

COURT OF APPEALS OF GEORGIA

Armstrong v. Rapson

299 Ga. App. 884 (Ga. Ct. App. 2009) · No. A09A1721 · Decided August 28, 2009

SUMMARY

The Georgia Court of Appeals affirmed the denial of summary judgment in a medical malpractice action involving a sponge allegedly left in a patient during surgery. The court held that the appellants failed to provide portions of the evidence relied upon by the trial court, requiring the appellate court to presume the judgment was correct and affirm.

CASE DETAILS

COURT	Court of Appeals of Georgia
WRITING FOR THE COURT	Blackburn, Presiding Judge; Adams, Judge; Doyle, Judge
JURISDICTION	Georgia
DECIDED	August 28, 2009
DOCKET	A09A1721
DISPOSITION	affirmed
PROCEDURAL POSTURE	Defendants in a medical-malpractice action appealed the denial of their motion for summary judgment.
STANDARD OF REVIEW	On review of a summary-judgment ruling, the appellate court examines the entire record before the trial court. The party alleging error bears the burden of affirmatively demonstrating it from the record; when evidence necessary to resolve the appeal is omitted, the appellate court assumes the judgment was correct and affirms.
PRECEDENTIAL VALUE	Published Georgia Court of Appeals opinion; precedential.
PARTIES	Ned Armstrong, Orthopaedic Surgery, P.C. v. Rapson

TOPICS

- appellate procedure
- summary judgment
- standard of review
- preservation of error
- medical malpractice

PRACTICE AREAS

- Appellate procedure
- Civil procedure
- Medical malpractice
- Torts

QUESTIONS PRESENTED

1. Whether the Court of Appeals could reverse the denial of summary judgment when the appellants omitted from the appellate record evidence on which the trial court relied.
2. Whether the incomplete appellate record required affirmance of the trial court's summary-judgment ruling.

HOLDINGS

1. When an appellant omits from the appellate record evidence necessary to determine the alleged error, the appellate court must assume that the trial court's judgment was correct and affirm.

KEY QUOTATIONS

“When this court reviews the grant of summary judgment, we must look at the entire record before the trial court.” (916)

“It is well established that the burden is on the party alleging error to show it affirmatively by the record and where the proof necessary for determination of the issues on appeal is omitted from the record, an appellate court must assume that the judgment below was correct and affirm.” (916)

“As appellants have omitted from the record some portion of the evidence upon which the state court relied, we must affirm.” (917)

FACTUAL BACKGROUND

This medical-malpractice action arose from a sponge allegedly left in a patient during surgery. Dr. Armstrong and his professional corporation contended that no evidence showed Dr. Armstrong acted negligently. The appellate record omitted several depositions, including an expert nurse's deposition concerning a key medical record, the surgery, and the sponge count.

PROCEDURAL HISTORY

The trial court denied Dr. Ned Armstrong and Orthopaedic Surgery, P.C.'s motion for summary judgment. The defendants appealed, but omitted portions of the evidence relied upon by the trial court from the appellate record. The Court of Appeals affirmed because the incomplete record prevented review of the alleged error.

DISPOSITION

affirmed

CASES CITED

- Bennett v. Exec. Benefits, 210 Ga. App. 429, 436 S.E.2d 544 (1993)
- Advanced Electrical Systems v. Turkin, 288 Ga. App. 799, 799-800, 655 S.E.2d 685 (2007)
- Roach v. Roach, 237 Ga. App. 264, 265, 514 S.E.2d 44 (1999)
- Transport Indem. Co. v. Hartford Ins. Co., 198 Ga. App. 265, 266, 401 S.E.2d 294 (1990)

- Regency Exec. Plaza Unit Owner's Assn. v. Wilmock, Inc., 237 Ga. App. 193, 194-195, 514 S.E.2d 446 (1999)
- Moulton v. Wood, 265 Ga. App. 389, 389-390, 593 S.E.2d 911 (2004)

OPINION

BLACKBURN, J.

683 S.E.2d 915 (2009) ARMSTRONG et al. v. RAPSON. No. A09A1721. Court of Appeals of Georgia. August 28, 2009. *916 Huff, Powell & Bailey, Randolph P. Powell, Jr., Camille N. Jarman, Atlanta, for appellants. Hubert E. Hamilton III, for appellee. BLACKBURN, Presiding Judge.

In this medical malpractice action involving a sponge left in a patient, Dr. Ned Armstrong and his professional corporation (Orthopaedic Surgery, P.C.) appeal from the denial of their motion for summary judgment. They claim no evidence showed that Dr. Armstrong acted negligently in the surgery at issue.

Because defendants omitted from the appellate record evidence relied on by the trial court in denying summary judgment, we must affirm. We note first that the notice of appeal filed by defendants Dr. Armstrong and his corporation was not in the form directed by OCGA § 5-6-37 in that, rather than designating portions of the record to be omitted on appeal, defendants instructed that only items listed on the notice of appeal be included in the record sent to this court.

Under the statutory scheme, the notice of appeal provides information concerning omission of portions of the record before the lower court. See *Bennett v. Exec. Benefits*.^[1] Thus, we are unable to discern from the notice of appeal what evidence was omitted from the appellate record. Nonetheless, as in *Bennett*, "after study of the record sent up and communication with the clerk of the court below, it is apparent that under the directions contained in the notice of appeal, some portion of the evidence upon which the [trial] court relied in this case has been omitted from the record on appeal."

Id. For example, several depositions on file in the trial clerk's office were not included in the appellate record designated by defendants, including the deposition of an expert nurse Stevenson, who apparently testified as to the meaning of a key medical record on the surgery at issue and the sponge count and who was quoted to this effect in plaintiff's brief in opposition to summary judgment.

Under such circumstances, we must affirm. When this court reviews the grant of summary judgment, we must look at the entire record before the trial court. It is well established that the burden is on the party alleging error to show it affirmatively by the record and where the proof necessary for determination of the issues on appeal is omitted from the record, an appellate court must assume that the judgment below was correct and affirm.

(Punctuation omitted.) *Advanced Electrical Systems v. Turkin*.^[2] Thus, we have consistently affirmed the trial court's summary judgment order where the appellant has omitted a deposition or other evidence from the appellate record, especially where, as here, the trial court stated in its order that it has relied on "the entire record" in reaching *917 its decision.

See *id.*; *Roach v. Roach*.^[3] "As appellants have omitted from the record some portion of the evidence upon which the state court relied, we must affirm." *Transport Indem. Co. v. Hartford*.^[4] See *Regency Exec. Plaza Unit Owner's Assn. v. Wilmock, Inc.*;^[5] *Moulton v. Wood*.^[6] Judgment affirmed. *ADAMS and DOYLE, JJ., concur. NOTES* [1] *Bennett v. Exec. Benefits*, 210 Ga.App.

429, 436 S.E.2d 544 (1993). [2] *Advanced Electrical Systems v. Turkin*, 288 Ga. App. 799, 799-800, 655 S.E.2d 685 (2007). [3] *Roach v. Roach*, 237 Ga.App. 264, 265, 514 S.E.2d 44 (1999). [4] *Transport Indem. Co. v. Hartford Ins. Co.*, 198 Ga.App. 265, 266, 401 S.E.2d 294 (1990).

[5] *Regency Exec. Plaza Unit Owner's Assn. v. Wilmock, Inc.*, 237 Ga.App. 193, 194-195, 514 S.E.2d 446 (1999). [6] *Moulton v. Wood*, 265 Ga.App. 389, 389-390, 593 S.E.2d 911 (2004).