

IN THE
SUPREME COURT OF OHIO

CASE NO: 06-1201

KATHLEEN M. BRYAN-WOLLMAN,)	
)	
Plaintiff-Appellee,)	On Appeal from the Cuyahoga
)	County Court of Appeals,
)	Eighth Appellate District
v.)	APP. NO. 86429
)	
CORRINE C. DOMONKOS,)	
)	
Defendant-Appellant.)	Trial Court Case No. 513286
)	

APPELLANT'S BRIEF
OF CORRINE C. DOMONKOS

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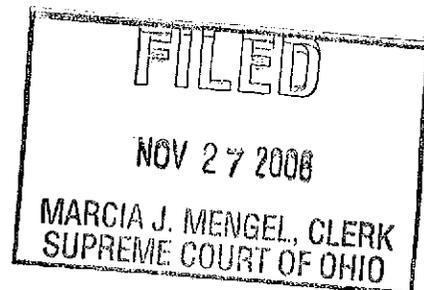


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APPENDIX

- A. Notice of Appeal filed on 6/22/06
- B. Journal Entry and Opinion dated 5/22/06
- C. Journal Entry dated 4/27/05
- D. Journal Entry dated 5/9/05

STATEMENT OF THE FACTS

A. The Accident

On September 30, 1999, the Appellant was operating her vehicle eastbound on Bagley Road near Old Pleasant Valley Road, headed towards her girlfriend's home. (Transcript, pg. 6.) She took her eyes off the road and attempted to use her cell phone to call work and realized that everyone had stopped in front of her. (Id. at 7, 11.) She slammed on her brakes, but could not stop in time and ended up hitting the Appellee's vehicle. (Id. at 8.) The airbag in the Appellant's car did not go off. (Id. at 10.)

B. Appellee's Allegations Regarding Damages.

The Appellee alleged that she could no longer work after the accident at issue. The Appellee further alleged as a result of the accident she suffered: neck pain, memory problems, cognitive problems, foot numbness, dizziness, light-headedness, fatigue, head pain, sleep problems, arm pain, arm numbness, left shoulder pain and pinching, swelling of throat in front of the neck, difficulty swallowing, difficulty talking, difficulty chewing, difficulty sitting, difficulty walking, difficulty laying down, clavicle pain, lower back pain, upper back pain, nerve damage to back and snoring. (Id. at 168 - 170.) The Appellee alleges that she cannot drive at night because she sees "star bursts." (Id. at 78.) She alleged that she gets very dizzy. (Id. at 80.) The Appellee alleged \$55,000 in medical bills as a "pretty good ballpark figure," as being related to the motor vehicle accident (Id. at 76.)

C. Appellee's Prior Medical History

The Appellee testified that she had counseling prior to the accident due to a miscarriage. (Id. at 47.) She denied having any persistent vertigo prior to the incident. (Id. at 48.) She denied dizziness prior to the accident. (Id. at 48.) She admitted one incident of arm numbness prior to the accident. (Id. at 48, 49.) The only medication that she admitted to be taking prior to the accident was a thyroid pill. (Id. at 49.) The Appellee admitted that she suffered from Grave's disease and POTS. (Id. at 51, 177.) The Appellee admitted to suffering from Crohn's disease. (Id. at 52.) The Appellee had two prior back injuries, one at karate class and another due to a motor vehicle accident. (Id. at 53.)

A review of Appellee's extensive medical documentation reveals that: in April of 1989 she complained of chronic headaches for the last three years in the afternoon. (Id. at 151.) In 1996, the Appellee was diagnosed with possible depression. (Id. at 154.) On June 3, 1992, the Appellee had episode of dizziness and double vision. (Id. at 155.) On May 23, 1998, she complained of vertigo and on May 27, she complained of positional dizziness. (Id. at 156.) On October 28, 1997, she complained of vertigo related to bladder infection. (Id. at 157.) On September 26, 1996, she complained of dizziness, nausea, double vision, and had a tumor in her pituitary gland. (Id. at 157.) On January 18, 1990, she complained that she had "dizziness experienced yesterday." (Id. at 157.) On February 20, 1991, the Appellee's records stated she had a history of headaches, frontal and occipital headaches, constant pain, vertigo headache, etiology unknown. (Id. at 157.) On December 23, 1992, the Appellee complained that she feels dizzy, light headed, and Appellee had a neurological exam. (Id. at 158.) On January 16, 1993, the Appellee complained that dizziness and headaches had started a month ago. (Id. at 159.) On

May 23, 1998, the Appellee was taken to the emergency room for dizziness and vertigo. (Id. at 161.) On August 10, 1999, the Appellee complained of depression in the Kaiser's E.R. This last date was a month and a half prior to the accident at issue. (Id. at 165.) In this entry, the Appellee had listed 37 prior problems listed, including: attention headaches, headaches, recurrent hyperthyroidism, fatigue, vertigo, paresthesia, arm, possible depression, muscle strain, sinusitis. Appellee testified to a prior history of cervical degenerative disk disease. (Id. at 177.)

D. Appellee's Inconsistent Statements

Besides the above inconsistencies between the Appellee's recollection of her health before and after the accident, the Appellee took issue with the record keeping of her medical providers. The Appellee alleged that she complained of visual problems to the nurses and doctors in the E.R. (Id. at 148.) However, the EMS run report did not indicate that the Appellee complained of any vision difficulties after the accident at issue. (Id. at 142.) The emergency room report indicates that the patient denied any injury to the head and had no loss of consciousness. (Id. at 144, 145.) And the E.R. records specifically noted that the patient is not complaining of any visual symptoms. (Id. at 147.)

E. The Jury Heard Conflicting Medical Testimony Regarding Proximate Cause.

Dr. Charles Mann, a neurologist, testified for the defense. (Id. at 191.) He examined the Appellee on December 16, 2004. He opined that there was no nerve impingement regarding any alleged disc herniation and no radiculopathy. (Id. at 208.) Dr. Mann was asked:

Q. Doctor, based upon your education, your training, the 34 years as a practicing neurologist, your examination of the Appellee, your review of the medical records, do you have an opinion, based upon a reasonable degree of medical certainty and probability as to what part of Mrs. Wollman's current medical condition was proximately caused by the automobile accident of September 30th, 1999. Do you have an opinion, Doctor?

- A. I do.
- Q. What is that opinion.
- A. **That the contribution of the 1999 automobile accident to her present state is not any at all.** Her present condition is in no way traceable to that automobile accident.
- Q. Do you know what's causing her current problems
- A. There's no succinct, simple explanation for the large number of symptoms and the extensive parts of the nervous system that she is troubled with. (Id. at 210.)

Further, Appellee's expert had authored two separate reports concerning the Appellee. (Id. at 216.) The first report stated that the injuries and symptoms were related to the accident, while the second report indicated that only the symptoms were related. (Id. at 216.)

*** *** ***

On cross examination, Dr. Mann testified:

- Q. And is it your opinion now that since the auto accident she's malingering or fabricating.
- A. That is not my opinion.
- Q. So you believe that the auto accident has disabled her.
- A. I do not. (Id. at 224.)

*** *** ***

- Q. Well, you're indicating that you can't explain how the auto accident has disabled – you say she's not disabled, is that correct. I'm confusing myself here. We're going to get through this.
- A. The symptoms that Mrs. Wollman has now, and they're just symptoms, there's no specific organic disease here, those alone wouldn't disable patients. And those are symptoms she had earlier. The only theory I can offer to explain this is that she had those symptoms before and worked and now she feels she's not able to do so. (Id. at 224, 225.)

*** *** ***

- Q. And you could testify on that based on a reasonable degree of professional or medical professional certainty.
- A. Yeah. I would even go further and say that there's no clinical evidence at all that she had an acute disk herniation, cervical disk herniation, that showed up on the scan as a result of the 1999 automobile accident. (Id. at 288.)

The Defense also called Dr. Vijay Balraj to testified by video tape regarding the

Appellee's alleged psychological damages. (Deposition transcript of Dr. Balraj.) He conducted

an I.M.E. and ran approximately 11 neuro-psychological tests on the Appellee. (Deposition, pg. 22.) Dr. Balraj testified:

*** *** ***

And the other thing we assessed for the emotional domain was personality. In Miss Wollman's case her personality profile was one that suggested the very high likelihood of a somatization disorder or a conversion disorder. **And what that means, in other words, is a person will take psychological or emotional stress and convert that into physical symptoms.** And this is often done unconsciously, it's not necessarily done on a conscious level, and often is the cause of intractable pain complaints and other such disorders. (Deposition, Dr. Balraj, pgs. 27, 28.)

*** *** ***

Q. Let me ask you this, Doctor, before you start offering opinions, any opinion that you give today is within a reasonable degree of neuropsychological probability and certainty; is it not.

A. Yes it is. (Deposition, Dr. Balraj, pg. 31.)

*** *** ***

A. My opinion is that, based on the records, based on my evaluation and taking a detailed history from Miss Wollman herself, **that she did not sustain a memory loss as a result of this injury in 1999.** (Deposition of Dr. Balraj, pg. 35.)

*** *** ***

Q. Right. Right. Moving on to memory, you indicate that her immediate and delayed recall were in the borderline to low average ranges.

A. That is correct.

Q. And that's accurate.

A. That is accurate.

Q. Is that something she's, for lack of a better term, trying to fake.

A. No. Again, I don't think she's trying to fake that. I think, as I've said before, this is more consistent with a – the result of depression which she has very severe depression.

Q. I see. And her memory for structured information appears lower than expected.

A. Yes.

Q. on page 6. Recall visual information again borderline to low average.

A. Correct.

Q. **And these are as a result of depression, not due to the trauma of the accident in your opinion.**

A. **In my opinion, yes.** (Deposition of Dr. Balraj, pgs. 55, 56.)

Further, the jury heard testimony that Dr. Balraj's opinion was consistent with another doctor named Dr. Chelune of the Cleveland Clinic. (Deposition of Dr. Balraj, pg. 41.) In short, Dr.

Balraj's opinion was that the Appellee was suffering from Depression which caused the Appellee

to somatize the emotional stressors in her life. Further, that this was not proximately related to the motor vehicle accident in question.

F. Two reports of Dr. Patterson Which had Conflicting Causal Statements.

The jury heard testimony concerning the medical reports of Dr. Patterson. The transcript states:

- Q. Turn to the second page where the doctor offers his opinions. And turn to the second page of the first report. Is there any difference between the language regarding the direct causation of the symptoms or the injuries, and if there is, is there a difference.
- A. There is a difference in the one marked B. Dr. Patterson says that the injuries and symptoms are directly related to the motor vehicle accident. And in the one marked A, Dr. Patterson states that the symptoms are related to the motor vehicle accident. (Id. at 216.)

- Q. Do you know if anyone asked him to change that report.
- Mr. Jenkins: Objection
- The Court: Does he have any knowledge.
- Q. If you know.
- A. I don't know. (Id. at 217.)

G. The Jury Specifically Found that the Appellee was Unable to Show that her Alleged Injuries were Proximately Related to the Motor Vehicle Accident at Issue.

The trial judge refused to give the Jury a defense verdict form over argument and objection of trial counsel for the Appellant. (See pages 275 through 280.) After the Jury had been sent for deliberations, the Jury sent out questions to the Judge. One question was:

We seem to be missing the form for the defendant. Is there a Defendant's verdict form? If so, may we have it. (Id. at 300.)

After Counsel for the Appellant "more than adequately preserved" his objection. The Court ruled that the jury would not get a defense verdict form and was free to award zero damages. (Id. at 303, 304.) Thereafter, the jury sent a further question to the judge asking:

How is the jury to proceed if, based upon a preponderance of evidence, the defendant's negligence did not proximately cause injury to the plaintiff. (Id. at 305.)

The Court proposed an answer to the jury "in that hypothetical situation, you would award plaintiff zero dollars." However, the Appellee objected to this instruction and the trial court decided it was proper to give the jury a defense verdict form. (Id. at 305 through 307.) Thereafter the jury came back with a defense verdict signed by six of eight jurors. (Id. at 308.)

H. The Appeal

At issue in the Eighth District Court of Appeals was whether the trial court properly overruled Appellee's Motion for a New Trial/Motion for Judgment Notwithstanding the Verdict. In a two to one decision, the Eight District reversed and remanded the case for a new trial.

ARGUMENT

I. Under the Ohio Constitution, in Order to Reverse a Case for a New Trial Based Upon the Manifest Weight of the Evidence, the Judgment of the Appellate Court Must be Unanimous in a Civil Action.

In the original Ohio Constitution and the 1851 Amendment, the Constitution provided no specific guidance in regard to appellate review and jury determinations other than those found in the Bill of Rights:

sec 7. That all courts shall be open, and every person, for an injury done him in his lands, goods, person or reputation, shall have remedy by the due course of law, and right and justice administered, without denial or delay. (Ohio Constitution, Article VIII, 1802; Ohio Constitution, Article I, Section 16, with slightly amended wording.)

sec 8. That the right of trial by jury shall be inviolate (Ohio Constitution, Article VIII, 1802; Ohio Constitution, Article I, Section 5, 1851.)

In 1913, Ohio Constitution Article IV, Section was amended. The amendment specifically addressed the jurisdiction of the Appellate tribunals when reviewing a decision of a jury. The Amendment stated:

No judgment of a court of common pleas, a superior court or other court of record shall be reversed except by the concurrence of all the judges of the court of appeals on the weight of evidence and by a majority of such court of appeals upon other questions; ***

In 1915, the Ohio Supreme Court decided Chicago Ornamental Iron Co. v. Rook (1915) 93 Ohio St. 152, which discussed this amendment. In Rook, a worker fell to his death allegedly due to the negligence of his employer. The Estate received a judgment against the employer for \$8,000.00. The employer appealed the decision of the trial court and the appellate court affirmed the decision of the trial court; even though two of the three judges would have reversed but for the dissenting judge on a manifest weight of the evidence standard. The Ohio Supreme Court reviewed the case to determine whether there was *any* evidence to support the jury's determination. The Court held:

*** there was some evidence upon all the issues joined by the pleadings. The jury found in favor of the plaintiff. One of the judges of the Court of Appeals having reached the conclusion that this verdict was not against the manifest weight of the evidence, therefore, under the provisions of our Constitution, that court could not reverse for this reason. This court having found that there is some evidence to sustain the verdict and judgment of the common pleas court, it will not inquire into the weight of the evidence.

The next time this provision came to the attention of the Ohio Supreme Court is in Newman v. Cleveland Museum of Natural History (1944) 143 Ohio St. 369. In Newman a child was allegedly injured by an elephant at a charity event. The Court held that:

In the ordinary course of events we would remand these cases to the Court of Appeals to determine whether the verdicts are manifestly against the weight of the

evidence. However Judge Morgan has already determined and held in each judgment entry that, in his opinion, 'the verdict is not against the weight of the evidence.' By virtue of the provisions of Section 6, Article IV of the Constitution, the two remaining judges of the Court of Appeals are without lawful authority to reverse the judgments and order a retrial upon that ground. Therefore, an order of remand would amount to the doing of a vain thing.

No case found by counsel opines the reasons that this particular provision was included in the Constitution. Ultimately, the provisions of Article VI of the Constitution were transferred into Article IV. Additionally, the language was modified so that the provision, in Section 3(B)(3), Article IV, of the Ohio Constitution, now reads:

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2 (B) (2) of this article. **No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause. (emphasis added.)**

When the provision is read in context there is no express language limiting its use to only criminal trials. Moreover, while there is not a great deal of case law on this Constitutional provision, the case law in existence does not distinguish between criminal and civil trials. (See, King v. Michel (2003, 6th App. Dist.) 2003 WL 21299933 and Hartz v. Dowds (1995, 5th App. Dist.) 1995 WL 615687, modern cases applying the provision to civil actions.) Therefore, there is no reason to apply this only to criminal cases.

In the case at bar, the Eighth District reversed the decision of the trial court in a two to one decision. Justice Cooney drafted an eight page dissent explaining why the decision of the jury was not against the manifest weight of the evidence. Based upon the plain language of the Ohio Constitution, as well as case law discussing this subject, the Eighth District Court of

Appeals exceeded their jurisdiction when it reversed and remanded the case for a new trial.

Therefore, this Honorable Court should reinstate the decision of the trial court.

II. When a Motion for New Trial is Granted under Civil Rule 59(A)(6), it is Proper to Remand Only for Non-disputed Damages, when practicable.

On a Motion for a New Trial, a trial court is reviewing the weight and sufficiency of evidence presented a trial. As part of this review, if the court can identify issues that do not meet the “manifest weight of the evidence” standard, and when practicable, a new trial should only be granted on these issues. Ohio Civil Rule 59(A) governs new trials, it reads as follows:

CIV R 59 NEW TRIALS

(A) Grounds

A new trial may be granted to all or any of the parties and **on all or part of the issues** upon any of the following grounds:

- (1) Irregularity in the proceedings ***
- (2) Misconduct of the jury ***
- (3) Accident or surprise ***
- (4) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.
- (5) Error in the amount *** when the action is upon contract ***
- (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;
- (7) The judgement is contrary to law;
- (8) Newly discovered evidence,***
- (9) Error of law ***

In addition to the above grounds, a new trial may also be granted in the sound discretion of the court for good cause shown. *** (Emphasis added.)

With the exception of the 59 (A)(6) and the unnumbered “catch all” provision, the grounds for a new trial all concern whether the judicial proceeding’s rules and procedures were fair and whether the jury was lead astray by emotion. These grounds for a new trial all insure that the basic foundation of the proceedings was fair to the litigants.

However, 59(A)(6) is unique because the trial court looks at the actual evidence presented at trial to determine whether the jury reached a “seriously erroneous result.” Bland v. Graves (1993, 9th App. Dist.), 85 Ohio App.3d 644, 620 N.E.2d 920.

When considering a Civ.R. 59(A)(6) motion, the trial court must weigh the evidence and pass on the credibility of the witnesses. The trial court's consideration of this weight and credibility is not in the substantially unlimited sense employed by the jury but in a more restricted sense of whether it appears to the trial court that manifest injustice has been done and that the verdict is against the weight of the evidence. Rohde v. Farmer (1970), 23 Ohio St.2d 82, 262 N.E.2d 685, paragraph three of the syllabus.

A trial judge should abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. Graves, supra. In its role as judge, the trial court is testing the evidence that a decision is based upon to determine if it is sound. As discussed previously, the people of the State of Ohio believed that the decision of a jury should stand, unless an Appellate Court unanimously agreed that the jury's decision was against the manifest weight of the evidence. This is the basic public policy of Ohio. Therefore, when practicable, an Appellate Court should limit the issues on remand to those which the jury mistakenly decided or failed to consider.

If one were drawing an analogy to building a home, grounds one through five and seven through nine, are the foundation of a fair trial. If the foundation is not properly built, all that follows will be suspect. However, Civ. R. 59(A)(6) concerns whether the builder failed to properly install a wall. The question then becomes whether the error was such that the entire home needs to be rebuilt, or can only the wall be rebuilt without having to go through the expense associated with rebuilding from the foundation up. As the basic public policy of the

State of Ohio is to respect decisions of juries, it is proper that, if practicable, only the wall be replaced.¹

The safeguard to this approach is the unanimity required to reverse a trial based upon the manifest weight of the evidence. While not mathematical in precision, to fall under the rubric of seriously erroneous, the deficiency should be obvious to all individuals who review the record. Further, if the error is “seriously erroneous” under the manifest weight of the evidence standard, the error is prejudicial and subject to Appellate review. (See, Mast v. Doctor’s Hosp. N. (1976) 46 Ohio St.2d 539, holding: Under Rules of Civil and Appellate Procedure, Court of Appeals may order retrial of only those issues, claims or defenses the original trial of which resulted in prejudicial error and may allow issues tried free from error to stand.)

In the case at bar, the Appellee alleged that she suffered extensive medical problems throughout her body as a result of the motor vehicle accident. The Eighth District reversed the decision for a new trial on all of her alleged injuries because one defense expert concurred that the Appellee sustained cervical and lumbar strain which should have resolved within a two to three month period. There is no evidence that the jury was lead astray by emotion or prejudicial statements of Defense Counsel. Assuming *arguendo* that the majority opinion is correct and there was no conflicting evidence on the sprain/strain testimony, the likely reason that the Appellee received no recovery is because this issue was lost in the testimony of Appellant’s

¹I do note that there is some overlap with the grounds for a new trial. The best example would be with ground (4), excessive or inadequate damages appearing to have been given under the influence of passion or prejudice.” Differentiating between the two would be fact specific, i.e. did counsel engage in inflammatory remarks or did the item of damage get lost in consideration of other categories of damages. See Fylak v. Drehmer, (2005, 2nd Dist.) 163 Ohio App.3d 248, discussing Civ. R. 59 (A)(6) categories of damages.

alleged psychological/neurological claim. The majority points to the emergency room treatment and the agreement of experts that she suffered a sprain/strain as being against the manifest weight of the evidence. (Opinion, May 11, 2006, Vol. 613, pg. 117.) Therefore, under Civ. R. 59(A)(6), the decision was against the manifest weight of the evidence and the trial court should have scheduled a new trial only for damages associated with the sprain/strain.

The Eighth District did not have a unanimous decision and therefore, it was improper for the Court to remand the case for a new trial. Assuming that the Constitution is not followed in this instance, the case should only be reversed under the manifest weight of the evidence standard for those injuries that Appellee clearly demonstrates she is entitled too; ie, a sprain/strain injury. Otherwise, a second jury will have to hear at trial all of Appellee's alleged injuries and the parties will have to put on all the experts previously called. There is no evidence of any irregularity at the trial which would indicate it was anything other than fair. Therefore, the decision of the jury should stand insofar as it was not against the manifest weight of the evidence.

III. It is Not Proper to Reverse a Case Under the Manifest Weight of the Evidence Standard, When the Records Upon Which an Expert Based Their Opinion is Called into Question by the Testimony of the Appellee.

The EMS run report did not indicate that the Appellee complained of any vision difficulties after the accident at issue. The emergency room report indicates that the patient denied any injury to the head and had no loss of consciousness. And the emergency room records specifically noted that the patient is not complaining of any visual symptoms. The Appellee alleged that she complained of visual problems to the nurses and doctors in the emergency room. She also vacillated on whether or not she lost consciousness. (Transcript of

Proceedings, pg. 142.) The Appellee alleged that the emergency room personnel were not proper record keepers. (Id. 140 through 149.) The Appellee testified as to the confusion in the emergency room:

- Q. You were taken to the emergency room at Southwest – strike that – Kaiser Permanente.
A. Correct.
Q. And you’re Kaiser Permanente. I think you agreed with Mr. Jenkins that there may be some confusion as to what is going on in the emergency room. He mentioned something about TV and people not accurately taking down your history.
A. Emergency room is a very crazy situation. Especially if someone has a Kaiser membership. They would certainly know there – (Transcript, pg. 143.)

Besides the EMS and emergency room records, the Appellee called into question the accuracy of her medical history.

- Q. Now, I told this jury that there were 70 entries for, and I don’t want to go through the list, fatigue, vertigo, headache, dizziness.
A. Several, no.
Q. You deny that.
A. Yes.
Q. Okay. So the jury will have these medical records, and they’re going to have the dates. (Transcript, pg. 155.)

In essence, the Appellee called into question her emergency records by insisting that she complained about injuries that were not recorded and the previous history that was recorded was wrong. Therefore, the Appellee called into question the accuracy of all her medical records.

Experts may not base an opinion upon a subjective belief or unsupported speculation; instead, expert’s opinions must be based on methods and procedures that meet a level of intellectual rigor demanded by relevant discipline. Valentine v. PPG Industries, Inc. (2004, 4th App. Dist) 158 Ohio App. citing Rules of Evid., Rule 702. A trial court may not exclude expert testimony simply because court disagrees with the expert’s conclusions; instead, if the expert

followed methods and principles deemed valid by discipline to reach his opinion, court should allow the testimony, with the traditional adversary process weeding out shaky opinions. Id. Reliability of expert's opinion depends upon (1) validity of underlying theory, (2) validity of technique used to apply that theory, and (3) proper application of technique on a particular occasion. Id., citing Rules of Evid., Rule 702. Determination regarding scientific validity of a particular theory requires not only an examination of trustworthiness of tested principles on which expert opinion rests, but also an analysis of reliability of expert's application of tested principles to particular set of facts at issue. Id., citing Rules of Evid., Rule 702.

In the case at bar, the testimony reveals that the various doctors typically take the patients history, review the medical records of the patient, and conduct an examination of the patient to arrive at a diagnosis. Under Valentine, when a Appellee questions the reliability of the medical records to the extent that the Appellee in the case *sub judice* does, the expert opinion is called into question because this concerns the “(3) proper application of the technique on a particular occasion.” Typically, a jury is free to believe all, part or none of the testimony of witnesses who appear before them. Rogers v. Hill (1998, 4th App. Dist.), 124 Ohio App.3d 468, 470, 706 N.E.2d 438.

However, Appellate Courts often look under the manifest weight of the evidence to see if an expert's conclusions are uncontroverted. (See, Scibelli v. Pannunzio (2003, 7th App. Dist.) 2003 WL 21505068 holding: when it is clear that the jury failed to consider an element that was established by uncontroverted expert testimony, a trial court should grant a new trial.)

In the case at bar, Dr. Kim Stearns, testified on behalf of defense and opined that Mrs. Wollman sustained cervical and lumbar strain, which should have resolved within a two to three

month period. As the Appellee called into question her medical records, this would make a jury question as to whether or not the doctor's testimony is reliable. Therefore, it was improper for the majority to remand for a new trial merely because the doctors testimony was "uncontroverted expert testimony." The basis for that testimony, the medical records, was called into question, thus the conclusions the expert arrived at were a jury question because the "traditional adversary process (is for) weeding out shaky opinions."

Because the trial court cannot keep out shaky opinions, the jury, as fact finder, is the party left with that responsibility. In the case at issue, the basis on which the experts based their opinions, the emergency room records, as well as prior medical records, were called into question by the Appellee. The jury heard testimony to the effect that experts changed their reports for Appellee's counsel. Additionally, there was testimony to the effect that her injuries were somatizations and pre-existing conditions. Therefore, there was ample testimony which would bring into question the opinions of the experts in this case and the decision was not against the manifest weight of the evidence.

CONCLUSION

For the foregoing reasons, Defendant-Appellant Corrine C. Domonkos, moves this Court for an order reversing the decision of the Eight District Court of Appeals and reinstating the trial court's order denying Appellee a new trial.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was sent this 22 day of November, 2006 to James A. Jenkins, Attorney for Plaintiff-Appellee, 2000 Standard Building, 1370 Ontario Street, Cleveland, OH 44113 by regular U.S. Mail.



James L. Glowacki
William H. Kotar
Attorneys for Defendant/Appellant

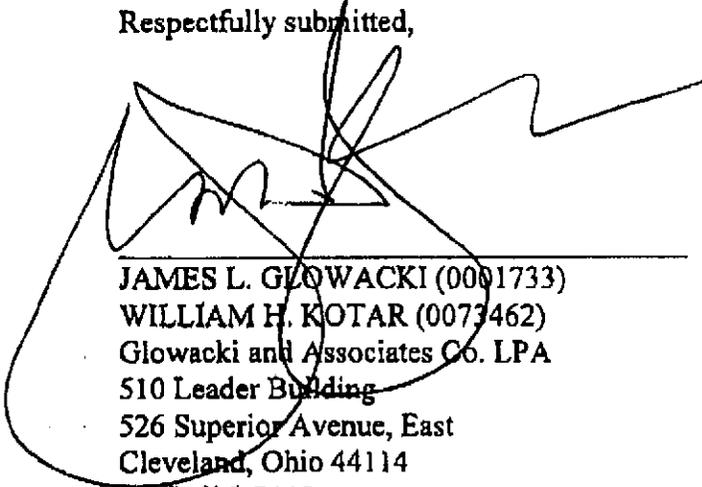
APPENDIX A

Notice of Appeal of Appellant Corrine C. Domonkos

Appellant Corrine C. Domonkos, by and through counsel, hereby respectfully gives notice of its appeal to the Ohio Supreme Court from the judgment of the Cuyahoga County Court of Appeals, Eighth Appellate District, entered in Court of Appeals APP. NO. 86429, a copy which is attached hereto and incorporated herein by reference.

This case raises a substantial constitutional question and is one of public or great general interest.

Respectfully submitted,



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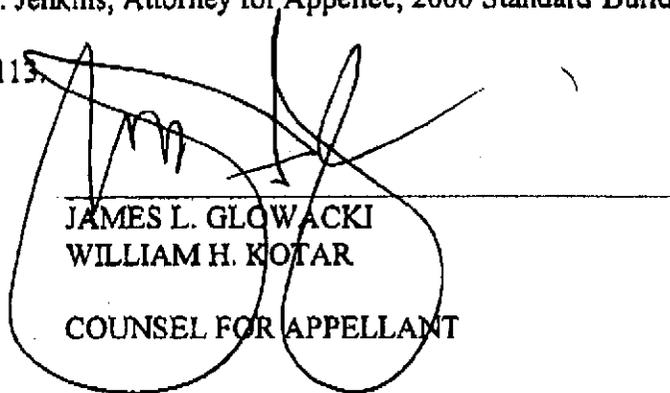
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COUNSEL FOR APPELLANT

SERVICE

The undersigned hereby certifies that a copy of the foregoing was sent on June 21,
2006 via ordinary U.S. mail to James A. Jenkins, Attorney for Appellee, 2000 Standard Building,
1370 Ontario Street, Cleveland, OH 44113.



JAMES L. GLOWACKI
WILLIAM H. KOTAR
COUNSEL FOR APPELLANT

APPENDIX B

MAY 22 2006

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 86429

KATHLEEN M. BRYAN-WOLLMAN, ET AL.	:	
	:	
Plaintiffs-Appellants	:	JOURNAL ENTRY
	:	
-vs-	:	AND
	:	
CORRINE C. DOMONKO	:	OPINION
	:	
Defendant-Appellee	:	

CA05086429
 39327239

Date of Announcement
of Decision: MAY 11, 2006

Character of Proceeding: Civil appeal from
Court of Common Pleas
Case No. CV-513286

Judgment: Reversed and remanded
for a new trial.

Date of Journalization: MAY 22 2006

Appearances:

For Plaintiffs-Appellants: JAMES A. JENKINS, ESQ.
1370 Ontario Street
Cleveland, Ohio 44113

For Defendant-Appellee: JAMES L. GLOWACKI, ESQ.
WILLIAM H. KOTAR, ESQ.
526 Superior Avenue, East
Cleveland, Ohio 44114

CA05086429 39533842


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JAMES J. SWEENEY, J.:

Plaintiffs-appellants, Kathleen Bryan-Wollmann and Michael Wollmann,¹ appeal from the defense verdict and judgment entered on their negligence claim against defendant-appellee, Corrine Domonko.² The Wollmanns believe the verdict was not supported by the evidence and that the trial court erred by denying their post-trial motions for judgment notwithstanding the verdict and/or for a new trial. For the reasons that follow, we reverse and remand for a new trial.

The plaintiffs assert that Mrs. Wollmann suffered extensive injuries as a result of a car accident caused by Ms. Domonko's negligence on September 30, 1999. Ms. Domonko admitted her negligence caused the accident. She, however, disputed the extent of injury to Mrs. Wollmann as a result of the collision.

At trial, the witnesses included Ms. Domonko, the Wollmanns, plaintiffs' expert witnesses, defendant's expert witnesses and some of Mrs. Wollmann's former co-workers.

It was undisputed that Mrs. Wollmann was transported from the accident to the hospital emergency room by ambulance. The medical records reflect she was complaining of neck pain and a burning sensation. Mrs. Wollmann was x-rayed and received medications and

¹Referred to herein as Mrs. and Mr. Wollmann, individually and plaintiffs or the Wollmanns collectively.

²Referred to herein as defendant or Ms. Domonko.

injections. Plaintiffs allege that she subsequently developed additional symptoms, including lower back pain, following and related to the accident.

The Wollmans experts opined that the September 1999 car accident caused a myriad of injuries and damages to Mrs. Wollmann. In particular, plaintiffs presented the testimony of Dr. Vernon Patterson and Dr. Oas. Dr. Patterson's practice is a combination of medical orthopedics and primary care sports medicine. Dr. Oas is a neurologist. Both related Mrs. Wollmann's persistent and extensive symptoms and medical problems to the September 1999 accident.

In response, Ms. Domonko offered the testimony of several expert witnesses to dispute the extent of injury suffered by Mrs. Wollmann as a result of the accident. First to testify was Dr. Donald C. Mann who specializes in neurology. Ultimately, he concluded that the September 1999 automobile accident had no contribution to Mrs. Wollmann's "present state," which included complaints of dizziness, head pain, and neck pain radiating down her arms, sleep difficulty, vision trouble, difficulty with recall and depression.

Defendant then offered the testimony of Dr. Balraj, a neuropsychologist who treats patients for psychological illnesses and neuropsychological problems. Dr. Balraj explained that he was asked to determine whether Mrs. Wollmann suffered a brain injury as

a result of the accident. He concluded that she did not but stated his opinion derived largely from subjective observations. He also relied on the medical records, which indicated Mrs. Wollmann did not lose consciousness following the accident.

Lastly, Dr. Kim Stearns, an orthopedic surgeon, testified on behalf of the defense. Dr. Stearns concluded that Mrs. Wollmann sustained cervical and lumbar sprains as a result of the motor vehicle accident. He opined those injuries should have resolved within a two-to-three month period following the accident. Based on that theory, he further concluded any of Mrs. Wollmanns' complaints that persisted beyond that period were unrelated to the accident.

In addition to the experts, Ms. Domonko also presented evidence of Mrs. Wollmann's significant medical history.

Despite Ms. Domonko's stipulations of negligence, disputing only the extent of injury proximately caused by the accident, the jury entered a defense verdict. The trial court denied plaintiffs' motion for a judgment notwithstanding the verdict ("JNOV"), or in the alternative for a new trial.

The Wollmann's raise two assignments of error as set forth below:

"I. . . The trial court abused its discretion in denying appellants' motion for judgment notwithstanding the verdict where there was insufficient evidence to support the jury's verdict.

"II. The trial court abused its discretion in denying appellants' motion for new trial as it failed to independently weigh the evidence and assess the credibility of witnesses."

In deciding a motion for j.n.o.v., "the evidence adduced at trial and the facts established by admissions in the pleadings and in the record must be construed most strongly in favor of the party against whom the motion is made, and, where there is substantial evidence to support his side of the case, upon which reasonable minds may reach different conclusions, the motion must be denied." *Altmann v. Southwyck AMC-Jeep Renault* (1991), 76 Ohio App.3d 92, 95.

Civ.R. 59 provides for the granting of a motion for a new trial where the judgment is not supported by the weight of the evidence. Civ.R. 59(A)(6). The trial court's decision not to grant a new trial will not be reversed absent an abuse of discretion. *Isquick v. Classic Autoworks, Inc.* (1993), 89 Ohio App.3d 767, 774. Where a motion for new trial is denied, there must be competent, credible evidence in the record to support the jury's verdict. *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279.

"A motion for a new trial with reference to the weight or sufficiency of the evidence *** imposes upon that court a duty to review the evidence and pass upon the credibility of witnesses."

Rohde v. Farmer (1970), 23 Ohio St.2d 82, 90, quoting, *Berry v. Roy*, 172 Ohio St. 422.

As set forth previously herein, Ms. Domonko had conceded liability leaving the sole question for the jury concerning the amount of damages proximately caused by her negligence. *Golias v. Goetz* (July 22, 1999), Cuyahoga App. No. 73924. Yet, the jury returned a verdict in Domonko's favor.

No one disputed that Mrs. Wollmann left the scene of the accident by ambulance or that she required a certain amount of medical attention as a result of the accident. No one claimed that the emergency room visit or treatment was unreasonable or unnecessary. On at least two occasions the trial court observed on the record that the manifest weight of the evidence established that plaintiffs were entitled to at a minimum the medical bills from the emergency room visit.

Defendant failed to refute that Mrs. Wollmann suffered some injury as a direct and proximate result of the September 1999 accident. Plaintiffs and their experts opined that Mrs. Wollmann suffered extensive and on-going injuries as a result of the accident. While defense expert Dr. Mann felt none of Mrs. Wollmann's "present" conditions were related to the 1999 accident, he never claimed that she suffered no injury as a result of it. Dr. Balraj opined that Mrs. Wollmann did not suffer a brain injury but did not necessarily disagree with plaintiffs' neurology expert,

Dr. Oas, who opined the dizziness she experiences stems from a neck injury related to the car accident. Rather, Balraj distinguished that he was looking at a different question than Dr. Oas when he examined Mrs. Wollmann. The final defense expert, Dr. Stearns, actually concluded that Mrs. Wollmann suffered injuries as a result of the 1999 accident.

While the record contains a significant amount of disagreement over the extent of plaintiff's damages, there was a certain amount of uncontroverted evidence that plaintiff suffered some damages as a proximate result of Ms. Domonko's negligence. In such cases, a defense verdict is against the manifest weight of the evidence because it is not supported by competent, credible evidence. See *Salem v. Trivsonno* (Jan. 29, 1998), Cuyahoga App. No. 71147, citing *Vescuso v. Lauria* (1989), 63 Ohio App.3d 336 and *Hallman v. Skender* (Jan. 28, 1988), Cuyahoga App. No. 53027.

The trial court should have granted plaintiffs' motion for judgment notwithstanding the verdict/new trial. The assignments of error are sustained and this cause is reversed and remanded for a new trial.

Judgment reversed and remanded for a new trial.

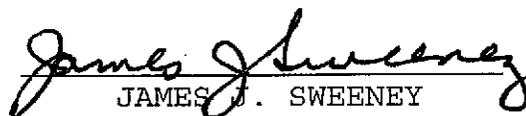
It is ordered that appellants recover of appellee their costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Court of Common Pleas to carry this judgment into execution.

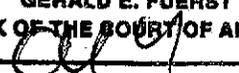
A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, A.J., CONCURS.
COLLEEN CONWAY COONEY, J., DISSENTS.
(See dissenting opinion attached).


JAMES J. SWEENEY
JUDGE

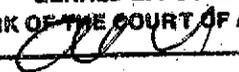
FILED AND JOURNALIZED
PER APP. R. 22(E)

MAY 22 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY  DEP.

ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED

MAY 11 2006

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY  DEP.

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. 112, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

Wollmann testified that as a result of the auto accident, she experienced a plethora of injuries, including neck pain, memory problems, foot numbness, dizziness, light-headedness, fatigue, head pain, sleep problems, arm pain and numbness, left shoulder pain and pinching, swelling of the throat in front of the neck, difficulty swallowing, talking, chewing, sitting, walking, and lying down, pain in her clavicle, lower and upper back pain, nerve damage to her back, and snoring. She also alleged that she could not drive at night because she saw "star bursts." Wollmann further claimed that she could no longer work due to the injuries she suffered as a result of the accident. She testified that she continues to suffer from pain in her neck and back and that she receives treatment for a variety of injuries, including Botox injections.

On cross-examination, however, Wollmann was questioned regarding medical records which indicated that all of her alleged complaints preceded the accident, including headaches, depression, dizziness, double vision, and vertigo. Wollmann also testified that she was involved in two prior accidents in 1983 and in the late 1990's. Wollmann testified that she sustained injury to her lower back in the 1983 accident, from which she never fully recovered.

Medical expert, Dr. Vernon Patterson, testified on behalf of Wollmann. He testified that in October 1999, he conducted a musculoskeletal examination on Wollmann, concentrating on her neck

and upper back. He further testified that she complained of neck pain, left arm and foot numbness, headaches, dizziness, a decrease in concentration, memory loss, and sleep difficulties. According to Patterson, Wollmann had a decreased range of motion and tenderness in her neck and upper back. He further stated that she suffered from dizziness when she moved her head. Patterson testified that, as of August 2004, her diagnosis had become more complex because her conditions progressively worsened. He opined, based upon a reasonable degree of medical certainty, that her conditions were related to the auto accident.

On cross-examination, Patterson was questioned regarding two different reports he issued as a result of his examination and a letter he received from Wollmann's counsel. Both reports were dated August 13, 2004; however, they contained different causal statements. Patterson testified that the report was not changed, but clarified, at the request of Wollmann's counsel. Both versions of the report as well as the letter sent from Wollmann's counsel requesting the amendment were submitted to the jury.

Another plaintiff expert, Dr. John Oas, testified regarding his examination of Wollmann for diagnosis and treatment of dizziness. He testified that there were three different causes of her dizziness that were impossible to differentiate. The first diagnosis was cerviogenic dizziness, which means "dizziness with origin in the neck." Oas explained that this condition related to

the position of her head and how the movement of the head and her inner ear functions created balancing conflicts in the brain. The second diagnosis, benign paroxysmal positional vertigo (BPPV), was abandoned as a potential cause of Wollmann's dizziness. The final diagnosis was migraine-associated dizziness. Oas stated that while she is genetically vulnerable to headaches and dizziness, some, but not all of her dizziness stems from migraines. According to Oas, migraines cannot explain her neck pains because migraines are not treated with Botox. However, he did opine that neck pain can cause migraines. Oas testified that based upon a reasonable degree of medical certainty, the cerviogenic dizziness and injury to her neck were directly and proximately caused by the auto accident.

On cross-examination, Oas admitted that he had no prior knowledge whether Wollmann had any complaints of cerviogenic dizziness prior to the accident. Oas was also questioned regarding the different reports he generated as a result of his examination. He drafted the first report dated August 24, 2004, wherein he made specific opinions regarding the cause of Wollmann's dizziness. However, in his September 14, 2004 report, those specific opinions were deleted at the request of Wollmann's counsel. When asked about the purpose of the deletions, Oas responded that the deletions were done to clarify and make his report simpler. Both versions of the report were submitted to the jury.

Defense medical expert, Dr. Donald Mann, testified that his physical examination of Wollmann revealed that she experienced dizziness from the recline position, her neck movement was restricted, and she had trouble bending forward. However, her eyes, facial movements, cranial nerves, hearing, extremity sensations, reflexes, general postural movements, and walking were normal. Mann also examined two MRIs from October 1999 and September 2000. He testified that the 1999 MRI showed a herniated disk with mild impingement on the spine, and the 2000 MRI showed degenerative changes with no impingement on the spinal cord or nerve root. Mann testified that, based on Wollmann's previous medical history, the symptoms she was currently experiencing had been present before the accident. He opined, based on a reasonable degree of medical certainty, that the auto accident did not contribute in any way to Wollmann's present condition. He further testified that Wollmann had cervical degenerative disk disease prior to the accident.

Defense expert, Dr. Vijay Balraj, a neuropsychologist, examined Wollmann regarding brain function and any injury thereto. He testified that his examination revealed that Wollmann was suffering from high levels of anxiety and depression which may have affected memory and motor functions. He also opined that Wollmann's personality profile suggested that she had a high likelihood of a somatization or conversion disorder. Balraj

explained that a person will unconsciously take psychological or emotional stress, i.e. anxiety or depression, and convert that into physical symptoms, which is often the cause of intractable pain complaints or other disorders. Balraj opined to a reasonable degree of neuropsychological probability and based upon his evaluation and Wollmann's medical history, that Wollmann did not sustain a memory loss as a result of the accident.

Domonko's last medical expert to testify, Dr. Kim Stearns, opined to a reasonable degree of medical certainty and probability that Wollmann sustained cervical and lumbar sprains which were proximately caused by the automobile accident. He further testified that these injuries were new injuries and were not exacerbations or aggravations of a preexisting condition. Stearns, however, admitted that these soft tissue injuries typically respond and resolve within two to three months after injury, and that Wollmann's continuing complaints were unrelated to the accident but related to preexisting conditions.

Although Dr. Stearns testified that Wollmann had sustained some injury as a result of the accident, there were multiple expert opinions to the contrary.

A jury has the choice to believe or disbelieve the testimony presented by the witnesses and, absent passion or prejudice, the jury's verdict should not be disturbed upon appeal unless the verdict is incredible. *Culpepper v. Pedraza*, Cuyahoga App No.

82382, 2004-Ohio-145. "A jury is free to believe all, part, or none of the testimony of any witness who appeared before it." *Iler v. Wright*, Cuyahoga App. No. 80555, 2002-Ohio-4279, at ¶15, citing *Rogers v. Hill* (1998), 124 Ohio App.3d 468, 470, 706 N.E.2d 438. Moreover, questions of fact are best left to the trier of fact. *Complete Gen. Constr. Co. v. Ohio Dept. of Transp.*, 94 Ohio St.3d 54, 2002-Ohio-59, 760 N.E.2d 364.

It has long been held that factfinders are generally charged with drawing reasonable inferences from established facts, and that they "view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Mid-America Tire, Inc. v. PTZ Trading Ltd.*, 95 Ohio St.3d 367, 2002-Ohio-2427, 768 N.E.2d 619, citing *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 461 N.E.2d 1273. If the evidence is susceptible to more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment most favorable to sustaining the verdict and judgment. *Seasons Coal*, supra.

The jury heard testimony from Wollmann's experts that her injuries were related to the accident. However, the jury also heard testimony from those experts that Wollmann's counsel asked them to change or clarify their reports. Testimony was given by Domonko's experts that Wollmann's complaints were not related to

the accident but instead were somatizations or preexisting conditions. However, there was also testimony from a defense expert that Wollmann sustained injury to her neck and back. The jury was presented with evidence requiring assessment of the weight of the evidence and credibility of the witnesses. We cannot speculate what testimony the jury believed or disbelieved, nor are we to weigh the evidence or determine the credibility of the witnesses. However, my review of the testimony and evidence adduced at trial indicates that there is some competent and credible evidence to support the jury's verdict in favor of Domonko.

I would find that the trial court did not abuse its discretion in denying Wollmann's motion for judgment notwithstanding the verdict, or in the alternative, for a new trial, and I would affirm.

APPENDIX C



33565036



**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

KATHLEEN M. BRYAN-WOLLMANN, ET AL
Plaintiff

Case No: CV-03-513286

Judge: DAVID T MATIA

CORINNE C. DOMONKO
Defendant

JOURNAL ENTRY

JURY DELIBERATES ON APRIL 21 AND APRIL 22. ON APRIL 22, 2005 THE JURY RETURNS A 6-2 VERDICT IN FAVOR OF THE DEFENDANT AND AGAINST THE PLAINTIFFS.
COURT COST ASSESSED TO THE PLAINTIFF(S).

Judge Signature

04/27/2005

Exhibit "A"

04/27/2005

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APPENDIX D



33696805

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**



KATHLEEN M. BRYAN-WOLLMANN, ET AL
Plaintiff

Case No: CV-03-513286

Judge: DAVID T MATIA

CORINNE C. DOMONKO
Defendant

JOURNAL ENTRY

PLAINTIFFS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, FOR A NEW TRIAL IS DENIED.

Judge Signature

05/09/2005

05/05/2005

Exhibit "B"

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