[Cite as *Hardin v. Weltle*, 2011-Ohio-3409.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

Paul D. Hardin, et al.	Court of Appeals No. E-10-016
Appellants	Trial Court No. 2007 CV 0578
v.	
Judith M. Weltle	**DECISION AND JUDGMENT**
Appellee	Decided: July 8, 2011

* * * * *

Michael Murray and William Bartle, counsel for appellants.

J. Mark Trimble and Todd Zimmerman, counsel for appellee.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Erie County Court of Common Pleas, which dismissed appellants' negligence suit against appellee, Judith Weltle. The jury determined that appellants failed to show that appellee was the proximate cause of the alleged injuries claimed subsequent to a minor motor-vehicle incident.

{¶ 2} Appellant, Paul Hardin, has an extensive medical history of similar medical conditions dating back to 1998, long preceding the accident which triggered this case. On January 29, 2007, Paul and Elsie Hardin filed a complaint alleging personal injuries, damages, and loss of consortium arising out of a motor vehicle accident that occurred on January 23, 2006. On January 25, 2010, the case proceeded to a jury trial. The jury returned a defense verdict.

{¶ 3} On February 18, 2010, appellants filed a motion for new trial. The motion was premised on the jury allegedly awarding inadequate damages based upon passion or prejudice, in violation of Civ.R. 59(A)(4), that the verdict was not sustained by the weight of the evidence, in violation of Civ.R. 59(A)(6), the verdict was contrary to law, in violation of Civ.R. 59(A)(7), and the plaintiffs were prevented from having a fair trial, in violation of Civ.R. 59(A)(1).

{¶ 4} Appellants' motion for a new trial was denied on March 25, 2010. Appellee filed a motion to tax as costs the sum of $674.10, which was the cost of defendant obtaining copies of transcripts of videotape depositions. The motion was granted on March 19, 2010. On April 26, 2010, the trial court denied appellants' motion for reconsideration of that order. A timely notice of appeal was filed on April 5, 2010. For the following reasons, the judgment of the trial court is affirmed.

{¶ 5} From that judgment, counsel for appellants sets forth the following two assignments of error:

{¶ 6} "1. THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S [SIC] MOTION FOR A NEW TRIAL SINCE THE JURY VERDICT WAS NOT SUSTAINED BY THE WEIGHT OF THE EVIDENCE, BASED UPON CIV. R. 59(A)(1), (4), (6) AND (7).

{¶ 7} "2. THE TRIAL COURT ERRED IN TAXING AS COURT COSTS THE SUM PAID BY DEFENDANT FOR PURCHASING COPIES OF TRANSCRIPTS OF THE VIDEOTAPE MEDICAL TESTIMONY."

{¶ 8} The following facts are relevant to this appeal. On January 23, 2006, Paul Hardin ("appellant") and Judith Weltle ("appellee") were involved in a low speed, low impact chain-reaction motor-vehicle incident.

{¶ 9} Appellant was rear-ended by appellee. The vehicle then bumped a vehicle directly in front of it. Appellant stated that he was not injured at the scene. Appellant did not sustain any visible injuries of any kind. In fact, after appellant refused being transported by a rescue squad for treatment, he drove himself home from the scene. Appellant did not seek medical attention until the next day. The property damage to the vehicles was extremely minor, reflecting the low speed of the vehicles.

{¶ 10} Liability was not disputed in this matter. The crux of the dispute focused on damages. Thus, the determinative issue was whether appellant suffered injuries and damages proximately caused by the accident. Appellant's extensive past medical history was highly relevant to the proximate cause determination.

{¶ 11} On January 24, 2006, the day after the accident, appellant went to the Firelands Regional Medical Center. His chief complaint was of a headache and pain in his neck. The emergency room report indicated no definite acute fracture or dislocation. The report noted extensive degenerative changes. X-rays confirmed the significant degenerative changes of the cervical spine consistent with appellant's medical history. Specifically, they confirmed degenerative disc changes with near obliteration of all the disc spaces associated with endplate sclerosis and osteophyte formation. All of these conditions indisputably predated the accident.

{¶ 12} At the time of the incident, appellant was a 75-year-old male. After driving a commercial truck for 45 years, appellant developed extensive and significant medical problems.

{¶ 13} Specifically, medical records beginning in 1999, seven years prior to the accident, reflect severe degenerative disc disease with loss of disc space and density. Also suffering from degenerative arthritis, appellant developed a significant degree of osteopenia which caused pain radiating in his lower back. The record reflects appellant's medical condition grew progressively worse with disc bulge and significant narrowing of the spinal cord, called canal stenosis. His treating physician recommended retirement given his serious physical conditions.

{¶ 14} Appellant's conditions became progressively more acute. Medical records revealed radiculopathy, which refers to severe pain in neck, shoulder, arm, back, and/or leg. The records indicated pain in his right leg, lower back across the base of the spine

and degenerative changes in the lower lumbar spine. Appellant's pre-accident medical records reflect significant spondylosis and severe degenerative changes, particularly in the L3-4, L4-5, and L5-S1 portions of the spine. Spondylosis consists of degenerative osteoarthritis of the joints between the center of the spine and can cause pressure on nerve roots with subsequent sensory and/or motor disturbances. Severe stenosis was routinely noted. Notably, between 1998 and 2002, four years prior to the accident, Dr. Zelm ("Zelm") treated appellant fifty-one times for an array of severe neck and back conditions. Again, neck pain was appellant's chief complaint after the accident. Due to these conditions and the continued intermittent pain, back surgery was performed on September 9, 2003.

{¶ 15} Prior to the accident, in a progress record taken May 27, 2005, Dr. Kim noted appellant's residual back pain as well as pain coming down into his right thigh and in both anterior and lateral aspects to the knee. Appellant was taking Vioxx, an arthritic medication, to relieve pain. On November 22, 2005, prior to the accident, Dr. Kim noted appellant's ongoing osteoarthritis conditions.

{¶ 16} In the first assignment of error, appellants argue the court erred when it denied their motion for a new trial. Civ.R. 59(A) states in relevant part:

{¶ 17} "A new trial may be granted to all or any parties and on all or part of the issues upon any of the following grounds:

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

{¶ 19} "* * *

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

{¶ 21} "* * *

{¶ 22} "(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;

{¶ 23} "(7) The judgment is contrary to law."

{¶ 24} Civ.R. 59 is expressly discretionary. *Sims v. Dibler*, 172 Ohio App.3d 486, 2007-Ohio-3035, at ¶ 31. As such, this court must affirm the disputed judgment unless the complaining party demonstrates that the court abused its discretion. *Jones v. Booker* (1996), 114 Ohio App.3d 67, at ¶ 69; citing *Jenkins v. Krieger* (1981), 67 Ohio St.2d 314, 320.

{¶ 25} The term abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140; *Steiner v. Custer* (1940), 137 Ohio St. 448; *Conner v. Conner* (1959), 170 Ohio St. 85. Furthermore, when a trial court's decision on a motion for a new trial involves a question of fact, a reviewing court must view the evidence in a light favorable to the trial court's

decision. *Osler v. Lorain* (1986), 28 Ohio St.3d 345, 351, 504 N.E.2d 19, citing *Jenkins*, supra.

{¶ 26} In support of their arguments, appellants contend that the accident exacerbated and aggravated Paul's various pre-existing injuries. They cite to *Rhode v. Farmer* (1970), 23 Ohio St.2d 82. Appellants are correct that the granting of new trials may be granted when the general verdict was against the manifest weight of the evidence. However, in ruling on a motion for a new trial on grounds that the judgment was not sustained by sufficient evidence, this court must weigh evidence so as to ascertain whether a manifest injustice has occurred. The standard of review on appeal is that of deference to the decision of the trier of fact. *Seasons Coal Co. v. City of Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶ 27} As the record plainly and consistently reflects, Paul has a long history of significant medical problems with ongoing effects that were present prior to and after the accident. Close evidentiary questions are within the domain of the trial court. *Calderon v. Sharkey* (1970), 70 Ohio St. 2d 218, 223. Appellants are not entitled to prevail, so long as there appears in the record discernible reasons upon which the jury could rely. See *State v. Brown* (1983), 5 Ohio St.3d 133, 135.

{¶ 28} Given ample, objective evidence reflecting the pre-existence and worsening over many years of appellant's complaints and conditions, it was not arbitrary, unreasonable, or unconscionable to find no compelling basis so as to warrant the extreme

measure of disregarding the jury verdict and ordering a new trial. We find appellants' first assignment of error not well-taken.

{¶ 29} In the second assignment of error, appellants assert the trial court improperly awarded as court costs the sum paid by defendant for purchasing copies of the transcripts of the videotape medical testimony presented as evidence and filed by plaintiffs. The Supreme Court of Ohio declared in *Williamson v. Ameritech Corp.*, 81 Ohio St.3d 342, that expenses of litigation that can constitute "costs" under the rule are limited to only those authorized by statute. See *Williamson*, supra.

{¶ 30} Appellants contend the costs of transcripts were not "costs" authorized by statute. Specifically, they cite to R.C. 2303.21 and Civ.R. 54(D). R.C. 2303.21 states:

{¶ 31} "Expenses of transcript or exemplification shall be taxed in costs:

{¶ 32} "When it is necessary in an appeal, or other civil action to procure a transcript of a judgment or proceeding, or exemplification of a record, as evidence in such action or for any other purpose, the expense of procuring such transcript or exemplification shall be taxed in the bill of costs and recovered as in other cases."

{¶ 33} Appellants maintain that the costs to make copies of video depositions are not permitted because there is no statutory authorization to do so. We do not concur. As correctly noted, R.C. 2303.31 authorizes expenses incurred "[w]hen it is necessary in an appeal or other civil action to procure a transcript of a judgment or proceeding * * * [and] the expense of procuring such transcript or exemplification shall be recovered as in other cases."

{¶ 34} Civ.R. 54(D) declares that "Except when express provision therefore is made either in a statute or in these rules, costs shall be allowed to the prevailing party unless the court otherwise directs." In the case before us, the trial court properly granted appellee's motion to tax as costs the sum of $674.10 because the appellee was the prevailing party, pursuant to Civ.R. 54(D). Appellee was forced to incur such expense to defend itself. Thus, it was necessary in a civil action to procure a transcript of the video depositions. Therefore, the "cost" is statutorily authorized. Appellants' second assignment of error is not well-taken.

{¶ 35} Wherefore, we find that substantial justice has been done in this matter. The judgment of the Erie County Court of Common Pleas is affirmed. Appellants are ordered to pay costs pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. ________________________
JUDGE

Arlene Singer, J. ________________________
JUDGE

Thomas J. Osowik, P.J. ________________________
CONCUR.
JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.