

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

JOYCE GOINS

C. A. No. 25041

Appellant

v.

JON D. OLIVERIO, D.P.M., et al.

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CV 2007 05 3853

Appellees

DECISION AND JOURNAL ENTRY

Dated: August 18, 2010

MOORE, Judge.

{¶1} Appellant, Joyce Goins, appeals from the decision of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} In May of 2007, Goins filed her medical malpractice complaint against, in part, Jon Oliverio, D.P.M. In her complaint, Goins asserted that she sought treatment of her ankle from Oliverio, a podiatric physician employed by Foot and Ankle Institute, Inc. She claimed that, as a result of Oliverio's negligence in diagnosing and treating an infection in her leg, it became necessary to amputate her leg below the knee.

{¶3} On August 31, 2009, the matter proceeded to a jury trial. On the first day of trial, the trial court gave the jury preliminary instructions. After swearing in the jury, the trial court informed the jury that it would allow jurors to ask questions of witnesses. It then outlined the process for submitting questions. On September 4, 2009, it came to the attention of the trial

court that two jurors appeared to be discussing their questions prior to giving them to the court. The trial court held an in chambers discussion with each juror individually, outside the presence of counsel. The court informed counsel that it would not excuse the jurors. The jury found in Oliverio's favor.

{¶4} Goins timely filed her notice of appeal, along with her App.R. 9(B) statement of intent to only order specific portions of the transcript. Subsequently, Goins filed in the trial court a proposed App.R. 9(C) statement. The statement purported to be a statement of the proceedings that occurred off the record during trial. Oliverio responded in opposition. The trial court denied the proposed App.R. 9(C) statement.

{¶5} Oliverio filed a motion to tax expenses as costs. Goins responded in opposition, and the trial court granted the motion.

{¶6} Goins has raised three assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

“[GOINS] DID NOT RECEIVE A CONSTITUTIONALLY GUARANTEED FAIR TRIAL BECAUSE THE TRIAL COURT PERMITTED JURORS TO QUESTION WITNESSES BUT FAILED TO EMPLOY AND ENFORCE THE SAFEGUARDS ENUMERATED BY THE OHIO SUPREME COURT IN STATE V. FISHER AND OTHERWISE CONTROL JURY QUESTIONING AND RELATED JUROR MISCONDUCT.”

ASSIGNMENT OF ERROR II

“[GOINS] HAS BEEN DENIED HER RIGHT TO BRING A COMPLETE RECORD OF THE PROCEEDINGS IN THE TRIAL COURT TO THIS COURT FOR REVIEW BECAUSE THE TRIAL COURT FAILED TO PERFORM ITS MANDATED LEGAL DUTY UNDER APP.R. 9(C).”

{¶7} In her first assignment of error, Goins contends that she did not receive a constitutionally fair trial because the trial court permitted jurors to question witnesses but failed

to employ and enforce the safeguards enumerated by the Ohio Supreme Court in *State v. Fisher*, 99 Ohio St.3d 127, 2003-Ohio-2761. She contends in her second assignment of error that by failing to approve and settle her App.R. 9(C) statement, the trial court denied her right to bring a complete record of the proceedings in the trial court for this Court's review. She explains that "[b]ecause much of the evidence that would support [Goins'] [first] assignment of error with respect to the jury's questioning of witnesses was not transcribed, and because [her] ability to prevail on her [first] assignment of error depends on that missing statement of evidence, the trial court's error was prejudicial to [Goins]."

{¶8} Goins has presented this Court with excerpts from the proceedings at trial. It does not appear from these excerpts that Goins objected to the trial court's procedure with regard to juror questioning. Even presuming the trial court incorrectly denied Goins' App.R. 9(C), statement, and thus Goins could show that she objected to the trial court's procedural mechanism for allowing jury questions, she has still failed to provide this Court with an adequate record to determine the merits of her first assignment of error.

{¶9} Goins points to the Ohio Supreme Court's decision in *Fisher*, supra, for the appropriate mechanism she contends the trial court should have utilized with regard to jury questions. However, Goins has failed to note the importance the Supreme Court placed upon the issue of prejudice. At the outset, we recognize that *Fisher* was a criminal case. The Supreme Court explained that, in order to determine if juror questioning was "prejudicial," it must apply a two part test. First, the Court must determine if juror questioning was in error. "Second, the reviewing court must engage in a specific analysis of the trial court record-a so-called 'harmless error' inquiry-to determine whether the error 'affect[ed] substantial rights' of the criminal defendant." *Fisher*, supra, at ¶7. Thus, the Court determined in the context of a criminal case

that the error must be prejudicial. *Id.* The Court pointed to Crim.R. 52(A) to define harmless error. The civil counterpart of Crim.R. 52(A) is Civ.R. 61, which explains that

“[n]o error *** or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties.”

{¶10} An error is not prejudicial if its “avoidance would not have changed the result of the proceedings.” *In re K.B.*, 7th Dist. No. 09 BE 24, 2010-Ohio-1015, at ¶21, citing *Fada v. Information Sys. & Networks Corp.* (1994), 98 Ohio App.3d 785, 792.

{¶11} Although Goins contends that the trial court did not properly utilize the procedural safeguards presented in *Fisher*, she has failed to provide this Court with a record of the entire trial to determine based on the record that prejudice has occurred. Even if she were permitted to fill in the blanks of the excerpts she has provided this Court with an App.R. 9(C) statement, she specifically declined to present this Court with the full transcript of the proceedings before the trial court.

{¶12} For example, Goins, in part, contends that Juror No. 1 asked questions that demonstrated “partiality” by asking questions aimed at advocacy. “The issue of whether juror questions are aimed at advocacy rather than clarification cannot be answered in the abstract, but instead requires courts to examine the nature of each question in the *overall context of a trial*. We conclude that the trial court is in the best position to render such a determination and, within its sound discretion, disallow improper juror questions.” (Emphasis added.) *Fisher* at ¶27. Accordingly, to determine that the trial court abused its discretion in allowing these “advocacy”

questions, we must review the “overall context of the trial.” *Id.* It is impossible for this Court to undertake this task in the absence of a complete record.

“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 v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 199.

{¶13} Accordingly, we must presume regularity in the trial court’s proceedings and accept its judgment. *Wozniak v. Wozniak* (1993), 90 Ohio App.3d 400, 409. Even presuming the trial court erred in denying Goins’ App.R. 9(C) statement, on the basis of the incomplete record currently before us, we have not been convinced that any avoidance of the error would change the outcome of her appeal. Civ.R. 61. Thus, Goins’ first and second assignments of error are overruled.

ASSIGNMENT OF ERROR III

“\$5,372.97 IN ‘COSTS’ HAVE BEEN AWARDED AGAINST [GOINS] THAT ARE UNSUPPORTED BY ANY EVIDENCE AND ARE CONTRARY TO LAW.”

{¶14} In her third assignment of error, Goins contends that costs awarded against her were unsupported by any evidence and were contrary to law. We do not agree.

{¶15} Although Goins contends that the award was against the manifest weight of the evidence, her argument centers around the fact that the trial court did not hold a hearing on the issue. She contends that because there was no hearing, the award was not based upon competent credible evidence. She does not, however, contend that the trial court erred in failing to hold a hearing.

{¶16} She further contends that Oliverio was not the “real party-in-interest” and therefore the costs were contrary to law. She continues, however, to explain that because the

trial court did not hold a hearing on the issue, she could not present the facts regarding the identity of the “real party-in-interest” and therefore, the issue was “not yet ripe for adjudication.” Again, she does not contend that the trial court erred by not holding a hearing. Instead, she contends that because there was no hearing, she could not present her defense. Goins has failed to point to any legal support for these contentions. App.R. 16(A)(7). Accordingly, we decline to address this assignment of error. App.R. 12(A)(2). Goins’ third assignment of error is overruled.

III.

{¶17} Goins’ assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
CONCURS

DICKINSON, P. J.
CONCURS IN JUDGMENT ONLY

APPEARANCES:

DEAN S. HOOVER, Attorney at Law, for Appellant.

DOUGLAS K. FIFNER, and DALE KWARCIANY, Attorneys at Law, for Appellees.