

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Michael E. Gold,	:	
Plaintiff-Appellant,	:	
v.	:	No. 14AP-603 (C.P.C. No. 12CV-13245)
Marjorie A. Burnham et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on April 14, 2015

The Behal Group, LLC and John M. Gonzales, for appellant.

Gallagher, Gams, Pryor, Tallan & Littrell, and Mitchell M. Tallan, for appellees.

APPEAL from the Franklin County Court of Common Pleas

HORTON, J.

{¶ 1} Plaintiff-appellant, Michael E. Gold, appeals from a judgment of the Franklin County Court of Common Pleas, entered upon a jury verdict in his favor. Plaintiff asserts the following sole assignment of error for our review:

The trial court erred as a matter of law and abused its discretion by excluding evidence of the Ohio Bureau of Workers' Compensation's statutory lien.

{¶ 2} Because the trial court did not plainly err by excluding evidence of the statutory lien, we affirm.

I. FACTS AND PROCEDURAL HISTORY

{¶ 3} On October 19, 2012, plaintiff filed a complaint against defendant-appellee, Marjorie A. Burnham, asserting that he had incurred damages as a result of her

negligence. The facts giving rise to the complaint began on January 12, 2009, when defendant failed to yield the right-of-way as she made a left turn and hit plaintiff's automobile, causing him injury. Plaintiff was acting in the course and scope of his employment as a pizza delivery driver when the accident occurred. As such, the Ohio Bureau of Workers' Compensation ("BWC") covered a portion of plaintiff's medical bills.

{¶ 4} On February 21, 2013, the BWC filed a motion to intervene in the action and align as a new party plaintiff. The BWC sought to intervene in the action "for the purpose of asserting its statutory subrogation claim with respect to any recovery due the Plaintiff." (Motion to Intervene, 1.) The court granted the motion.

{¶ 5} On November 25, 2013, defendant filed a motion in limine asking the court to exclude all evidence relating to plaintiff's claim with the BWC. Defendant noted that the primary issue in the court action was whether the January 12, 2009 accident proximately caused plaintiff's shoulder injury. Plaintiff had surgery on his shoulder on January 4, 2012. The BWC had approved plaintiff's shoulder injury as an allowed condition, and had paid medical bills relating to the shoulder injury. Plaintiff responded to the motion in limine, asserting that the "industrial claim permeate[d] the case," that "hiding it from the jury [would] be next to impossible," and that there was "no practical way to separate the injury from the workers compensation claim without prejudicing Mr. Gold and the BWC." (R. 48, Plaintiff's Combined Response, 2.)

{¶ 6} A jury trial commenced on January 7, 2014. Regarding the motion in limine, the court initially asked plaintiff's counsel how his client would be prejudiced if the court did not allow evidence of the BWC payments or of the BWC's subrogated lien to be admitted at trial. Plaintiff's counsel stated that, potentially, his client would not be prejudiced, stating that, "[i]f I can get Exhibit 1 in, which are the amount of the total medical bills, the amount the bureau paid, and the amount Mr. Gold was responsible for, then the plaintiff has no problem with your excluding the evidence. * * * All I care about are the medical bills that have been incurred, and I am okay with telling the jury the Robinson numbers of what has been paid." (Tr. 18-19.)

{¶ 7} The court then stated that, regarding "the presentation of evidence related to the bureau's statutory subrogated lien," the court ruled as follows:

I had an opportunity to review again the Posel versus Dayton Power & Light decision, * * *. I also reviewed the Ross versus Nappier decision.

Based on my review, it appears to me that the Ross decision was written to address a specific set of circumstances that should not have existed under ordinary trial circumstances, and the court notes the unusual nature of the circumstances presented in that case in that the record was replete with references to collateral source evidence that likely should have not been introduced and evidence also of some subrogated interests that should not be introduced.

So to that extent, I think that the holding in Ross is limited to the unique circumstances outlined in that particular case. This court finds the Posel decision to be more persuasive where the court first found that the trial court has broad discretion in balancing the probative value of evidence against its potential for unfair prejudice.

This court believes that an introduction of any amounts paid or in dispute on behalf of BWC would be misleading to this panel. It would be more prejudicial than probative.

* * *

I am not interested in having a convoluted set of circumstances for this panel to review. I think that having the bureau present that evidence would be more prejudicial than probative.

The Posel court indicates that this issue is not one of settled Ohio law, and so at some point it will be settled, but the way that I am going to settle it today is that I am going to disallow that presentation as outlined in Mr. Tallan's oral motion in limine.

Mr. Tallan has indicated that he will or he does not have disagreement that the court may instruct that the BWC did pay funds to plaintiff, that the verdict should not in any way be influenced by the payment of those funds. Is that correct, Mr. Tallan?

MR. TALLAN: Yes, Your Honor.

THE COURT: Does that still stand?

MR. TALLAN: It does.

THE COURT: All right. I am certain that [plaintiff's counsel] has an objection. I will make that instruction to this panel. That is the way that the court is going to rule on this issue.

(Tr. 27-30.)

{¶ 8} Despite the court's indication, plaintiff's counsel did not object to the court's ruling.

{¶ 9} Consistent with the court's ruling, the record demonstrates that both plaintiff's counsel and defendant's counsel briefly referenced the fact that the BWC had paid a portion of plaintiff's medical bills. Plaintiff's counsel presented exhibit No. 1 to plaintiff, and plaintiff explained that exhibit No. 1 outlined "all of the medical bills that were accrued because of this accident." (Tr. 105.) Plaintiff explained that exhibit No. 1 showed "the total bill amount, how much the BWC -- as we talked about, I had to deal with BWC and the delays in this entire process -- this is what they paid out for the medical bills; and then the column labeled Mike Gold is what I am ultimately financially responsible for." (Tr. 105.) On cross-examination, defense counsel also addressed exhibit No. 1, and asked plaintiff, "Let's take this particular bill where BWC pays \$6,300 on a \$53,000 bill, you understand that there is no obligation to pay anything else after that, right?" (Tr. 108-09.) Plaintiff indicated he did not know "one way or another" if he owed the \$47,000 difference. (Tr. 109.) Despite these brief discussions of the BWC payments, the majority of the transcript before this court consists of a discussion of the accident, of plaintiff's employment following the accident, and of the events which led to plaintiff's shoulder surgery.

{¶ 10} The jury entered an \$8,425.91 verdict in plaintiff's favor. Through interrogatories, the jury identified that \$5,050.91 of the award was for economic damages, with \$4,850.91 representing the medical bills and \$200.00 representing the lost wages, and that \$3,375.00 of the award was for non-economic damages. The court accordingly entered judgment in plaintiff's favor, and noted in the judgment entry that pursuant to R.C. 4213.931, "the amount of \$326.86 from the judgment shall be applied to the Ohio

Bureau of Workers' Compensation's statutory lien, which is satisfied in full." (R. 74.) The BWC is not a party to the instant appeal.

II. NO PLAIN ERROR

{¶ 11} Plaintiff asserts that the "only issue on appeal is whether the trial court abused its discretion by keeping the fact that Mr. Gold was required to pay back the BWC lien from the jury." (Appellant's brief, 1.) Defendant contends that plaintiff "failed to properly object and/or preserve his right to appeal as it pertains to any argument that the jury should have been instructed as to the mechanics of OBWC's lien." (Appellee's brief, 17.) Based on the record before us, we agree that plaintiff failed to preserve this issue for appeal.

{¶ 12} Plaintiff filed only an excerpted portion of the entire trial transcript for this court to review. The excerpted portion of the transcript contains the initial conversations between the court and counsel, opening statements, and the plaintiff's testimony during plaintiff's case-in-chief. Plaintiff also did not file any of the trial exhibits with this court. The duty to provide a transcript for appellate review falls upon the appellant. *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199 (1980); *see also* App.R. 9(B)(3) (stating that "[t]he appellant shall order the transcript in writing and shall file a copy of the transcript order with the clerk"). This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record. *Knapp* at 199. *See also* App.R. 9(B)(5); *In re Estate of Clapsaddle*, 79 Ohio App.3d 747, 753 (4th Dist.1992) (noting that "App.R. 9(B) places an affirmative duty upon appellants to ensure that all documents and other evidence necessary for appellate review are included in the record transmitted on appeal."). "When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." *Knapp* at 199.

{¶ 13} A motion in limine is a request " 'that the court limit or exclude use of evidence which the movant believes to be improper, and is made in advance of the actual presentation of the evidence to the trier of fact, usually prior to trial.' " *Gordon v. Ohio State Univ.*, 10th Dist. No. 10AP-1058, 2011-Ohio-5057, ¶ 82, quoting *State v. Winston*, 71 Ohio App.3d 154, 158 (2d Dist.1991). "[A] motion in limine is a preliminary

ruling which must be renewed at trial or the argument made therein is waived for purposes of appeal." *State v. Smith*, 7th Dist. No. 11 MA 120, 2013-Ohio-756, ¶ 128. A trial court's decision on a motion in limine is a ruling to admit or exclude evidence. *Gordon* at ¶ 82. Decisions regarding the admissibility of evidence are within the broad discretion of the trial court, and will be upheld absent an abuse of discretion. *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787, ¶ 20.

{¶ 14} However, failure to draw the court's attention to possible error, by objection or otherwise, when the error could have been corrected, results in a waiver of the issue for purposes of appeal, absent plain error. *In re Ebenschweiger*, 12th Dist. No. CA2003-04-080, 2003-Ohio-5990, ¶ 9-10. "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and * * * [i]n case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer." Evid.R. 103(A)(2). *See also McClure v. Finfrock*, 1st Dist. No. C-980323 (Mar. 19, 1999) (noting that, since it was "incumbent upon McClure, as the proponent of evidence excluded by the court's preliminary ruling on the motion *in limine*, to seek the introduction of the evidence at trial by proffer or otherwise, he has failed to preserve the alleged error for appeal," and thus waived "any challenge, absent plain error."). In a civil case, the plain error doctrine is limited to extremely rare cases involving exceptional circumstances "where the error, left unobjected to at the trial court, rises to the level of challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 122 (1997).

{¶ 15} When the court granted defendant's motion in limine, and held that evidence of the BWC's subrogated lien would be excluded from trial, plaintiff failed to object or otherwise proffer evidence concerning the lien. (See Tr. 27-31.) On appeal, plaintiff asserts that he did proffer evidence regarding the BWC's statutory lien when he attempted to call Howard Sanders, a BWC representative, to testify during plaintiff's case-in-chief. (Reply brief, 1-2.) Our review of the available record, however, indicates that the proffered exhibit and testimony did not concern the BWC's statutory lien.

{¶ 16} When counsel attempted to call Sanders to testify, counsel acknowledged the court's ruling "following the federal district court in keeping evidence of the BWC lien, to the extent possible, out of the case," and stated that he would show the court "exactly

what I was going to do with Mr. Sanders." (Tr. 160.) Counsel indicated that, "[w]hat I have circled here are the timeline events that I wanted him to breathe life in from the bureau's records, which would have been the initial shoulder claim, the MRI approval, the surgery approval," and counsel stated that, "those events I was going to limit his testimony to." (Tr. 160.) The court asked counsel, "[s]o you just want Mr. Sanders to identify these five or six events in Mr. Gold's treatment history?" (Tr. 161.) Counsel responded stating, "[e]xactly," and explained that this line of questioning would demonstrate the "delay in the treatment of [in]jury." (Tr. 161.) The court ruled that it was "not going to permit that testimony in these proceedings today." (Tr. 164.) Plaintiff's counsel stated, "I just want to proffer this exhibit and make it a part of the record." (Tr. 165.) As noted above, however, the proffered exhibit is not contained in the record which was transmitted to this court.

{¶ 17} Thus, it appears that the proffered exhibit was merely a timeline of the events which occurred in plaintiff's case before the BWC. The record does not indicate whether the proffered exhibit concerned the BWC's statutory lien, and counsel expressly stated that Sanders' testimony would be limited to discussing the time line events. As such, the record fails to demonstrate that plaintiff proffered evidence relating to the BWC's statutory lien. Plaintiff thus failed to preserve this issue for appeal, and we accordingly review for plain error only.

{¶ 18} R.C. 4123.931(A), the basis for the BWC's lien in this action, provides that "[t]he payment of compensation or benefits pursuant to this chapter * * * creates a right of recovery in favor of a statutory subrogee against a third party, * * *. The net amount recovered [by the claimant] is subject to a statutory subrogee's right of recovery." R.C. 4123.931(H) sets forth a mathematical formula to determine the amount of the BWC's lien, and provides that the "right of subrogation under this chapter is automatic, regardless of whether a statutory subrogee is joined as a party in an action by a claimant against a third party." *See Ohio Bur. of Workers' Comp. v. McKinley*, 130 Ohio St.3d 156, 2011-Ohio-4432, ¶ 25, quoting Black's Law Dictionary (9th Ed.2009) 1563-64 (noting that subrogation "is '[t]he substitution of one party for another whose debt the party pays, entitling the paying party to rights, remedies, or securities that would otherwise belong to the debtor.' "). *See also* R.C. 2315.20; *Pryor v. Webber*, 23 Ohio

St.2d 104 (1970); and *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362 (regarding the collateral-source rule in Ohio).

{¶ 19} Plaintiff acknowledges that R.C. 4123.931 "does not expressly address whether an injured worker may introduce evidence of the BWC's lien." (Appellant's brief, 7.) Nevertheless, plaintiff asserts that the trial court erred by excluding evidence of the BWC's lien from trial. Plaintiff contends that the "closest case on point" is *Ross v. Nappier*, 185 Ohio App.3d 548, 2009-Ohio-6995 (11th Dist.). As noted above, in ruling on defendant's motion in limine, the trial court expressly considered both *Ross* and *Posel v. Dayton Power & Light*, No. 1:09-cv-149 (S.D. Ohio.2012).

{¶ 20} In *Ross*, the trial court granted the defendant's motion in limine to exclude evidence of the BWC's R.C. 4123.931 subrogated lien from trial. As the trial proceeded, however, the record became "saturated with evidence offered by both parties regarding workers' compensation benefits." *Id.* at ¶ 3. Ross had admitted exhibits into evidence which detailed the payments made by the BWC on his medical bills. As the jury knew that Ross received workers' compensation benefits, but did not know that he was statutorily obligated to repay a portion of those amounts, the court concluded that the jury "was presented with a partial, incomplete picture." *Id.* at ¶ 56. The court also found that "evidence of juror confusion [was] contained in the record." *Id.* at ¶ 112. Thus, "[b]ased on the unique facts and circumstances" present in the case, the *Ross* court concluded that the trial court abused its discretion in granting the defendant's motion in limine. *Id.* at ¶ 120.

{¶ 21} Additionally, we note that Ross had "proffered Exhibit 4, the subrogation-interest worksheet," and proffered the "proposed testimony of bureau attorney Leuchtag," who would have testified regarding Ross's statutory obligation to repay the bureau in an amount determined by the statutory formula. *Id.* at ¶ 20. The court noted that "[b]y proffering the exhibit and proposed testimony of Leuchtag, Ross preserved this issue for review." *Id.* at ¶ 24. The BWC was not a party in the *Ross* action.

{¶ 22} In *Posel*, the district court granted the motion in limine of the defendant, Mid-Atlantic Construction, Inc., to exclude evidence of payments made by Zurich American Insurance Company to the plaintiff, pursuant to a workers' compensation claim Zurich administered and covered. The *Posel* court acknowledged the *Ross*

decision, and concluded that it was "unlikely that the court of appeals in *Ross* would have ruled the way it did in the absence of a trial court record permeated with improper collateral source evidence." *Id.* The *Posel* court also noted that the *Ross* decision did "not answer the question of whether a plaintiff may introduce evidence of a collateral source's right of subrogation in the absence of evidence of payments by a collateral source in the first instance." *Id.* The court concluded that the plaintiff had not shown how the disputed evidence was relevant to the issue of Mid-Atlantic's liability, or how the exclusion of such evidence would prejudice the plaintiff's case. Thus, based on Fed.R.Evid. 403, the court concluded that the "better and fairer course of action in the instant case [was] to exclude evidence of both collateral source payments and the subrogation lien." *Id.*

{¶ 23} Unlike *Posel*, the trial court herein allowed evidence of collateral source payments, but excluded evidence of the BWC's subrogated lien. However, we cannot say that the trial court's evidentiary ruling challenges the legitimacy of the underlying judicial process itself. To the contrary, the trial court made an informed ruling after considering relevant case law. Additionally, unlike *Ross*, the record before this court is not saturated with evidence of workers' compensation benefit payments. Indeed, in the excerpted portion of the transcript filed by plaintiff, there are only brief references to the BWC payments. The excerpted transcript does not indicate whether exhibit No. 1 was admitted into evidence, and the record on appeal does not contain exhibit No. 1 for this court to review. Moreover, unlike *Ross*, there is no evidence of juror confusion in the record before us. Accordingly, we find that the trial court did not commit plain error by refusing to admit evidence of the BWC's statutorily subrogated lien at trial.

{¶ 24} Based on the foregoing, plaintiff's sole assignment of error is overruled. As such, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

TYACK and LUPER SCHUSTER, JJ., concur.
