[Cite as *Henson v. K. Collins Plumbing, Inc.*, 2006-Ohio-3090.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

DEBORIA HENSON, et al.,	:	
Plaintiffs-Appellants,	:	CASE NO. CA2005-07-069
	:	O P I N I O N
-vs-		6/19/2006
	:	
K. COLLINS PLUMBING, INC. et al.,	:	
Defendants-Appellees,	:	

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2001CVH01168

James R. Rimedio, 704 Queen's Tower, 810 Matson Place, Cincinnati, OH 45204-1444, for plaintiffs-appellants

Lindhorst & Dreidame, Jay R. Langenbahn, 312 Walnut Street, Suite 2300, Cincinnati, OH 45202-4091, for defendants-appellees, Kraig Collins & K. Collins Plumbing, Inc.

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YOUNG, J.

{¶1} Plaintiffs-appellants, Deboria and George Henson, appeal from the judgment of the Clermont County Court of Common Pleas in a personal injury suit against defendants-appellees, Kraig Collins, K. Collins Plumbing, Inc., and Bridgette McKinney.

{¶2} On October 27, 1999, Deboria Henson ("Henson") was involved in an automobile accident with Collins. On July 5, 2000, she was involved in an automobile

accident with McKinney. Henson sustained injuries in both accidents, and in October 2001, appellants brought suit to recover for medical bills, pain and suffering, and loss of consortium.

{¶3} At a jury trial in June 2005, Henson submitted medical records and testified that she had been receiving medical treatment for ailments, pain, and injuries associated with her left and right shoulders, neck, mid and lower back, and right hip. Evidence was also presented that Henson had shoulder surgery and two hip replacement surgeries some time after the accidents.

{¶4} Two medical doctors who treated Henson, George T. Shybut and Mitchell Simons, testified that the collisions with Collins and McKinney caused, aggravated, or were in some way related to Henson's ailments, injuries, and surgeries.

{¶5} Conversely, Dr. Arthur F. Lee examined Henson, reviewed her medical records, and testified that her injuries were primarily due to either pre-existing conditions, or circumstances unrelated to the collisions. Dr. Lee testified that objective tests could not validate many of Henson's subjective complaints, that medical records failed to establish a causal connection between the accidents and many of her ailments, and that pre-existing osteoarthritis necessitated Henson's hip-replacement surgery.

{¶6} Appellants asked the jury to award over $500,000 in damages from Collins, and $42,300 in damages from McKinney. The jury returned a verdict in favor of appellants, but awarded only $8,250 in damages as a result of the collision with Collins, and $900 in damages as a result of the collision with McKinney. This appeal followed, in which appellants raise two assignments of error.

{¶7} Assignment of Error No. 1:

{¶8} "THE COURT ERRED TO THE PREJUDICE OF PLAINTIFFS-

APPELLANTS BY FAILING TO GRANT PLAINTIFFS-APPELLANTS' REQUEST FOR MISTRIAL WHICH WAS BASED ON THE DEFENDANTS-APPELLANTS' (SIC) REMARK THAT THERE IS NO INSURANCE, BY FAILING TO RULE ON THE OBJECTION TO THAT REMARK, AND BY FAILING TO IMMEDIATELY GIVE A CURATIVE INSTRUCTION."

{¶9} In their first assignment of error, appellants contend the trial court erred by not granting a motion for a mistrial made after counsel for Collins stated: "There's no insurance in this * * *" while voicing an objection during voir dire.

{¶10} To begin, it is well established that a trial court's denial of a motion for mistrial will not be reversed on appeal absent an abuse of discretion by the trial court. *Apaydin v. Cleveland Clinic Found*. (1995), 105 Ohio App.3d 149, 152. An abuse of discretion involves more than an error of law or judgment; the trial court's action must be arbitrary, unreasonable or unconscionable. *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169.

{¶11} To warrant reversal for abuse of discretion, the trial court's action must have been one "that no conscientious judge, acting intelligently, could honestly have taken." *State v. Hancock*, 108 Ohio St.3d 57, 77, 2006-Ohio-160, ¶130, quoting *Wilms v. Blake* (1945), 144 Ohio St. 619, 624.

{¶12} At trial, appellants were represented by Mr. White and Collins was represented by Mr. Langenbahm. The following transpired during voir dire:

{¶13} "MR. WHITE: All right. Okay. Anyone else? Let's explore that for a few minutes. Your job – your job is a, as I understand it, is you're a claims adjuster of some type?

{¶14} PROSPECTIVE JUROR: That's correct.

{¶15} MR. WHITE: Which means that you deal with investigating claims?

{¶16} PROSPECTIVE JUROR: Yes.

{¶17} MR. WHITE: And you deal with evaluating claims?

{¶18} PROSPECTIVE JUROR: Yes.

{¶19} MR. WHITE: and then you deal with – with attorneys, I'm sure?

{¶20} PROSPECTIVE JUROR: Yes.

{¶21} MR. WHITE: both – on both sides of the fence, either attorneys representing people like Mrs. Henson?

{¶22} PROSPECTIVE JUROR: That's correct.

{¶23} MR. WHITE: Or attorneys that would be representing your interest?

{¶24} PROSPECTIVE JUROR: Yes.

{¶25} MR. WHITE: Your company's interest; correct?

{¶26} PROSPECTIVE JUROR: That's correct.

{¶27} MR. WHITE: Would – would that fact alone enter into how you would approach this case? And could it possibly affect your ability to judge the facts and apply the law fairly and impartially?

{¶28} PROSPECTIVE JUROR: No. I would be able to do this fair and impartially.

{¶29} MR. WHITE: All right. What -- what about in the jury room? You're back in the jury room, and you've got all this experience; do you think you would have more credibility in the jury room than perhaps Mr. DeLisle because he has no experience in the – in the area of insurance – evaluating claims?

{¶30} MR. LANGENBAHN: Objection, Your Honor. There's no insurance in this–

{¶31} MR. WHITE: Well, not –

{¶32} THE COURT: Sustained.

{¶33} MR. WHITE: Your Honor, I'll object to that.

{¶34} THE COURT: Approach, counsel."

{¶35} At a sidebar conference, the parties argued over who was at fault for mentioning insurance and over whether a mistrial was necessary. Before ruling on the issue, the court removed the jury and reviewed the record in chambers. After reviewing the record, the court stated the following:

{¶36} THE COURT: "Court's reconvened. The jury is still absent. The Court in chambers with counsel did review the audio of the questioning of the juror by Mr. White. In the Court's view, the audio does – I don't think intentionally – but I think the question did imply at least that there was a presence of insurance with respect to this case. Mr. Langenbahn's response, while also I think maybe not appropriate, kind of leveled the playing field in my view at least by indicating that insurance is not an issue in this case.* *

{¶37} THE COURT: I'm going to overrule a motion for mistrial. I think it's certainly invited if it's there. Mr. White, you interjected the concept that insurance may be present in this case. It was countered I think by Mr. Langenbahn's statement as well. I'm not frankly pleased with either of them. With respect to whether or not the Court should give a limine instruction, I'm inclined frankly to – to say unless there's a specific request that we move forward and not highlight the issue further by giving a limine instruction at this point in time. But if I am requested, I'll give a limine instruction if either request it. And the limine instruction I would give is, Ladies and Gentlemen of the jury, there's been mention of insurance. The presence or absence of insurance in this case has no bearing on the issues in this case for your decision. And that would be the extent of my limine instruction if counsel wishes to request it."

{¶38} Evidence that a person was or was not insured is not a proper consideration

for a jury in determining the liability of a defendant. See Evid.R. 411; *Hudock v. Youngstown Municipal Ry. Co.* (1956), 164 Ohio St. 493. In general, when a reference is made to insurance during a trial, the appropriate step is for the court to give a limiting instruction admonishing the jury to disregard the statement. *Taylor v. Davignon* (Sept. 13, 2001), Cuyahoga App. No. 79019; see, also, Evid.R. 105.

{¶39} The trial court offered to give a curative instruction to counteract any prejudice that might have been created from the statement about insurance. We cannot say the trial court's offer to instruct the jury concerning insurance rather than declare a mistrial was an action that no conscientious judge, acting intelligently, could honestly have taken. See Hancock. Accordingly, appellants' contention that the trial court abused its discretion in failing to grant a mistrial is not well-taken.

{¶40} Appellants also contend that the trial court erred in failing to rule on their objection to counsel for Collins' statement that "[t]here is no insurance in this * * *," and in failing to immediately give a curative instruction. For the reasons that follow, we disagree.

{¶41} First, the trial court did, though not explicitly, rule on the objection. As the portions of the record quoted above reveal, the court found that both sides improperly interjected the concept of insurance into the case. Second, the record reveals that appellants declined the trial court's offer to give a curative instruction. After the court offered to give a curative instruction, counsel for appellants' stated: "I don't think I really want it at this time." A trial court need only give a limiting instruction if a party requests one. *Taylor*; see, also, *State v. Collins* (1990), 66 Ohio App.3d 438, 445; *Agler v. Schine Theatrical Co*. (1938), 59 Ohio App. 68.

{¶42} The first assignment of error is overruled.

{¶43} Assignment of Error No. 2:

{¶44} "THE VERDICT IS CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶45} In their second assignment of error, appellants argue the damages awarded by the jury were inadequate and against the weight of evidence presented at trial.

{¶46} We will not reverse a judgment as being against the manifest weight of the evidence where the judgment is supported by some competent, credible evidence going to all essential elements of the case. *C.E. Morris Co. v. Foley Const. Co.* (1978), 54 Ohio St.2d 279, syllabus. Evaluating and assessing evidence are the primary functions of the trier of fact, not an appellate court. *Yuhasz v. Mrdenovich* (1992), 82 Ohio App.3d 490, 492. The trier of fact has the best opportunity to view witnesses, observe their demeanor, gestures and voice inflections and, ultimately, determines their credibility. *Seasons Coal Inc.*, *v. City of Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶47} Thus, this court must not substitute its judgment for that of the trial court when there is competent and credible evidence supporting the trial court's findings of fact and conclusions of law, and if the evidence is susceptible to more than one interpretation, we must interpret it consistently with the judgment of the trial court. Id.

{¶48} Additionally, in order to set aside a damage award as inadequate and against the manifest weight of the evidence, a reviewing court must determine that the verdict is the result of jury passion and prejudice, *Weidner v. Blazik* (1994), 98 Ohio App.3d 321, 335, and is so gross as to shock the sense of justice and fairness. *Uhlir v. State Farm Ins. Co*., 164 Ohio App.3d 71, 74, 2005-Ohio-5545, ¶18.

{¶49} As the trier of fact, the jury was free to accept or reject any or all of appellants' evidence of damages. *Krauss v. Kilgore* (July 27, 1998), Butler App. No. CA97-05-099. A jury is free to accept or reject any or all of the testimony of a witness, including

testimony of an expert witness. *Weidner*, 98 Ohio App.3d at 335; *Botts v. Tibbs* (May 24, 1999), Butler App. No. CA98-06-125. A jury may reject even uncontroverted, unimpeached, or unchallenged evidence. *Krauss*; see, also, *Ace Baling Inc. v. Porterfield* (1969), 19 Ohio St.2d 137, 138.

{¶50} The jury in this case heard competent, credible evidence from Dr. Lee concerning the cause of Henson's injuries and ailments. Dr. Lee attributed only a small part of Henson's medical problems to the auto accidents. While Dr. Simons and Dr. Shybut testified to the contrary concerning the cause of Henson's ailments, the jury was free to disregard or reject any or all of their testimony.

{¶51} In reaching its verdict, the jury answered interrogatories. One interrogatory asked: "What, if any, injuries do you find were proximately caused to Deboria Henson by the collision of October 27, 1999?" The jury answered that only injuries to Henson's neck and mid-back were caused by that collision. Another interrogatory asked: "What, if any, injuries do you find were proximately caused to Deboria Henson by the collision of July 5, 2000?" The jury answered that only injuries to Henson's low back were caused by that collision. Finally, the jury found none of Henson's injuries to be permanent.

{¶52} Based upon the foregoing and a complete review of the record, we cannot say the verdict in this case is the result of jury passion or prejudice, or so gross as to shock the sense of justice and fairness. The second assignment of error is overruled.

{¶53} Judgment affirmed.

WALSH, P.J., and BRESSLER, J., concur.

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