[Cite as *Knous v. Bauer*, 2023-Ohio-2622.]

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

Joyce Knous, Individually and as Executor of the Estate of Jack Knous, Deceased, et al.,	Court of Appeals No. H-22-011
	Trial Court No. CVA 2019 1113
Appellant	
v.	
Brendan Bauer, M.D. et al.,	**DECISION AND JUDGMENT**
Appellees	Decided: July 28, 2023

* * * * *

Mark J. Obral and Joseph J. Darwal, for appellant.

Stephen W. Funk, Emily K. Anglewicz, Tammi J. Lees, and R. Mark Jones, for appellees

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DUHART, J.

{¶ 1} This medical malpractice case is before the court on appeal by appellant, Joyce Knous ("Joyce"), individually and as executor of the estate of Jack Knous ("Jack"), from the August 4, 2022 judgment of the Huron County Court of Common Pleas which denied Joyce's motion for a new trial. For the reasons that follow, we affirm.

Assignment of Error

> The court abused its discretion when it denied [Joyce]'s motion for a new trial because the jury's verdict was against the manifest weight of the evidence.

Injury

{¶ 2} On April 8, 2016, appellee, Dr. Bauer, performed a lumbar epidural nerve block on Jack at the offices of appellee, Advanced Neurological Associates, Inc. ("ANA"). After the procedure, Jack was experiencing numbness to his lower extremities. Jack was placed in a wheelchair in a separate room, and a moist heating pad, double-wrapped in terry cloth, was placed on Jack's back. The parties dispute how long Jack remained in the room, and whether he was checked on by staff.

{¶ 3} Later that day, Jack went to Magruder Memorial Hospital where he was treated for first and second degree burns to his buttocks.

Complaint

{¶ 4} Joyce filed a complaint against appellees, Dr. Bauer and ANA (jointly "appellees") as well as numerous John Doe defendants alleging that appellees were negligent in (1) failing "to properly administer and monitor the application of a thermal modality upon Jack Knous," (2) failing "to provide and employ competent medical care for Jack Knous, including the training, supervision and evaluation of the physicians and/or personnel practicing in the respective facilities and/or group," and (3) being

otherwise "negligent in the medical care, treatment, and supervision provided to Jack Knous."

Trial

{¶ 5} Jack passed away prior to trial. The case was tried to a jury, and the following relevant testimony was produced.[1]

Joyce

{¶ 6} Joyce related statements made by Jack regarding his visit to the office of ANA. Specifically, she stated he was put in a wheelchair in a room alone. According to Joyce, "[a]ll of the[] people supposedly that came and looked at him, did not do that." A heating pad was put on Jack's back.

{¶ 7} Jack didn't realize his legs were numb, so at one point he tried to stand up to pull his pants up, as they were partway down, and he fell to the floor. He crawled over to the door to get help, and eventually someone came and placed him back in the wheelchair.

{¶ 8} Jack eventually drove home. During the drive, he felt pain in his buttocks and after going home to change, he drove himself to the hospital, where he was treated for a burn. When asked how he got the burn, he thought it must have been the heating pad that had caused the burn.

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[1] As Joyce has noted, the jury found that appellees did not breach a duty of care owed to Jack. It did not "weigh the evidence on the remaining determinative issues of causation * * * and damages." Thus, we have only recounted testimony relevant to whether the appellees breached their duty of care.

{¶ 9} After the injury, Joyce sent a letter to Dr. Bauer, in which she informed him of the burn, and contended that someone should have kept checking on Jack, since he was numb and could not feel that he was being burned.

{¶ 10} Joyce and Jack also had a meeting with Dr. Bauer a couple of weeks after Jack's burn. During this visit, Dr. Bauer looked at Jack's burn.

Jon Bolding

{¶ 11} Bolding was an x-ray technician working at ANA at the time of Jack's procedure. He no longer worked for ANA at the time of trial.

{¶ 12} Bolding testified that after escorting a patient to the front desk, he walked by the room in which Jack was sitting in the wheelchair alone. He noticed that Jack looked uncomfortable and was hunched over in the wheelchair. He asked someone walking by in the hallway to help him, and together they helped Jack "back into the comfortable position." Bolding did not see a heating pad being applied to Jack. He did not see a heating pad on Jack's back, nor did he see one on the chair, or on the ground. He also testified that there was not a heating pad underneath Jack, and he would have noticed it if there had been. He did acknowledge that he did not lift Jack up to stand him up.

{¶ 13} After helping Jack get comfortable, Bolding left the room.

Dr. Bauer

{¶ 14} Joyce called Dr. Bauer on cross-examination. He testified that on April 8, 2016, Jack came to Dr. Bauer's office for an epidural steroid injection. After the

injection, Jack "felt numbness down his legs," which is a known side effect from the injection. While waiting for the numbness to resolve, Jack was placed in a wheelchair in an exam room and given moist heat. Dr. Bauer acknowledged that while waiting for a patient's numbness to resolve, "you want to keep eyes on them so that they don't try to walk or leave." According to Dr. Bauer's testimony, Jack was in the room about 20 minutes, and he checked on him at some point, although not at the time Jack left. When questioned regarding Jack's statements, as found in the medical records, that Jack had been in the exam room for an hour and a half, Dr. Bauer stated that Jack "couldn't have been there for an hour and a half" and suggested that Jack was "off on his timing."

{¶ 15} When asked if Jack left ANA with a burn on April 8, 2016, Dr. Bauer responded that he didn't know, but it was possible.

{¶ 16} Joyce's attorney pointed to Dr. Bauer's April 8, 2016 notes, which did not include much of the information that was later testified to, including that Jack was later checked on, that the moist heat was double wrapped, that the moist heat was 120 degrees, and the time that Jack was discharged. Dr. Bauer acknowledged that he wrote a lot more details about the incident after his visit with Jack and Joyce.

{¶ 17} On direct examination, Dr. Bauer testified that the use of moist heat on Jack was reasonable as it offered "pain relief," and that Jack's burn was not foreseeable. He testified that they had never before had any issues with placing heating pads on patients, and he had been doing it for over twenty years, including to patients who were

numb. He explained that he has not applied moist heat to an area that was numb, and that Jack's back was not numb.

{¶ 18} Dr. Bauer also stated that he came back to check on Jack about 15 minutes after the procedure. At that time he had Jack stand up, which he was able to do. During this visit, he observed that the heat was on Jack's back. He attempted to check on Jack again, but Jack had already left.

Dr. Richard Rauck

{¶ 19} Dr. Rauck testified to a reasonable degree of medical certainty, that Jack was injured while under the care of ANA and Dr. Bauer, through the application of the heating pad. He stated that Jack's treatment fell below the standard of care because (1) there was no possibility of therapeutic benefit, (2) it was not appropriate to apply heat to an area of Jack's body that was numb, and (3) Jack was not properly monitored. Even assuming the heating pad was placed on Jack's back, Dr. Rauck stated that it should be expected the heating pad would slip down to the area that was burned.

Rebecca Burroughs

{¶ 20} On the date of Jack's accident, Burroughs, a nurse, was asked by Dr. Bauer to go with Jack to an exam room and put a warm pack on him. Jack was placed in an exam room in a wheelchair, and then Burroughs went to another room where the warm packs are kept in a warm water bath. She removed the warm pack from the warm water bath with her bare hands, "placed it in a terrycloth wrap, which is a thickness of two layers of terrycloth, and then placed another layer of terrycloth over that layer." This

resulted in essentially four layers of terrycloth covering the pack, which was closed securely with Velcro. Burroughs took the gel pack to Jack and placed it on the mid lumbar area of his back on top of his clothing. She instructed Jack to lean against the back of the chair to keep the pack in place. She then left Jack alone in the exam room to meet with another patient. She returned about two and a half to three minutes later to check on Jack. She noticed that the warm pack had slipped to the seat of the wheelchair, where it was touching the base of Jack's back, so she lifted it up and replaced it. She again instructed him to keep the pack in the lumbar midback area, and he "verbalized understanding he could feel it." She then checked on him an additional two times. Both times, the pack was still in place on his midback. Burroughs did not ever see the pack underneath Jack when she checked on him.

{¶ 21} After the third check-in, Burroughs did not return again to check on Jack since he had been "able to maintain the warm pack, * * * had no concerns, voiced no new issues, had no questions, [and] had no needs." Instead, she "reached out to Dr. Bauer's medical assistant and instructed her of [Jack] ***, his pack on his midback, the warm pack, and to keep monitoring him, because Dr. Bauer was wanting him monitored because his legs were numb * * *."

{¶ 22} When asked if she had any concerns that the moist heat would injure Jack, she responded "no" because "of the temperature of the pad, the fact that it could be handled with bare hands, the fact it had four layers of terrycloth secured around it, and that after application many times on a daily basis to patients' bare skin, we've never had

an injury of any kind, a complaint of any kind." Burroughs believed her care of Jack was reasonable.

Exhibits

{¶ 23} Photos and Jack's medical records were admitted into evidence. A Magruder Hospital record, dated April 8, 2016, noted that Jack "state[d] that the heating pad was on his buttock for quite some time. * * * [H]e does state that his buttock was initially numb when he had this on his buttocks and states [the heating pad] was on it for approximately an hour and [a] half." The doctor believed the injury to be a "first and second-degree burn secondary to his heating pad."

{¶ 24} Additionally, records from ANA were provided. On the day of the procedure, Dr. Bauer noted that "[t]he patient had numbness in bilateral legs post block from a more caudal approach from [M]arcaine effect and thus was placed in a wheel chair [sic] for 20 minutes and given moist heat until the [M]arcaine effect wore off which it did. The patient did have good pain relief and did otherwise tolerate the procedure well."

{¶ 25} A second office note, which was drafted after Jack and Joyce's last visit with Dr. Bauer, stated, inter alia, that Jack "received a transforaminal block and he did have numbness in his legs which lasted for 20 minutes and I did not want him to leave until I was sure he was stable. The patient was taken into room 4 where moist heat was placed on his back and double wrapped by Becky Burroughs our RN and he was checked on by myself once after he[] tried to stand up to button his pants and was wittnessned

(sic) by a staff member and he stated he felt his right leg was normal but his left leg was still numb but improving. He sat back down and was seen by [Burroughs] once (sic) more time as well as by John but the patient had left after I was able to see him back and was able to walk out of the office unassisted and was not compolaining (sic) of anymore (sic) symptoms when he left." The note from April 22, 2016, also stated that "* * * I had the nurse [Burroughs] get him a wheel chair and help him into room -4 and wanted him to stay until we could see and observe him walk unassisted without any left numbness. After I checked on him and during his procedure he did not ever have any exposed buttocks so this region had to be covered by his jeans as well as I did not know how his heat could go from his back where he could lean forward if hot and feel heat still to his buttocks below th[e] region that was numb and not the area injected nor in any pain as this was the left cheeek (sic) of his buttock * * *."

Verdict

{¶ 26} On June 3, 2022, the jury returned a verdict in favor of appellees. In response to an interrogatory asking whether [Joyce] "proved by a preponderance of the evidence that the care provided to Jack Knous by Defendant Dr. Brendan Bauer, was negligent," the jury answered no. The jury also answered no when asked whether Joyce proved "by a preponderance of the evidence that the care provided to Jack Knous by any employee of [ANA] other than Dr. Bauer was negligent."

Motion for New Trial

{¶ 27} On June 20, 2022, Joyce filed a motion requesting a new trial pursuant to Civ.R. 59(A), arguing both that the verdict was against the manifest weight of the evidence, and that there was jury misconduct, citing to a post-trial comment made by a juror explaining the jury's verdict.

{¶ 28} The trial court denied the motion, finding that there was competent, credible evidence, including expert testimony, that there was no deviation from the standard of care. With respect to the juror misconduct claim, the trial court found that the juror's statement was barred by Evid.R. 606(B).

{¶ 29} Joyce now appeals the trial court's denial of her motion for new trial only on the basis that the verdict was against the manifest weight of the evidence.

Standard of Review

Scope of Appeal

{¶ 30} The parties dispute the scope of this court's review. Appellees contend that Joyce only challenged the trial court's denial of her motion for new trial; she did not request an independent review of the jury's verdict. Joyce counters that her assignment of error asks us to "decide whether the Trial Court abused its discretion in denying the motion for a new trial *as well as whether the jury's verdict was against the manifest weight of the evidence*" (Emphasis added.) This distinction is important, as our review of a trial court's denial of a motion for new trial, where it was alleged that the jury verdict

was against the manifest weight of the evidence, is different that an independent review of the jury verdict on the basis of manifest weight.

{¶ 31} We first note that, although both the trial court's order denying the motion for new trial, which was journalized on August 4, 2022, and the order documenting the jury's verdict, which was journalized June 6, 2022, are attached to Joyce's notice of appeal, her notice merely states that she is appealing "a decision of the Court of Common Pleas of Huron County Ohio, journalized on August 4, 2022." Moreover, her assignment of error states that "[t]he court abused its discretion when *it denied [Joyce]'s motion for a new trial* because the jury's verdict was against the manifest weight of the evidence." (Emphasis added.)

{¶ 32} Pursuant to App.R. 12(A)(1)(b), an appeal is determined based upon the assignments of error set forth in the briefs. *Gilliam v. Rucki*, 6th Dist. Lucas No. L-22-1107, 2023-Ohio-1413, ¶ 27. "An appellate court rules on assignments of error only, and cannot address mere arguments." *Id*. Here, Joyce's assignment of error was specifically limited to the court's denial of the motion for new trial. This conclusion is supported by her notice of appeal, which only states she is appealing the trial court's order denying the motion for new trial.

{¶ 33} Because Joyce did not assign it as error, we decline to address Joyce's argument that the verdict was against the manifest weight of the evidence. Our review is therefore limited to whether the trial court erred in denying Joyce's motion for new trial.

Standard

{¶ 34} Joyce requested a motion for new trial pursuant to Civ.R. 59(A)(6), which permits a court to grant a new trial when the "judgment is not sustained by the weight of the evidence." When reviewing such a motion, "we do not directly review whether the judgment was against the manifest weight of the evidence." *KB Resources, LLC v. Patriot Energy Partners, LLC*, 2018-Ohio-2771, 116 N.E.3d 728, ¶ 113 (7th Dist.), citing *Malone v. Courtyard by Marriott*, 74 Ohio St.3d 440, 448, 659 N.E.2d 1242 (1996). Rather, as "the trial court is in a better position to determine credibility issues," our focus is on whether the trial court abused its discretion when ruling on the Civ.R. 59(A)(6) motion. *Id*. Abuse of discretion implies that the court's decision was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

Analysis

Trial Court Applied the Correct Standard

{¶ 35} Joyce contends that the trial court used the wrong standard of review. In its opinion, the trial court stated that "[i]n order to determine whether a verdict is against the manifest weight of the evidence the Court must determine whether the verdict is supported by some competent credible evidence." The court ultimately concluded that the jury's finding that there was no deviation from the standard of care "was supported by some competent, credible evidence, including expert testimony." Joyce argues that in limiting its review to whether the verdict was supported by "some competent, credible

evidence," the trial court improperly applied the standard of review for sufficiency of the evidence, not manifest weight. We do not find the trial court erred.

{¶ 36} In the civil case of *C. E. Morris Co. v. Foley Const. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), the Ohio Supreme Court stated that "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *Id*. at syllabus. Following *C.E. Morris*, the court issued its decision in the criminal case of *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997), where it described the difference between sufficiency of the evidence and manifest weight of the evidence. Under the manifest weight standard set forth in *Thompkins*, a reviewing court "must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether, in resolving any conflicts in the evidence, the jury or trier of fact clearly lost its way and thereby created such a manifest miscarriage of justice that the conviction must be reversed and a new trial must be ordered. A conviction should be reversed on manifest weight grounds only in the most 'exceptional case in which the evidence weighs heavily against the conviction.'" (Citation omitted.) *Toledo v. Levesque*, 6th Dist. Lucas No. L-20-1028, 2021-Ohio-27, ¶ 22, citing *Thompkins* at 387.

{¶ 37} Although for a while, some courts used separate standards for reviewing manifest weight in civil and criminal cases, relying on *C.E. Morris* in the civil cases, in *Eastley v Volkman*, the Ohio Supreme Court explained there were not two standards of

review, and the standard set forth in *Thompkins* also applies in civil cases. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, at ¶ 17. Nonetheless, *Eastley* did not overrule *C.E. Morris*, and subsequent to *Eastley*, this court has continued to hold that "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *Berry's Restaurant, Inc. v. Aisling, LLC*, 6th Dist. Huron No. H-21-003, 2022-Ohio-1971, ¶ 13 quoting *Lewis v. Coup*, 6th Dist. Sandusky No. S-10-0006, 2010-Ohio-4386. *See also State v. Connin*, 6th Dist. Fulton No. F-21-001, 2021-Ohio-4445, ¶ 22, *Sandusky Metropolitan Housing Auth. v. Jackson*, 6th Dist. Sandusky No. S-19-046, 2020-Ohio-5118, ¶ 10. This is consistent with *Eastley*, where the Ohio Supreme Court stated that "[t]he phrase 'some competent, credible evidence' * * * presupposes evidentiary weighing by an appellate court to determine whether the evidence is competent and credible." *Eastley*, at ¶ 15.

{¶ 38} Therefore, we do not find that the trial court used the wrong standard of review.

Trial Court Did Not Error in Denying the Motion for New Trial

{¶ 39} Joyce next contends that the jury's determination that appellees were not negligent was against the manifest weight of the evidence. As discussed above, Joyce appealed the trial court's denial of her motion for new trial, not the jury verdict itself, and thus, we review whether the trial court abused its discretion in denying Joyce's motion.

{¶ 40} As the jury answered interrogatories in which it stated that appellees were not negligent, we limit our review to whether the trial court abused its discretion in finding that the jury's conclusion that appellees were not negligent was against the manifest weight of the evidence. *See Cromer v. Children's Hosp. Med. Ctr. of Akron*, 2016-Ohio-7461, 64 N.E.3d 1018, ¶ 13 - 18 (9th Dist.).

{¶ 41} After reviewing the record, we do not find that the trial court abused its discretion, nor do we find that the trial court's decision was "unreasonable, arbitrary or unconscionable." There is competent, credible evidence in the record that appellees did not breach any duty of care owed to Jack, including evidence supporting a finding that it was not foreseeable that a moist heat pack, double-wrapped, and placed on the back, which was not numb, would result in a burn to the buttocks, and evidence that Burroughs and Dr. Bauer monitored Jack. Therefore, we find Joyce's sole assignment of error not well-taken.

Conclusion

{¶ 42} The judgment of the Huron County Court of Common Pleas is affirmed. Pursuant to App.R. 24, Joyce is hereby ordered to pay the costs incurred on appeal.

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.

Thomas J. Osowik, J. _____
JUDGE

Myron C. Duhart, P.J. _____
JUDGE

Charles E. Sulek, J. _____
CONCUR.
JUDGE