[Cite as *Thomas v. Pisoni*, 2015-Ohio-376.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

GERRI THOMAS	:	JUDGES:
	:	
Plaintiff - Appellant	:	Hon. William B. Hoffman, P.J.
	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	
NICHOLAS PISONI, ET AL.	:	Case No. 2014CA00034
	:	
Defendants - Appellees	:	
	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2012 CV 03643
JUDGMENT:	REVERSED & REMANDED
DATE OF JUDGMENT:	January 29, 2015

APPEARANCES:

For Plaintiff-Appellant	For Defendants-Appellees
STANLEY R. RUBIN 437 Market Avenue North Canton, OH 44702	CRAIG G. PELINI KRISTEN E. CAMBELL TRAUB Pelini, Campbell & Williams LLC 8040 Cleveland Avenue NW -Suite 400 North Canton, OH 44720

Delaney, J.

{¶1} Plaintiff-appellant Gerri Thomas appeals from the March 3, 2014 Judgment Entry of the Stark County Court of Common Pleas overruling her Motion for Judgment Notwithstanding the Verdict or in the Alternative New Trial.

STATEMENT OF THE FACTS AND CASE

{¶2} On March 4, 2011, appellant, a licensed practical nurse, was injured in an automobile accident when a van driven by appellee Nicholas Pisoni struck her vehicle. On November 26, 2012, appellant filed a personal injury complaint against appellees Pisoni and Jerry Loveless dba Loveless Exterminating, his employer. Appellee Pisoni, at the time of the accident, was working for appellee Loveless Exterminating, which owned the van. The matter proceeded to a jury trial on the issue of damages only since liability was admitted. The following evidence was adduced at the trial.

{¶3} Following the automobile accident, appellant, who had severe pain in her chest, knees and across her back and shoulders, was taken to the emergency room at Aultman Hospital. Appellant also complained of neck pain. A CT scan taken at the hospital revealed that appellant had suffered a fracture of the lamina at C6 with no significant displacement. The CT scan further indicated that appellant had prominent degenerative changes at C5-6 and C6-7. In addition, the CT scan report noted “a minimal grade 1 anterolisthesis of C4 on C5 that appears to be degenerative”. Appellant was discharged from the emergency room the same day and told to wear a cervical collar until she saw Dr. Mark Weiner, the on-call neurosurgeon.

{¶4} When Dr. Weiner[1] saw appellant in his office on March 9, 2011, he put appellant in a hard cervical collar to allow the bones to heal since she had a stable fracture. Appellant was ordered to wear the collar at all times and was permitted to return to work the following week.

{¶5} The next time that Dr. Weiner saw appellant was on April 13, 2011. During his deposition, he testified that she was doing well at such time and had minimal neck discomfort. Cervical spine flexion and extension films showed that appellant had no instability in her cervical spine. Appellant was permitted to take off the collar, but told to return if she had any further problems. On June 13, 2011, appellant, who had returned to her job, returned to see Dr. Weiner complaining of increased pain in her neck. X-rays were taken which showed a slight increase in kyphosis, which is an instability, at C4-5. An MRI of appellant's cervical spine, which was taken on June 30, 2011, indicated that appellant had stenosis throughout her cervical spine.

{¶6} In his progress notes from appellant's July 13, 2011 visit, Dr. Weiner stated as follows:

> Gerri Thomas returns. She has headache and neck pain. I told her I do not know if this is from the fracture at C6 with the mild kyphosis at C4-5. I do not believe she needs surgery at C5-6 because I believe the stenosis there is mild and the cord is not compressed. I will see her back in three months with lateral cervical spine, flexion and extension x-rays. At that time I will

[1] A videotape of Dr. Weiner's deposition was played at trial for the jury.

> assume the fracture is healed, and if she has any pain it would likely be due to something else, such as instability at C4-5.

{¶7} Appellant returned to Dr. Weiner for objective testing in October of 2011. The testing showed new anterolisthesis at C4-5. According to Dr. Weiner, the instability found in October of 2011 was not present in April of 2011.

{¶8} Dr. Weiner recommended that appellant receive facet injections in each side of her neck. The purpose of the injections was to relieve appellant's pain and to help him diagnosis what was causing appellant's pain. During his deposition, Dr. Weiner testified that the fact that the injections relieved some of her pain indicated that the pain was coming from the C4-5 interspace.

{¶9} After appellant had the facet injections, she saw Dr. Weiner in his office on November 14, 2011 and again on March 19, 2012. Because appellant's pain had returned, the decision was made for appellant to have a surgical fusion via an anterior cervical discectomy and fusion. When asked, Dr. Weiner testified that the pain was from instability at C4-5 and not from the fracture at C6. The surgery was performed on April 26, 2012 and plates and screws were placed in appellant's cervical spine. Dr. Weiner testified that they would probably remain in her spine forever. Following the surgery, during which appellant's neck was fused at C4-5, appellant's activities were limited for a period of six to twelve weeks. According to Dr. Weiner, who saw appellant on April 27, 2012 and May 16, 2012, appellant was doing well after the surgery and her pain was gone. Appellant was permitted to take off the cervical collar after a visit on June 6, 2012. Dr. Weiner also testified that appellant, in July of 2012, said that she had not felt

so well in years. Dr. Weiner further testified that he had seen appellant, who was complaining of neck pain, the week before trial.

{¶10} When asked, Dr. Weiner opined that the injuries suffered by appellant to her cervical spine were the proximate result of her accident. He testified that the accident caused "ligamentous damage resulting in her kyphotic instability at C4-5 which resulted in her requiring at C4-5 anterior cervical discectomy and fusion." Deposition of Dr. Weiner at 25. When asked, he opined that appellant's injury was permanent because the fusion was permanent and that appellant could require treatment in the future as a result of having the surgery.

{¶11} On cross-examination, Dr. Weiner explained that the statement on the CT scan report indicating that the anterolisthesis of C4 on C5 "appeared degenerative" was probably unwarranted in light of the trauma sustained by appellant. *Id*. at 40. He also noted that a CT scan is an insensitive test for detecting damage to the soft tissues around the bones and the reason "we put her in a collar is because we don't know if there's additional ligamentous injury at the time of the accident". *Id*. at 42-43. He also indicated that appellant had arthritis at C5-C6 and C6-C7 and throughout her cervical spine that pre-existed the accident and occurs due to aging. *Id*. at 46.

{¶12} Dr. Weiner explained that the neck instability occurring in June 2011, which was not present in October 2011, occurred as follows:

> So my point is that she injured her neck in the C4-C5 ligaments when she had the accident, and then just be doing her routine, daily activities after having the collar off, getting a little more constant, being more active she damaged the ligaments more and then it becomes a very painful condition

> because they moved more. And then that required the surgery that I did fusing the neck at C4-C5. And then her pain went away, which proves that that was the painful condition which did not exist before her accident.

Id. at 58.

{¶13} At trial, appellant testified when she was treated at the ER, she was given pain medication and had a neck collar on. She was given a prescription to obtain a collar or brace, which she did. When asked how she felt after her release from the hospital until she was able to see Dr. Weiner the following week, appellant testified that she had pain in her neck, chest, and knees. She testified that Dr. Weiner released her to return to work after she first saw him, and that she was off of work full time for seven or eight days before returning and working half days. As a licensed practical nurse, appellant was scheduled to work 32 hours a week, but often worked more. Appellant stated that she thought that she worked half days for two weeks while wearing the collar. She testified that she did not do any lifting and that it was difficult pushing the medicine cart.

{¶14} According to appellant, after she was told she could remove the neck collar, she experienced a different kind of pain and a lot of stiffness. She testified that she had a lot of pain in her neck when pushing the heavy medicine cart and retrieving items in the drawers. Appellant testified Dr. Weiner recommended physical therapy and she attended physical therapy at Aultman West for four weeks. She further testified that while the therapy helped relieve her pain, it was “very short lasting.” Trial Transcript at 188.

{¶15} Appellant was also questioned about the facet injections. She testified they were "very, very painful" and they helped for four or five weeks before the pain started to return. Trial Transcript at 190. Appellant testified she decided to have surgery due to the pain. She had to wear a soft collar for six weeks after the surgery. Appellant was off work for two and a half months following the surgery and as a result, she lost wages totaling over $9,400.00 as a result of the injuries she suffered in the crash. She further testified she had out-of-pocket medical expenses totaling $4,467.00 for office visits and co-pays. Appellant's total medical bills amounted to approximately $37,000.00, most of which were covered by insurance. Appellant was unable to state the exact amount her insurance carrier paid. Appellant also testified she had last seen Dr. Weiner the week before trial for "stabbing, sharp pain" and muscle spasms. Trial Transcript at 201. When asked, she stated that she could do most everything she did after the accident as she did before the accident.

{¶16} On cross-examination, appellant testified that the "sharp, stabbing pain" was new and had not happened before. Appellant agreed when she answered written questions in January of 2013, she claimed a fracture at C6, chest contusions and knee injuries and did not mention any C4-5 instability. Appellant further testified that after she was discharged from Dr. Weiner the first time, she was never given any written instructions stating she could not perform any of her normal activities at work. When asked if she remembered telling Dr. Weiner in July of 2012 that she had not felt that great in years, appellant stated that she had. She testified that between July of 2012 and December of 2012 and from March of 2013 through the end of December of 2013, she did not go back to Dr. Weimer.

{¶17} On the second day of trial, appellee was permitted to call appellant as on cross-examination. Appellant was unable to recall what she had said during her deposition in August of 2013 when she was asked what she had paid out-of-pocket for her medical expenses. She recalled telling defense counsel she did not have the exact figure and admitted she had not gathered the information to take it to the deposition. In her answers to interrogatories, which she completed in January of 2013, appellant indicated the medical bills for expenses she had incurred were not in her possession. She testified she had given copies of her medical bills to her counsel.

{¶18} On redirect, appellant testified that Exhibit 1 was a compilation of all of the medical bills she incurred because of the accident in this case, which totaled approximately $37,000.00. She testified she paid $4,460.00 out of pocket and did not know how much her health insurance carrier had actually paid to her medical providers.

{¶19} At the conclusion of the evidence and the end of deliberations, the jury, on February 11, 2014, found in favor of appellant and against appellees and awarded appellant a total of $2,114.11 in damages. Of the $2,114.11, $700.00 was for lost wages, $214.11 was reimbursement for her cervical collar, and $1,200.00 was for pain and suffering. Pursuant to a Judgment Entry filed on February 12, 2014, the trial court entered judgment in favor of appellant and against appellees in such amount.

{¶20} Thereafter, on February 13, 2014, appellant filed a Motion for Judgment Notwithstanding the Verdict or in the Alternative New Trial. Appellant, in her motion, argued the jury's verdict was contrary to both the law and the facts presented at trial and the jury's verdict was inadequate. Appellees filed a memorandum in opposition to

such motion on February 24, 2014 and appellant filed a reply to the same on February 26, 2014.

{¶21} As memorialized in a Judgment Entry filed on March 3, 2014, the trial court overruled appellant's motion.

ASSIGNMENTS OF ERROR

{¶22} Appellant now raises the following assignments of error on appeal:

{¶23} "I. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR A NEW TRIAL BECAUSE THE JURY'S AWARD WAS INADEQUATE AND CONTRARY TO THE WEIGHT OF THE EVIDENCE.

{¶24} "II. THE TRIAL COURT INCORRECTLY DENIED THE APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT BECAUSE THE JURY'S AWARD WAS INADEQUATE."

I.

{¶25} Appellant, in her first assignment of error, argues that the trial court erred in denying her Motion for New Trial because the jury's award was inadequate and contrary to the weight of the evidence. We agree.

{¶26} Civ.R. 59(A) governs grounds for a new trial and states as follows:

> 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:
>
> (4) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice;
>
> * * *

(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; * * *

{¶27} 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*., 108 Ohio App.3d 96, 103, 670 N.E.2d 268 (9th Dist.1995). An abuse of discretion "implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶28} In order to set aside a damage award as inadequate and against the manifest weight of the evidence, a reviewing court must determine that the verdict is 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 items of damage making up the plaintiff's claim. Bailey v. Allberry,* 88 Ohio App.3d 432, 435, 624 N.E.2d 279 (2nd Dist.1993) (emphasis in original).

{¶29} Thus, in reviewing a motion for a new trial, we do so with deference to the trial court's decision, recognizing that "the trial judge is better situated than a reviewing court to pass on questions of witness credibility and the surrounding circumstances and atmosphere of the trial." *Malone v. Courtyard by Marriott L.P.,* 74 Ohio St.3d 440, 448, 659 N.E.2d 1242 (1994).

{¶30} In the present case, the parties agree that appellant, age 56, was struck by appellee's vehicle while she travelling approximately 40 mph. Appellant's car was "totaled". Appellant, who was seat belted but without the protection of an airbag,

sustained a broken neck at the C-6 vertebrae, which was confirmed by CT scan. Appellant also experienced knee, neck, and back pain. At the scene of the accident, appellant was placed in a neck collar and backboard for immobilization.

{¶31} Dr. Weiner, a board certified neurologist, was advised of appellant's condition. Dr. Weiner recommended appellant be placed in a hard cervical collar or neck brace due to the C-6 fracture, and to follow up with Dr. Weiner at his office.

{¶32} Appellant was seen by Dr. Weiner within 5 days of the accident and he ordered appellant to remain in the hard cervical collar[2] at all times for another 5 weeks to allow the bones to heal and stay in place. Dr. Weiner testified at trial if the bones moved, neck pain and in the worst case, paralysis could occur.

{¶33} Appellant is employed as a license practical nurse at a long-term care facility. She is required to push a medicine cart during her shift and to lift patients. Due to the accident, Appellant missed seven days of work and worked half-days for another week. Thereafter, she returned full-time but was limited in her usual daily life and work activities due to the neck collar and discomfort to her knees and chest. Dr. Weiner removed the neck brace at her second visit on April 13, 2011. Appellant testified she felt better but still had neck pain, which was aggravated by her work activities. Subsequently, appellant developed neck instability that ultimately led to surgery.

{¶34} Upon review, the evidence remains uncontroverted. In fact, appellee agreed the jury should compensate appellant for her lost wages, medical treatment, and pain and suffering in the six weeks following the accident and recommended to the jury "something in the neighborhood of $40,000." Appellee asserts the evidence

[2] The trial court characterized the collar as a "precautionary" neck brace (Judgment Entry, March 3, 2014, p.3), however, the record does not support this characterization.

demonstrates appellant had degenerative neck and back issues on more than one level. However, Dr. Weiner testified degenerative changes were common in a person of similar age and the degenerative changes had nothing to with his treatment of appellant for the injury she suffered in the accident. Deposition of Dr. Weiner at 70. Furthermore, there was no evidence of prior or subsequent injury that had any effect on appellant's cervical area before or after the accident or surgery.

{¶35} The jury awarded appellant a sum of $2,114.11 ($914.11 for economic loss and $1,200.00 for pain and suffering). Our review demonstrates that jury's verdict was inadequate because there was no evidence disputing the severity of the collision; no evidence, expert or otherwise, disputing the collision neither solely caused appellant's fractured neck and subsequent surgery; nor disputing the collision resulted in limited life functions, pain and discomfort. The jury's award did not fully compensate appellant and denied her justice.

{¶36} We recognize that a defendant is not required to present contrary medical testimony to challenge causation. *Shadle v. Morris,* 5 th Dist. No. 2012CA00073, 2013-Ohio-906 (to avoid a directed verdict on causation of plaintiff's disc herniation, defendant was not required to present own expert medical testimony; rather, through cross-examination, the defendant could cause the jury to question the conclusion that the injuries were the result of the accident). In this case, Dr. Weiner testified regarding causation and opined that the crash caused a neck fracture, ligament injury and resulting instability. Although degenerative neck conditions may have existed prior to the accident, Dr. Weiner's testimony that these conditions did not result in the neck fracture and instability was unchallenged through cross-examination.

{¶37} The accident was not minor -- appellant had an objective injury verified by a CT scan and MRI. Her injury did not resolve quickly. The damages award cannot be reconciled with the uncontroverted evidence and is against the manifest weight of the evidence.

{¶38} Appellant's first assignment of error is sustained.

II.

{¶39} Having sustained appellant's first assignment of error, appellant's second assignment of error is rendered moot.

CONCLUSION

{¶40} Accordingly, the judgment of the Stark County Court of Common Pleas is reversed and this matter is remanded to that court for further proceedings in accordance with law, consistent with this decision.

By, Delaney, J.,

Hoffman, P.J., and

Baldwin, J., concur.