[Cite as *Taylor v. Freedom Arms, Inc.*, 2009-Ohio-6091.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
ROBERT W. TAYLOR	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellee	:	Hon. Julie A. Edwards, J.
	:	
-vs-	:	
	:	Case No. CT2008-0071
FREEDOM ARMS, INC.	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING: Civil appeal from the Muskingum County Court of Common Pleas, Case No. CB2005-0465

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: November 17, 2009

APPEARANCES:

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Gwin, P.J.

{¶1} Defendant-appellant Freedom Arms, Inc. appeals a judgment of the Court of Common Pleas of Muskingum County, Ohio, which overruled both its motion for judgment notwithstanding the verdict pursuant to Civ. R. 50 (B) and its motion for a new trial pursuant to Civ. R. 59 (A). Appellee is plaintiff Robert W. Taylor. Appellant assigns one error to the trial court:

{¶2} "FREEDOM ARMS, INC. ("FREEDOM") CLAIMS THAT THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT: (1) DENIED FREEDOM'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT PURSUANT TO CIV. R. 50 (B) and (2) DENIED FREEDOM'S MOTION FOR A NEW TRIAL PURSUANT TO CIV. R. 59(A)."

{¶3} This appeal arises out of a product liability lawsuit alleging negligent design of a firearm.

{¶4} On September 9, 2003, appellee was horseback riding with friends near Red Rock, Wyoming. He was carrying a Freedom Arms Model 83.454 Casull revolver in a holster on his right thigh. After a day of riding, he returned to his horse trailer to get out of the rain. Appellee was wearing a heavy oilcloth coat. While appellee was taking off his coat in the trailer, a part of it caught on the hammer of the gun, causing it to "snap fire". The gun discharged a bullet into his lower right leg. Appellee lost his right leg below the knee and now wears a prosthetic limb.

{¶5} In May, 2007, the parties engaged in the three-week trial, after which the jury found the gun in question to be a defective product. The jury awarded appellee

$600,000 in economic damages, and nothing for pain and suffering. The jury found appellee was 50% liable, and reduced his economic award by half.

{¶6} First, appellant argues the court should have sustained its motion for a judgment notwithstanding the verdict.

{¶7} Civ. R. 50 (B) provides in pertinent part:

{¶8} “Whether or not a motion to direct a verdict has been made or overruled and not later than fourteen days after entry of judgment, a party may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion; or if a verdict was not returned to such party, within fourteen days after the jury has been discharged, may move for judgment in accordance with his motion. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment. If the judgment is reopened, the court shall either order a new trial or direct the entry of judgment, but no judgment shall be rendered by the court on the ground that the verdict is against the weight of the evidence. If no verdict was returned, the court may direct the entry of judgment or may order a new trial.”

{¶9} When ruling on a motion for judgment notwithstanding the verdict, a trial court applies the same test as in reviewing a motion for a directed verdict. *Ronske v. Heil Co.,* Stark App. No.2006-CA-00168, 2007-Ohio-5417; see also, *Pariseau v. Wedge Products, Inc.* (1988), 36 Ohio St.3d 124, 127, 522 N.E.2d 511. “A motion for judgment notwithstanding the verdict is used to determine only one issue i.e., whether the evidence is totally insufficient to support the verdict.” *Krauss v. Streamo,* Stark App.

No.2001 CA00341, 2002-Ohio-4715, paragraph 14; see also, *McLeod v. Mt. Sinai Medical Center* (2006), 166 Ohio App.3d 647, 853 N.E.2d 1235, reversed on other grounds, 116 Ohio St.3d 139, 876 N.E.2d 1201. Neither the weight of the evidence nor the credibility of the witnesses is a proper consideration for the court. *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271, 275, 344 N.E.2d 334. See, also, Civ.R. 50(B); and *Osler v. Lorain* (1986), 28 Ohio St.3d 345, 347, 504 N.E.2d 19. In other words, if there is evidence to support the nonmoving party's side such that reasonable minds could reach different conclusions, the court may not usurp the jury's function and the motion must be denied. *Osler,* supra.

{¶10} Appellate review of a ruling on a motion for judgment notwithstanding the verdict is de novo, *Midwest Energy Consultants, L.L.C. v. Utility Pipeline, Ltd.,* Fifth Dist. App. No.2006CA00048, 2006-Ohio-6232; *Ronske* supra. "While we are aware that the grounds for granting a judgment n.o.v. are not easily met, a motion for such a judgment must be sustained when circumstances so require.

{¶11} "'The test to be applied by a trial court in ruling on a motion for judgment notwithstanding the verdict is the same test to be applied on a motion for a directed verdict. The evidence adduced at trial and the facts established by admissions in the pleadings and in the record must be construed most strongly in favor of the party against whom the motion is made, and, where there is substantial evidence to support his side of the case, upon which reasonable minds may reach different conclusions, the motion must be denied. Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in ruling upon either of the above motions.' *Posin,* supra at 275; *McNess v. Cincinnati Street Ry. Co.* (1949), 152 Ohio St. 269, 40

O.O. 318, 89 N.E.2d 138; *Ayers v. Woodard* (1957), 166 Ohio St. 138, 1 O.O.2d 377, 140 N.E.2d 401; Civ. R. 50(A) and (B)."

{¶12} Appellant argues it is entitled to judgment as a matter of law because the jury's award was not supported by sufficient evidence. When presented with a sufficiency of the evidence argument, this court construes the evidence in favor of the appellee to determine whether it was legally sufficient to support the findings of the jury. *State v. Thompkins* (1997), 78 Ohio St. 3d 380, 386-7, 678 N.E. 2d 541.

{¶13} Appellee's economic damages fall into three categories: (1) past medical bills; (2) lost earnings; and (3) future care costs. Appellant argues appellee did not present sufficient evidence to support an award of damages for any of these categories. Appellant asserts the only evidence properly before the trial court regarding damages was appellee's testimony as to his pain and suffering, for which the jury did not award any damages.

{¶14} With regard to appellee's evidence of past medical bills, appellee presented the bills themselves without objection from appellant. Dr. Shelly Dunmyer testified the medical bills were reasonable and necessary. On cross, Dr. Dunmyer admitted she did not examine the specific details of treatment and all medical records, payment records, fee schedules, and billing guidelines.

{¶15} In *Wagner v. McDaniels* (1984), 9 Ohio St. 3d 184, 459 N.E. 2d 561, the Supreme Court held: "Proof of the amount paid or the amount of the bill rendered and of the nature of the services performed constitutes prima facie evidence of the necessity and reasonableness of the charges for medical and hospital services. ***" syllabus by the court, paragraph one. Where a medical expert has testified as to the necessity of

the services rendered, and there is no evidence presented that the charges are not reasonable, we presume the charges were reasonable.

{¶16} Regarding appellant's lost earnings, Dr. Rosen, appellee's economic damages expert, calculated appellee's future lost wages. Dr. Rosen testified he relied on a vocational rehabilitation and life care plan report and information from the Bureau of Labor Statistics to calculate appellee's future lost wages.

{¶17} In *Eastman v. Stanley Works* (2009), 180 Ohio App. 3d 844, 2009-Ohio-634, 907 N.E. 2d 768, the Court of Appeals for Franklin County cited the Supreme Court case of *Hanna v. Stoll* (1925), 112 Ohio St. 344, 353, 147 N.E. 339, wherein the Supreme Court held: "the measure of damages from impairment of earning capacity is the difference between the amount which the plaintiff was capable of earning before his injury and that which he is capable of earning thereafter." *Eastman* at paragraph 22.

{¶18} *Eastman* cited *Power v. Kirkpatrick* (July 20, 2000), Franklin App. No. 99AP1026, which held an award of damages for future lost wages requires two independent evidentiary concerns: (1) whether there is evidence of future impairment; and (2) whether there is evidence of the extent of prospective damages flowing from the impairment. *Eastman* at paragraph 23.

{¶19} Appellant argues appellee's income increased after the accident, and Dr. Rosen should have based his opinion on the pre-injury wages. Appellee responds calculation of lost wages is based upon what an injured worker is capable of earning, not necessarily what he was actually earning at any one time. Appellee presented evidence he would probably leave the workforce early because of his injury.

{¶20} Finally, appellant argues appellee did not present sufficient evidence of the cost of his future medical needs.

{¶21} Dr. Gracie, appellee's vocational rehabilitation and life care plan analyst explained the elements of his future needs, estimated the present cost, and projected the future costs.

{¶22} We find the above evidence legally sufficient.

{¶23} Appellant also argues it is entitled to judgment as a matter of law because the jury should have found appellee assumed the risk of injury, and the jury's finding to the contrary is not supported by sufficient evidence. The assumption of the risk defense requires a defendant to present evidence the plaintiff knew of the dangerous condition, knew the condition was patently dangerous, and voluntarily exposed himself to the condition. *Carrel v. Allied Products Corporation* (1997), 78 Ohio St. 3d 284, 1997-Ohio-12, 677 N.E.2d 795. A plaintiff must have voluntarily and unreasonably assumed a known risk. *Syler v. Signode Corporation* (1992), 76 Ohio App. 3d 250, 601 N.E.2d 225.

{¶24} The trial court gave a correct charge to the jury that appellant had the burden of proving assumption of the risk by a preponderance of the evidence, and was required to show appellee impliedly assumed the risk of injury, that is, if he had knowledge of a condition which was obviously dangerous to him and voluntarily exposed himself to that risk. Appellee testified he did not know of the risk or voluntarily assume the risk associated with the gun. Appellant did not present evidence to controvert this.

{¶25} We have reviewed the record, and we find the evidence appellee presented was sufficient to support the jury's verdict. Accordingly, the trial court did not err as a matter of law in overruling the motion for judgment notwithstanding the verdict.

{¶26} Appellant argues in the alternative the trial court should have granted a new trial. Civ. R. 59 provides in pertinent part:

{¶27} " **(A) Grounds**

{¶28} "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:

{¶29} "(1) Irregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial;

{¶30} "(2) Misconduct of the jury or prevailing party;

{¶31} "(3) Accident or surprise which ordinary prudence could not have guarded against;

{¶32} "(4) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice;

{¶33} "(5) Error in the amount of recovery, whether too large or too small, when the action is upon a contract or for the injury or detention of property;

{¶34} "(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;

{¶35} "(7) The judgment is contrary to law;

{¶36} "(8) Newly discovered evidence, material for the party applying, which with reasonable diligence he could not have discovered and produced at trial;

{¶37} "(9) Error of law occurring at the trial and brought to the attention of the trial court by the party making the application.

{¶38} "In addition to the above grounds, a new trial may also be granted in the sound discretion of the court for good cause shown."

{¶39} "This court reviews a trial court's judgment on a Civ. R. 59 motion for new trial under the abuse of discretion standard." *Effingham v. XP3 Corp.,* 11th Dist. No. 2006-P-0083, 2007-Ohio-7135 at paragraph 18. The Ohio Supreme Court has consistently held the term "abuse of discretion" implies that the court's attitude is unreasonable, arbitrary or unconscionable. See, e.g. *Blakemore v. Blakemore* (1983), 5 Ohio St. 3d 217, 219, 450 N.E. 2d 1140.

{¶40} Thus, in reviewing a motion for a new trial we do so with deference to the trial court's decision, recognizing that "the trial judge is better situated than a reviewing court to pass on questions of witness credibility and the 'surrounding circumstances and atmosphere of the trial." *Malone v. Courtyard by Marriott L.P.* (1996), 74 Ohio St. 3d 440, 448, 659 N.E. 2d 1242.

{¶41} First, appellant argues appellee repeatedly committed misconduct in attempting to inflame the passions of the jury. Appellant argues the jury's verdict was excessive, while appellee argues it was inadequate, although appellee has not pursued an appeal.

{¶42} The trial court had overruled appellee's attempt to amend his complaint and add a claim for punitive damages. Appellee elicited testimony, and argued to the

jury, that the gun in question was prone to "snap firing" or "drop firing" and had injured or killed people previously. Appellee argued presumably people were still at risk because there were 30,000 of this particular model sold. The trial court intervened on several occasions when it found appellee had exceeded the scope of what the court considered appropriate.

{¶43} We cannot reverse a judgment based on misconduct of counsel unless we find the misconduct prevented a fair trial. *Vescuso v. Lauria* (1989), 63 Ohio App. 3d 336, 340, 578 N.E.2d 862. We must presume the jury has followed the instructions given to it by the trial court. *State v. Fox* (1938), 133 Ohio St. 154, 12 N.E.2d 413, and must presume a jury verdict is based upon the evidence presented at trial and not based upon the influence of passion or prejudice. *Prudential Insurance Company of America v. Hashman* (1982), 7 Ohio App. 3d 55, 454 N.E. 2d 149.

{¶44} We find the jury verdict is not so excessive as to overcome the strong presumption it is based upon the evidence. We also find the court did not erroneously permit appellee to introduce improper evidence or argue impermissibly.

{¶45} Appellant argues it is entitled to a new trial court because the court erred as a matter of law in refusing to give appellant's requested negative inference instruction. At trial, appellant argued appellee failed to produce or purposely altered evidence which was critical to appellant's ability to defend, including the spent cartridge casing, the holster in which the revolver was secured, appellant's pants showing the path of the bullet, and the horse trailer in which the incident occurred. Appellant argues it moved in limini regarding the "mountain" of missing and/or altered evidence, but the court overruled its motion regarding spoliated evidence.

{¶46} The negative inference instruction appellant sought would have informed the jury that if relevant evidence which would probably be part of the case is within the control of a party whose interest would naturally be to produce it, but the party fails to do so without satisfactory explanation, an inference may be drawn that such evidence would be unfavorable to the party. To draw such an inference requires a finding of misconduct or neglect, because inadvertence, mistake, or other plausible explanation is not sufficient to give rise to the inference.

{¶47} Appellee responds appellant put forward no evidence of any of the alleged acts of spoliation, any ill intent, or purposeful suppression or withholding of evidence. Appellee asserts he adequately accounted for the evidence. He repaired the holster. The pants he was wearing had been discarded. The personnel at the hospital were not attempting to preserve evidence and the x-rays could not be located. The horse trailer had been sold. The law enforcement personnel were not investigating a crime scene. We find the trial court did not err as a matter of law in declining to give the jury instruction.

{¶48} Appellant repeats its arguments made supra with regard to Dr. Dunmyer's, Dr. Gracey's, and Dr. Rosen's testimonies, and argues the court erred in permitting these experts to testify. The admission or exclusion of relevant evidence is within the broad discretion of the trial court, and we will not reverse unless we find abuse of that discretion. *Calderon v. Sharkey* (1982), 70 Ohio St. 2d 218, 436 N.E.2d 1008.

{¶49} Appellant challenges the testimony of appellee's expert witness Thomas Given, who testified regarding the design and accident reconstruction issues. Appellant argues Givens testified about items well outside his expertise in the area of handling of

firearms. Appellee asserts appellant failed to object at trial, and thus failed to preserve this issue for appeal. We agree.

{¶50} Appellant also argues it was erred to permit the testimony of Tom Butters concerning forensic reconstruction, firearms handling, and the feasibility of placing a B.F.R-type transfer bar in the subject firearm. Appellant filed a motion in limini with regard to Butters, to preclude him from testifying to matters outside his expertise in firearms design. Over objection, Butters testified regarding an experiment to show the gun would "flick fire". Butters gave an opinion that ten years prior to the incident, there was technology which was economically and technologically feasible to install on the gun to make it safe. On cross, Butters admitted he never tried to install any such technology.

{¶51} We have reviewed Butters' testimony, and we find the trial court did not abuse its discretion in admitting his testimony.

{¶52} Appellant also challenges the court's admission of evidence regarding prior unrelated incidents wherein, the firearm malfunctioned and injured or killed a user.

{¶53} In *Renfrom v. Black* (1990), 52 Ohio St. 3d 27, 556 N.E. 2d 150, the Ohio Supreme Court cited *McInnon v. Skil Corporation* (C.A.1, 1981), 638 F. 2d 270 with approval. The *McInnon* court held evidence of prior accidents is admissible to show knowledge, duty to warn, existence of defect, causation, and negligent design if the prior accidents occurred under substantially similar circumstance to the circumstances in the case at bar.

{¶54} Appellee argues appellant cannot claim the other incidents were not substantially similar to the one at bar, because appellant's agent testified he knew the

firearm in question was vulnerable to accidental discharges with drop firing or snap firing, which occurred in the previous incidents.

{¶55} We find the court did not abuse its discretion in admitting evidence of prior incidents with this firearm, because the operant facts were substantially similar.

{¶56} Appellant also argues the jury's verdict on the issue of assumption of risk and the percentage of negligence attributed both to appellee is not sustained by the weight of the evidence. This court will not disturb the trial court's decision as against the manifest weight of the evidence, if the decision is supported by some competent and credible evidence. *C.E. Morris Company v. Foley Construction Company* (1978), 54 Ohio St. 2d 279, 376 N.E.2d 578. This court may not substitute our judgment for that of the trier of fact. *Pons v. Ohio State Medical Board* (1993), 66 Ohio St. 3d 619, 621, 614 N.E. 2d 748.

{¶57} We find the jury's verdict is supported by some competent and credible evidence. We conclude the trial court did not err in overruling the motion for new trial.

{¶58} The assignment of error is overruled.

{¶59} For the foregoing reasons, the judgment of the Court of Common Pleas of Muskingum County, Ohio, is affirmed.

By Gwin, P.J.,

Wise, J., and

Edwards, J., concur

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HON. W. SCOTT GWIN

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HON. JOHN W. WISE

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HON. JULIE A. EDWARDS

WSG:clw 1020

[Cite as *Taylor v. Freedom Arms, Inc.*, 2009-Ohio-6091.]

IN THE COURT OF APPEALS FOR MUSKINGUM COUNTY, OHIO

FIFTH APPELLATE DISTRICT

ROBERT W. TAYLOR	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
FREEDOM ARMS, INC.	:	
Defendant-Appellant	:	CASE NO. CT2008-0071

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Muskingum County, Ohio, is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. JOHN W. WISE

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HON. JULIE A. EDWARDS