

IN THE COURT OF APPEALS OF OHIO  
SIXTH APPELLATE DISTRICT  
LUCAS COUNTY

Martha Morgan

Court of Appeals No. L-08-1351

Appellant

Trial Court No. CI07-2189

v.

Donna Gruetter, et al.

**DECISION AND JUDGMENT**

Appellee

Decided: September 18, 2009

\* \* \* \* \*

Samuel G. Bolotin and Andrew J. Stough, for appellant.

Louis R. Moliterno and Ian R. Luschin, for appellee Donna Gruetter.

\* \* \* \* \*

PIETRYKOWSKI, J.

{¶ 1} Plaintiff-appellant, Martha Morgan, appeals the September 11, 2008 judgment of the Lucas County Court of Common Pleas which granted appellant's motion for a new trial on appellant's claim for pain and suffering; however, the court limited the retrial from September 22, 2005, the date of the automobile accident, to October 5, 2005,

the date of appellant's follow up visit with her physician. For the reasons that follow, we affirm the trial court's judgment.

{¶ 2} On September 22, 2005, appellant was operating a motor vehicle and was stopped due to traffic when defendant-appellee, Donna Gruetter, failed to maintain an assured clear distance and struck appellant's vehicle from behind. At the time of the impact, appellee was traveling at a low rate of speed; damage to appellant's vehicle was minimal. Appellant drove herself to the nearest emergency room; she was treated for her injuries and released. Appellant then followed up with her primary care physician.

{¶ 3} On February 27, 2007, appellant filed a complaint against appellee alleging negligence and negligence per se. Appellant also set forth a claim against her uninsured/underinsured carrier, State Farm Mutual Automobile Insurance Company. Appellee stipulated to negligence and on April 14, 2008, the case proceeded to a jury trial on the issue of damages.

{¶ 4} During the trial, appellant presented the videotaped deposition of her treating physician, Dr. James D. Diethelm, to support her personal injury claim. Appellant also submitted all the medical records and expenses allegedly incurred as a result of the accident. Appellee presented evidence that appellant had a pre-existing arthritic neck condition. Following deliberations, the jury awarded appellant damages of \$3,034.90. Their response to an interrogatory indicated that the award represented the medical expenses from the initial emergency room visit and the October 5, 2005 follow

up visit with Dr. Diethelm. The jury awarded no damages for appellant's pain and suffering.

{¶ 5} On April 18, 2008, appellant filed a Civ.R. 59 motion for a new trial. In her motion, appellant argued that the jury erred by limiting her recovery for medical expenses where the testimony of her physician and her medical records established expenses totaling \$11,880.18. Appellant further argued that the verdict was inconsistent and inadequate because the jury failed to award damages for pain and suffering. In opposition, appellee argued that appellant waived the objection because she failed to raise an objection to the alleged inconsistent verdict while the jury was still impaneled.

{¶ 6} On September 11, 2008, the trial court granted appellant's motion, in part. The court noted that appellant's Civ.R. 59 motion argued that the verdict was not sustained by the weight of the evidence, not that the jury's findings were inconsistent. The court then concluded that the damages award was inadequate because the jury awarded damages for medical treatment but failed to award damages for pain and suffering. The court then limited the retrial to the consideration of the pain and suffering related to the \$3,034.90 in medical expenses found by the original jury. This appeal followed.

{¶ 7} Appellant now presents the following two assignments of error for our review:

{¶ 8} "I. The trial court erred in limiting retrial of appellant's personal injury damage claim to damages for pain and suffering only, and limiting it to a two week period.

{¶ 9} "II. The trial court erred in failing to grant appellant's motion for a new trial of her personal injury damage claim as the jury's inadequate verdict was influenced by passion and prejudice."

{¶ 10} A motion for new trial is governed by Civ.R. 59. Appellant's motion was based on Civ.R. 59(A)(4), which provides that a trial court may grant a new trial based upon excessive or inadequate damages. The motion was also based upon Civ.R. 59(A)(6), which allows a new trial where the judgment was not sustained by the weight of the evidence; and (A)(7), the judgment is contrary to law. The determination of whether or not to grant a new trial is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *Pena v. Northeast Ohio Emergency Affiliates, Inc.* (1995), 108 Ohio App.3d 96, 103, citing *Verbon v. Pennese* (1982), 7 Ohio App.3d 182, 184. An abuse of discretion connotes an unreasonable, arbitrary, or unconscionable decision. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 11} In her first assignment of error, appellant contends that the trial court should have awarded a retrial on the entire issue of damages, not just the pain and suffering portion of the damages relating to the medical expenses awarded by the original jury. In support of her argument, appellant relies on the case captioned *Wines v. Flowers*, 7th Dist. No. 06 BE 3, 2006-Ohio-6248.

{¶ 12} In *Wines*, the jury in a personal injury case awarded all of the plaintiff's medical expenses but failed to award damages for pain and suffering. The plaintiff filed a motion for a new trial as to the pain and suffering issue only; the trial court granted the motion as to all the damages. *Id.* at ¶ 5.

{¶ 13} On appeal, the plaintiff argued that the new trial should only encompass the inadequate portions of the verdict. *Id.* at ¶ 11. She further argued that Civ.R. 59 specifically provides that a new trial may be granted "on all or part of the issues." *Id.* at ¶ 16. Rejecting her arguments, the court analyzed varying appellate court decisions; some remanding cases for a retrial on pain and suffering only, and some remanding cases for a full retrial on damages. *Id.* at ¶ 12-18. The court concluded that the varying decisions underscore the fact that "a trial court has discretion to determine if the new trial should be granted on all damage issues or only on a portion of the damage award." *Id.* at ¶ 19. The court then found that the trial court did not abuse its discretion when it granted the plaintiff's motion for a new trial as to all of the damages.

{¶ 14} In the present case, in its September 11, 2008 judgment entry, the trial court found "that there was competent, substantial and credible evidence to support the jury's finding that plaintiff was not entitled to recover for medical expenses and pain and suffering following her visit to Dr. Diethelm on October 5, 2005." The court then limited the retrial to the issue of damages for pain and suffering up to and including October 5, 2005.

{¶ 15} Upon review, we cannot say that the trial court abused its discretion when it limited the retrial to the determination of damages for pain and suffering from September 22 to October 5, 2005. Civ.R. 59 specifically provides for a new trial on "all or part of the issues." Moreover, the cases that this court has reviewed, as in *Wines*, supra, demonstrate that the trial court has considerable discretion in fashioning the scope of a retrial. Accordingly, appellant's first assignment of error is not well-taken.

{¶ 16} In appellant's second assignment of error, she contends that the trial court erred when it failed to grant her motion for a new trial on her entire damages claim where the jury's inadequate verdict was influenced by passion or prejudice. Specifically, appellant contends that she provided "uncontroverted medical evidence of her injuries" yet the jury failed to fully compensate her; thus, the jury must have been influenced by passion or prejudice.

{¶ 17} To show that inadequate or excessive damages were a result of a jury's passion or prejudice under Civ.R. 59(A)(4), the moving party must demonstrate that "the jury's assessment of the damages was so overwhelmingly disproportionate as to shock reasonable sensibilities." *Pena v. Northeast Ohio Emergency Affiliates*, 108 Ohio App.3d at 104. "An appellate court reviewing a trial court's decision under Civ.R. 59(A)(4) should consider 'the excessive [or inadequate] nature of the verdict, consideration by the jury of incompetent evidence, improper argument by counsel, or other improper conduct which can be said to have influenced the jury.'" *Porter v. Keefe*, 6th Dist. No. E-02-018,

2003-Ohio-7267, ¶ 91, quoting *Fields v. Dailey* (1990), 68 Ohio App.3d 33, 39. The size of a verdict alone is insufficient to establish passion or prejudice. *Pena* at 104.

{¶ 18} In support of her argument, appellant cites *Gorney v. Naus*, 6th Dist. No. L-06-1223, 2007-Ohio-2827. In *Gorney*, the trial court granted the plaintiff's motion for a retrial where the jury found that the defendant was negligent but awarded no damages. *Id.* at ¶ 17. On appeal, we affirmed the trial court's judgment noting that "basic medical testimony was furnished at trial \* \* \* that appellee sustained forearm soft tissue injury in the accident." *Id.* at ¶ 24.

{¶ 19} Reviewing the *Gorney* decision, it is apparent that we doubted the veracity of the plaintiff's claims (especially in light of her redrafting her own medical records); however, this court adhered to the basic principle that because the trial court is in the best position to judge the credibility of witnesses, we must defer to its judgment. *Id.* at ¶ 22. We reviewed the trial court's decision for any "indicia of sufficiency"; in the context of the evidence presented to the jury. The jury's passion or prejudice was not mentioned.

{¶ 20} In the present case, appellant has failed to demonstrate that improper evidence or misconduct influenced the jury; appellant merely rehashes her sufficiency of the evidence argument. Accordingly, we find that appellant's second assignment of error is not well-taken.

{¶ 21} On consideration whereof, we find that substantial justice was done the party complaining and the judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

\_\_\_\_\_  
JUDGE

Arlene Singer, J.

\_\_\_\_\_  
JUDGE

Thomas J. Osowik, J.  
CONCUR.

\_\_\_\_\_  
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:  
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.