NO. 4-10-0405 Filed 05/06/2011

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

JACK L. BETTIS, Executor of the Estate of JOY ANN BETTIS, Deceased, Plaintiff-Appellant, v. MARK W. WADE, D.C., Defendant-Appellee.	)))))))	Appeal from Circuit Court of Macoupin County No. 08L48 Honorable Steven H. Nardulli, Judge Presiding.

JUSTICE McCULLOUGH delivered the judgment of the court.
Justices Turner and Appleton concurred in the judgment.

ORDER

Held: The trial court did not abuse its discretion by denying plaintiff's motions to reopen discovery or granting defendant's motion to bar the opinions of plaintiff's expert witness. The court also committed no error in granting summary judgment in defendant's favor.

Plaintiff, Jack L. Bettis, Executor of the Estate of Joy Ann Bettis, his deceased wife, filed an action against defendant, Mark W. Wade, D.C., raising wrongful death and survival claims. The trial court granted summary judgment in defendant's favor. Plaintiff appeals, arguing the trial court (1) abused its discretion by denying his motion to name a new expert witness, (2) abused its discretion by denying his motion to conduct discovery as to a letter written by his expert to defendant, (3) abused its discretion by granting defendant's motion to bar the opinions of his expert, and (4) erred by

granting defendant's motion for summary judgment where its decision was prefaced on previous erroneous rulings. We affirm.

The record shows defendant was Joy's chiropractor, beginning in 1986. On September 20, 2002, she sought treatment from defendant after experiencing neck stiffness and headache pain for two days. Defendant provided treatment to Joy but, ultimately, recommended she seek emergency room care. Plaintiff took Joy to the hospital where a CT scan of her head revealed a ruptured intra-cerebral aneurysm. After undergoing two unsuccessful surgeries, Joy died five days later, on September 25, 2002.

On September 26, 2003, plaintiff filed a cause of action against defendant, alleging he failed to properly diagnose and treat Joy on September 20, 2002, thereby proximately causing her death. During the course of those proceedings, plaintiff named Dr. Frank Baker and Dr. Gary Sash as his expert witnesses. On July 20, 2007, defendant filed a motion *in limine* to bar Dr. Baker's opinions, a motion *in limine* to bar Dr. Sash's opinions, and a motion for a *Frye* hearing. Approximately one week after defendant's motions were filed, plaintiff filed a motion to voluntarily dismiss his cause of action without prejudice pursuant to section 2-1009 of the Code of Civil Procedure (735 ILCS 5/2-1009 (West 2006)). On October 5, 2007, the trial court granted plaintiff's motion for voluntary dismissal.

In connection with that voluntarily dismissed case, plaintiff appealed the trial court's denial of his motion to convert one of defendant's associates from a respondent in discovery to a named defendant. He also appealed the court's order that, as a consequence of his voluntary dismissal, he reimburse defendant for costs in the amount of $4,767. On October 9, 2008, this court affirmed the trial court's judgment as to those issues. *Bettis v. Wade*, 4-07-1017, 4-08-0021 (2008)(unpublished order under Supreme Court Rule 23).

On December 19, 2008, plaintiff refiled his cause of action against defendant. He raised wrongful death and survival claims, again alleging Joy's death was the result of defendant's negligent treatment. On March 27, 2009, defendant filed a request to set motions for hearing and a trial date. He noted the previous litigation and, citing Supreme Court Rule 219(e) (eff. March 28, 2002), argued no additional discovery or witness disclosure should be allowed in the case. Defendant requested the court enter an order setting hearing dates for the three motions he filed prior to plaintiff's voluntary dismissal in the 2003 case and setting a date for trial.

On May 18, 2009, a telephone hearing was conducted in the matter. The record does not contain a transcript of the hearing but the trial court's docket entry shows it gave plaintiff seven days to file an affidavit addressing the identity of a

new occurrence witness. It also denied a motion to conduct discovery with regard to a letter from Dr. Sash to defendant. (Presumably, the court's ruling was in response to an oral motion by plaintiff as the record does not contain any written motion with such a request.) Finally, the court requested the parties provide it with the appellate court's ruling in connection with the voluntarily dismissed case, pleadings related to the voluntary dismissal, and the court's rulings on the voluntary dismissal.

On June 8, 2009, the trial court conducted a second telephone hearing. Again, the record does not contain a transcript of the hearing but the court's docket entry states as follows:

> "Motion for Leave to Re-Open Discovery denied, both with regard to opinion witnesses and with regard to Nurse Bergland. Plaintiff given 30 days within which to file further responses to Defendant's Motion for *Frye* hearing and Motion to Strike portions of Dr. Sash's testimony. Cause set for oral argument on pending motions on August 4, 2009 ***."

The record does not contain a written motion to reopen discovery.

On August 4, 2009, the trial court conducted a hearing

in the matter. Defendant's attorney informed the court that they were present for a hearing on the three separate motions filed by defendant in the 2003 case. Plaintiff's attorney raised an objection, stating he was not aware that the motion with respect to Dr. Baker had ben set for that day. Over plaintiff's objection, the court stated it would proceed on all pending motions.

On August 18, 2009, the trial court entered a written order on the motions. It allowed defendant's motion with respect to Dr. Baker, barring him from testifying as to the chiropractic standard of care. It then denied defendant's motion for a *Frye* hearing regarding Dr. Sash's opinions, finding such a hearing would be unnecessary. The court then granted defendant's motion to bar various opinions from Dr. Sash. On September 15, 2009, plaintiff filed a motion to reconsider the court's order only as it related to the court's decision to bar Dr. Sash's opinions. On October 28, 2009, the court denied plaintiff's motion to reconsider.

On November 12, 2009, defendant filed a motion for summary judgment, alleging plaintiff had no expert to establish either a standard of care or proximate cause. In his response to defendant's motion, plaintiff conceded he could not establish the necessary element of a chiropractic standard of care given the trial court's rulings on defendant's motions and its determination that he could not name another chiropractic expert. He then

stated that, without evidence of a standard of care, it was "a useless exercise to make argument as to proximate cause." On April 30, 2010, the court entered summary judgment in defendant's favor.

This appeal followed.

On appeal, plaintiff challenges the trial court's decision to grant defendant's motion for summary judgment. He argues that, prior to the court's grant of summary judgment, it made erroneous rulings to deny him the right to name a new expert witness, preclude further discovery, and bar Dr. Sash's opinions. Plaintiff contends the court's erroneous rulings left him unable to establish a chiropractic standard of care, a necessary element in his case against defendant.

We first consider plaintiff's argument that the trial court abused its discretion by denying his request to name a new expert witness. He contends that because of the court's ruling, he suffered substantial prejudice that affected the outcome of the case.

The trial court "has discretion over the conduct of discovery" and its rulings will not be overturned absent an abuse of that discretion. *Ragan v. Columbia Mutual Insurance Co.*, 183 Ill. 2d 342, 352, 701 N.E.2d 493, 498 (1998). "A court abuses its discretion only where its ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would adopt the

court's view." *Evitts v. DaimlerChrysler Motors Corp.*, 359 Ill. App. 3d 504, 513, 834 N.E.2d 942, 951 (2005). When a voluntarily dismissed case is refiled, Supreme Court Rule 219(e) (eff. March 28, 2002) "requires the court to consider the prior litigation in determining what discovery will be permitted, and what witnesses and evidence may be barred." *Morrison v. Wagner*, 191 Ill. 2d 162, 167, 729 N.E.2d 486, 489 (2000).

Initially, we note defendant contends plaintiff did not make a motion to replace Dr. Sash with a new expert. He points out that the record contains no written motion. Defendant also maintains the trial court's ruling that discovery would not be reopened was in response to his own request to set his motions for a hearing and to set a trial date. In that written request, he also asked that discovery pick up where it left off at the time of plaintiff's voluntary dismissal in the 2003 case.

We disagree with defendant's contention and find evidence of a motion for a new expert witness by plaintiff. Specifically, the trial court's June 2009 docket entry states it was denying a "Motion for Leave to Re-Open Discovery *** with regard to opinion witnesses" not that it was granting defendant's request to bar further discovery. Further, at the August 2009 hearing on defendant's three motions, defendant's counsel informed the court that "at our hearing about six weeks ago, the Court denied Plaintiff's motions for new experts." Thus, al-

though the record contains no written motion from plaintiff, it supports the finding that he made at least an oral motion before the court.

Addressing the merits of this issue, we find no abuse of discretion by the trial court. Per Rule 219(e) the court in a refiled case must consider the previously dismissed litigation when making its discovery determinations. Defendant set forth the procedural history of plaintiff's initial cause of action in his request to set motions for hearing and a trial date. Plaintiff does not dispute that history.

Defendant's request shows plaintiff sought a voluntary dismissal of his initial cause of action in July 2007, almost four years after the case was filed in September 2003, and just over two months before the trial in the matter was scheduled, on October 1, 2007. While the 2003 case against defendant was pending, the parties engaged in a lengthy discovery process. During that time, plaintiff initially named Dr. Charles Theisler as an expert witness. He later withdrew Dr. Theisler as his expert and the court set a new deadline for him to disclose a different expert. In March 2006, plaintiff disclosed Dr. Baker and Dr. Sash as his expert witnesses. On July 20, 2007, after discovery had concluded, defendant filed motions to bar the testimony of plaintiff's experts and for a *Frye* hearing. One week later, plaintiff filed his motion to voluntarily dismiss the

case.

Plaintiff contends he should not have been forced to keep Dr. Sash as his expert and notes there was no showing to the trial court that he sought to dismiss the prior case because he missed discovery deadlines. Plaintiff contends that, in fact, he timely disclosed his experts in the 2003 voluntarily dismissed action. However, plaintiff neglects to mention that, following his voluntary dismissal of the 2003 action, the trial court imposed monetary sanctions on him pursuant to Rule 219(e) for "improper litigation and discovery tactics." The court's award of costs was affirmed by this court on appeal wherein we noted the lower court's finding of misconduct. In the present case, the trial court would have been aware of the misconduct finding as it had requested pleadings and rulings associated with plaintiff's motion for voluntary dismissal, as well as this court's decision on appeal.

Plaintiff asks this court to consider *Habtu v. Woldemichael*, 694 A.2d 846 (1997), a case from the District of Columbia Court of Appeals, as support for his position that the trial court should have allowed him to name a new expert witness. There, the court summarized the matter before it as follows:

> "In this medical malpractice suit, plaintiff appeals from a verdict directed against her which in turn stemmed from the

> trial court's refusal to allow her to designate a new expert medical witness after the first jury trial had ended in a mistrial. In the somewhat unusual circumstances of this case, including the fact that plaintiff bore no responsibility for the aborted first trial at which her expert opinion proof was concededly sufficient, we hold that the trial court abused its discretion in not granting the request to name a new expert." *Habtu*, 694 A.2d at 847.

As defendant points out, *Habtu* is not precedential authority for Illinois courts. Additionally, it is factually distinguishable from the present case such that consideration of the *Habtu* court's ruling does not warrant reversal of the trial court's decision in this case.

Here, the record discloses plaintiff had ample time to conduct discovery in his 2003 case against defendant and had already been granted one continuance to find a new expert witness. Only after discovery had concluded in his previous case, the case had been pending for nearly four years, and the trial date was scheduled for just over two months away, did plaintiff seek to have that action voluntarily dismissed. His voluntary dismissal of that previous case resulted in monetary sanctions

pursuant to Rule 219(e) for misconduct. Plaintiff is not entitled to infinite time or opportunities to establish and prove his case against defendant. Given the facts presented, we find no abuse of discretion in the trial court's decision to deny his motion to reopen discovery for the purpose of naming a new expert witness.

Plaintiff next argues the trial court erred by refusing his request to conduct additional discovery as to a letter written by Dr. Sash to defendant. He argues the letter was relevant to the case and he was entitled to discover the bias or prejudice of any witness, including his own.

The letter at issue was dated February 24, 2009, and appeared to have been written by Dr. Sash to defendant. In March 2009, defendant produced the letter through supplemental compliance with discovery. The letter stated as follows:

> "I talked with Jackie Brandenburg today. She stated that she had to dismiss the Bettis v. Wade case because of my testimony. Whether you think so or not, I believe that I helped you out. I don't know what to say beyond this point. I am at peace about my involvement in the case. I pray for fairness to you in this situation."

In a docket entry, the trial court denied a motion to

conduct discovery with regard to the letter. Defendant argues no error occurred because Dr. Sash was plaintiff's retained expert and plaintiff could easily have discovered the basis for letter. We agree. Additionally, for the reasons already stated, we find no abuse of discretion in the court's decision to deny requests for additional discovery in the case.

On appeal, plaintiff further argues the trial court abused its discretion by granting defendant's motion *in limine* to bar Dr. Sash's testimony. He maintains Dr. Sash's opinions were based upon his training and experience and sufficient to show the chiropractic standard of care.

"[T]o prove a case of negligence in treatment against a medical professional, the plaintiff must prove (1) the proper standard of care against which the professional's conduct must be measured; (2) a negligent failure to comply with the standard; and (3) that the injury for which suit is brought had as one of its proximate causes, the negligence of the professional." *Ingle v. Hospital Sisters Health System*, 141 Ill. App. 3d 1057, 1064, 491 N.E.2d 139, 144 (1986). Generally, a plaintiff must use expert medical testimony to establish standard of care and the defendant's deviation from that standard. *Purtill v. Hess*, 111 Ill. 2d 229, 242, 489 N.E.2d 867, 872 (1986).

"It must be established that the expert is a licensed member of the school of medicine

> about which he proposes to express an opinion (citation), and the expert witness must show that he is familiar with the methods, procedures, and treatments ordinarily observed by other physicians, in either the defendant physician's community or a similar community. *Purtill*, 111 Ill. 2d at 243, 489 N.E.2d at 872-73.

"[W]hether to admit expert testimony is within the sound discretion of the trial court (citation), and a ruling will not be reversed absent an abuse of that discretion (citation). *Snelson v. Kamm*, 204 Ill. 2d 1, 24, 787 N.E.2d 796, 809 (2003). "Abuse of discretion is found only where the trial court's rulings are arbitrary, fanciful or unreasonable, or where no reasonable person would take the view adopted by the court." *Auten v. Franklin*, 404 Ill. App. 3d 1130, 1151, 942 N.E.2d 500, 518 (2010).

At his deposition, Dr. Sash testified defendant deviated from the chiropractic standard of care in various ways during his assessment and treatment of Joy. He stated his source for standard of care was his own training and written guidelines from his malpractice carrier, O.U.M. Dr. Sash agreed that O.U.M.'s guidelines were not national guidelines and were not disseminated to other chiropractors. Since there was no showing

that the guidelines were observed by others in the relevant chiropractic community, it was improper for Dr. Sash to rely on them to establish the standard of care applicable to defendant.

Moreover, although Dr. Sash criticized defendant's assessment and treatment of Joy in several ways, at various points during his testimony, he acknowledged (1) his criticisms were based on how he would have handled the situation and not a deviation from the standard of care or (2) other chiropractors would disagree with his opinions. Further, Dr. Sash identified several criticisms which he admitted would have had no effect on Joy's outcome.

Plaintiff argues his written discovery disclosures, made pursuant to Supreme Court Rule 213(f) (eff. September 1, 2008), make it "apparent that the standard of care testimony Dr. Sash was to give was based on criteria acceptable under the law." He notes those written disclosures provided that Dr. Sash's opinions would be based on "his training, education and experience as well as the applicable standard of care" and "his own review of the chiropractic, medical records as well as other depositions taken in the case." The trial court, however, was not required to ignore Dr. Sash's deposition testimony in which he clearly stated his reliance on O.U.M guidelines. The court determined as follows:

"In reviewing Dr. Sash's deposition, it is

> impossible to separate out what portion of Dr. Sash's opinion is based upon his education and experience, what portion is upon the OUM/PACO Home Study, and which portion is based upon his own practices, to which he acknowledges other chiropractors might not agree, and which implies to this court that his personal practices do not reflect the standard of care to be applied in this case. He did not testify that the risk management publication reflects the standard of care in the Central Illinois chiropractic community. Indeed, he appears to testify that he finds it to be useful, but that many other chiropractors disagree."

We agree with the trial court's assessment. Any reliance by Dr. Sash on the O.U.M guidelines was improper because there is no evidence they reflect the relevant chiropractic standard of care. The cases cited by plaintiff are distinguishable from the facts of the present case. The court did not abuse its discretion by granting defendant's motion to bar Dr. Sash's opinions.

Plaintiff's ultimate challenge on appeal is to the trial court's grant of summary judgment in defendant's favor.

However, his arguments on that challenge are based upon the arguments we have already addressed and rejected. Plaintiff acknowledges his inability to prove standard of care or proximate cause in light of the court's rulings. Moreover, we note he has failed to put forth any real argument with respect to proximate cause either before the lower court or on appeal. For those reasons, the court did not err by granting defendant's motion for summary judgment.

Finally, throughout plaintiff's brief he raised complaints about the August 2009 hearing on defendant's motions to bar expert witness testimony and for a *Frye* hearing. Specifically, he characterizes the hearing as a "free-for-all" and complains that defendant was allowed to argue motions that were not before the court. Plaintiff asserts that, although defendant's motions had been filed in the 2003 case, they had not been refiled in the present cause of action. We decline to address plaintiff's claims as he has failed to identify his claims as issues on appeal, cite supporting legal authority for his contentions, or properly set forth any developed argument with respect to those claims.

For the reasons stated, we affirm the trial court's judgment.

Affirmed.