

[Cite as *May v. Marc Glassman, Inc.*, 2011-Ohio-1581.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93966

LARAIN MAY

PLAINTIFF-APPELLEE

vs.

MARC GLASSMAN, INC. d.b.a MARC'S

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Common Pleas Court
Case No. CV-677493

BEFORE: E. Gallagher, J., Kilbane, A.J., and Stewart, J.

RELEASED AND JOURNALIZED: March 31, 2011

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ATTORNEYS FOR APPELLANT

John C. Meros
Jack Schulman
Schulman, Schulman & Meros
600 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113

ATTORNEY FOR APPELLEE

Donald Gallick
190 North Union Street, #201
Akron, Ohio 44304

EILEEN A. GALLAGHER, J.:

{¶ 1} Appellant Marc Glassman, Inc., appeals the trial court's decision to grant plaintiff Larain May's motion for a new trial. The appellant argues that the trial court abused its discretion in granting the motion for a new trial because the parties did not stipulate to the issue of negligence, the trial court's jury instructions charged the jury with the determination of negligence and substantial evidence existed to support the jury's verdict. For the following reasons, we affirm the decision of the trial court.

{¶ 2} On the evening of January 10, 2006, May and her fianc_ William Imblum entered the Marc's Deep Discount Store located at 435 Midway Mall in Elyria, Ohio to purchase a greeting card. May and Imblum entered the store only minutes prior to its closing time of 9:00 p.m. and proceeded to the rear of the store to browse in the greeting card section.

{¶ 3} Marc's employees made announcements at 8:45 p.m., 8:50 p.m., and 8:55 p.m. over the public address system advising customers that the store would close at 9:00 p.m. and instructing all remaining customers to bring their purchases to the registers. At closing, a member of Marc's staff washed the floor of the store with a Nobles 265XP electric floor-washing machine. The Nobles 265XP floor washer is powered by an electric motor, which drives rotating brushes that scrub the floor using water and solvent from a tank in the machine. When filled, the machine weighs approximately 1,145 pounds. The operator of the machine walks behind it, using the handlebars to control the speed and direction. The operator is required to twist the grips on the handlebars and hold the grips in the twisted position to move the machine forward. If the operator releases the grips, the machine shuts down instantaneously, but will continue to roll several inches to a stop. Store policy forbade the commencement of washing the floors until either the store was closed or until all customers had vacated the area in the rear of the store in connection with the store's closing.

{¶ 4} At or near closing time on the evening of January 10, 2006, Marc's employee

Demitrus Burks contacted the store's assistant manager Donald Greene to ask permission to begin washing the floors. Having received permission, Burks began operating the machine down one side of one of the rear aisles, turned, and began moving up the other side of that aisle toward the rear of the store. As Burks turned the corner of the aisle he had been washing and entered the greeting card aisle, he observed May and Imblum and he released the handlebars of the floor washer but the machine continued to roll forward, hitting May on her left side and pushing her into the greeting cards in the nearby display.

{¶ 5} Mr. Burks apologized profusely and contacted Greene, who filled out a customer incident report to document the incident. May told Greene that her back and neck hurt but refused Greene's offer to contact EMS. May stated that she would seek medical attention on her own and she and Imblum left the store.

{¶ 6} On November 26, 2008, May filed the instant lawsuit seeking compensation for her medical expenses and unspecified non-economic damages. During trial, May testified that the January 10, 2006 incident at Marc's transformed her life. May explained that prior to the accident she had an active social life that included travel, dancing, biking, and bowling. May stated that as a result of the accident she experienced pain in her left neck, left side, left upper and lower back, and numbness and tingling in her fingers, left leg, and left toes. May reported an exhaustive history of treatment: visits with chiropractor Dr. Richard Scheithauer for treatment; visits to her family physician, Dr. Jack Cramer, who

prescribed pain killers and physical therapy; surgery, which was performed in June 2006 by Dr. Douglass Orr for cervical fusion of her C4-5, C5-6, and C6-7 vertebrae; and a November 2007 surgery to her left knee performed by Dr. John Krebs to repair a meniscal tear; all of which May claimed were direct results of the January 10, 2006 incident at Marc's. Dr. Scheithauer testified in support of May's claims as her medical expert. Irrespective of all of the above-cited treatment, May testified at trial that the pain in the left side of her neck, left shoulder, and left upper and lower back continue.

{¶ 7} On cross-examination, the appellant elicited conflicting testimony that May had similar, if not identical, long-standing problems dating from 1994 for which she has been treated throughout the years. Appellant's expert neurologist, Dr. Peter Bambakidis, testified by videotape that these prior conditions were degenerative and that her major problems were preexisting and were, therefore, not caused by the accident. However, Dr. Bambakidis opined, with reasonable medical certainty, that plaintiff sustained a soft tissue injury primarily to her left side as a result of the incident at Marc's from which she should have recovered after several weeks or months of physical therapy.

{¶ 8} At the conclusion of a two-day trial, the jury returned a general, unanimous verdict for Marc's; no interrogatories were submitted to the jury. May filed a timely motion for judgment notwithstanding the verdict and, alternatively, a motion for a new trial, which appellant opposed. On September 3, 2009, the trial court denied May's motion for judgment

notwithstanding the verdict but granted her motion for a new trial. The trial court determined, based on the circumstances of the case, that the jury's verdict in favor of Marc's was against the manifest weight of the evidence, Civ.R. 59(A)(6). Specifically, the trial court determined, "[s]ince the plaintiff * * * and defense expert[s] both recognized that some injury and some necessary medical treatment, therapy and medication resulted from the accident, even if there is dispute about how much or how long, 'a defense verdict is against the weight of the evidence as it is not supported by competent credible evidence.'" (Citations omitted).

{¶ 9} Appellant appeals this order in the sole assignment of error:

"The trial court abused its discretion when it granted plaintiff a new trial on grounds that the defendant's negligence was "undisputed" because: (1) the issue of defendant's negligence was always disputed and was submitted to the jury; (2) the trial court's instructions to the jury expressly authorized the jury to find that the defendant was not negligent; and (3) there was substantial evidence to support the jury's verdict that the defendant was not negligent."

{¶ 10} In its appeal, appellant argues that the trial court abused its discretion in granting May's motion for a new trial because sufficient evidence existed in the record to support the jury's verdict. We disagree.

{¶ 11} "In deciding a motion for a new trial based on the weight of the evidence, the trial court must weigh the evidence and pass upon the credibility of witnesses. However, the trial court's weighing of the evidence differs from that of the jury in that it is restricted to

determining whether a manifest injustice has been done and whether the verdict is, therefore, manifestly against the weight of the evidence.” *Jones v. Olcese* (1991), 75 Ohio App.3d 34, 598 N.E.2d 853.

{¶ 12} As an appellate court, we review a trial court’s judgment on a Civ.R. 59 motion for a new trial under the abuse of discretion standard. *Eddingham v. XP3 Corp.*, Portage App. No. 2006-P-0083, 2007-Ohio-7135. We will adhere to the principle that the granting of a motion for a new trial rests within the sound discretion of the trial court and will not be disturbed upon appeal unless there has been an abuse of that discretion. *Pena v. N.E. Ohio Emergency Affiliates, Inc.* (1995) 108 Ohio App.3d 96, 104, 670 N.E.2d 268. See, also, *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, 262 N.E.2d 685 (where a trial court is authorized to grant a new trial for a reason that requires the exercise of a sound discretion, the order granting a new trial may be reversed only upon a showing of abuse of discretion by the trial court). “The term ‘abuse of discretion’ connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 13} As the Ohio Supreme Court explained in *Rohde*, supra:

“[W]here the appeal is from the granting of a motion for new trial, and the trial court’s decision on the motion for new trial involves questions of fact, it has been held that the appellate court should view the evidence favorably to the trial court’s action rather than to the original jury’s verdict. 5 American Jurisprudence 2d 326, Section 887.

“This rule of appellate review is predicated, in part, upon the principle that the discretion of the trial judge in granting a new trial on the weight of the evidence may be supported by his having seen and heard the witnesses and having formed a doubt as to their credibility, or having determined from the surrounding circumstances and atmosphere of the trial, that the jury’s verdict resulted in manifest injustice.”

{¶ 14} Furthermore, as the Ohio Supreme Court recently stated in *Harris v. Mt. Sinai Med. Ctr.*, 116 Ohio St.3d 139, 2007-Ohio-5587, 876 N.E.2d 1201:

“When in the exercise of discretion a trial court decides to grant a new trial and that decision is supported by competent, credible evidence, a reviewing court must defer to the trial court. In such a case, the reviewing court may not independently assess whether the verdict was supported by the evidence, because the issue is not whether the verdict is supported by competent, credible evidence, but rather whether the court’s decision to grant the new trial is supported by competent, credible evidence.”

{¶ 15} In the present case, the parties agreed that an employee of the appellant struck May with the 1,145 pound floor cleaner while she was shopping for a greeting card on January 10, 2006. The parties agreed that this was a departure from the appellant’s standard of care as it relates to use of the floor cleaner. They also stipulated to the \$1,980 in chiropractor bills and \$43,150.52 in medical expenses covered by Anthem Blue Cross. What the parties disputed, however, was whether the accident proximately caused the nature and extent of the injuries and damages claimed and whether the appellant was negligent.

{¶ 16} The parties presented conflicting evidence regarding May’s injuries with May, through her expert, alleging that all injuries and damages claimed were the proximate result of the January 10, 2006 accident. The appellant, through its expert, claimed that the injuries

and damages resulted from preexisting and degenerative conditions outlined in May's medical history. Even if the jury did not believe May's testimony or that of her expert, Dr. Scheithauer, the evidence shows that May experienced neck pain, upper and lower left back pain as well as numbness and tingling two days after the accident and sought evaluation and treatment from her chiropractor and later from her physician, Dr. Cramer, who ordered X-rays and an MRI, treated her pain and also referred her to a surgeon for further assessment and treatment. May submitted the documentation regarding these medical expenses at trial.

{¶ 17} Thus, May presented evidence at trial showing that she incurred medical bills for initial diagnostic exams and treatments by Drs. Scheithauer and Cramer as well as expenses for surgeries performed by Drs. Orr and Krebs. Appellant did not argue that any of these doctors performed unnecessary diagnostic examinations or treatments for May's pain. The weight of the evidence demonstrated that at least some medical expenses were proximately caused by the January 10, 2006 accident, which is supported by appellant's own expert's testimony.

{¶ 18} We are constrained to review a trial court's granting of a new trial with deference. *McWreath v. Ross*, 179 Ohio App.3d 227, 2008-Ohio-5855, 901 N.E.2d 289. Viewing the evidence favorably to the trial court's action, *Rohde*, we conclude that the trial court's decision to grant May a new trial is supported by competent and credible evidence. Although the facts in the instant case could be used to explain a minimal award of damages

far short of what was requested by May, they cannot support a unanimous defense verdict. The trial court's decision to grant May a new trial is not arbitrary or unconscionable in the context of the evidence presented in this case. Accordingly, appellant's sole assignment of error is overruled.

{¶ 19} The judgment of the trial court is affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court 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.

EILEEN A. GALLAGHER, JUDGE

MARY EILEEN KILBANE, A.J., CONCURS, and
MELODY J. STEWART, J., CONCURS IN
JUDGMENT ONLY