[Cite as *Argie v. Three Little Pigs, Ltd.*, 2012-Ohio-667.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

George J. Argie, III,	:	
Plaintiff-Appellant,	:	
		No. 11AP-437
v.	:	(C.P.C. No. 09CVC10-16167)
Three Little Pigs, Limited et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on February 16, 2012

Spangenberg Shibley & Liber LLP, *Dennis R. Lansdowne*, and *Melissa Z. Kelly*, for appellant.

Robert P. Lynch Jr., for appellees.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶ 1} Plaintiff-appellant, George J. Argie, III ("appellant"), appeals from a judgment of the Franklin County Court of Common Pleas denying his motion for a new trial following a jury verdict entered in favor of defendants-appellees, Three Little Pigs, Limited and Hoggy's Restaurant and Catering ("appellees"). For the following reasons, we affirm.

{¶ 2} It is undisputed that, on July 7, 2007, appellant was involved in an automobile collision caused by the negligence of Jennifer Cheesman while Cheesman was driving within the scope of her employment for appellees. Appellant was stopped in traffic on I-270 when his son, who was following him in another car, came to a stop behind him. Cheesman was following behind appellant's son, but she failed to come to a

stop and, as a result, crashed her car into the rear of appellant's son's car. The collision pushed appellant's son's car into appellant's car, which then forced appellant's car into a guardrail.

{¶ 3} Appellant filed a personal-injury action against appellees in the Cuyahoga County Court of Common Pleas. After the Cuyahoga County trial court granted appellees' request for a change of venue, the matter was transferred to the Franklin County Court of Common Pleas where a jury trial began on March 7, 2011.

{¶ 4} The issue contested at trial was whether the collision was the proximate cause of appellant's claimed injuries. More specifically, the parties disputed whether the collision resulted in a herniated disc that appellant claimed to have suffered several months after the collision.

{¶ 5} Appellant testified that, two days after the July 7, 2007 collision, he sought treatment from his chiropractor, Dr. John Bondra, for neck and back pain. Although he had seen Dr. Bondra before the collision for "low back complaints" caused by golf and exercise, appellant denied having any neck pain prior to the date of the collision. (Tr. 70.) Appellant did not meet with Dr. Bondra again until January 2008, when he began to notice that a "pinching sensation" in his neck was progressively worsening. (Tr. 72.) In late April, early May 2008, appellant began to notice pain radiating from his neck down to his left arm along with numbness in several fingers. During his cross-examination, appellant testified that he did not complain of any numbness or pain radiating down his left arm when he met with Dr. Bondra two days after the collision. Appellant also testified that he experienced the pinching pain in his neck while playing golf, but still continued golfing and exercising with his personal trainer after the collision.

{¶ 6} Throughout trial, appellees argued for the admission of a letter addressed to appellant from Dr. Bondra dated March 4, 2008. The letter was unsigned and contained a narrative of appellant's July 9, 2007 meeting with Dr. Bondra, including a summary of appellant's chief complaints. Appellees argued for the introduction of the letter because, although it stated appellant suffered a cervical sprain-strain, thoracic sprain-strain, and lumbo-sacral sprain strain, it did not reference any complaints from

appellant about numbness or pain radiating from his neck to his arm. In response, appellant argued that the letter was inadmissible because "there is no evidence in the record that Dr. Bondra is qualified to give those expert opinions." (Tr. 131.) The trial court, however, found the letter to be admissible as an exception to the hearsay rule.

{¶ 7} Appellant presented videotaped deposition testimony from Dr. Louis Keppler and Dr. Deborah Blades. Dr. Keppler, an orthopedic surgeon, testified that he met with appellant in June 2008 and that an MRI examination revealed a herniated disc at "C-6/7," the sixth and seventh cervical levels of appellant's cervical spine. Dr. Keppler did not testify as to whether the collision caused the herniated disc or any of appellant's other claimed injuries. Because Dr. Keppler thought appellant might require cervical-spine surgery, he referred appellant to Dr. Blades, a neurosurgeon specializing in such procedures.

{¶ 8} Dr. Blades testified that she met with appellant in June 2008 and reviewed his MRI. After describing the nature of appellant's herniated disc, Dr. Blades acknowledged that there are a number of "daily activities" that could cause a herniated disc, and that she has treated patients who suffered from herniated discs in their neck while playing sports. In a letter addressed to Dr. Keppler, Dr. Blades wrote that appellant suffered significant soft tissue injuries that "subsequently manifested a few months following the accident." (Dr. Blades Deposition, 38.) During her testimony, Dr. Blades explained that the soft-tissue injuries did not manifest themselves until approximately two to three months after the collision.

{¶ 9} After the presentation of the evidence, the trial court instructed the jury to determine whether appellees' negligence proximately caused appellant to suffer noneconomic losses. Following deliberations, the jury returned a verdict in favor of appellees.

{¶ 10} Appellant moved for a new trial under Civ.R. 59, arguing that the jury's verdict was against the manifest weight of the evidence. Appellant claimed that, while the jury was free to believe that the collision did not cause his herniated disc, there was uncontroverted evidence that he suffered "some injury" as a result of the collision. Appellant pointed to his testimony describing the neck and back pain for which he

sought treatment from Dr. Bondra two days after the collision. Appellant also relied on Dr. Bondra's March 4, 2008 letter, which diagnosed him with various "sprain-strain" injuries. In response, appellees argued that the verdict was not against the manifest weight of the evidence because appellees did not concede that the collision caused appellant to suffer any injury. According to appellees, the issue disputed at trial was the cause of appellant's herniated disc, and there was conflicting evidence of causation.

{¶ 11} The trial court denied appellant's motion for a new trial, finding that appellant only presented evidence of subjective pain and suffering and that there was conflicting evidence regarding the cause of appellant's claimed injuries.

{¶ 12} Appellant now appeals, advancing the following assignment of error for our consideration:

> The Trial Court Abused Its Discretion When It Denied Plaintiff's Motion For A New Trial, Where The Jury Returned A Defense Verdict Despite Uncontroverted Evidence That Plaintiff Suffered Some Injury As A Result Of The Defendants' Negligence.

{¶ 13} In his sole assignment of error, appellant argues the trial court erred in denying his motion for a new trial under Civ.R. 59(A)(6). Civ.R. 59(A)(6) permits a trial court to order a new trial where "[t]he judgment is not sustained by the weight of the evidence." A judgment is not against the manifest weight of the evidence if there is competent, credible evidence going to all the essential elements of the case. *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279 (1978), syllabus. When presented with a Civ.R. 59 motion, the trial court is afforded wide discretion in determining whether the jury's verdict is against the manifest weight of the evidence. *Osler v. Lorain*, 28 Ohio St.3d 345, 351 (1986). " '[A]buse 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*, 5 Ohio St.3d 217, 219 (1983).

{¶ 14} Appellant asserts that the jury's verdict was against the manifest weight of the evidence because the parties did not dispute that Cheesman's negligence caused the collision and because, according to appellant, there was uncontroverted evidence establishing that he suffered "some injury" as a result of the collision. Conceding that it was in the province of the jury to reject his claim that the collision caused his herniated

disc, appellant maintains it was undisputed he sought treatment for soft-tissue injuries two days after the collision.

{¶ 15} "[W]here subjective, soft-tissue injuries are alleged, the causal connection between such injuries and the automobile accident alleged to have caused them is beyond the scope of common knowledge, and that such causal connection must be established by expert testimony." *Rogers v. Armstrong*, 1st Dist. No. C-010287, 2002-Ohio-1131 (Mar. 15, 2002). "Soft-tissue injuries like neck and back strains and sprains require expert testimony to establish a causal connection, because they are injuries that are 'internal and elusive, and are not sufficiently observable, understandable, and comprehensible by the trier of fact.' " *Lane v. Bur. of Workers' Comp.*, 2d Dist. No. 24618, 2012-Ohio-209, ¶ 60, citing, inter alia, *Wright v. Columbus*, 10th Dist. No. 05AP-432, 2006-Ohio-759, ¶ 19; *see also Maney v. Jernejcic*, 10th Dist. No. 00AP-483 (Nov. 16, 2000) (soft-tissue injuries sustained in a rear-end collision are internal injuries that are usually unaccompanied by observable external injuries and, therefore, require expert medical testimony of causation).

{¶ 16} Although appellant testified that he sought treatment from Dr. Bondra for neck and back pain two days after the collision, he did not present any expert testimony to establish a causal link between the collision and his alleged soft-tissue injuries within a reasonable degree of medical probability. Because appellant's trial strategy focused on his claimed herniated disc injury, neither Dr. Keppler nor Dr. Blades offered any testimony about whether the collision caused appellant to sustain the neck and back pain that he claimed to have suffered within two days after the collision. While appellant now points to Dr. Bondra's March 4, 2008 letter stating appellant sustained various "sprain-strain" injuries, Dr. Bondra never testified at trial, and the letter was contradicted by the testimony of Dr. Blades, who stated that any significant soft-tissue injuries did not manifest themselves until approximately two or three months after the collision. (Dr. Blades Deposition, 38.) Interestingly, appellant argued *against* the admission of this letter at trial, stating "there is no evidence in the record that Dr. Bondra is qualified to give those expert opinions." (Tr. 131.) Nevertheless, the jury was free to accept Dr. Blades' testimony over Dr. Bondra's unsigned, unsworn letter,

especially given the evidence that appellant continued golfing and working out with a physical trainer after the collision.

{¶ 17} Notwithstanding the above, appellant relies on three cases for the proposition that a defense verdict is against the manifest weight of the evidence whenever "uncontroverted" evidence proves that the defendant's negligence caused "some injury." *See Vescuso v. Lauria*, 63 Ohio App.3d 336 (8th Dist.1989); *Starcher v. Adams*, 10th Dist. No. 96APE07-884 (Mar. 25, 1997); *Bryan-Wollman v. Domonko*, 167 Ohio App.3d 261, 2006-Ohio-2318 (rev'd by *Bryan-Wollman v. Domonko,* 115 Ohio St.3d 291, 2007-Ohio-4918). In each of these cases, however, *both* parties presented expert testimony establishing that the defendant's negligence caused some injury. *Vescuso* at syllabus; *Starcher*; *Bryan-Wollman* at ¶ 19. Here, in contrast, neither appellant nor appellees presented expert testimony establishing that the collision was the proximate cause of appellant's claimed soft-tissue injuries. Thus, we find the cases relied on by appellant to be unpersuasive.

{¶ 18} Regardless, even if Dr. Bondra's letter constituted "uncontroverted" expert testimony that the collision caused "some injury," it is well-settled that "triers of fact are not required to accept evidence simply because it is uncontroverted, unimpeached, or unchallenged." *Smith v. Simkanin*, 5th Dist. No. 2011 CA 00045, 2011-Ohio-6123, ¶ 32, citing *Ace Steel Baling, Inc. v. Porterfield*, 19 Ohio St.2d 137, 138 (1969). A plaintiff still bears the burden of persuasion on all dispositive issues, and " '[a]s long as there are objectively discernable reasons why the jury may have rejected the expert medical testimony, an award less than what the "uncontroverted" medical evidence implies may withstand challenge on appeal.' " *Welch v. Ameritech Credit Corp.*, 10th Dist. No. 04AP-1123, 2006-Ohio-2528, ¶ 13, quoting *Dottavio v. Shepherd*, 9th Dist. No. 98CA0042 (Dec. 1, 1999). As explained above, there were several objectively discernable reasons for the jury's verdict, and the jury was not required to accept Dr. Bondra's letter as definitive evidence of causation.

{¶ 19} Based on the above, we find that the trial court did not act in an arbitrary, unreasonable or unconscionable manner when it denied appellant's motion for a new trial under Civ.R. 59. Accordingly, appellant's assignment of error is overruled.

{¶ 20} Having overruled appellant's sole assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and CONNOR, JJ., concur.
