[Cite as *Bailey v. Providence Healthcare Mgt., Inc.*, 2019-Ohio-5461.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

BARBARA L. BAILEY,

Plaintiff-Appellant,

v.

PROVIDENCE HEALTHCARE,
MANAGEMENT, INC. et al.,

Defendants-Appellees.

OPINION AND JUDGMENT ENTRY
Case No. 19 CO 0008

Civil Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2016 CV 522

BEFORE:
Carol Ann Robb, Cheryl L. Waite, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Ira Mirkin, *Atty. Richard T. Bush*, *Atty. Danielle L. Murphy,* Green Haines Sgambati Co., L.P.A., City Centre One, Suite 800, 100 Federal Plaza East, P.O. Box 849, Youngstown, Ohio 44501 for Plaintiff-Appellant and

Atty. G. Brenda Coey, The Coey Law Firm, LLC, 29225 Chagrin Boulevard., #230, Pepper Pike, Ohio 44122, for Defendants-Appellees.

Dated: December 19, 2019

Robb, J.

{¶1} Plaintiff-Appellant Barbara Bailey appeals from the Columbiana County Common Pleas Court's decision denying her post jury trial motions for a judgment notwithstanding the verdict and a new trial. On appeal, Appellant argues the uncontroverted evidence admitted at trial clearly established she has an impairment and is disabled, Appellees-Defendants Providence Healthcare Management, Inc., Nentwick Care Center, and Eli Gunzburg perceived her as disabled, and she has a record of impairment indicating she is disabled. As such, she contends the jury clearly lost its way when it determined she was not disabled. For the reasons expressed below, her arguments lack merit. The trial court's decision to deny the post-trial motions is affirmed.

Statement of the Case

{¶2} Appellees hired Appellant in early 2015 to be Director of Nursing for Appellee Nentwick Care Center. She began her orientation at another facility, Briarwood, on February 2, 2015. She worked at Briarwood on February 2 and 3, 2015. Late on February 3 or in the early hours of February 4, Appellant became ill and had to have emergency surgery. She had a subtotal colectomy with ileostomy and splenectomy. In nonprofessional terms, 3/4 of her large bowel was removed and an opening, a stoma, was created near her belly button where a bag was attached for her waste to come out. Tr. 415-416. She also had her spleen removed because during the surgery it was "nicked." Tr. 416.

{¶3} Appellant was released from the hospital on February 14, 2015. The discharge papers indicated she had a 10-pound weight lifting restriction. Tr. 523. She was also placed under the care of a home health nurse. At her two-week follow-up appointment, the surgeon noted that Appellant was feeling better, tolerating a diet, and her ostomy was functioning well. Tr. 421. Appellant admitted at trial that by the end of March - beginning of April she was able to walk, go outside, go out and eat, watch TV, read a book, use a computer, talk on the telephone, bathe herself, dress herself, brush her teeth and hair, ride in a car and had a limited ability to drive a car. Tr. 499-501.

However, she was having a hard time keeping the bag attached and this would cause leaking.

{¶4} Six weeks later, on April 8, 2015, she had another follow-up appointment. Tr. 433, 532. Appellant testified she was hoping to be released to return to work at that appointment. Tr. 532. At that appointment, the doctor indicated she could return to work on April 20, 2015 on a part time basis "as tolerated" and on May 4, 2015 she could return full time. Tr. 533. Appellant stated she was not released to work because she was still having issues with the ostomy. Tr. 533, 534-535. On the day of her appointment, the bag had stayed on for four days. Tr. 536.

{¶5} The next day, April 9, Appellant called Peggy Morrison, the Vice President of Clinical Operations for Appellee Providence to inform Appellees about the doctor's release to work directives. Tr. 441. Ms. Morrison did not answer the phone. Tiera Woolmaker, Assistant Administrator for Appellee Nentwick, returned Appellant's phone call. Tr. 441. Ms. Woolmaker informed Appellant that if she did not return to work on Monday April 13 she was terminated. Tr. 442.

{¶6} Appellant testified that as of April 9, she was doing better and gaining strength and her bag was staying on. Tr. 443. On April 10, because the bag issues had been resolved, Ohio Valley, the home health nurse company, released Appellant from their care. Tr. 536. Appellant's doctor then wrote a release allowing her to return to full time work on April 13 without restrictions. Tr. 537. The record contains a note written October 2, 2015 stating the April 10, 2015 return to work letter "was issued in anticipation that Barbara would be able to return sooner than Dr. Papouras recommended because she feared consequences up to and including loss of job." Plaintiff's Exhibit 20.

{¶7} Despite the new release to work directives, Appellant decided to adhere to the physician's recommendation and did not go to work on April 13, 2015. She did not call to inform Appellees she was not returning to work. Appellant was fired from her position and a new director of nursing was hired within a month of her termination.

{¶8} In late 2016, Appellant filed disability discrimination and failure to accommodate causes of action against Appellees. 10/3/16 Complaint; 11/3/16 First Amended Complaint; 11/7/16 Second Amended Complaint. Appellees filed answers and the case proceeded through discovery and summary judgment motions. Jury trial began

on October 22, 2018 and ended October 26, 2018. The jury granted judgment for the Appellees. Interrogatories were submitted to the jury. The jury answered two of the interrogatories in the negative. Those two interrogatories asked:

> On Barbara Bailey's first claim of disability discrimination against Providence Healthcare Management, Inc. and Selfridge Leasing L.L.C., has Ms. Bailey proven, by a preponderance of the evidence, that she was disabled on April 13, 2015?
>
> On Ms. Bailey's second claim of failure to reasonably accommodate disability against Providence Healthcare Management, Inc. and Selfridge Leasing L.L.C., has Ms. Bailey proven, by a preponderance of the evidence, that she was disabled on April 13, 2015?

10/31/18 Jury Interrogatories.

{¶9} Following the trial, Appellant moved for a judgment notwithstanding the verdict arguing she was disabled as a matter of law. 11/28/18 Motion. She also moved for a new trial pursuant to Civ.R. 59(A)(6) and (7) arguing the judgment was not sustained by the weight of the evidence and the judgment was contrary to law. Appellant argued the jury lost its way when it found she was not disabled and the evidence indicated she was disabled as a matter of law. 11/28/18 Motion.

{¶10} The trial court denied the motions stating Appellant did not meet the legal standards governing motions for JNOV or new trial. 2/14/19 J.E. It stated there was competent credible evidence supporting the jury's verdict. 2/14/19 J.E. It further explained when there is conflicting testimony and either party's version of events is rational, it is not the province of the court to reverse the jury and indicate which version is the correct one to believe. Rather, that choice is best left to the trier of fact. 2/14/19 J.E.

{¶11} Appellant timely appealed the denial of the post-trial motions.

First Assignment of Error

"The trial court erred by denying Plaintiff-Appellant Barbara Bailey's Motion for Judgment Notwithstanding the Verdict."

{¶12} Appellate courts review decisions to grant or deny a motion for JNOV under a de novo standard of review. *Environmental Network Corp. v. Goodman Weiss Miller,*

LLP, 119 Ohio St.3d 209, 2008-Ohio-3833, 893 N.E.2d 173, ¶ 22. Thus, we use the same test the trial court applies when it is determining whether to grant or deny the motion. A motion for JNOV under Civ.R. 50(B) tests the legal sufficiency of the evidence. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 25 (a motion for JNOV presents a question of law). When a verdict has been returned, the trial court, in determining whether to sustain a motion for judgment notwithstanding the verdict, must decide, construing the evidence most strongly in favor of the nonmovant, whether the moving party is entitled to judgment as a matter of law. *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.*, 81 Ohio St.3d 677, 679, 693 N.E.2d 271 (1998), citing Civ.R. 50(A)(4). In determining whether to grant or deny a Civ.R. 50(B) motion, the trial court should not weigh the evidence or evaluate the credibility of the witnesses. *Malone v. Courtyard by Marriott*, 74 Ohio St.3d 440, 445, 659 N.E.2d 1242 (1996). "Absent a reason to do otherwise, we presume regularity in the jury's verdict." *Frederick D. Harris, M.D., Inc. v. Univ. Hosps.*, 8th Dist. Cuyahoga Nos. 76724 and 76785, 2002 WL 363593 (Mar. 7, 2002).

{¶13} The jury verdict and the answers to the interrogatories indicated the jury found Appellant was not disabled on April 13, 2015. The claims asserted by Appellant in her complaint against Appellees were based on R.C. 4112.02. That statute provides that it is an unlawful discriminatory practice for an employer to discharge without cause an employee because of a disability. R.C. 4112.02(A). Disability is defined as "a physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or being regarded as having a physical or mental impairment." R.C. 4112.01(A)(13).

{¶14} Given the definition, a "disability" can be an actual disability, a perceived disability, or a record of physical or mental impairment. An actual disability is a "physical or mental impairment that substantially limits one or more major life activities." R.C. 4112.01(A)(13). A perceived disability is when a person, whether or not actually impaired, is "regarded as having a physical or mental impairment." *Id.* A record of impairment is when a person has a history of long-term or permanent disability which qualifies as a

substantial limitation on one or more major life activities. *Yamamoto v. Midwest Screw Products,* 11th Dist. Lake App. No.2000-L-200, 2002-Ohio-3362, ¶ 29.

{¶15} Included in all three types of "disabilities" is a physical or mental impairment. A "mental or physical impairment" for purposes of R.C. Chapter 4112 includes "[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine." R.C. 4112.01(16)(a)(i).

{¶16} Appellant asserts the evidence establishes she meets all three definitions of disability. Each will be addressed in turn.

1. Actual Disability

{¶17} Appellant contends the uncontroverted facts established that she suffered from an impairment to her digestive system that substantially limited her major life activities. Appellee disagrees. It asserts that there was not physical impairment and to the extent that any medical conditions had been an impairment, the conditions were remediated by April 13, 2015, the date she was asked to return to work.

{¶18} Appellant seems to insinuate that merely having the colectomy and having a stoma and waste bag means she suffers from an impairment that substantially limits her major life activity of digestion and elimination of waste and therefore she qualifies as disabled. Such argument would mean that any person who has this ailment is disabled even though they eat, sleep, work, drive, watch TV, etc. Although a colectomy may affect digestion and elimination, both still are accomplished; they are just accomplished in a different manner.

{¶19} The uncontroverted facts do show that Appellant initially had difficulty following her surgery. She did have an infection and she was having trouble keeping the waste bag attached to her stoma. The inability to keep the waste bag attached to her stoma hindered her ability to do things. She testified that she delayed eating if she knew she was going to have to go anywhere because of fear that the bag would leak and smell. She indicated the bag leaked often and sometimes rather than calling for nursing help or help from her boyfriend she would use towels to clean up the leaking. She described an

incident when she and her boyfriend tried to go out in mid-March, but the bag was not attaching properly and started leaking and they had to return home.

{¶20} By the end of March beginning of April, Appellant was able to walk, go outside, go out and eat, watch TV, read a book, use a computer, talk on the telephone, bath and groom herself, drive a car on a limited basis, and ride in a car. Tr. 500. The testimony also established by April 10, 2015 that the bag issues had been resolved. At her April 8, 2015 follow up appointment, the bag had been in place for four days. Tr. 535. At that appointment, the doctor told her she could return to work on a part time basis starting April 20, 2015 and full time on May 4. Tr. 533. Appellant indicated that the April 8, 2015 return to work instructions were based on her still having trouble with her stoma. Tr. 534. On April 10, 2015, Appellant was released from the home health nursing care because the bag attachment issues were resolved. Tr. 536.

{¶21} On that same day her doctor altered his previous April 8, 2015 order regarding her return to work; a new return to work release was written allowing her to return to work on April 13, 2015 without restrictions. Tr. 536. Admittedly, there is a note in the record indicating that the April 10, 2015 release to work was written at the request of Appellant because she was afraid of losing her job. Tr. 446. This note was written six months after the April 10, 2015 release to work note was written.

{¶22} The above testimony and evidence presents conflicting evidence of whether there was an actual disability; the jury could have decided there was an actual disability or it could have determined there was no actual disability. The jury determined Appellant did not prove there was an actual disability. It is not in the province of this court to assess the witnesses' credibility. Jurors are free to believe some, all, or none of each witness' testimony, and they may separate the credible parts of the testimony from the incredible parts. *State v. Barnhart*, 7th Dist. Jefferson No. 09 JE 15, 2010-Ohio-3282, 2010 WL 2749627, ¶ 42, citing *State v. Mastel*, 26 Ohio St.2d 170, 176, 270 N.E.2d 650 (1971). When there is conflicting evidence of the elements necessary to establish a violation of R.C. 4511.21(A), it is a jury question and a trial court properly denies the JNOV. *McFarland v. Gillespie*, 5th Dist. Fairfield No. 18-CA-17, 2019-Ohio-1050, ¶ 49. Thus, given the conflicting evidence, the issue of whether there was an actual disability was a

decision for the jury; it was a credibility question that was best left for the jury to decide. Accordingly, a JNOV was not warranted on the issue of actual disability.

2. Perceived Disability

{¶23} Appellant argues perceived disability does not require proof that a perceived physical or mental impairment substantially limits one or more major life activities. All that is needed is a perception of mental or physical impairment, not whether the impairment limits a major life activity. Appellant contends it is "unequivocally clear" that her medical condition is an impairment and there is evidence that Appellees regarded her as impaired by their act of holding her job and waiting for her to be released from the doctor, and by arranging for her to have an office with a private bathroom for the specific purpose of accommodating her condition.

{¶24} Appellees assert the evidence does not establish they regarded her as disabled. They admit they were aware of her condition, they held the director of nursing job for her for 10 weeks even though she had only worked for them for two days, and they provided her with an office with a private bathroom. However, they contend this does not mean they regarded her as disabled.

{¶25} In 2014, we held the test for a perceived disability is not whether the disability is perceived to limit a major life activity, but rather whether there is a perception of the disability. *Roghelia v. Hopedale Mining, L.L.C.*, 7th Dist. Harrison No. 13 HA 8, 2014-Ohio-2935, ¶ 18. In that case, we further explained that accommodations alone do not evince a perception of disability; "[A] perceived disability cannot be established by a mere showing that the employer attempted to accommodate the employees perceived needs." *Id*. at ¶ 25, 35, quoting *Lanterman v. Columbia Gas of Ohio, Inc.,* 7th Dist. Columbiana No. 01 CO54, 2002–Ohio–5224, ¶ 23. Therefore, the fact that Appellees were making an office with a private bathroom available to Appellant upon her return to work alone was insufficient to indicate Appellees perceived Appellant as disabled.

{¶26} Beyond the alleged accommodation of a private bathroom, evidence of a perceived disability in this case is minimal. At trial, Appellant admitted she worked for Appellees for 10 hours prior to needing emergency surgery. Appellees had little contact other than well wishes with Appellant following her surgery. When Appellant indicated she was released to work part-time on April 20 and full-time on May 4, she was informed

the position was not a part-time position and she needed to start work on April 13. This is the only potential evidence of being regarded as disabled; there is no other evidence insinuating Appellee regarded Appellant as disabled.

{¶27} Given the evidence, a jury could reasonably conclude Appellant did not meet her burden to demonstrate a perceived disability. As stated above, it was in the province of the jury to assess credibility and given the evidence perceived disability was a proper question for the jury. There is no basis to reverse the trial court's decision that a JNOV was not warranted on the issue of perceived disability.

3. Record of Impairment

{¶28} Appellant asserts her hospital records from her colectomy surgery clearly shows she has a record of impairment. Consequently, she contends she is disabled as a matter of law. Appellee disagrees and asserts that the diagnosis of ischemic bowel resulting in a colectomy does not in and of itself necessitate a finding of impairment or a record of impairment.

{¶29} The Eleventh Appellate District has explained that in order to establish a record of impairment, a plaintiff must demonstrate that he or she has a history of long-term or permanent disability. *Yamamoto*, 2002-Ohio-3362 at ¶ 29. The *Yamamoto* court explained that the "EEOC has interpreted the 'record of impairment' provision of the ADA, set forth in Section 1630.2(k), Title 29, C.F.R., as being a measure to ensure that individuals are not discriminated against because of a history of disability." *Id*. at ¶ 41.

{¶30} The records in this case do not show a history of disability. The records show no disability or bowel issue prior to the February 2015 emergency colectomy. Therefore, there is no history of a long term or permanent disability.

{¶31} Even if the records could constitute a record of impairment for purposes of a cause of action under R.C. 4112.02, as explained under the actual disability section, the jury could have determined that Appellant did not meet her burden demonstrating that any impairment was not resolved prior to her termination. There was evidence her doctor released her to return to work on April 13 on a full-time basis without restrictions. The evidence established her bag was staying attached to the stoma on April 8 and on April 10 she was released from the care of the home health nurses because the appliance was staying affixed. Therefore, their services were no longer needed. Although conflicting

evidence may have suggested she was impaired, it was for the jury to decide which evidence to believe. The jury determined Appellant failed to prove she was impaired.

4. Conclusion

{¶32} The trial court did not err in denying the motion for a JNOV; Appellant failed to prove disability. This assignment of error is meritless.

Second Assignment of Error

"The lower court erred by denying Plaintiff-Appellant Barbara Bailey's Motion for New Trial."

{¶33} In addition to moving for a JNOV, Appellant also moved for a new trial. The new trial motion did not specifically reference which provisions of Civ.R. 59 Appellant was using to seek a new trial. However, based on the language in the motion, the trial court correctly determined it was Civ.R. 59(A)(6) and (7). The trial court denied the motion for reasons similar to the ones used to deny the request for JNOV.

{¶34} "The purpose of Civ.R. 59(A) is to empower the trial court to prevent a miscarriage of justice." *Frazier v. Swierkos,* 183 Ohio App.3d 77, 2009–Ohio–3353, 915 N.E.2d 724 (7th Dist.), ¶ 8. Civ.R. 59(A)(6) and (7) provide that a new trial may be granted if the judgment is not sustained by the weight of the evidence or is contrary to law.

{¶35} We review the trial court's decision to deny the Civ.R. 59(A)(6) new trial motion for an abuse of discretion. *Gateway Consultants Group, Inc. v. Premier Physicians Centers, Inc.*, 8th Dist. Cuyahoga No. 104014, 2017-Ohio-1443, ¶ 12. We do not directly review whether the judgment was against the manifest weight of the evidence. *Malone v. Courtyard by Marriott LP*, 74 Ohio St.3d 440, 448, 659 N.E.2d 1242 (1996). Rather, the focus is on the trial court's ruling. *Id.* The decision is reviewed for an abuse of discretion. *Mannion v. Sandel,* 91 Ohio St.3d 318, 321, 744 N.E.2d 759 (2001). An abuse of discretion implies that a trial court was unreasonable, arbitrary or unconscionable in its judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Deference is given to the trial court's decision because the trial court is better situated than a reviewing court to pass on questions of witness credibility and the "surrounding circumstances and atmosphere of the trial." *Rohde v. Farmer,* 23 Ohio St.2d 82, 262 N.E.2d 685 (1970).

{¶36} The assertion that the trial court incorrectly denied the motion for new trial because the judgment is contrary to law is a question of law and requires a de novo review. *Hanko Nestor v. Hanko*, 6th Dist. Erie No. E-18-007, 2019-Ohio-2256, ¶ 67; *Catalanotto v. Byrd*, 9th Dist. Summit No. 28426, 2017-Ohio-7688, 97 N.E.3d 1016, ¶ 12; *Gateway Consultants Group, Inc.* at ¶ 12. Thus, we review a trial court's ruling on a Civ.R. 59(A)(7) motion under a de novo standard of review. *Id.* A de novo review is conducted without deference to the lower court's decision. *Dixon v. Conrad*, 7th Dist. Mahoning No. 04 MA 114, 2005-Ohio-6932, ¶ 35.

{¶37} Under both standards of review, Appellant's argument fails. Appellant's arguments under this assignment of error are the same arguments asserted under the first assignment of error. Appellant asserts the evidence overwhelming established she had a physical impairment which substantially limited a major life activity, she was perceived as disabled, and/or has a record of physical impairment. She also contends as a matter of law she was physically impaired which substantially limited a major life activity, regarded as disabled and has a record of physical impairment. As explained above, the evidence could be construed to support her position that she had a physical impairment. However, a reasonable jury could also conclude that she was not physically impaired or that the impairment was resolved by the April 13 return to work date. There is nothing in the record to suggest that as a matter of law she was disabled. We have previously explained that when there are two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, we will not choose which one is more credible. *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999). "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 118. The trier of fact is in the best position to weigh the evidence and judge the witnesses' credibility by observing their gestures, voice inflections, and demeanor. *Seasons Coal Co. v. City of Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). If there was conflicting evidence of the elements necessary to establish a violation of R.C. 4511.21(A), it is a jury question and a trial court properly denies the JNOV. *McFarland*, 2019-Ohio-1050 at ¶ 49. Thus, the issue of whether Appellant met her burden to prove disability was an issue for the jury. The jury found Appellant did not

prove she was disabled. Given the conflicting evidence and the fact that credibility is best left to the jury to decide, there is no basis for reversing the trial court's denial of the motion for a new trial.

{¶38} For those reasons, this assignment of error is overruled.

Conclusion

{¶39} Both assignments of error are meritless. The trial court's decision to deny the motions for JNOV and new trial are affirmed.

Waite, P.J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.