[Cite as *White v. Bannerman*, 2010-Ohio-4846.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

ASHLEY WHITE, et al.	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiffs-Appellees	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case Nos. 2009CA00221,
EBOW BANNERMAN	:	2009CA00245, and
	:	2009CA00268
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2008CV04839
JUDGMENT:	AFFIRMED IN PART; REVERSED IN PART; VACATED IN PART
DATE OF JUDGMENT ENTRY:	September 27, 2010

APPEARANCES:

For Defendant-Appellant:	For Plaintiffs-Appellees:
SHANNON J. GEORGE 405 Madison Ave., Suite 1850 Toledo, OH 43604	STANLEY R. RUBIN 437 Market Ave. N. Canton, OH 44702

Delaney, J.

{¶1} Defendant-Appellant Ebow Bannerman appeals multiple decisions from the Stark County Court of Common Pleas related to a personal injury action due to an automobile accident. Plaintiffs-Appellees are Ashley White, Jodie White, and Darren White.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellees filed a personal injury action against Appellant on November 14, 2008, due to injuries suffered by Appellee, Ashley White in an automobile accident caused by Appellant's negligence. As a second cause of action, Appellees Jodie White and Darrin White alleged loss of consortium with their minor child. Service was completed on Appellant by ordinary mail on February 2, 2009. Appellees filed their motion for default judgment on March 2, 2009, due to Appellant's failure to answer or otherwise respond to the complaint. The trial court granted the motion for default judgment on March 10, 2009, and set the matter for a damages hearing.

{¶3} On March 18, 2009, Appellant filed a motion to vacate the default judgment and for leave to file an answer. Appellant stated he received Appellees' complaint and forwarded it to his insurance company. Appellant's insurance company stated that they did not receive notice of the lawsuit until March 12, 2009, and immediately contacted counsel for Appellees to resolve the matter. Appellant argued the default judgment should be vacated due to excusable neglect.

{¶4} On April 2, 2009, the trial court denied the motion to vacate default judgment and set the matter for a damages hearing. Appellant filed a motion to continue the damages hearing and a request for a jury trial on Appellees' claims for

damages. On April 21, 2009, the trial court overruled Appellant's request for a jury trial as being untimely filed.

{¶5} Appellant also filed a motion to enforce settlement, arguing that the parties had agreed to settle the matter for the limits of Appellant's insurance policy. Appellees responded that no settlement had occurred.

{¶6} The matter proceeded to a hearing before the trial court, where the trial court heard evidence regarding the motion to enforce settlement and the damages. The following evidence, in addition to the averments in Appellees' complaint deemed admitted by Appellant's failure to answer, were adduced at the hearing through the testimony of Appellees.

{¶7} On August 9, 2008, Appellee Ashley White was the passenger in a vehicle driven by Appellant Ebow Bannerman. Ashley was 17 years old. Appellant approached an intersection and failed to stop at a stop sign, causing a collision with another vehicle in the intersection. Significant damage occurred to the passenger side of the vehicle.

{¶8} As a result of the accident, Ashley suffered severe injuries. She required surgery to remove glass imbedded in her hands and face. The tendons in her hands were severed and the physicians were not sure if Ashley would ever regain the use of her hands. After the surgery, her hands were tied to metal bars for four days while she recovered. Before the accident, Ashley resided with her father, Appellee, Darrin White. The hospital released Ashley into her mother's care, Appellee, Jodie White. Due to the injuries to her hands, Ashley had no capacity to care for herself and Ashley's mother had to assist her with her daily functions.

{¶9} Ashley participated in physical therapy to regain the use of her hands. Her hands are scarred and she requires pain medication. She has difficulty doing everyday tasks and has permanent numbness in her fingers. She has scarring on her face that she would like to eliminate with plastic surgery.

{¶10} Ms. White cared for Ashley since the accident. Ms. White took medical leave from her job as a part-time gas station attendant for approximately a month to care for her daughter. Ms. White does not have medical insurance for Ashley and has not pursued Medicaid for Ashley. Ms. White testified that Ashley's medical expenses were $81,437.13.

{¶11} Mr. White does not have medical insurance for Ashley. Mr. White cared for Ashley during her recuperation by taking Ashley to her physical therapy appointments.

{¶12} At the hearing, the trial court denied Appellant's motion to enforce settlement.

{¶13} The trial court issued its judgment entry on damages on July 9, 2009. The trial court stated that "[b]ased upon all the medical expenses, medical expenses that will increase in the Plaintiff's future, [and] a reconstructive surgery to reduce the Plaintiff's facial scars," the trial court awarded Ashley damages in the amount of $750,000. The trial court also awarded Ms. White damages for $75,000 and damages for Mr. White for $25,000.

{¶14} Appellant filed a request for findings of fact and conclusions of law. He also filed a motion for remittitur. The trial court issued its findings of fact and

conclusions of law on July 30, 2009. The trial court denied Appellant's motion for remittitur on August 11, 2009.

{¶15} On August 28, 2009, Appellant filed a notice of appeal of the trial court's July 30, 2009 decision. Appellant also appealed the trial court's decisions made on March 10, 2009, April 2, 2009, April 21, 2009, July 9, 2009, and August 11, 2009.

{¶16} On September 1, 2009, the trial court filed a Nunc Pro Tunc judgment entry. The trial court stated in its entry that "The Court hereby expands its prior Findings of Fact and Conclusions of Law * * * in consideration of the recent ruling from the Court of Appeals * * * in the case of *H.J., et al. v. Thomas Baddley* (August 24, 2009), Stark App. No. 2008CA171." The trial court stated that it issued the Nunc Pro Tunc judgment entry to clarify its prior findings. The trial court stated:

{¶17} "The Court finds that Plaintiff has provided sufficient evidence of reasonable medical expenses of eighty-one thousand four hundred and thirty seven dollars and thirteen cents ($81,437.13). The Court also awards the following: five hundred thousand dollars ($500,000) to Plaintiff for the pain and suffering and permanency which results from those objective injuries which the Court observed; one hundred thousand dollars ($100,000) for permanent injury in regards to permanent injury to Plaintiff's health and for disfigurement; forty thousand dollars ($40,000) for Plaintiff's loss of enjoyment of life, which includes loss of ability to perform usual activities, both basic and hedonic, and twenty eight thousand five hundred and sixty two dollars and eighty seven cents ($28,562.87) for any future pain and suffering as caused by the nature of her injuries and the permanency thereof."

{¶18} Appellant filed a motion to vacate the trial court's Nunc Pro Tunc judgment entry on September 9, 2009. On September 28, 2009, Appellant filed its appeal of the Nunc Pro Tunc judgment entry.

{¶19} The trial court denied Appellant's motion to vacate the Nunc Pro Tunc judgment entry on October 6, 2009. Appellant appealed the October 6, 2009 judgment entry.

{¶20} This Court will now consider Appellant's appeal of the multiple trial court rulings in this case.

ASSIGNMENTS OF ERROR

{¶21} In Case No. 2009CA00221, Appellant raises six Assignments of Error:

{¶22} "I. THE TRIAL COURT ERRED WHEN IT GRANTED DEFAULT JUDGMENT PREMATURELY AS SET FORTH IN THE MARCH 10, 2009 JUDGMENT ENTRY.

{¶23} "II. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION TO VACATE THE MARCH 10, 2009 JUDGMENT ENTRY AND DEFAULT JUDGMENT, AS APPELLANT HAD ESTABLISHED ALL THE NECESSARY ELEMENTS FOR RELIEF PURSUANT TO CIVIL RULE 60(B).

{¶24} "III. THE TRIAL COURT ERRED WHEN IT GRANTED APPELLEES' MOTION TO STRIKE APPELLANT'S JURY DEMAND, AS SET FORTH IN THE APRIL 21, 2009 JUDGMENT ENTRY.

{¶25} "IV. THE TRIAL COURT ERRED WHEN IT ISSUED ITS JULY 9, 2009 JUDGMENT ENTRY, SETTING FORTH DAMAGES IN THIS MATTER EXCEEDING THOSE REQUESTED BY APPELLEES, EXCEEDING STATUTORY CAPS,

IMPROPERLY DUPLICATING DAMAGES, AND AWARDING DAMAGES THAT WERE NOT SUPPORTED BY THE EVIDENCE BEFORE THE COURT.

{¶26} "V. THE TRIAL COURT ERRED WHEN IT ISSUED ITS JULY 30, 2009 JUDGMENT ENTRY, CONTAINING THE COURT'S PURPORTED FINDINGS OF FACT AND CONCLUSIONS OF LAW.

{¶27} "VI. THE TRIAL COURT ERRED WHEN IT ISSUED ITS AUGUST 11, 2009 JUDGMENT ENTRY, DENYING APPELLANT'S MOTION FOR REMITTITUR.

{¶28} In Case No. 2009CA00245, Appellant raises one Assignment of Error:

{¶29} "[VII.] THE TRIAL COURT ERRED IN ENTERING THE SEPTEMBER 1, 2009 NUNC PRO TUNC JUDGMENT ENTRY."

{¶30} In Case No. 2009CA00268, Appellant raises one Assignment of Error:

{¶31} "[VIII.] THE TRIAL COURT ERRED IN ENTERING THE OCTOBER 6, 2009 JUDGMENT ENTRY."

I.

{¶32} Appellant argues in his first Assignment of Error that the trial court erroneously granted Appellees' motion for default judgment on March 10, 2009. We disagree.

{¶33} The trial court granted default judgment pursuant to Civ.R. 55(A). This rule provides, in pertinent part:

{¶34} "When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, the party entitled to a judgment by default shall apply in writing or orally to the court therefore; but no judgment by default shall be entered against a minor or an incompetent person unless

represented in the action by a guardian or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least seven days prior to the hearing on such application. * * * "

{¶35} Civ.R. 55(A) provides that default judgment may be awarded when a defendant fails to make an appearance by filing an answer or otherwise defending an action. *Davis v. Immediate Med. Serv., Inc.* (1997), 80 Ohio St.3d 10, 14, 684 N.E.2d 292, citing Civ.R. 55(A). However, it is a basic tenet of Ohio jurisprudence that cases should be decided on their merits.

{¶36} We review a trial court's decision concerning a default judgment under an abuse of discretion standard. *Huffer v. Cicero* (1995), 107 Ohio App.3d 65, 74, 667 N.E.2d 1031. In order to find an abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶37} Appellant argues that Appellees prematurely filed their motion for default judgment. After certified mail service failed, the docket of the Stark County Clerk of Courts and the certificate of mailing shows the complaint was served on Appellant by ordinary mail on February 2, 2009. Appellees filed the motion for default judgment on March 2, 2009.

{¶38} Appellant argues that Appellant was required to file his answer or otherwise respond to the complaint by March 2, 2009. Civ.R. 12 states that the defendant shall serve his answer within 28 days after service of the summons and

complaint upon him. If a complaint if served by ordinary mail, the answer day is 28 days after the date of mailing as evidenced by the certificate of mailing. Civ.R. 4.6(D). By filing their motion for default judgment on Appellant's answer date, Appellant argues he was not given proper time to respond to the complaint.

{¶39} The record shows that the trial court did not rule on the motion for default judgment until March 10, 2009. From March 2, 2009 to March 10, 2009, Appellant did not answer the complaint, file a motion for extension to file an answer, or otherwise appear in the case.

{¶40} Upon the record, we find no abuse of discretion in the trial court granting Appellees' motion for default judgment.

{¶41} Appellant's first Assignment of Error is overruled.

II.

{¶42} Appellant argues in his second Assignment of Error that the trial court abused its discretion when it denied Appellant's motion to vacate the default judgment. We disagree.

{¶43} A motion for relief from judgment under Civ.R. 60(B) lies within the trial court's sound discretion. *Griffey v. Rajan* (1987), 33 Ohio St.3d 75, 514 N.E.2d 1122. In order to find abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶44} Civ.R. 60(B) states in pertinent part,

{¶45} On motion and upon such terms as are just, the court may relieve a party * * * from a final judgment, order or proceedings for the following reasons: (1) mistake,

inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(B); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (5) any other reason justifying relief from the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered to taken. * * *."

{¶46} A party seeking relief from judgment pursuant to Civ.R. 60(B) must show: "(1) a meritorious defense or claim to present if relief is granted; (2) entitlement to relief under one of the grounds set forth in Civ.R. 60(B)(1)-(5); and (3) the motion must be timely filed." *GTE Automatic Electric, Inc. v. ARC Industries, Inc.* (1976), 47 Ohio St.2d 146, 351 N.E.2d 113, paragraph two of the syllabus. A failure to establish any one of these three requirements will cause the motion to be overruled. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 20, 520 N.E.2d 564; *Argo Plastic Prod. Co. v. Cleveland* (1984), 15 Ohio St.3d 389, 391, 474 N.E.2d 328.

{¶47} Appellant argues he has a meritorious defense to the claim and that he is entitled to relief pursuant to Civ.R. 60(B)(1). The trial court determined that Appellant failed to demonstrate operative facts to be successful on either prong of the *GTE* test.

{¶48} In presenting a meritorious defense under Civ.R. 60(B), a movant's burden is only to allege a meritorious defense, not to prove that he will prevail on that

defense. *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 520 N.E.2d 564. Appellant admits that the accident occurred, but states that there are issues of proximate cause as to Ashley's medical expenses.

{¶49} Appellant also argues that his failure to timely respond to the complaint was excusable neglect. Civ.R. 60(B)(1) states that a party may be granted relief from judgment if their trial counsel's actions represent "excusable neglect." The Ohio Supreme Court has defined "excusable neglect" in the negative by stating that, "* * * the inaction of a defendant is not 'excusable neglect' if it can be labeled as a 'complete disregard for the judicial system.'" *Kay v. Marc Glassman, Inc.* (1996), 76 Ohio St.3d 18, 20, citing *GTE,* supra, at 153.

{¶50} Appellant provided an affidavit that stated that Appellant received the complaint on February 4, 2009. Approximately two weeks later on or about February 18, 2009, Appellant forwarded the complaint on to his automobile liability insurance carrier, Safe Auto Insurance Company. The Litigation Supervisor with Safe Auto Insurance Company attested that the litigation department received notice of the lawsuit against Appellant on March 12, 2009. As stated above, the answer date was March 2, 2009.

{¶51} In the trial court's judgment entry, the trial court found no excusable neglect in the insurance company's processing of the legal proceedings because Safe Auto Insurance Company was a sophisticated insurance company. It found there was no explanation as to why the litigation department did not receive notice of the lawsuit until approximately three weeks after Appellant attested he mailed the complaint.

{¶52} Appellant's actions in responding to the complaint are also integral to the determination of excusable neglect. The court may grant relief from judgment if it finds that the movant has made a good faith attempt to defend by promptly delivering to its insurance carrier the information necessary to defend it, and the insurance carrier failed to properly process the information. *Colley v. Bazell* (1980), 64 Ohio St.2d 243, 247, 416 N.E.2d 605. Appellant received the complaint on February 4, 2009 but did not forward it on to his insurance carrier until two weeks later. No action was taken on the lawsuit until March 12, 2009. *Colley v. Bazell*, supra, further states:

{¶53} "Where a defendant, upon being served with summons in a cause of action based on a claim for which he has liability insurance, relies upon his carrier to defend the lawsuit, his failure to file an answer or to determine independently that his carrier has failed to file timely an answer which leads to the taking of a default judgment, may constitute 'excusable neglect,' depending on the facts and circumstances of the case, so as to justify relief from the default judgment pursuant to Civ.R. 60(B)."

{¶54} Under the general definition of excusable neglect, it is some action "not in consequence of the party's own carelessness, inattention, or willful disregard of the process of the court, but in consequence of some unexpected or unavoidable hindrance or accident." *Emery v. Smith*, Stark App. Nos. 2005CA00051, 2005CA00098, 2005-Ohio-5526, ¶16 citing *Vanest v. Pillsbury Co.* (1997), 124 Ohio App.3d 525, 536 fn. 8, 706 N.E.2d 825.

{¶55} Under the facts and circumstances of this case, we find the trial court did not abuse its discretion in finding that Appellant's failure to timely answer the complaint was inexcusable neglect. Both Appellant and his insurance carrier failed to show

excusable neglect in their response to Appellees' complaint. Because Appellant failed to meet one prong of the *GTE* requirements, Appellant's argument must fail.

{¶56} Appellant's second Assignment of Error is overruled.

III.

{¶57} Appellant argues in his third Assignment of Error that the trial court abused its discretion in denying Appellant's April 13, 2009 demand for a jury trial. We disagree.

{¶58} "The right to a trial by jury shall be inviolate. * * *." Section 5, Article I, Ohio Constitution. It is well-established, however, that this constitutional guarantee still permits the legislature or courts to set the procedure by which the right to a jury is obtained and to declare that the failure to conform to such procedure constitutes waiver. See *Cincinnati v. Bossert Mach. Co.* (1968), 16 Ohio St.2d 76, 79, 243 N.E.2d 105; *Cassidy v. Glossip* (1967), 12 Ohio St.2d 17, 19, 231 N.E.2d 64.

{¶59} Appellant argues that pursuant to Civ.R. 38(B), Civ.R. 39(B), and Civ.R. 55(A), the trial court abused its discretion in denying Appellant's demand for a jury trial to determine the amount of damages in the present case.

{¶60} In order to invoke the right to a jury trial, a party must take affirmative action. *Soler v. Evans, St. Clair & Kelsey* (2002), 94 Ohio St.3d 432, 437, 763 N.E.2d 1169. Pursuant to Civ.R. 38(B), "[a]ny party may demand a trial by jury on any issue triable of right by a jury by serving upon the other parties a demand therefore at any time after the commencement of the action and not later than fourteen days after the service of the last pleading directed to such issue." Failure to timely serve and file a demand for a jury trial constitutes a waiver of the right to a trial by jury. Civ.R. 38(D).

{¶61} Civ.R. 7(A) defines "pleadings" as: "a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer."

{¶62} In this case, Appellees filed their complaint on November 14, 2008. Service of the complaint was completed by ordinary mail on February 2, 2009. Appellant defaulted and the trial court denied Appellant's motion to vacate the default judgment. Therefore, the trial court did not allow Appellant leave to file an answer. As such, the last pleading directed to the issue was served on February 2, 2009. Appellant filed his jury demand on April 13, 2009. Pursuant to Civ.R. 38(D), Appellant's demand for a jury trial was not filed fourteen days after the service of the last pleading directed to the issue and therefore constitutes a waiver of the right to a trial by jury.

{¶63} We also find no support for Appellant's position under Civ.R. 39(B). It states, "[i]ssues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues." We cannot find the trial court abused its discretion in conducting a bench trial on the issue of damages.

{¶64} Appellant's third Assignment of Error is overruled.

IV., V., VI.

{¶65} We consider Appellant's fourth, fifth, and sixth Assignments of Error together as they are interrelated. Appellant contends that the trial court erred in its determination of damages awarded to Appellees. We disagree in part and agree in part.

{¶66} Appellees' complaint brought a cause of action for Ashley's injuries and a cause of action for loss of consortium with their minor child. At the hearing, Appellees were the only witnesses to testify as to Ashley's injuries, medical expenses, future medical expenses, permanency, and lost income. Exhibits were submitted regarding Ashley's medical expenses, medical records, and photographs of her injuries.

{¶67} In the trial court's July 9, 2009 judgment entry, the trial court awarded damages as follows:

{¶68} "Based upon all the medical expenses, medical expenses that will increase in the Plaintiff's future, [and] a reconstructive surgery to reduce the Plaintiff's facial scars, this court enters judgment in favor of the Plaintiff Ashley White in the amount of $750,000 and in favor of Jodie White damages in the amount of $75,000 and Darren White in the amount of $25,000."

{¶69} The trial court reiterated its determination of damages in its findings of fact and conclusions of law filed on July 30, 2009. In the findings of fact, the trial court specified that medical specials were $81,437.13. It further stated in its findings of fact that, "[b]ased on all the medical expenses, future expenses, pain and suffering, future pain and suffering and loss of enjoyment of life, the Court entered judgment in favor of

Plaintiff Ashley White in the amount of $750,000.00 and in favor of Jodie White damages in the amount of $75,000.00 and Darren White in the amount of $25,000.00."

{¶70} Appellant states that the trial court's findings of fact and conclusions of law were improper under Civ.R. 52, therefore rendering this Court unable to determine the existence of an assigned error. We find that the trial court's findings of fact and conclusions of law to be sufficient under Civ.R. 52 to allow a meaningful review of the trial court's determination of damages.

{¶71} Appellant argues overall that the trial court committed reversible error when it awarded Appellees' damages based on inadequate evidence and inadmissible evidence. He states that the award was in error because Appellees testified on their own behalf and offered no proper evidentiary support for their claimed damages.

{¶72} A reviewing court will not reverse a trial court's decision regarding its determination of damages absent an abuse of discretion. *Kaufman v. Byers,* 159 Ohio App.3d 238, 823 N.E.2d 520, 2004-Ohio-6346, at ¶ 37. In order to find abuse of discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶73} Upon review of the record and the evidence presented, we find the trial court did not abuse its discretion in the determination of future and permanent damages as to Ashley. This Court recently addressed the determination of future damages in *H.J. v. Baddley*, Stark App. No. 2008CA00171, 2009-Ohio-4318. It stated:

{¶74} "An award of future damages is limited to damages reasonably certain to occur from the injuries. *Stone v. Patarini* (June 21, 2000), Lorain App.No. 98CA007242,

citing *Hammerschmidt v. Mignogna* (1996), 115 Ohio App.3d 276, 281-282, 685 N.E.2d 281. '[I]n awarding prospective damages, [the trier of fact] is confined to those damages reasonably certain to follow from the claimed injury. Generally in the case of an objective injury, such as the loss of a body member, [the trier of fact] may draw [its] conclusions as to future pain and suffering from the fact of the injury alone, the permanency being obvious. However, in a case involving a subjective injury, expert medical testimony is needed to prove future pain and suffering or permanency.' *Jordan v. Elex, Inc.* (1992), 82 Ohio App.3d 222, 230-231, 611 N.E.2d 852."

{¶75} "' [A]n injury is "objective" when, without more, it will provide an evidentiary basis for a [trier of fact] to conclude with reasonable certainty that future damages, such as medical expenses will probably result.' *Powell v. Montgomery* (1971), 27 Ohio App.2d 112, 119, 56 O.O.2d 279, 272 N.E.2d 906."

{¶76} In this case, Ashley suffered objective injuries to her hands and face in the form of severe scarring and limited mobility, with the permanency of those injuries being obvious. No expert testimony was necessary to demonstrate the probability of Ashley's future damages in coping with her injuries. We find this determination to be in conformity with our decision in *Turner v. Progressive Ins. Co*., Holmes App. No. 2007CA015, 2008-Ohio-4988, where we found that the plaintiff was not entitled to future medical expenses for subjective injuries to his back and neck because he failed to present expert testimony as to those expenses.

{¶77} Appellant next argues that the amount of damages awarded to Ashley exceeded statutory limits for noneconomic loss as found in R.C. 2315.18. We disagree.

{¶78} R.C. 2315.18(A)(4) defines "Noneconomic loss" as:

{¶79} “nonpecuniary harm that results from an injury or loss to person or property that is a subject of a tort action, including, but not limited to, pain and suffering, loss of society, consortium, companionship, care, assistance, attention, protection, advice, guidance, counsel, instruction, training, or education, disfigurement, mental anguish, and any other intangible loss.”

{¶80} R.C. 2315.18 sets a $250,000 limit on noneconomic damages for certain tort actions. The statute states:

{¶81} “(B) In a tort action to recover damages for injury or loss to person or property, all of the following apply:

{¶82} “(1) There shall not be any limitation on the amount of compensatory damages that represents the economic loss of the person who is awarded the damages in the tort action.

{¶83} “(2) Except as otherwise provided in division (B)(3) of this section, the amount of compensatory damages that represents damages for noneconomic loss that is recoverable in a tort action under this section to recover damages for injury or loss to person or property shall not exceed the greater of two hundred fifty thousand dollars or an amount that is equal to three times the economic loss, as determined by the trier of fact, of the plaintiff in that tort action to a maximum of three hundred fifty thousand dollars for each plaintiff in that tort action or a maximum of five hundred thousand dollars for each occurrence that is the basis of that tort action.

{¶84} “(3) There shall not be any limitation on the amount of compensatory damages that represents damages for noneconomic loss that is recoverable in a tort

action to recover damages for injury or loss to person or property if the noneconomic losses of the plaintiff are for either of the following:

{¶85} "(a) Permanent and substantial physical deformity, loss of use of a limb, or loss of a bodily organ system;

{¶86} "(b) Permanent physical functional injury that permanently prevents the injured person from being able to independently care for self and perform life-sustaining activities."

{¶87} Upon review of the evidence presented, including Ashley's testimony of the substantial nature of her injuries to both her hands, photographs of her injuries, and the objective permanency thereof in appearance and function, we find the trial court's determination of damages does not exceed the statutory limits for noneconomic damages.

{¶88} Appellant then raises the argument that the trial court erred in awarding Appellees damages that exceeded the amount requested in the Appellees' prayer for relief, which sought "an amount in excess of $25,000." Civ.R. 54(C) states, "A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment." We find the judgment awarded by the trial court does not exceed the amount prayed for in Appellees' demand for judgment. Further, Appellant participated in discovery and the damages hearing so he was not unaware of the medical expenses and severity of the injuries in this case.

{¶89} Appellant next argues that the evidence did not support the damages awarded to Ashley's parents. In the trial court's Findings of Fact and Conclusions of Law, the trial court stated as to the parents, "[b]oth parents have suffered damages and

are traumatized by the crash. They both have assisted in the transfer of the Plaintiff to physical therapy and have missed considerable time from employment. The Plaintiff's mother moved the Plaintiff into her home for care."

{¶90} This Court has thoroughly reviewed the transcript and the evidence presented at the damages hearing. It is with regret that based on controlling Ohio law, we must agree that the evidence presented does not justify or permit a damages award to Appellees, Jodie and Darren White.

{¶91} The evidence in this case does not permit an award compensating the parents for providing care to Ashley. In *Hutchings v. Childress,* 119 Ohio St. 3d 486, 2008-Ohio-4568, 895 N.E.2d 520, the Ohio Supreme Court reviewed a decision originating in our district. The Supreme Court discussed whether an injured spouse could recover damages from a tortfeasor for income lost by the uninjured spouse while the uninjured spouse cared for the injured plaintiff. The Court found the provision of care by a spouse to an injured spouse is to be admired and encouraged, but its value cannot be determined. *Hutchings* at ¶15.

{¶92} Instead, the Court found the appropriate measure of damages for an uninjured spouse's provision of care to an injured spouse is the economic value of the care provided, such as that provided by home nursing care. The Court recognized that this issue most commonly arises in cases where care is provided to a minor child by her parents. In Ohio, a parent can recover damages for the value of the care they provided, but not for their lost wages. Id., ¶19, citations deleted. In the *Hutchings* case, the Supreme Court found a tortfeasor is responsible for the reasonable value of nursing services or other care, regardless of who provides it. While a family member's care has

great emotional value, the Supreme Court found this emotional value cannot be quantified in economic terms. Further, wages vary according to profession, and the personal care a family member provides is not more or less objectively valuable because of the caretaker's earning ability. There is also the consideration of causation and forseeability. A tortfeasor is responsible for the injuries caused and the care required, regardless of who actually provides the care. Id., at ¶39-41.

{¶93} In *Hutchings,* the plaintiffs presented no evidence of the cost of home nursing care, but only evidence of the wages the uninjured spouse lost from his job while caring for his injured wife. The Supreme Court agreed with this court that the appropriate measure of damages is the economic value of the care provided, and because the plaintiffs did not present any evidence on that element of their damages, they could not recover.

{¶94} In the case at bar, Mr. and Ms. White provided personal care for Ashley, but did not present evidence of the value of the personal care. Appellee, Jodie White testified about her lost wages and Appellee, Darren White presented evidence he spent time with Ashley, including taking her to physical therapy and being with her while she was hospitalized. This evidence does not meet the standard as set forth in *Hutchings*, and it was therefore error for the trial court to award damages to the parents based on lost wages and the care that they provided to Ashley.

{¶95} We also cannot find that the evidence supports an award for Appellees' loss of consortium claim brought in their complaint. In the complaint, the parents made a loss of consortium claim alleging that "as a direct and proximate result of the aforesaid negligent conduct of Defendant, [the parents are] deprived of the society,

companionship, love and affection, consortium, and assistance of their daughter, Plaintiff Ashley White."

{¶96} In *Gallimore v. Children's Hosp. Med. Ctr*. (1993), 67 Ohio St.3d 244, 617 N.E.2d 1052, the Ohio Supreme Court recognized that a parent has the right to maintain a loss of consortium action against a third-party tortfeasor who negligently injures the parent's child. The Court found that consortium includes services, society, companionship, comfort, love, and solace. Id., paragraph one of the syllabus.

{¶97} The facts of *Gallimore* involve an eleven-month-old infant who was rendered permanently and profoundly deaf in both ears when the defendant hospital negligently administered a massive overdose of a drug. The mother brought a cause of action for medical negligence on behalf of her son and sought recovery on her behalf for the damages she suffered as a result of her child's injuries.

{¶98} In determining that a parent may recover damages in a derivative action against the third-party tortfeasor for loss of filial consortium, the Court discussed the measure of damages:

{¶99} "The difficulty in measuring damages for a parent's loss of filial consortium is no justification for denying the right to pursue the claim. In the case at bar, the losses suffered by Joshua's mother are readily apparent. Joshua has been rendered profoundly deaf, and he and his mother will be unable to enjoy a number of life experiences normally shared between parent and child.

{¶100}"* * *

{¶101}"* * * the parent's testimony will more likely be focused on the parent's and child's inability to share in the activities and enjoyment of life experiences normally shared by parents and their children." Id.

{¶102}While the Court recognized the difficulty in measuring damages for such as loss, the Court did establish a parameter under which damages could be determined.

{¶103}In this case, the parents testified to the trauma they experienced in seeing their injured daughter and how painful it was to witness her suffering. They testified as to how they assisted in her difficult recovery and the hard work their daughter has done to regain the use of her hands. The family in this case has been through an upsetting journey with much work ahead, but in determining damages, the Court is required to apply the established law to the facts of the case as presented. As such, a methodical review of the evidence in this case shows no testimony from the parents as to their claims for loss of filial consortium. There is no evidence in the record going towards the standard set in *Gallimore* – the parents' inability to share in the activities and enjoyment of life experiences with Ashley normally shared by parents and their children. The parents never testified about the activities that they were no longer able to engage in with Ashley because of Ashley's injuries. The evidence shows the trauma they suffered, the wages they lost, and the care that they gave, but there is no evidentiary basis to support the parents' claim for loss of consortium.

{¶104}Based on the lack of evidence in the record, we reluctantly find that Appellees, Jodie and Darrin White are not entitled to damages on their claim for loss of consortium.

{¶105}Accordingly, we reluctantly reverse the trial court's decision to award damages to Appellees, Jodie and Darrin White for lack of evidentiary support based on the application of that evidence to established law.

{¶106}Appellant's final argument states that the amount of the trial court's award should be reduced because the trial court was swayed by its sympathy for Appellees. While the record shows the judge showed concern for Ashley's injuries, there is no evidence that the damages awarded were the result of passion or prejudice.

{¶107}We therefore overrule in part and sustain in part Appellant's fourth, fifth, and sixth Assignments of Error.

VII., VIII.

{¶108}Appellant argues the trial court was without jurisdiction to issue its Nunc Pro Tunc judgment entry on September 1, 2009 and the October 6, 2009 judgment entry denying Appellant's motion to vacate the September 1, 2009 entry. We agree.

{¶109}On August 28, 2009, Appellant filed a notice of appeal of the trial court's July 30, 2009 decision. Appellant also appealed the trial court's decisions made on March 10, 2009, April 2, 2009, April 21, 2009, July 9, 2009, and August 11, 2009.

{¶110} "When a case has been appealed, the trial court retains all jurisdiction not inconsistent with the court of appeals' jurisdiction to reverse, modify, or affirm the judgment." *Yee v. Erie County Sheriff's Department* (1990), 51 Ohio St.3d 43, 44, citing *In re Kurtzhalz* (1943), 141 Ohio St. 432, at paragraph two of the syllabus.

{¶111}The trial court labeled the September 1, 2009 judgment entry as a Nunc Pro Tunc judgment entry. It states within the entry that "[t]he Court hereby expands its prior Findings of Fact and Conclusions of Law * * * in consideration of the recent ruling

from the Court of Appeals * * * in the case of *H.J., et al. v. Thomas Baddley* (August 24, 2009), Stark App. No. 2008CA171." The trial court stated that it issued the Nunc Pro Tunc judgment entry to clarify its prior findings. The trial court stated:

{¶112}"The Court finds that Plaintiff has provided sufficient evidence of reasonable medical expenses of eighty-one thousand four hundred and thirty seven dollars and thirteen cents ($81,437.13). The Court also awards the following: five hundred thousand dollars ($500,000) to Plaintiff for the pain and suffering and permanency which results from those objective injuries which the Court observed; one hundred thousand dollars ($100,000) for permanent injury in regards to permanent injury to Plaintiff's health and for disfigurement; forty thousand dollars ($40,000) for Plaintiff's loss of enjoyment of life, which includes loss of ability to perform usual activities, both basis and hedonic, and twenty eight thousand five hundred and sixty two dollars and eighty seven cents ($28,562.87) for any future pain and suffering as caused by the nature of her injuries and the permanency thereof."

{¶113}This Court stated in *Boylen v. Ohio Dept. of Rehab. & Corr*., Richland App. No. 08-CA-24, 2009-Ohio-1953, ¶47, that "[t]he purpose of a nunc pro tunc entry is to make the record speak the truth. *Smith v. Smith,* Marion App. No. 9-06-41, 2007-Ohio-1089, 2007 WL 730234, ¶ 13, citing *Ruby v. Wolf* (1931), 39 Ohio App. 144, 146, 177 N.E. 240." "A court's power to enter a nunc pro tunc judgment is restricted to placing upon the record evidence of judicial action that has already been taken and can be exercised only to supply omissions in the exercise of functions that are merely clerical. Id. The function of a nunc pro tunc entry is not to correct or modify an existing judgment but rather to make the record conform to what has already occurred. *Pepera v. Pepera*

(Mar. 26, 1987), Cuyahoga App. No. 51989, 1987 WL 8586, citing *State ex rel. Phillips v. Indus. Comm.* (1927), 116 Ohio St. 261, 155 N.E. 798. A court may not by way of a nunc pro tunc entry enter of record that which it intended or might have done but which in fact was not done. Id., citing *Webb v. W. Res. Bond & Share Co.* (1926), 115 Ohio St. 247, 153 N.E. 289." Id.

{¶114} Upon that standard, we find the September 1, 2009 judgment entry is not a proper Nunc Pro Tunc judgment entry. We find that the trial court went beyond correcting a mere clerical error and instead modified its prior decisions as to damages to conform to a recent decision from the Fifth District Court of Appeals. Because the September 1, 2009 modifies the July 9, 2009 and July 20, 2009 judgment entries that were currently on appeal with this Court, we find that the September 1, 2009 judgment entry (and the subsequent October 6, 2009 judgment entry) is inconsistent with our appellate jurisdiction.

{¶115} Appellant's seventh and eighth Assignments of Error are sustained.

{¶116} We hereby vacate the trial court's September 1, 2009 and October 6, 2009 judgment entries as being void for lack of jurisdiction due to the August 28, 2009 appeal of the matter.

{¶117}Accordingly, the judgments of the Stark County Court of Common Pleas are affirmed in part, reversed in part, and vacated in part.

By: Delaney, J.

Gwin, P.J. and

Wise, J. concur.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. JOHN W. WISE

PAD:kgb

[Cite as *White v. Bannerman*, 2010-Ohio-4846.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

ASHLEY WHITE, et al.	:	
	:	
Plaintiffs-Appellees	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
EBOW BANNERMAN	:	
	:	
	:	Case No. 2009CA00221
Defendant-Appellant	:	

For the reasons stated in our accompanying Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed in part and reversed in part. The September 1, 2009 and October 6, 2009 judgments are vacated for lack of jurisdiction. 70% of the costs assessed to Appellant and 30% of the costs assessed to Appellees.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. JOHN W. WISE

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

ASHLEY WHITE, et al.	:	
	:	
	:	
Plaintiffs-Appellees	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
EBOW BANNERMAN	:	
	:	
	:	Case No. 2009CA00245
Defendant-Appellant	:	

For the reasons stated in our accompanying Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed in part and reversed in part. The September 1, 2009 and October 6, 2009 judgments are vacated for lack of jurisdiction. 70% of costs assessed to Appellant and 30% of costs assessed to Appellees.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. JOHN W. WISE

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

ASHLEY WHITE, et al.	:	
	:	
	:	
Plaintiffs-Appellees	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
EBOW BANNERMAN	:	
	:	
	:	Case No. 2009CA00268
Defendant-Appellant	:	

For the reasons stated in our accompanying Opinion on file, the judgment of the Stark County Court of Common Pleas is affirmed in part and reversed in part. The September 1, 2009 and October 6, 2009 judgments are vacated for lack of jurisdiction. 70% of the costs assessed to Appellant and 30% of the costs assessed to Appellees.

HON. PATRICIA A. DELANEY

HON. W. SCOTT GWIN

HON. JOHN W. WISE