[Cite as *Rollison v. Humility of Mary Health Partners,* 2017-Ohio-7959.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

RICHARD C. ROLLISON, III, ADMINISTRATOR OF THE ESTATE OF RICHARD C. ROLLISON, IV, DECEASED,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2016-T-0090**
- vs -	:	
HUMILITY OF MARY HEALTH PARTNERS, d.b.a. ST. JOSEPH HEALTH CENTER, et al.,	:	
Defendant-Appellee.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2014 CV 01961.

Judgment: Affirmed.

Percy Squire, Percy Squire Co., L.L.C., 341 South Third Street, Suite 10, Columbus, OH 43215, and *Sarah Thomas Kovoor,* Ford, Gold, Kovoor & Simon, Ltd., 8872 East Market Street, Warren, OH 44484 (For Plaintiff-Appellant).

Marshall D. Buck, Comstock, Springer & Wilson, 100 Federal Plaza East, #926, Youngstown, OH 44503 (For Defendant-Appellee).

CYNTHIA WESTCOTT RICE, P.J.

{¶1} Appellant, Richard C. Rollinson, III, Administrator of the Estate of his son, Richard C. Rollinson, IV, Deceased, appeals the judgment of the Trumbull County Court of Common Pleas denying his motion for new trial. He also appeals the court's judgment denying his motion for judgment notwithstanding the verdict ("JNOV").

Appellant filed these motions after the trial court entered judgment on a jury verdict against him and in favor of appellee, Humility of Mary Health Partners, d.b.a. St. Joseph Health Center ("St. Joseph") on appellant's complaint for wrongful death/medical malpractice. Because the trial court did not abuse its discretion in denying appellant's motion for new trial or err in denying his motion for JNOV, we affirm.

{¶2} As a preliminary matter, we note that appellant's statement of facts is not supported by *any* references to the trial transcript. In fact, appellant did not file the transcript. As a result, appellant's statement of facts does not comply with App.R. 16(A)(7). According to the complaint, on October 26, 2013, appellant's son was the victim of multiple gunshot wounds while he was at a gas station in Warren, Ohio. He was transported to St. Joseph's trauma center, where he was treated and stabilized. He was then transported to St. Elizabeth Hospital for further treatment, where he expired later that day.

{¶3} One year later, on October 27, 2014, appellant filed a complaint asserting a claim for wrongful death/medical malpractice against St. Joseph. He alleged his son died due to St. Joseph's negligence in failing to provide him with appropriate care before he was transported to St. Elizabeth.

{¶4} The case was tried to a jury beginning on July 11, 2016. The jury returned a verdict against appellant and in favor of St. Joseph on July 22, 2016. The trial court entered judgment on the verdict.

{¶5} Subsequently, on August 1, 2016, appellant filed a motion for new trial alleging juror misconduct. St. Joseph filed a brief in opposition. The court denied the

motion. Two weeks later, appellant filed a motion for JNOV. St. Joseph filed a brief in opposition. The trial court also denied that motion.

{¶6} Appellant appeals, asserting two assignments of error. For his first, he alleges:

{¶7} "The Trial Court committed prejudicial error when it overruled Appellant's motion for new trial due to juror misconduct."

{¶8} We review a trial court's ruling on a motion for new trial based on juror misconduct for an abuse of discretion. *Koch v. Rist*, 89 Ohio St.3d 250, 251 (2000).

{¶9} Appellant's motion for a new trial was based on the affidavit of Robin Wilson, a secretary in the office of appellant's attorney. According to Ms. Wilson's affidavit, after the jury returned its verdict, she was outside the courthouse when she saw Juror No. 8 having a conversation with an unidentified person Ms. Wilson referred to as "Mrs. A." Ms. Wilson said that after their conversation, Mrs. A told her that Juror No. 8 said Juror No. 1 told the jury she had discussed the standard of care in this case with her physician-husband and shared with the jurors what her husband said.

{¶10} Ms. Wilson said that she and Mrs. A later went to Juror No. 8's home "to get clarification" from her and at that time Juror No. 8 said Mrs. A must have misunderstood her because Juror No. 1 did not say she talked to her husband about the case. Juror No. 8 said she "just assumed" Juror No. 1 talked to her husband about it because she, i.e., Juror No. 8, talked to her own husband each night about the case, telling him "they said this and they said that."

{¶11} Apparently recognizing he had no evidence to challenge the verdict based on any alleged misconduct of Juror No. 1, appellant argued in his motion that he was

entitled to a new trial based *solely* on Juror No. 8's discussions with her husband. Appellant also asked for an order requiring the spouses of both Juror No. 1 and Juror No. 8 to appear for examination by the court.

{¶12} "'Misconduct of a jury will not be presumed, but must be affirmatively proved. The law will presume proper conduct on their part. Clear and positive evidence aliunde is necessary to overcome this presumption.'" *First Natl Bank of Omaha v. iBeam Solutions, L.L.C.*, 10th Dist. Franklin No. 13AP-850, 2016-Ohio-1182, ¶61, quoting *Lund v. Kline*, 133 Ohio St. 317, 320 (1938).

{¶13} Evid.R. 606(B), regarding the competency of a juror to testify at a later proceeding regarding the jury's verdict, provides:

> **{¶14}** Upon an inquiry into the validity of a verdict * * *, a juror may not testify as to any matter or statement occurring during the * * * jury's deliberations or to the effect of anything upon that or any other juror's mind * * * as influencing the juror to assent to or dissent from the verdict * * *. A juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear on any juror, *only after some outside evidence of that act or event has been presented*. (Emphasis added.)

{¶15} "The first sentence of Evid.R. 606(B) embodies the common-law tradition of *protecting and preserving the integrity of jury deliberations* by declaring jurors generally incompetent to testify as to any matter directly pertinent to, and purely internal to, the emotional or mental processes of the jury's deliberations. The rule is designed to protect the *finality of verdicts* and to ensure that jurors are insulated from harassment by defeated parties." *State v. Schiebel*, 55 Ohio St.3d 71, 75 (1990). The second sentence "conforms to Ohio's aliunde rule[,]" which "requires the introduction of evidence from a competent source *other than a juror* to impeach a jury verdict."

(Emphasis added.) Staff Notes to Evid.R. 606(B). The Ohio Supreme Court, in *Schiebel, supra*, explained:

> **{¶16}** In order to permit juror testimony to impeach the verdict, a foundation of extraneous, independent evidence must first be established. This foundation must consist of information from *sources other than the jurors themselves*, * * * and the information must be from *a source which possesses firsthand knowledge* of the improper conduct. One juror's affidavit alleging misconduct of another juror may not be considered without evidence aliunde being introduced first. * * * Similarly, where an attorney is told by a juror about another juror's possible misconduct, the attorney's testimony is incompetent and may not be received for the purposes of impeaching the verdict or for laying a foundation of evidence aliunde. (Emphasis added.) *Id*. at 75-76.

{¶17} Further, it is well settled that a court will not set aside a verdict unless the complaining party affirmatively demonstrates prejudice resulting from jury misconduct. *State v. Kehn*, 50 Ohio St.2d 11, 19 (1977). "It is a long-standing rule of this court that we will not reverse a judgment because of the misconduct of a juror unless prejudice to the complaining party is shown." *Id.* In other words, in order to impeach a jury verdict, the evidence aliunde must demonstrate the alleged jury misconduct had a prejudicial effect on the verdict. *Bentley v. Kremcheck*, 1st Dist. Hamilton No. C-040721, 2005-Ohio-3038, ¶5.

{¶18} I. Lack of Independent Source for Information in Affidavit

{¶19} Since a juror cannot impeach the jury's verdict directly by his testimony, a defeated party cannot indirectly impeach the verdict via an affidavit of a third party that is based on what a juror has said. *Sedgwick v. Kawasaki Cycleworks, Inc.*, 71 Ohio App.3d 117, 136 (10th Dist.1991); a*ccord State v. Kellum*, 2d Dist. Miami No. 81 CA 47, 1982 WL 3795, *8 (Sep. 10, 1982) ("A third person's affidavit to the effect that he has heard jurors make, subsequent to trial, statements tending to impeach their verdict, is

not evidence aliunde. This result is based on the fact that the evidence is received not from another source, but from the jurors themselves.")

{¶20} Here, appellant submitted the affidavit of Ms. Wilson in an apparent attempt to provide evidence from an outside source. However, the source of Ms. Wilson's affidavit as to what Juror No. 8 said (about discussing the case with her husband) was not Ms. Wilson, but, rather, was Juror No. 8 herself. Since appellant could not impeach the verdict directly by Juror No. 8's affidavit, he could not indirectly impeach the verdict via an affidavit as to what Juror No. 8 said to Ms. Wilson.

{¶21} Further, since an attorney's affidavit about possible juror misconduct learned from another juror is incompetent and improper aliunde evidence, *Schiebel, supra*, the affidavit of Ms. Wilson, appellant's attorney's secretary, to the same effect is equally incompetent.

{¶22} Contrary to appellant's argument, *it makes no difference* that Ms. Wilson said Juror No. 8 admitted discussing the case with her husband. Otherwise, a defeated party could challenge a verdict simply by having a third party say that a juror *admitted* misconduct. The aliunde rule requires that the evidence come from a source other than a juror. *Kellum, supra*. In any event, appellant fails to cite any case law holding that a juror's alleged admission is an exception to the aliunde rule.

{¶23} II. Lack of Firsthand Knowledge of Juror Misconduct

{¶24} Ms. Wilson's affidavit is also incompetent because she did not have *firsthand knowledge* of any alleged misconduct of Juror No. 8 in that Ms. Wilson did not witness her discussing the case with her husband. Rather, as noted above, the sole source of Ms. Wilson's affidavit was Juror No. 8.

{¶25} For these reasons, Ms. Wilson's affidavit was incompetent to challenge the validity of the verdict with respect to any misconduct of Juror No. 8. Appellant thus failed to demonstrate the existence of juror misconduct.

{¶26} III. Lack of Prejudice

{¶27} Appellant also failed to present any evidence that he was prejudiced by alleged misconduct on the part of Juror No. 8 or that it had any effect on the verdict. While her conduct was obviously improper, Juror No. 8 said she simply told her husband each night what was said in court that day. No evidence was presented that Juror No. 8 received any information about the case from her husband.

{¶28} IV. Request for Examination of The Jurors' Spouses

{¶29} Appellant included in his motion a request for an order requiring the spouses of Juror No. 1 and Juror No. 8 to be examined by the court to try to obtain evidence aliunde to challenge the verdict. However, he cites no case law holding he was entitled to an examination of the spouses without any evidence aliunde.

{¶30} As noted above, the policy behind the aliunde rule is to protect the finality of verdicts and to insulate jurors from harassment by defeated parties. *Schiebel, supra*. Appellant's motion attempted to circumvent this policy by seeking to compel testimony from the jurors' spouses rather than the jurors themselves. However, if jurors' spouses (or other family members) could be examined by disgruntled parties post-verdict without evidence aliunde, this would obviously also adversely affect the jurors involved, thus defeating the policy the rule was designed to promote.

{¶31} We agree with the trial court's finding that if the court were to issue the order sought by appellant, this would set a dangerous precedent by allowing attorneys

of defeated parties to haul jurors' family members into court whenever there was a mere suspicion of juror misconduct with no evidence aliunde in support.

{¶32} Appellant argues an examination of the juror's spouses would have revealed whether the jurors shared their discussions with their husbands with the jury. However, the source of such information could only be Juror No. 1 and Juror No. 8.

{¶33} No credible evidence was presented by appellant in support of his request for an examination of the jurors' spouses. Ms. Wilson's affidavit was based on *hearsay* relayed by an *unidentified* source.

{¶34} In fact, no evidence was presented of any improper influence exerted by either of the jurors' spouses. Contrary to appellant's argument, Juror No. 8 did not "retract" her alleged statement to Mrs. A that Juror No. 1 talked to her husband about the case. To the contrary, Juror No. 8 denied she ever said this. A retraction is a withdrawal of a former statement. Webster's New World Dictionary 635 (Concise Ed.1966). Even according to Ms. Wilson's affidavit, Juror No. 8 told Mrs. A that she must have "misunderstood" her because Juror No. 1 never said she had discussed the case with her husband. As a result, there was no evidence the jurors' spouses influenced the verdict and, thus, there was no reason for the trial court to examine the spouses because there was nothing to investigate.

{¶35} Finally, a few comments are in order regarding the conduct of appellant's counsel at oral argument. During his rebuttal, after he cited two cases, *State v. Phillips*, 74 Ohio St.3d 72 (1995), and *State v. Rudge*, 89 Ohio App.3d 429 (11th Dist.1993), a member of the panel asked him if he had cited these cases in his brief and he said "yes, your honor." In fact, he had not cited them. Another member of the panel then advised

counsel that he had not cited *Rudge* in his briefs. While counsel later wrote a letter to the court apologizing for his "misstatement," the damage had already been done. By waiting until his rebuttal to cite these cases, appellant's counsel effectively prevented opposing counsel from addressing them. For this reason, counsel is not ordinarily permitted to cite case law during oral argument that was not cited in briefing.

{¶36} We therefore hold the trial court did not abuse its discretion in denying appellant's motion for new trial due to Juror No. 8's discussions with her husband or in denying appellant's request for an order requiring the spouses of Juror No. 1 and Juror No. 8 to appear for examination by the court.

{¶37} For his second and last assigned error, appellant alleges:

{¶38} "The Trial Court committed reversible error when it overruled Appellant's motion for Judgment Notwithstanding the Verdict."

{¶39} "The test to be applied by a trial court in ruling on a motion for [JNOV] is the same test to be applied on a motion for a directed verdict. The evidence adduced at trial and the facts established * * * in the record must be construed most strongly in favor of the party against whom the motion is made, and, where there is substantial evidence to support his side of the case, upon which reasonable minds may reach different conclusions, the motion must be denied. Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in ruling upon [such motion]." *Posin v. A.B.C. Motor Court Hotel, Inc.*, 45 Ohio St.2d 271, 275 (1976). The question is whether there was sufficient evidence for the trial court to submit the case to the jury. *O'Day v. Webb*, 29 Ohio St.2d 215 (1972), paragraph four of the syllabus. A motion for JNOV does not present factual issues, but rather a question of law. *Blatnik v.*

Avery Dennison Corp., 148 Ohio App.3d 494, 504 (11th Dist.2002). As such, "[w]e review a trial court's ruling on a motion for [JNOV] * * * de novo." *Lanzone v. Zart*, 11th Dist. Lake No.2007-L-073, 2008-Ohio-1496, ¶56.

{¶40} Appellant argues he is entitled to JNOV because the evidence was insufficient to support the verdict in favor of St. Joseph. The Ohio Supreme Court, in *Bruni v. Tatsumi*, 46 Ohio St.2d 127 (1976), held:

> **{¶41}** In order to establish medical malpractice, it must be shown by a preponderance of evidence that the injury complained of was caused by the doing of some particular thing * * * that a physician * * * of ordinary skill, care and diligence would not have done under like or similar * * * circumstances, or by the failure * * * to do some particular thing * * * that such a physician * * * would have done under like or similar * * * circumstances, and that the injury complained of was the direct and proximate result of such doing or failing to do [the thing]." *Id.* at paragraph one of the syllabus.

{¶42} In order to show that the actions of the physician fell below the standard of care and that this breach was the cause of the plaintiff's injuries, the plaintiff must present expert testimony. *Celmer v. Rodgers*, 11th Dist. Trumbull No. 2004-T-0074, 2005-Ohio-7054, ¶30. "In particular, an expert witness must testify as to the applicable standard of care, the breach of that standard, and proximate cause." *Id*.

{¶43} Here, the jury entered a general verdict in favor of St. Joseph. The jury also found in their interrogatories that St. Joseph was not negligent and that no such negligence proximately caused the death of appellant's decedent. Further, in the court's judgment denying appellant's motion for JNOV, the court found that JNOV was not warranted because there was sufficient evidence in the record to support the verdict in St. Joseph's favor.

{¶44} Although appellant obtained from this court an extension of time to file the complete trial transcript, he never filed it. Instead, he filed a partial transcript consisting of just two witnesses (neither of whom was qualified to testify as a medical expert under Evid.R. 601(D)) and several depositions, but he does not refer to any of this testimony in his brief. Moreover, appellant does not reference the record to show that any of these depositions was read or otherwise presented as evidence at trial.

{¶45} "It is the duty of an appellant to ensure that the record, or whatever parts thereof are necessary for the determination of the appeal, are filed with the appellate court." *In re Kovacic*, 11th Dist. Lake No. 2008-L-101, 2008-Ohio-6882, ¶22. "An appellant has the duty to exemplify any alleged errors by reference to the record." *Id*., citing *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199 (1980). "It is an appellant's duty to provide a record of the trial court's proceedings that is necessary for the resolution of his appeal * * *." *Kovacic, supra* at ¶23. "The duty to provide a transcript for appellate review falls upon the appellant because he or she has the burden of showing error by reference to the record." *Id*. at ¶24, citing *Knapp, supra*. "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, supra*.

{¶46} "[A] motion for judgment notwithstanding the verdict is decided upon a review of all evidence submitted." *Clevecon, Inc. v. Northeast Ohio Regional Sewer Dist*., 90 Ohio App.3d 215, 222 (8th Dist.1993). *Accord Ayers v. Woodard,* 166 Ohio St. 138, 142 (1957). Thus, appellant was required to present the complete trial transcript

containing all evidence presented to the jury. Because he failed to do so, we are left with no alternative but to presume the regularity of the trial court's ruling on his motion for JNOV and that, as the trial court found, the jury's verdict was supported by sufficient evidence. Significantly, appellant does not even address his failure to file the transcript.

{¶47} Appellant attempts to avoid the consequences of his failure to file the transcript by attaching to his appellate brief a copy of a document, entitled "American College of Surgeons Consultation/Verification Program Reference Guide of Suggested Classification," which, he argues, sets forth the pertinent standard of care. However, Loc.R. 16(B)(1) prohibits documents from being attached to the brief. Further, without the transcript, appellant does not show that this document was offered or admitted in evidence. That document is therefore stricken from the record. Also, without a transcript, appellant does not (1) show the document was authenticated, or (2) reference any expert testimony stating that the document contained the pertinent standard of care or that St. Joseph breached it. Moreover, without a transcript, we must presume the verdict in favor of St. Joseph was supported by sufficient evidence.

{¶48} We thus hold the trial court did not err in denying the motion for JNOV.

{¶49} For the reasons stated in this opinion, the assignments of error are overruled. It is the order and judgment of this court that the judgment of the Trumbull County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, J., concurs,

THOMAS R. WRIGHT, J., concurs in judgment only.