

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

David E. Davis, et al.

Court of Appeals No. E-10-013

Appellants

Trial Court No. 2007 CV 0862

v.

Firelands Regional Medical Center, et al.

DECISION AND JUDGMENT

Appellee

Decided: August 27, 2010

* * * * *

Alicia Wolph Roshong and Michael A. Kenny, Jr., for appellants.

Michael P. Murphy and David R. Hudson, for appellee.

* * * * *

SINGER, J.

{¶ 1} Appellants appeal the order of the Erie County Court of Common Pleas, denying motions for judgment notwithstanding the verdict or new trial, following an adverse jury verdict on a personal injury claim. For the reasons that follow, we affirm.

{¶ 2} Appellants are David E. Davis and his wife, Julia D. Davis.¹ Appellee is the Firelands Regional Medical Center.

{¶ 3} On July 6, 2007, appellant went to appellee's hospital to receive an epidural steroid injection in the lumbar region of his spine. Appellant was taken to an operating room on a gurney, lying on his back. Once in the operating room, nurses assisted appellant to roll from the gurney onto an operating table so that he was face down on the table. According to the deposition testimony² of a nurse and an x-ray technician in the room at the time, when the nurse who delivered appellant left with the gurney, the operating table upon which appellant was lying began to slowly tilt in the direction of appellant's feet. The witnesses said that, as the table tilted, appellant slid down the table until the table was nearly perpendicular and appellant's feet were on the floor. The nurse and the x-ray technician reported that appellant said he was all right and that he elected to get back on the table and continue the procedure.

{¶ 4} In his deposition, appellant provides a different account. He characterizes the tipping as "sudden" and states "[m]y belly was on the floor, and my chest and my – the top of my belly – I was bent like a banana." According to appellant, he experienced

¹David Davis's wife is a party by virtue of a loss of consortium claim. For clarity, David Davis will be referred to as appellant.

²In ordinary circumstances, when a matter goes to trial we would not consider depositions unless admitted into evidence. In this matter, however, appellants have filed only a small portion of the trial transcript, necessitating that we look elsewhere for a more complete account.

cervical pain in the recovery room, but was administered an analgesic and sent home.

Later the same day, appellee returned to appellee's emergency room, complaining of back pain and, according to his account, specifically cervical pain which he attributed to the fall from the operating table.

{¶ 5} Appellant's assertion that he immediately reported cervical pain on July 6 is disputed. It is undisputed, however, that at some point following the table incident a cervical condition in appellant that had been asymptomatic began to offer him serious distress that eventually required cervical decompression surgery.

{¶ 6} On October 10, 2007, appellants initiated the lawsuit that underlies this appeal. The suit alleged that appellee's negligence in failing to assure that the operating room table was secured, resulted in the fall that caused his cervical injury. The case was tried to a jury over a two week period beginning on September 21, 2009. On deliberation, the jury found that appellee was negligent in failing to properly secure the operating room table, but refused to find that this negligence was the proximate cause of appellant's injury. In the end, the jury's general verdict was in favor of appellee.

{¶ 7} The trial court denied appellant's subsequent motions for a judgment notwithstanding the verdict and new trial on the issue of causation and damages. The court entered judgment on the verdict. From this judgment, appellants now bring this appeal, setting forth the following two assignments of error:

{¶ 8} "A. ASSIGNMENT OF ERROR NO. I: The Trial Court Erred When It Denied Plaintiffs'/Appellants' Motion for Judgment Notwithstanding The Verdict, under Ohio Rules of Civil Procedure 50 (B), as the Plaintiffs/Appellants Proved Negligence And Submitted To The Jury Sufficient Evidence That The Incident On July 6, 2007 Caused Plaintiff/Appellant His Permanent and Debilitating Cervical Injuries.

{¶ 9} "B. ASSIGNMENT OF ERROR NO. II: The Trial Court Erred When It Denied Appellant's Motion for a New Trial on Causation and Damages, as Plaintiffs/Appellants Proved Negligence."

{¶ 10} It is an appellant's burden to ensure that the record or the portions of the record necessary for the determination of the appeal are filed with the appeals court. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 19; App.R. 9(B). When an appellant claims that a judgment was against the manifest weight of the evidence or unsupported by sufficient evidence, the appellant must include all portions of the transcript relevant to contested issues. *Hartt v. Munobe* (1993), 67 Ohio St.3d 3, 7. The appellant may not attempt to shift the burden to an appellee by filing only portions of the trial record and claiming a lack of opposing evidence. *Id.*

{¶ 11} It is the burden of a plaintiff in a negligence action to prove that the defendant breached a duty owed the plaintiff and that the breach of duty proximately caused the defendant's injury. *Mussivand v. David* (1989), 45 Ohio St.3d 314, 318. The jury is the sole judge of the weight of the evidence and the credibility of witnesses, and

"may believe or disbelieve any witness or accept part of what a witness says and reject the rest." *State v. Antill* (1964), 176 Ohio St. 61, 67. There is a presumption that the findings of a jury are correct. When a party is charged with the burden of proving his or her claim, the presumption is all the more rigorous and that party can hardly complain if the trier of fact chooses not to believe some or all of his or her proofs. *In re Scott* (1996), 111 Ohio App.3d 273, 276.

{¶ 12} In this matter the only trial transcripts appellants requested were the direct and cross examination of two medical witnesses and the direct testimony of two others. Appellants would like to frame the question of proximate cause in terms of a contest between the opinions of these experts. They argue that the experts agree that appellant did not have symptomatic cervical discomfort prior to his fall and that he did after the fall. Therefore, appellants ask, how can causation be disputed?

I. J.N.O.V.

{¶ 13} The standard for a motion for judgment notwithstanding the verdict pursuant to Civ.R. 50(B) is the same as that for a motion for a directed verdict pursuant to Civ.R. 50(A). *Estate of Cowling v. Estate of Cowling*, 109 Ohio St.3d 276, 2005-Ohio-2418, ¶ 28. "[I]f there is substantial competent evidence to support the party against whom the motion is made, upon which evidence reasonable minds might reach different conclusions, the motion must be denied." *Id.* at ¶ 31, quoting *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 284-285.

{¶ 14} Appellants had the burden of proof. The trier of fact may believe any or all of the plaintiff's proofs. Even were we to narrow our consideration to that small part of the transcript that appellants included in the record, we could not say the jury did not disbelieve some of the proofs included. Since appellants failed to include in the record the complete transcript, we cannot determine whether there was or was not competent evidence to support appellants' claim. Consequently, they have failed in their burden to point to evidence in the record in support of their assertion of error. Accordingly, appellants' first assignment of error is not well-taken.

II. New Trial.

{¶ 15} Appellants moved for a new trial pursuant to Civ.R. 59(A)(6) and (7). The rule provides:

{¶ 16} "A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:

{¶ 17} " * * *

{¶ 18} "(6) The judgment is not sustained by the weight of the evidence * * *

{¶ 19} "(7) The judgment is contrary to law[.]"

{¶ 20} Appellants argued that since there was sufficient evidence submitted to establish causation, the verdict was contrary to law.

{¶ 21} "When applying a sufficiency-of-the-evidence standard, a court of appeals should affirm a trial court when the evidence is legally sufficient to support the jury

verdict as a matter of law. When applying a civil manifest-weight-of-the-evidence standard, a court of appeals should affirm a trial court when the trial court's decision is supported by some competent, credible evidence." *Bryan-Wollman v. Domonko*, 115 Ohio St.3d 291, 2007-Ohio-4918, ¶ 3. (Internal citations and quotations omitted.)

{¶ 22} Again, it is not the defendant who must prove that there was a lack of proximate cause between its negligence and the plaintiff's injury. It is the plaintiff's burden to prove that there was such a link. Appellants have failed to provide a complete transcript of the proceeding. As a result, they have failed to meet their burden to prove error by reference to the record. Accordingly, appellants' second assignment of error is not well-taken.

{¶ 23} On consideration whereof, the judgment of the Erie County Court of Common Pleas is affirmed. It is ordered that appellants pay court costs of this appeal pursuant to App.R. 24.

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, P.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:
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