

STATE OF OHIO, MAHONING COUNTY  
IN THE COURT OF APPEALS  
SEVENTH DISTRICT

BRYAN SCIBELLI,	)	
	)	CASE NO. 02 CA 175
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	O P I N I O N
	)	
DOMINIC PANNUNZIO, D.D.S.,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court,  
Case No. 99CV1774.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

Attorney William Hawal  
1900 East Ninth Street  
2400 National City Center  
Cleveland, Ohio 44114

For Defendant-Appellant:

Attorney Christopher Humphrey  
4518 Fulton Drive, N.W.  
P.O. Box 35548  
Canton, Ohio 44735

JUDGES:

Hon. Joseph J. Vukovich  
Hon. Cheryl L. Waite  
Hon. Mary DeGenaro

Dated: June 27, 2003

VUKOVICH, J.

{¶1} Defendant-appellant Dominic Pannunzio, D.D.S. appeals the Mahoning County Common Pleas Court's decision granting plaintiff-appellee Bryan Scibelli's motion for a new trial. This court is asked to determine whether the trial court abused its discretion by finding that the jury's verdict was against the weight of the evidence whereby it granted a new trial pursuant to Civ.R. 59(A)(6). For the reasons explained below, the decision of the trial court is affirmed.

#### STATEMENT OF FACTS

{¶2} Scibelli began seeing Dr. Pannunzio, a dentist, on October 3, 1998, because the wisdom tooth in his lower right jaw was becoming loose. (Tr. 215-216). Dr. Pannunzio informed Scibelli that an infection was the cause of this problem and accordingly prescribed penicillin and recommended extraction of the tooth. At this same visit, Dr. Pannunzio ordered periapical x-rays to be taken. A periapical x-ray is a limited view focusing on the root of a tooth or a small number of teeth. While x-rays typically show bones looking whitish gray, this x-ray displayed a black spot in the jawbone adjacent to the root of the tooth. A black spot or radiolucency can indicate destruction of the bone. Dr. Pannunzio failed to diagnose the radiolucency.

{¶3} Scibelli returned to Dr. Pannunzio's office on January 6, 1999, and at this visit a panorex x-ray, an x-ray showing the entire jaw and teeth, was taken. After viewing the panorex x-ray, Dr. Pannunzio told Scibelli that the x-ray was normal despite the fact that this x-ray showed the black radiolucency of the jaw that the previous periapical x-ray had displayed. However, this panorex x-ray was purportedly misplaced prior to trial.

{¶4} Scibelli once again returned to Dr. Pannunzio's office in April of 1999, this time complaining of swelling and that the infection was not improving. It is disputed whether he informed Dr. Pannunzio that he felt tingling in his lip. At this appointment another panorex x-ray was taken. Dr. Pannunzio noticed the jaw abnormality and referred Scibelli to Dr. Mayo, an oral surgeon. Dr. Mayo diagnosed

the jaw abnormality as a potential myxoma, and referred Scibelli to Dr. Stepnick, another oral surgeon.

{¶5} The jaw growth was diagnosed as an odontogenic myxoma that was benign. The tumor had destroyed the majority of Scibelli's right jawbone and, as such, it had to be removed. Surgery was performed to remove the tumor five weeks after the diagnosis. Scibelli lost nine teeth on the right lower side of his mouth as a result of the disintegration of the jawbone and the surgery. In order to create a new jawbone, a portion of Scibelli's fibula, the bone of the lower leg, was removed and relocated to the jaw. Complications resulting from the surgery to remove the tumor resulted in an emergency tracheostomy. In addition to those surgeries, Scibelli has undergone reconstructive plastic surgeries and restorative dental procedures.

{¶6} Due to the failure to diagnose the tumor earlier, Scibelli filed a medical malpractice action against Dr. Pannunzio in which the doctor admitted breach of duty in the care and treatment of Scibelli. Therefore, the only remaining issues for the jury were proximate cause and damages. After a five day trial, the jury returned a defense verdict. Scibelli then filed a Civ.R. 59(A)(6) motion for a new trial which the trial court granted. Dr. Pannunzio timely appeals from that decision raising one assignment of error.

#### ASSIGNMENT OF ERROR

{¶7} "THE TRIAL COURT ERRED WHEN IT GRANTED APPELLEE'S MOTION FOR NEW TRIAL."

{¶8} The trial court based its decision to grant a new trial on Civ.R. 59(A)(6), i.e. the judgment was not sustained by the weight of the evidence. Civ.R. 59(A)(6) dictates that a new trial should be granted if the jury's verdict was not supported by competent, substantial, and credible evidence. *Dillion v. Bundy* (1992), 72 Ohio App.3d 767, 773-774; *Verbon v. Pennese* (1982), 7 Ohio App.3d 182, 183. The trial court has broad discretion to grant or deny a motion for a new trial. *Poske v. Mergl* (1959), 169 Ohio St. 70, paragraph one and two of the syllabus. When a trial court orders a new trial upon the ground that the verdict was unsupported by the weight of the evidence, a reviewing court will disturb that order only when the trial court's decision constitutes an abuse of discretion by being unreasonable, arbitrary, or

unconscionable. *Malone v. Courtyard by Marriott L.P.*, 74 Ohio St.3d 440, 448, 1996-Ohio-311, citing *Rohde v. Farmer* (1970), 23 Ohio St.2d 82. In applying the abuse of discretion standard, we must “view the evidence favorably to the trial court’s action rather than to the original jury’s verdict.” *Malone*, 74 Ohio St.3d at 448, quoting *Rohde*, 23 Ohio St.2d at 94. This deference to a trial court’s grant of a new trial stems in part from the recognition 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*, 74 Ohio St.3d at 448.

{¶9} When a trial court grants a “motion for new trial based on the contention that the verdict is not sustained by the weight of the evidence, [it] must articulate the reasons for so doing in order to allow” for a meaningful review by the appellate court. *Antal v. Olde World Products, Inc.* (1984), 9 Ohio St.3d 144, syllabus. In the situation where the judgment entry cannot provide meaningful review, the case will be reversed and remanded to the trial court to reconsider its order and/or state reasons supporting that decision. *Id.*; *Richards v. Santini-Diaz* (Aug. 3, 2000), 8th Dist. No 75806. The determination of whether a trial court’s statement of reasons is sufficient is a case-by-case determination, but it is understood that reasons will be “deemed insufficient if simply couched in the form of conclusions or statements of ultimate fact.” *Mannion v. Sandel*, 91 Ohio St.3d 318, 2001-Ohio-47, quoting *Antal*.

{¶10} In the case at hand, the journal entry merely states that a new trial is granted because the “jury’s verdict did create an injustice because the verdict was against the weight of the evidence.” 9/5/00 J.E. According to *Antal* and its progeny, this journal entry is inadequate and therefore should be remanded to the trial court to sufficiently detail its findings. *Witt v. Akron Exp., Inc.*, 4th Dist. No. 01CA7, 2002-Ohio-507. However, we are not remanding this case for the trial court to articulate its reasons for granting a new trial for two reasons.

{¶11} First, despite the trial court’s error, Dr. Pannunzio did not properly raise this issue. Dr. Pannunzio did not argue this issue until he submitted his reply brief. A reply brief is not to be used by an appellant to raise new assignments of error or issues for consideration; it is merely an opportunity to reply to the appellee’s brief. *Sheppard v. Mack* (1980), 68 Ohio App.2d 95, 97; App.R. 16(C). Here, the argument

that the trial court failed to sufficiently explain its reasons for granting the new trial was not a logical reply to Scibelli's arguments. Scibelli's answer brief argued that the trial court did not abuse its discretion in granting the new trial. Scibelli supported this argument with citations to cases, including *Mannion*, which he believed were factually analogous to the situation at hand. The cases, including *Mannion*, were not cited for purposes of raising or addressing a question as to the adequacy of the journal entry. Furthermore, appellate courts that have remanded Civ.R. 59(A)(6) rulings for more sufficiently detailed holdings have done so when the adequacy of the journal entry was actually raised on appeal, none have raised the issue sua sponte. As such, this argument is not properly raised for our review.

{¶12} Second, the record in this specific situation provides uncontroverted testimony that Dr. Pannunzio was the proximate cause of some injury to Scibelli and, as such, the record is sufficient to provide this court with a meaningful review of the issues raised. If the record is clear enough to provide a meaningful review, no remand is necessary. *Richards*, 8th Dist. No 75806. Due to the admission that Dr. Pannunzio breached his duty, the testimony at trial became whether the six month delay in the diagnosis was the proximate cause of the injury and how much, if any, damages should be awarded. Testimony at trial revealed that Dr. Pannunzio's expert and Scibelli's expert agreed that the delayed diagnosis caused the additional loss of one or two teeth. Dr. Assael, Scibelli's expert, testified that if the delay had not occurred, the surgery would only have resulted in the loss of four or five teeth, thereby indicating that the delay caused the additional loss of four to five teeth. (Tr. 91). Dr. Li, Dr. Pannunzio's expert, stated that the six month delay caused the tumor to grow anteriorly. (Tr. 582). Dr. Li then added that the delay caused the loss of one or two additional teeth:

{¶13} "Q. All right. Doctor, thank you. And Doctor, you've indicated that possibly this tumor did grow slightly anteriorly. How many additional teeth do you think had to be removed as a result of this tumor growth anteriorly?

{¶14} "A. One or two.

{¶15} "Q. Okay. And finally, Doctor, have all the opinions you've given us here today been to a reasonable degree of medical probability?

{¶16} “A. Yes.” (Tr. 584).

{¶17} While the experts are not in agreement on the exact number of teeth lost due to the delayed diagnosis, their testimony indicates that they would agree that the delay in the diagnosis proximately caused the loss of one or two additional teeth. The experts’ opinions, taken in conjunction with the admission of negligence, provide this court with sufficient indication of what was the basis for the trial court’s decision to grant a new trial. Therefore, despite the insufficient journal entry, we are not reversing and remanding for more detailed findings. However, we caution the trial court that an absence of sufficiently detailed findings when holding that the jury’s verdict is against the weight of the evidence will generally necessitate a reversal and remand to cure the defect. However, in this factually specific situation, i.e. the failure to properly raise the inadequacy of the journal entry, the admission of negligence, and the uncontroverted testimony that the delay proximately caused some damage, there is a sufficient factual basis in the record for this court to review the trial court’s decision.

{¶18} Having determined that the journal entry in this case is not per se a cause for reversal, we will now address the merits of this appeal that is, whether the trial court abused its discretion in granting a new trial. Dr. Pannunzio argues that the jury is free to believe or disbelieve the testimony of any witness who appears before it. According to Dr. Pannunzio, the jury may have disbelieved the experts’, Dr. Li and Dr. Assael, opinion that one or two teeth could have been saved if the diagnosis occurred earlier. Dr. Pannunzio insists that the jury verdict rendered is in accordance with that belief.

{¶19} Dr. Pannunzio is correct that a jury is free to believe all, part or none of the testimony of witnesses who appear before them. *Rogers v. Hill* (1998), 124 Ohio App.3d 468, 470. However, 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. *White v. Costilow* (July12, 1996), 11th Dist. No. 95-T-5339. A new trial should be granted under Civ.R. 59 when a jury’s award of inadequate damages resulted from its failure to consider an element of damages that were established by uncontroverted evidence. *Pena v. Northeast Ohio Emergency Affiliates, Inc.* (1995), 108 Ohio App.3d 96, 104. Even though the jury was free to believe or disbelieve any

of the witnesses' statements, given the deference we must give to the trial court's ruling, this argument fails because of the uncontroverted testimony that an injury, despite how small, occurred.

{¶20} Dr. Pannunzio further argues that because Scibelli failed to test the general verdict by using jury interrogatories, it is unclear how the jury decided on the issue of causation and damages. According to Dr. Pannunzio, an untested jury verdict on the issue of damages will be construed in favor of the successful party. *Bobb Forest Products, Inc. v. Morbark Industries, Inc.*, 151 Ohio App.3d 63, 2002-Ohio-5370. In Dr. Pannunzio's opinion, a jury interrogatory could have been asked as to whether the delay in the diagnosis caused the loss of additional teeth and, if so, what are the damages. In Dr. Pannunzio's view, failing to ask the interrogatory means the verdict was not tested and, as such, the trial court could not conclude that the verdict was against the weight of the evidence when the jury could have disbelieved Dr. Li, his own expert. Scibelli claims *Morbark* is not analogous to the situation at hand because it dealt with multiple causes of action which the jury based its decision on.

{¶21} The purpose of jury interrogatories is to test the correctness of the general verdict. *Cincinnati Riverfront Coliseum, Inc. v. McNulty Co.* (1986), 28 Ohio St.3d 333, 336-337. Proper jury interrogatories lead to "findings of such a character as will test the correctness of the general verdict returned and enable the court to determine as a matter of law whether such verdict shall stand." *Freeman v. Norfolk & W. Ry. Co.*, 69 Ohio St.3d 611, 613-614, 1994-Ohio-326, quoting *Bradley v. Mansfield Rapid Transit, Inc.* (1950), 154 Ohio St. 154, 160. In a complicated trial where there are multiple defendants and/or multiple claims, jury interrogatories are useful to determine the apportionment of loss. However, in the situation at hand, we do not have a complicated case or multiple claims. As such, while the jury interrogatories may have been helpful, the failure to use them is not fatal to our review of the trial court's decision to grant a new trial. In *Morbark*, we explained that when *Morbark* raised issues regarding the jury's award which could have been resolved by submitting jury interrogatories, the error with respect to any one of those claims is disregarded if another independent claim, free from prejudicial error, supported the jury verdict. *Morbark*, 151 Ohio App.3d 63, citing *Wagner v. Roche Laboratories*, 77 Ohio St.3d

116, 119, 1996-Ohio-85. Thus, we held that *Morbark* was limited to challenging the jury's verdict as a whole as being against the manifest weight of the evidence. This is precisely what Scibelli did; he challenged the jury verdict as a whole as being against the manifest weight of the evidence. As such, there is no requirement that jury interrogatories were needed. This argument is without merit.

{¶22} Lastly, Dr. Pannunzio argues that this case is closely analogous to *Holub v. Hagan* (Nov. 10, 1993), 9th Dist. No. 15987, and since a new trial was not granted in that case, a new trial should not have been granted in the case sub judice. Scibelli rebuts this argument by contending that Dr. Pannunzio's closing argument wherein he stated that the loss of one or two teeth was worth \$50,000, implies that the trial court properly granted the new trial. (Tr. 682). We find neither of these arguments persuasive.

{¶23} Despite Dr. Pannunzio's contention, the *Holub* case is distinguishable from the case at hand for two reasons. In *Holub*, expert testimony revealed that the expert based his opinion on what the plaintiff told him and that in the beginning, the expert did not believe that the injuries resulted from the defendant's actions. Given that the expert's change of opinion was based solely upon information from the plaintiff, which the expert could not confirm, the appellate court stated that the evidence was not uncontroverted. *Id.* In our case, both plaintiff's and defendant's experts opined that at least one or two more teeth were lost due to the delay in diagnosis. This information was based on a reasonable degree of medical certainty having nothing to do with Scibelli's own statements. Therefore, the testimony establishing that at least one or two more teeth were lost as a result of the delayed diagnosis was uncontroverted, unlike the testimony in *Holub*. Second, in *Holub*, the jury verdict actually stated that the defendant was not the proximate cause of the injury. Therefore, in *Holub*, the jury's defense verdict is clearly based upon this finding. However, in the case at hand, the jury verdict states nothing about proximate cause, but rather states:

{¶24} "We, the jury, being duly impaneled and sworn and affirmed, do hereby find in favor of defendant, Dominic Pannunzio, D.D.S., and we do render our verdict upon the concurrence of six members of our jury, that being three-fourths or more of



our number. Each of us said jurors concurring in said verdict signs his or her name hereto the 3rd day of May of the year 2001.” (Tr. 721).

{¶25} From this verdict it is unclear whether or not the jury found that Dr. Pannunzio was the proximate cause of the injury. Given the uncontroverted evidence that he was the cause of some injury, and being unable to determine if the jury determined that he was the proximate cause of the injury, this case differs from *Holub*. Furthermore, even if the jury determined that he was not the proximate cause of the injury, that decision could be seen as against the weight of the evidence when the testimony indicated that he caused some damage, regardless of the extent of that damage. As such, *Holub* is not analogous to the case sub judice.

{¶26} Additionally, Scibelli’s contention that Dr. Pannunzio’s statement made during closing arguments that the loss of the additional one or two teeth was worth \$50,000 suggests that the trial court properly granted a new trial is unpersuasive. Scibelli cites *Menda v. Springfield Radiologists, Inc., et al.*, 2d Dist. No. 2001-CA-91, 2002-Ohio-6785, in support of his proposition. However, *Menda* is not analogous. *Menda* deals with a trial court granting a remittitur. In granting a remittitur, the amount requested during closing arguments can be used by the trial court, along with other information, in determining the correct amount of damages. *Id.* However, granting a remittitur is different from granting a new trial. In a remitter the trial court is changing the amount of damages, not determining whether the jury’s verdict is against the weight of the evidence. In determining whether to grant a new trial based on weight of the evidence, the trial court weighs the evidence. Statements made during closing arguments may be reasonable inferences the jury may draw from the evidence presented. However, these statements in and of themselves are not evidence. *Id.*; *Coffey v. Shenk* (1974), 39 Ohio App.2d 156, 160. Therefore, statements made during closing arguments are not considered when determining whether the verdict is against the weight of the evidence. Accordingly, Dr. Pannunzio’s statement during closing argument cannot be a persuasive factor in our analysis of whether the trial court’s grant of a new trial was erroneous.

{¶27} As such, neither the *Holub* nor *Menda* cases are dispositive of the issue before this court. However, we do embrace the reasoning in an Eighth Appellate

District case which found that the trial court abused its discretion by failing to grant a new trial when the plaintiff's and defendant's experts agreed that defendant was the proximate cause of some injury. *Darling v. Scheid* (May 20, 1993), 8th Dist. No. 62464. The appellate court stated the following:

{¶28} "It was incredible for the jury to find that defendant's negligence was not the proximate cause of *some* injury to the plaintiff. Even the defendant's expert neurologist found that plaintiff suffered injures \* \* \*." *Id.* (Emphasis added.)

{¶29} Here, Dr. Pannunzio admitted to violating the standard of care. Further, as explained earlier, both parties' experts agree that some injury, though minor, resulted from this breach of duty. As such, given these facts and the deference we must give to the trial court's decision, we cannot conclude that the trial court abused its discretion in granting a new trial.

{¶30} Therefore, despite the inadequacy of the journal entry, the admission of a breach of duty, and the uncontroverted testimony of proximate cause and some damage, permits us to review the trial court's decision. Given our limited standard of review and the reasons provided for above, we are unable to conclude that the trial court abused its discretion.

{¶31} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Judgment affirmed.

Waite, P.J., and DeGenaro, J., concur.