

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Mark House, et al.

Court of Appeals No. L-09-1232

Appellants

Trial Court No. CI-2008-2172

v.

Gary F. Swann, D.O.

DECISION AND JUDGMENT

Appellee

Decided: September 30, 2010

* * * * *

Michael F. Becker, Pamela Pantages, and Paul W. Flowers,
for appellants.

Martin T. Galvin and Brian D. Sullivan, for appellee.

* * * * *

COSME, J.

{¶ 1} Appellants, Mark House, Yolanda House and their daughter, Ayanna House, a minor, appeal the adverse judgment of the Lucas County Common Pleas Court in a medical malpractice action they brought against appellee, Gary F. Swann, D.O. Mark and Yolanda claim that their daughter, Ayanna, suffered permanent brachial plexus

nerve injuries at birth due to the mismanagement by Dr. Swann of shoulder dystocia during delivery. Shoulder dystocia is a complication during childbirth where a baby's shoulder becomes caught in the birth canal after the head has delivered.

{¶ 2} Appellants assert that the trial court erred in permitting Dr. Swann to impeach their expert witness, James O'Leary, M.D., through evidence that Dr. O'Leary had breached a contract 15 years ago with his hospital employer and falsified hospital records; recently participated on a website geared at creating medical malpractice referrals for shoulder dystocia to himself, and to his attorney son, and received a negative performance review 20 years ago.

{¶ 3} Appellants also assert that the trial court erred in precluding them from impeaching Dr. Swann with evidence of prior allegations of medical malpractice and evidence of prior, and similar, surgical errors.

{¶ 4} For the reasons set forth below, the judgment of the Lucas County Common Pleas Court is affirmed.

I. BACKGROUND

{¶ 5} The brachial plexus is a bundle of nerves that connects the spinal cord to the shoulder and arm. Appellants claim that Dr. Swann caused permanent brachial plexus injuries to Ayanna by employing excess lateral traction force after failing to identify and manage shoulder dystocia during delivery.

{¶ 6} It is undisputed that Ayanna suffered a permanent brachial plexus injury. The cause of the brachial plexus injury, however, was disputed at trial. Appellants'

expert, Dr. O'Leary, insists that Ayanna suffered this injury because Dr. Swann failed to identify and manage shoulder dystocia during delivery and did not employ any recognized and accepted maneuvers to eliminate the use of excess lateral traction. In this context, excess lateral traction involves force applied by the delivering physician to the head to assist delivery. "Lateral" refers to the angle of force in relation to the long axis of the baby's spine.

{¶ 7} Dr. Swann disputes appellants' allegations that the injury must have occurred during delivery as a result of a breach of his duty of care. Dr. Swann denies that shoulder dystocia was an issue during delivery and suggests that a brachial plexus injury can occur in the absence of shoulder dystocia, even during normal deliveries.

II. CHARACTER EVIDENCE IMPEACHING DR. O'LEARY

{¶ 8} In their first assignment of error, appellants maintain:

{¶ 9} "The trial judge abused his discretion, to Plaintiff-Appellants' substantial detriment, by permitting questioning of their expert upon irrelevant and prejudicial matters."

{¶ 10} Appellants assert that the trial court erred in permitting Dr. Swann to impeach the credibility of their expert witness, Dr. O'Leary, through evidence that Dr. O'Leary: (A) breached a contract 15 years earlier with his employer hospital and allegedly falsified records involving that hospital; (B) participated on a website geared at creating medical malpractice referrals for shoulder dystocia; and (C) received a negative performance review nearly 20 years prior to trial.

{¶ 11} We disagree with appellants' first assignment of error.

{¶ 12} At the outset, "A trial court has broad discretion in determining whether to admit or exclude evidence. Absent an abuse of discretion that materially prejudices a party, the trial court's decision will stand." *Krischbaum v. Dillon* (1991), 58 Ohio St.3d 58, 66. A trial court abuses its discretion when it makes a decision that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. In applying the abuse of discretion standard, an appellate court is not free to substitute its own judgment for that of the trial court. *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169.

{¶ 13} In this case, the trial court viewed the evidence concerning Dr. O'Leary's breach of contract, website, and negative performance reviews as indicators of his veracity and bias.

{¶ 14} The question before this court is not whether the trial court ruled as we would have ruled if confronted with these questions, but whether the court abused its discretion so as to prejudice appellants. *Calderon v. Sharkey* (1982), 70 Ohio St.2d 218, 222. In *O'Brien v. Angley* (1980), 63 Ohio St.2d 159, 163, the Supreme Court of Ohio held:

{¶ 15} "The scope of cross-examination and the admissibility of evidence during cross-examination are matters which rest in the sound discretion of the trial judge. Thus, when the trial court determines that certain evidence will be admitted or excluded from

trial, it is well established that the order or ruling of the court will not be reversed unless there has been a clear and prejudicial abuse of discretion."

A. Breach of Contract

{¶ 16} Appellants assert that evidence of the breach of contract should not have been permitted because it served no useful purpose in demonstrating bias, and the trial court should have limited the scope of inquiry pursuant to Evid.R. 403(A). Appellants argue that Evid.R. 403(A) seeks to eliminate the potential for prejudice of certain evidence by prohibiting its use in certain circumstances: "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of *unfair prejudice*, of confusion of the issues, or of misleading the jury." (Emphasis added.)

{¶ 17} Prior to trial, appellants filed a motion in limine to exclude evidence of a contract dispute that had occurred 15 years earlier between Dr. O'Leary and his former employer, a hospital, asserting "this issue has nothing to do with any of the issues in this case and are tantamount to character evidence and used only for the purposes of prejudicing the jury against Dr. O'Leary."

{¶ 18} The trial court rejected appellants' motion to exclude evidence of the breach of contract because "credibility * * * is always an issue in any trial." The trial court emphasized that "[Dr. O'Leary is] not the one on trial, but his credibility is always at issue." Based on appellants' claim that Dr. O'Leary had been "exonerated" of fraud or misrepresentation in that case, the trial court agreed to reconsider its decision to permit questioning of Dr. O'Leary on his breach of contract dispute.

{¶ 19} The questioning of Dr. O'Leary revealed that the jury in the breach of contract case returned a verdict in favor of the employer hospital in the amount of \$132,800. The award was based upon both the expert fees Dr. O'Leary earned in violation of the contract and an amount the jury determined the employer hospital was entitled to be reimbursed for expenses it incurred through Dr. O'Leary's improper use of hospital staff to prepare his reports, his participation in depositions during office hours, and other expenses resulting from Dr. O'Leary's outside work. During questioning, Dr. O'Leary admitted that he understood the terms of the contract but refused to comply because he felt it was "unfair."

{¶ 20} Holding that evidence of the breach of contract was admissible, the trial court emphasized, Dr. O'Leary is "an intelligent man that has a medical degree, reads a document. He agrees to the terms and conditions of the document, and unilaterally, having been bound to it monetarily and otherwise, he says I'm not going to abide by that. That affects his veracity. It's very limited. We're not going to get into the use of the term conversion, breach of contract, fraud."

{¶ 21} Based on the trial court's ruling, appellants inquired of Dr. O'Leary, on direct, the circumstances surrounding the breach of contract claim and whether he knowingly violated the agreement. Dr. O'Leary conceded that he had been sued for breach of contract and ordered to reimburse the hospital.

{¶ 22} On cross-examination, Dr. Swann further explored the breach of contract claim, eliciting information that Dr. O'Leary had also knowingly submitted time sheets

that misrepresented who he was meeting with, and whether it was hospital-related work or his own work as an expert witness.

{¶ 23} Appellants suggest that Dr. Swann's counsel was attempting to inflame the jury by implying that the jury in the breach of contract case had not believed Dr. O'Leary and that Dr. O'Leary "must have stolen or misappropriated something serious" since a judgment in the amount of \$132,800 was rendered against Dr. O'Leary.

{¶ 24} In considering potential bias, the trial court was of the view that an expert who had previously been sued by a hospital, might be hostile to hospitals and the doctors who work for them. In *Oberlin v. Akron Gen. Med. Ctr.* (2001), 91 Ohio St.3d 169, 172, the Supreme Court of Ohio reasoned that an expert witness "might apply what he considers the unfairness of the entire process to his interpretation of whether this particular doctor acted reasonably."

{¶ 25} More importantly, the fact that evidence of a breach of contract might affect how a jury views testimony of an expert does not of itself create unfair prejudice. *Ede v. Atrium S. OB-GYN, Inc.* (1994), 71 Ohio St.3d 124, 128. Instead, "[u]nfair prejudice is that quality of evidence which might result in an improper basis for a jury decision." *Oberlin*, 91 Ohio St.3d at 172, quoting Weissenberger, *Ohio Evidence* (2000), 85-87, Section 403.3. According to *Oberlin*, "[I]f the evidence arouses the jury's emotional sympathies, evokes a sense of horror, or appeals to an instinct to punish, the evidence may be unfairly prejudicial. Usually, although not always, unfairly prejudicial evidence appeals to the jury's emotions rather than intellect." *Id.*

{¶ 26} As well, the very reason for establishing the bias of a witness is "to cause a jury to think critically about the testimony being offered. The only important inquiry is whether the evidence of the bias is *unfairly* prejudicial." *Oberlin*, 91 Ohio St.3d at 173. Here, the evidence presented against Dr. O'Leary's credibility may have been prejudicial, but not unfairly so.

{¶ 27} Furthermore, issues of the scope of cross-examination and the admissibility of evidence during cross-examination rest within the discretion of the trial judge, only to be reversed if that discretion is abused. *O'Brien v. Angley* (1980), 63 Ohio St.2d 159, 163. In *Calderon v. Sharkey* (1982), 70 Ohio St.2d 218, 223-224, the Supreme Court of Ohio held that "[e]vidence of *bias* * * * is a legitimate subject of inquiry of all expert witnesses within the limits imposed by the trial court in the reasonable exercise of its discretion[,] * * * [and] the scope of cross-examination of a medical expert on the question of the expert's bias and the admissibility of matters thereto are matters that rest in the sound discretion of the trial court." (Emphasis added.) The trial judge in this case made a reasonable determination that evidence of the breach of contact was relevant to credibility and did not create unfair prejudice.

B. Website

{¶ 28} In addition to the evidence of the breach of contract, Dr. Swann also introduced evidence of Dr. O'Leary's participation on a website geared at creating medical malpractice referrals for shoulder dystocia to himself and his son, an attorney. Appellants complain that evidence of the website is highly prejudicial and admitting such

evidence over their objections was error. Dr. Swann contends only that the website is "relevant."

{¶ 29} As discussed earlier, Evid.R. 403(A) seeks to eliminate the potential for prejudice of certain evidence by prohibiting its use in certain circumstances. In *Calderon*, 70 Ohio St.2d at 223-224, the Supreme Court of Ohio held that "[e]vidence of * * * *pecuniary interest* is a legitimate subject of inquiry of all expert witnesses within the limits imposed by the trial court in the reasonable exercise of its discretion." (Emphasis added.) The court later affirmed, in *Stinson v. England* (1994), 69 Ohio St.3d 451, 459, "that inquiry regarding the pecuniary interest of the witness in the litigation was a proper subject of cross-examination" and that "[c]ontrol over the mode of interrogation of witnesses is within the sound discretion of the trial court. Evid.R. 611."

{¶ 30} In this case, Dr. O'Leary's pecuniary interest in the website, which includes referrals to his son, an attorney, is sufficiently probative of credibility, bias, or prejudice that it is a proper subject of cross-examination. *Stinson*, 69 Ohio St.3d at 459.

{¶ 31} We find that there is no unfair prejudice in allowing Dr. Swann to inquire into Dr. O'Leary's website. Although appellants claim that there was a "dispute" as to whether Dr. O'Leary knew that there was a link from his website to his son's website, the website itself is a sufficient basis upon which pecuniary interest can be inferred. Evidence of a relationship between Dr. O'Leary and his son, an attorney who specializes in medical malpractice cases, suggests a pecuniary interest that could reasonably be explored on cross-examination.

C. Performance Review

{¶ 32} Dr. Swann was also permitted to question Dr. O'Leary about a negative departmental performance evaluation he received while working at a hospital in Jersey City, New Jersey, from 1987-1990. Dr. Swann suggests that because Dr. O'Leary was not well liked by those he was responsible for supervising, he is less credible. Although we fail to see the correlation between a doctor's administrative skills or popularity and his credibility, the overriding concern here, instead, is Dr. O'Leary's potential bias against hospitals. The trial court believed the performance review, when considered together with the breach of contract and Dr. O'Leary's website, suggested a potential bias against hospitals and the medical profession, which the jury may consider. *Davis v. Immediate Med. Services, Inc.* (1997), 80 Ohio St.3d 10, 18.

{¶ 33} The trial judge's reasoning also comports with *Oberlin*, which noted that "an expert with an active malpractice case might be hostile to malpractice claimants in general. He might apply what he considers the unfairness of the entire process to his interpretation of whether this particular doctor acted reasonably." *Oberlin*, 91 Ohio St.3d at 172.

{¶ 34} Although disclosure of the negative performance review may be detrimental to the party seeking to exclude it, its admissibility does not rise to the level of unfair prejudice.

{¶ 35} Accordingly, we cannot find that the trial court's decision to admit this performance review was unreasonable, arbitrary, or unconscionable, *Blakemore v.*

Blakemore (1983), 5 Ohio St.3d 217, 219, and we decline to substitute our own judgment for that of the trial court. *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169. The trial court did not abuse its discretion in allowing Dr. Swann to present evidence of Dr. O'Leary's negative performance review.

{¶ 36} Appellants' first assignment of error is not well-taken.

III. CROSS-EXAMINATION WAS PROPERLY LIMITED

{¶ 37} In their second assignment of error, appellants maintain:

{¶ 38} "A further abuse of discretion was committed, and Plaintiff-Appellants were denied their fundamental right to a fair trial, when their counsel was precluded from fully and effectively cross-examining Defendant-Appellee."

{¶ 39} Appellants complain that the trial court inappropriately limited the scope of their cross-examination of Dr. Swann, particularly in light of the latitude Dr. Swann was given to cross-examine Dr. O'Leary concerning the breach of contract, website, and performance evaluations.

{¶ 40} Appellants assert that they should have been allowed to impeach Dr. Swann's credibility with evidence of prior allegations of medical malpractice and evidence of prior, and similar, surgical errors. Appellants argue that they were entitled to conduct a full and fair cross-examination and that they were prejudiced when the trial court refused to allow them the opportunity to do so. *Davis v. Immediate Med. Services, Inc.* (1997), 80 Ohio St.3d 10, 18.

{¶ 41} We disagree with appellants' second assignment of error.

A. Disciplinary Proceedings

{¶ 42} During trial, appellants attempted to impeach Dr. Swann's credibility based on his deposition testimony that he had not been "subjected" to disciplinary proceedings by the State Medical Board of Ohio. Conceding that Dr. Swann had been involved in disciplinary proceedings before the board, the trial court nevertheless refused to allow appellants to impeach Dr. Swann's statements reasoning that it found the deposition testimony to be accurate, "based on excerpts from the board and a no finding of public reprimand and the fact they did not hold [Dr. Swann] responsible for this."

{¶ 43} Under Evid.R. 608(B), the decision to allow such prior instances on cross-examination is within the discretion of the trial court. *Weidner v. Blazic* (1994), 98 Ohio App.3d 321, 327. Moreover, the trial court's discretion to admit evidence is still subject to Evid.R. 403. *Ruff v. Bowden* (Mar. 28, 1995), 10th Dist. No. 94APE08-1116.

{¶ 44} After thoroughly reviewing the record, we find that the trial court did not abuse its discretion in prohibiting appellants from cross-examining Dr. Swann about his disciplinary proceeding with the State Medical Board of Ohio despite the fact that Dr. Swann's response during the deposition was ambiguous. The question of whether he was subjected to disciplinary proceedings is arguably open to interpretation. As phrased, Dr. Swann could reasonably have construed the question as asking whether he had actually been disciplined. Thus, the trial court in prohibiting that line of questioning did not abuse its discretion.

B. Admissibility of Prior Incidents

{¶ 45} Appellants also argue that they should have been permitted to question Dr. Swann regarding his competence as evidenced by previous delivery incidents.

Appellants sought to introduce evidence that Dr. Swann had been involved in three questionable deliveries during which one infant died, another had injuries, and the third had to be resuscitated. All three incidents occurred when Dr. Swann was a second year resident under the direct supervision of an attending physician. Appellants suggest that the testimony of Stephen J. DeVoe, M.D. demonstrates that the forceps had been used inappropriately during delivery, causing the injuries to the three infants. Appellants assert that the injury to Ayanna was also caused by forceps being used improperly. As such, appellants assert there is sufficient similarity between those three cases and Ayanna's to overcome the danger of unfair prejudice under Evid.R. 403(A) analysis. See *Lumpkin v. Wayne Hosp.*, 2d Dist. No. 1615, 2004-Ohio-264, ¶ 13-16. See, also, *Renfro v. Black* (1990), 52 Ohio St.3d. 27, 32.

{¶ 46} As to appellants' claim that the trial court erred in denying the admission of evidence of prior, similar, surgical errors, we find instructive a case from our district that also involved shoulder dystocia. In *D'Amore v. Cardwell*, 6th Dist. No. L-06-1342, 2008-Ohio-1559, ¶ 97, this court concluded that the trial court was within its discretion to exclude the evidence of two other pending malpractice claims involving brachial plexus injuries to other children delivered by appellee, in that case, under Evid.R. 403(A). This court held that since "[t]here had been no finding of professional negligence in either of

the other claims[,] [c]onsideration of other negligence claims, that remained to be proven, would have been highly prejudicial to appellee in this action and risked confusion of the issues for the jury in an already complicated case." *Id.*

{¶ 47} Although a doctor often testifies as an expert in a medical malpractice suit against him, "*Oberlin* did not specifically address whether a defendant doctor's own statements in another medical malpractice case could be used against him." *McGarry v. Horlacher*, 149 Ohio App.3d 33, 2002-Ohio-3161, ¶ 42. Nevertheless, applying the reasoning set forth in *Oberlin*, the court in *McGarry* concluded that a defendant doctor who has been involved in other medical malpractice cases is at greater risk of being unfairly prejudiced than an expert witness, and that evidence relating to that other malpractice case is not admissible.

{¶ 48} Similarly, in *Lumpkin v. Wayne Hosp.*, 2d Dist. No. 1615, 2004-Ohio-264, ¶ 16, the Second District Court of Appeals upheld the ruling of the trial court excluding evidence of errors made by the defendant doctor in another surgery to a different patient. The plaintiff sought to introduce evidence that the defendant physician "made the same surgical 'mistake' on another patient * * * a year prior to Lumpkin's surgery, using the same surgical technique used on her." *Lumpkin* at ¶ 11.

{¶ 49} Applying the reasoning set forth in *D'Amore*, *McGarry*, and *Lumpkin*, we conclude that evidence of prior allegations of medical malpractice against Dr. Swann would have been unfairly prejudicial. Dr. Swann was a second-year resident under the direct supervision of an attending physician and was not "directly" responsible. The

Ohio State Board of Medicine declined to find Dr. Swann at fault for any of the injuries that occurred.

{¶ 50} Therefore, we conclude in this case that permitting evidence of the injuries that occurred while Dr. Swann was a second-year resident, and for which negligence was not imputed, would have been highly prejudicial and its use would have resulted in confusion of the issues or misleading the jury. See *Oberlin*, 91 Ohio St.3d 169.

C. Impeachment through Evidence of Prior Lawsuit and Complication Rates

{¶ 51} Appellants also argue that they should have been allowed to explore at trial, Dr. Swann's disclosure during his deposition that he had previously been sued in another case involving a newborn diagnosed with Erb's palsy and Dr. Swann's complication rate for permanent injuries.

{¶ 52} Concerning appellants' attempt to impeach Dr. Swann with evidence of a prior lawsuit alleging medical malpractice and evidence of prior, similar, surgical errors, we again find *D'Amore*, *McGarry*, and *Lumpkin*, instructive. In *D'Amore*, this court concluded that evidence of two other pending malpractice claims involving brachial plexus injuries to other children was not admissible. *D'Amore*, 2008-Ohio-1559, ¶ 97. Similarly, in *McGarry*, 2002-Ohio-3161, ¶ 43, and *Lumpkin*, 2004-Ohio-264, ¶ 23, the court concluded that absent a finding of malpractice, evidence of the existence of a prior medical malpractice case is properly excluded, as unfairly prejudicial.

{¶ 53} We conclude that the trial court did not abuse its discretion in preventing appellants from introducing evidence of a prior, similar, injury involving shoulder

dystocia and brachial plexus injury since the probative value of the evidence was substantially outweighed by the danger of unfair prejudice under Evid.R. 403(A) analysis.

{¶ 54} As to appellants' claim that they were "prohibited from disclosing [Dr. Swann's] complication rate for permanent injuries," we find that the trial court did not abuse its discretion in refusing to allow the introduction of such evidence. During a bench conference, portions of which were not recorded, appellants suggested that further inquiry into Dr. Swann's complication rate based on the other, similar, injuries and an allegation that the medical records may have been altered, presumably because of these prior, similar, incidents should be allowed. The trial court sustained Dr. Swann's objection to this line of inquiry, acknowledging that the probative value of such evidence was outweighed by the danger of unfair prejudice.

{¶ 55} As the trial court noted, there had been no finding of malpractice in the claim before the State Medical Board of Ohio or the lawsuit which Dr. Swann settled, upon which evidence of a prior, similar, injury involving shoulder dystocia and brachial plexus injury could be introduced. Nor was there any evidence that the medical records had been altered. We conclude, in this case, that the probative value of such evidence was outweighed by the danger of unfair prejudice. Appellants' second assignment of error is not well-taken.

IV. CONCLUSION

{¶ 56} The trial court properly allowed Dr. Swann to inquire on cross-examination into the credibility and bias presented by the breach of contract, the website, and the 20 year old negative performance review.

{¶ 57} The trial court did not abuse its discretion when it precluded appellants from impeaching Dr. Swann with evidence of prior allegations of medical malpractice and evidence of prior, similar, surgical errors.

{¶ 58} Accordingly, the judgment of the Lucas County Common Pleas Court is affirmed. Appellants are ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Keila D. Cosme, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
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