

IN THE SUPREME COURT OF OHIO

07-1448

Teresa Frazier, Executor, :
Appellant, : On Appeal from the Fairfield
County Court of Appeals,
v. : Fifth Appellate District
Charles Pruitt, M.D., et al. : Court of Appeals
Appellees. : Case No. 2005 CA 00099

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT TERESA FRAZIER

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EXPLANATION OF WHY THIS CASE IS A CASE OF
PUBLIC OR GREAT GENERAL INTEREST AND
INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

This case presents important questions about jury instructions in cases where a coroner is called to testify. One question has to do with the scope of the coroner's authority under the Ohio Revised Code. This is an important issue because, in the case at bar, the coroner claimed he had statutory authority to render a determination as to the liability of a third person, a physician, with regard to a patient's death. This is an extremely dangerous precedent, for it would allow a coroner to state his or her opinion, in a criminal law case, that a specific person did or did not commit a murder, rather than just stating that the death was a homicide.

This outcome raises other difficult issues, for one need only consider what would happen if a coroner were allowed to state his or her opinion that someone, other than the defendant, was the murderer. Likewise, a defendant's counsel would be allowed to question the coroner whether someone other than the defendant might be guilty.

This case could also set a dangerous precedent in that, if followed, Ohio' coroners could all become expert witnesses, rendering standard of care opinions in medical cases. They could testify, based solely on their elected status, whether or not they had the requisite education, training and experience, otherwise required, in the particular field of medicine. This is a scary proposition for it would allow a small-town, family-doctor, who was a coroner, to render a standard of care opinion in the field of surgery, against a surgeon, for example at the Ohio State University. At a time when both plaintiffs' counsel and defense counsel should share the goal of having well-qualified experts testify in their appropriate fields, this case would create a special exception for coroners.

In the case bar, Dr. David Cummin, a family physician, was called to testify as to the standard of care in emergency medicine, simply because he is a coroner. In closing argument, defense counsel candidly admitted (Tr. 20-21, September 20, 2005):

We've called Dr. Cummin, and he is the Hocking County Coroner. We didn't call him as an emergency room doctor...We called him because he is the chief investigator for that county. He was doing this as part of his duties, as an elected official of that county...Now the Court is going to instruct you about his verdict....

Dr. Cummin, the Hocking County Coroner, offered testimony in favor of the defendant, one Dr. Pruitt, who just happens to be the emergency medicine partner of the Fairfield County Coroner. On the other hand, in some other case, an unqualified coroner could just as easily render standard of care testimony adverse to a hospital or physician.

This outcome stands years of established case law on its head, for it says that the requirements of *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, 346 N.E.2d 673, do not apply to Ohio's coroners.

The closing argument, quoted above, provides another reason why this case should be reviewed by the Supreme Court. Indeed, the jury instruction, given in this case, elevates the testimony of Dr. Cummin above that of every other expert in the case, just because of his official capacity. In fact, the instruction at issue creates a "non-binding rebuttable presumption" that the coroner's determinations are to be "legally accepted" and "as a matter of law" if there is no "competent credible evidence" contrary to the opinions of the coroner – whatever that means.

Further, the trial court overruled Appellant's objections to the instruction, stating that the jury, rather than the judge, should determine whether there was such competent,

credible evidence. However, allowing jurors to make this determination, rather than the trial judge, is contrary to established case law. *Moore v. Retter* (1991), 72 Ohio App. 3d 167, 594 N.E.2d 122; and *Evans v. National Life & AA. Ins. Co.* (1986), 22 Ohio St. 3d 87, 488 N.E. 2d 1247. This outcome would mean that such an instruction would be given in every case, so jurors would hear, and read, that the coroner's standard of care opinions were special.

So how did this all come about? The answer is that the jury instruction was proposed by defendants, based on *Vargo v. Travelers Ins. Co, Inc.* (1987), 34 Ohio St. 3d 27, an action to collect the proceeds of an insurance policy. ^{1/} In *Vargo*, the question was

^{1/} See Appendix A for the text of this instruction. This text is taken from Tab A of Appellee's brief to the Court of Appeals. This text is also in Document #69, identified on the docket sheet as the proposed jury instructions submitted by defendants to the trial court. A copy of the transcript of the trial judge reading the written instructions to the jurors is also provided. This transcript was ordered, and filed by the Court Reporter, when Appellant was first informed, by the Opinion in this case, that only an incomplete copy of the written jury instructions required by Civ.R. 51(A) and R.C. 2315.01(A)(7) was transmitted by the common pleas court to the Court of Appeals.

This incomplete document is #109 on the docket sheet – called JURY INSTRUCTIONS. The adequacy of these written instructions, for purposes of this appeal, was only briefly addressed in a footnote in Appellee's Brief (n.4 at page 11). It was likewise only mentioned in a footnote in Appellant's Reply Brief (n.4 at page 8). It was not addressed by either party, or raised by the Court, at oral argument.

Even so, the Court of Appeals properly tried to determine the text of the *Vargo* instruction by reference to this Document #109. But, because the document was incomplete, the Court said it could not rule on Appellant's assignment of error (Opinion at 6). Appellant then filed a timely application for reconsideration and correction of the record based on App. R. 9(E), because Civ.R. 51(A) and R.C. 2315.01(A)(7) require the trial court to file a complete set of the written instruction. See text, *infra* at 5.

whether a driver suffered a heart attack before driving his car off the highway, or as a result of his driving off the highway -- which has absolutely nothing to do with standard of care issues in a medical case.

In Ohio, coroners exercise only the jurisdiction provided by statute – Chapter 313 of the Ohio Revised Code. *State v. ex rel Harrison v. Perry* (1925), 113 Ohio St. 641, 150 N.E. 78. Until now, there was no dispute that such authority is limited to making determinations of “cause of death” and “manner and mode of death.” As noted by the Attorney General, “cause of death” is basically the medical or physiological reason for the death; the “mode” of death is generally the type of instrument or injury, for example, by gun, knife or poison, etc.; and the “manner of death” is whether the death was by natural causes, suicide, homicide, accident or undetermined. Ohio Attorney General’s Opinion No. 80-0891, 1980 Opinions 2-351. None of these determinations, however, pertain to the civil or criminal liability of a third-person, for someone else’s death.

This case also is important because it presents a novel question as to the meaning of R.C. 2315.01(A)(7) and Civ.R. 51(A), which implement the recommendation of the Supreme’s Court’s Task Force on Jury Service. These provisions require the trial judge to give the jurors a written copy of the jury instructions. The trial court is to first read such written instructions to the jurors -- without oral modification or qualification – and then give the written instructions to the jury to take with them as they deliberate. R.C. 2315.01(A)(7) further requires that the written instructions must be returned to the trial court with the verdict. The instructions must then be filed by the trial judge, to become part of the record on appeal.

The Court of Appeals was clearly aware that Appellant had not ordered the transcript of the trial court reading the written instructions. So, the Court properly tried review the written instructions that were transmitted by the common pleas court. However, the Court of Appeals discovered that the trial court had submitted only an incomplete copy of the written instructions, Document #109 on the docket sheet. For this reason, the Court said it was unable to rule on Appellant's assignment of error as to the *Vargo* instruction.

But, had Document #109 been complete, it would have been identical to the transcript of the trial judge reading the written instructions. For this reason, Appellant filed a timely application for reconsideration and correction of the record on appeal.

See n.1, *supra*.

This situation raises another important question: whether the transcript of the testimony of the Hocking County Coroner, and closing argument, are sufficient to show that the *Vargo* jury instruction and Dr. Cummin's testimony, as coroner, were unduly prejudicial. The Court of Appeals held that the entire transcript was needed to make this determination.

To be sure, a full transcript would be necessary to sustain a weight of the evidence argument, or to prove there was absolutely no evidence presented to justify giving a challenged jury instruction. On the other hand, App. R. 9 expressly contemplates partial transcripts in other situations – as in the case at bar.

Here, the transcript of Dr. Cummin's testimony and the defendants' closing argument demonstrate that the *Vargo* jury instruction was highly prejudicial for several reasons: (1) the instruction should never have been given at all, yet it gives elevates the status of Dr.

Cummin's standard of care testimony above that of every other expert; (2) the instruction, on its face, creates a confusing presumption that Dr. Cummin's opinions were "legally accepted", (3) it permits Dr. Cummin to render a standard of care opinion solely on the basis of his official capacity, and (4) it allows Dr. Cummin to testify as coroner on standard of care, and cloaks his extra-statutory testimony with the authority of his office. Thus, there is no reason to require Plaintiff to provide a complete transcript, in this case. The prejudice to Appellant is obvious from just the closing argument and Dr. Cummin's testimony.

Last, this case raises a constitutional issue: Is Appellant denied due process under the Ohio and United States Constitutions, when State officials, in the common pleas court, fail to file complete copy of the written jury instructions as required by Civ. R. 51(A) and R.C. 2315.01(A)(7). There should be no reason for Appellant to be required to provide a transcript of the trial court simply reading the written instructions, when the transcript would be identical to the written instructions themselves.

In sum, the Opinion of the Court of Appeals sets dangerous precedent regarding the testimony of Ohio's coroners, in medical negligence cases, which would open the door to mischief in the prosecution of criminal law defendants. The Opinion would also negate the important work of this Court's Task Force on Jury Service, regarding written jury instructions. And, it raises due process issues, because State officials failed to follow Civ. R. 51(A) and R.C. 2315.01(A)(7). For these reasons, this Court must grant jurisdiction to hear this case and to review the Opinion of the Court of Appeals.

STATEMENT OF THE CASE AND FACTS

This case arises from a challenge to a jury instruction given by the trial court at the conclusion of a medical case. Very briefly, Robert Frazier had chest pains, off and on since the day before. The pain went to the left side of his neck. He sought medical care at the emergency department at Fairfield Medical Center. After initial tests were done, he had subsequent chest discomfort, yet was sent home. He died that evening at Hocking Valley Community Hospital, having suffered a heart attack. The jury's verdict was for the defense.

The Hocking County Coroner, David Cummin, M.D., testified along with others, for the defendants. He testified as to standard of care, in his official capacity, and not as an expert in emergency medicine. The instruction, offered on the basis of *Vargo v. Travelers Ins. Co., Inc.* (1987), 34 Ohio St.3d 27, 516 N.E.2d 226, stated that the coroner's determinations create a "non-binding rebuttable presumption" and were "legally accepted" in the absence of "competent credible evidence to the contrary."

Objections to the jury instruction, raised before and during the trial, were overruled. First, Plaintiff-appellant argued that a coroner's duties, as set forth in R.C. Chap. 313, did not extend to standard of care and liability matters, and that the instruction was unduly prejudicial, as it cloaked the coroner's opinions with the authority of his office and served to elevate his status above all other experts. Second, Plaintiff-Appellant maintained that the instruction should never have been given at all, because the trial court left it to the jury to determine whether Plaintiff had submitted such competent, credible evidence. Based on this ruling, the instruction would be given in every case. Rather, the decision whether a jury instruction applies should be made by the trial court.

The Court of Appeals declined to address these matters, stating “we have no way to determine what charge was read to the jury.” The Court of Appeals was aware that Appellant did not order the transcript of the judge reading the instructions to the jury. Even so, as suggested by Appellant (n. 4, Reply Br. at 8) the Court of Appeals properly tried to determine the text of the jury instruction by referring to Document #109. But, the Court of Appeals discovered that Document #109 was incomplete.

This outcome penalized Appellant for what certainly was a simple error by someone at the common pleas court in transmitting a complete Document # 109 to the Court of Appeals. For example, perhaps some pages were lost when the court scanned them into its system, or perhaps they were not stapled together.

But, this Court has said that an appellant has no “obligation ... to supervise the actions of the clerk of the trial court to ensure that he [or she] transmits every portion of the record that the praecipe requests.” Further, litigants are not to be denied their day in court because a complete record was not assembled and transmitted. *Cobb v. Cobb* (1980), 62 Ohio St.2d 124; *In re Holmes*, 104 Ohio St.3d 664, 2004-Ohio-7109.

Accordingly, the Court of Appeals should have considered whether Appellant should be penalized, or whether there was some other way to obtain a complete copy of the Document #109 jury instructions from the common pleas court. Because the Court of Appeals did not consider these matters that were raised by its Opinion, Appellant filed a timely application for reconsideration and correction of the record on appeal based on App. R. 9(E), Civ.R. 51(A), and R.C. 2315.01(A)(7). *Matthews v. Matthews* (1981), 5 Ohio App.3d 140; *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197 (Justice

Holmes, concurring); *Cobb v. Cobb*, supra; *In re Holmes*, supra; and *Reichart v. Ingersoll* (1985) 18 Ohio St.3d 220, 222-23.

App. R 9(E) certainly could have been used by the Court of Appeals to obtain, from the trial court, a complete copy of the instructions. This rule permits a court of appeals, on its own initiative, to correct an omission occurring by error or accident, or to direct that a supplemental record be certified and transmitted. *State v. Kuhn*, 2003-Ohio-4007 citing *Cobb v. Cobb*. So, too, the Court of Appeals could have remanded the case to the trial court, to correct a clerical mistake via Civ.R. 60(A). *Knapp v. Edwards Laboratories*, supra.

The Court of Appeals also held that it arguably was error for the trial court to allow the coroner to testify on standard of care (Opinion at 6-7). But, the Court erred in ruling that an entire transcript was needed to determine the prejudicial effect of this error, or any error arising from the *Vargo* instruction.

Further, the Court of Appeals should have determined that it is the duty of the trial court, and not the jury, to determine whether a plaintiff has submitted any competent, credible evidence contrary to the coroner's opinions, and that if such evidence has been presented, the *Vargo* instruction should not be given.

Last, in light of Civ.R. 51(A) and R.C. 2315.01(A)(7), the Opinion of the Court of Appeals denies Appellant due process under the Ohio and United States Constitutions, as State officials failed to follow these provisions, set forth by this Court and by legislature.

In support of its position on these issues, the appellant presents the following argument.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: Revised Code Chapter 313 does not grant to Ohio's coroners authority to render opinions as to the liability of third-persons for another person's death.

In Ohio, coroners exercise only the limited jurisdiction provided by statute, Chapter 313 of the Revised Code. *State ex rel. Harrison v. Perry* (1925), 113 Ohio St. 641, 150 N.E. 78. This authority is limited to determinations as to cause of death and manner and mode of death. Ohio Attorney General's (OAG) Opinion No. 80-091, 1980 Opinions 2-351. A coroner has no authority to apply law to the facts and determine what, if any statute has been violated, and the legal responsibility of persons involved. OAG Opinion No. 69-036, 1969 Opinions 69-036; Opinion No. 80-091, 1980 Opinions 2-356. A coroner's inquiry into human causation and legal responsibility goes far beyond the scope of the statute. *State v. Cousin* (1982), 5 Ohio App.3d 32, 34, 449 N.E.2d 32. So, too, the coroner's "limited investigation" does not "resolve other facts or the legal or criminal responsibility of those involved." *Everman v. Davis* (1989), 54 Ohio App.3d 119, 121, 561 N.E.2d 547.

Proposition of Law No. II: It is the duty of the trial court to decide whether any competent credible evidence was presented contrary to the coroner's testimony, and whether the presumption jury instruction applies. In this case, the instruction should not have been given.

The following language of this Court is instructive (emphasis added):

The crux of the question is who shall determine sufficiency of the evidence produced contrary to the presumption and whether the presumption has been rebutted – the trial judge or jury. This court, by its case law on this subject, has concluded that it must be the trial

court, and when it is so determined by the trial court that there has been a sufficiency of evidence adduced to rebut the presumption... the jury should be charged in the normal fashion with no instruction being given concerning the presumption....

Evans v. National Life & Acc. Ins. Co. (1986), 22 Ohio St.3d 87, 488 N.E.2d 1247.

Also see *Moore v. Retter* (1991), 72 Ohio App.3d 167, 594 N.E.2d 122 [trial court properly did not give *Vargo* type instruction in medical case].

In this case, the instruction should not have been given because the partial transcript -- of the testimony of Dr. Breall, a nationally recognized cardiologist with emergency department experience, and Dr. Sperry -- clearly shows that there was substantial competent and credible evidence offered by Plaintiff-Appellant contrary to the testimony offered by the coroner.

Proposition of Law No. III: Civil Rule 51(A) and R.C. 2315.01(A)(7) require the trial court to file a complete copy of the written jury instructions that were read and given to the jury to take into their retirement. These written instructions would be identical to the transcript of the trial court reading these instructions to the jury, and are thus a proper basis in the record for ruling on objections to a jury instruction.

Civil Rule 51(A) and R.C. 2315.01(A)(7) were put into effect based on the recommendation of the Supreme Court's Task Force on Jury Service (2004) that written jury instructions be given to jurors to take with them when they deliberate. The statute provides that the trial court may not orally modify or qualify the written instructions when reading them to the jury. These provisions require the trial judge to preserve the written instructions and to file a complete set of the written instructions so they are part of the trial record, and record on appeal. Thus, a transcript of the trial judge reading the written jury instructions to the jury would be identical to the written instructions

themselves. Indeed, the Court of Appeals must have recognized this point for it properly tried to look at the Document #109 written jury instructions (and even the “Tab A” instructions attached to Appellees’ Brief) in an effort to rule on Appellant’s objections to the *Vargo* instruction.

Proposition of Law No. IV: The partial transcript, of the coroner’s testimony and closing argument, is sufficient to show that the *Vargo* instruction was highly prejudicial because, on its face, the instruction elevates the extra-statutory testimony of the coroner above that offered by all other experts, cloaks this testimony with the authority of his office, and because the instruction should never have been given at all.

In this case at bar, the challenged jury instruction relates exclusively to the testimony of a single expert witness, a coroner. For this reason, there is no reason to require Appellant to provide an entire transcript. The undue prejudice arising from the coroner’s testimony and from the *Vargo* instruction is readily apparent from the instruction itself, the testimony and closing argument. The instruction elevates this testimony above that of the other experts; it says the testimony is presumed to be legally accepted; and, it cloaks this extra-statutory testimony with the authority of the coroner’s office.

Proposition of Law No. V: When a trial court fails to transmit to the Court of Appeals a complete copy of the written jury instructions as required by Civ.R. 51(A) and R.C. 2315.01(A)(7), the appellate court must use App.R. 9(E) to correct the record on appeal by obtaining a complete copy of the jury instructions from the trial court.

There is no reason why Appellant could not refer to the written jury instructions to provide the Court of Appeals with the text of the *Vargo* instruction. Indeed, this Court’s own Task Force on Jury Service recommended that the written instructions be taken with

the jury into their retirement. Civ.R. 51(A) and R.C. 2315.01(A)(7) put this recommendation into effect. Further, the Court of Appeals very properly sought to use the Document#109 written instruction to review the challenged *Vargo* instruction.

However, when the appellate court discovered that Document #109 was incomplete, it failed to consider how this situation could have occurred and it penalized Appellant for this incompleteness. However, when a document, transmitted by the common pleas court to the appellate court, is incomplete or even missing altogether, App. R. 9(E) provides for correction of the record. *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 201 (Justice Holmes concurring); *Cobb v. Cobb* (1980), 62 Ohio St.2d 124, 125; and *In re Holmes*, 104 Ohio St.3d 664, 2004-Ohio-7109.

There are several good reasons why App.R. 9(E) should have been used. First, there is a well-recognized preference for deciding cases on the merits. *Webster v. Timken Co.*, 2005-Ohio-1759 citing *Cobb v. Cobb*, supra. Second, the transmission of an incomplete Document #109 should not be used to deny Appellant her day in court. *Cobb v. Cobb*, supra, and *In re Holmes*, supra.

Further, this Court has said that if an appellant first learns of an omission in the record when reading the appellate opinion, it would be an abuse of discretion for the court of appeals not to grant an App.R. 9(E) application for reconsideration and correction of the record. *Reichart v. Ingersoll* (1985), 18 Ohio St.3d 220, 222-23. Having very properly considered Document #109 to resolve the issues raised on appeal, the Court of Appeals should have gone on to address the incompleteness of the document in the context of Civ.R. 51(A), R.C. 2315.01(A)(7) and App.R. 9(E).

Proposition of Law No. VI: The failure of State officials at the trial court to transmit a complete copy of the written jury instruction to the Court of Appeals, denies Appellant due process under the Ohio and United States Constitutions.

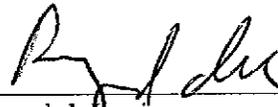
It is apparent that Appellant is denied due process if she is denied her day in court when State court officials fail to follow the requirements of Civ. R.51(A) and R.C. 2315.01(A)(7) which implement the recommendations of this Court's Task Force on Jury Service. Appellant's federal due process rights come into play via the Fourteenth Amendment to the United State Constitution.

CONCLUSION

For the reasons discussed above, this case involves matters of public and great general interest and a substantial constitutional question. The appellant requests that this Court accept jurisdiction in this case so that the important issues presented will be reviewed on the merits.

Respectfully submitted,

Raymond deLevie, Counsel of Record



Raymond deLevie
COUNSEL FOR APPELLANT
TERESA FRAZIER

Certificate of Service

I certify that a copy of this Memorandum in Support of Jurisdiction was hand delivered to counsel for appellees, Gregory Foliano, Esq. and Paul Rozelle, Esq., Porter Wright Morris & Arthur, 41 S. High Street, Columbus, Ohio 43215 on August 6, 2007.



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APPENDIX

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Raymond
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IN COMPUTER

COURT OF APPEALS
FAIRFIELD COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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FAIRFIELD CO. OHIO

TERESA FRAZIER, Executor
Plaintiff-Appellant

-vs-

CHARLES PRUITT, M.D., et al.

Defendants-Appellees

JUDGES:
John W. Wise, P.J.
Julie A. Edwards, J.
John F. Boggins, J.

Case No. 2005 CA 00099

OPINION

CHARACTER OF PROCEEDING:

Civil Appeal From Fairfield County Court Of
Common Pleas Case No. 2004 CV 00268

JUDGMENT:

Affirmed

DATE OF JUDGMENT ENTRY:

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1

Edwards, J.

{¶1} Appellant Teresa Frazier, administrator of the estate of Robert Frazier, deceased, appeals the judgment of the Fairfield County Court of Common Pleas following a jury trial in the wrongful death of her husband. Appellees are Charles L. Pruitt, M.D., and Fairfield Emergency Physicians, Inc.

STATEMENT OF LAW AND FACTS

{¶2} On or about May 7, 2002, appellant drove her husband, Robert Frazier, to the Fairfield Medical Center emergency room. Mr. Frazier had been having intermittent chest pains since the day before. They arrived at the emergency room at 11:00 a.m., and Mr. Frazier was evaluated by appellee Pruitt. Mr. Frazier was told that his chest pain was not due to his heart, and was discharged at 2:15 p.m. Mr. Frazier returned home, where he suffered a cardiac arrest at 7:30 p.m.

{¶3} Appellant called 911, and the local EMS squad responded. The EMS squad attempted to resuscitate Mr. Frazier at home, and then transported him to Hocking Valley Community Hospital in Logan, Ohio, where he was pronounced dead at 8:38 p.m.

{¶4} On March 18, 2004, appellant filed a complaint for wrongful death, naming as defendants Dr. Pruitt, Fairfield Emergency Medical Physicians, Inc. as employer of Dr. Pruitt, and Fairfield Medical Center. On March 24, 2005, Fairfield Medical Center and appellant filed a Stipulation of Voluntary Dismissal Without Prejudice. Appellant's complaint against Dr. Pruitt and the Fairfield Emergency Medical Physicians, Inc. remained pending. Various pretrial motions and briefs were filed, including appellant's motion to exclude the opinions of Dr. Cummin, in his capacity as

the Hocking County Coroner, regarding the issues of standard of care and "coumadin resistance", and appellant's objection to the appellees' proposed jury instruction regarding the coroner's opinion. Both the motion to exclude and objection to the proposed jury instruction were overruled by the trial court. Trial commenced on September 13, 2005, and concluded on September 21, 2005. In addition to her pretrial objection to the proposed jury instruction, appellant objected on the record during trial to the jury instruction regarding the coroner's opinion. The objection was once again overruled by the trial court. The jury returned a defense verdict on September 22, 2005. The appellant filed a timely appeal in which she set forth the following assignments of error:

{¶5} "I. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN GIVING A JURY INSTRUCTION BASED ON *VARGO V. TRAVELERS INS. CO.* IN A MEDICAL NEGLIGENCE CASE, AND IN ALLOWING DR. CUMMIN TO TESTIFY – AS CORONER – ON STANDARD OF CARE ISSUES, BECAUSE A COUNTY CORONER HAS NO STATUTORY AUTHORITY TO DETERMINE A THIRD PERSON'S CRIMINAL OR CIVIL RESPONSIBILITY FOR A DEATH.

{¶6} "II. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN HAVING THE JURY DECIDE WHETHER PLAINTIFF HAD PRESENTED ANY COMPETENT, CREDIBLE EVIDENCE CONTRARY TO THE CORONER'S FINDINGS, AND WHETHER THE *VARGO* INSTRUCTION SHOULD APPLY."

I

{¶7} In her first assignment of error, appellant argues that the trial court erred in giving a jury instruction based upon the Ohio Supreme Court case of *Vargo v.*

*Travelers Ins. Co., Inc.*¹ and, that the trial court erred in allowing Dr. Cummin to testify, in his capacity as county coroner, on standard of care issues. We disagree.

{¶8} R.C. 313.19 provides that the coroner's verdict shall be the legally accepted cause of death, and states as follows: "The cause of death and the manner and mode in which the death occurred, as delivered by the coroner and incorporated in the coroner's verdict and in the death certificate filed with the division of vital statistics, shall be the legally accepted manner and mode in which such death occurred, and the legally accepted cause of death, unless the Court of Common Pleas of the county in which the death occurred, after a hearing, directs the coroner to change his decision as to such cause and manner and mode of death."

{¶9} The Ohio Supreme Court, in the case of *Vargo*, supra, held: "Further, it must be noted that while the coroner's factual findings are not conclusive, neither are they a nullity. The coroner is a medical expert rendering an expert opinion on a medical question....Therefore, to rebut the coroner's determination, as expressed in the coroner's report and the death certificate, competent credible evidence must be presented." *Id.* at 30.

{¶10} In the case sub judice, the appellees introduced the opinion of Dr. David Cummin. Based upon Dr. Cummin's status as Hocking County Coroner, appellees sought an instruction based upon R.C. 313.19 and the Ohio Supreme Court case of *Vargo*, supra. Appellant argues that the *Vargo* instruction should not have been given to the jury.

{¶11} However, a transcript of the jury instructions as read to the jury by the trial court has not been furnished to this court. The record transmitted by the clerk of

¹ (1987), 34 Ohio St.3d 27, 516 N.E.2d 226.

courts contains a document entitled "jury instructions", but the document appears to be incomplete. The "Charge to the Jury" portion of the document consists of pages fifteen through twenty-two, has two paragraphs under "Duty of Patient" and does not include the allegedly erroneous charge. A copy of a document entitled "Charge to the Jury" is attached to appellees' brief, but it differs from the document included in the record transmitted by the clerk of courts. The document attached to appellee's brief consists of pages fifteen through twenty-seven, has one paragraph under "Duty of Patient" and includes the allegedly erroneous charge on pages twenty-two and twenty-three. In short, we have no way to determine what charge was read to the jury, and are thus unable to make a determination as to appellant's assignment of error concerning the *Vargo* instruction.

{¶12} App. R. 9(B) provides: "At the time of filing the notice of appeal the appellant, in writing, shall order from the reporter a complete transcript or a transcript of the parts of the proceedings not already on file as the appellant considers necessary for inclusion in the record and file a copy of the order with the clerk. . . ." The appellant bears the burden of showing error by reference to matters in the record. Further, the appellant bears the responsibility of providing a reviewing court with an appropriate transcript for appellate review. See, *Knapp v. Edwards Laboratories* (1981), 61 Ohio St.2d 197, 199, 400 N.E.2d 384. If those portions of the transcript necessary for resolution of the assigned errors are omitted from the record, a reviewing court has nothing to pass on and has no choice but to presume the validity of the trial court's ruling. *Id.*

{¶13} In addition, the Ohio Supreme Court has held that a jury instruction must be reviewed in its entirety. See, *Sech v. Rogers* (1983), 6 Ohio St.3d 462, 464, 453 N.E.2d 705. Further, appellate courts have held that a "review of a trial court's jury instructions requires the entire charge to the jury as well as a complete trial transcript." See, *Cline v. Electronic Data Systems Corp.* (Sept. 18, 2000), Washington App. No. 99CA14, 2000 WL 1573087, at *2, citing *Baker v. Cuyahoga Cty. Court of Common Pleas* (1989), 61 Ohio App.3d 59, 572 N.E.2d 155, dismissed by (1989), 43 Ohio St.3d 702, 539 N.E.2d 164.

{¶14} We find that the failure to provide this Court with a complete transcript of the jury instructions on the record is dispositive. We have an insufficient record upon which to pass on the assignment of error concerning the *Vargo* instruction, and must presume the regularity of the trial court proceedings in this regard. See, *Knapp*, supra. Thus, this portion of the appellant's first assignment of error is overruled.

{¶15} Appellant also argues in her first assignment of error that the trial court erred in allowing Dr. Cummin to testify – as coroner – on standard of care issues. Assuming, arguendo, that we agree with the appellant, we can not determine from the portions of the record provided to us that such error was prejudicial.

{¶16} R.C. 313.19 provides that the coroner shall determine the cause of death and the manner and mode in which the death occurred. The statute does not authorize the coroner to make a determination as to legal liability. "It is the duty of the coroner to determine the reasonable and true cause of death. He does not resolve other facts or the legal or the criminal responsibility of those involved." *Everman v. Davis* (1989), 54 Ohio App.3d 119, 121, 561 N.E.2d 547, dismissed by (1989), 43 Ohio

St.3d 702, 539 N.E.2d 163. See, also, *State v. Beaver* (1997), 119 Ohio App.3d 385, 392, 695 N.E.2d 332, dismissed, appeal not allowed by (1997), 79 Ohio St.3d 1504, 684 N.E.2d 88 (coroner's verdict does not assign criminal responsibility for the decedent's death).

{¶17} The determination regarding whether the standard of care was met in a medical malpractice cause of action is a question of fact for the finder of fact to decide. The trial court's decision to allow Dr. Cummin to testify, in his capacity as coroner, that Dr. Pruitt was not negligent and that Dr. Pruitt performed his examination and assessment of Mr. Frazier according to the relevant standards of care was arguably error.

{¶18} It should be noted here that this Court was not provided with a complete transcript of the trial testimony. We were provided with only bits and pieces of that testimony. The transcript we received consisted of: a) In chambers conference and portion of defense counsel's opening statement (30 pgs.), b) cross-examination of Dr. Pruitt done in plaintiff's case (85 pgs.), c) portion of Dr. Vajen's testimony (26 pgs.), d) portion of Dr. Sperry's testimony (25 pgs.), e) portion of Dr. Breall's testimony (81 pgs.), f) portion of Dr. Cummin's testimony (166 pgs.) and g) discussion regarding Dr. Baker's deposition, snippets of closing argument, and discussion on jury instruction (39 pgs.). We do not know who else testified and we do not know what exhibits were accepted into evidence.

{¶19} The admission or exclusion of evidence by the trial court will not be reversed unless there has been a clear and prejudicial abuse of discretion. *O'Brien v. Angley* (1980), 63 Ohio St.2d 159, 407 N.E.2d 490. Evid.R. 103 (A) states, "Error may

not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected....” We cannot determine by reading the portions of the transcript provided to us whether or not the testimony of Dr. Cummin affected a substantial right of appellant to her prejudice. Pursuant to App. R. 9(B) it is “appellant’s responsibility to provide this Court with a transcript which is adequate to determine the error assigned for review.” *Bungo v. Nowacki*, (August 29, 1996), Cuyahoga App. No. 70024, 1996 WL 492293 at p. 2 citing *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197, 400 N.E.2d 384. In other words, it is impossible for us to conclude that a “causal connection” existed between the admission of Dr. Cummin’s testimony and the jury returning a verdict for appellee absent a complete transcript of the proceedings. *Jones v. Bartley*, (Nov. 10, 1993), Summit App. No. 16216, 1993 WL 473824 at p. 2. Other evidence may have been presented regarding the fact that Dr. Pruitt followed the relevant standards of care. We can not make a determination of prejudicial error absent a complete transcript. See also *Deluca v. Goldstein*, (Mar. 13, 2000), Cuyahoga App. No. 76023, 2000 WL 284088, *Fite v. University Hospital*, Hamilton App. Nos. C-030225, C-030242, 2004-Ohio-1266.

{¶20} Finally, appellant argues that the *Vargo* instruction, which was given to the jury by the trial court, served to elevate the status of Dr. Cummin’s opinion above the opinions of the other medical expert witnesses whose opinions were not rebuttably presumed to be “the legally accepted cause of death.” This alleged elevation in Dr. Cummin’s status, combined with the fact that the trial court allowed Dr. Cummin to testify as to standard of care issues, was, according to the appellant, unfairly prejudicial. However, as we were unable to rule on the issue of the jury instruction regarding the

legal status of the coroner's verdict, any alleged elevation in the status of Dr. Cummin's testimony is not properly before us. In other words, we can not determine if the jury was instructed that Dr. Cummin's opinion on cause of death was rebuttably presumed to be correct.

{¶21} Accordingly, appellant's first assignment of error is overruled.

II

{¶22} In her second assignment of error, the appellant argues that the trial court erred in allowing the jury, rather than the trial judge, to decide whether appellant had presented any competent, credible evidence to rebut the coroner's determinations. Appellant argues that if the trial judge determines that there was competent, credible evidence to rebut the coroner's determinations, then no instruction should be given to the jury that the coroner's determination is the legally accepted cause of death and that the coroner's factual determinations create a non-binding rebuttable presumption. Based upon the absence of the transcript of the jury instruction at issue, we must again presume the regularity of the proceedings of the trial court. See *Knapp*, supra.

{¶23} The appellant's assignments or error are overruled, and the decision of the trial court is affirmed.

By: Edwards, J.

Wise, P.J. and

Boggins, J. concur

Julie A. Edwards
Stephen Wise
Robert F. Boggins

JUDGES

JAE/1220

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IN THE COURT OF APPEALS FOR FAIRFIELD COUNTY, OHIO

FILED

2007 JUN 22 AM 10:52

FIFTH APPELLATE DISTRICT

BERAH SMALLEY
CLERK OF COURTS
FAIRFIELD CO. OHIO

TERESA FRAZIER, Executor
Plaintiff-Appellant

-vs-

CHARLES PRUITT, M.D., et al.

Defendants-Appellees

JUDGMENT ENTRY

CASE NO. 2005 CA 00099

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Fairfield County Court of Common Pleas is affirmed. Costs assessed to appellant.

Julia A. Edwards
Robert W. ...
Robert ...

JUDGES

is whether, under all the circumstances, a reasonably cautious, careful, or prudent person would have anticipated that injury and damage were likely to result to someone from the act or failure to act.

C. Conclusion. If a Defendant, by the use of ordinary care, should have foreseen some injury and damage and should not have acted or, if he or she did act, should have taken precautions to avoid the result, then the performance of the act or the failure to take such precautions is negligence.

PROXIMATE CAUSE

A. Separate Issue. A party who seeks to recover for injury and damage must prove not only that the other party was negligent, but also that such negligence was a proximate cause of the injury and damage.

B. Defined. Proximate cause is an act or failure to act that, in the natural and continuous sequence, directly produces the injury, and without which the injury would not have occurred. Cause occurs when the injury is the natural and foreseeable result of the act or failure to act.

C. Remote Cause. A party is not responsible for injury and damages to another if his negligence is a remote cause and not a proximate cause. A cause is remote when the result could not have been reasonably foreseen or anticipated as being the natural or probable cause of any injury and damage.

CORONER'S VERDICT THE LEGALLY ACCEPTED CAUSE OF DEATH

The cause of death and the manner and mode in which the death occurred, as delivered by the coroner and incorporated in the coroner's verdict and in the death

certificate filed with the division of vital statistics, shall be the legally accepted manner and mode in which such death occurred, and the legally accepted cause of death.

I charge you, as a matter of law, that the cause of death and the manner and mode in which the death occurred, as delivered by the coroner and incorporated in the coroner's report and in the death certificate, filed in this case, shall be the legally accepted manner and mode in which such death occurred, and the legally accepted cause of death, which evidence may be considered by you in reaching your decision in this case.

The coroner's factual determinations concerning the manner, mode and cause of the decedent's death, as expressed in the coroner's report and death certificate, create a non-binding rebuttable presumption concerning such facts in the absence of competent, credible evidence to the contrary.

While the coroner's factual findings are not conclusive, neither are they a nullity. The coroner is a medical expert rendering an expert opinion on a medical question. Therefore, to rebut the coroner's determination, as expressed in the coroner's report and the death certificate, the Plaintiff must present competent, credible evidence.

DAMAGES

A. In this case, Plaintiff has brought an action for the wrongful death of Robert Frazier and funeral expenses.

B. If you find for Plaintiff, you will determine what sum of money will compensate the beneficiaries of his estate for the injury and loss to them resulting by the reason of the wrongful death of Robert Frazier.

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