**[Cite as *Brabson v. Perkins*, 2003-Ohio-7343.]**

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

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| CAREY BRABSON, | : | |
| | : | |
| Plaintiff-Appellant, | : | Case No. 02CA2681 |
| | : | |
| v. | : | |
| | : | |
| RITA L. PERKINS, | : | DECISION AND JUDGMENT ENTRY |
| | : | |
| Defendant-Appellee. | : | **RELEASED 5/28/03** |

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APPEARANCES:

COUNSEL FOR APPELLANT: Michael H. Mearan
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Portsmouth, Ohio 45662

COUNSEL FOR APPELLEE: Mark A. Preston
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280 Yoctangee Parkway
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EVANS, P.J.

**{¶1}** Plaintiff-Appellant Carey Brabson appeals the judgment of the Ross County Court of Common Pleas denying her motion for a new trial. Appellant argues that the jury's verdict was against the manifest weight of the evidence presented at trial; and, therefore, the trial court's denial of appellant's motion for a new trial was error. Because appellant failed to provide this Court with a complete transcript of the trial court proceedings, we find no error in the trial court's denial of appellant's motion. Therefore, the judgment of the trial court is affirmed.

## I. Proceedings Below

**{¶2}** On April 13, 1998, Defendant-Appellee Rita L. Perkins drove her vehicle into the rear end of Plaintiff-Appellant Carey Brabson's vehicle. As a result of the collision, appellant was thrust forward in her seat, and her face impacted the vehicle's rear-view mirror. Although she showed a minor cut on her face, appellant told the investigating officer on the scene that she was not injured. Appellant left the scene of the accident with the tow truck operator. Later that evening, she visited the emergency room at Adena Regional Medical Center. Following a routine exam, appellant was released and sent home but was instructed to see her personal physician.

**{¶3}** Several days later, appellant saw Dr. Adams, her personal physician, and informed him that she was involved in a car accident. Appellant complained to Dr. Adams that she had pain in her jaw. Apparently, in 1993, appellant had suffered from temporomandibular joint disorder (TMJ). Appellant believed that this condition was surfacing again. Dr. Adams instructed appellant to see an oral surgeon. However, appellant became pregnant around June 1998. Shortly thereafter, appellant began experiencing pain in her back. As a result, it was not until after May 1999 that appellant visited Dr. Schmidt, an oral surgeon. Dr. Schmidt referred appellant to Dr. Butler, an orthodontist, who fitted appellant with a bite splint. Eventually, appellant moved to Wheelersburg, West Virginia, where she returned to her original orthodontist, Dr. Fenton, who assumed appellant's TMJ treatment from that point.

**{¶4}** Around April 2000, appellant visited Dr. Barker, a chiropractor, for the pain in her back. Dr. Barker referred appellant to Dr. Dyche, a neurosurgeon, who conducted a study of appellant. Dr. Dyche also prescribed some medications to her. In the meantime, appellant continued to visit with Dr. Barker two or three times a week for the pain in her back.

**{¶5}** On April 14, 2000, appellant filed a complaint against appellee, alleging that as a direct and proximate cause of appellee's negligence, appellant suffered injuries, incurred medical expenses, and suffered pain arising out of the car accident on April 13, 1998. Appellee admitted negligence, and on May 29 and May 30, 2002, the case went to trial before a jury on the issue of proximate cause and damages.

**{¶6}** Apparently, Dr. Fenton and Dr. Barker testified at trial via their depositions. In rebuttal, appellee presented the videotaped testimony of Dr. Paul Matrka, as well as that of a dentist, Dr. John Cheek. After hearing all the testimony and considering all the evidence on the issues of proximate cause and damages, the jury found in favor of appellee.

**{¶7}** On June 20, 2002, appellant filed a motion for a new trial, claiming that the weight of the evidence showed that appellant suffered damages, and that the jury's verdict was against the manifest weight of the evidence. However, on July 15, 2002, the trial court denied appellant's motion.

## II. The Appeal

**{¶8}** Appellant timely filed an appeal raising the following assignment of error:

**{¶9}** "The trial court erred in failing to grant the appellant's motion for new trial, as the jury's decision was contrary to the manifest weight of the evidence."

**{¶10}** Appellant argues that appellant sustained her burden of proving damages at trial by presenting evidence of her injuries. Therefore, she argues, it was error for the trial court to deny appellant's motion for a new trial when the jury's verdict was clearly against the manifest weight of that evidence. In support of her arguments, appellant has filed in this Court a transcript of her testimony at trial, as well as a partial transcript of closing arguments. We note that appellant has failed to provide this Court with a complete transcript of the proceedings in the trial court. Because we do not have all the evidence before us, we cannot find that the trial court abused its discretion in denying appellant's motion for a new trial.

### A. Standard of Review

**{¶11}** The decision to grant or deny a motion for a new trial rests in the sound discretion of the trial court. See *Randolph v. Fetty*, Lawrence App. No. 02CA9, 2003-Ohio-598, at ¶9. Therefore, we will not reverse that decision absent a showing of an abuse of discretion. Id. See, also, *Demski v. Sidwell*, 11th Dist. No. 2002-T-0058, 2003-Ohio-1423, at ¶16; *Napierala v. Szczublewski*, 6th Dist. No. L-02-1025,

2002-Ohio-7109, at ¶14, quoting *Youssef v. Parr, Inc.* (1990), 69 Ohio App.3d 679, 690, 591 N.E.2d 762. An abuse of discretion consists of more than an error of law or judgment; rather it implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. See *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. Furthermore, when applying the abuse of discretion standard, we are not free to substitute our judgment for that of the trial court. See *In re Jane Doe I* (1991), 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181, citing *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301.

**{¶12}** Civ.R. 59 provides that a trial court may grant a new trial, in its discretion, upon a showing of good cause. See Civ.R. 59(A). Under Civ.R. 59(A)(6), the trial court may grant a new trial if the judgment was not sustained by the weight of the evidence. Thus, "when ruling on a motion for new trial predicated on the weight of the evidence, the trial court must weigh the evidence and pass on the credibility of witnesses." *Demski v. Sidwell*, 2003-Ohio-1423, at ¶14, citing *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, 91, 262 N.E.2d 685. Therefore, while juries possess unlimited authority to judge weight and credibility, the trial court's assessment of such matters is limited as the trial court must make a "broad-based determination as to whether a manifest injustice has been done because the verdict returned by the jury is against the manifest weight of the evidence." Id. Thus, when presented with a motion for a new trial pursuant to Civ.R. 59(A)(6), the trial court must necessarily weigh the evidence.

Id., 2003-Ohio-1423, at ¶15. Accordingly, our job entails a review of the trial court's discretion in weighing the evidence. See *Randolph v. Fetty*, 2003-Ohio-598, at ¶11. If the jury's verdict was not against the manifest weight of the evidence, we cannot say that the trial court abused its discretion in denying appellant's motion for a new trial. However, if the jury's verdict is manifestly against the weight of the evidence, the trial court was under a duty to set aside the judgment and grant a new trial. *Demski v. Sidwell*, 2003-Ohio-1423, at ¶15, citing *Rohde v. Farmer*, 23 Ohio St.2d at 92, 262 N.E.2d 685.

**B. App.R. 9(B)**

**{¶13}** App.R. 9(B) provides in part:

**{¶14}** "At the time of filing the notice of appeal the appellant, in writing, shall order from the reporter a complete transcript or a transcript of the parts of the proceedings not already on file as the appellant considers necessary for inclusion in the record ***. If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the weight of the evidence, the appellant shall include in the record a transcript of all evidence relevant to the findings or conclusion."

**{¶15}** The Supreme Court of Ohio has interpreted App.R. 9(B) in this way: "The duty to provide a transcript for appellate review falls upon the appellant. This is necessarily so because an appellant bears the burden of showing error by reference to matters in the record." *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197,

199, 400 N.E.2d 384. This principle is echoed in App.R. 9(B) when it states that "the appellant shall *** order from the reporter a *complete transcript* or a transcript of such parts of the proceedings *not already on file* as the appellant deems necessary for inclusion in the record." (Emphasis added.) Thus, the Supreme Court of Ohio held that "[w]hen portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." *Knapp v. Edward Laboratories*, 61 Ohio St.2d at 199, 400 N.E.2d 384.

**{¶16}** Appellant is arguing that the trial court's denial of her motion for a new trial was an abuse of discretion because the jury's verdict was against the manifest weight of the evidence. Once again, the only transcripts we have before us are those of appellant's testimony and closing arguments. These portions of the record do not completely and adequately resolve those issues that were in dispute at trial, namely causation and damages. We do not have before us the transcripts of the testimony of either Dr. Barker or Dr. Fenton, appellant's experts, who each testified through depositions. Nor do we have before us either the transcripts or videotapes of the testimony of Dr. Matrka and Dr. Cheek, appellee's experts who likely offered opinions different from those offered by appellant's experts.

**{¶17}** Without these portions of the record, we have nothing to pass upon and thus, must presume that the jury's verdict was not

against the manifest weight of the evidence. Accordingly, we find that the trial court did not abuse its discretion by denying appellant's motion for a new trial.

**{¶18}** Appellant's assignment of error is overruled.

**III. Conclusion**

**{¶19}** Appellant failed to provide this Court with a complete transcript of the proceedings from the lower court as mandated by App.R. 9(B). Therefore, we cannot find that the jury's verdict was against the manifest weight of the evidence. Accordingly, the trial court did not abuse its discretion by denying appellant's motion for a new trial.

**Judgment affirmed.**

Abele, J., and Kline, J.: Concur in Judgment Only.

FOR THE COURT

BY: _____
David T. Evans, Presiding Judge