

No. 1-18-1208

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

GLORIA DUPREE, as Independent Administrator)	
of the Estate of DOROTHY RICKETTE, deceased,)	
)
Plaintiff-Appellee,)	Appeal from the
)
v.)	Circuit Court of Cook County.
)
LORETTO HOSPITAL, MARK TOMERA, M.D.,)	
VISWANATHA REDDY, M.D., and)	14 L 4661
CRAWFORD AVENUE ANESTHESIA)	
PROVIDER SERVICES, LLC, COVIDIEN, LLC,)	
COVIDIEN SALES, LLC, COVIDIEN, INC.,)	
COVIDIEN HOLDING, INC., COVIDIEN, LTD.,)	
and COVIDIEN, LP ¹ ,)	
)
Defendants)	
)
(Viswanatha Reddy, M.D. and Crawford Avenue)	Honorable Cassandra Lewis,
Anesthesia Provider Services, LLC, Defendants-)	Judge Presiding.
Appellants).)	

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Delort and Justice Cunningham concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm the trial court’s determination that plaintiff’s

¹ Although not mentioned by either party in their briefs, Covidien, LLC, Covidien Sales, LLC, Covidien, Inc., Covidien Holdings, Inc., Covidien, Ltd., and Covidien, LP (Covidien defendants), were all named as defendants in this case. A review of the Clerk of the Circuit Court’s electronic docket website and the trial court’s May 9, 2018, order indicates that the Covidien defendants were all previously dismissed from this case. They are not parties to this appeal.

settlement with two of the defendants was made in good faith and apportioned properly where the appellants failed to present a sufficient record on appeal; affirmed.

¶ 2 This appeal stems from a medical malpractice action and asks this court to determine whether the trial court abused its discretion when it found that settlements made by two of the defendants, Mark Tomera, M.D. and Loretto Hospital, were in good faith and approved the proposed apportionment of settlement proceeds. The two remaining non-settling defendants, Viswanatha Reddy, M.D. and Crawford Avenue Anesthesia Provider Services, LLC (Crawford Anesthesia) (collectively, defendants), appeal the trial court's decision, arguing that the trial court erroneously determined that a settlement allocation of 90% for the wrongful death count and 10% for the survival count was fair and reasonable because the court failed to consider the medical bills incurred by the decedent, Dorothy Rickette, prior to her death. Plaintiff, Gloria Dupree as the independent administrator of Rickette's estate, argues that the trial court considered the totality of the circumstances and thus its decision was proper. For the following reasons, we affirm the trial court's decision.

¶ 3 **BACKGROUND**

¶ 4 On April 27, 2012, Rickette, who was then 79 years old, was admitted to Loretto Hospital, and a tracheostomy² procedure was performed. Dr. Tomera was the general surgeon who performed the tracheostomy and Dr. Reddy was the attending anesthesiologist. Plaintiff alleges that during the procedure, Rickette suffered significant delays in ventilation, resulting in anoxic encephalopathy and severe brain damage. Rickette subsequently died from her injuries on May 10, 2013. Between April 27, 2012, the date of the tracheostomy, and May 10, 2013, the date of her death, Rickette incurred \$1,922,848.60 in medical bills.

² We note that defendants' brief refers to the procedure as a "tracheostomy" but plaintiff's brief refers to it as a "tracheotomy." Plaintiff's operative pleading, its third amended complaint, refers to the procedure as a "tracheostomy," and thus we opt to use that term.

¶ 5 On April 28, 2014, plaintiff filed suit against Dr. Tomera, Loretto Hospital, Dr. Reddy and Crawford Anesthesia. Two counts were alleged against each defendant—one count pursuant to the Wrongful Death Act (740 ILCS 180/0.01 *et seq.* (West 2012)) and one count pursuant to the Survival Act (755 ILCS 5/27-6 (West 2012)).

¶ 6 Prior to trial, plaintiff settled her claims against Dr. Tomera and Loretto Hospital pursuant to two separate settlement agreements. Subsequently, plaintiff presented a motion for good faith finding and to apportion damages of Dr. Tomera's settlement. Loretto Hospital also filed a motion for good faith finding and to apportion damages of its settlement. Plaintiff settled against Dr. Tomera for \$1 million, which was his policy's limit, and against Loretto Hospital for \$2.5 million. Each settlement agreement proposed to allocate 90% of the total amount of the settlement to a settlement of plaintiff's wrongful death claim against the settling defendant, and 10% of the total amount of the settlement to a settlement of plaintiff's survival claim against the settling defendant. Plaintiff did not settle her claims against defendants Dr. Reddy and Crawford Anesthesia.

¶ 7 On May 8, 2018, the trial court conducted a hearing on the motions for good faith finding. The transcript from that hearing was not included in the record on appeal. On that date, the trial court entered an order that stated as follows:

“IT IS HEREBY ORDERED that the settlement negotiated between the defendant, MARK TOMERA, M.D., and the plaintiff is found to have been entered in good faith pursuant to 740 ILCS 100/2(c).

IT IS FURTHER ORDERED THAT the defendant, MARK TOMERA, M.D., shall be and hereby is dismissed with prejudice and without costs pursuant to settlement.

IT IS FURTHER ORDERED THAT the Court reserves ruling as to the proposed allocation of the settlement between the pending wrongful death and Survival Act counts.

IT IS FURTHER ORDERED THAT plaintiff’s cause of action against the defendants, VISWANATHA REDDY, M.D. AND CRAWFORD AVENUE ANESTHESIA PROVIDER SERVICES, LLC shall remain pending.” (Emphasis in original.)

¶ 8 On May 9, 2018, the trial court conducted another hearing—the transcript of which was also not included in the record on appeal—and ultimately entered three orders. One of the orders issued rulings on plaintiff’s motions *in limine*. Another order stated, in relevant part, as follows:

“IT IS HEREBY ORDERED:

1. The court finds that the settlement between plaintiff and defendant, Loretto Hospital, was made in good faith as defined by the Illinois Joint Tortfeasor Contribution Act.
2. The court finds that the apportionment of damages, 90% of the settlement total to the wrongful death count and 10% of the settlement to the survival action, is reasonable and made in good faith over [Dr.] Reddy’s objection[.]
3. Plaintiff’s motion for good faith settlement finding with Dr. Tomera regarding apportionment of damages, 90% of the settlement total attributed to the wrongful death count and 10% of the settlement to the survival count is reasonable and made in good faith over Dr. Reddy’s objection[.]
4. Loretto Hospital is DISMISSED WITH PREJUDICE[.]
5. The case shall remain pending as to Defendants VISWANATHA REDDY, M.D. AND CRAWFORD ANESTHESIA.” (Emphasis in original.)

¶ 9 The third order that the court entered on May 9, 2018, stated as follows:

“This matter coming before the court on plaintiff’s motion to voluntarily dismiss Dr. Reddy and Crawford Avenue Anesthesia Provider Services, LLC, claims against all other defendants having been dismissed pursuant to settlement. It is hereby ordered:

1. Plaintiff’s motion is granted. The case against Dr. Reddy and Crawford Avenue Anesthesia Provider Services, LLC is voluntarily dismissed pursuant to 2-1009 of the Code of Civil Procedure with leave to refile within one year. Costs to be paid to defendant upon receipt of a list of those costs.”

¶ 10 Defendants filed their timely notice of appeal on June 7, 2018.

¶ 11 ANALYSIS

¶ 12 On appeal, defendants argue that the trial court erred when it approved the allocation of the settlement amounts between plaintiff’s wrongful death claims (90%) and survival claims (10%) in her settlements with Dr. Tomera and Loretto Hospital. Defendants make clear that they are not challenging the trial court’s ruling of good faith as it pertains to the amounts for which the settlements were entered into, and only take issue with the allocation. Specifically, defendants argue that the trial court failed to consider the nearly \$2 million in medical bills that Rickette incurred between the tracheostomy and her death.

¶ 13 Section 2(c) of the Joint Tortfeasor Contribution Act provides:

“When a release or covenant not to sue or not to enforce judgment is given in good faith to one or more persons liable in tort arising out of the same injury or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide but it reduces the recovery on any claim against the others to the extent of any amount stated in the release or the covenant, or in

the amount of the consideration actually paid for it, whichever is greater.” 740 ILCS 100/2(c) (West 2012).

¶ 14 Once the settling parties inform the court that they have reached a good-faith settlement and the terms are made known to the court, a presumption of validity arises and the burden of proof on the issue of good faith shifts to the party challenging the settlement. *Readel v. Towne*, 302 Ill. App. 3d 714, 718 (1999). “[O]nce a preliminary showing of good faith has been made by the settling parties, the party challenging the good faith of the settlement need prove the absence of good faith by a preponderance of the evidence.” *Johnson v. United Airlines*, 203 Ill. 2d 121, 132 (2003). “When reviewing a proposed settlement, the trial court should consider, *in addition to the good-faith elements*, the percentage of the settlement to be allocated with respect to the particular cause of action.” (Emphasis in original.) (Internal quotation marks omitted.) *Readel*, 302 Ill. App. 3d at 719. Absent an abuse of discretion, we will not reverse a trial court’s decision that a settlement was made in good faith. *Johnson*, 203 Ill. 2d at 135.

¶ 15 Plaintiff argues that defendants have failed to provide this court with a record of what the trial court reviewed when it made its good faith finding. Plaintiff points out that the basis for defendants’ appellate contentions is that the trial court failed to consider Rickette’s approximate \$2 million in medical bills.

¶ 16 It is well-settled that the appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and if such a record is not presented, it will be presumed that the trial court’s order was in conformity with the law and had a sufficient factual basis. *Foutch v. O’Bryant*, 99 Ill. 2d 389, 391-92 (1984). “Any doubts which may arise from the incompleteness of the record will be resolved against the appellant.” *Id.* at 392.

¶ 17 Plaintiff argues that it is impossible for this court to review what the trial court considered because defendants have not provided the documents the trial court reviewed.

Specifically, plaintiff contends:

“According to the [r]eport of [p]roceedings, on May 8, 2018, the trial court instructed the parties to identify the documents that they wanted the trial court to consider in making its determination of whether the allocation of the settlement was appropriate. (Report of Proceedings of 5/8/18, p. 19). The next day, the trial court came back and stated that it ‘did review the transcripts of both doctors and family members and other relevant portions of the record.’ ”

¶ 18 Plaintiff further asserts that defendants have failed to present this court with the doctor depositions, family member depositions and portions of the record that were provided to the trial court for review. We agree with plaintiff but find additional problems with the record on appeal beyond what plaintiff has argued. In the parties’ briefs, they consistently cite to the report of proceedings for the hearings on May 8, 2018, and May 9, 2018. For example, defendants provide the following citation when referring to a transcript from one of those hearings: “(Report of Proceedings of 5/8/18, p. 19).” Problematically, the transcripts for those two hearings are not contained in the record on appeal and instead were attached to the appendix of defendants’ brief. We cannot consider the reports of proceeding for May 8 and 9. “[A] reviewing court will not supplement the record on appeal with documents attached to the appellant’s brief on appeal as an appendix, where there is no stipulation between the parties to supplement the record and there was no motion in the reviewing court to supplement the record with the material.” *Pikovsky v. 8440-8460 North Skokie Boulevard Condominium Ass’n, Inc.*, 2011 IL App (1st) 103742, ¶ 16. “[A] party may generally not rely on matters outside the record to support its position on

appeal.” *Oruta v. B.E.W. and Continental*, 2016 IL App (1st) 152735, ¶ 32. Further, if materials are not taken from the record on appeal, they typically may not be placed before the appellate court in an appendix and will be disregarded. *Id.*

¶ 19 In *Foutch*, our supreme court held that because there was no transcript of the hearing that resulted in the order at issue, there was no basis for holding that the trial court abused its discretion. *Foutch*, 99 Ill. 2d at 392. In this case, our standard of review is also an abuse of discretion. “An issue relating to a circuit court’s factual findings and basis for its legal conclusions obviously cannot be reviewed absent a report or record of the proceeding.” *Corral v. Mervis Industries, Inc.*, 217 Ill.2d 144, 156 (2005).

¶ 20 Here, defendants’ failure to provide this court with a sufficient record is particularly egregious. In addition to the record missing the documents upon which the trial court relied in making its ruling and the transcripts from the May 8 and May 9 hearings, plaintiff points out that defendants have also failed to include plaintiff’s motion for a good faith finding and Loretto Hospital’s motion for a good faith finding—the two motions upon which this entire appeal is based. Defendants improperly included plaintiff’s motion for a good faith finding in the appendix to their brief (*Pikovsky*, 2011 IL App (1st) 103742, ¶ 16), and further, the copy of that motion is not file-stamped and does not contain a notice of filing, which further calls into question its reliability. Defendants did not include Loretto Hospital’s motion for a good faith finding anywhere.

¶ 21 Supreme Court Rule 329 (Ill. S. Ct. R. 329 (eff. Jul. 1, 2017)), provides that “[m]aterial omissions or inaccuracies or improper authentication may be corrected by stipulation of the parties or by the trial court, either before the record is transmitted to the reviewing court, or by the reviewing court or a judge thereof.” One could make the argument that because plaintiff

cites to the report of proceedings included in defendants' brief's appendix, plaintiff has indicated a willingness to stipulate to the inclusion of the transcripts from the May 8 and May 9 hearings, and thus we should amend the record pursuant to Rule 329 to include the transcripts. We acknowledge that the power to amend under Rule 329 has been exercised by this court. See *Scepurek v. Board of Trustees of Northbrook Firefighters' Pension Fund*, 2014 IL App (1st) 131066, ¶ 3. However, we decline to do so here, where such an amendment would be an exercise in futility because defendants have also failed to include the depositions and materials upon which the trial court relied in reaching its decision and the two motions for good faith findings that are the crux of this appeal. The primary issue in this appeal is whether the trial court considered the totality of the circumstances when it issued its ruling on the allocation of settlement proceeds. We cannot determine whether an abuse of discretion occurred when we do not know the trial court's reasoning, what materials the trial court based its decision on, and the contents of the two motions for a good faith finding.

¶ 22 In fact, it appears defendants agree that these omitted materials are necessary to our review. On October 18, 2018, defendants filed a "Motion to Extend Due Date for Filings of Appellants' Brief." Defendants stated that they were asking for an extension of time to allow defendants' counsel the time necessary to supplement the record on appeal with the pertinent documents. Attached to the motion was a notarized affidavit from defendants' counsel. The motion and the affidavit contained substantially similar information. In relevant part, the affidavit stated:

"6. In support of their argument regarding the improper allocation of the overall settlement amounts, the defendants/appellants filed with the trial court deposition transcripts of a number of witness. The deposition testimony of these witnesses

contained evidence to establish the extent of damages suffered by the Plaintiff's Decedent prior to her death.

7. On May 9, 2018, after reviewing the aforesaid deposition transcripts, hearing oral argument, and reviewing the motions for good faith finding filed by LORETTO (in connection with the Plaintiff-LORETTO settlement) and filed by the Plaintiff (filed in connection with the Plaintiff-TOMERA settlement), the trial court entered an order finding both [settlements] to be good faith settlements. ***

8. In order for this honorable court to review the trial court's finding that both of the aforesaid settlements were good faith settlements within the meaning of the Joint Tortfeasor Contribution Act, it will be necessary for this honorable court to have before it (a) LORETTO'S motion for good faith finding regarding its settlement with the Plaintiff, (b) the Plaintiff's motion for good faith finding in regard to the Plaintiff's settlement with TOMERA, and (c) the deposition transcripts filed with the trial court judge by the defendants/appellants in support of their argument that neither of the aforesaid settlements were good faith settlements." (Emphasis in original.)

Despite the foregoing representations and the fact that this court granted defendants' motion for extension of time, defendants never filed a motion to supplement the record on appeal. Instead, they improperly attached some (but not all) of the omitted materials as an appendix to their brief.

¶ 23 Finally, in their reply brief, defendants argue that plaintiff's contention that the record is insufficient to show that the trial court failed to consider the medical bills has no merit because "[w]e know for a certainty that the trial court did not take those medical bills into consideration because the trial court stated specifically, and in no uncertain terms, that it had not done so. ([S]ee above quoted excerpts from Report of Proceedings 5/9/18, pps. 5-10)." However,

defendants' argument ignores the fact that they improperly included the transcripts in their appendix. Thus, we do not know what the trial court considered, let alone for a certainty.

Ultimately, we construe the glaring deficiencies in the record against defendants and resolve any doubts against them. *Foutch v. O'Bryant*, 99 Ill. 2d at 392. 392. As a result, we presume that the trial court's order was in conformity with the law and had a sufficient factual basis and affirm.

¶ 24

CONCLUSION

¶ 25 Based on the foregoing, we affirm the trial court's decision approving the allocation of the settlement proceeds amongst plaintiff's wrongful death claims and survival claims as related to plaintiff's settlement with Dr. Tomera and plaintiff's settlement with Loretto Hospital.

¶ 26 Affirmed.