2014 IL App (1st) 131707-U

FOURTH DIVISION
September 18, 2014

No. 1-13-1707

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

HAREY ISRAEL and SAMANTHA ISRAEL,	)	
	)	Appeal from the
Plaintiffs-Appellees,	)	Circuit Court of
	)	Cook County, Illinois.
v.	)	
	)	
DIANE ISRAEL,	)	No. 2012-L-003464
	)	
Defendant	)	
	)	Honorable
(Aaron Israel,	)	John C. Griffin,
	)	Judge Presiding.
Contemnor-Appellant).	)	

JUSTICE BILL TAYLOR delivered the judgment of the court.
Justices Howse and Epstein concurred in the judgment.

ORDER

HELD: In defamation action, 94-year-old nonparty witness moved for an order barring his deposition, citing cardiac issues that allegedly made him not healthy enough to be deposed. The trial court appointed a guardian ad litem (GAL) to serve as factfinder; when the witness refused to meet with the GAL, the court summarily denied his motion and ordered him to sit for a deposition. The witness refused to sit for a deposition, and the court found him in civil contempt of court. We reversed and remanded, finding that: (1) the trial court lacked authority to appoint a GAL for a competent adult who objected to the appointment, and (2) the trial court erred in ordering him to sit for a deposition without an evidentiary hearing on the issue of his health.

¶ 1 Aaron Israel, a nonparty to the action below, appeals the trial court's order finding him in contempt of court for failing to appear for a deposition.

¶ 2 Plaintiff Harey Israel brought a defamation suit against his sister, Diane Israel. Harey alleged that Diane had made defamatory statements about him to their father, Aaron, and thereby induced Aaron not to convey certain real estate to Harey. As part of the discovery process, Harey sought to obtain Aaron's deposition. Aaron refused to sit for a deposition, citing cardiac and other medical issues that allegedly made him not healthy enough to be deposed. The parties presented conflicting documentary evidence as to whether giving a deposition would present a health risk to Aaron. On March 27, 2013, without holding an evidentiary hearing on the issue of Aaron's health, the trial court ordered Aaron to sit for a deposition within 21 days. Aaron failed to do so, and on May 21, 2013, the trial court found him in indirect civil contempt and ordered that he be fined $500 per day until he complied with the March 27 order. Aaron now appeals the trial court's finding of contempt. For the reasons that follow, we vacate the trial court's March 27 and May 21 orders, and we remand for the trial court to hold an evidentiary hearing to determine whether Aaron is capable of sitting for a deposition.

¶ 3 I. BACKGROUND

¶ 4 In Harey's complaint against Diane, filed on March 30, 2012, Harey alleged the following.[1] Aaron, who was 94 years old and "of ailing health," owned a commercial shopping center in West Allis, Wisconsin, which was valued at $3 million. In June 2011, Aaron was in the

[1] Although Harey's complaint contained several claims, all of them except his defamation claim had been dismissed by the time of the contempt proceedings relevant to this appeal. This includes all claims pertaining to coplaintiff Samantha Israel. Thus, we shall confine our discussion to Harey's defamation claim.

process of gifting his ownership of the Wisconsin property to Harey. Before the transaction was complete, Diane allegedly made various false and defamatory statements about Harey to Aaron and others. In particular, Diane allegedly told various people that Harey had not worked for over three years and disparaged his work ethic and his desire and ability to work as a trader. The complaint alleged that Diane's statements induced Aaron not to transfer the Wisconsin property to Harey and otherwise harmed Harey's reputation. Accordingly, the complaint sought compensatory damages against Diane.

¶ 5 On July 19, 2012, Harey filed a motion for expedited discovery as to Aaron. Harey argued that since Aaron was 94 years old and in failing health, it was critical to proceed immediately with discovery from him. Harey further alleged that Diane had sequestered Aaron from Harey and all of his other family members, and, at Diane's direction, Harey as well as all other members of Aaron's family had been denied access to him. The trial court granted Harey's motion for expedited discovery on July 25, 2012.

¶ 6 In response, on August 21, 2012, Aaron filed a motion seeking a protective order "shielding him from the deposition and any other discovery sought by Plaintiff Harey Israel." In that motion, Aaron alleged that ever since he had suspended contact with his son Harey in 2011, Harey had made various attempts to embarrass and harass him through the court system and otherwise. Aaron alleged that the present lawsuit was an extension of this campaign of harassment as well as an attempt to pressure Aaron into conveying the Wisconsin property to Harey. Aaron concluded by stating that Harey "should not be permitted to use a baseless lawsuit against his sister as a vehicle by which to harass [Aaron] and invade his privacy." Notably, Aaron did not allege that health concerns prevented him from sitting for a deposition.

¶ 7 In an order dated August 24, 2012, the trial court denied Aaron's motion for a protective order and further ordered him to provide a date for a deposition to take place within the next 30 days.

¶ 8 On August 31, 2012, Aaron filed a second motion for a protective order, in which he alleged the following. Immediately following the hearing on Aaron's first motion for a protective order, counsel for Aaron conferred for the first time with Aaron's treating cardiologist, Dr. Micah Eimer. Dr. Eimer informed counsel that Aaron suffered from numerous cardiac problems that, when coupled with his advanced age, gave him "serious concerns" about potential adverse effects on Aaron's health and life if he were to be subjected to a deposition. Aaron stated that, based upon his doctor's opinion, it would be too risky for him to sit for a deposition. He further stated that, in lieu of a deposition, he would be willing to provide answers to interrogatories or an affidavit addressing reasonably discoverable information.

¶ 9 Attached to the motion was the affidavit of Dr. Eimer. Dr. Eimer stated that he was a board certified physician in cardiology and internal medicine, and he had been treating Aaron for approximately five years. He said that Aaron had significant cardiac disease, including congestive heart failure, coronary artery disease, and atrial fibrillation. He further stated: "Given Mr. Israel's advanced age (94 years-old) and his significant, multiple medical problems, I have serious concern about the potential adverse effect on his health, and indeed on his life, if he were to be subjected to a deposition, particularly given the emotional circumstances involving his children."

¶ 10 Harey filed a response to Aaron's motion for a protective order on November 20, 2012. In that response, Harey stated that he had deposed Dr. Eimer. Harey's own medical expert, Dr. John E. Markis, a board certified cardiologist, attended Dr. Eimer's deposition by telephone and

reviewed the deposition transcript. Based upon that information, Dr. Markis concluded that Aaron was capable of sitting for a deposition and would not suffer adverse cardiac consequences from doing so.

¶ 11 In support of his response, Harey attached Dr. Eimer's deposition transcript and the affidavit of Dr. Markis. In his deposition, Dr. Eimer testified that he met Aaron in July 2008, when he was brought to Glenbrook Hospital after suffering cardiac arrest. During that hospitalization, Aaron received an implantable cardio defibrillator (ICD), though it had not been triggered at any time since installation. Dr. Eimer opined that since he met Aaron, there was no time at which Aaron could have given a deposition without significant risk to his health, due to his advanced cardiac disease. Dr. Eimer explained that Aaron's condition was life-threatening, and he required multiple medications and frequent interactions with Dr. Eimer in order to maintain his health.

¶ 12 Dr. Eimer testified that his most recent examination of Aaron was on October 19, 2012. On that date, Dr. Eimer diagnosed him with congestive heart failure, based upon stress tests and ultrasounds. He also observed swelling in Aaron's legs that had worsened since his last visit on July 16, 2012. At the end of the examination, Dr. Eimer increased Aaron's dosage of diuretics and sent him home. He also instructed Aaron's caregiver, Diane, to follow up with him and let Dr. Eimer know about any changes in his condition. He did not direct Aaron to follow up with any particular physician.

¶ 13 Less than a week after his October 19, 2012 visit with Dr. Eimer, Aaron went to see his internist, Dr. Gabriel Berlin, and received a chest X-ray that showed that he had fluid in his lungs. Based upon his viewing of that X-ray, Dr. Eimer stated that Aaron had pulmonary edema. "That's heart failure," Dr. Eimer said.

¶ 14 Dr. Eimer stated that Aaron "goes in and out of heart failure" and described him as "the kind of person that could be hospitalized every three months." He stated that Aaron had been hospitalized three times since 2008. The first time, on July 18, 2011, he was hospitalized due to atrial fibrillation. The second time, on August 2, 2011, he was hospitalized due to dehydration, hyponatremia, and atrial defibrillation. He went home the following day. The third time, on August 22, 2011, he was taken to the emergency room because of weakness partly attributed to dehydration. Dr. Eimer admitted that none of these three hospitalizations were due to congestive heart failure. He attributed this to "our ability to manage [his condition] as an outpatient." Nevertheless, he emphasized that Aaron's health was "on a razor-thin line."

¶ 15 Dr. Eimer stated that Aaron engaged in regular exercise. "[H]e likes to go to Costco and push a cart around slowly," he said. Dr. Eimer also stated that he sent Aaron to a fitness trainer who had 40-minute sessions with him twice a week. He stated that Aaron's performance during those fitness sessions varied. On some days, he could cycle for two minutes on a stationary bicycle, but on other days, he would not be able to get on the bicycle at all.

¶ 16 Counsel for Harey asked Dr. Eimer whether he had talked to Aaron about what caused his stress level to increase. Dr. Eimer said that he had not, because he considered it outside the scope of his role as cardiologist. Likewise, Dr. Eimer said that he had not talked to Aaron about the circumstances of his family relationships.

¶ 17 Counsel for Harey then asked Dr. Eimer whether he had ever observed Aaron in a stressful situation. Dr. Eimer stated that it was emotionally stressful for Aaron when his wife died in December 2010. Between the time of his wife's death and his next checkup on July 18, 2011, Dr. Eimer had no reason to see Aaron for any reason relating to his cardiac condition. Moreover, he did not see any reason to prevent Aaron from attending his wife's funeral.

However, Dr. Eimer also stated that he believed Aaron "got lucky" in not having a heart attack following his wife's death.

¶ 18 Also attached to Harey's response was the affidavit of Dr. Markis, a medical doctor specializing in cardiology. Based upon his review of Dr. Eimer's affidavit and deposition testimony, Dr. Markis opined that sitting for a deposition involving issues relating to Aaron's children would not adversely affect Aaron's cardiac status or his life.

¶ 19 Dr. Markis gave several reasons for this opinion. First, he noted that, although Aaron was saddened at his wife's death, he dealt with the associated acute stress without having a cardiac event. He also noted that Dr. Eimer made no changes in his medical therapy at the time and did not prevent Aaron from attending his wife's funeral.

¶ 20 Second, Dr. Markis found it significant that Aaron engaged in a "reasonably active lifestyle," including walks through Costco, regular exercise with a trainer, and long distance air travel, but had not been hospitalized since 2008 for heart failure, arrhythmias, or coronary events. He observed that none of Aaron's three hospitalizations since 2008 were for the care of his coronary disease.

¶ 21 Third, Dr. Markis discussed Aaron's ICD, which he received during his hospitalization following his cardiac arrest in 2008. Dr. Markis stated that monitoring of Aaron and his ICD was performed on a regular basis, and the device would also record any arrhythmia events. However, there had been no recorded episodes of ventricular arrhythmias since the device's implantation.

¶ 22 Finally, Dr. Markis took issue with Dr. Eimer's finding that Aaron had pulmonary edema. Dr. Markis stated that pulmonary edema is a term used to describe acute cardiac decompensation as a consequence of fluid overload within the tissue of the lung that interferes

with oxygen transfer. He stated that it is an emergency situation which requires urgent hospitalization with immediate evaluation and treatment. Dr. Markis opined that a diagnosis of pulmonary edema was inconsistent with events as Dr. Eimer described them. Aaron's October 19, 2012, visit with Dr. Eimer was a routine, scheduled visit, and there was no statement of urgency expressed by Aaron's caregivers as a prelude to the visit. Additionally, according to Dr. Markis, simply changing a patient's dose of diuretics and sending him home, as Dr. Eimer did with Aaron after the October 19 visit, is not an appropriate response to pulmonary edema.

¶ 23 Initially, the trial court planned to hold an evidentiary hearing on the issue of whether Aaron's health would permit him to sit for a deposition. However, on January 8, 2013, the trial court instead appointed Maria Ammendola as a guardian ad litem (GAL) for Aaron, stating that Ammendola would serve as a fact finder who would "confer with the doctors" and then report back to the court. It ordered that the parties should make their experts available to confer with the GAL and that Aaron should also be made available to confer with the GAL. It additionally ordered that the parties would split the cost of the GAL's appointment. Aaron's counsel did not raise any objections to the appointment of a GAL at that time.

¶ 24 On January 15, 2013, Aaron's counsel filed a motion to replace the GAL. Counsel prefaced the motion by stating:

> "In light of the fact that Mr. Israel is represented by counsel and his treating cardiologist has testified extensively regarding the risk to Mr. Israel if he is ordered to sit for deposition, Mr. Israel and his counsel disagree that a guardian ad litem is needed here. That said, for the time being, Mr. Israel is willing to accept the Court's current approach and is willing to be interviewed by an unbiased guardian ad litem."

However, counsel stated that she was concerned that Ammendola would not be an unbiased GAL because of her "substantial connections" to Harey's counsel, Jeanine Stevens. In particular, counsel alleged that Stevens and Ammendola were business associates and had been codefendants in a federal lawsuit (*Avunca v. Motor Coach Industries International*, 2009 WL 483867 (N.D. Ill. 2009)). Counsel further alleged that when she learned about the connection between Ammendola and Harey's counsel, she emailed Harey's counsel and asked her to agree to the appointment of a different GAL, but Harey's counsel refused. Accordingly, counsel requested that the court withdraw its appointment of Ammendola and appoint a different GAL.

¶ 25 The trial court denied Aaron's motion at a hearing on January 16, 2013, stating that it saw nothing in the record that would indicate bias on the part of Ammendola. Subsequently, on January 25, 2013, Diane moved to vacate the appointment of the GAL, and Aaron joined in the motion. Diane contended that the appointment of Ammendola as GAL was prohibited under Illinois law for three reasons. First, she argued that there was no statutory basis for the appointment of a GAL, because Aaron was not a minor, an unborn or deceased person, or an incompetent adult. Second, she argued that the GAL was an unconstitutional "fee officer." Third, she argued that the GAL's appointment was an improper delegation of judicial factfinding duties.

¶ 26 Following a hearing on February 1, 2013, the trial court denied Diane's motion to vacate. It stated that it had broad discretion to supervise discovery under Supreme Court Rule 201 (Ill. S. Ct. R. 201 (eff. Jan. 1, 2013)), and it considered the appointment of Ammendola to be a proper exercise of that discretion. Counsel for Harey suggested that Ammendola be designated as something other than a "GAL," stating, "The guardian ad litem designation arises out of the Probate Act, and the guardian ad litem for an adult who has not been adjudicated incompetent is

improper." The court agreed to designate Ammendola as a "person to assist the court." Additionally, over Aaron's objection, the court ordered that the costs associated with Ammendola's services would be split between Harey and Aaron.

¶ 27 Ammendola proceeded to interview the parties' medical experts, including Dr. Eimer and Dr. Gabriel Berlin. She also sought to interview Aaron, but Aaron refused to meet with her. On March 5, 2013, Harey filed a motion to compel Aaron to appear for an interview with Ammendola, or, in the alternative, to compel his deposition. Following a hearing on this motion, on March 6, 2013, the court denied Aaron's second motion for a protective order and ordered him to appear for a deposition at a mutually agreeable time and date. The court later stated that it made this ruling "[a]s a result of the Respondent's deliberate refusal to participate in the Court's fact finding, which was for *solely his benefit*." (Emphasis in original.) The court also ordered that "Marina Ammendola is discharged as GAL with the Court's thanks." Ammendola did not ever provide the court with a report concerning her interviews with the parties' medical experts.

¶ 28 On March 19, 2013, because Aaron had not yet provided a date for his deposition, Harey filed a motion to show cause. The court held a hearing on the motion on March 27, 2013. At that hearing, Aaron's counsel told the court that one of the reasons that a date had not been agreed upon for a deposition was an incident that had recently occurred at Aaron's Florida residence. According to counsel, on March 16, Harey's son Michael showed up at Aaron's residence and demanded to see him; when Aaron did not wish to see him, Michael called the police, who went to perform a wellness check on Aaron. "[I]t really upset Mr. Israel," counsel stated, "and now I'm having difficulties getting a date from him." At the conclusion of that hearing, the court ordered Aaron to sit for a deposition within 21 days.

¶ 29 Harey subsequently challenged Aaron's counsel's characterization of the March 16 incident by presenting the court with the affidavit of Officer Edward Santiago. In that affidavit, Santiago stated that he was a sergeant in the Sunny Isles Beach Florida police department. On March 16, 2013, the police department received a call from Michael Israel requesting that an officer check on the welfare of his 95-year-old grandfather, Aaron. Michael advised the police department that he had been unable to speak to his grandfather for the past few years because his aunt, Diane, had been "shielding Aaron from the rest of the family." Santiago proceeded to Aaron's residence and spoke with Aaron. Santiago averred that Aaron was fully alert and appeared to be well taken care of and in good health. Santiago further averred that, when Aaron heard that his grandson was concerned about him, Aaron smiled and said that Michael was a great kid and that Aaron missed him. Santiago then telephoned Michael and allowed him to speak directly with Aaron. During the ensuing conversation, Aaron asked Michael, "Please come over and see me," and he stated that he loved Michael very much.

¶ 30 Santiago further averred that he spoke with Diane. Diane allegedly told Santiago that she was in the middle of a lawsuit with Michael's father and, as a consequence, was preventing the family from having any contact with Aaron. She stated that she had hired bodyguards in Chicago to prevent family contact with Aaron and intended to do the same in Florida. According to Santiago, Diane directed him to inform Michael that he was not allowed to come and visit Aaron.

¶ 31 Aaron continued to refuse to provide a date for a deposition, stating in an April 12, 2013, letter to Harey's counsel that appearing for a deposition "would present too grave a risk to his life." On April 16, 2013, Harey moved to hold Aaron in contempt of court for failing to appear for a deposition.

¶ 32 Aaron submitted a response to Harey's petition on May 6, 2013. In that response, Aaron argued that his failure to comply with the court's March 27 deposition order was not willful or contumacious because he physically could not comply. In support of his position, Aaron submitted written declarations from three of his physicians, Dr. Eimer, Dr. Gabriel Berlin, and Dr. Howard Berlin. Dr. Eimer's declaration essentially echoed his earlier affidavit in which he stated that he had serious concerns about the impact of a deposition on Aaron's health and life.

¶ 33 Dr. Gabriel Berlin stated in his declaration that he was a board certified physician in internal medicine who had been treating Aaron for close to 20 years. He stated that Aaron suffered from severe cardiac disease, as well as depression, which began following the death of his wife in 2010. He further stated that Aaron had informed him that his relationship with his sons was a source of significant stress with him. Due to Aaron's advanced age, weakness, and cardiac conditions, Dr. Gabriel Berlin recommended that he not sit for a deposition, because the associated stress could trigger cardiac complications and depression.

¶ 34 Finally, Dr. Howard Berlin stated in his declaration that he was a board certified physician in internal medicine and cardiovascular disease. His practice was located in Florida, and he had been treating Aaron in Florida since late 2012. Dr. Howard Berlin stated that Aaron suffered from "numerous cardiac conditions" and was in "an extremely weak state." He said that Aaron suffered shortness of breath and chest pains as a result of his cardiac disease and also required a walker to walk. He stated that he advised Aaron not to appear for a deposition out of concern that the stress of a deposition "could severely compromise his health and could trigger a cardiac event."

¶ 35 The court had originally ordered Aaron to appear at the contempt hearing, which was scheduled for May 14, 2013. At that time, Aaron had been in Florida since the fall of 2012. On

May 11, 2013, Aaron's counsel informed the court that Aaron would not be able to appear for the hearing due to health issues. In support, he presented a doctor's note from Dr. Howard Berlin telling Aaron that he was "not permitted to attend a deposition from a medical view" and that he could not travel to Illinois for the May 14 hearing because of "cardiac and mental issues."

¶ 36 The contempt hearing proceeded as scheduled on May 14, 2013. At the hearing, counsel for Aaron called Aaron on her cell phone's speakerphone so that the judge could speak with Aaron. The judge asked Aaron what the case was about. Aaron stated, "It's about my sons and me," and later, "Case is about money." However, Aaron was unable to identify who was suing whom. He was also unable to remember what happened in the March 16 incident involving his grandson Michael.

¶ 37 The judge asked Aaron why he refused to meet with Ammendola. Aaron replied, "Sometimes my blood pressure goes up to 150, and I might die on the chair." Aaron additionally stated that he did not want to sit for a deposition because of health concerns. He stated that he had seen his doctor about a week ago, and his doctor had told him, " '[Y]ou have deposition, you drop dead.' " Following that conversation, the court took the contempt matter under advisement.

¶ 38 On May 21, 2013, the court issued an order finding Aaron in indirect civil contempt, stating that Aaron had engaged in "unscrupulous gamesmanship" in attempting to prevent Harey from being able to depose him. The court stated that Aaron's purported health concerns were questionable in light of the fact that his first motion for a protective order made no mention of those concerns. Next, the court stated that it went to "extraordinary lengths" to determine whether Aaron's health should preclude him from sitting for a deposition when it appointed Ammendola as GAL. However, Aaron sought to delay the appointment of Ammendola and ultimately refused to meet with her, even though, according to the court, there was no medical

basis in the record for his refusal. Additionally, the court stated that Aaron "caused misleading arguments and statements to be offered to the Court in an apparent attempt to manipulate the Court's decisions." In this regard, the court cited the March 16, 2013, incident at Aaron's Florida residence and the contrasting versions of events given by Aaron's counsel and by Officer Santiago. The court found it particularly significant that Officer Santiago found Aaron to be in "good health" and was able to talk about his family with him.

¶ 39 With regard to the medical evidence presented by the parties, the court stated that the health risks of sitting for a deposition were "speculative at best." It stated that Dr. Eimer's testimony "is potentially self-serving and is based on [Aaron's] wishes and descriptions." The court also stated that Aaron withstood his wife's death with no medical complications. Finally, the court noted that Dr. Eimer's opinion was opposed by Dr. Markis, Harey's expert, who opined that Aaron was not unable to sit for a deposition. For these reasons, the court found that Aaron did not have a valid reason for his violation of the court's order to sit for a deposition.

¶ 40 Accordingly, the court found Aaron to be in indirect civil contempt of court and ordered that he be fined $500 per day until he appeared at a deposition conducted by Harey. This appeal followed.

¶ 41 II. ANALYSIS

¶ 42 Illinois Supreme Court Rule 219(c) provides trial courts with authority to compel compliance with discovery orders by means of contempt proceedings. Ill. S. Ct. R. 219(c) (eff. July 1, 2002); see also *In re Marriage of Daniels*, 240 Ill. App. 3d 314, 323 (1992). In the present case, the trial court found Aaron guilty of indirect civil contempt. Indirect contempt is contempt which is committed outside the presence of the court. *People v. Carter*, 132 Ill. App. 2d 29, 31 (1971). Civil contempt ordinarily consists in failing to comply with a court order, and

its purpose is prospective in nature, *i.e.*, to compel the contemnor to perform an act in the future. *Id.*

¶ 43 In contempt proceedings, the petitioner bears the initial burden of proving by a preponderance of the evidence that the alleged contemnor has violated a court order. *Cetera v. DiFilippo*, 404 Ill. App. 3d 20, 41 (2010). If the petitioner meets this burden, then the burden shifts to the alleged contemnor to show that his noncompliance with the court's order was not willful or contumacious and that he had a valid excuse for his noncompliance. *Id.*

¶ 44 In this case, it is not in dispute that Aaron violated the trial court's March 27, 2013, order to sit for a deposition. Therefore, Aaron's contentions on appeal focus upon the validity of the underlying orders and the question of whether his noncompliance was willful and contumacious. Aaron raises three main arguments. First, he argues that the underlying order appointing a GAL was invalid. Second, he argues that the underlying order directing him to sit for a deposition was improper in light of the medical evidence before the court. Third, he argues that even if the underlying orders were proper, he still should not be held in contempt, because his failure to sit for a deposition was not willful or contumacious but, rather, was based upon legitimate health concerns.

¶ 45 A. Validity of the GAL Appointment

¶ 46 Aaron's first contention on appeal is that the trial court's finding of contempt was improper because the underlying order appointing a GAL was invalid. In support, he raises the same three arguments that he urged before the court below: first, that there was no statutory basis for the appointment of a GAL, because Aaron was not a minor, an unborn or deceased person, or an incompetent adult; second, that the GAL was an unconstitutional "fee officer"; and third, that the GAL's appointment was an improper delegation of judicial factfinding duties. He

additionally argues that Harey is estopped from arguing the legality of the GAL appointment, because, in the proceedings below, Harey conceded that the appointment was improper. Harey disputes these contentions. Harey further contends that we lack jurisdiction to review the appointment of the GAL, since it was not part of either the May 21, 2013, contempt order or the March 27, 2013, order upon which the contempt order was based.

¶ 47 We begin by considering Harey's jurisdictional argument. Appellate courts have jurisdiction to review contempt orders under Illinois Supreme Court Rule 304(b)(5). Ill. S. Ct. R. 304(b)(5) (eff. Feb. 26, 2010); *Illinois Emcasco Insurance Co. v. Nationwide Mutual Insurance Co.*, 393 Ill. App. 3d 782, 785 (2009). It is well established that when a party appeals a contempt sanction, our review necessarily encompasses not only the contempt order, but also the order upon which it was based. *Norskog v. Pfiel*, 197 Ill. 2d 60, 69 (2001); *In re Marriage of Bonneau*, 294 Ill. App. 3d 720, 723 (1988) ("where the trial court's discovery order is invalid, a contempt judgment for failure to comply with the discovery order must be reversed"). In this case, the parties disagree as to whether the trial court's appointment of a GAL qualifies as such an order.

¶ 48 A brief recap of the operative facts is instructive here. On January 8, 2013, the trial court appointed Ammendola as a GAL for Aaron. Aaron, however, refused to meet with the GAL. As a result of this "deliberate refusal to participate in the Court's fact finding" (to use the trial court's language), on March 16, 2013, the trial court denied Aaron's motion for a protective order and ordered him to sit for a deposition. The trial court also dismissed the GAL. The GAL never actually provided the court with a report on her findings. By March 27, 2013, Aaron still had not set a date for his deposition, and the trial court ordered him to sit for a deposition within 21 days. Aaron refused to do so. On May 21, 2013, the trial court found him in contempt for failing to comply with the March 27 order.

¶ 49 From these facts, it is apparent that, although the GAL appointment order did not immediately precede the contempt order, it formed a critical step in the chain of events that led to the contempt finding, since Aaron's refusal to meet with the GAL is what prompted the court to order him to sit for a deposition. In other words, the deposition order which Aaron violated was clearly based upon the court's prior GAL appointment order. Upon these facts, we find that we have jurisdiction to review that GAL appointment order as part of our review of the contempt sanction imposed upon Aaron. See *Norskog*, 197 Ill. 2d at 69 (review of contempt sanction necessarily encompasses order upon which the contempt finding was based).

¶ 50 We therefore proceed to consider the validity of the court's order appointing Ammendola as a GAL for Aaron. Initially, Aaron argues that Harey is estopped from asserting that the trial court had authority to appoint a GAL, because he took the opposite stance in the proceedings below. We agree. It is well-established that a party is estopped from taking a position on appeal that is inconsistent with the position that he took before the trial court. See, *e.g.*, *In re Stephen K.*, 373 Ill. App. 3d 7, 25 (2007); *Raabe v. Maushak*, 55 Ill. App. 3d 169, 171 (1997). In the present case, Harey's counsel advised the trial judge not to designate Ammendola as a "GAL," stating, "The guardian ad litem designation arises out of the Probate Act, and the guardian ad litem for an adult who has not been adjudicated incompetent is improper." Harey may not now reverse his position on appeal.

¶ 51 Waiver aside, we find that the court lacked authority to appoint a GAL for Aaron where he had not been adjudicated incompetent and objected to the appointment. All of the statutes permitting GAL appointments for nonconsenting adults concern disabled or incompetent adults, and they require certain criteria to be satisfied prior to the appointment of a GAL. For instance, the Adult Protective Services Act authorizes appointment of a temporary guardian for an adult

who lacks capacity to consent to an assessment of a reported incident of suspected abuse or neglect (320 ILCS 20/9 (West 2012)), while the Mental Health and Developmental Disabilities Code authorizes appointment of a GAL for a mental health patient who is subject to involuntary administration of psychotropic medication or electroconvulsive therapy (405 ILCS 5/2-107.1 (West 2012)). No such conditions are present in the instant case.

¶ 52 In *J.H. v. Ada S. McKinley Community Services, Inc.*, 369 Ill. App. 3d 803 (2006), this court held that the the trial court exceeded its authority when it *sua sponte* appointed a GAL for two competent adult plaintiffs who objected to the appointment. The court initially observed that, under Illinois law, an adult is presumed to be competent to manage his legal affairs unless it is shown otherwise. *Id.* at 808. The court also stated that an adult who has not been adjudicated incompetent has the right to represent his own interests. *Id.* at 809. Based upon these principles, as well as the lack of any legal authority underlying the trial court's appointment, the *J.H.* court found that the appointment was improper. *Id.* at 810, 815. Similarly, in the instant case, Aaron has not been adjudicated incompetent, nor is there any serious question to his competency, and he vehemently objected to the appointment of a GAL in the proceedings below.

¶ 53 Harey cites *In re Mark W.*, 228 Ill. 2d 365, 374-75 (2008), for the proposition that, under certain circumstances, a court may appoint a GAL for an adult even without explicit authorization under the Probate Act. However, *Mark W.* is inapposite because it dealt with an appointment for a disabled adult, and the court's decision explicitly relied upon her "status as a disabled person entitled to the utmost protection of the courts." *Id.* at 375. As noted above, this reasoning is not applicable here, since Aaron's competency is not questioned.

¶ 54 Based upon the foregoing law, we find that the trial court's appointment of a GAL for Aaron was improper. Consequently, the court's subsequent order, in which it required Aaron to

sit for a deposition based on his refusal to meet with the improperly-appointed GAL, was also improper. The trial court's finding of contempt against Aaron must therefore be vacated.

¶ 55 B. Validity of the Trial Court's Order Requiring Aaron to Sit for a Deposition

¶ 56 As an alternative ground for vacating the contempt order, Aaron challenges the validity of the trial court's March 27, 2013, order requiring him to sit for a deposition. He contends that a nonparty should not be compelled to participate directly in judicial proceedings against medical advice. He further argues that the trial court improperly rejected the opinions of Aaron's three treating physicians, which were the most credible evidence of Aaron's medical condition. We shall consider these arguments, since, as shall become clear, they have ramifications upon our instructions to the lower court upon remand.

¶ 57 Setting aside the issue of Aaron's health for the time being, we agree with the general principle urged by Aaron, namely, that a witness should not be compelled to sit for a deposition if the medical evidence shows that the stress of deposition questioning could cause serious injury or death. Although we have not found any Illinois cases addressing this precise issue, numerous decisions in courts from other states and from federal courts have declined to hold witnesses or parties in contempt when they presented opinions from their doctors that they were medically unable to sit for a deposition or provide trial testimony.

¶ 58 For instance, in *Sells v. Drott*, 330 S.W.3d 696, 698 (Tex. App. 2010), the defendant was an eighty-four-year-old who had four strokes in the past decade. Her treating physician submitted an affidavit stating that she was "not mentally nor physically capable of enduring the stress of testifying at a deposition or trial." *Id.* at 701. When she refused to appear for a deposition, the trial court sanctioned her by entering default judgment against her. *Id.* at 702-03. On appeal, the Court of Appeals of Texas found that the trial court's imposition of sanctions was

an abuse of discretion, stating: "We are hard pressed to say that any sanction for [defendant's] refusal to attend a deposition before addressing the health concerns can be justified. But we definitely cannot say that death penalty sanctions are justified." *Id.* at 706; see also *Solesky v. Tracey*, 17 A.3d 718 (Md. Ct. Spec. App. 2011) (trial court did not abuse its discretion in declining to impose sanctions on 89-year-old defendant who refused to appear for a deposition, where it was uncontroverted that she had cardiac problems and her physician asserted that the stress of deposition questioning might be detrimental to her health).

¶ 59 Similarly, in *United States v. Mariani*, 178 F.R.D. 447, 449 (M.D. Penn. 1998), an 83-year-old witness with congestive heart failure and severe coronary artery disease sought a protective order prohibiting his deposition. At a hearing, his attending physician testified that the stress of a deposition could lead to his death. *Id.* at 450. In opposition, the party seeking to depose him presented the testimony of a cardiologist who opined that there was less than a 1% chance that the stress from a deposition would trigger a cardiac arrest. *Id.*

¶ 60 Under these facts, the *Mariani* court granted the witness' motion for a protective order. *Id.* at 451. The court acknowledged that it was rare for a court to issue a protective order that prohibits a deposition, but it stated that it was proper to do so in the face of compelling evidence that a deposition would threaten a witness' life. *Id.* at 448-49. Although the party opposing the motion had presented evidence that the health risk was small, the court stated that it was "not willing to take such a chance." *Id.* at 451.

¶ 61 In rendering this decision, the *Mariani* court relied upon the decision in *In re McCorhill Publishing, Inc.*, 91 B.R. 223 (Bankr. S.D.N.Y. 1988). In that case, a protective order was sought on behalf of an 80-year-old nonparty witness with congenital heart, renal, and arthritis conditions. *Id.* at 224. His doctor testified that a deposition could cause heart failure which

could constitute "a direct threat to his life." *Id.* at 225. Upon these facts, the *McCorhill* court granted a protective order precluding the pretrial deposition of the witness.[2] The court explained its decision as follows:

> "This court is not prepared to assume the responsibility of subjecting Mr. Kraus [the witness] to a life-threatening deposition simply on the statement of McCorhill's attorney that he has no intention of pressuring Mr. Kraus with questions if it appears that Mr. Kraus is incapable of furnishing any information. In the event that Mr. Kraus suffers a heart attack or other life-threatening seizure as a result of an oral deposition, no amount of subsequent apologies or statements of sorrow will compensate for the known risk, especially since the only medical testimony in this case reflects the fact that Mr. Kraus' life will be placed in jeopardy by exposing this infirm and senile 80 year old man to a pre-trial deposition." *Id.*

Other district courts have reached similar conclusions when presented with testimony from physicians that participating in judicial proceedings would be dangerous to a witness' health. See *Schiavone v. Northeast Utilities Service Co.*, 2010 WL 382537 (D. Conn. Jan. 27, 2010) (district court granted motion of 84-year-old nonparty witness to quash subpoena *duces tecum*; physician averred that witness suffered from dementia and memory loss, and a deposition would "emotionally overwhelm and traumatize" him, thus endangering his health); *Hometown Folks, LLC, v. S & B Wilson, Inc.*, 2007 WL 2227817 (E.D. Tenn. July 31, 2007) (granting defendant's

[2] Although the record also showed that the witness suffered from senile dementia and Alzheimer's-type disease, the court explicitly declined to base its ruling on those facts, stating: "At this point in [the witness'] life, the issue for the court is not his competency to testify, but his ability to survive an oral deposition." *Id.*

motion for a protective order prohibiting his deposition upon doctor's testimony that he had dementia and the stress from a deposition could cause a stroke or other serious health consequences).

¶ 62 We find these cases to be persuasive of the general proposition that a witness should not be forced to give a deposition if doing so would endanger his health. However, Harey argues, and we agree, that when a witness or a party seeks a protective order prohibiting his deposition, the court is entitled to weigh the credibility of any medical evidence presented in support of that motion. If the court determines that the medical evidence is not credible, or otherwise determines that the witness has not demonstrated a risk of harm resulting from a deposition, then it is proper for the court to require the witness to sit for a deposition.

¶ 63 In this regard, Harey cites *Jennings v. Family Management*, 201 F.R.D. 272 (D.D.C. 2001), and *Haviland & Co. v. Montgomery Ward & Co.*, 31 F.R.D. 578 (S.D.N.Y. 1962). In *Jennings*, the plaintiff sought a protective order prohibiting her deposition. *Jennings*, 201 F.R.D. at 274. In support, she presented a report from her doctor stating that an adversarial proceeding could cause " 'great harm' " to her because such a proceeding had the " 'potential to overwhelm [her] current coping abilities which are tenuous at best.' " *Id.* The doctor also stated that plaintiff's mental condition was " 'fragile' " and that a deposition might exacerbate her symptoms of dementia and depression. *Id.* at 274-75. The district court in *Jennings* denied plaintiff's motion, stating that the doctor's report was "marked by conjecture and generalization" and relied on conclusory, speculative statements instead of demonstrating evidence of specific harm that would result from testifying. *Id.* at 275. In the absence of any testimony of how specifically plaintiff's health would be threatened by the deposition process, plaintiff's

generalized assertions of harm were outweighed by the defendant's need to prepare a defense. *Id.* at 275-76.

¶ 64 Meanwhile, in *Haviland*, defendants sought to take the deposition of the chairman of the board of directors of the plaintiff company. *Haviland*, 31 F.R.D. at 579. Eighteen months after notice of the deposition was served, the chairman claimed for the first time that his age and health would not permit him to sit for a deposition. He was 80 years old, and his physician averred that he should not give a deposition because his heart condition necessitated " 'moral tranquility.' " *Id.* On these facts, the *Haviland* court held that defendants were entitled to take the chairman's deposition, but in view of his age and claimed illness, the chairman would be given the option of having the deposition taken at his residence in France or at some other place convenient to him. *Id.* at 580. In rendering this decision, the court found it significant that it was the chairman's company that had initiated the litigation: "The plaintiff has selected this forum to enforce its rights and necessarily must expect that its officers and managing agents will be subjected to its process." *Id.* at 580. Moreover, the court found that a fair reading of the doctor's affidavit indicated that the chairman would be able to testify for limited periods each day at his home, without impairment to his health. at 579-80.

¶ 65 From these cases, we can draw two conclusions. First, where a witness has not presented any credible evidence of particularized harm that may result from a deposition, as in *Jennings*, his motion for a protective order should be denied. *Jennings*, 201 F.R.D. at 275-76. On the other hand, where a witness has presented some credible evidence of particularized harm, but the court finds that he may still participate in judicial proceedings on a limited basis without an undue risk of harm, the court may, in its discretion, order such limited participation. *Haviland*, 31 F.R.D. at 579-80; but see *Mariani*, 178 F.R.D. at 451 (faced with conflicting medical

testimony as to the likely impact of a deposition on the witness' health, the court was "not willing to take [the] chance" of accelerating his death and therefore granted him a protective order); *McCorhill*, 91 B.R. at 225 (stating that if elderly witness suffered a heart attack as a result of a deposition, "no amount of subsequent apologies or statements of sorrow will compensate for the known risk").

¶ 66 We now turn to apply these principles to the instant case. It is undisputed that Aaron was 94 years old in 2012, when the complaint was filed, and in poor health. It is further undisputed that Aaron suffered a cardiac arrest in June 2008, and he has been hospitalized three more times since then, although none of those hospitalizations were for the care of his coronary disease. However, Aaron's ability to sit for a deposition was a fiercely contested factual issue. Dr. Eimer, Aaron's treating cardiologist, testified in his deposition that, due to Aaron's advanced cardiac disease, he could not give a deposition without significant risk to his health. Additionally, after the trial court entered its March 27 order, but before it issued its judgment of contempt, two more of Aaron's treating physicians submitted sworn declarations stating that the stress of a deposition could cause Aaron to suffer cardiac complications. In opposition to these statements by Aaron's experts, Harey submitted the affidavit of cardiologist Dr. Markis. Dr. Markis had neither examined Aaron nor reviewed his medical records, but he had reviewed Dr. Eimer's deposition in connection with the instant litigation. Based upon the information contained therein, Dr. Eimer opined that sitting for a deposition would not adversely affect Aaron's cardiac status or his life.

¶ 67 Deciding whether to believe the medical judgment of Aaron's treating physicians or that of Harey's retained expert would necessarily entail credibility determinations. Indeed, such credibility determinations are at the heart of the instant dispute. Aaron argues that Harey's

expert is not credible because he never personally met Aaron, let alone examined him, and his affidavit purportedly contains certain misrepresentations of Dr. Eimer's deposition testimony. Harey, on the other hand, argues that the affidavits submitted by Aaron's physicians are not credible because they do not reference sufficient diagnostic testing or objective clinical findings to ensure the reliability of their content. Nevertheless, the trial court declined to hold an evidentiary hearing on the issue of Aaron's health before issuing its March 27, 2013, order requiring Aaron to sit for a deposition.

¶ 68 In light of the factual dispute as to whether Aaron could sit for a deposition without endangering his health, we conclude that the trial court erred in ordering him to sit for a deposition without first holding an evidentiary hearing on the matter. As our supreme court has stated, "[c]redibility determinations cannot be accurately made by simply referring to a cold, paper record." *People v. Ramey*, 151 Ill. 2d 498, 550 (1992). An evidentiary hearing is needed so that the court may properly evaluate the demeanor and sincerity of the witnesses and determine the weight to be afforded their testimony. *Id.* (citing *People v. Wysocki*, 20 Ill. 2d 62, 68 (1960)).

¶ 69 In this regard, we are guided by the decision in *Independent Trust Corp. v. Hurwick*, 351 Ill. App. 3d 941 (2004). In that case, plaintiff moved for summary judgment, and in support of its summary judgment motion, it submitted recordings of the defendants' telephone conversations. *Id.* at 951. The defendants moved to suppress the recordings, claiming that they were made without consent and therefore in violation of the eavesdropping statute. *Id.* The issue of consent was disputed, and the parties submitted competing affidavits on this issue. *Id.* at 951-52. Nevertheless, the trial court, like the trial court in the instant case, declined to hold an

evidentiary hearing on the matter. *Id.* at 952. Instead, it simply denied defendants' motion and granted summary judgment for the plaintiff. *Id.* at 943.

¶ 70 On appeal, the *Hurwick* court held that because there was a question of fact regarding consent, the trial court erred in denying defendants' motions to preclude admission of the recordings without an evidentiary hearing. Id. at 952. Accordingly, the *Hurwick* court vacated the trial court's order denying suppression of the recordings and remanded for an evidentiary hearing to determine their admissibility. *Id.* at 958.

¶ 71 Harey argues that *Hurwick* is distinguishable because "there was no factual dispute regarding Respondent's physical condition in the present case." This is a blatant misstatement. As previously discussed, although the parties to this appeal agree that Aaron is in poor health, they disagree on the central factual issue of whether Aaron's physical condition will permit him to give a deposition without endangering his own health. In fact, Harey's assertion that no factual dispute exists is belied by his own statement a few pages later that "Plaintiffs in the present case vehemently dispute Respondent's claim that he is too infirmed to appear for a deposition."

¶ 72 Therefore, in accordance with *Hurwick*, and remembering our supreme court's admonition that credibility determinations cannot properly be made upon a cold record (*Ramey*, 151 Ill. 2d at 550), we vacate the trial court's March 27, 2013, order requiring Aaron to sit for a deposition, and we remand for the trial court to hold an evidentiary hearing on the issue of whether Aaron is capable of sitting for a deposition. In rendering a decision on that issue, the court should be mindful of the principles stated above, namely, that a witness should not be compelled to sit for a deposition if the medical evidence shows that the stress of deposition questioning could cause serious injury or death, but also that the court is entitled to weigh the

credibility of any such medical evidence. See *Mariani*, 178 F.R.D. at 448-51; *McCorhill*, 91 B.R. at 225; *Jennings*, 201 F.R.D. at 275-76; *Haviland*, 31 F.R.D. 579-80. Additionally, we vacate the contempt order premised upon Aaron's violation of the March 27 order.

¶ 73 C. Issues that May Arise on Remand

¶ 74 Our resolution of the previous issues renders it unnecessary for us to decide the remaining issues raised by Aaron in this appeal. However, two of the issues he raises are likely to arise on remand; therefore, for the purposes of judicial economy, we shall consider them briefly.

¶ 75 First, Aaron contends that, in ordering him to sit for a deposition, the trial judge improperly compared his own cardiac condition to Aaron's cardiac condition. In support, Aaron cites a couple of comments by the judge suggesting that, because the judge himself could sit for a deposition despite having cardiac problems, Aaron could as well. Harey argues that the complained-of comments were mere isolated comments, and the record shows that the judge had legitimate, nonpersonal reasons for issuing his decision.

¶ 76 The complained-of comments are as follows. At a September 5, 2012, hearing on Aaron's motion for a protective order, the judge stated:

> "I mean, you know, the funny thing is I read what the cardiologist [Dr. Eimer] said, and, I mean, I appreciate it. I probably appreciate it more than anybody. I had a heart attack. I had stents put in. I had quadruple bypass. I have a defibrillator. I think I could take a dep, you know."

¶ 77 The second complained-of comment occurred on January 24, 2013, when the GAL was presenting a status report on her investigation. At that hearing, counsel for Diane stated that he

believed the appointment of a GAL for Aaron was unconstitutional. (This was the day before Diane filed her motion to vacate the GAL appointment.) In response, the judge stated:

> "I'm most concerned about Mr. Israel's health. I was trying to come up – fashion a way of determining that without bringing him into court, but maybe I'll just order the dep. I mean, that's fine.
>
> If you don't want to go through any of this, *let him sit for his dep. It's okay. I told you before everything he has had that I read in the medical records I've done. I have got my second defibrillator. I have had open heart surgery, quadruple bypass, heart attack*, and so that in itself – and I understand that he is 94 years old, and I'm of the utmost respectful for that, and my whole purpose of this proceeding is putting his health above this case." (Emphasis added.)

Aaron argues that this statement shows that the judge erroneously concluded that "[i]t's okay" for Aaron to sit for a deposition based upon the judge's own cardiac condition.

¶ 78 It is reversible error for a trial court to base its rulings on facts that are not in evidence but are solely within the court's own personal knowledge, because "[a] judge's experience and observations are not judicially noticeable facts capable of immediate substantiation by easily accessible sources of indisputable accuracy." *People v. Walker*, 119 Ill. 2d 465, 474 (1988); see also *Palmer v. Mitchell*, 57 Ill. App. 2d 160, 167 (1965) (trial judge erred in taking judicial notice of evidence that he had heard in a related case); *Drovers National Bank of Chicago v. Great Southwest Fire Insurance Co.*, 55 Ill. App. 3d 953, 958-59 (1977) (in bench trial, judge committed reversible error where he related an incident from his personal experience and stated that he was taking that experience into account).

¶ 79 Because we are vacating the trial court's March 27, 2013, order, we need not decide whether that order was improperly influenced by the judge's reliance on his own cardiac condition, or whether, as Harey contends, the judge did not base his ruling upon the sentiments expressed above. However, on remand, we would caution the court not to take its own private experience into account when deciding whether Aaron's health will permit him to sit for a deposition.

¶ 80 Second, Aaron contends that the trial court placed undue weight on the statements of Officer Santiago, who was not a medical professional. In an affidavit presented to the court, Santiago stated that on March 16, 2013, he performed a wellness check on Aaron at his Florida residence, and he observed that Aaron appeared to be well taken care of and in "good health." In its May 21 contempt order, the trial court stated that Santiago's affidavit "cast serious doubts" on Aaron's assertions that he is not healthy enough to be deposed. We caution the court that, when Santiago made his statements, he was not purporting to state a medical opinion, nor could he properly have done so. "[A] lay witness may not offer testimony pertaining to a specific medical diagnosis unless he or she is properly qualified as an expert to give such testimony." *Steele v. Provena Hospitals*, 2013 IL App (3d) 110374, ¶ 48 (in medical malpractice case, it was error to admit lay testimony that was the functional equivalent of a medical diagnosis); see also *Robinson v. Wieboldt Stores, Inc.*, 104 Ill. App. 3d 1021, 1026 (1982) (error to allow lay plaintiff to testify concerning damages she suffered as a result of alleged medical conditions).

¶ 81 III. CONCLUSION

¶ 82 For all of the aforementioned reasons, the trial court's March 27, 2013, order requiring Aaron to sit for a deposition is vacated, and its contempt order is also vacated. The cause is

remanded for the trial court to conduct an evidentiary hearing on the issue of whether Aaron's health will permit him to sit for a deposition.

¶ 83 Vacated and remanded, with instructions.