[Cite as *Cooper v. Moran*, 2011-Ohio-6847.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

WATTDELL COOPER, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2010-L-141**
- vs -	:	
MATT MORAN, et al.,	:	
Defendants-Appellees.	:	

Civil Appeal from the Court of Common Pleas, Case No. 09 CV 000713.

Judgment: Reversed and remanded.

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CYNTHIA WESTCOTT RICE, J.

{¶1} Appellants appeal from the judgment of the Lake County Court of Common Pleas denying their motion for a new trial. At issue is whether, in a personal injury action, appellants are entitled to a new trial to determine non-economic damages where the jury returned a general verdict limiting its award to economic damages even though the evidence demonstrated the injured plaintiff sustained pain and suffering,

which caused him to incur economic damages. As a matter of law, we answer this question in the affirmative and therefore reverse the judgment of the trial court and remand the matter for a new trial.

{¶2} On April 26, 2007, Appellant Wattdell Cooper was traveling eastbound on Interstate 90 when his vehicle was rear-ended by a vehicle driven by Appellee Matt Moran. On October 25, 2010, the matter was tried before a jury. The following facts can be gleaned from the limited record before this court:[1]

{¶3} At the time of the accident, Mr. Cooper was employed as a construction worker. He had been employed as such for nearly ten years. He testified his job was very physical, involving heavy lifting, and the occasional operation of a jack hammer. On April 26, 2007, work was "rained out." On his way home from the job site, Mr. Cooper's vehicle was struck by Mr. Moran's. When emergency personnel arrived, Mr. Cooper told responding officers he did not believe he was injured. Later that day, however, Mr. Cooper went to the hospital due to pain in his lower back and shoulder. Mr. Cooper was discharged and took two days off from his construction job.

{¶4} Several days later, Mr. Cooper returned to the hospital complaining of lower back and shoulder pain. The limited record is vague as to what transpired at this second visit. Regardless, Mr. Cooper returned to work at his construction job on "light duty," i.e., flagging, raking, driving a truck, and operating a Bobcat.

1. To the extent it is necessary to the resolution of an appeal, the appellate rules require an appealing party to order a transcript of the proceedings. Appellants in this case filed an incomplete transcript of the jury trial, which included *only* Mr. Cooper's direct examination and the full video-taped testimony and written transcript of same of Mr. Cooper's treating physician. Appellees, however, moved this court to supplement the record with an additional portion of the trial transcript. This court granted the motion, and appellees subsequently supplemented the record with Mr. Cooper's cross-examination testimony.

{¶5} On May 25, 2007, Mr. Cooper visited his primary care physician at Lake County Family Practice, who prescribed him pain medication and referred him to physical therapy. Mr. Cooper subsequently received an MRI, which indicated he had a herniation in his lumbar spine. Between late June and late August 2007, Mr. Cooper attended physical therapy for his low back and shoulder pain. Although he conceded he was improving, he failed to appear for seven of the last nine visits. At trial, Mr. Cooper asserted he was unable to continue with physical therapy because of his job; during his deposition, however, taken September 21, 2009, he stated he ceased therapy because he did not like the treatment.

{¶6} Over the next year, Mr. Cooper visited numerous additional pain management physicians, who treated him mainly with injections to his neck and low back. Eventually, in November 2008, approximately 18 months after the accident, Mr. Cooper met with Dr. Robert Zaas, an orthopaedic surgeon. At his initial consult, Dr. Zaas diagnosed Mr. Cooper with cervical (neck) and lumbar (low back) sprains. Based upon Mr. Cooper's prior medical history and the onset of his symptoms, Dr. Zaas concluded that Mr. Cooper's complaints were causally related to the accident that occurred on April 27, 2007. Dr. Zaas referred Mr. Cooper to aquatic therapy. Mr. Cooper found this treatment effective, but had to discontinue the therapy for lack of insurance.

{¶7} Over the course of his treatment of Mr. Cooper, Dr. Zaas observed that he was not getting better and, in fact, his condition appeared to be worsening. Although Mr. Cooper left work in July 2008 with the expectation of eventually returning, Dr. Zaas

recommended he not return to construction work. At the time of trial, Mr. Cooper remained on various medications to control his persistent pain.

{¶8} After each party rested, the jury returned a verdict in Mr. Cooper's favor in the amount of $10,000.[2] Interrogatories were submitted asking the jury to indicate how Mr. Cooper's monetary award was apportioned. The first interrogatory asked the jury to state the total compensatory damages it awarded Mr. Cooper. The second asked the jury to set forth the portion of the total amount representing Mr. Cooper's economic loss. And the final interrogatory asked the jury to state the total amount representing Mr. Cooper's non-economic loss. The jury stated the $10,000 in compensatory damages represented the economic loss it concluded Mr. Cooper sustained.

{¶9} Mr. and Mrs. Cooper filed a motion for new trial, asserting the jury erred in failing to award them damages for Mr. Cooper's pain and suffering. In support, the Coopers asserted the evidence demonstrated Mr. Cooper suffered non-economic loss; and therefore the jury's decision to award only economic damages was contrary to law and against the manifest weight of the evidence. The trial court denied the motion and appellants filed the instant appeal.

{¶10} For their sole assignment of error, appellants allege:

{¶11} "The trial court committed prejudicial error in not granting plaintiffs-appellants' Wattdell and Tamia Cooper's [sic] motion for a new trial."

{¶12} Civ.R. 59 sets forth the various grounds upon which a party may move for a new trial. Appellants' motion was based on Civ.R. 59(A)(4), (6), and (7). Civ.R.

2. There is no indication how the jury arrived at the $10,000 figure. Although there is some vague indication in defense counsel's closing argument regarding the medical expenses appellants had purportedly paid, the limited record fails to clearly indicate the actual amount of medical bills appellants were required to pay as a result of Mr. Cooper's injuries.

59(A)(4) provides that a trial court may grant a new trial based upon excessive or inadequate damages; Civ.R. 59(A)(6) allows a new trial where the judgment was not sustained by the weight of the evidence; and Civ.R. 59(A)(7) permits a new trial if the judgment is contrary to law. The determination of whether to grant a new trial pursuant to Civ.R. 59(A)(4) and (6) is within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *Pena v. Northeast Ohio Emergency Affiliates, Inc*. (1995), 108 Ohio App.3d 96, 103, citing *Verbon v. Pennese* (1982), 7 Ohio App.3d 182, 184. An abuse of discretion is a term of art connoting a judgment which neither comports with reason nor the record. *Janecek v. Marshall*, 11th Dist. No. 2010-L-059, 2011-Ohio-2994, at ¶7. Alternatively, because a decision denying a new trial under Civ.R. 59(A)(7) presents a question of law, we review this aspect of appellants' argument de novo. *Harper v. Lefkowitz*, 10th Dist. Nos. 09AP-1090 and 09AP-1116, 2010-Ohio-6527, at ¶6, citing *O'Day v. Webb* (1972), 29 Ohio St.2d 215.

{¶13} In order to set aside a damage award as inadequate and against the manifest weight of the evidence, a reviewing court must either determine that the verdict is so gross as to shock the sense of justice and fairness, cannot be reconciled with the undisputed evidence in the case, or is the result of an apparent failure by the jury to include all the elements of damage making up the plaintiff's claim. *Iames v. Murphy* (1995), 106 Ohio App.3d 627, 631. With respect to the latter point, new trials are often granted when medical expenses are awarded but no damages are awarded for pain and suffering in cases where the evidence clearly shows that the plaintiff incurred pain and suffering. *Wines v. Flowers*, 7th Dist. No. 06 BE 3, 2006-Ohio-6248, at ¶8; see,

also, *Vieira v. Addison* (Aug. 27, 1999), 11th Dist. No. 98-L-054, 1999 Ohio App. LEXIS 3984.

{¶14} Under their sole assignment of error, appellants contend the trial court erred in denying their motion for a new trial because, although the jury awarded them $10,000 in economic damages, the jury lost its way in failing to also award them non-economic damages. Appellants maintain the jury's failure to award some non-economic damages for pain and suffering is logically inconsistent with its decision to award economic damages for medical bills that resulted from pain and suffering where, as here, the record demonstrated Mr. Cooper was suffering from chronic pain as a result of the accident.

{¶15} In support of their position, appellants cite this court's holding in *Vieira*, supra. In *Vieira*, the plaintiff filed suit for injuries sustained as a result of an automobile accident. Like the instant case, the defendant admitted fault and a jury trial was held to determine damages. The jury ruled in favor of plaintiff for the exact amount of her medical bills. The trial court denied the plaintiff's motion for a judgment notwithstanding the verdict and a new trial.

{¶16} On appeal, the plaintiff contended the trial court erred in denying her motion for a new trial because, by awarding her damages for her medical bills, the jury must have believed she sought medical treatment due to the pain and suffering that resulted from the defendant's negligence. This court agreed, holding that, based on the uncontroverted evidence before the jury and the instructions given by the trial court, the jury could not ignore evidence of plaintiff's pain and suffering. Id. at *7. This court reasoned that the jury must have been persuaded that the defendant's negligent

conduct caused plaintiff some pain and suffering because the jury awarded the plaintiff compensation for her medical bills. Id. And, moreover, the evidence demonstrated the plaintiff sought medical care solely because she was in pain due to the accident. This court also noted that other appellate districts had held that a jury's award of economic damages for medical bills for injuries involving pain and suffering without any award for pain and suffering is reversible error. Id., citing *Farkas v. Detar* (1998), 126 Ohio App.3d 795 (Ninth District); *Boldt v. Kramer* (May 14, 1999), 1st Dist. No. C-980235, 1999 Ohio App. LEXIS 2140 (First District); *Iames,* supra (First District); *Slivka v. C.W. Transport, Inc.* (1988), 49 Ohio App.3d 79 (Tenth District). Given these points, this court concluded that "*** the jury's failure to determine [the plaintiff's] claim for pain and suffering was not a consistent verdict and was against the manifest weight of the evidence." Id.

{¶17} In response, appellees note that this court, in *Mensch v. Fisher*, 11th Dist. No. 2002-P-0055, 2003-Ohio-5701, held that a jury's award of only economic damages for medical bills did not necessitate a new trial to determine pain and suffering. In *Mensch*, like this case, the defendant did not dispute liability; rather, the only issue before the jury was the amount of damages to which the plaintiff was entitled. The jury ultimately returned a general verdict in favor of the plaintiff in the amount of $4,500, and the interrogatory form confirmed the entire amount was awarded to the plaintiff solely for medical expenses.

{¶18} In affirming the trial court's decision denying the plaintiff's motion for a new trial, this court observed that it was "unaware of any binding precedent, statute, or rule which requires an award of pain and suffering whenever medical expenses have been

awarded." Id. at ¶29.[3] This court continued by stating that damages for pain and suffering are triggered where there is "overwhelming and uncontroverted evidence that appellant incurred pain and suffering from the injuries which were the direct result of the car accident." Id. at ¶51. In arriving at its conclusion, the court in *Mensch* therefore underscored that the evidence produced for the jury was such that "appellant either did not incur any pain and suffering, or the pain and suffering incurred was de minimus." Id. at ¶53.

{¶19} *Mensch* and *Vieira*, while ostensibly inconsistent, can be reconciled by considering the facts that precipitated the individual dispositions. The ruling in *Mensch* was premised upon this court's decision that the record failed to disclose the plaintiff experienced pain and suffering as a result of the defendant's negligence. Alternatively, the *Vieira* court determined that the jury could not ignore the "undisputed evidence" of the pain and suffering the plaintiff sustained as a result of the defendant's negligence. *Mensch* and *Vieira* are therefore not necessarily at odds.

{¶20} In this case, Dr. Zaas testified that Mr. Cooper's injuries, which caused him to experience the pain of which he continues to complain, were a result of the underlying accident. The available testimony indicates that Mr. Cooper has sought treatment for his chronic back and shoulder/neck pain regularly and often since the accident. The record also indicates he has consistently been in pain management and participated in various therapies and has remained on pain medications since the accident. As a result of his injuries and chronic pain, Mr. Cooper was unable to

3. Although *Mensch* addressed the very same issue as that addressed by this court in *Vieira*, the opinion in *Mensch* fails to cite or discuss *Vieira*. Hence, and notwithstanding the quoted observation regarding the perceived dearth of authority on the issue, at the time *Mensch* was decided, this district did possess some precedent relating to the issue before the court.

continue his regular work routine at his construction job and, eventually, was laid off. And, finally, due to the injuries and the pain they have caused Mr. Cooper, Dr. Zaas recommended that he cease working in construction altogether.

{¶21} The only conclusion that can be drawn from the jury's general verdict is that it believed Mr. Cooper's medical treatment was a direct and proximate result of the accident. Nothing in the record indicates Mr. Cooper did not suffer pain or experienced only de minimis pain as a result of the accident or that his medical expenses were unreasonable. Mr. Cooper sought medical care solely because he was in pain and, given the testimony, the jury had to believe that the tortfeasor's negligence caused Mr. Cooper some pain and suffering. *Vieira*, supra, at *7.

{¶22} "Damages for pain and suffering should be awarded if the evidence demonstrates that pain and suffering occurred." *Crosby v. Lenart* (Apr. 19, 1995), 9th Dist. No. 2896, 1995 Ohio App. LEXIS 1644, at *17. *Miller v. Irvin* (1988), 49 Ohio App.3d 96, 98. There was obvious and uncontradicted evidence that Mr. Cooper experienced pain and suffering as a result of the accident. The jury, in rendering its verdict, consequently failed to include all the elements of damage making up Mr. Cooper's claim. The jury's award reimbursing Mr. Cooper for only economic damages, without at least some pain and suffering, was therefore "so manifestly contrary to the natural and reasonable inference to be drawn from the evidence as to produce a result in complete violation of substantial justice." *Farkas*, supra, at 807-808 (appellate court determined the jury's verdict reimbursing the plaintiff for medical expenses without making an award for pain and suffering was contrary to the evidence); see, also, *Boldt*, supra (appellate court reversed trial court's denial of new trial motion where the jury

awarded emergency room bill but no pain and suffering); *Iames*, supra (appellate court reversed trial court's denial of motion for new trial where jury awarded medical bills but no pain and suffering); *Slivka*, supra (where jury awarded medical expenses but no other damages, the appellate court reversed for new trial); *Elston v. Woodring* (Feb. 1, 2001), 3d Dist. No. 4-2000-12, 2001-Ohio-2103 (appellate court reversed trial court's denial of new trial motion where plaintiff was compensated for medical expenses but awarded no pain and suffering); *Perry v. Whitaker* (June 22, 2001), 6th Dist. No. WD-00-65, 2001 Ohio App. LEXIS 2745 (appellate court ordered a new trial where jury awarded all past medical expenses but no pain and suffering); *Popson v. Pennington* (Aug. 14, 2000), 12th Dist. No. CA99-05-013, 2000 Ohio App. LEXIS 3669 (appellate court determined jury was not permitted to award medical expenses without also awarding damages for pain and suffering).

{¶23} For the foregoing reasons, we therefore hold the trial court erred in denying appellants' motion for a new trial. Appellants' assignment of error is consequently sustained.

{¶24} Having determined that a new trial is required, we must next consider (1) whether that new trial should include all damage issues or (2) whether the award concerning economic damages should remain and the new trial proceed only on the issue of pain and suffering. Certain districts, including this court in *Vieira*, have utilized the latter remedy. See id.; *Boldt*, supra (First District); *Elston*, supra (Third District). Other districts, alternatively, have ordered a new trial on all damages where the jury awarded past medical expenses but no pain and suffering. See *Slivka*, supra (Eighth District); *Perry*, supra (Sixth District); *Popson*, supra (Twelfth District).

{¶25} Although, in *Vieira*, we remanded the matter for a new trial only on pain and suffering, we perceive certain foreseeable problems with this approach. A new jury will be selected to consider the issue and that jury could award Mr. Cooper $0 in pain and suffering. Mr. Cooper could appeal this determination and this court would find itself in the same position as it sits today; namely, issuing a remand order for a third trial on the same issue. We believe the potential for cyclical and redundant appeals on the same issue is real. To avoid this problem, we therefore believe there is a compelling justification to deviate from the approach taken in *Vieira* and remand the instant matter for a new trial on all damage issues.

{¶26} For the reasons discussed in this opinion, the judgment of the Lake County Court of Common Pleas is hereby reversed and remanded for a new trial consistent with this opinion.

MARY JANE TRAPP, J.,

THOMAS R. WRIGHT, J.,

concur.