem in testimony that might be elicited from the plaintiffs’ side with respect to the doctor’s reputation for truthfulness in the community. That, the court believes, is an issue for any witness that takes the stand.

“The court has said, however, and I think that both the rule and case law indicate, that specific instances of issues involving that are not permissible to be entered and it was for that reason that the court did what it did on the record. And it’s my intention to continue in the same vein throughout the course of the trial.”

{¶22} Before the continuation of her cross-examination of Dr. Ruf, Mrs. Abels asserted that the trial court “indicated” that it would prohibit her from inquiring on cross of Dr. Ruf regarding the issues delineated above because Dr. Ruf was not testifying as an expert. The trial court never made any such statement or distinction on the record.

{¶23} At the conclusion of her cross-examination of Dr. Ruf, Mrs. Abels asserted that the trial court had prohibited her from inquiring whether Dr. Ruf had ever asked any medical professional to alter records or lie on his behalf. Mrs. Abels reserved her objection relative to that line of questioning and asked to make the affidavit of Tonya Babbitt part of the record. That affidavit was never properly proffered. The trial court again attempted to clarify its position, stating:

“Well, the court has indicated either on or off the record on several occasions but will clarify it again that the question of the doctor’s reputation for truthfulness is an issue for a jury’s determination. However, the court does not believe that alleged acts or specific acts of untruthfulness necessarily in this court’s discretion come into play as germane to the issues in this particular case and have so instructed matters in that regard.

“What I’m going to suggest that you do, you’ve certainly made an objection. At the close, since the court indicated at side bar that the court did not think that a question concerning asking Dr. Ruf as to whether or not he had ever ordered somebody to alter records on his behalf was appropriate, that in the event you are going to call the person who you claim in an affidavit, that I would suggest that at

an appropriate time you would indicate that my next witness is such and such and the court would rule as to whether or not she should testify as to that.

“You can proffer the record as to what you believe the record would indicate at that time to protect the record for yourself, but the court’s prior rulings will stand.”

{¶24} Mrs. Abels never indicated that she would be calling Ms. Babbitt as one of her witnesses. Accordingly, the trial court had no opportunity to rule as to whether or not Ms. Babbitt should testify as to the reasons for her termination and the other issues implicated thereby. Instead, after Mrs. Abels rested and the trial court admitted her exhibits into evidence, she proffered several additional exhibits for the record. First, Mrs. Abels attempted to proffer her May 9, 2008 response to Dr. Ruf’s motion in limine regarding evidence of Dr. Ruf’s sexual misconduct and other lawsuits. The trial court overruled that request because it had already heard those arguments.

{¶25} Mrs. Abels then proffered a videotape and transcript of Tonya Babbitt’s deposition, which addressed the alleged reason for her termination by Dr. Ruf. Ms. Babbitt’s reasons implicated allegations of sexual misconduct by Dr. Ruf which led to the termination of his privileges at Akron General Medical Center.

{¶26} Mrs. Abels further proffered the affidavit of Hollis Vargo, which addressed issues of alleged sexual misconduct by Dr. Ruf. The trial court had earlier conducted a voir dire of Ms. Vargo to determine whether she might be “called as a witness for the plaintiff with respect to certain issues relative to reputation questions of the defendant, Dr. Ruf.” After voir dire, the trial court allowed her to testify regarding her opinion as to Dr. Ruf’s reputation for truthfulness in the community. Mrs. Abels did not question her regarding any of the other issues relevant to this assignment of error.

{¶27} Finally, in regard to issues implicated by this assignment of error, Mrs. Abels proffered a letter from Akron General Medical Center’s Senior Vice President of Legal Services to an attorney regarding Dr. Ruf’s resignation and noting “incidents of alleged sexual misconduct by Dr. Ruf.” The letter included Dr. Ruf’s signature indicating his agreement with the terms set forth in the letter. Mrs. Abels did not call the senior vice president as a witness.

{¶28} The trial court twice directed the parties to preserve the record by attempting to present the type of evidence addressed in the motions in limine and allow the court to rule on its admissibility after objection at that time. However, in none of the cases related to the proffered evidence did Mrs. Abels first attempt to present the evidence before the jury, so that the trial court could rule on any objection.

{¶29} This Court has stated:

“A motion in limine is a request for a preliminary order regarding the admissibility of evidence that a party believes may be improper or irrelevant. *Riverside Methodist Hosp. Assn. v. Guthrie* (1982), 3 Ohio App.3d 308, 310. The purpose of a motion in limine is to alert the court and counsel of the nature of the evidence in order to remove discussion of the evidence from the presence of the jury until the appropriate time during trial when the court makes a ruling on its admissibility. *Id.* An appellate court need not determine the propriety of an order granting or denying a motion in limine, unless the claimed error is preserved by an objection, proffer, or ruling on the record at the proper point during the trial. *State v. Maurer* (1984), 15 Ohio St.3d 239, 259-260. In order for an appellate court to review the propriety of the exclusion of evidence, the party claiming prejudice must proffer into the record the substance of the excluded evidence. *State v. Tait* (Jan. 29, 1997), 9th Dist. No. 96CA006339. See, also, Evid.R. 103(A)(2). This enables the reviewing court to ‘determine whether or not the [ruling] of the trial court [was] prejudicial.’ *Smith v. Rhodes* (1903), 68 Ohio St. 500, 505.” *State v. Keenan* (Feb. 20, 2002), 9th Dist. No. 20528.

{¶30} In the instant case, there is nothing in the record to indicate that Mrs. Abels sought to impeach Dr. Ruf with the evidence in question. The trial court attempted to guide her in this regard so that she might properly preserve the record. This Court has recognized a party need not proffer evidence which was excluded during cross-examination. *State v. Jackson*, 9th

Dist. Nos. 22378, 22394, 2005-Ohio-5184, at ¶12, citing Evid.R. 103(A)(2). Although no proffer is necessary where the evidence is sought to be introduced on cross-examination, the record is not adequately preserved if there has been no initial attempt to introduce the evidence during trial. Nevertheless, Mrs. Abels made no attempt to impeach Dr. Ruf's credibility with the evidence, which would have allowed Dr. Ruf the opportunity to object and the trial court the opportunity to sustain or overrule the objection. As we held in *Keenan*, supra, because Mrs. Abels failed to seek the introduction of the evidence at trial, she has not preserved the issue for this Court's review and we decline to address it.

CROSS-ASSIGNMENT OF ERROR

“THE TRIAL COURT ERRED IN DENYING DEFENDANTS’ MOTIONS FOR DIRECTED VERDICT DUE TO PLAINTIFFS’ FAILURE TO OFFER ANY EVIDENCE TENDING TO ESTABLISH THAT ANY ALLEGED BREACH OF THE STANDARD OF CARE PROXIMATELY CAUSED CHERYL ABELS INJURY OR DAMAGE AS REQUIRED UNDER OHIO LAW.”

{¶31} Dr. Ruf did not file a cross-appeal, although he properly filed this cross-assignment of error pursuant to App.R. 3(C)(2). App.R. 3(C)(2) provides:

{¶32} “A person who intends to defend a judgment or order appealed by an appellant on a ground other than that relied on by the trial court but who does not seek to change the judgment or order is not required to file a notice of cross appeal.”

Here, Dr. Ruf seeks to defend the judgment in his favor, albeit on other grounds than those relied on by the trial court.

{¶33} Based on this Court's resolution of Mrs. Abels' assignments of error, however, we decline to address Dr. Ruf's cross-assignment of error as it has been rendered moot. See App.R. 12(A)(1)(c). The Ohio Supreme Court has held:

“Where the court of appeals determines that the trial court committed no error prejudicial to the appellant in any of the particulars assigned and argued in the brief thereof, App.R. 12(B) requires the appellate court to refrain from consideration of errors assigned and argued in the brief of appellee on cross-

appeal which, given the disposition of the case by the appellate court, are not prejudicial to the appellee. The judgment or final order of the trial court should, under such circumstances, be affirmed as a matter of law by the court of appeals.” *Pang v. Minch* (1990), 53 Ohio St.3d 186, paragraph eight of the syllabus.

In this case, as our disposition of the case is not prejudicial to Dr. Ruf, we decline to address his cross-assignment of error.

III.

{¶34} Mrs. Abels’ first assignment of error is overruled. We decline to address her second assignment of error. We further decline to address Dr. Ruf’s cross-assignment of error as it has been rendered moot. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellants.

DONNA J. CARR
FOR THE COURT

MOORE, P. J.
WHITMORE, J.
CONCUR

APPEARANCES:

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