**[Cite as *Lloyd v. Cleveland Clinic Found.*, 2011-Ohio-826.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 94957**

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## HOWARD LLOYD

PLAINTIFF-APPELLANT

vs.

## CLEVELAND CLINIC FOUNDATION, ET AL.

DEFENDANTS-APPELLEES

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**JUDGMENT:**
**AFFIRMED**

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Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-686845

**BEFORE:** Rocco, J., Gallagher, P.J., and Keough, J.

**RELEASED AND JOURNALIZED:** February 24, 2011

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KENNETH A. ROCCO, J.:

**{¶ 1}** Plaintiff-appellant, Howard Lloyd ("appellant"), appeals the trial court's denial of his motion to dismiss, refusal to provide the jury with a dual causation instruction, and the trial court's admission of testimony from Joel S. Steinberg, M.D., which he maintains is hearsay and speculative. Finding no merit to each of these

assertions, we affirm.

**{¶ 2}** On February 9, 2007, appellant suffered injuries to his left shoulder while working as an employee at the Cleveland Clinic Foundation ("CCF"). He subsequently filed an application for benefits and compensation under the Ohio Workers' Compensation Act and related statutes. His claims were initially allowed for left shoulder bursitis, adhesive capsulitis, and left rotator cuff tear but disallowed participation for the condition of reflex sympathetic dystrophy of the left upper extremity ("RSD"). Appellant appealed to the Industrial Commission of Ohio ("ICO"), which reversed the disallowance, and instead, permitted the claim for RSD. Thereafter, the ICO denied CCF's request for review of its decision.

**{¶ 3}** On March 6, 2009, CCF appealed the ICO's denial of review and granting of appellant's RSD claim pursuant to R.C. 4123.512 to the Cuyahoga County Court of Common Pleas. Thereupon, on March 20, 2009, appellant filed suit against CCF and the Ohio Bureau of Workers' Compensation ("BWC") seeking participation for the RSD allowance and costs associated with the suit. A year later, on March 8, 2010, appellant filed a motion to dismiss CCF's notice of appeal for the failure of service of process. On April 1, 2010, the trial court denied appellant's motion to dismiss.

**{¶ 4}** The case proceeded to trial on March 10, 2010. Following deliberations, the jury concluded that appellant may not participate in the Workers' Compensation Fund for the condition of RSD of the left upper extremity.

**{¶ 5}** Appellant now appeals and presents three assignment of errors for our review.

**"I. The trial court erred by denying plaintiff-appellant's motion to dismiss because defendant-appellee failed to perfect service upon Mr. Lloyd pursuant to the Ohio Rules of Civil Procedure.**

**"II. The trial court erred by failing to give the jury a dual causation instruction.**

**"III. The trial court erred by allowing into evidence hearsay and speculative testimony from Dr. Steinberg."**

**{¶ 6}** R.C. 4123.512 provides that "[t]he filing of the notice of the appeal with the court is the only act required to perfect the appeal." R.C. 4123.512(A). The statute further states that "[u]pon receipt of notice of appeal, the clerk of courts shall provide notice to all parties who are appellees and to the commission." R.C. 4123.512(D).

**{¶ 7}** This court in *Cobb v. Mayfield* (Jan. 16, 1986), Cuyahoga App. No. 50095, held that "the clear and unambiguous language of the statute[1] directs the clerk of courts to serve both the notice of the filing of the notice of appeal and the summons and petitions upon the parties named in the notice of appeal upon receipt." We further provided that no requirement "can reasonably be implied from the language of the statute" mandating appellant to serve the notice of appeal. Id. Accordingly,

[1]This case was decided under the former R.C. 4123.519, which was

appellant's first assignment of error is overruled.

**{¶ 8}** In his second assignment of error, appellant argues that the trial court erred in failing to provide the jury with an instruction on dual causation. He maintains that there is evidence of multiple proximate causes for his RSD condition. We find this assertion without merit.

**{¶ 9}** "It is well established that the trial court will not instruct the jury where there is no evidence to support an issue. *Riley v. Cincinnati* (1976), 46 Ohio St.2d 287, 75 O.O.2d 331, 348 N.E.2d 135. However, the corollary of this maxim is also true. 'Ordinarily requested instructions should be given if they are correct statements of the law applicable to the facts in the case and reasonable minds might reach the conclusion sought by the instruction.' Markus & Palmer, Trial Handbook for Ohio Lawyers (3 Ed.1991) 860, Section 36:2. See, also, *Feterle v. Huettner* (1971), 28 Ohio St.2d 54, 57 O.O.2d 213, 275 N.E.2d 340, at the syllabus: 'In reviewing a record to ascertain the presence of sufficient evidence to support the giving of a[n] * * * instruction, an appellate court should determine whether the record contains evidence from which reasonable minds might reach the conclusion sought by the instruction.'" *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 591, 575 N.E.2d 828.

**{¶ 10}** Ultimately, the trial court is afforded broad discretion in determining whether evidence presented at trial is sufficient to require a jury instruction and such

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renumbered in 1993 to the current R.C. 4123.512.

decision will not be reversed absent an abuse of that discretion. *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, 541 N.E.2d 443.

**{¶ 11}** In this case, none of the evidence presented indicates that two or more factors combined to cause appellant's RSD. The appellant's treating physician, Dr. Narouze, testified that appellant's workplace injury was the cause for the RSD. CCF's expert, Dr. Steinberg, testified that appellant's RSD "only related to the carpal tunnel surgery." Thus, no evidence supports an instruction on dual causation. Appellant's second assignment of error is overruled.

**{¶ 12}** Appellant's third assignment of error is equally without merit. The trial court did not allow hearsay or speculative testimony from Dr. Steinberg. Appellant complains that Dr. Steinberg frequently testified as to the beliefs of Dr. McCarron, appellant's treating physician, rather than to the contents of his medical records. In this regard, appellant cites the following testimony:

"A Because I think that would have been a time when Doctor McCarron did just what he did do, he began to wonder about the possibility of RSD, and that's what it says in the next line, 'need to consider RSD as a possible diagnosis.' But after considering it, he decided that it was not present.

* * *

Q What makes you think that based on a review of that note, Doctor?

A Well, he goes on to say— I'll just read it because these are his words

anyway—'however, he appears to have symptoms that are more truly nerve irritation at the ulnar nerve and median nerve distally and his shoulder function and pain is continuing to decrease. Given the fact that in person his exam looks less like RSD at this point, I think we will delay that in favor of an EMG' to go ahead and evaluate nerve function compromise.

* * *

Q Doctor, further down in the note of December 17th, 2007, Doctor McCarron notes, 'I do not like the idea of proceeding with another surgery before we have recovered him from his first surgery but if the EMG findings show that the nerves are being significantly damaged, it may be necessary despite the fact that it is less than ideal.' Is that comment contained within Doctor McCarron's note significant?

A Yes.

Q Why?

A Because if you thought someone were developing RSD, the last thing you would want to do would be push them over into where it was more certain that they would get it. So another trauma would not be something the surgeon would want to contribute. So as he said earlier in the paragraph, what you do is you wait time, a year or so, before you do elective surgery.

* * *

Q And Doctor, if there was any objective physical basis for a diagnosis of RSD, would it in any way have been appropriate to do carpal tunnel surgery at this time?

* * *

A No, in my opinion, it would not have been."

**{¶ 13}** Such testimony does not constitute hearsay as it is not "a statement, other than one made by the declarant while testifying at the trial or the hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C).

**{¶ 14}** Furthermore, the testimony read in its context reveals that Dr. Steinberg was reading verbatim from a treatment note of Dr. McCarron and expressing his opinions as to the significance of that medical record, which was entered into evidence. Such testimony is entirely within the province of expert testimony. Evid.R. 703 provides "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by him or admitted in evidence at the hearing." Experts are called to testify to provide their opinions as to the treatment and injuries suffered by a plaintiff. In *Virga v. Allstate Ins. Co.* (Dec. 14, 1989), Cuyahoga App. No. 56391, we determined that a nontreating physician may base his opinion on the cause of a plaintiff's injury upon his review of the plaintiff's medical records. Additionally, courts have concluded that an expert may review and disagree with a report by an examining physician. *Perkins v. Miami Valley Regional Transit Auth.* (Jan. 12, 1987), Montgomery

App. Nos. 9563 and 9696.

**{¶ 15}** Appellant also argues that various portions of Dr. Steinberg's testimony regarding appellant's stab wound and his statement that smoking and diabetes are generally factors contributing to RSD was violative of Local Rule 21.1. This rule provides that "A non-party expert will not be permitted to testify or provide opinions on issues not raised in his report."

**{¶ 16}** In this regard, we have searched the file several times in an effort to find Dr. Steinberg's expert report, but were unsuccessful. The appellant did note in his notice of appeal that he was only filing a partial transcript under App.R. 9(B). "In the face of an inadequate record on appeal, this court presumes regularity[.]" *Conley v. City of Cleveland* (July 27, 2000), Cuyahoga App. No. 76495. Thus, since appellant has failed to provide an adequate record, we are unable to evaluate the merits of this argument. See *Ali v. Vargo*, Cuyahoga App. No. 85244, 2005-Ohio-3156. Appellant's final assignment of error is overruled and the judgment of the trial court is affirmed.

**{¶ 17}** It is ordered that appellees recover from appellants costs herein taxed.

**{¶ 18}** The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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KENNETH A. ROCCO, JUDGE

SEAN C. GALLAGHER, P.J., and
KATHLEEN ANN KEOUGH, J., CONCUR