

299 Ga.App. 884
Court of Appeals of Georgia.

ARMSTRONG et al.

v.

RAPSON.

No. A09A1721. | Aug. 28, 2009.

Synopsis

Background: Patient brought medical malpractice action against surgeon and his professional corporation. The State Court, Fulton County, [Eady, J.](#), denied defendants' motion for summary judgment, and they appealed.

Holding: The Court of Appeals, [Blackburn, P.J.](#), held that affirmance of decision to deny surgeon's summary judgment motion was required by omission from record of some evidence upon which trial court relied.

Affirmed.

West Headnotes (1)

[1] **Appeal and Error**

Evidence

Affirmance of decision to deny surgeon's summary judgment motion in medical malpractice action that alleged sponge was left in patient was required by omission from record of some evidence upon which trial court relied, including deposition of expert who testified about key surgical record regarding sponge count; surgeon instructed that only items listed on notice of appeal be included in record, rather than designating portions of record to be omitted. West's [Ga.Code Ann. § 5-6-37](#).

[3 Cases that cite this headnote](#)

Attorneys and Law Firms

****916** Huff, Powell & Bailey, [Randolph P. Powell, Jr.](#), [Camille N. Jarman](#), Atlanta, for appellants.

[Hubert E. Hamilton III](#), for appellee.

Opinion

[BLACKBURN](#), Presiding Judge.

***884** 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 ***885** 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.

Parallel Citations

683 S.E.2d 915, 09 FCDR 2919

Footnotes

- 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).