

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Ali Gill,	:	
	:	
Plaintiff-Appellant,	:	No. 10AP-1094
v.	:	(C.C. No. 2005-09847)
Grafton Correctional Institution,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellee.	:	

D E C I S I O N

Rendered on August 25, 2011

Swope and Swope, and Richard F. Swope, for appellant.

Michael DeWine, Attorney General, *John P. Reichley* and *Janelle Totin*, for appellee.

APPEAL from the Court of Claims of Ohio

KLATT, J.

{¶1} Plaintiff-appellant, Ali Gill, appeals a judgment of the Court of Claims of Ohio in favor of defendant-appellee, the Grafton Correctional Institution ("Grafton"). For the following reasons, we affirm.

{¶2} Gill, who suffers from poor vision, is an inmate at Grafton. Upon his release from the special management unit on March 10, 2004, Grafton staff assigned Gill to D2, a dormitory-style housing unit. The lights in D2 are shut off at approximately 9:30 p.m. each night, but night lights illuminate the unit. According to Gill, the night lights were not

bright enough for him to see where he was going, and he complained about this problem to several Grafton staff members. In response, the staff members told Gill that nothing could be done until a bed became available in another housing unit.

{¶3} On March 15, 2004, Gill awoke around 3:00 a.m. and needed to use the restroom. Gill got out of bed, took a few steps, tripped on a garbage can, and fell.

{¶4} Gill filed a negligence suit against Grafton seeking recompense for the injuries from his fall. The trial court bifurcated the issues of liability and damages for the purpose of trial, and parties tried the liability portion of the case to a magistrate. In a decision filed June 12, 2009, the magistrate recommended that the trial court enter judgment in Grafton's favor. The magistrate found that Grafton did not owe Gill a duty to assign him to a well-lit housing unit and that it was not unreasonable for Grafton to place Gill in the D2 housing unit. Additionally, the magistrate found that Gill did not act reasonably to ensure his own safety. Although Gill was aware of his vision impairment and the existence of the garbage can, he made no attempt to get assistance or to ascertain the exact location of the garbage can on the night that he fell. Finally, to the extent that Gill's complaint included allegations critical of the conditions of his confinement, the magistrate determined that those allegations raised a claim under 42 U.S.C. 1983. Because the Court of Claims lacks jurisdiction over claims brought pursuant to 42 U.S.C. 1983, the magistrate did not rule on that claim.

{¶5} Gill objected to the magistrate's factual findings and legal conclusions. Civ.R. 53(D)(3)(b)(iii) states that an objection to a magistrate's factual finding must "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." Gill was indigent

and unable to afford a transcript. Thus, from Gill's perspective, a transcript was "not available." However, instead of supporting his objections with an affidavit of evidence as required in Civ.R. 53(D)(3)(b)(iii), Gill relied on a statement of evidence prepared pursuant to App.R. 9(C).¹

{¶6} On September 28, 2009, the trial court rendered judgment on Gill's objections. Before addressing the merits of Gill's objections, the trial court ruled that it would not consider Gill's statement of evidence because a transcript was, in fact, available. As the transcript was physically obtainable, the trial court held that Civ.R. 53(D)(3)(b)(iii) required Gill to submit it. The trial court then overruled Gill's objections and adopted the magistrate's decision.

{¶7} Gill responded to the trial court's judgment with a motion seeking reconsideration and leave to file affidavits verifying the accuracy of the App.R. 9(C) statement of evidence. In support of this motion, Gill submitted his own affidavit and an affidavit from his attorney, both of which affirmed the validity of the App.R. 9(C) statement of evidence. Because motions seeking reconsideration of a final judgment are a nullity, the trial court denied Gill's motion.

{¶8} Gill appealed the trial court's September 28, 2009 judgment to this court. We agreed with Gill that his indigency rendered the transcript unavailable and, thus, he could utilize an "alternative method" of putting evidence before the trial court. *Gill v. Grafton Corr. Inst.*, 10th Dist. No. 09AP-1019, 2010-Ohio-2977, ¶16. Finding that a

¹ According to App.R. 9(C), 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. The statement shall be served on the appellee * * * and the appellee may serve on the appellant objections or propose amendments to the statement * * *. The statement and any objections or proposed amendments shall be forthwith submitted to the trial court for settlement and approval. * * * [A]s settled and approved, the statement shall be included by the clerk of the trial court in the record on appeal."

question remained as to whether Gill's App.R. 9(C) statement was an appropriate "alternative method" of presenting the evidence, we remanded the matter to the trial court. *Id.*

{¶9} On remand, the trial court concluded that Civ.R. 53(D)(3)(b)(iii) required Gill to submit an *affidavit* of evidence. As Gill's App.R. 9(C) statement of evidence did not qualify as an affidavit, the trial court again declined to consider it. Reiterating its earlier ruling, the trial court overruled Gill's objections and adopted the magistrate's decision.

{¶10} Gill then moved for a new trial pursuant to Civ.R. 59(A)(1), (6), (7), and (9) or, alternatively, relief from judgment pursuant to Civ.R. 60(B)(1) and (5). The trial court denied Gill's motion in its entirety.

{¶11} Gill now appeals to this court, and he assigns the following errors:

[1.] THE TRIAL COURT ERRED IN FAILING TO SETTLE THE RECORD BASED ON APPELLANT'S 9(C) STATEMENT, RATHER THAN A RULE 53 AFFIDAVIT OF EVIDENCE, SUCH AFFIDAVIT BEING PROCEDURALLY DEFECTIVE TO ENSURE A RELIABLE RECORD.

[2.] THE TRIAL COURT AND MAGISTRATE ERRED IN RULING DEFENDANTS-APPELLEES [sic] HAD NO DUTY TO PLACE A VISUALLY IMPAIRED INMATE IN A CELL OR A LIGHTED AREA SO HE WOULD NOT FALL OVER OBJECTS HE COULD NOT SEE.

[3.] THE TRIAL COURT AND MAGISTRATE ERRED AND ABUSED THEIR DISCRETION IN RULING PLAINTIFF-APPELLANT DID NOT CLAIM ACCOMMODATION UNDER HIS ESTABLISHED STATUS AS A VISUALLY IMPAIRED PERSON.

[4.] THE TRIAL COURT AND MAGISTRATE ERRED IN RULING PLAINTIFF-APPELLANT'S KNOWLEDGE A GARBAGE CAN WAS IN THE AISLE PROTECTED DEFENDANT-APPELLEE FROM LIABILITY WHEN IT WAS CLEAR PLAINTIFF-APPELLANT WAS PARTIALLY BLIND,

IT WAS 3:00 A.M. AND THERE WAS NO ONE IMMEDIATELY AVAILABLE TO ASSIST APPELLANT.

[5.] THE TRIAL COURT AND MAGISTRATE ERRED IN RULING THE CLAIM WAS MADE AS DELIBERATE INDIFFERENCE UNDER TITLE 42, §1983, SINCE THE CLAIM WAS BASED ON DEFENDANT-APPELLEE'S FAILURE TO HONOR PLAINTIFF-APPELLANT'S VISUAL IMPAIRMENT AND ACCOMMODATE HIS CONDITION UNDER THE AMERICANS [WITH] DISABILITIES ACT, ALL OF WHICH CONSTITUTE NEGLIGENCE.

[6.] THE TRIAL COURT AND MAGISTRATE ERRED WHEN THEY RULED THE PERMANENT RESTRICTION AUTOMATICALLY TERMINATED WITHOUT NOTICE TO PLAINTIFF-APPELLANT, THE CURRENT MEDICAL RESTRICTION POLICY HAD NOT GONE INTO EFFECT UNTIL JUNE 1, 2004, AND THERE BEING NO OTHER GUIDELINES OFFERED TO JUSTIFY DEFENDANT-APPELLEE'S POSITION AND EVIDENCE IS CLEAR THE RESTRICTION WAS HONORED UNTIL APPELLANT WAS PLACED IN SEGREGATION.

[7.] THE TRIAL COURT AND MAGISTRATE ERRED WHEN THEY FOUND NO NEGLIGENCE IN DEFENDANT-APPELLEE IGNORING PLAINTIFF-APPELLANT'S PERMANENT PHYSICAL IMPAIRMENT IN LIGHT OF HIS AMERICANS UNDER DISABILITY ACT [sic], A PRIOR PERMANENT RESTRICTION AND CLEAR ACKNOWLEDGEMENT BY DEFENDANT HE WAS DISABLED.

[8.] THE TRIAL COURT ERRED IN OVERRULING THE MOTION FOR NEW TRIAL, OR IN THE ALTERNATIVE, MOTION FOR RELIEF FROM JUDGMENT, FILED BY PLAINTIFF-APPELLANT.

{¶12} By his first assignment of error, Gill argues that the trial court erred in refusing to consider his App.R. 9(C) statement of evidence when ruling on his objections to the magistrate's decision. We disagree.

{¶13} As we stated above, Civ.R. 53(D)(3)(b)(iii) requires a party who objects to a magistrate's factual findings to submit either a transcript of all relevant evidence or, if a

transcript is not available, "an affidavit of [] evidence." The rule also provides that, "[w]ith leave of court, alternative technology or manner of reviewing the relevant evidence may be considered." Gill first asserts that this latter part of the rule allows a trial court to review the evidence via an App.R. 9(C) statement. While Civ.R. 53(D)(3)(b)(iii) empowers a trial court to permit an objecting party to present evidence in an alternative manner, a party must seek leave of court before offering the evidence in any way other than by transcript or affidavit. *Gumins v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 10AP-941, 2011-Ohio-3314, ¶14. Prior to filing his App.R. 9(C) statement, Gill did not ask the trial court for permission to use an alternative method to present the relevant evidence. Absent such a request, the portion of the rule allowing review by alternative method does not apply. *Id.*

{¶14} Second, Gill states that submittal of an affidavit of evidence is "an alternative to a 9(C) statement, but is not exclusive." Appellant's brief, at 12. This interpretation of Civ.R. 53(D)(3)(b)(iii) is opposite of the plain language of the rule. Civ.R. 53(D)(3)(b)(iii) requires an affidavit of evidence, but gives trial courts the discretion to allow objecting parties to submit evidence through another manner. Therefore, with a trial court's approval, an App.R. 9(C) statement can operate as an alternative to an affidavit of evidence. See *Zartman v. Swad*, 5th Dist. No. 02CA86, 2003-Ohio-4140, ¶70 (finding that the objecting party "was required to attach an affidavit of evidence to the supplemental objections, [but] [] treat[ing] the proposed unsworn statement of the facts, prepared at the direction of the trial court, as the functional equivalent of the affidavit * * *"). However, of the two methods of presenting evidence, an affidavit of evidence, not

an App.R. 9(C) statement, is the only method expressly authorized by Civ.R. 53(D)(3)(b)(iii).

{¶15} Third, Gill argues that the trial court should have accepted his App.R. 9(C) statement because App.R. 9(C) delineates a more satisfactory method of settling the record than Civ.R. 53(D)(3)(b)(iii). We will not engage in a debate over whether an App.R. 9(C) statement or a Civ.R. 53(D)(3)(b)(iii) affidavit is the better method of presenting evidence to a court. If a rule of civil procedure is unambiguous, a court applies it as written. *Erwin v. Bryan*, 125 Ohio St.3d 519, 2010-Ohio-2202, ¶22. A court cannot "ignore the plain language of a rule in order to assist a party who has failed to comply with a rule's specific requirements." *Gumins* at ¶16 (quoting *LaNeve v. Atlas Recycling, Inc.*, 119 Ohio St.3d 324, 2008-Ohio-3921, ¶23). Here, the plain language of Civ.R. 53(D)(3)(b)(iii) mandated the submittal of an affidavit of evidence, but Gill submitted a statement of evidence. Because Gill failed to comply with Civ.R. 53(D)(3)(b)(iii), the trial court did not err in excluding his statement of evidence from its consideration of the objections. *Id.* (holding that the trial court properly concluded that the objecting party failed to support his objections to the magistrate's findings of fact because the party's proffered statement did not constitute an affidavit and the party did not request leave to submit an unsworn statement of evidence).

{¶16} Fourth, Gill argues that the use of an affidavit of evidence contravenes procedural due process. Gill asserts that it is fundamentally unfair to allow an objecting party to create the record without contribution by other parties and the magistrate. We reject this argument. An affidavit of evidence "must contain a description of all the relevant evidence, not just the evidence deemed relevant by the party objecting to the

magistrate's findings." *Id.* at ¶13. An objecting party, therefore, cannot disregard unfavorable evidence in compiling an affidavit of evidence. Additionally, nothing prevents an opposing party from pointing out that an affidavit omits relevant evidence or inaccurately states the evidence. If a trial court suspects that an affidavit of evidence is incomplete or incorrect, it may hear the matter itself, take additional evidence, or return the matter to the magistrate with a request that the magistrate provide his or her own recollection of the evidence. Civ.R. 53(D)(4)(b) and (d); *Zartman* at ¶78-79. Thus, we conclude that no violation of due process results from the use of an affidavit of evidence to develop the record.

{¶17} Finally, Gill argues that the trial court erred in not considering the affidavits that he filed in conjunction with his motion for reconsideration and leave to file affidavits verifying the accuracy of the App.R. 9(C) statement. In the affidavits, Gill and his attorney swore to the validity of the App.R. 9(C) statement. We are disinclined to consider this argument because it does not correspond with the assignment of error. As a general matter, appellate courts review assignments of error, not mere arguments. *Coffman v. Mansfield Corr. Inst.*, 10th Dist. No. 09AP-447, 2009-Ohio-5859, ¶18.

{¶18} Moreover, even if Gill had assigned the failure to consider the affidavits as error, we would conclude that the trial court acted appropriately. The affidavits, which Gill submitted *after* the trial court's original judgment, were irrelevant to the question before the trial court on remand, i.e., whether Gill's statement of evidence was an appropriate means of supporting his objections to the magistrate's decision.

{¶19} In sum, we find no merit in Gill's assertion that the trial court erred in rejecting his App.R. 9(C) statement of evidence. Accordingly, we overrule his first assignment of error.

{¶20} Because Gill's second and seventh assignments of error are interrelated, we will address them together. By those assignments of error, Gill argues that the trial court erred in finding that Grafton had no duty to house him in a location that was well lit at night. We disagree.

{¶21} If an objecting party fails to submit a transcript or affidavit of evidence, the trial court must accept the magistrate's factual findings and limit its review to the magistrate's legal conclusions. *Gill* at ¶13; *Law Offices of James P. Connors v. Cohn*, 10th Dist. No. 08AP-1031, 2009-Ohio-3228, ¶23. On appeal of a judgment rendered without the benefit of a transcript or affidavit of evidence, an appellate court only considers whether the trial court correctly applied the law to the magistrate's factual findings. *Gumins* at ¶18; *Haynes v. Straub*, 10th Dist. No. 09AP-1009, 2010-Ohio-4089, ¶10.

{¶22} To recover on a claim for negligence, a party must prove the existence of a duty, a breach of that duty, and an injury proximately caused by the breach. *Flagstar Bank, F.S.B. v. Airline Union's Mtge. Co.*, 128 Ohio St.3d 529, 2011-Ohio-1961, ¶19. A prison is not an insurer of the safety of its inmates. *Franks v. Ohio Dept. of Rehab. and Corr.*, 10th Dist. No. 10AP-770, 2011-Ohio-2048, ¶13; *Clifton v. Ohio Dept. of Rehab. and Corr.*, 10th Dist. No. 06AP-677, 2007-Ohio-3791, ¶18. Rather, a prison owes inmates a common-law duty of reasonable care and protection from unreasonable risks. *Franks* at ¶12; *Clifton* at ¶18. Thus, a prison must exercise the degree of caution and foresight that

an ordinarily reasonable and prudent person would employ under the same or similar circumstances. *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318; *Woods v. Ohio Dept. of Rehab. and Corr.* (1998), 130 Ohio App.3d 742, 745. The extent of the prison's duty will vary with the circumstances. *Barnett v. Ohio Dept. of Rehab. and Corr.*, 10th Dist. No. 09AP-1186, 2010-Ohio-4737, ¶18; *McElfresh v. Ohio Dept. of Rehab. and Corr.*, 10th Dist. No. 04AP-177, 2004-Ohio-5545, ¶16.

{¶23} Here, the extent of Grafton's duty to Gill turns on whether an ordinarily reasonable and prudent person would have placed Gill in the D2 housing unit. As recounted by the magistrate, Gill testified at trial that he is blind in one eye and has had four surgeries on his other eye. Gill presented evidence that Grafton recognized and accommodated his impaired vision. Gill also stated that he could not see sufficiently to navigate the D2 unit after the main lighting in the unit was turned off, and he complained about that to multiple Grafton staff members.

{¶24} While Grafton acknowledged that Gill was visually impaired, it introduced evidence that Gill's eyesight was not as poor as Gill claimed. After a November 2002 vision examination, Gill was diagnosed with "questionable functional vision loss" in his left eye and "normal" vision in his right eye. Magistrate's decision, at 3. A March 2004 examination revealed "decreased visual acuity in [the] right eye," but because there was no explanation for a worsening of Gill's eyesight, the ophthalmologist "suspect[ed] malingering." *Id.*

{¶25} Based on Grafton's evidence, the magistrate concluded that Gill's vision was not so impaired that an ordinarily prudent and reasonable person would foresee that an injury would occur as a result of assigning Gill to the D2 unit. The prison's duty,

therefore, did not extend to placing Gill in a better lit housing unit. We find no error in the trial court's adoption of this legal conclusion given the facts as found by the magistrate. Accordingly, we overrule Gill's second and seventh assignments of error.

{¶26} By his third assignment of error, Gill argues that the trial court erred in adopting the magistrate's ruling that Gill did not claim an accommodation for his vision impairment. After reviewing the magistrate's decision, we conclude that the magistrate never made the ruling that Gill now disputes. Rather, the magistrate recognized Gill's testimony that he sought and received accommodations, including permission to use magnifiers to aid in reading and issuance of a special badge that designated him visually impaired. The magistrate also found that Gill complained about his housing situation to Grafton staff and sought relocation to a different unit. As the magistrate acknowledged those instances in which Gill claimed an accommodation, the trial court could not err in the manner that Gill asserts. Accordingly, we overrule Gill's third assignment of error.

{¶27} By his fourth assignment of error, Gill argues that the trial court erred in finding that Gill's own negligence barred him from recovering damages. We disagree.

{¶28} The contributory fault of a plaintiff bars him from recovery if it exceeds the negligence of all other persons involved. R.C. 2315.33. Here, as an alternative basis for his recommendation that the trial court render judgment for Grafton, the magistrate found that Gill failed to act reasonably to ensure his own safety. Thus, the magistrate concluded that Gill, not Grafton, was at fault for Gill's fall. The trial court adopted this conclusion, and because Gill's fault surpassed Grafton's, the trial court entered judgment for Grafton.

{¶29} Gill does not dispute that prisoners are required to use reasonable care to ensure their own safety. See *Nott v. Ohio Dept. of Rehab. and Corr.*, 10th Dist. No. 09AP-842, 2010-Ohio-1588, ¶8; *Horton v. Ohio Dept. of Rehab. and Corr.*, 10th Dist. No. 05AP-198, 2005-Ohio-4785, ¶8; *Harwell v. Grafton Corr. Inst.*, 10th Dist. No. 04AP-1020, 2005-Ohio-1544, ¶11. Instead, Gill attacks the evidentiary underpinnings for the magistrate's finding, adopted by the trial court, that Gill failed to use reasonable care. As set out above, the scope of our review of the trial court's judgment does not include consideration of whether the evidence supports the facts found by the magistrate and adopted by the trial court. Accordingly, we overrule Gill's fourth assignment of error.

{¶30} By Gill's fifth assignment of error, he argues that the trial court erred in ruling that he asserted a claim under 42 U.S.C. 1983, when he only asserted a negligence claim. Assuming that Gill's argument is correct, he fails to identify how he suffered any prejudice from the trial court addressing a claim that he did not assert. We cannot identify any prejudice either. Absent any indication of material prejudice, error is harmless and cannot serve as a basis for reversal. *Theobald v. Univ. of Cincinnati*, 160 Ohio App.3d 342, 2005-Ohio-1510, ¶17. Accordingly, we overrule Gill's fifth assignment of error.

{¶31} By his sixth assignment of error, Gill argues that the trial court erred in finding that a permanent medical restriction that he was "to be placed in a non-smoking pod, when one is available" automatically terminated without notice to him. Again, Gill challenges a factual finding that the magistrate did not reach. According to the magistrate, Gill possessed a medical restriction labeled "permanent" that entitled him to assignment to a non-smoking housing unit, if one was available. The magistrate also

found that, as Grafton's healthcare administrator testified, such medical restrictions were no longer issued, but Gill's medical restriction would have been honored had a bed in a non-smoking housing unit been open. Given that the magistrate never arrived at, and the trial court never adopted, a factual finding that Gill's medical restriction terminated, we overrule Gill's sixth assignment of error.

{¶32} By Gill's eighth assignment of error, he argues that the trial court erred in denying his motion for a new trial or, in the alternative, relief from judgment. We disagree.

{¶33} Civ.R. 59(A) provides multiple grounds on which a party may seek a new trial. On appeal, Gill fails to specify which of these grounds he relies upon to justify a new trial in his case. Rather, Gill merely argues that he deserves a new trial because the trial court wrongly rejected his App.R. 9(C) statement. We find that this argument correlates with two of the Civ.R. 59 grounds that Gill asserted before the trial court: (1) Civ.R. 59(A)(1), which allows the grant of a new trial if the moving party establishes "[i]rregularity in the proceedings of the court, jury, magistrate, or prevailing party * * *," and (2) Civ.R. 56(A)(7), which allows the grant of a new trial if "[t]he judgment is contrary to law."

{¶34} In the context of a motion for new trial, an "irregularity" is a departure from the due, orderly, and established mode of proceeding, whereby a party, through no fault of his own, is deprived of some right or benefit otherwise available to him. *Reeves v. Healy*, 10th Dist. No. 10AP-418, 2011-Ohio-1487, ¶18; *Am. Chem. Soc. v. Leadscope*, 10th Dist. No. 08AP-1026, 2010-Ohio-2725, ¶93, appeal accepted, 126 Ohio St.3d 1615, 2010-Ohio-5101. The decision to grant or deny a new trial pursuant to Civ.R. 59(A)(1) rests within the trial court's discretion, and an appellate court will not reverse such a

decision absent an abuse of that discretion. *Reeves* at ¶18; *Weinstock v. McQuillan*, 10th Dist. No. 09AP-539, 2010-Ohio-1071, ¶10.

{¶35} Here, Gill cannot point to any departure from the rules governing trial court proceedings. As we determined above, the trial court appropriately applied Civ.R. 53(D)(3)(b)(iii). Therefore, we conclude that the trial court did not abuse its discretion in denying Gill a new trial on the basis of an irregularity in the proceedings.

{¶36} A court reviewing a trial court's decision regarding a Civ.R. 59(A)(7) motion for a new trial must decide whether the trial court erred as a matter of law. *Mullins v. Comprehensive Pediatric and Adult Medicine, Inc.*, 7th Dist. No. 07 MA 144, 2009-Ohio-1310, ¶88; *Elwer v. Carrol's Corp.*, 3d Dist. No. 1-06-33, 2006-Ohio-6085, ¶22; *Wright v. Suzuki Motor Corp.*, 4th Dist. No. 03CA2, 2005-Ohio-3494, ¶127. In refusing to accept Gill's App.R. 9(C) statement of evidence, the trial court did not commit any error. Therefore, we conclude that the trial court did not err in denying Gill a new trial on the basis that its judgment was contrary to law.

{¶37} Finally, Gill argues that the trial court should have granted him relief from judgment under Civ.R. 60(B)(5). Intended as a "catch-all" provision, Civ.R. 60(B)(5) "reflect[s] the inherent power of a court to relieve a person from the unjust operation of a judgment." *Caruso-Ciresi, Inc. v. Lohman* (1983), 5 Ohio St.3d 64, paragraph one of the syllabus. Courts only invoke Civ.R. 60(B)(5) in those extraordinary and unusual cases where the moving party demonstrates substantial grounds warranting relief from judgment. *Id.*, paragraph two of the syllabus; *Social Psych. Servs., Inc. v. Magellan Behavioral Health, Inc.*, 10th Dist. No. 10AP-326, 2010-Ohio-6531, ¶17.

{¶38} The decision to grant or deny a Civ.R. 60(B) motion rests in the trial court's sound discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 77. An appellate court will not reverse such a decision absent an abuse of that discretion. *Id.*

{¶39} Here, Gill asserts that relief under Civ.R. 60(B)(5) is justified by "a denial of due process and a disregard of previous practice of utilizing the 9(C) process in various courts." Appellant's brief, at 24. As we explained above, we find that the use of an affidavit of evidence does not violate procedural due process. Moreover, we conclude that the trial court did not abuse its discretion in refusing to grant relief from judgment based on one instance where a trial court allowed the use of an App.R. 9(C) statement in lieu of an affidavit of evidence.² Accordingly, we overrule Gill's eighth assignment of error.

{¶40} For the foregoing reasons, we overrule all of Gill's assignments of error, and we affirm the judgment of the Court of Claims of Ohio.

Judgment affirmed.

BRYANT, P.J., and CONNOR, J., concur.

² The one instance we refer to is *Zartman*. Gill failed to direct us to any other instance.