[Cite as *Clayton v. Pedersen*, 2009-Ohio-5381.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

---

JOURNAL ENTRY AND OPINION
**No. 92761**

---

**PEGGY CLAYTON**

PLAINTIFF-APPELLEE

vs.

**PATRICIA PEDERSEN**

DEFENDANT-APPELLANT

---

**JUDGMENT:**
**AFFIRMED**

---

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-602332

**BEFORE:** Jones, J., Gallagher, P.J., Rocco, J.

**RELEASED:** October 8, 2009

**JOURNALIZED:**

**ATTORNEYS FOR APPELLANT**

Roger H. Williams
Joshua R. Angelotta
Williams, Moliterno & Scully Co., LPA
2241 Pinnacle Parkway
Twinsburg, OH 44087-2367

**ATTORNEYS FOR APPELLEE**

Donald E. Caravona
Aaron P. Berg
Caravona & Czack, P.L.L.
50 Public Square
1900 Terminal Tower
Cleveland, Ohio 44113

LARRY A. JONES, J.:

**{¶ 1}** Defendant-appellant, Patricia Pedersen ("Pedersen"), appeals the decision of the lower court. Having reviewed the arguments of the parties and the pertinent law, we hereby affirm the lower court.

## STATEMENT OF THE CASE AND THE FACTS

**{¶ 2}** On November 8, 2004, a significant motor vehicle accident occurred between Pedersen and plaintiff-appellee, Peggy Clayton ("Clayton"). Pedersen's vehicle struck Clayton's vehicle in the rear, thrusting it approximately 60 feet from the roadway. Clayton alleged that she suffered personal injuries as a result of Pedersen's negligence. The parties were unable to reach a settlement agreement on the bodily injury claim and Clayton filed a complaint on September 25, 2006. Pedersen timely filed her answer to the complaint.

**{¶ 3}** There was no liability dispute and the issue before the trial court was damages. Clayton presented $25,459.20 in medical bills related to the crash. Appellee further claimed economic damages of lost future earnings, specifically that the crash aggravated her pre-existing condition of multiple sclerosis, thereby causing her to retire prematurely from her employment as a teacher with Beachwood City Schools. Appellee claimed non-economic damages of injury to her spine, pain and suffering.

**{¶ 4}** Trial began on September 30, 2008, and the jury returned a verdict for Clayton on October 1, 2008 in the amount of $59,679.95. Clayton filed a motion for new trial on October 7, 2008 and appellee filed her brief in opposition.

On December 11, 2008, the trial court conducted an oral hearing. On January 7, 2009, the trial court granted Clayton's motion for new trial. On February 5, 2009, appellant filed her notice of appeal with this court.

## Assignments of Error

**{¶ 5}** Pedersen assigns two assignments of error on appeal:

**{¶ 6}** "[1.] The trial court abused its discretion in awarding appellee a new trial and determining that the jury's verdict was against the manifest weight of the evidence because it did not award appellee damages for future pain and suffering.

**{¶ 7}** "[2.] The trial court abused its discretion in awarding appellee a new trial and determining that the jury's verdict was inadequate, appearing to have been given under the influence of passion or prejudice."

## LEGAL ANALYSIS

**{¶ 8}** Due to the substantial interrelation between appellant's first two assignments of error, we shall address them together. Specifically, appellant argues in her first two assignments or error that the lower court erred in awarding a new trial.

## Abuse of Discretion

**{¶ 9}** The law requires appellate courts to apply the abuse of discretion standard when reviewing a trial court's decision to grant a new trial. We are further directed to "view the evidence favorably to the trial court's action rather

than to the jury's verdict. The predicate for that rule springs, in part, from the principle that the discretion of the trial judge in granting a new trial may be supported by his having determined from the surrounding circumstances and atmosphere of the trial that the jury's verdict resulted in manifest injustice." *Jenkins v. Krieger* (1981), 67 Ohio St.2d 314, 320, 423 N.E.2d 856.

**{¶ 10}** "It is not the place of [a reviewing] court to weigh the evidence in these cases." *Mannion v. Sandel* (2001), 91 Ohio St.3d 318, 322, 744 N.E.2d 759. The trial court's order may not be reversed absent an abuse of discretion, i.e., that the order was "unreasonable, arbitrary, or unconscionable." Id., citing *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, 87, 262 N.E.2d 685, and *Steiner v. Custer* (1940), 137 Ohio St. 448, 31 N.E.2d 855, paragraph two of the syllabus.

**Manifest Weight**

**{¶ 11}** In evaluating a challenge to the verdict based on the manifest weight of the evidence, a court sits as the thirteenth juror and intrudes its judgment into proceedings that it finds to be fatally flawed through misrepresentation or misapplication of the evidence by a jury that has "lost its way." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541. As the Ohio Supreme Court declared:

> "Weight of the evidence concerns 'the inclination of the greater amount of credible evidence offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief.' * * *

> "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." Id.

**{¶ 12}** In *State v. Bruno*, Cuyahoga App. No. 84883, 2005-Ohio-1862, we stated that the court must be mindful that the weight of the evidence and the credibility of witnesses are matters primarily for the trier of fact. A reviewing court will not reverse a verdict where the trier of fact could reasonably conclude from substantial evidence that the prosecution proved the offense beyond a reasonable doubt. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. Moreover, in reviewing a claim that a conviction is against the manifest weight of the evidence, the conviction cannot be reversed unless it is obvious that the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Garrow* (1995), 103 Ohio App.3d 368, 370-371, 659 N.E.2d 814.

**Motion for New Trial - Civ. R. 59**

**{¶ 13}** Civ.R. 59, New Trial, Grounds, Section (A), subsections (4) and (6), provide the following: "(A) Grounds, 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: * * * (4) Excessive or inadequate damages, appearing to have been given under the

influence of passion or prejudice; * * * (6) The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case."

**{¶ 14}** The trial court in the case at bar summarized the evidence and law behind its rationale for granting appellee's motion for new trial. The trial court found the following in its January 7, 2009 opinion:

> "The Court finds that the *size of the jury's award was insufficient, appearing to have been given under the influence of passion or prejudice.* The court further finds that *the jury rejected or ignored uncontroverted medical testimony relating to future pain and suffering/disability.* The failure of the jury to make any award was *against the manifest weight of the evidence pertaining to future disability and apparently prejudiced by evidence of the combined income of the Plaintiffs from tax records*. The insufficiency findings is also supported by the *defense at closing argument suggesting that a '$90,000.00 award would be adequate*.'" (Emphasis added.)

Accordingly, a review of the trial court's opinion demonstrates that the lower court found: (1) that the damages were inadequate and appeared to be given under the influence of passion or prejudice and (2) the judgment was not sustained by the weight of the evidence.

**{¶ 15}** Significant medical testimony relating to future pain and suffering and disability was provided at trial. Specifically, with regard to Clayton being permanently disabled from work as a result of this crash aggravating her multiple sclerosis, Dr. Stone testified as follows:

> A: "So both because of the course of her MS and because of her personality and the way she had previously approached her medical care, I didn't anticipate that, barring something unforeseen such as the accident, she would have to go out on disability."

Q: “And, doctor, the conditions that you’ve described, and you used the term 51 percent, which is under the legal standard reasonable medical certainty. All right?”

A: “Correct.”

* * *

Q: “It is unlikely multiple sclerosis itself was effected by the accident of 11/8/04 and this appears to be a problem of pain management alone without underlying physical derangement.”

“My question to you, doctor, is do you agree with that statement?”

A: “I do not agree with that statement.”

Q: “Why?”

A: “I do not agree because of the time course and the change in functional level, in pain level, in walk time before and after, which would indicate to me that there was a worsening of her neurologic condition, i.e., her multiple sclerosis after the accident.”

Q: “Okay.”[1]

Moreover, defense counsel presented no expert medical testimony refuting or contradicting the testimony of plaintiff’s treating physicians, Dr. Frederick Wilson and Dr. Lael A. Stone.

**{¶ 16}** In addition to the medical testimony and evidence presented, it is noteworthy that the jury’s award of $59,679.95 was significantly less than the $847,513.73 that Pedersen suggested would be appropriate, and further it is

[1]See, July 2, 2008, Deposition transcript of Lael A. Stone, M.D., at 21-22, 24.

two-thirds less than the $90,000.00 award that *Pedersen's counsel* stated would be fair and reasonable under the evidence produced at trial.[2]

**{¶ 17}** Ultimately, the trial court concluded that the jury failed to properly analyze plaintiff's expert opinions and other evidence. The trial court therefore concluded that the jury's verdict was against the manifest weight of the evidence. It is clear that the trial court engaged in an objective examination of the evidence and testimony presented and did not inappropriately substitute its judgment for that of the jurors. Instead, the trial court reasonably surmised that the jury missed, or improperly disregarded, key testimonial evidence.

**{¶ 18}** Our review of the record lends evidentiary support to the trial court's rationale, and leaves us unpersuaded by appellant's claims that the trial court abused its discretion by granting Clayton's motion for a new trial.

**{¶ 19}** Accordingly, appellant's first and second assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

---

[2]Tr. 209, 234.

LARRY A. JONES, JUDGE

SEAN C. GALLAGHER, P.J., CONCURS IN JUDGMENT ONLY;
KENNETH A. ROCCO, J., CONCURS