**[Cite as *Druzin v. S.A. Comunale Co., Inc.*, 2015-Ohio-4699.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
**No. 102674**

**BARRY P. DRUZIN**

PLAINTIFF-APPELLEE

vs.

**S.A. COMUNALE CO., INC., ET AL.**

DEFENDANTS-APPELLANTS

**JUDGMENT:**
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-807596

**BEFORE:** Boyle, J., Kilbane, P.J., and Blackmon, J.

**RELEASED AND JOURNALIZED:** November 12, 2015

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MARY J. BOYLE, J.:

**{¶1}** In this workers' compensation case, defendant-appellant, S.A. Comunale Co., Inc. ("employer") appeals from the trial court's decision denying its motion for a new trial following a jury verdict in favor of plaintiff-appellee, Barry P. Druzin. The jury found that Druzin is entitled to participate in the workers' compensation system for his condition of generalized anxiety disorder. The employer raises the following single assignment of error:

> The trial court abused its discretion in denying S.A. Comunale's motion for a new trial as the irregularities with the court's transmission of a jury interrogatory and the court's answer to a jury question denied S.A. Comunale of a fair trial.

**{¶2}** For the reasons that follow, we affirm.

## I. Procedural History and Facts

**{¶3}** Druzin worked as a pipefitter for employer. On October 9, 2007, Druzin sustained injuries to his left shoulder while working. As a result of the injuries, he was allowed to participate in the workers' compensation system for his shoulder conditions. In January 2011, Druzin sought an additional allowance from the workers' compensation system for the condition of generalized anxiety disorder. After this claim was disallowed at the administrative level, Druzin filed an appeal with the Industrial Commission, which refused his appeal. Druzin then filed his "petition and complaint on appeal" in common pleas court, and the matter proceeded to a jury trial.

**{¶4}** After three days of trial, the jury returned a verdict in favor of Druzin and against the employer, finding that Druzin is entitled to participate in the workers' compensation system for the condition of generalized anxiety disorder.

**{¶5}** One week following the jury's verdict, the employer filed a motion for leave to question jurors on the grounds that "there may have been irregularities in the jury's deliberations and its verdict." Specifically, the employer argued that (1) a different interrogatory than the one agreed to by the parties was submitted and answered by the jury; and (2) the record contains no written response from the court to the jury's single question during deliberations. According to the employer's motion, defense counsel requested a copy of the jury question and the judge's written answer from the court reporter, who indicated that she only had the question and was never provided with the written answer. The employer argued that "there are serious questions about how the jury received and answered an interrogatory which was not submitted to them, and also how the question they posed was communicated to the court and answered by the court."

**{¶6}** While that motion was still pending, the employer filed a motion for a new trial and a partial transcript of the trial proceedings. Relevant to this appeal, the employer argued that irregularities in the jury's deliberations and verdict warranted a new trial under Civ.R. 59(A).

**{¶7}** The agreed-upon interrogatory No. 1 asked the following question:

> Did the Plaintiff prove by a preponderance of the evidence that he suffers from generalized anxiety disorder?

**{¶8}** The submitted and signed jury interrogatory No. 1, however, stated the following:

> Did the Plaintiff prove by a preponderance of the evidence that he suffers or suffered from generalized anxiety disorder as a result of his physical injuries of October 9, 2007?

**{¶9}** The bottom of interrogatory No. 1 (both the agreed-upon one and the submitted one), indicated that if the jury answered "Yes," it then should "go on to answer interrogatory No. 2," which asked the following question:

> Did the plaintiff prove by a preponderance of the evidence that his generalized anxiety disorder was caused by the allowed shoulder conditions he sustained as a result of the October 9, 2007 work injury?

**{¶10}** The employer argued that interrogatory No. 1 submitted to the jury was substantively different than the agreed-upon interrogatory and improperly inquired as to the cause of the alleged anxiety disorder, which was supposed to be answered in interrogatory No. 2. The employer contended that the submission of the two interrogatories — interrogatory No. 1 and interrogatory No. 2 — confused the jury because they essentially asked the same question in two different ways. The employer further argued that the jury's confusion was also evidenced by their inconsistent response to the interrogatories — seven jurors answered "Yes" to interrogatory No. 1, but only six jurors answered "Yes" to interrogatory No. 2.

**{¶11}** As additional grounds for a new trial, the employer further argued that the record contained no written response from the court to the jury's single question during deliberations, i.e., "are we to decide if [the plaintiff] suffers from generalized anxiety disorder or suffered, i.e., current, present tense or past tense?" According to the employer, the absence of any documentation as to how the trial judge communicated a response suggested an ex parte communication — both prejudicial to the employer and grounds for a new trial.

**{¶12}** The trial court ultimately denied the employer's motion for a new trial and this appeal now follows.

## II. Analysis

**{¶13}** In its sole assignment of error, the employer argues that the trial court abused its discretion in denying its motion for a new trial. We disagree.

### A. Standard of Review

**{¶14}** Civ.R. 59(A)(1) provides a trial court with discretion to grant a new trial when there is an "irregularity" in the proceedings that prevents a party from having a fair trial. "The rule preserves the integrity of the judicial system when the presence of serious irregularities in a proceeding could have a material adverse effect on the character of and public confidence in judicial proceedings." *Wright v. Suzuki Motor Corp.*, 4th Dist. Meigs Nos. 03CA2, 03CA3, and 03CA4, 2005-Ohio-3494, ¶ 114. We afford great deference to the trial court's decision denying or granting a motion for a new trial pursuant to Civ.R. 59(A)(1) and will not reverse the decision absent a showing that the court abused its discretion. *Koch v. Rist*, 89 Ohio St.3d 250, 251, 730 N.E.2d 963 (2000). An abuse of discretion connotes an attitude by the court that is unreasonable, arbitrary, or unconscionable. *Id.*

**B. Irregularities in the Trial Court Proceeding**

**{¶15}** Relying on the submission of jury interrogatory No. 1 and the absence of the trial court's response to the jury's question, the employer argues that the trial court should have granted its motion for a new trial. The employer argues that the submitted jury interrogatory No. 1 was prejudicial because the issue of whether Druzin "suffers" or "suffered" from generalized anxiety disorder became a material point of contention amongst the jury, as evidenced by their question to the court.

**{¶16}** Druzin counters that the interrogatories were not prejudicial and that they properly framed the dispositive issue at trial, i.e., whether Druzin's generalized anxiety disorder was a result of his physical injuries from October 9, 2007. He further argues that had the employer believed the interrogatory to be prejudicial and confusing to the jury, it should have polled the jury, which it failed to do.

**{¶17}** Generally, the failure to object to an interrogatory constitutes waiver of any error on appeal. *Boewe v. Ford Motor Co.*, 94 Ohio App.3d 270, 279, 640 N.E.2d 850 (8th Dist.1992). A reviewing court will not consider any error which a party failed to bring to the trial court's attention at a time when that error could have been avoided or corrected by the court. *LeFort v. Century 21-Maitland Realty Co.*, 32 Ohio St.3d 121, 123, 512 N.E.2d 640 (1987). As stated by the Ohio Supreme Court, "the fundamental rule is that an appellate court will not consider any error which could have been brought to the trial court's attention, and hence avoided or otherwise corrected." *Schade v. Carnegie Body Co.*, 70 Ohio St.2d 207, 210, 436 N.E.2d 1001 (1982).

**{¶18}** Similarly, "[i]f an appellant believed that the jury's verdict was substantially defective, the proper procedure was for [the appellant] to request the trial judge to poll the jurors." *McKiernan v. Home Sav. of Am.*, 93 Ohio App.3d 13, 16, 637 N.E.2d 384 (3d Dist.1994), citing Civ.R. 48. In the absence of such a request, a court "must assume appellant did not believe the verdict to be substantially defective." *Id.* At the very least, the appellant should object prior to the jury being discharged as a means to preserve any argument on appeal. *Id.*

**{¶19}** While Ohio courts consistently apply the waiver doctrine to claims of alleged error with jury interrogatories when the appellant failed to object prior to the jury being discharged, we find that the employer's argument fails on another procedural ground. In support of its motion for a new trial, the employer filed only a partial transcript. On appeal, the employer relies solely on this partial transcript in support of its sole assignment of error. The partial transcript ends after the parties discussed on the record the jury's question, the trial judge's proposed answer, and the parties' stated objections. The transcript submitted as part of the appellate record does

not include any of the proceedings following this point, including the public announcement of the verdict before the parties and jury.

**{¶20}** The employer has the duty to provide a transcript for appellate review. *See Skoda Minotti Co. v. Novak, Pavlik & Deliberato, L.L.P.*, 8th Dist. Cuyahoga No. 101964, 2015-Ohio-2043, ¶ 24, citing *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 284 (1980). "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." *Id.*

**{¶21}** Here, the employer concedes that it did not seek to poll the jury after the reading of the verdict or object to the interrogatory that it now challenges. The employer alleges it was unaware of the issue until after the jury was discharged. However, we have no way to resolve the merits of this claim because the employer did not provide a complete transcript of the proceedings relevant to this issue. And while we fail to see any error in the interrogatory, we need not even reach the merits of employer's claim because we must presume regularity in the proceedings below. For the same reason, we refuse to accept the employer's speculation as to a possible ex parte communication between the trial judge and jury when the employer has failed to provide a crucial part of the transcript. Notably, the employer likewise has not provided any statement under App.R. 9(C) to support its claim.

**{¶22}** Accordingly, based on the record before us, we cannot say that the trial court abused its discretion in denying the employer's motion for a new trial.

**{¶23}** The sole assignment of error is overruled.

**{¶24}** Judgment affirmed.

It is ordered that appellee recover from appellant the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

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

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MARY J. BOYLE, JUDGE

MARY EILEEN KILBANE, P.J., and
PATRICIA ANN BLACKMON, J., CONCUR