IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

JACOB LACEK, *et al.*	)	**CASE NO. CV 16 872771**
	)	
Plaintiffs,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	**JUDGMENT ENTRY BIFURCATING**
	)	**THE DEFENSE OF STATUTE OF**
METROHEALTH MEDICAL	)	**LIMITATIONS AND GRANTING AND**
CENTER, *et al.*	)	**DENYING IN PART THE**
	)	**DEFENDANTS' MOTION TO**
Defendants.	)	**DISQUALIFY PLAINTIFFS' COUNSEL**

John P. O'Donnell, J.:

This is a medical malpractice lawsuit. Plaintiff Jacob Lacek is plaintiff Dawn Pruitt's son. Lacek was born on September 4, 1997, at MetroHealth Medical Center in Cleveland. He alleges that the defendants' care of him at MetroHealth on September 5, 1997, fell below the standard of care and resulted in injuries to him. Pruitt claims a concomitant loss of her son's consortium.

Lacek turned 18 on September 4, 2015. Accordingly, pursuant to sections 2305.113 and 2305.16 of the Ohio Revised Code, Lacek was required to commence the lawsuit by September 4, 2016, or be barred by the statute of limitations from ever bringing the lawsuit.

In July and August 2016, Lacek's attorney Christopher Mellino corresponded with MetroHealth's associate general counsel Marlene Franklin about whether the defendants would agree to extend the deadline by which suit must be filed to allow more time for the possibility of a negotiated settlement. Ultimately, they reached an agreement to "extend the tolling of this

matter" until December 4, 2016.[1] No settlement was reached and the lawsuit was filed on December 6, 2016.

The defendants then filed a motion for summary judgment on the basis that the suit was filed after the expiration of the agreed time within which suit was required to be commenced. The motion was denied because there is a genuine issue of material fact about whether the parties agreed to change the last possible filing date from September 4, 2016, until December 4, or that they agreed that the period of time from August 3 through December 4, 2016, would not be counted toward the calculation of the statute of limitations period.

The defendants have now moved to disqualify Mellino and the other lawyers at his firm. The grounds for the motion are, first, that Mellino and the other attorneys in his office are prohibited under Rule 3.7 of the Ohio Rules of Professional Conduct from acting as counsel in the prosecution of the plaintiffs' causes of action because they are material witnesses to an issue in dispute, namely the lawyers' intent when they agreed to "extend the tolling of this matter." Second, the defendants assert that the interests of Mellino and his firm now conflict with the interests of the plaintiffs since the lawyers may have committed legal malpractice by filing the lawsuit after the expiration of the statute of limitations.

Mellino and his firm oppose the motion on the basis that they are not "necessary" witnesses whose disqualification would be required under Prof. Conduct Rule 3.7. The motion to disqualify is now fully briefed and this judgment entry ensues.

Prof. Conduct Rule 3.7(a) provides:

> [A] lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless one or more of the following applies:
>
> (1) the testimony relates to an uncontested issue;

[1] Franklin's correspondence of August 3, 2016.

(2) the testimony relates to the nature and value of legal services rendered in the case;

(3) the disqualification of the lawyer would work substantial hardship on the client.

As an initial matter, none of the parties or lawyers in this case contend that either of exceptions (2) and (3) in the rule apply here. As for exception (1) – that any testimony of Mellino or the other lawyers in his office relates to an uncontested issue – the plaintiffs' attorneys do claim in their brief opposing disqualification that the authenticity of the written communications on the subject of changing the statute of limitations bar date is uncontested. That may be true, but the meaning of the agreement – i.e., the intent of the parties – is contested, so exception (1) does not apply.

That leaves the question of whether Mellino and the other lawyers in his office are "likely" to be "necessary" witnesses. While the tenor of the plaintiffs' brief in opposition to the motion to disqualify suggests that Mellino does not intend to testify on the statute of limitations issue he has made no firm commitment not to testify and, in any event, he appears likely to be called as a witness by the defendants.

As to whether Mellino is a necessary witness, it is not required that the disputed issue is incapable of being resolved without his testimony. A necessary witness is someone whose proposed testimony is relevant and material and unobtainable elsewhere. *Popa Land Co. v. Fragnoli*, 9th Dist. Medina No. 08 CA 0062-M, 2009-Ohio-1299, ¶15. Stated differently, counsel's testimony must be admissible and unobtainable through other trial witnesses. *Id.* As the only lawyer on the plaintiffs' side to participate in negotiations with MetroHealth's counsel to change the statute of limitations date[2] there is no question that Mellino's testimony about the intended effect of the agreement is relevant, material and unobtainable elsewhere. As a result, he

[2] Mellino's associate Margo Moore did email Franklin on November 29, 2016, to ask for more time but Franklin never agreed to it, so Moore would have no testimony to offer about the intent of Mellino when he entered into the agreement in August.

should be disqualified from acting as an advocate at any evidentiary proceeding where the affirmative defense of the statute of limitations is being decided since the purposes of Prof. Conduct Rule 3.7 are to prevent the trier of fact from being confused or misled by a lawyer serving as both advocate and witness as well as ensuring that the combination of roles does not prejudice the defendants' rights in this lawsuit. Prof. Conduct Rule 3.7, Comment 2.

But there is no indication that any other lawyer in Mellino's office participated in negotiating the change to the statute of limitations bar date. Accordingly, there is no reason the other lawyers in the office should be disqualified as long as they have no conflict with the plaintiffs' own interests that would require disqualification under Prof. Conduct Rule 3.7(b). In that regard, the defendants claim there is a conflict because Mellino and his associates are purported to be more concerned with avoiding a legal malpractice charge than advancing the interests of their clients. The response to that is that the interests of the plaintiffs and their lawyers don't conflict. The immediate hurdle to any finding of medical negligence and an award of damages is the statute of limitations bar. Both the plaintiffs and their counsel are motivated to defeat the affirmative defense even if the lawyers might also have selfish reasons beyond their professional obligation to zealously advocate for their clients.[3] Not only that, until such time as the affirmative defense is decided in the defendants' favor and the plaintiffs lose the lawsuit the legal malpractice is hypothetical at most, and the same can be said for any trial advocate, including the defendants' lawyers in this case, since until litigation is over there is always a possibility of legal malpractice. But the bare possibility is not enough to justify disqualification in any other case and it is not enough in the circumstances of this case.

[3] A proposition with which, it must be said, I do not agree. Mellino is known to be experienced as a lawyer generally and in the field of medical malpractice specifically. It is a recognized occupational hazard to be sued by a dissatisfied client for professional negligence regardless of the merits of such a claim, so while Mellino surely wouldn't welcome such a lawsuit I would expect that professional liability insurance and the wisdom of years would cushion such a prospect to the point where he would not let it impair his advocacy for Lacek and Pruitt in this case.

If I stopped here, the defendants' motion to disqualify would be granted as to Mellino but denied as to the other lawyers in his office. But it is well accepted that disqualification of an attorney is a drastic measure that should not be taken unless absolutely necessary. *Brown v. Spectrum Networks, Inc.*, 180 Ohio App. 3d 99, 2008-Ohio-6687, ¶11 (1st Dist.). Litigants are entitled to their choice of counsel and courts, or opposing parties, should be able to disturb that selection only to the extent necessary to preserve a fair trial. Under the particular circumstances of this case there is a remedy that avoids the utter disqualification of Mellino as an advocate for the clients who chose him: bifurcation of the affirmative defense from the trial on the merits of the negligence claim.

Rule 42(B) of the Ohio Rules of Civil Procedure provides that, for convenience, to avoid prejudice, or to expedite or economize, the court may order a separate trial of one or more separate issues or claims. Here, the statute of limitations defense can be tried alone to a jury. If the jury finds in the defendants' favor then there is no need to have a trial on the merits of the medical negligence claim and economy will have been achieved through an expeditious trial on the threshold defense. If the jury finds in the plaintiffs' favor then Mellino can advocate for his clients at the trial on the merits and the "drastic measure" of full disqualification will have been avoided.

I therefore grant the motion to disqualify in part, insofar as Mellino is disqualified from serving as an advocate at a trial on the affirmative defense of statute of limitations, but I deny it insofar as Mellino is not disqualified from representing the plaintiffs at a trial on the merits of the claims in the complaint, and I deny it insofar as the other lawyers in Mellino's firm are not disqualified from serving as advocates at any proceedings in this case. Finally, on my own

motion and pursuant to Civil Rule 42(B), the affirmative defense of the statute of limitations will be tried separately, and before, a trial on the causes of action in the complaint.

An attorney telephone conference to select a trial date for the affirmative defense will be held on December 4, 2017, at 11:00 a.m.

IT IS SO ORDERED:

Judge John P. O'Donnell

Date: November 30, 2017

SERVICE

A copy of this judgment entry was sent by email on November 30, 2017 to the following:

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Judge John P. O'Donnell
11/30/2017

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

JACOB LACEK, et al., Plaintiffs, vs. METROHEALTH MEDICAL CENTER, et al. Defendants.	)	Case No. CV-16-872771 JUDGE JOHN P. O'DONNELL **MOTION FOR LEAVE TO FILE REPLY BRIEF IN SUPPORT OF MOTION TO DISQUALIFY ATTORNEYS CHRISTOPHER MELLINO, MARGO MOORE AND THE MELLINO LAW FIRM AS PLAINTIFFS' COUNSEL AND ATTACHED REPLY BRIEF, *INSTANTER***)

Defendants, MetroHealth Medical Center, David G. Roberts, M.D., James B. Besunder, D.O., Andrea M. Walker, M.D., and Nebiat Tafari, M.D. (collectively referred to as "Defendants"), by and through the undersigned counsel, and pursuant to Local Rule 11(D), hereby moves this Court for leave to file the attached Reply Brief, *Instanter*, to Plaintiffs' Brief in Opposition to Defendant's Motion to Disqualify Plaintiffs' Counsel. The Court is assured that this Motion for Leave and attached Reply Brief, *Instanter,* are not being made for the purpose of delay, but in the interest of justice to fully address with the Court the serious and compelling issues which have given rise to this particular dispute. Leave is necessary to fully respond to the arguments presented in Plaintiffs' Brief in Opposition and advise the Court accordingly relative to any pertinent disputes and factual omission in Plaintiffs' Brief in Opposition which bear issue on the Court's decision.

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Respectfully submitted,

/s/ John F. Bodie, Jr.
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Reply Brief, *Instanter*, in Support of Motion to Disqualify Counsel.

In their Brief in Opposition to Defendants' Motion to Disqualify, counsel wholly fails to take into account, or intentionally completely ignores, the underlying significant primary facts that Mr. Mellino, as a witness, by means of his Affidavit, submitted evidence and arguments to be considered as to the *intent* of the Plaintiffs as to any meaning/interpretation of any agreement or the terms thereof contrary to those of MetroHealth. They further ignore the fact that the final written expression confirming the operative terms and understanding of any agreement, and thus the final documented intent/expression between the parties, was submitted to Plaintiffs on August 16, 2016; a fact of which Plaintiffs do not dispute receipt thereof. (Attached as Exhibit "A"). This clearly and unambiguously identifies the operative terms of any agreement as to "extend the statute of limitations for additional time, until December 4, 2016..." as MetroHealth has understood and agreed this entire time. Further, Exhibit "A" is the first and *only* expression of any agreement relative to a limitations period and extension applicable to the individual defendant physicians. There is nothing Plaintiffs can point to relative to any agreement, communication, or extension as to the individual physicians that would make this action timely filed as to them.[1]

Plaintiffs simply cannot argue or present a contrary understanding or intent of any agreement without Mr. Mellino and his firm expressing it, as witnesses, that they had an understanding or intent contrary to that of MetroHealth. In fact, Mr. Mellino's submitted

[1] As set forth in the Motion for Summary Judgment and Defendants' Reply Brief in Support of Summary Judgment, the email communications between Plaintiffs' counsel and MetroHealth *in no way* reference any agreement with or on behalf of the Defendant/physicians as to the Statute of Limitations. As Plaintiffs admit, without any agreement, the Statute of Limitations would expire on September 4, 2016; long before any action was filed against the individual physician/Defendants. As such, Summary Judgment should have been and continues to be appropriate as to them, individually. Finally, by way of *Comer v. Risko*, 2005-Ohio- 4559 and *National Union Fire Insurance Co. v. Wuerth*, 122 Ohio St.3d 594, 2009-Ohio-3601 and its progeny, as argued in the Motion for Summary Judgment, but not addressed in the Court's opinion, Summary Judgment would further have been appropriate as to MetroHealth as well, following *Wuerth*, as the limitations expired as to the individual physicians.

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Affidavit, particularly ¶3, 4, 6, 8, 9, 10, 11, and 12 enunciate *his* interpretation, understanding and intent of any agreement and terms thereof with MetroHealth. For Plaintiffs to submit *any* evidence or argument of intent or understanding of terms of any agreement contrary to that submitted by Defendants' (i.e. for an extension to a date certain), it would necessarily come solely from Mr. Mellino and members of his firm. Without such evidence submitted by Mr. Mellino and his firm as witnesses of Plaintiffs' contrary intent and understanding of the agreement or the terms therein, there would be no question of fact and Summary Judgment would be warranted.

In their Brief in Opposition to the Motion for Summary Judgment, Plaintiffs cite to *Kostelnik v. Helper*, 2002-Ohio-2985, 96 Ohio St.3d 1, 77 N.E.2d 58, a settlement agreement dispute, as setting forth the essential elements of an enforceable contract in Ohio; however in so doing, failed to include the most important element of an *enforceable* contract in their recitation, and pertinent to the issue now before the Court: a meeting of the minds of the parties.

> "A contract is generally defined as a promise, or a set of promises, actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration." *Perlmuter Printing Co. v. Strome, Inc.* (N.D.Ohio 1976), 436 F.Supp. 409, 414. **A meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract.** *Episcopal Retirement Homes, Inc. v. Ohio Dept. of Indus. Relations* (1991), 61 Ohio St.3d 366, 369, 575 N.E.2d 134."

Id. at ¶16. (Emphasis added)

It would appear here that there may well have been no "meeting of the minds as to the essential terms," and thus **no** enforceable contract exists. However, for the purposes of the Motion to Disqualify now before this Court, the only "mind" to be submitted contrary to that of

Defendants' is Mr. Mellino and his firm. Without his contrary interpretation, there is no dispute of fact.

If, as Plaintiff argues in their Brief in Opposition to Defendants' Motion to Disqualify, Mr. Mellino and no one from his firm are necessary to testify or submit evidence on a contested issue, then there should not be, nor should there have been, any *evidence or argument* whatsoever put forth by the Plaintiffs that there was anything other than an intent and agreement as expressed by Defendants: an extension of limitations to a date certain as confirmed and memorialized in Exhibit "A;" the final expression of agreed and intended terms of the parties. However, that was not the case and Plaintiffs' counsel *did* in fact attach and submit his Affidavit testimony and exhibits of his understanding and intent in opposition to Summary Judgment. To oppose MetroHealth's position in this way places the intent, understanding, interpretation, and actions of Mr. Mellino and his firm directly at issue and in evidence as necessary witnesses for Plaintiffs.

In their recitation of "Pertinent Facts," Plaintiffs suggest, again without supportive citations, that there has been a "judicial admission" by the Defendants as to "a tolling agreement and complete agreement...," having previously gone to great lengths to argue the same in previous motions[2]. Defendant, MetroHealth and the individual defendant/physicians, have never disputed that an agreement with Plaintiffs relative to the Statute of Limitations for this claim was intended, and thought to have been reached. That agreement and the operative terms thereof was memorialized and confirmed with Plaintiffs as demonstrated in Exhibit "A." What has been placed in dispute throughout this litigation and in all the pleadings is Plaintiffs' contrary position to this, supported solely by Mr. Mellino's actions, intent, understanding, interpretation, and

[2] Again, without supportive citations.

Affidavit testimony contrary to MetroHealth's. MetroHealth did not create Mr. Mellino as a necessary witness; Mr. Mellino did by enunciating a contrary intent.

Well before there was litigation or a necessity to move to disqualify counsel, MetroHealth documented and sent written confirmation to Plaintiffs' counsel memorializing the understanding and intended operative terms of agreement, as shown by the plain language of Exhibit "A.". There is no dispute that Plaintiffs' counsel received this confirmation and memorialization of the final terms and understanding of the parties. There were no corrections, objections, disagreement, dispute, or contrary understanding ever enunciated by Plaintiffs to MetroHealth. This did not occur until Mr. Mellino and his firm raised their objection, disagreement with, and dispute to this agreement and its terms in opposition to and to avoid Summary Judgment. And they did (and continue to do) so as testimonial witnesses on behalf of the Plaintiffs to create a dispute as to the operative terms and intent between the parties.

Defendants do not take their Motion to Disqualify lightly or in any way consider it a means of delay or gamesmanship; but given the circumstances that have arisen in this case, this Motion to Disqualify has necessarily been brought to bear solely by the actions of the Plaintiffs' counsel. They have affirmatively placed their understanding, intent, and interpretation of the terms of any agreement with MetroHealth at issue and in dispute. The moment Mr. Mellino and his firm argued and submitted evidence that they intended or understood the terms/agreement to be different than those of MetroHealth, they became likely necessary witnesses as contemplated under Prof. Cond. R. 3.7. Without their created dispute, Summary Judgment to all Defendants should have been granted.

Conclusion

If, as Plaintiffs argue in their Brief in Opposition, Mr. Mellino and his firm are unnecessary as witnesses in this action, then any argument, suggestion, inference, or evidence of any understanding, intent, or agreement regarding operative terms contrary to that Defendants should be stricken and disregarded relative to an extension of limitations to a date certain. Summary Judgment would then be warranted, as this matter was not filed timely, per the operative terms of the agreement as agreed and understood by the Defendants.

On the other hand, if Plaintiffs' counsel is of the position that an agreement and the operative terms therein are contrary to that of Defendants', the underlying basis and evidence of that disputed intent, understanding, and/or agreement regarding the operative terms between the parties rest solely with, and emanate entirely from, Mr. Mellino and his firm. They become necessary witnesses as to the disputed agreement and the operative terms therein. Mr. Mellino and firm created the dispute as to the agreement with MetroHealth by arguing and presenting evidence that they understood any agreement differently than MetroHealth. Per Prof. Cond. R. 3.7, counsel simply cannot create and present evidence of a disputed material fact to be tried and remain as an advocate for the party. As such, Plaintiffs' counsel, Mr. Mellino and his firm should be disqualified as counsel in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The foregoing was filed electronically with the Court on this 10th day of October, 2017. Notice of this filing will be sent to all parties of record by operation of the Court's electronic filing system, with courtesy copies to counsel of record via electronic mail. Parties may access this filing through the Court's electronic filing system.

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CL2:470044_v1

MetroHealth

August 16, 2016

Mr. Christopher M. Mellino
The Mellino Law Firm LLC
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Re: Jacob Lacek

Dear Mr. Mellino:

The purpose of this letter is to confirm our agreement to extend the statute of limitations for additional time, until December 4, 2016 relative to the care and treatment of the above captioned patient.

The extension of time to file or otherwise resolve this matter applies to The MetroHealth System and its employees including but not limited to our employed physicians.

Thank you for your assistance in this matter.

Sincerely,

Cheryl A. Greer
Coordinator, Insurance/Litigation Management

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EXHIBIT
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