

**97-LW-3648 (4th)**

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Heather Lawson, A Minor, By and Through Her Mother and Next Friend, Cindy Lawson, Plaintiff-Appellant  
v.  
Y.D. Song, M.D., Inc. et al., Defendants-Appellees

Case No. 97 CA 2480.  
4th District Court of Appeals of Ohio, Scioto County.  
Decided on September 23, 1997.

Richard H. H. Troxell and Craig D. Barclay, Columbus, Ohio, for Plaintiff-Appellant.

Rebecca Widdig Amlung and Stanley C. Bender, Portsmouth, Ohio, for Defendant-Appellee Jack D. MacDonald, M.D.

**DECISION**

Kline, J.

Heather Lawson appeals the Scioto County Court of Common Pleas entry of summary judgment in favor of Jack D. MacDonald, M.D., on her medical malpractice claim. Lawson contends that the trial court erred by disregarding the expert opinions she submitted with her memorandum opposing summary judgment. Further, Lawson contends that when the opinions of all the expert witnesses before the court are construed in the light most favorable to her case, genuine issues of material fact remain in dispute. We agree. Accordingly, we reverse and remand the judgment of the trial court.

**I.**

In 1983, Heather Lawson was born prematurely and with a low birth weight. During her birth, after her birth, or both, Heather suffered oxygen deprivation which resulted in her being afflicted with cerebral palsy. At some point, though not later than two hours and twenty minutes following her birth, doctors intubated Heather to assist her breathing.

Heather filed a medical malpractice action in 1993 against the doctors who provided medical care to Heather and her mother prior to and during Heather's birth. In conducting discovery, Heather learned that, according to some experts, adequate resuscitation efforts following her birth would have prevented her cerebral palsy. Heather then amended her complaint to include Dr. MacDonald, the pediatrician who cared for Heather during the one to two hours immediately following her birth. Heather alleges that Dr. MacDonald's inadequate resuscitation efforts, especially his failure to intubate Heather and monitor her blood gas levels during the first hour following her birth, were the primary cause of her current medical condition.

Dr. MacDonald filed a motion for summary judgment and attached his own affidavit attesting that, in his professional opinion, he was not negligent. Heather filed a motion in opposition supported by the affidavit of Robert J. Lerer, M.D. and the deposition of Stephen J. DeVoe, M.D. Dr. Lerer opined that, based on his review of Heather's medical records, Dr. MacDonald fell below acceptable standards of care in his treatment of Heather, and that this below-standard care was the proximate cause of Heather's cerebral palsy. Dr. DeVoe likewise opined that, based on the blood gas levels recorded in Heather's medical records, she was not adequately resuscitated during the hour or so following her birth, and the inadequate treatment caused Heather's neurological damage.

The Scioto County Court of Common Pleas determined that the expert opinions of Dr. Lerer and Dr. DeVoe were based on the erroneous belief that Heather was not intubated. Therefore, the court concluded that the experts' opinions lacked evidentiary value. Consequently, no evidence was on record to contradict Dr. MacDonald's opinion, and the court found that the adequacy of care provided by Dr. MacDonald was not in dispute. The court granted summary judgment in favor of Dr. MacDonald and certified that there was no just reason for delay pursuant to Civ.R. 54(B). Heather now appeals, asserting the following assignment of error:

I. THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF PLAINTIFF-APPELLANT IN GRANTING DEFENDANT-APPELLEE JACK D. MACDONALD'S MOTION FOR SUMMARY JUDGMENT AND DISMISSING

## PLAINTIFF-APPELLANT'S CLAIMS AGAINST DEFENDANT-APPELLEE.

## II.

Heather asserts that the trial court erred by granting summary judgment in favor of Dr. MacDonald because a genuine issue of material fact, namely, whether Dr. MacDonald acted as a reasonable doctor during the first hour or so following her birth, remains in dispute. She challenges the trial court's conclusion that her experts' opinions "lack sufficient evidentiary value to be used" in determining whether Dr. MacDonald was negligent. Rather, she contends that her experts were aware that she was intubated two hours and twenty minutes after her birth, but that their assessment of Dr. MacDonald's negligence was based on the care he rendered prior to her intubation, including his failure to intubate her sooner. Furthermore, she contends that whether her experts were informed of all the details of her treatment goes to the weight, not the admissibility, of their opinions. Therefore, Heather asserts that the trial court erred by disregarding her experts' opinions entirely, and contends that when her experts' opinions are considered in the light most favorable to her case, the quality of care provided by Dr. MacDonald remains in dispute.

Summary judgment is appropriate only when it has been established: (1) that there is no genuine issue as to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party. Civ.R. 56(A). See Bostic v. Connor (1988), 37 Ohio St.3d 144, 146; Morehead v. Conley (1991), 75 Ohio App.3d 409, 411. In ruling on a motion for summary judgment, the court must construe the record and all inferences therefrom in the opposing party's favor. Doe v. First United Methodist Church (1994), 68 Ohio St.3d 531, 535.

The burden of showing that no genuine issue of material fact exists falls upon the party who moves for summary judgment. Dresher v. Burt (1996), 75 Ohio St.3d 280, 294, citing Mitseff v. Wheeler (1988), 38 Ohio St.3d 112, 115. However, once the movant supports his or her motion with appropriate evidentiary materials, the nonmoving party "may not rest upon mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Civ.R. 56(E); Wing v. Anchor Media, Ltd. of Texas (1991), 59 Ohio St.3d 108, 111. Additionally, in medical malpractice cases, once the movant uses expert testimony to carry his or her burden, the non-moving party must submit contrary expert testimony to resist summary judgment, unless the standard of care is so obvious that non-professionals can reasonably evaluate the accused's conduct. Whiteleather v. Yosowitz (1983), 10 Ohio App.3d 272, 274; see, also, Bruni v. Tatsumi (1976), 46 Ohio St.2d 127, 131; Rogoff v. King (1993), 91 Ohio App.3d 438.

Expert affidavits offered in support of or in opposition to summary judgment must comply with Civ.R. 56(E) as well as the evidence rules governing expert opinion testimony, Evid.R. 702-705. Copper and Brass Sales, Inc. v. Plating Resources, Inc. (Dec. 9, 1992), Summit App. No. 15563, unreported; Ambulatory Health Care Corp. v. Schulz (May 30, 1991), Cuyahoga App. No. 58595, unreported. Thus, the affidavit must demonstrate that the affiant's opinion is based on personal knowledge; that the facts contained in the affidavit are admissible in evidence; and that the affiant is competent to testify as to the matter. Civ.R. 56(E). Further, the affidavit must set forth the expert's credentials and the facts or data he considered in rendering his opinion. Evanoff v. Ohio Edison Co. (Nov. 10, 1994), Portage App. No. 93-P-0015, unreported; Copper and Brass Sales, supra; see Evid.R. 703 and 705.

In reviewing whether an entry of summary judgment is appropriate, an appellate court must independently review the record and the inferences which can be drawn from it to determine if the opposing party can possibly prevail. Morehead, 75 Ohio App.3d at 411-12. "Accordingly, we afford no deference to the trial court's decision in answering that legal question." Id. See, also, Schwartz v. Bank-One, Portsmouth, N.A. (1992), 84 Ohio App.3d 806, 809. However, questions regarding the admissibility of evidence are within the sound discretion of the trial court, and so long as such discretion is exercised in line with the rules of procedure and evidence, its judgment will not be reversed absent a clear showing of an abuse of discretion with attendant material prejudice to a party. State v. Hymore (1967), 9 Ohio St.2d 122, certiorari denied (1968), 390 U.S. 1024; Rigby v. Lake Cty. (1991), 58 Ohio St.3d 269, 271. The term 'abuse of discretion' connotes more than an error of law; it implies that the court acted unreasonably, arbitrarily or unconscionably. Blakemore, supra, at 219. When applying the abuse of discretion standard, a reviewing court may not substitute its judgment for that of the trial court. Berk v. Matthews (1990), 53 Ohio St.3d 161, 169.

## A.

In the instant case, Dr. MacDonald presented an expert opinion (his own affidavit) supporting his assertion that he

was not negligent and is entitled to judgment as a matter of law. This evidence gave rise to Heather's burden to produce expert testimony showing that a genuine issue exists for trial. Whiteleather, supra. Heather claims she satisfied this burden by submitting the affidavit of Dr. Lerer and the deposition of Dr. DeVoe. The trial court found that the testimony propounded by Heather's experts was not based on facts contained in the record, and therefore their opinions did not comply with Evid.R. 703 and 705. Specifically, the trial court found that Heather's experts based their opinions on the erroneous belief that Heather was not intubated. Heather asserts that her experts did base their opinions on facts in the record, and that the trial court abused its discretion by excluding her experts' opinions from consideration.

Dr. MacDonald apparently denies Heather's allegation that she was not intubated until two hours and twenty minutes following her birth because he simply states in his briefs that the incubation was performed "shortly" after her birth. Regardless of Dr. MacDonald's position on the time of incubation, however, Heather is entitled to provide her experts with her version of this fact in obtaining their opinions. Mayhorn v. Pavey (1982), 8 Ohio App.3d 189, 191-92. See Camden v. Miller (1986), 34 Ohio App.3d 86, 91. On cross-examination, the opposing party is entitled to posit questions to the expert based on his or her version of the disputed fact. "It is then for the trier of the facts to resolve the factual dispute and, depending upon its findings, to determine what weight it will give to the opinion-answer." Mayhorn at 192, citing Haas v. Kundtz (1916), 94 Ohio St. 238, Community Traction Co. v. Wandtke (1929), 32 Ohio App. 207 and Utility Coals, Inc. v. Fruehauf Corp. (July 20, 1971), Franklin App. No. 71-28, unreported.

In his affidavit, Dr. Lerer stated that he reviewed all of Heather's medical records before rendering his opinion. Thus, as required by Evid.R. 703 and 705, Dr. Lerer set forth facts admissible in evidence upon which he based his opinion. Heather's medical records reflect that she was intubated. Dr. Lerer gave his opinion that Dr. MacDonald's resuscitation efforts fell below acceptable standards of care without mentioning intubation. There is no evidence whatsoever in the record indicating that Heather misled Dr. Lerer. Thus, we find that Dr. Lerer's affidavit plainly reflects that he based his opinion on evidence before the court, including Heather's incubation. Accordingly, we find that the trial court abused its discretion by excluding the affidavit of Dr. Lerer from consideration on summary judgment.

Dr. DeVoe's deposition likewise reveals that he based his opinion on information in the record. Though during the deposition Heather's counsel did ask Dr. DeVoe about Dr. MacDonald's "failure to intubate" Heather, the context of this question clearly limited it to the first one to one and one-half hours after Heather's birth. A review of Dr. DeVoe's deposition in its entirety reveals that his opinion focused on the fact that Heather's blood gas levels during this early neonatal period indicated to him that Dr. MacDonald's resuscitation efforts were inadequate. Just a few pages later in the deposition, Dr. DeVoe plainly stated that "the baby was incubated," and thus revealed his knowledge of that fact. The blood gas levels which Dr. DeVoe based his opinion were contained in Heather's medical records, which in turn are part of the court record. Thus, Dr. DeVoe's testimony was based on facts before the court, and the court abused its discretion by refusing to consider his opinion.

#### B.

Having determined that the trial court should have considered the affidavit of Dr. Lerer and the deposition of Dr. DeVoe, we now must decide whether Heather has successfully established through these opinions that there is a genuine issue for trial. Civ.R. 56(E); Wing, supra, 59 Ohio St.3d at 111. In addition to the affidavits and depositions attached to the parties' motions, we consider all depositions, affidavits and transcripts of evidence on record in determining whether summary judgment is appropriate. Civ.R. 56(C).

Dr. MacDonald's affidavit states that he met or exceeded the conduct of a physician of ordinary skill, care and diligence in his treatment of Heather. Conversely, Dr. Lerer's affidavit states that, based on his personal knowledge of the standard of care in 1983, Dr. MacDonald's resuscitation efforts did not rise to the level of ordinary skill, care and diligence. Thus, there is a genuine issue of material fact as to whether Dr. MacDonald's resuscitation efforts were adequate.

Additionally, Dr. Amos Grunebaum opined that the event causing Heather's cerebral palsy occurred six to ten hours prior to her birth. However, Dr. DeVoe opined that the primary cause of Heather's cerebral palsy was oxygen deprivation suffered due to inadequate resuscitation subsequent to her birth. Finally, Dr. Seid Ahmad Ettehadieh opined that, though he needed more details about Heather's condition to speak with certainty, he may have changed his diagnosis of the cause of her cerebral palsy from "asphyxia prior to birth" to "asphyxia after birth" had he known that Heather was not intubated for over two hours. Thus, a genuine issue of material fact also exists as to whether Dr. MacDonald's negligence caused Heather's cerebral palsy.

Finally, we note that if Dr. MacDonald does, by use of the phrase "shortly after birth," intend to contest Heather's claim that she was not intubated until two hours and twenty minutes after birth, that too is a genuine issue of material fact which remains in dispute.

Accordingly, we sustain Heather's assignment of error and reverse the judgment of the trial court.

JUDGMENT REVERSED.

Stephenson, P.J. and Abele, J., Concur in Judgment and Opinion.