

IN THE SUPREME COURT OF OHIO
CASE No. 2007-1448

ON APPEAL FROM THE COURT OF APPEALS
FIFTH APPELLATE DISTRICT
FAIRFIELD COUNTY, OHIO
CASE No. 2005 CA 00099

Teresa Frazier, Executor
PLAINTIFF-APPELLANT,

vs.

Charles Pruitt, M.D., et al.
DEFENDANTS-APPELLEES.

**MEMORANDUM OF DEFENDANTS-APPELLEES CHARLES L. PRUITT, M.D. AND
FAIRFIELD EMERGENCY PHYSICIANS, INC. IN OPPOSITION TO JURISDICTION**

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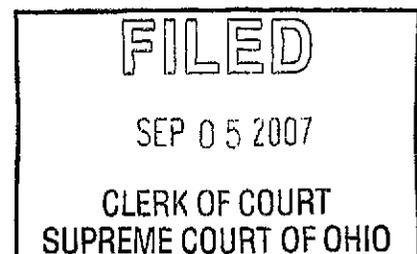


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**STATEMENT WHY THIS CASE IS NOT OF
PUBLIC OR GREAT GENERAL INTEREST**

This case concerns whether the trial judge correctly instructed the jury, whether a physician who is also a county coroner can testify as an expert witness, and whether the Court of Appeals must assist an appellant in creating a record on appeal, where Appellant -- despite challenging the jury instructions and prejudicial effect of those instructions and certain testimony at trial -- did not order a transcript of the instructions or of the vast majority of the trial testimony. No aspect of this case is of public or great general interest. See Noble v. Colwell (1989), 44 Ohio St.3d 92, 94, 540 N.E.2d 1381 (“This court will grant a motion to certify only if there is a substantial constitutional question or if the case is of public or great general interest.”). Rather, the decisions of the trial judge, a unanimous jury, and a unanimous panel of the Court of Appeals, both in its opinion and in denying Appellant’s motion for reconsideration, involve the application of well-settled law to case-specific facts. Because these issues are of interest only to the parties, the Court should not exercise discretionary jurisdiction in this case. See Williamson v. Rubich (1960), 171 Ohio St. 253, 254, 168 N.E.2d 876 (per curiam) (distinguishing questions of public or great general interest from questions of interest primarily to the parties).

Appellant’s first two propositions of law concern the trial judge’s jury instructions taken from R.C. 313.19, and Vargo v. Travelers Ins. Co., Inc. (1987), 34 Ohio St.3d 27, 31, 516 N.E.2d 226, and the trial judge’s discretion to permit a medical doctor, who also is a coroner, to give expert testimony. Although the trial judge was within his discretion in both matters, the Court of Appeals held that it could not fully address either of Appellant’s assignments of error because Appellant (1) had not made the relevant jury instructions part of the record, and (2) had not ordered anything other than “bits and pieces” of the trial transcript, thereby preventing it from assessing, even if there was error below, whether that error was prejudicial to Appellant.

Cases of public or great general interest typically involve novel questions of law or procedure that appeal to the legal profession and to the Court's "collective interest in jurisprudence." Noble, 44 Ohio St.3d at 94. Appellant asks this Court to reach a different outcome on weighing the evidence from the trial judge, a unanimous jury, and a unanimous panel of the Court of Appeals. This is not the function of this Court, which should be reluctant to accept jurisdiction over a case involving "a simple, discretionary evidentiary issue."

Manigault v. Ford Motor Co., 96 Ohio St.3d 431, 2002-Ohio-5057, 775 N.E.2d 824, at ¶ 14 (Lundberg Stratton, J., dissenting). Cf. State v. Urbin, 100 Ohio St.3d 1207, 2003-Ohio-5549, 797 N.E.2d 985, at ¶ 5 (Moyer, C.J., concurring) (proposition of law concerning trial judge's error in admission of evidence is "a case-specific issue of no general interest"). The Court should decline jurisdiction over Appellant's first two propositions.

Appellant's other four propositions involve her failure to ensure that the Court of Appeals had an adequate record to review in addressing her assignments of error. Despite complaining of the trial court's jury instructions, Appellant did not order a transcript of those instructions, never reviewed the record to ensure that the jury instructions were part of the record, nor in any of her briefing to the Court of Appeals, did Appellant ever cite the jury instructions she complained of. Appellant did none of these things even after Appellees argued that Appellant's failure to make the jury instructions part of the record constituted an independent basis for affirming the judgment below. Rather, only after the Court of Appeals unanimously affirmed the trial court's judgment did Appellant seek to "correct" the record on appeal to include the "missing" jury instructions. She now claims that the denial of her motions under App.R. 9(E) and for reconsideration were an abuse of that court's discretion. Appellant's arguments are without merit and this Court should reject these four propositions of law.

No aspect of this case meets the test for discretionary appeals -- *i.e.*, that the case be of “public or great general interest.” As this Court has observed, “in this jurisdiction a party to litigation has a right to but one appellate review of his cause.” Williamson, 171 Ohio St. at 253-254. In a case, such as this one, that does not present this Court with an issue of public or great general interest, the Court of Appeals serves as “the ultimate and final adjudication” of the matter. Id. at 253. Appellant had her one appellate review of right in which the Court of Appeals, applying well-settled Ohio law, unanimously affirmed the trial judge’s exercise of discretion and a unanimous jury verdict. Therefore, the Court should decline jurisdiction over this case.

STATEMENT OF THE CASE

In this wrongful death case filed in the Fairfield County Court of Common Pleas on March 18, 2004, Appellant Teresa Frazier alleged that Charles L. Pruitt, M.D. fell below the standard of care in treating her decedent-husband, Robert Frazier. After an eight-day trial, a unanimous jury found for Dr. Pruitt and his practice group, Fairfield Emergency Physicians, Inc. Appellant timely filed a notice of appeal on October 28, 2005. The Fifth District Court of Appeals affirmed that judgment on June 22, 2007. On July 2, 2007, following issuance of the Court of Appeals’ opinion, Appellant sought to supplement the record on appeal and, based on that new record, sought reconsideration from the Court of Appeals. On August 14, 2007, the Court of Appeals denied Appellant’s Motion for Correction of Record on Appeal Pursuant to App.R. 9(E) and also denied her motion for reconsideration.¹

¹ Appellant includes in the materials she submitted to this Court the transcript of the jury instructions that she ordered after the Court of Appeals issued its opinion. Appellant utterly fails to inform this Court in her Memorandum in Support of Jurisdiction that she had sought leave from the Court of Appeals to correct the record pursuant to App.R. 9(E) to include the transcript of the trial judge’s instructions to the jury and that the Court of

Although on appeal Appellant principally complained of a jury instruction given pursuant to R.C. 313.19 and Vargo v. Travelers Ins. Co., Inc. (1987), 34 Ohio St.3d 27, 516 N.E.2d 226, Appellant never cited or quoted the jury instruction at issue. Appellant also chose not to order a transcript of the judge's charge to the jury and made no attempt to attach or otherwise to call the Court of Appeals' attention to the questioned instruction. Nor, apparently (as is evident from Appellant's motion to "correct" the record) did Appellant ever, during the pendency of her appeal, confirm that jury instructions were contained in the record transmitted to the Court of Appeals. In addition to failing to order a transcript of the jury instructions, Appellant also ordered only 452 pages of trial transcript, which were a mishmash of different witness's testimony and argument. The Court of Appeals held that, even were Appellant's assignments of error well taken, her failure to create a record from which it could determine whether the claimed errors were prejudicial constituted an independent basis for affirmance. Frazier v. Pruitt (Fairfield), 2007-Ohio-3256, at ¶¶ 14, 19.

STATEMENT OF THE FACTS

This case concerns the treatment of Robert Frazier by Charles L. Pruitt, M.D., an emergency medicine physician who saw Mr. Frazier for complaints of chest pain on May 7, 2002. Mr. Frazier suffered a heart attack and died later that day. His death was reported to the Hocking County coroner, Dr. David Cummin.

After conducting an autopsy requested by Ms. Frazier, Dr. Cummin concluded that Mr. Frazier died from acute coronary occlusion due to atherosclerotic heart disease and Coumadin resistance. As part of his investigation, Dr. Cummin spoke with Ms. Frazier, who expressed

Appeals denied Appellant's motion. Appellant's submission of this transcript to this Court is both improper and misleading, and this Court should disregard it.

concern that Mr. Frazier's death was due to medical negligence. Under his statutory duty to determine the cause, manner, and mode of death, Dr. Cummin investigated this concern and reported that Mr. Frazier's death was not the result of "obvious negligence" of Dr. Pruitt and that Dr. Pruitt had "gone beyond the usual chest pain evaluation including appropriate cardiac enzymes, normal EKG and negative CT for a [pulmonary embolism] prior to discharging [Mr. Frazier with] apparent musculoskeletal chest pain." At trial, Dr. Cummin testified that, as a county coroner, he is an expert in the investigation of death and that his investigatory responsibilities included determining whether medical negligence occurred in a case that comes under his jurisdiction. Dr. Cummin also testified, to a reasonable degree of medical probability based on his education, training, and experience, that Dr. Pruitt's care and treatment of Mr. Frazier met the standard of care. Of course, during the two-week trial, numerous other physicians -- both fact witnesses and retained experts -- offered extensive expert medical opinion testimony concerning the cause of Mr. Frazier's death and whether Dr. Pruitt's treatment of Mr. Frazier on May 7, 2002, met the applicable standard of care. At the conclusion of the evidence the jury returned a unanimous verdict for Appellees.

ARGUMENT IN RESPONSE TO APPELLANT'S PROPOSITIONS OF LAW

A. Defendants' Response to Appellant's First Proposition of Law:

The Trial Judge Acted Within His Sound Discretion in Permitting Dr. David Cummin to Testify as an Expert Medical Witness in This Case.

Nothing in R.C. 313 prevents a coroner, who is a medical doctor, from testifying as an expert witness in a medical negligence case. "A coroner is an expert witness who is permitted to give an opinion on matters within the scope of his expertise." State v. Heinisch (1990), 50 Ohio St.3d 231, 234, 533 N.E.2d 1026. Indeed, the findings of the county coroner by their very nature

are “a determination of a medical expert on a medical question.” Vargo v. Travelers Ins. Co., Inc. (1987), 34 Ohio St.3d 27, 31, 516 N.E.2d 226.

A trial judge enjoys broad discretion in the admission and exclusion of evidence and is not subject to reversal absent a clear and prejudicial abuse of that discretion. State v. Hymore (1967), 9 Ohio St.2d 122, 128, 224 N.E.2d 126. Such deference is particularly appropriate in determining whether a witness is qualified to render an expert opinion. Alexander v. Mt. Carmel Med. Ctr. (1978), 56 Ohio St.2d 155, 157, 383 N.E.2d 564; State v. Maupin (1975), 42 Ohio St.2d 473, 479, 330 N.E.2d 708.

In this case, following his investigation into Mr. Frazier’s death, Dr. Cummin found in his report, and opined at trial to a reasonable degree of medical probability based on his education, training, and experience, that Mr. Frazier’s death was not the result of medical negligence and that Mr. Frazier did not have an arterial clot the morning that he went to Fairfield Medical Center, but rather that Mr. Frazier died from a thrombus following an appropriate medical evaluation by Dr. Pruitt. Notably (and a fact entirely ignored by Appellant) Dr. Cummin’s report included the now-protested finding of “no medical negligence” because Appellant herself specifically raised this issue in conversations with Dr. Cumin during his investigation of her husband’s death.

Appellant is incorrect that a coroner’s passing on whether medical negligence was the cause of death constitutes a legal conclusion beyond the coroner’s statutory authority.

“Testimony regarding the types of injuries sustained and their likely cause is clearly one of the statutory duties placed upon a coroner.” State v. Stewart (Ashtabula), 2002-Ohio-3842, at ¶ 46. Appellant erroneously cites State v. Cousin (Seneca 1982), 5 Ohio App.3d 32, 449 N.E.2d 32, for the proposition that a coroner’s inquiry into “human causation and legal responsibility”

(Appellant's Br. at 10) is impermissibly beyond the scope of the coroner's authority. Appellant neglects to inform this Court that Cousin was expressly overruled by the Ohio Supreme Court in State ex rel. Blair v. Balraj, 69 Ohio St.3d 310, 312, 1994-Ohio-40, 631 N.E.2d 1044 (per curiam). In Balraj, the Supreme Court held that "Cousin is wrong insofar as it holds, or appears to hold, that a coroner is limited to describing only physical or physiological facts." Id. At trial, the coroner testified that the death of plaintiffs' decedent in police custody occurred "during legal intervention," testimony that the Supreme Court held was proper and within the coroner's statutory authority. Id. at 312-313.

Finally, Appellant's proposition of law would have this Court hold that a physician, simply because he or she is elected as a county coroner, is thereby incompetent to give expert opinion testimony. Nothing in the Evidence Rules suggests this result, nor does Appellant cite any case law consistent with this proposition. Accordingly, this Court should deny discretionary review of Appellant's First Proposition of Law.

B. Defendants' Response to Appellant's Second Proposition of Law:

The Trial Judge Correctly Instructed the Jury Pursuant to R.C. 313.19 and Vargo v. Travelers Ins. Co., Inc. (1987), 34 Ohio St.3d 27, 516 N.E.2d 226.

"Ordinarily requested instructions should be given if they are correct statements of the law applicable to the facts in the case and reasonable minds might reach the conclusion sought by the instruction." Murphy v. Carrollton Mfg. Co. (1991), 61 Ohio St.3d 585, 591, 575 N.E.2d 828 (quotation omitted). In Vargo v. Travelers Ins. Co., Inc. (1987), 34 Ohio St.3d 27, 516 N.E.2d 226, this Court affirmed the use of the very jury instruction that was given in this case. Id. at 31. Vargo explicitly rejected Appellant's argument that this instruction compelled the jury to accept, as a matter of law, the findings of the coroner. Id. The Vargo Court also expressly rejected Appellant's arguments that this jury instruction "cloth[ed] the coroner impermissibly

with the power to make ex parte judicial determinations that are binding upon nonparties.” Id. at 29. In fact, the Vargo Court affirmed the propriety of this jury instruction despite the fact that -- as in this case -- the parties had put in evidence testimony from other experts concerning the cause of the death at issue. Id.

Appellant’s contention that the trial judge failed to pass on whether she had submitted “competent, credible” evidence contrary to the coroner’s testimony ignores the holding in Vargo that the instruction given in this case is proper even when there is a dispute concerning the substance of the coroner’s testimony. In fact, the jury instruction contemplates that the coroner’s testimony is but one piece of the evidentiary puzzle and that it is ultimately for the jury to decide, informed by all of the trial judge’s instructions and weighing all of the evidence, what weight -- if any -- to give the coroner’s testimony.

Appellant also ignores entirely the fact that she had a remedy, that she did not avail herself of, to challenge the findings of the coroner that she now attempts to use as the basis for reversing a unanimous jury verdict. Appellant could have sought to have the coroner’s verdict changed after his report was issued or at any time during the three years prior to the trial of this case (for example, after Dr. Cummin’s discovery deposition at which Plaintiff learned of Dr. Cummin’s opinions concerning the cause of death) by following the procedure outlined in R.C. 313.19 and in the case law interpreting that provision. As the Court in Vargo noted, “the coroner’s factual determinations shall be accepted unless, following a hearing, the common pleas court directs the coroner to change such determination. Similarly, pursuant to R.C. 3705.04, the coroner may be compelled to show evidence supporting the facts contained within the death certificate and to issue an amended death certificate when so required.” Id. at 29, citing R.C. 313.19. See State ex rel. Blair, 69 Ohio St.3d at 314 (holding that the proper mechanism for

challenging a coroner's findings under R.C. 313.19 is an action for declaratory judgment). Accord Perez v. Cleveland (1997), 78 Ohio St.3d 376, 377, 1997-Ohio-33, 678 N.E.2d 537 (same). Accordingly, this Court should decline to exercise discretionary review of Appellant's Second Proposition of Law.

C. Defendants' Response to Appellant's Third Proposition of Law: The Civil Rules Require That the Jury Instructions Be Preserved for the Record, Which the Trial Judge Did in This Case.

Appellant's argument concerning Civil Rule 51(A),² entirely devoid of any legal authority (see App.R. 16(A)(7)), is incorrect. Civil Rule 51(A) requires only that: (1) the trial judge reduce to writing the jury instructions or "make an audio, electronic, or other recording of those instructions"; (2) the jury be provided with "at least one written copy or recording of those instructions" for use in deliberations; and (3) the jury instructions be preserved for the record. Id. (emphasis added). Contrary to Appellant's argument, there is nothing in the Civil Rules requiring the trial judge to give "written instructions" to the jury or that the trial court preserve "written" jury instructions, per se, for the record.

Here, the trial judge complied with the Civil Rules in charging the jury and in preserving a record of that charge. The trial judge not only provided written instructions to the jury, but the court reporter also preserved the jury instructions for the record. See, e.g., Hammoud v. Cleveland Clinic Found. (Cuyahoga), 2005-Ohio-2617, ¶ 21 (holding that because appellant had other means by which to preserve claimed error in absence of record materials (transcript of a sidebar conference, which appellant could have recreated under App.R. 9(C)), appellants did not demonstrate prejudice in trial court's procedure). See also State v. Drake (Cuyahoga 1991), 73

² Appellant also cites R.C. 2315.01(A)(7), however, the Civil Rule -- and not a statute -- controls the procedures of the trial court. See Ohio Const. art. IV, § 5(B).

Ohio App.3d 640, 647, 598 N.E.2d 115 (noting that if transcript is unavailable, appellant is still obligated to provide record in support of claimed error).

As in Drake, in this case Appellant made no effort to review the record or to correct it by providing a transcript. Appellant herself could have easily cured any omissions in the record had she simply reviewed the record at any time or ordered the very part of the trial transcript necessary to the determination of her appeal. Appellant was not without the ability to notice the “error” in the record and then to remedy it. Accordingly, this Court should deny Appellant’s petition for discretionary review.

D. Defendants’ Response to Appellant’s Fourth Proposition of Law: The Court of Appeals Correctly Presumed the Regularity of the Proceedings Because Appellant Failed to Order a Complete Trial Transcript.

Once again unburdened by any citation to authority, see App.R. 16(A)(7), Appellant asserts that the partial transcript she ordered of the trial testimony showed, on its face, that trial judge’s instructions to the jury pursuant to Vargo was prejudicial. However, it is not the province of this Court to engage in mere error correction, which is precisely what Appellant implores in urging review the transcript of her eight-day jury trial de novo. “According to Section 2, Article IV of the Ohio Constitution, this court sits to settle the law, not to settle cases.” Baughman v. State Farm Mut. Auto. Ins. Co. (2000), 88 Ohio St.3d 480, 492, 2000-Ohio-397, 727 N.E.2d 1265, (Cook, J., concurring). See also State Auto. Ins. Co. v. Pasquale, 113 Ohio St.3d 11, 2007-Ohio-970, 862 N.E.2d 483, at ¶ 46 (Pfeiffer, J., dissenting) (“Because this appeal involves nothing more than error correction, it should be dismissed as having been improvidently allowed.”); Schlachet v. Cleveland Clinic Found. (Cuyahoga 1995), 104 Ohio App.3d 160, 168, 661 N.E.2d 259 (noting that intermediate appellate courts have primary authority for error correction).

Appellant could have, but did not, order a transcript either of the jury instructions or of the complete trial, which would have enabled a reviewing court to determine whether the errors she alleged occurred were, in fact, prejudicial. As this Court has held, it is an appellant's obligation to provide the reviewing court with the appropriate transcript; if portions of the transcript necessary to the assigned errors are omitted from the record, then the reviewing court, without anything to pass on, presumes the validity of the proceedings below. Knapp v. Edwards Labs., (1980), 61 Ohio St.2d 197, 199, 400 N.E.2d 384 (per curiam).

Here, the Court of Appeals held that a complete transcript was necessary to pass on Appellant's claims. Even were Appellant correct that instructing the jury under Vargo or the admission of Dr. David Cummin's expert medical testimony was erroneous, Appellant would still have to show on appeal that the instruction and the admission of Dr. Cummin's testimony were prejudicial abuses of the trial judge's discretion. See Hymore, 9 Ohio St.2d at 128 (admission of expert testimony); State v. DeMastry (Fairfield), 155 Ohio App.3d 110, 2003-Ohio-5588, 799 N.E.2d 229, at ¶¶ 54, 71 (jury instructions). As the Court of Appeals rightly held, such determinations were not possible given the "bits and pieces" of the trial transcript -- only 452 pages from an eight-day trial -- that Appellant chose to submit in support of her assignments of error. Frazier, 2007-Ohio-3256, at ¶ 18. Given the errors claimed and the facts of this case, the Court of Appeals could not "make a determination of prejudicial error absent a complete trial transcript." Id. ¶ 19. With Appellant having failed to create an appropriate record for review, affirmance of the trial court's judgment was proper, and this Court should deny Appellant's petition for discretionary review.

E. Defendants' Response to Appellant's Fifth Proposition of Law: App.R. 9(E) Does Not Require a Reviewing Court Sua Sponte to Correct an Appellant's Deficient Record of Appeal.

Whether to permit correction or supplementation of the record pursuant to App.R. 9(E) is a matter within the reviewing court's sound discretion. Cobb v. Cobb (1980), 62 Ohio St.2d 124, 127, 403 N.E.2d 991. The record transmitted in this case was not the subject of ministerial error or nonfeasance by the court clerk. Appellant could have avoided any alleged "error" by reviewing the record that was pertinent to her assignments of error and ordering a transcript of the jury instructions that she claimed were erroneous. The Court of Appeals' holding that Appellant should not be permitted to "correct" the record after the issuance of its opinion, where Appellant knowingly failed to order the necessary transcript, is well within that court's discretion.

Because Appellant must demonstrate error below, the duty to provide record materials for appellate review is her responsibility alone. See Knapp, 61 Ohio St.2d at 199. As the Court of Appeals observed, Appellant failed to furnish that court with a transcript of the jury instructions. Frazier, 2007-Ohio-3256, at ¶¶ 11, 14. Appellees pointed out this shortcoming in their brief and urged this deficiency in the record as an independent basis for affirming the trial court's judgment. However, Appellant never, until after the Court of Appeals issued its opinion, reviewed the record in this case to determine whether the jury instructions that were the core of her assignments of error were included in that record. Had Appellant even attempted to cite the jury instructions in either her opening brief or her reply brief, she would have realized this deficiency immediately. Here, "there was not an error in transmission of the record, but an error in creating a proper record to begin with." Maseck v. Lindav Props. (Hamilton), 2006-Ohio-3721, at ¶ 11.

The cases cited by Appellant are distinguishable because in this case Appellant was not free of fault in causing the error or omission in the record and Appellant had other means to

create the necessary record, but she failed to make use of them. Cobb involved an appellate court that refused to review the appellant's assignments of error on the merits because a trial court clerk failed to transmit pertinent parts of the record. Unlike this case, in Cobb, counsel realized that part of the record was not transmitted and timely filed a motion under App.R. 9(E) to correct the omission. Cobb, 62 Ohio St.2d at 126-127. The Supreme Court held that the Court of Appeals abused its discretion in not permitting the appellant to correct the record under App.R. 9(E): "The granting of this motion would not have delayed justice, and it would have prevented appellants from suffering an injustice solely because of the nonfeasance of the trial court clerk." Id. at 127 (emphasis added).

Similarly, in In re Holmes, 104 Ohio St.3d 664, 2004-Ohio-7109, 821 N.E.2d 568, appellant did not cause the deficiencies in the record and had no recourse but to seek supplementation of the record after the Court of Appeals issued its opinion. The Court of Appeals had declined to address the assignments of error and the Supreme Court reversed because the deficiencies in the record were not in any way appellant's fault. Id. ¶¶ 8-9. However, this Court noted: "Where procedural deficiencies arise out of the neglect of a party, the party can blame only himself for the failure of his case. * * * The lack of fault on behalf of the appellant is an important aspect of this case." Id. ¶¶ 11, 14. Accord State v. Jones (1994), 71 Ohio St.3d 293, 297, 643 N.E.2d 547 (appellant "must suffer the consequences of nonproduction of an appellate record where such nonproduction is caused by his or her own actions").

An additional distinguishing feature of these cases is that, unlike in Cobb and Holmes, here the Court of Appeals reached and ruled on the merits of Appellant's assignments of error. See State v. Kuhn (Belmont), 2003-Ohio-4007, ¶ 20 (distinguishing Cobb on this basis). Reichert v. Ingersoll (1985), 18 Ohio St.3d 220, 480 N.E.2d 802 (per curiam), relied on by

Appellant, is similarly distinguishable. There, this Court noted that the Court of Appeals “did not seriously entertain the merits of the appeal” even though counsel for appellant was not aware that portions of the trial transcript evidencing his objection to the admission of certain evidence were not included in the record and the court reporter in an affidavit accepted responsibility for the error. *Id.* at 222.

In this case, the Court of Appeals did not dismiss the appeal, but rather ruled on the merits. Notably, even had Appellant included a transcript of the jury instructions, or even had the instructions in docket entry 109 completely and unambiguously revealed the contents of the jury instructions, Appellant still failed to order anything other than “bits and pieces” of the trial transcript. *Frazier*, 2007-Ohio-3256, ¶ 18. As the Court of Appeals observed, “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.” *Id.* ¶ 19. See also *id.* ¶ 13 (noting that “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” (quotation and citations omitted; emphasis added)). It was not the duty of the Court of Appeals to fashion the appropriate record for Appellant, who was represented by counsel at all times. Because the Court of Appeals did not abuse its discretion, this Court should decline to exercise discretionary review of Appellant’s Fifth Proposition of Law.

**F. Defendants’ Response to Appellant’s Sixth Proposition of Law:
This Case Is Not of a Constitutional Dimension and Appellant Never Raised a Claim Under the State or Federal Constitutional Below.**

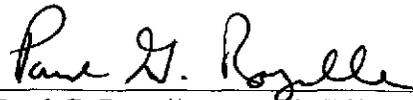
Appellant never before urged that the failure of court personnel to transmit a complete copy of the written jury instructions to the Court of Appeals deprived her of due process under the State and Federal Constitutions. Having never before raised this issue below -- namely in her

motion for reconsideration to the Court of Appeals -- Appellant cannot raise this issue here for the first. See Thirty-Four Corp. v. Sixty-Seven Corp. (1984), 15 Ohio St.3d 350, 352, 474 N.E.2d 295. Furthermore, Appellant once again presents this Court with a proposition of law that is entirely unsupported by any legal citation and this Court should reject Appellant's petition for this additional reason. See, e.g., App.R. 16(A)(7). Finally, Appellant should not be heard to complain that her constitutional rights were violated when she failed to review the record on appeal and to order a transcript from which the Court of Appeals could adjudicate fully her claimed errors. Appellant's Sixth Proposition of Law is without merit and this Court should decline to exercise its discretionary review of Appellant's claim.

CONCLUSION

For the foregoing reasons, the Court should decline to exercise its discretionary jurisdiction over this appeal. This case is not one of public or great general interest, but rather is of interest only to the parties involved.

Respectfully submitted,



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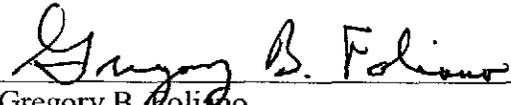
CERTIFICATE OF SERVICE

The undersigned certifies a true and accurate copy of the foregoing was served by regular United States mail, postage prepaid, this 5th day of September, 2007, on the following:

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