[Cite as *Smith v. Lutz*, 2015-Ohio-2301.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

RONALD SMITH, et al.,	:	**O P I N I O N**
Plaintiffs-Appellants,	:	**CASE NO. 2014-T-0060**
- vs -	:	
RENEE LUTZ,	:	
Defendant-Appellee.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 12 CV 02316.

Judgment: Affirmed.

Gregg A. Rossi and *Corey J. Grimm,* Rossi & Rossi, 26 Market Street, 8th Floor, P.O. Box 6045, Youngstown, OH 44501 (For Plaintiffs-Appellants).

Frank G. Mazgaj, R. Brian Borla, and *Matthew J. Walker,* Hanna, Campbell & Powell, L.L.P., 3737 Embassy Parkway, Suite 100, P.O. Box 5521, Akron, OH 44333 (For Defendant-Appellee).

COLLEEN MARY O'TOOLE, J.

{¶1} Appellants, Ronald and Barbara Smith, appeal from the July 2, 2014 judgment of the Trumbull County Court of Common Pleas, granting judgment on the verdict in favor of appellee, Renee Lutz, and denying their motions for new trial and for judgment notwithstanding the verdict.[1] For the reasons that follow, we affirm.

1. Appellants are husband and wife.

{¶2} This matter arises from a February 15, 2006 low-speed motor vehicle collision which occurred at the intersection of Elm Road and North River Road in Warren, Trumbull County, Ohio. Appellee's vehicle coasted into the bumper of Mr. Smith's vehicle while he was stopped, causing only minor scuffing to the vehicles. Appellee admitted negligence. As a result of the accident, Mr. Smith drove himself to urgent care. A physician diagnosed Mr. Smith at that time with cervical strain.[2]

{¶3} On February 23, 2006, Mr. Smith followed up with Dr. Moore, a spinal surgeon. The following month, a myelogram was performed. Dr. Moore diagnosed Mr. Smith with cervical strain/whiplash.

{¶4} Appellants originally filed a personal injury/loss of consortium action in the Trumbull County Court of Common Pleas, Case No. 08 CV 567. However, that original case was later voluntarily dismissed. Thereafter, appellants re-filed the instant action on October 10, 2012, Case No. 12 CV 02316. Appellee filed an answer the following month.

{¶5} A two-day jury trial commenced on January 13, 2014. Each appellant testified. They claimed that the rear-end accident caused injuries to Mr. Smith's neck. However, Mr. Smith acknowledged that two years prior to this accident, he underwent surgery on his neck as a result of a serious motor accident. His injuries were so serious that he never returned to work. Mr. Smith stated he was only occasionally pain-free before this 2006 accident.

{¶6} Appellants also presented the testimony of Dr. Michael Lyons, a chiropractic physician, who performed a records review. Dr. Lyons never treated or

2. Prior to this collision, Mr. Smith underwent a surgical procedure to his neck in March 2004, in which he had cervical fusion performed at three levels.

even met with Mr. Smith until the first day of trial. Dr. Lyons described the 2004 surgery as a fusion from C4 to C7. As a result of this 2006 accident, Dr. Lyons opined that Mr. Smith sustained a cervical sprain with significant aggravation of the C3-4 disc and of the cervical fusion. Dr. Lyons acknowledged that there was no loosening or fracture of the hardware in Mr. Smith's neck and that prior to this accident, Mr. Smith suffered from degenerative joint disease with arthropathy. Dr. Lyons indicated that Mr. Smith's degenerative joint disease, arthritis, and narrowing of the cervical spine pre-existed this 2006 accident. Dr. Lyons was asked whether these types of pre-existing conditions "can be independent and competent producing causes of pain in individuals." Dr. Lyons answered "Yes," that "they can be." Dr. Lyons opined that the treatment Mr. Smith had received was reasonable and necessary.

{¶7} In addition, appellee testified at trial. Appellee admitted she was negligent in causing the accident. Appellee testified that Mr. Smith did not complain of injury or discomfort at the scene. Appellee also presented the testimony of Greg Hoso, a lieutenant with the Warren City Police Department, who responded to this incident. No report was completed because neither party complained of any injury.

{¶8} After both sides rested, the jury deliberated for some two hours. Upon a purported verdict being reached, the trial court discovered that the jury was never sent back with Jury Interrogatory No. 1. That interrogatory states: "Was the defendant's negligence a direct and proximate cause of injury or damage to the plaintiffs?" The court then asked the jury to return to the jury room for further deliberations. The jury summarily completed Jury Interrogatory No. 1 and signed a general verdict form in favor of appellee, concluding that appellee's negligence was not a direct and proximate cause

of any injury to Mr. Smith. The trial court rendered judgment on the verdict that same date.

{¶9} On February 10, 2014, appellants filed a motion for judgment notwithstanding the verdict, or, in the alternative, a motion for new trial, as well as a motion for new trial. On July 2, 2014, the trial court granted judgment on the verdict in favor of appellee and denied appellants' February 10, 2014 motions. Appellants filed a timely appeal and assert the following assignments of error:

{¶10} "[1.] The Trial Court erred in denying Appellants' Motion for a New Trial on the basis that the Court's failure to provide Jury Interrogatory No. 1 is a significant irregularity in the proceeding, and Appellants were, therefore, denied their right to a fair trial.

{¶11} "[2.] The Trial Court erred in denying Appellants' Motion for a New Trial as the verdict was against the manifest weight of the evidence.

{¶12} "[3.] The Trial Court erred in giving a Defense Verdict Form to the jury."

{¶13} In their first assignment of error, appellants argue the trial court abused its discretion in denying their motion for new trial. Appellants contend the entire jury deliberations were tainted. Appellants assert that the trial court's failure to provide the jury from the outset with Jury Interrogatory No. 1 prejudiced their right to a fair trial. Appellants maintain that sending the jury back to complete the missing interrogatory after it had reached its verdict did not cure the error.

{¶14} The decision to grant or deny a motion for new trial is reviewed for abuse of discretion. *McWreath v. Ross*, 179 Ohio App.3d 227, 2008-Ohio-5855, ¶69 (11th Dist.) Regarding this standard, we recall the term "abuse of discretion" is one of art,

connoting judgment exercised by a court which neither comports with reason, nor the record. *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). An abuse of discretion may be found when the trial court "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, ¶15 (8th Dist.)

{¶15} Civ.R. 59(A)(1) provides in part: "A new trial may be granted to all or any of the parties and on all or part of the issues upon * * * [i]rregularity in the proceedings of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial[.]"

{¶16} In analyzing whether a trial court committed error, the Supreme Court of Ohio has confirmed that courts of appeals should look to R.C. 2309.59 to determine whether a party's rights were materially affected. *Hayward v. Summa Health Sys.*, 139 Ohio St.3d 238, 2014-Ohio-1913, ¶23-24.

{¶17} R.C. 2309.59, "Reviewing court to disregard certain errors," states in part:

{¶18} "In every stage of an action, the court shall disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party. No final judgment or decree shall be reversed or affected by reason of such error or defect. * * * If the reviewing court determines and certifies that, in its opinion, substantial justice has not been done to the party complaining as shown by the record, such court shall reverse the final judgment or decree and render, or remand the case to the lower court with instructions to render, the final judgment or decree that should have been rendered."

{¶19} R.C. 2309.59 is consistent with Civ.R. 61 which states:

{¶20} "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

{¶21} Civ.R. 49(B) directs a trial court on the proper use of interrogatories and states in part:

{¶22} "The court shall submit written interrogatories to the jury, together with appropriate forms for a general verdict, upon request of any party prior to the commencement of argument. * * * The interrogatories may be directed to one or more determinative issues whether issues of fact or mixed issues of fact and law.

{¶23} "The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict.

{¶24} "When the general verdict and the answers are consistent, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When one or more of the answers is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the

general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial."

{¶25} "'The requirement of Civ.R. 49(B) that a court "shall submit written interrogatories to the jury (* * *) upon the request of any party prior to the commencement of argument" is mandatory, but the further requirement of the rule that "the interrogatories shall be submitted to the jury in the form that the court approves" reposes discretion in the trial court to review and approve the appropriateness and content of proposed interrogatories.'" *Arndt v. P & M LTD,* 11th Dist. Portage No. 2013-P-0027, 2014-Ohio-3076, ¶110, quoting *Ragone v. Vitali & Beltrami, Jr., Inc*., 42 Ohio St.2d 161 (1975), paragraph one of the syllabus. Thus, a trial court has a mandatory duty to submit written interrogatories to the jury upon the request of any party unless the interrogatories "are not based upon the evidence, are ambiguous, or are otherwise legally objectionable." *West v. Vajdi*, 39 Ohio App.3d 60, 61 (9th Dist.1987), citing *Ragone, supra,* at 165-166.

{¶26} "The purpose of jury interrogatories and the burden of proof applicable to a party invoking Civ.R. 49(B) has been stated as follows:

{¶27} "'The function of jury interrogatories is to "test the correctness of a general verdict by eliciting from the jury its assessment of the determinative issues presented by a given controversy in the context of evidence presented at trial." *Cincinnati Riverfront Coliseum v. McNulty Co.* (1986), 28 Ohio St.3d 333, 337 * * * (* * *). In cases invoking Civ.R. 49(B), it is incumbent upon the party challenging the general verdict to demonstrate that the answers to the interrogatories are inconsistent *and* irreconcilable with the general verdict. *Becker v. BancOhio Natl. Bank* (1985), 17 Ohio St.3d 158,

162-163 * * * (* * *).' (Citations omitted and emphasis added.) *Altvater v. Claycraft Co.* (1994), 92 Ohio App.3d 759, 763 * * *." (Emphasis sic.) (Parallel citations omitted.) *Martz v. El Paso Petro Inc.*, 11th Dist. Trumbull No. 95-T-5343, 1997 Ohio App. LEXIS 2895, *10-11 (June 27, 1997).

{¶28} In this case, appellants and appellee both requested that the trial court provide Jury Interrogatory No. 1 to the jury. As indicated, Jury Interrogatory No. 1 states: "Was the defendant's negligence a direct and proximate cause of injury or damage to the plaintiffs?" Jury Interrogatory No. 1 further states that if the answer is "yes," move on to Interrogatory No. 2. If the answer is "no," then enter a general verdict for the defendant.

{¶29} Jury Interrogatory No. 1 was approved by the court in its entirety. Jury Interrogatory No. 1 was an important interrogatory and was to be addressed by the jury during deliberations. However, the trial court inadvertently did not provide Jury Interrogatory No. 1 to the jury prior to their initial deliberations.

{¶30} As stated, after both sides rested, the jury deliberated for some two hours without Jury Interrogatory No. 1. The jury never asked for Jury Interrogatory No. 1. Upon a purported verdict being reached, the trial court discovered that the jury was not sent back with Jury Interrogatory No. 1 as it was apparently left on the bench by mistake. Because Jury Interrogatory No. 1 was not an interrogatory that was "not based upon the evidence, ambiguous, or otherwise legally objectionable," the trial court had a mandatory duty to submit it to the jury. *See* Civ.R. 49(B); *West, supra,* at 61, citing *Ragone, supra,* at 165-166.

{¶31} In compliance with Civ.R. 49(B), the court then asked the jury to return to the jury room. Thus, the trial judge cured any defect in the proceedings by sending the jury back for further deliberations. The jury went back to deliberate and summarily completed Jury Interrogatory No. 1, finding that Mr. Smith did not suffer injury as a direct and proximate result of appellee's negligence. The jury signed a general verdict form in favor of appellee. The trial court rendered judgment on the verdict that same date.

{¶32} Upon consideration, the record establishes that the trial court properly instructed the jury and appellants raised no objection to those instructions. The court's handling of Jury Interrogatory No. 1 was proper and consistent with Civ.R. 49(B). In fact, sending the jury back for further deliberations in similar matters is the preferred choice. *See, e.g., Perez v. Falls Fin. Inc.*, 87 Ohio St.3d 371 (2000); *Coffman v. Stoll*, 9th Dist. Summit No. 22189, 2005-Ohio-711.

{¶33} The record further establishes that the jury ultimately answered Jury Interrogatory No. 1 consistently with their defense verdict and consistently with the court's jury instructions. As a result, appellants suffered no prejudice. Based on the facts presented, we find the trial court did not abuse its discretion in denying appellants' motion for new trial.

{¶34} Appellants' first assignment of error is without merit.

{¶35} In their second assignment of error, appellants contend the trial court erred in denying their motion for new trial because the verdict was against the manifest weight of the evidence.

{¶36} This court recently noted the following in *Patterson v. Godale*, 11th Dist. Lake Nos. 2014-L-034 and 2014-L-042, 2014-Ohio-5615, ¶12-14:

{¶37} "'[T]he Supreme Court of Ohio has clarified the analysis used to determine whether judgments in civil cases are against the manifest weight of the evidence. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶12-23 * * * (* * *). In *Eastley*, the Supreme Court noted that most of Ohio's appellate courts applied the analysis set forth in *C.E. Morris Co. v. Foley Constr. Co*., 54 Ohio St.2d 279 * * * (* * *). *Eastley* at ¶14. In *C.E. Morris*, the court held: "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris* at the syllabus. As the court in *Eastley* observed, this is the standard applicable to determining the sufficiency of the evidence underpinning a judgment. *Id*. at ¶14. The court held that the proper analysis for determining challenges to the manifest weight of the evidence is the same in civil and criminal cases, and that *State v. Thompkins*, 78 Ohio St.3d 380 * * * (* * *) (1997) applies to both. *Id*. at ¶17-20. The court quoted with approval the following language used by the Ninth Appellate District:

{¶38} """"The (reviewing) court (* * *) weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the (finder of fact) clearly lost its way and created such a manifest miscarriage of justice that the (judgment) must be reversed and a new trial ordered."' (Alterations made in Tewarson) *Tewarson v. Simon*, 141 Ohio App.3d 103, 115 * * * (* * *) (* * *) (9th Dist.2001) (* * *), quoting *Thompkins*, 78 Ohio St.3d at

387, (* * *), quoting *State v. Martin*, 20 Ohio App.3d 172, 175 * * * (* * *) (* * *) (1st Dist.1983)." (Parallel citations omitted.) *Eastley* at ¶20.

{¶39} "'The court in *Eastley* further observed that in weighing the evidence in civil cases, courts of appeals must make every presumption in favor of the finder of fact, and construe the evidence, if possible, to sustain the judgment of the trial court. *Id*. at ¶21, quoting *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80 * * * (* * *) (1984).' (Parallel citations omitted.) *Avery Dennison Corp. v. Transact Techs., Inc*., 11th Dist. Lake No. 2012-L-132, 2013-Ohio-4551, ¶20-22." (Parallel citations omitted.)

{¶40} In the case at bar, appellants assert that all of the medical evidence and testimony presented was undisputed because appellee did not call a medical expert as a witness. Thus, appellants maintain that appellee was required to present an expert witness in order to dispute the testimony offered by appellants. We disagree.

{¶41} This court has held that expert opinions are only an item of evidence intended to assist the jury in reaching a correct result and that a defendant is not required to present the testimony of an expert witness to rebut the testimony of a plaintiff's expert. *See Mackey v. McCormick*, 11th Dist. Trumbull No. 96-T-5517, 1997 Ohio App. LEXIS 3585, *6 (Aug. 8, 1997) ("the opinion of an expert, including an opinion offered by a medical expert in personal injury cases * * *, is an item of evidence intended to assist the jury in reaching the correct result in consideration with the other evidence of the case, and * * * the expert's opinion is not ordinarily conclusive upon the jury"); *Johnson v. Malone*, 11th Dist. Trumbull No. 96-T-5513, 1997 Ohio App. LEXIS 3661, *7-8 (Aug. 15, 1997) ("it is not necessary for a defendant to present the testimony of an expert witness to rebut the testimony of a plaintiff's expert when the plaintiff has

failed to meet his burden of proof"); *Erie Ins. Co. v. Cortright*, 11th Dist. Ashtabula No. 2002-A-0101, 2003-Ohio-6690, ¶13-14 (the opinion of a medical expert may be completely disregarded because the jury is not required to give expert medical testimony any weight).

{¶42} Here, the jury chose to disbelieve the testimony of appellants and their expert witness, Dr. Lyons. Mr. Smith testified that he was only occasionally pain-free prior to this 2006 accident. Dr. Lyons was aware of Mr. Smith's prior cervical fusion. However, there was sufficient evidence to undermine the credibility of Dr. Lyons, including: Dr. Lyons never treated Mr. Smith; Dr. Lyons met Mr. Smith for the first time on the first day of trial; Dr. Lyons revealed confusion as to which vehicle Mr. Smith was traveling; Dr. Lyons indicated he could have given a more complete opinion if he had been able to talk to Mr. Smith; Dr. Lyons was not given the opportunity to see Mr. Smith; Dr. Lyons was unaware that Mr. Smith was only occasionally pain-free from 2004 up until this 2006 accident; and Dr. Lyons believed that headrests played a factor, however, he never examined the type of headrests contained in Mr. Smith's vehicle.

{¶43} The jury instead chose to believe the following: this was a low-speed accident which only caused minor scuffing to both vehicles; Mr. Smith did not complain of injury or discomfort at the scene; two years before this accident, Mr. Smith had cervical fusion performed at three levels; Mr. Smith suffered from pre-existing degenerative joint disease, arthritis, and arthropathy; all of Mr. Smith's pre-existing conditions can be independent and competent producing causes of pain; Mr. Smith was only occasionally pain-free before this 2006 accident; prior to this accident, Mr. Smith was taking a pain reliever on a monthly basis; and due to the injuries Mr. Smith

sustained in his 2004 accident, he was never able to return to work and had no plans to return to work.

{¶44} Based on the facts presented, the jury did not clearly lose its way in concluding that this motor vehicle accident was not a proximate cause of any injury or damage to Mr. Smith. The court did not err in denying appellants' motion for new trial as the jury's verdict in favor of appellee was not against the manifest weight of the evidence.

{¶45} Appellants' second assignment of error is without merit.

{¶46} In their third assignment of error, appellants allege the trial court erred in giving a defense verdict form to the jury. As addressed in their second assignment of error, appellants again claim here that the expert testimony of Dr. Lyons was uncontroverted and because this was an admitted negligence motor vehicle accident, there was no evidence to support a defense verdict and it was error to give the jury a defense verdict form.

{¶47} As set forth by appellee in her brief, this court decided this very issue in *Johnson, supra*. In *Johnson*, the appellant asserted that only a single verdict form in favor of himself should have been submitted to the jury because the appellee did not rebut his expert testimony and proximate cause had been established, thereby leaving the remaining issue as damages. *Id.* at *7. This court acknowledged that it is not necessary for a defendant to present the testimony of an expert witness to rebut the testimony of a plaintiff's expert when the plaintiff failed to meet his burden of proof. *Id.* At 7-8. The appellant in *Johnson*, like appellants in the case at bar, argued that the verdict was against the manifest weight of the evidence. *Id.* at *2. This court

determined that where there is competent, substantial and credible evidence to support a verdict in favor of the defendant, instructing the jury on the issues of proximate cause and providing the jury with a verdict form for the defendant is entirely appropriate. *Id.* at *6-8.

{¶48} Pursuant to *Johnson* and for the reasons set forth in appellants' second assignment of error, there was competent, substantial and credible evidence to support a verdict in favor of appellee.

{¶49} Appellants' third assignment of error is without merit.

{¶50} For the foregoing reasons, appellants' assignments of error are not well-taken. The judgment of the Trumbull County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J., concurs,

DIANE V. GRENDELL, J., concurs in judgment only.