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BETH CARBAUGH, as Parent and Natural Guardian for JONATHAN T. CARBAUGH, a Minor, Plaintiff vs. COUNTY OF FRANKLIN OPERATION HEAD START (SOUTH MOUNTAIN DIVISION) and DR. BURTON F. TUCKER, Defendants, C.P. Franklin County Branch, Civil Action - Law, No. A.D. 1994 - 457

Carbaugh V. County Of Franklin Operation Head Start

Depositions - Medical Malpractice - Expert Report - Judicial Notice - Informed Consent - Assault and Battery - Amendments to Complaint

1. Depositions of a party or a medical witness who is not a party may be used by an adverse party of any purpose.

2. When a party wants to read portions of the depositions of adverse parties and medical witnesses into the record, the court does not commit an error by requiring the party to call the witnesses as on cross-examination.

3. In a medical malpractice case, the plaintiff is required to present an expert witness who will testify, to a reasonable degree of medical certainty, that the acts of the physician deviated from good and acceptable medical standards, and that such deviation was the proximate cause of the harm suffered.

4. It is unfair surprise to expect a party who has received inadequate notice of the facts and opinions of an adverse party's expert to prepare a response.

5. The testimony of an expert witness may not be inconsistent with or go beyond the fair scope of his or her testimony in discovery proceedings.

6. If a party wants to take judicial notice of laws, the party must establish the applicability of these laws.

7. A lack of informed consent cause of action requires the plaintiff to prove that a surgical procedure was involved.

8. Assault is an intentional attempt by force to do an injury to the person of another, and a battery is committed whenever the violence menaced in an assault is actually done, though in ever so small a degree, upon the person.

9. It is proper for defendants to cross-examine plaintiff about amendments made to the complaint on the eve of trial.

David W. Knauer, Esquire, Attorney for Plaintiff

F. Lee Shipman, Esquire, Attorney for Defendant, County of Franklin Operation Head Start
Robert D. MacMahon, Esquire, Attorney for Defendant, Dr. Burton F. Tucker

OPINION AND ORDER

WALKER, P. J., October 25, 1999:

Factual and Procedural Background

On November 17, 1994, plaintiff, Beth Carbaugh, on behalf of her son Jonathan, filed a complaint against Dr. Burton F. Tucker and the County of Franklin Operation Head Start, South Mountain Division. The events giving rise to the cause of action occurred on February 17, 1994, when an employee of Head Start took Jonathan to Dr. Tucker for dental treatment. It is alleged that the Head Start employee and Dr. Tucker improperly restrained Jonathan to keep him inert during the treatment. It is alleged that as a result of the restraint that Jonathan suffered emotional distress and temporomandibular joint (TMJ) dysfunction.

This case was originally scheduled for trial on January 25, 1999. On the eve of trial, plaintiff attempted to provide a supplemental report of her expert witness, Dr. Beaudry. Judge Kaye, by an order dated January 22, 1999, limited Dr. Beaudry's testimony to the fair scope of his May 19, 1997 report. Dr. Beaudry was prohibited from testifying about any information in his January 22, 1999 supplemental report because defendants were not provided with the report in a timely manner. The trial was continued when plaintiff's counsel had a migraine headache.

Due to Judge Kaye's illness, the trial was continued again. The case was reassigned to Judge Walker who entered an order on July 1, 1999, adopting all decisions previously made by Judge Kaye. The trial began on September 14, 1999. The

court refused to allow plaintiff to read into the record portions of the depositions of various witnesses. On the first day of trial, plaintiff moved for a mistrial because of the court's handling of the deposition issue. The court denied plaintiff's motion. On September 15, 1999, the second day of the trial, plaintiff moved for a voluntary nonsuit. The court refused to grant the nonsuit unless plaintiff agreed to grant the nonsuit with prejudice.

After plaintiff rested her case, defendants moved for compulsory nonsuit. The court, by a court order dated September 16, 1999, granted the compulsory nonsuit as to Defendant Dr. Tucker on the issue of informed consent because plaintiff did not prove that this matter concerned a surgical procedure. The court also granted a compulsory nonsuit for the remaining counts because plaintiff did not produce medical expert testimony beyond a reasonable degree of medical certainty that Dr. Tucker's actions in February 1994 resulted in the alleged TMJ suffered by the minor plaintiff. Plaintiff filed a post trial motion, and defendants filed responses.

Discussion

Pursuant to Pa.R.C.P. 4020(a)(2), the "deposition of a party...may be used by an adverse party for any purpose." Furthermore, Pa.R.C.P. 4020(a)(5) permits a deposition of a medical witness, other than a party, to be used "for any purpose whether or not the witness is available to testify." Plaintiff attempted to read into the record portions of various witnesses' depositions, but the court would not permit plaintiff to do this except for impeachment purposes.

In *Flynn v. City of Chester,* 429 Pa. 170, 175-176 (1970), the court noted that although it might have been better tactically for plaintiff to read the depositions into the record rather than call the witnesses as on cross-examination, the evidence given was the same as that in the deposition. In

Flynn, the court concluded that the appellant had not been prejudiced by having to question the witness as on cross-examination rather than read from the deposition. *Id.* at 175.

Although the court should have allowed plaintiff to read into the record portions of the depositions of the adverse parties and medical witnesses, plaintiff suffered no harm in not being allowed to do so. Plaintiff was able to call these witnesses as on cross-examination and question them as fully as she desired. Furthermore, plaintiff was able to use the depositions for impeachment purposes. In this case, as in *Flynn,* plaintiff was not prejudiced by the court's refusal to allow plaintiff to read directly from the depositions. The evidence on the record is the same that would have been entered if plaintiff had been permitted to simply read from the witnesses' depositions.

Plaintiff moved for a mistrial on September 14, 1999, because of the court's handling of the deposition issue. Plaintiff was not prejudiced by the court's ruling on the deposition issue because all the information was entered on the record that she wanted entered even if she was not able to do it in the manner that she preferred. Because plaintiff was not prejudiced, the court denied plaintiff's motion for a mistrial.

On September 15, 1999, after the first day of trial, plaintiff moved for a voluntary nonsuit pursuant to Pa.R.C.P. 230 because of the deposition issue. The court denied plaintiff's motion unless plaintiff agreed to take a voluntary nonsuit with prejudice. The court made this ruling because there had been no prejudice to plaintiff, the incident had occurred over five years ago, the trial had been continued several times, and the motion was made during the middle of trial. Given these reasons, the court denied plaintiff's motion for voluntary nonsuit.

The court, in its September 16, 1999 order, found plaintiff's case to be a medical malpractice case because this incident only involved dental treatment. In order to prevail in a medical

malpractice case, the plaintiff is "required to present an expert witness who will testify, to a reasonable degree of medical certainty, that the acts of the physician deviated from good and acceptable medical standards, and that such deviation was the proximate cause of the harm suffered." *Smith v. Grab,* 705 A.2d 894, 899 (Pa. Super. 1997). Plaintiff's expert, Dr. Beaudry, did not testify to a reasonable degree of medical certainty that Jonathan Carbaugh's TMJ was caused by Dr. Tucker. Dr. Beaudry only testified to a reasonable degree of medical certainty that Jonathan Carbaugh had TMJ, not that Dr. Tucker's actions caused it. Because plaintiff did not present an expert witness who testified to a reasonable degree of medical certainty that Jonathan Carbaugh's TMJ was caused by Dr. Tucker's actions, the court granted defendants compulsory nonsuit.

It is unfair surprise to expect a party who has received inadequate notice of the facts and opinions of an adverse party's expert to prepare a response. *Wilkes-Barre Iron & Wire Works, Inc. v. Pargas of Wilkes-Barre, Inc.,* 348 Pa. Super. 285, 293-294 (1985). Plaintiff attempted to supplement Dr. Beaudry's expert report on the eve of the trial scheduled for January 1999. Dr. Beaudry's supplemental report was prepared three days before trial. By court order, Judge Kaye limited Dr. Beaudry's testimony to the fair scope of his May 19, 1997 report because defendants would not have had time to review the supplemental report with their expert witness.

Plaintiff argues in her post trial motion that Judge Kaye's order was limited to the trial scheduled for January 1999. Plaintiff argues that the court should have allowed Dr. Beaudry to testify to the contents of his supplemental report because the defendants had time to prepare for the supplemental report since January 1999 when the trial was continued due to plaintiff's counsel's migraine headache. The court is unwilling to start a practice that would allow parties to obtain a

continuance, thereby allowing them more time to present additional information to negate the unfair surprise.

Pursuant to Pa.R.C.P. 4003.5(c), "the direct testimony of the expert at the trial may not be inconsistent with or go beyond the fair scope of his or her testimony in the discovery proceedings..." Plaintiff alleges that the court should have allowed plaintiff to question Dr. Beaudry about the bruising on Jonathan Carbaugh that Dr. Matthias diagnosed. Because this was outside the fair scope of Dr. Beaudry's expert report, the court forbid plaintiff's expert witness, Dr. Beaudry, from testifying about the bruising.

In her post trial motion, plaintiff alleges that the court should have allowed plaintiff to question Dr. Zimmerman about his office policy with respect to treatment of protesting minors and his reasons for adopting any such policy. Because Dr. Zimmerman was not plaintiff's expert witness, the court limited Dr. Zimmerman's testimony to his treatment of Jonathan Carbaugh. Furthermore, because Dr. Zimmerman was not qualified as an expert, he could not testify to expert opinions.

Also, plaintiff argues that the court should reconsider its pre-trial order that prohibited plaintiff from cross-examining defendant's expert, Dr. Drum, with regard to his relationship with the insurance companies for the purpose of establishing bias and prejudice. Because the compulsory nonsuit was granted before defendants presented their side of the case, the issue of defendants' expert's testimony is moot.

In her post trial motion, plaintiff argues that the court erred in failing to take judicial notice of the Dental Law, 63 P.S. §120 *et. seq.*, and the State Board of Dentistry Regulations, 49 Pa. Code. §33.1 *et. seq.* Plaintiff never established the applicability of these laws to this case in her case-in-chief. Therefore, the court did not take judicial notice of the Dental Law and the dentistry regulations.

Also, plaintiff argues that the court erred when it refused to treat Ms. Holden and Dr. Tucker's conduct as negligence per se. Because a compulsory nonsuit was granted after plaintiff's case-in-chief, the court never entertained possible jury instructions.

Next, plaintiff argues that defendants surprised plaintiff with the lack of surgical procedure defense. In order to support a lack of informed consent cause of action, plaintiff must prove that a surgical procedure was involved. *Boyer v. Smith,* 345 Pa. Super. 66, 72 (1985). The court finds no authority for the proposition that defendants must state the elements necessary for plaintiff's cause of action in defendant's answer with new matter. Plaintiff should have been aware of the elements needed for a lack of informed consent cause of action before alleging this cause of action in her complaint.

Plaintiff argues in her post trial motion that the court erred by granting defendants' motion for nonsuit with regard to count I, assault and battery. "Assault is an intentional attempt by force to do an injury to the person of another, and a battery is committed whenever the violence menaced in an assault is actually done, though in ever so small a degree, upon the person." *Renk v. City of Pittsburgh,* 537 Pa. 68, 76 (1994) (quoting *Cohen v. Lit Brothers,* 166 Pa. Super. 206, 209 (1950)). Plaintiff failed to establish that defendants intended to cause harm to Jonathan Carbaugh.

Plaintiff also argues that if the court grants plaintiff a new trial that defendants be prohibited from cross-examining plaintiff about her amendments to her complaint. Although the court will not grant plaintiff a new trial, it is proper for defendants to cross-examine plaintiff about her amendments to the complaint. The complaint has been the basis of this trial for over five years. Plaintiff verified the complaint under oath. Any amendments made on the eve of trial are a proper basis for cross-examination.

ORDER OF COURT

October 25, 1999, after consideration of plaintiff's post trial motion and defendants' responses, plaintiff's post trial motion is denied. This court's orders of September 16, 1999, shall stand.

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