

IN THE SUPREME COURT OF OHIO

06-1201

KATHLEEN M. BRYAN-WOLLMAN,)
et al.)

Plaintiffs/Appellees)

vs.)

CORRINE C. DOMONKO)

Defendant/Appellant)

On Appeal from the Eighth
District Court of Appeals
APP. CASE NO. 86429

Trial Court Case No. 513286

APPELLEES' BRIEF

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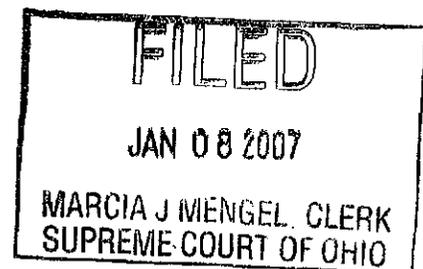


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STATEMENT OF THE FACTS

Appellant's recitation of the facts of this case so minimize and trivialize the severity of this collision, Appellees deem it necessary to provide their own version of the facts of this matter. This lawsuit arises from a high speed, rear-end collision involving four vehicles which occurred on or about September 30, 1999. The collision occurred on Bagley Road about 100 feet west of Old Pleasant Valley Road in the City of Parma, Ohio. Plaintiff Kathleen, her husband, Michael and their daughter, Stephanie were in the family's 1993 Pontiac Bonnevile at a full stop when struck unexpectedly and violently from behind by Defendant, driving a 1998 Jeep Cherokee while dialing her cellular telephone (Tr. 7). Defendant was reportedly traveling at the high speed of 35 miles per hour when she crashed into the rear of the Wollman's vehicle (Tr. 8). The impact forced Plaintiffs' vehicle into the vehicle ahead of them, a 1996 Pontiac Grand Prix. That vehicle was impacted with such high impact that it (the Pontiac Grand Prix) struck the vehicle in front of it! Plaintiff, Kathleen Wollman remained in her heavily damaged vehicle and felt burning in her neck and severe pain (Tr. 58). An ambulance arrived and immobilized Kathleen Wollman with a cervical brace and a backboard before transporting her to the emergency room at Kaiser Hospital in Parma. She sought and received follow up care with a variety of physicians and continues to do so to this date (almost 2007).

Plaintiffs/Appellees' witnesses included the videotaped testimony of Dr. Vernon Patterson and Dr. John G. Oas. Additionally, Dr. James Zinser testified as an expert economist and provided an economic loss in excess of \$1 million. It was the testimony of all of Plaintiffs/Appellees' witnesses that Kathleen Wollman was essentially asymptomatic and working full time prior to this serious collision. Lay witnesses included Graciela Barreto, Winnie Kong-Dutkiewicz, and Plaintiffs/Appellees. All medical records and bills were stipulated as was negligence by the defense.

Property damage to the Plaintiffs' vehicle was in the amount of \$5,465.22. Medical expenses were shown to be in the area of \$55,000.00 and increasing as Plaintiff Kathleen

Wollman continues to receive injections in her neck to relieve her pain.

During the trial, medical experts for both sides testified with reasonable medical certainty that injuries incurred by Plaintiff Kathleen Wollman were caused by the collision. Dr. Kim L. Stearns testified for Defendant as follows:

“Q. Okay. Again, Doctor, all your opinions from this point on obviously have to be expressed within a reasonable degree of medical certainty and probability.

Now, do you believe that the injuries that she sustained were injuries and not exacerbations or aggravations of a preexisting condition?

A. **It is my opinion that they were new injuries.**

Q. Those were new injuries?

A. Yes, sir.

Q. Okay. And those were, again, **cervical and lumbar sprains as a result of the September automobile accident?**

A. **That’s correct.”**

(Transcript page 22, lines 10-24 [emphasis added])

The defense medical expert Stearns added:

“Q. Okay. If I may. Let’s get back to your report then, Doctor. You agree that Mrs. Wollman sustained cervical and lumbar sprains, correct?

A. I do.

Q. These injuries sustained were new injuries and not an aggravation or exacerbation of preexisting conditions?

A. That was my opinion.”

(Transcript page 25, lines 17-24)

These were the opinions rendered by one of Defendant/Appellant’s own expert physicians. Plaintiffs/Appellees’ expert physicians stated unequivocally that a variety of personal injuries were incurred by Plaintiff Kathleen Wollman as a direct and proximate cause of the motor vehicle

accident.

LAW AND ARGUMENT

Under either Rule 50 or 59 of the Ohio Rules of Civil Procedure, the trial court had discretion to set aside the jury verdict in this case in order to prevent a miscarriage of justice. The jury's verdict was an absolute travesty and should have been set aside. The Eighth District Court of Appeals agreed and correctly reversed the trial court based upon sufficiency of the evidence.

Under the Ohio Constitution, the judgment of the Appellate Court does not need to be unanimous to reverse a case for a new trial based upon sufficiency of the evidence.

Appellant argues to this Court that, under the Ohio Constitution, the judgment of an appellate court must be unanimous in a civil action in order to reverse a case for a new trial based upon the manifest weight of the evidence. (Appellant's Br. 7). Appellee does not take issue with this argument. The issue of "weight of the evidence" was not even presented to the Court of Appeals for review. Appellant fails to recognize that the issue before the Eighth District Court of Appeals was not weight of the evidence but **sufficiency of the evidence**, which does not require a unanimous judgment of an appellate court (See Judgment Entry Vol. 613 Pg. 114).

The Ohio Constitution Art. IV 3(B)(3) **only** provides that no judgment may be reversed on the **weight of the evidence** except by the concurrence of all three judges hearing the case. [Emphasis added] *Id.* The Ohio Constitution does not have the same requirement of concurrence of all three judges when a judgment is reversed based upon insufficient evidence. Thus, two of the three judges of the court of appeals may reverse a trial court decision.

In the case *sub judice*, the Wollmans raised two assignments of error to the Eighth District Court of Appeals. The pertinent assignment of error herein as pled by the Wollmans and as set forth by the Appellate Court is as follows:

I. The trial court abused its discretion in denying [Wollmans'] motion for judgment notwithstanding the verdict where there was **insufficient evidence** to support the jury's verdict. [Emphasis added] (Judgment Entry Vol. 613 Pg. 114).

The Eighth District Court of Appeals, in a two to one decision, held that the Wollmans' assignment of error based upon insufficient evidence to have merit and reversed the trial court's decision and remanded it back for a new trial:

"The assignments of error are **sustained** and this cause is reversed and remanded for a new trial." [Emphasis added] (Judgment Entry Vol. 613 Pg.117).

It is indisputable that the judgment of an appellate court is **not** required, as in the case at hand, to be unanimous to reverse a case for a new trial based upon insufficient evidence. Foremost, the Ohio Constitution Art. IV 3(B)(3) only addresses a unanimous judgment when the issue is "weight of the evidence". *Id.* Thus, it is inapplicable to the assignment of error before this Court. Further, this Court, in *State v. Thompkins* (1997), 78 Ohio St. 3d 380, 389, superseded by state constitutional amendment on other grounds in *State v. Smith*, 80 Ohio St. 3d 89 (1997), held that:

... "[B]y its clear and unambiguous terms, former Section 6, Article IV, required a unanimous concurrence of all three judges on the panel of a court of appeals **only** when the reversal of a judgment of a trial court was based on the **weight of the evidence-not sufficiency of the evidence**. In point of fact, former Section 6, Article IV (like the current provision in Section 3(B)(3) did not prevent a **concurring majority** of a panel of judges of a court of appeals from reversing a judgment of a trial court on the ground that the judgment was not sustained by sufficient evidence."

"Accordingly, we...hold that to **reverse a judgment of a trial court** on the basis that the judgment is not sustained by sufficient evidence, **only a concurring majority of a panel of a court of appeals reviewing the judgment is necessary**. We further hold that to reverse a judgment of a trial court on the weight of the evidence, when the judgment results from a trial by jury, a unanimous concurrence of all three judges on the court of appeals panel reviewing the case is required." [Emphasis added] *Id.*; see also, *Chicago Ornamental Iron Co. v. Rook* (1915), 93 Ohio St. 152; *Kern v. Contract Cartage Co.* (7th Dist. Mahoning County 1936), 55 Ohio App. 481.

Not one of Appellees' assignments of error was based on "weight of the evidence". Thus,

Appellant's argument based on Ohio Constitution Art. IV 3(B)(3) has no application to this case. In *Dunn v. Higgins* (1968), 14 Ohio St. 2d 239, this Court held that where the jury in a negligence action returned a verdict for the defendant and on appeal the court of appeals by a vote of two to one reversed, finding that six assignments of error were well taken but **without considering** the seventh assignment of error, which was that the verdict was against the manifest **weight of the evidence**, Ohio Constitution Art. IV 3(B)(3) was not applicable. [Emphasis added] *Id* at 242. Accordingly, any argument presented by Appellant to this Court based upon weight of the evidence has no application to the case at hand.

The assignment of error addressed by the Eighth District Court of Appeals was based upon insufficient evidence. Since a concurring majority reversed the case for a new trial on said ground, the court of appeals judgment must stand. Appellant's argument that the Court of Appeals' judgment had to be unanimous is without merit.

Appellees' argument is further supported by the case of *Osler v. Lorain* (1986), 28 Ohio St. 3d 345, 347 as cited in *Chambliss v. Kennedy* (Ohio App. 8 Dist. 1996), which held that motions for judgment notwithstanding the verdict should only be denied where the prevailing party presents substantial evidence to permit reasonable minds to find in its favor at trial. Appellees contend that the Appellant presented no credible evidence to support their contention that a defense verdict was appropriate. There wasn't a scintilla of evidence upon which any reasonable mind could justify the verdict for the defendant/appellant. Appellant argues that a "Dr. Charles Mann" found no injuries related to the collision. Assuming that Appellant is referring to the doctor named in the transcript as Dr. Donald C. Mann (Tr. 191), it is apparent that this physician works overwhelmingly for defense firms as he admitted that he performs "hundreds" of medical examinations for the Bureau of Workers' Compensation (Tr. 194) at a rate of "\$400 an

hour” (Tr. 217). That aside, he admitted that Kathleen Wollman, one of the Appellees, suffered from a neck injury. That injury “is too vague and too uncertain to be scientific about, let alone where it comes from.” (Tr. 214) He could not and does not indicate that Mrs. Wollman’s neck injury was not related to the accident. In fact, he agrees that the herniated discs or disc protrusions at C5-C6 level are objective findings (Tr. 218) which supports Appellees’ position that her neck problems were causally connected to the collision. Dr. Mann also rendered his opinion solely on “what part of Mrs. Wollmann’s current medical condition was proximately caused by the automobile accident of September 30th, 1999”. [Emphasis added] (Tr. 210)

Other objective tests proved unequivocally that Kathleen Wollman was injured in this collision. Even Dr. Mann, the Appellant’s only expert to opine that most of Appellee Kathleen Wollman’s injuries were unrelated to the collision, agreed with Dr. Oas, a preeminent expert in otoneurology, and Dr. Fouad of the Cleveland Clinic. Those expert physicians found objective proof of Appellee Kathleen Wollman’s injuries in at least two tests: the video nystagmography and the tilt table test (recording blood pressure and heart rate). (Tr. 220-222) It’s worth noting that Dr. Mann spent approximately one half hour with Mrs. Wollman (Tr. 223) before rendering his alleged expert opinion “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.” [Emphasis added] (Tr. 210) Not one witness disputed that Mrs. Wollman was injured in this collision. Not even Dr. Mann could testify that she wasn’t hurt in the collision. All he could attempt to discount was her present condition.

Similarly, the Appellant’s reliance on Dr. Balraj’s testimony is misplaced. Dr. Balraj rendered an opinion based upon subjective observations about whether Mrs. Wollman suffers

from a brain injury. He could not and did not refute the testimony of the other witnesses concerning Mrs. Wollman's injuries.

Appellees also rely upon *Betz v. Timken Mercy Med. Ctr.* (Ohio App. 5 Dist. 1994) which, citing *Rohde v. Farmer* (1970), 23 Ohio St. 2d 82, 52 O.O. 2d 376, 262 N.E. 2d 685, paragraph three of the syllabus, held that the trial court abuses its discretion when it denies a motion for new trial based upon a claim that the verdict is not sustained by evidence if the trial court fails to independently weight the evidence and pass upon the credibility of the witnesses presented at trial. In the case *sub judice*, there is nothing in the record to demonstrate that the trial court independently weighed the evidence or independently assessed the credibility of the witnesses. The opposite is more accurate. The trial court's journal entry merely reflects a denial of Plaintiffs/Appellees' Motion for New Trial. Had the trial court properly evaluated the witnesses' credibility and the evidence, it would have been glaringly apparent that an injustice had been done. The record shows that the jury lost its way and created a miscarriage of justice when it returned a verdict for the Defendant/Appellant.

The granting of Plaintiffs' Motion for a new trial rests in the sound discretion of the trial court and will not be disturbed on appeal unless there has been an abuse of discretion. *Monroe v. Ohio Dept. of Rehab. & Corr.* (1990), 66 Ohio App. 3d, 236, 240, 583 N.E. 2d 1102, 1104; *Verbon v. Pennese* (1982), 7 Ohio App. 3d 182, 184, 7 OBR 229, 231-232, 454 N.E. 2d 976, 979. It's glaringly apparent that where (1) a party is struck from behind with such force that it causes a chain reaction involving **four vehicles** (2) the party is immobilized and transported directly to the emergency room (3) the opposing party's own expert agrees to injury and causation, and (4) the jury returns a verdict for the defense when they weren't even charged on such a verdict nor given the defense verdict form, the trial court's refusal to grant a new trial is an abuse of discretion.

In *Vescuso v. Lauria* (Cuyahoga 1989), 63 Ohio App.3d 336, the Eighth District Court of Appeals remanded the case for a new trial on damages holding that a verdict for the defendant is improper when the plaintiff, plaintiff's expert, and defendant's expert testimony that the accident, for which defendant admits liability but denies any damage, proximately caused injury to plaintiff's neck. In the case at hand, as in *Vescuso*, Plaintiff/Appellee Kathleen Wollman, Plaintiff/Appellee's experts, Dr. Vernon Patterson of Horizon Orthopedic and Dr. John Oas of the Cleveland Clinic Foundation, and Defendant/Appellant's expert, Dr. Kim Stearns, testified that the accident, for which Defendant/Appellant admitted liability, proximately caused injury to Plaintiff/Appellee's neck and back. The jury's verdict for the defendant/Appellant is not sustained by sufficient evidence, and Plaintiffs/Appellees are therefore entitled to a new trial on damages.

In *Boldt v. Kramer* (Ohio App. 1 Dist., Hamilton, 05-14-1999) No. C-980235, 1999 WL 299888, unreported, dismissed, appeal not allowed, 87 Ohio St.3d 1404, the appellate court reversed the trial court's denial of the plaintiff's motion for new trial and remanded the action for a new trial on damages holding that a jury is required to award a plaintiff an amount for pain and suffering for the time immediately following an automobile accident, including the time spent in the emergency room, where the undisputed evidence showed that the victim incurred at least some pain and suffering immediately following the accident and in the emergency room. In the case at hand, the jury was required at minimum to award Plaintiff an amount for pain and suffering for the time immediately following the accident, including the time spent in the emergency room, because the undisputed evidence showed that she had incurred at least some pain and suffering immediately following the accident and in the emergency room. There was no evidence admitted at trial that showed Plaintiff/Appellee Kathleen Wollman did not incur pain and suffering following the accident and in the emergency room. In fact, no one disputed that any of her injuries were unrelated to the accident up until the time of the Appellant's experts examinations of her. The failure of the jury to award Plaintiff/Appellee even the *minimum*

damages of emergency room expenses and pain and suffering associated therewith in a *stipulated liability* case clearly shows that the jury's verdict was not supported by sufficient evidence and Plaintiffs/Appellees were entitled to a new trial on damages.

Further, in *King v. Michel* (Ohio App. 6 Dist., Lucas, 06-06-2003), No. L-02-1187, 2003-Ohio-2910, 2003 WL 21299933, unreported, the appellate court held that the verdict was inadequate where the evidence in an automobile accident case arising out of a rear-end collision at a traffic light demonstrated that the jury failed to consider the issue of the injured driver's pain and suffering where the victim presented testimony as to pain and suffering, including expert testimony that the injured driver sustained injury with continuing symptoms, and the only damages awarded equaled emergency room expenses. In the case *sub judice*, not only did the jury fail to award Plaintiff/Appellee Kathleen Wollman damages for pain and suffering, it even failed to award Plaintiff/Appellee damages for emergency room expenses in this action arising from a rear-end collision at a traffic light where the Defendant/Appellant impacted the Plaintiffs/Appellees' stationary vehicle at a high rate of speed. The failure of the jury to award even emergency room expenses and pain and suffering to Plaintiffs/Appellees is evidence that the judgment is not sustained by the weight of the evidence and that the Plaintiffs/Appellees are entitled to a new trial on damages.

In addition, in *Demski v. Sidwell* (Ohio App. 11 Dist., Trumbull, 03-21-2003) No. 2002-T-0058, 2003-Ohio-1423, 2003 WL 1473632, unreported, the appellate court held that a new trial was warranted on the basis of inadequate damages where the jury returned a verdict in favor of the motorist in the amount of \$4,059.20 for medical expenses and zero dollars for past and future pain and suffering in a rear-end collision accident, where the plaintiff presented testimony of her chiropractor as well as all of her medical bills which were admitted into evidence in the amount of \$7,853.00. In the case *sub judice*, the parties stipulated to the authenticity of medical bills in excess of \$50,000.00.

A new trial should be granted if the jury's verdict was not supported by competent,

substantial and credible evidence. *Id.* at 773-774, 596 N.E. 2d at 504-505; *Verbon*, 7 Ohio App. 3d at 183, 7 OBR at 229-231, 454 N.E. 2d at 978-979. It's evident from the record in this case that this jury's verdict was NOT supported by competent, substantial OR credible evidence. As such, the jury's decision is not supported by sufficient evidence to justify such a verdict.

CONCLUSION

For the foregoing reasons, Appellees respectfully request this Honorable court affirm the decision of the Eighth District Court of Appeals reversing the trial court's denial of their Motion for Judgment Notwithstanding the Verdict or in the alternative, Motion for New Trial and remand the matter back to the trial court.

Respectfully submitted,

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SERVICE

A copy of the foregoing Appellees' Merit Brief was sent by regular U.S. mail to James Glowacki, Attorney for Defendant/Appellee at 510 Leader Bldg. 526 Superior Avenue East, Cleveland, Ohio 44114 this 6th day of January, 2007.

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