[Cite as *Garaux v. Ott,* 2010-Ohio-2044.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
JAMES D. GARAUX	:	Julie A. Edwards, P.J.
	:	Sheila G. Farmer, J.
Plaintiff-Appellant	:	John W. Wise, J.
	:	
-vs-	:	Case No. 2009 CA 00183
	:	
	:	
DENIS OTT, et al.,	:	O P I N I O N

Defendants-Appellees

CHARACTER OF PROCEEDING:	Civil Appeal from Canton Municipal Court Case No. 2009 CVE 02286
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	May 3, 2010
APPEARANCES:	
For Plaintiff-Appellant	For Defendants-Appellees
G. IAN CRAWFORD 116 Cleveland Ave. N.W., Ste. #800 Canton, Ohio 44702	MELISSA A. DAY 400 South Main Street North Canton, Ohio 44720

Edwards, P.J.

{¶1} Plaintiff-appellant, James Garaux, appeals from the June 30, 2009, and July 6, 2009, Judgment Entries of the Canton Municipal Court.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellees Donna and Denis Ott own real estate located in Canton, Ohio. On or about September 6, 2007, appellees hired appellant to make renovations and improvements to the property including the installation of an air conditioner unit in the kitchen.

{¶3} On or about September 14, 2007, appellees' property was partially damaged by a fire which originated in the kitchen. At the time, appellant was not inside the house, but was outside working. No other people or animals were inside the house. After noticing the flames, appellant ran inside the house "to see what was on fire and to see what I could do about putting it out." Transcript from June 29, 2009, at 110. Appellant testified that he went into the house to get his tools and because he felt like he had to do something. Appellant's hands were burned in the fire.

{¶4} On March 18, 2009, appellant filed a complaint alleging negligence and breach of contract against appellees, seeking recovery for personal injuries, pain and suffering, lost wages and medical expenses. The matter proceeded to a jury trial. The jury, on June 29, 2009, found that appellees were negligent and that their negligence was the proximate cause of appellant's injuries and damages. The jury awarded appellant $1,039.31 for medical expenses and $500.00 for lost wages or income. The jury declined to award appellant any money for pain and suffering, ability and/or inability

to perform usual activities and future damages. The jury also found that appellees had breached their contract with appellant and awarded appellant $464.52.

{¶5} As memorialized in a Judgment Entry filed on June 30, 2009, the trial court granted appellant judgment against appellees in the amount of $2,003.83 plus interest.

{¶6} On July 1, 2009, appellant filed a Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, Additur or New Trial on the Issue of Damages Only. Appellant, in his motion, argued, in part, that the jury had erred in failing to compensate him for any physical injury or the "corresponding pain, suffering, or inability to perform his usual activities." Pursuant to a Judgment Entry filed on July 2, 2009, the trial court overruled such motion.

{¶7} Appellant now raises the following assignments of error:

{¶8} "I. THE TRIAL COURT ERRED IN OVERRULING PLAINTIFF-APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, OR, IN THE ALTERNATIVE, ADDITUR OR NEW TRIAL ON THE ISSUE OF DAMAGES ONLY.

{¶9} "II. THE JURY AWARD OF DAMAGES FAILED TO INCLUDE ALL ITEMS OF DAMAGE COMPRISING PLAINTIFF-APPELLANT'S CLAIM, AND THEREFORE WAS INADEQUATE AND MANIFESTLY AGAINST THE WEIGHT OF THE EVIDENCE AND CONTRARY TO LAW."

I, II

{¶10} Appellant, in his first assignment of error, argues that the trial court erred in overruling his Motion for Judgment Notwithstanding the Verdict, or, in the Alternative, Additur or New Trial. In his second assignment of error, appellant argues that the jury's award was inadequate and against the weight of the evidence. We agree.

{¶11} As an initial matter, we note that a motion for additur is only proper with the express consent of the appellees. See *Slivka v. C.W. Transport, Inc.* (1988), 49 Ohio App.3d 79, 550 N.E.2d 196. No such consent was given. The trial court, therefore, did not err in overruling appellant's Motion for Additur.

{¶12} Appellant also moved for judgment notwithstanding the verdict. Civ. R. 50(B) governs motions for judgment notwithstanding the verdict, and provides: "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 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."

{¶13} 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, *Posin v. A.B.C. Motor Court Hotel*, Inc. (1976), 45 Ohio St.2d 271, 275, 344 N.E.2d 334. "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*, supra at 275. 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 so that reasonable minds could reach different conclusions, the court may not usurp the jury's function and the motion must be denied. *Osler,* supra.

{¶14} 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.,* Stark App. No.2006CA00048, 2006-Ohio-6232; *Ronske v. Heil,* supra.

{¶15} Because appellant argues that the verdict was against the weight of the evidence and Civ.R. 50(B) prohibits a court from entering judgment on the basis that a verdict is against the weight of the evidence, we find that the trial court did not err in overruling appellant's motion for judgment notwithstanding the verdict.

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

{¶17} "(A) Grounds

{¶18} "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:…

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

{¶20} "(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;… "

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

{¶22} It is well settled in the State of Ohio "where the inadequacy of the verdict is so gross as 'to shock the sense of justice and fairness,' or where the amount of the verdict cannot be reconciled with the undisputed evidence in the case, or where it is apparent that the jury failed to include all the items of damage making up plaintiff's claim, the judgment entered on such verdict may be set aside by a reviewing court as being manifestly against the weight of the evidence and contrary to law. *Toledo Rys. & Light Co. v. Mason*, supra;[1] 2 Ohio Jurisprudence (App.Rev., Pt. I), 1660, Section 877." *Sherer v. Smith* (1949), 85 Ohio App. 317, 322, 88 N.E.2d 426.

{¶23} An appellate court reviewing whether a trial court abused its discretion in ruling on a motion for a new trial pursuant to Civ.R. 59(A)(4) must consider (1) the amount of the verdict, and (2) whether the jury considered improper evidence, improper argument by counsel, or other inappropriate conduct which had an influence on the jury.

[1] The complete cite is *Toledo Rys. & Light Co. v. Mason* (1910), 81 Ohio St. 463, 91 N.E. 292.

Dillon v. Bundy (1991), 72 Ohio App.3d 767, 774, 596 N.E.2d 500. To support a finding of passion or prejudice, it must be demonstrated that the jury's assessment of the damages was so overwhelmingly disproportionate as to shock reasonable sensibilities. *Jeanne v. Hawkes Hosp. of Mt. Carmel* (1991), 74 Ohio App.3d 246, 257, 598 N.E.2d 1174, 1181; *Pearson v. Cleveland Acceptance Corp.* (1969), 17 Ohio App.2d 239, 245, 246 N.E.2d 602, 606. The mere size of the verdict is insufficient to establish proof of passion or prejudice. *Jeanne,* 74 Ohio App.3d at 257, 598 N.E.2d at 1181; *Pearson,* 17 Ohio App.2d at 245, 246 N.E.2d at 606.

{¶24} The denial by a trial court of a motion for a new trial is subject to reversal on appeal only upon demonstration the trial court abused its discretion. *Yungwirth v. McAvoy* (1972), 32 Ohio St.2d 285, 291 N.E.2d 739; and *Siegel v. Mt. Sinai Hospital* (1978), 62 Ohio App.2d 12, 23, 403 N.E.2d 202, 210. In assessing whether a verdict is contrary to the weight of the evidence, trial courts are vested with wide discretion to determine whether a manifest injustice has been done. *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, 262 N.E.2d 685, paragraph three of the syllabus. Generally, a new trial should be granted pursuant to Civ.R. 59(A)(6) where it appears that the jury awarded inadequate damages because it failed to consider an element of damages established by uncontroverted expert testimony. *Baum v. Augenstein* (1983), 10 Ohio App.3d 106, 107-108, 460 N.E.2d 701, 702-703. However, if the verdict is supported by substantial competent, credible evidence, a trial court abuses its discretion in granting a new trial based upon the weight of the evidence. *Hancock v. Norfolk & Western Ry. Co.* (1987), 39 Ohio App.3d 77, 81, 529 N.E.2d 937, 941-942; and *Verbon v. Pennese* (1982), 7

Ohio App.3d 182, 183, 454 N.E.2d 976, 978-979. *Dillon v. Bundy* (1991), 72 Ohio App.3d 767, 773-774, 596 N.E.2d 500.

{¶25} In the case sub judice, appellees contend that it is appellant's position that the jury was required to make an award for pain and suffering and that, therefore, the verdict was inconsistent. Appellee further notes, that appellant did not object to the jury's award of damages before the jury was discharged. Appellees argue that an objection to an inconsistent answer to a jury interrogatory is waived unless the party raises the objection prior to the jury's discharge. *Cooper v. Metal Sales Mfg. Corp.* (1995), 104 Ohio App.3d 34, 42, 660 N.E.2d 1245. Moreover, appellees assert that "[a]n appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." *State v. Williams* (1977), 51 Ohio St.2d 112, 117, 314 N.E.2d 1364, overruled on other grounds, (1988), 40 Ohio St.3d 226, 533 N.E.2d 272. In short, appellees maintain that appellant waived his right to raise the issue of damages because he failed to raise the issue before the trial court.

{¶26} However, while normally the failure to object prior to the discharge of a jury results in the waiver of any alleged error, this is not the case in the event the error in question equates to plain error. *O'Connell v. Chesapeake & Ohio RR. Co.* (1991), 58 Ohio St.3d 226, 229, 569 N.E.2d 889. In such case, the Ohio Supreme Court held that, in order to constitute plain error, the error must be clearly apparent on the face of the record and must be prejudicial to the party moving for relief. *Id.* The Ohio Supreme Court noted that the plain error doctrine may be applied in civil cases despite the fact

that the moving party has failed to object to the error if the error complained of would have a materially adverse effect on the character of the judicial proceedings or would cause a manifest miscarriage of justice. *Id.* citing *Schade v. Carnegie Body Co.* (1982), 70 Ohio St.2d 207, 209, 436 N.E.2d 1001.

{¶27} We find that the plain error doctrine must be applied in this case to prevent a manifest miscarriage of justice. We further find that the trial court abused its discretion in failing to grant appellant a new trial on the issue of damages because the damages were inadequate and against the weight of the evidence. In the case sub judice, there was unrefuted evidence that appellant suffered pain and suffering as a result of the burns on his hands and that he was unable to perform his usual activities. Alisha Garaux, appellant's companion who has limited vision, testified that when she saw appellant on September 14, 2007, after the fire, appellant's hands were red and blistered and very swollen. She further testified that appellant was in a lot of pain and shaking. The following is an excerpt from her trial testimony:

{¶28} "Q. How could you tell he was in so much pain?

{¶29} "A. He was crying for one. You know, this is a Marine, he doesn't show too much emotion, but this knocked him for a loop. So I went across the street and got a neighbor and she took us up to Timken.

{¶30} "Q. Timken Mercy Medical Center?

{¶31} "A. Yes, Timken Mercy Hospital, yes.

{¶32} "Q. I don't think it's called that anymore, but … Showing you what's been marked as Plaintiff's Exhibit Number Three. I'm going to ask you to look at the photograph at the bottom left hand corner. Can you identify what that is?

{¶33} "A. Okay. This is his hand. Their showing his hand I believe.

{¶34} "Q. His hand of - -

{¶35} "A. the burns.

{¶36} "Q. The burns? Okay.

{¶37} "A. Um hum [Yes].

{¶38} "Q. Thank you. You have no idea what those other three photographs are?

{¶39} "A. I can't tell what they are, no.

{¶40} "Q. Okay.

{¶41} "A. They're pretty blurry.

{¶42} "Q. What did his hand look like? Hands. I'm sorry. What did his hands look like?

{¶43} "A. They were – oh my goodness, just huge golf ball size blister. Red. Black. A lot of char. A lot of missing skin. They were – in between his fingers on all of his fingers, his hand, his thumbs.

{¶44} "Q. Did he complain about anything else at that time?

{¶45} "A. Um, at that time not really. His hands – he was in such severe pain, and like I said, I do believe he was in a little bit of shock.

{¶46} "Q. Okay. What did – what happened at Mercy Medical Center?

{¶47} "A. We took him to the emergency room. They immediately put him in a room and put water on his hands. They gave him a shot of Vistaril for the pain. The doctors came in, they examined him and looked at him. They said it looked like he had had second and third degree burns. They proceeded to put some salve and stuff on

him, clean him up and then they wrapped his hands. Then they ended up giving him another shot of morphine because he was in so much pain." Transcript at 47-49.

{¶48} Alisha Garaux further testified that appellant was very restless while sleeping and that in the days following the incident, he had trouble using the bathroom, getting a drink or eating, taking a shower and scratching because his hands were wrapped. She further testified that she had to help appellant do these types of things for about three weeks and that, during such time, appellant was unable to open and close his hands and was in extreme pain.

{¶49} When asked to describe his pain, appellant testified that the pain was the worst pain that he had ever experienced and that it was "incredibly burning, hurting, just unbelievable." Transcript at 78. He testified that he had an LST landing craft come down and hit him on the back and had his L-4 and L-5 taken out and that his burn hurt him worse than that. Appellant also testified that he went to the VA on the Monday following the accident to see the doctor and that his hands were still in terrible pain from the burns. He testified that he was unable to shower due to his bandages and that he could not play with his grandchildren. He further testified that he was unable to help his wife, who is blind, clean the house.

{¶50} When asked how long it took for the pain to go away, appellant testified that it took six to eight weeks and that he was unable to work the first month. According to appellant, he has ongoing problems with his hands. He testified that they would not bend and that a couple of times a year, "[t]hey'll' just lock. They'll be like claws." Transcript at 85.

{¶51} Appellee, Denis Ott, admitted that appellant's hands were burned "pretty bad." Transcript at 44. A photograph of appellant's hand, which was admitted at trial as Plaintiffs' Exhibit 3, shows extensive blistering and redness on appellant's hands.

{¶52} Based on the foregoing, we find that the jury lost its way and committed a manifest miscarriage of justice by failing to award appellant damages for pain and suffering and loss of enjoyment of life. We find that the jury's verdict was inadequate and not sustained by the weight of the evidence. We find, therefore, that the trial court erred in overruling appellant's Motion for a New Trial on the issue of damages.

{¶53} Appellant's two assignments of error are, therefore, sustained.

{¶54} Accordingly, the judgment of the Canton Municipal Court is reversed and this matter is remanded to the trial court for a new trial on this issue of damages.

By: Edwards, P.J.

Farmer, J. and

Wise, J. concur

s/Julie A. Edwards

s/Sheila G. Farmer

s/John W. Wise

JUDGES

JAE/d0209

[Cite as *Garaux v. Ott,* 2010-Ohio-2044.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

JAMES D. GARAUX	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
DENIS OTT, et al.,	:	
Defendants-Appellees	:	CASE NO. 2009 CA 00183

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Canton Municipal Court is reversed and this matter is remanded to the trial court for further proceedings. Costs assessed to appellees.

s/Julie A. Edwards

s/Sheila G. Farmer

s/John W. Wise

JUDGES