

[Cite as *Wolfe v. Ohio Dept. of Rehab. & Corr.*, 2010-Ohio-6180.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Ronald Wolfe,	:	
	:	
Plaintiff-Appellant,	:	
	:	
v.	:	No. 10AP-443
	:	(C.C. No. 2007-08902)
Ohio Department of Rehabilitation and Correction,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	
	:	

D E C I S I O N

Rendered on December 16, 2010

Swope and Swope – Attorneys at Law, and Richard F. Swope, for appellant.

Richard Cordray, Attorney General, and *Douglas R. Folkert*, for appellee.

APPEAL from the Court of Claims of Ohio.

FRENCH, J.

{¶1} Plaintiff-appellant, Ronald Wolfe ("appellant"), appeals the judgment of the Court of Claims of Ohio, which adopted a magistrate's decision recommending judgment in favor of defendant-appellee, Ohio Department of Rehabilitation and Correction ("ODRC"). For the following reasons, we reverse.

{¶2} Appellant is an inmate under the control of ODRC. On November 26, 2007, he filed a complaint against ODRC, alleging that he is a disabled person entitled to protection and benefits under the Americans with Disabilities Act, 42 U.S.C. 12132, et seq. ("ADA"). He alleged that, while working the prison kitchen and while medicated, disabled, fatigued, and ill, he fell and injured himself. His injuries, he alleged, were the proximate result of ODRC's negligence. He sought damages in the amount of \$500,000.

{¶3} A trial on liability was held before a magistrate. The magistrate issued a decision in December 2009 and rendered judgment in favor of ODRC.

{¶4} On February 5, 2010, appellant filed objections to the magistrate's decision. Appellant also moved to extend time for filing an affidavit of evidence pursuant to Civ.R. 53(D)(3)(b)(iii). Appellant argued that he should be permitted to file an affidavit because a trial transcript was unavailable to him due to his indigency.

{¶5} On April 9, 2010, appellant filed an affidavit of evidence. The affidavit described the testimony and evidence before the magistrate.

{¶6} On May 26, 2010, the court filed a judgment entry. The court denied appellant's request for an extension of time in which to file an affidavit of evidence and struck appellant's affidavit from the record. The court overruled appellant's objections to the magistrate's findings of fact because those objections were not supported by a transcript. The court also overruled appellant's objections to the magistrate's legal conclusions concerning the applicability of the ADA and appellant's entitlement to accommodations under the ADA. The court entered judgment in favor of ODRC.

{¶7} Appellant filed a timely appeal. He raises the following assignments of error:

ASSIGNMENT OF ERROR NO. 1:

THE TRIAL COURT ERRED BY NOT SETTLING THE RECORD PURSUANT TO [CIV.R. 53(D)(3)(b)(iii)], PREVENTING AN APPELLATE REVIEW AS TO VALIDITY OF THE FINDINGS AND WEIGHT OF THE EVIDENCE, CONTRARY TO THE 5TH AND 14TH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND ARTICLE I, SECTION 16, ARTICLE II, SECTION 26, AND ARTICLE IV, SECTION 3 OF THE OHIO CONSTITUTION AND [R.C. 2505.03].

ASSIGNMENT OF ERROR NO. 2:

THE MAGISTRATE AND THE TRIAL COURT ERRED IN RULING THAT THE AMERICANS WITH DISABILITIES ACT, 42 U.S.C. §12132, ET SEQ., DOES NOT APPLY TO PROTECT PRISONERS IN THE WORK ENVIRONMENT IN A STATE PRISON.

ASSIGNMENT OF ERROR NO. 3:

THE MAGISTRATE'S AND TRIAL COURT'S RULINGS THAT STATE AND FEDERAL SAFETY LAWS DO NOT APPLY BECAUSE PRISON WORKERS ARE NOT EMPLOYEES IS A LEGAL ERROR BASED ON CURRENT LAW.

{¶8} We begin with appellant's first assignment of error, in which he contends the trial court erred by denying his request to file an affidavit of evidence. We agree.

{¶9} Civ.R. 53(D)(3)(b) governs objections to a magistrate's decision. Civ.R. 53(D)(3)(b)(iii) provides, in part, as follows:

* * * An objection to a factual finding, whether or not specifically designated as a finding of fact under Civ.R. 53(D)(3)(a)(ii), shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available.

With leave of court, alternative technology or manner of reviewing the relevant evidence may be considered. * * *

{¶10} App.R. 9(C) addresses the record on appeal and similarly provides, in pertinent part: "If no report of the evidence or proceedings at a hearing or trial was made, or if a transcript is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection."

{¶11} The Supreme Court of Ohio has addressed the meaning of "unavailable" for purposes of App.R. 9(C) and rejected the contention that "unavailable" refers only to physical unavailability. See *State ex rel. Motley v. Capers* (1986), 23 Ohio St.3d 56. Stating that an App.R. 9(C) narrative statement "is an available, reliable alternative" to an appellant who cannot afford a transcript, the court held that "a transcript is unavailable for the purposes of App.R. 9(C) to an indigent appellant unable to bear the cost of providing a transcript." *Id.* at 58. The Supreme Court reasoned that defining "unavailable" for purposes of App.R. 9(C) as only physically unobtainable "would significantly limit the indigent appellant's right to appeal." *Id.* The court based its conclusion on civil litigants' statutory right to appeal an adverse judgment from a lower court, coupled with the requirement that the appealing party, in order to exercise that right, must ensure that the trial court transcript is sent to the court of appeals for review.

{¶12} On June 29, 2010, this court rendered a decision in *Gill v. Grafton Correctional Inst.*, 10th Dist. No. 09AP-1019, 2010-Ohio-2977. In *Gill*, the Court of Claims had denied an inmate's request to submit a statement under App.R. 9(C) in lieu of a transcript. Like appellant here, Gill contended that a transcript was "unavailable" to him because he could not afford to pay for it. While Gill made his request to the trial

court under App.R. 9(C)—a rule that does not apply to trial court proceedings—the trial court referred to Civ.R. 53(D) in its denial of Gill's request.

{¶13} Relying on *Motley*, this court held that the trial court erred by concluding that the transcript of the liability trial before the magistrate was available, thus precluding Gill from utilizing an alternative method of putting the evidence before the court for purposes of ruling on Gill's objections to the magistrate's factual findings. We reversed the trial court's judgment and remanded the case to the Court of Claims for a determination of whether Gill's statement under App.R. 9(C) was an appropriate means of supporting his objections to the magistrate's decision, even where a transcript is unavailable.

{¶14} Here, appellant moved to submit an affidavit of evidence under Civ.R. 53(D)(3)(b)(iii) because his indigency makes a transcript unavailable to him. In *Gill*, we discerned "no persuasive basis for concluding that, although a transcript is unavailable to an indigent appellant for purposes of App.R. 9(C), a transcript is not similarly unavailable for purposes of supporting an indigent party's objections to a magistrate's decision under Civ.R. 53." *Gill* at ¶13. Applying the reasoning articulated in *Gill* to this case, we conclude that the trial court erred. Accordingly, we sustain appellant's first assignment of error. In doing so, we express no opinion about whether appellant complied with Civ.R. 53 in other respects or whether he is indigent.

{¶15} In his second and third assignments of error, appellant attacks the trial court's legal conclusions concerning the applicability of the ADA and his entitlement to accommodations under the ADA. Our resolution of appellant's first assignment of error

renders these additional assignments moot, however. Because they are now moot, we overrule them.

{¶16} In conclusion, we sustain appellant's first assignment of error and overrule appellant's second and third assignments of error as moot. We reverse the judgment of the Court of Claims of Ohio and remand this matter to that court for further proceedings.

Judgment reversed and cause remanded.

KLATT and HARSHA, JJ., concur.

HARSHA, J., of the Fourth Appellate District, sitting by assignment in the Tenth Appellate District.
