

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Linda Weinstock,	:	
	:	
Plaintiff-Appellant,	:	No. 09AP-539
	:	(C.P.C. No. 04CVH11-12376)
v.	:	
	:	
Sharon McQuillan, M.D. et al.,	:	(REGULAR CALENDAR)
	:	
Defendants-Appellees.	:	

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D E C I S I O N

Rendered on March 18, 2010

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*Leigh-Ann M. Sims*, for appellant.

*Lane, Alton & Horst, LLC, Gregory D. Rankin and Ray S. Pantle*, for appellee Sharon McQuillan, M.D.

*Fruend, Freeze & Arnold, W. Frederick Fifner and Jennifer L. Hill*, for appellees Imitiaz Kazi, M.D., and Southwood Family Practice.

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APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Plaintiff-appellant, Linda Weinstock, appeals from a judgment of the Franklin County Court of Common Pleas denying her motion for a mistrial and/or a new trial. For the reasons that follow, we affirm that judgment.

{¶2} In 2004, appellant commenced this medical malpractice action against defendants-appellees, Sharon McQuillan, M.D., Imitiaz Kazi, M.D., and Southwood Family Practice. Appellant claimed that appellees' negligently prescribed her medication

which caused her to contract Graves disease. Appellant also alleged that Dr. McQuillan falsely represented to her that she was board certified in family practice.

{¶3} A jury trial on appellant's claims began on Monday, February 2, 2009. The trial proceeded that week until Friday, February 6, 2009, when appellant's trial counsel, Leigh-Ann Sims, went to a hospital complaining of neck and shoulder pain. She was diagnosed with a strained or pulled muscle and was prescribed medication to relieve her pain. The next day, Sims e-mailed appellees' attorneys as well as the trial court to inform them that she would "be there Monday at 9:00 ready to work." On Monday, February 9, 2009, Sims appeared in court and continued with her representation. On February 12, 2009, the jury returned verdicts in favor of each defendant on appellant's claims.

{¶4} At some point between February 13 and February 19, 2009, Sims received a diagnosis that she had suffered a stroke.

{¶5} On February 23, 2009, the trial court entered judgment in favor of Drs. McQuillan and Kazi in accordance with the jury's verdicts. The next day, appellant filed a motion requesting a mistrial. Specifically, appellant alleged that Sims had a stroke on the second day of trial and that Sims' medical condition impaired her ability to properly represent appellant. The trial court denied appellant's motion as untimely.

{¶6} Appellant later filed a motion for new trial pursuant to Civ.R. 59. Appellant repeated her claim that Sims suffered a stroke during the trial and that the stroke impaired Sims' ability to represent appellant. The trial court denied appellant's motion, noting that Sims did not request any relief during the trial because of any medical condition other than a strained or pulled muscle, nor did she appear to be unable to represent appellant because of any illness or medical condition.

{¶7} Appellant now appeals and assigns the following error:

AFTER A CIVIL TRIAL, THE TRIAL COURT COMMITS PREJUDICIAL ERROR WHEN IT DENIES PLAINTIFF'S MOTION FOR A MISTRIAL WHEN IT IS PROVED PLAINTIFF'S ATTORNEY SUFFERED A STROKE ON DAY TWO OF TRIAL; THEREFORE THE JUDGMENT OF THE TRIAL COURT MUST BE REVERSED.

{¶8} Before addressing the merits of this appeal, we first consider appellees' motion to dismiss. Appellees request the dismissal of this appeal due to appellant's failure to file a transcript of the trial proceedings. The failure of an appellant to file a transcript is not grounds for dismissal. *Corbin v. Dailey*, 10th Dist. No. 08AP-802, 2009-Ohio-881, ¶6. Such a failure does not preclude this court's review, but limits that review and requires that we presume the validity of the trial court's proceedings. *Fuller & Assoc., Inc. v. Adams Title Agency, Inc.*, 5th Dist. No. 2003-CA00253, 2003-Ohio-5923, ¶13 (citing *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197); *Camp-Out, Inc. v. Adkins*, 6th Dist. No. WD-06-057, 2007-Ohio-447, ¶22. Accordingly, appellees' motion to dismiss is denied.

{¶9} Turning to the merits of this appeal, we first consider our standard of review. Appellant argued for a new trial because of her counsel's alleged medical condition in both her motion for mistrial as well as her motion for new trial. The trial court denied both motions. In a civil case, we review a trial court's denial of a motion for mistrial under the same standard we review the denial of a motion for new trial under Civ.R. 59. *Hampton v. St. Michael Hosp.*, 8th Dist. No. 81009, 2003-Ohio-1828, ¶29; *Masters v. Wilson* (May 10, 2000), 9th Dist. No. 19777.

{¶10} Pursuant to Civ.R. 59(A)(1), a new trial may be granted to all or any of the parties based upon the "[i]rregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial." The decision to grant or deny

a motion for a new trial pursuant to Civ.R. 59 generally lies within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *Salvatore v. Findley*, 10th Dist. No. 07AP-793, 2008-Ohio-3294, ¶9. An abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Masters v. Masters*, 69 Ohio St.3d 83, 85, 1994-Ohio-483; *Rock v. Cabral* (1993), 67 Ohio St.3d 108, 112.

{¶11} In her lone assignment of error, appellant claims the trial court should have granted her a new trial, based on irregularities in the proceedings, because her counsel suffered a stroke during trial. However, appellant did not present any evidence to support her contention that Sims suffered a stroke during the trial. Appellant speculates that Sims suffered a stroke during the trial because Sims experienced pain in her shoulder during the first week of the trial. However, the medical records Sims presented did not indicate when Sims suffered the stroke.

{¶12} Further, the trial court stated that "[i]t was never apparent \* \* \* that Ms. Sims was unable to represent her client because of any illness or medical condition." As already noted, appellant did not file a transcript of the trial proceedings. An appellant is required to provide a transcript for appellate review. *Knapp* at 199. A transcript is necessary because an appellant shoulders the burden of demonstrating error by reference to matters within the record. *Id.*; *Dailey v. R & J Commercial Contracting, Inc.*, 10th Dist. No. 01AP-1464, 2002-Ohio-4724, ¶20. Without a transcript, this court is unable to review the trial court's assessment of Sims' conduct during the trial. In fact, without a transcript, we must presume the regularity of the proceedings. *Knapp*; *Rudloff v. Shamrock*, 11th Dist. No. 2004-T-0058, 2005-Ohio-4651, ¶12.

{¶13} Because appellant did not submit any evidence indicating that Sims suffered a stroke during the trial, the trial court did not abuse its discretion by denying appellant's motion for mistrial and/or her motion for a new trial. Accordingly, we overrule appellant's lone assignment of error.

{¶14} Dr. McQuillan has also filed a motion, pursuant to App.R. 23, seeking to recover attorney's fees on the ground that appellant's appeal is frivolous. She claims that the appeal is frivolous because appellant failed to file a transcript and because there is no evidence indicating Sims suffered a stroke at any time during the trial.

{¶15} App.R. 23 allows a court of appeals to order an appellant to pay an appellee's reasonable expenses, including attorney's fees, for a frivolous appeal. A frivolous appeal under App.R. 23 is one which presents no reasonable question for review. *Stuller v. Price*, 10th Dist. No. 03AP-30, 2003-Ohio-6826, ¶28. Appellant's failure to file a transcript is not dispositive of the question presented on appeal. See *Buzard v. Triplett*, 10th Dist. No. 05AP-579, 2006-Ohio-1478, ¶15. Although a close call, we find that this appeal is not frivolous, as it does present a reasonable question for us to review. Accordingly, we deny Dr. McQuillan's motion for attorney's fees.

{¶16} In conclusion, we deny appellees' motion to dismiss and Dr. McQuillan's motion for attorney's fees. We overrule appellant's lone assignment of error and, accordingly, affirm the judgment of the Franklin County Court of Common Pleas.

*Motions denied; judgment affirmed.*

FRENCH and CONNOR, JJ., concur.

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