**[Cite as *Foust v. Smith*, 2015-Ohio-787.]**

**IN THE COURT OF APPEALS OF OHIO**
**SECOND APPELLATE DISTRICT**
**MONTGOMERY COUNTY**

| | | |
|---|---|---|
| TIMOTHY FOUST, et al. | : | |
| | : | |
| Plaintiffs-Appellees | : | Appellate Case No. 26275 |
| | : | |
| v. | : | Trial Court Case No. 12-CV-7333 |
| | : | |
| TIMOTHY E. SMITH, II, et al. | : | (Civil Appeal from |
| | : | Common Pleas Court) |
| Defendants-Appellant | : | |
| | : | |

. . . . . .

O P I N I O N

Rendered on the 6th day of March, 2015.

. . . . . .

WALTER W. MESSENGER, Atty. Reg. No. 00074132, Kisling, Nestico & Redick, LLC, 2550 Corporate Exchange Drive, Suite 101, Columbus, Ohio 43231
Attorney for Plaintiffs-Appellees, Timothy and Regan Foust

ROBERT M. O'NEAL, Atty. Reg. No. 0021351, 131 North Ludlow Street, Suite 1060, Dayton, Ohio 45402
Attorney for Defendant-Appellant, Timothy Smith II
and Defendant-Appellee, Kimberly Jenkins

. . . . . .

HALL, J.

**{¶ 1}** Timothy Smith appeals the trial court's grant of a new trial, under Civ.R.

59(A)(6), to Regan Foust on the issue of damages for Smith's admitted negligence. The jury awarded Foust damages for medical expenses but awarded him nothing for his past physical pain and suffering. Because the evidence showing some amount of past pain is undisputed and supported by competent, credible evidence, the trial court did not err by granting a new trial on the issue of pain-and-suffering damages. To that extent, we affirm.

## I. BACKGROUND

**{¶ 2}** In October 2010, Smith was driving a car when he turned left in front of the vehicle driven by Timothy Foust and in which Timothy's son Regan was a passenger. The photographs of the vehicles demonstrate a substantial collision. The Fousts' driver's side airbag deployed; their car does not have a passenger-side airbag. Regan was not wearing his seatbelt.[1] There was testimony that Regan's head hit the windshield and his knee hit the dash. Regan was taken to Miami Valley Hospital to be checked out, and he was released the same day. Both cars had to be towed from the scene.

**{¶ 3}** Regan had had surgery on his left shoulder four days before the collision. When he saw his surgeon about a week after the collision, he complained of pain in his left shoulder, left knee, elbow, and neck. A few days later, Regan saw a chiropractor to whom Regan complained of headaches and pain in his neck, back, and knee.

**{¶ 4}** The Fousts filed suit against Smith and others. Smith admitted that he was negligent, and the issue of damages was tried to a jury. The jury found that Timothy Foust

---

[1] According to his father, Regan is not legally required to wear one "because he's so large * * * and also [because] of the arm condition, because it could do more damage." (Tr. 84). R.C. 4513.263(C) provides that a passenger in the front seat of an automobile is not required to wear a seat belt if the person "has an affidavit signed by a physician licensed to practice in this state under Chapter 4731. of the Revised Code or a chiropractor licensed to practice in this state under Chapter 4734. of the Revised Code that states that the person has a physical impairment that makes use of an occupant restraining device impossible or impractical."

was not injured in the collision and did not award him anything. It found that Regan, though, was injured and awarded him damages for medical expenses in the amount of $5,289.05. This amount is undoubtedly an award totaling the unreimbursed parts of the Miami Valley Emergency Specialists bill ($449.00); the Miami Valley Hospital bill ($855.05): and the Dr. Briggs chiropractic bill ($3,985.00) (See Plaintiff's Exhibit 5).[2] Several other bills were presented including those for additional chiropractic treatment beginning one year after the collision and for subsequent shoulder surgery more than two years after the collision. These other bills were not awarded by the jury. Jury interrogatory No. 3 shows that the entire amount of the award is for medical expenses. The jury interrogatory awarded Regan "$0" for past loss of ability to perform usual function and activities and "$0" for past physical pain and suffering.

**{¶ 5}** After the court read the verdicts the parties were given the opportunity for the jury to be polled. Both counsel declined and the jury was discharged. Before court was adjourned, Counsel for the Fousts orally moved for a new trial of the entire case under Civ.R. 59(A)(6), arguing that the verdict as to both of them is against the weight of the evidence. They later filed a written motion in which they focused their argument on the jury's finding that Timothy was not injured and on its apparent finding that Regan did not experience any physical pain and suffering. The trial court denied the motion as to Timothy but granted it as to Regan. The court's brief written decision states only that it "has reviewed the arguments and citations submitted by the parties, and after duly considering the matter, finds Plaintiffs' motion well-taken as to Plaintiff Regan Foust."

---

[2] In argument, counsel for the defense conceded that Regan should have gone to the hospital and should be compensated for those bills. Counsel also stated "its up to you whether to award the chiropractic bill. I have questions. You may too. But if you think it is appropriate, then it's appropriate for this accident." (T. 175)

**{¶ 6}** Smith appealed.[3]

## II. ANALYSIS

**{¶ 7}** Smith presents two assignments of error for our review. The first alleges that the trial court erred by granting Regan Foust a new trial. And the second alleges that Regan waived his objection to the interrogatory answers by failing to raise the issue before the jury was discharged.

### A. Granting a New Trial

**{¶ 8}** Civ.R. 59(A)(6) provides that a court may set aside a judgment and grant a new trial "to all or any of the parties and on all or part of the issues" if "[t]he judgment is not sustained by the weight of the evidence * * *." A judgment based on a jury's damage award is contrary to the weight of the evidence if the verdict " 'cannot be reconciled with the undisputed evidence in the case.' " *Drehmer v. Fylak*, 163 Ohio App.3d 248, 2005-Ohio-4732, 837 N.E.2d 802, ¶ 8 (2d Dist.), quoting *Bailey v. Allberry*, 88 Ohio App.3d 432, 435, 624 N.E.2d 279 (2d Dist.1993).

**{¶ 9}** Civ.R. 59 permits a new trial on "all or part of the issues." Here, the trial court did not state whether it granted a new trial on all of the issues or only some of them. Because the court refers to the parties' arguments, we look to the Fousts' written motion. There, as to Regan, the Fousts argue only that the jury's pain-and-suffering finding is against the weight of the evidence. We see no apparent problem with the other parts of his award. There is undisputed evidence in the record supporting the amount awarded for Regan's medical expenses. Regan's motion does not challenge the jury's decision not to award him anything for past loss of ability to perform usual functions and activities. Our

---

[3] Timothy Foust did not appeal.

review reveals disputed or insufficient evidence on that subject. Therefore the only issue on which the trial court properly could have granted a new trial is the issue of damages for pain and suffering. Whether the court erred by doing so is what we will consider.

**{¶ 10}** Smith contends that a trial court may not substitute its judgment for the jury's by granting a new trial merely because the jury awards an amount for medical expenses but nothing for pain and suffering. We agree. But this is not necessarily what happened here.

**{¶ 11}** The facts and issues here are very similar to those in *Drehmer v. Fylak*. In that case too, the plaintiff sought to recover damages for personal injuries suffered in an automobile collision caused by the defendant's undisputed negligence. The plaintiff claimed injury to his midsection and internal organs resulting from his seat belt.[4] A jury awarded the plaintiff amounts for medical expenses and lost wages related to the seat-belt injuries but awarded him nothing for pain and suffering, entering a finding of "$-0-" in an interrogatory response. The plaintiff moved for a new trial, and the trial court granted the motion under Civ.R. 59(A)(6). The court found that the seat-belt injury was uncontroverted and concluded that the jury's failure to award even nominal damages for pain and suffering was contrary to the weight of the evidence. The court ordered a retrial of all of the claims for relief, rejecting the defendant's request to limit the retrial to the pain-and-suffering claim.

**{¶ 12}** Fylak appealed, arguing that the trial court was not required to find that the jury's denial of a pain-and-suffering award was contrary to the weight of the evidence

[4] The plaintiff also claimed aggravation of preexisting injuries to his left shoulder. The jury did not award anything for this claim, and the issue was apparently not raised on appeal.

merely because it awarded something for medical expenses and lost wages. We agreed, but we said that the record did not reflect that the trial court necessarily held this. We pointed out that there was "ample evidence"—the plaintiff's own testimony and hospital emergency room reports—that the plaintiff experienced pain related to his seat-belt injury and that none of this evidence was contradicted. While we agreed that the jury was free to reject this evidence, we said that a plaintiff is entitled to be compensated for all of his actual losses, including any physical pain and suffering. We noted the concern that a plaintiff may be denied compensation if a jury "wholly reject[s] a claim for pain and suffering that's both undisputed and supported by competent, credible evidence." *Drehmer*, 163 Ohio App.3d 248, 2005-Ohio-4732, 837 N.E.2d 802, at ¶ 17. Civ.R 59(A)(6) helps ensure that this does not occur. *Id*. In *Drehmer*, because the evidence of some degree of pain and suffering was essentially uncontradicted, we concluded that the record showed that the trial court acted reasonably by finding that the $0 award " 'cannot be reconciled with the undisputed evidence in the case.' " *Id*. at ¶ 8, quoting *Bailey*, 88 Ohio App.3d at 435, 624 N.E.2d 279.

**{¶ 13}** Likewise in the present case, there is ample evidence that Regan incurred at least some pain as a result of the collision with Smith. Regan testified that following the collision he had headaches and pain, or more pain, in his neck, back, elbow, knee, and left shoulder. Regan's father's testimony corroborates these claims. Regan's orthopedic surgeon testified that Regan complained to him of pain in his left shoulder, left knee, elbow, and neck. The surgeon conceded that, less than a week after shoulder surgery, Regan would still be having pain in his shoulder from the surgery. But it was his opinion that it was possible that the shoulder pain that Regan complained of was caused by the

collision. The chiropractor who examined Regan after the accident testified that Regan also complained to him of pain in these areas and testified that in his opinion Regan sustained injuries to his neck, middle back, left arm, right elbow, left knee, and head as a result of the collision. The only contrary evidence comes from the orthopedist who examined Regan for the defense. He testified that Regan complained of pain in certain areas, including his neck. But the orthopedist said that he could find no evidence of injury. He stopped short, though, of saying that Regan did not have pain.

**{¶ 14}** We note too that Smith's counsel's statements at trial "support[], if only in a limited way, the trial court's finding that the jury's denial of any award at all is against the weight of the evidence, so as to order a new trial pursuant to Civ.R. 59(A)(6)," *Drehmer* at ¶ 20, just as defense counsel's statements in *Drehmer* did. Here, counsel told the jury that it should award something for pain and suffering. During opening statements, counsel said that, if the jury found injury, "some award, reasonable award for pain and suffering would be warranted." (Tr. 72). During closing statements, defense counsel told the jury that Regan was injured and that it should award something for pain and suffering:

> He did have some injury in this accident. There's no question about it, some. His ear, his neck may have been sore. He said that several times afterwards. Whether he needed the chiropractor treatment is up to you. You need to make some award for what they called pain and suffering. * * * It should be an appropriate amount. He got shook up. It's an accident. Nobody likes that. He deserves something for that.

(Tr. 176).

**{¶ 15}** Here, like in *Drehmer*, the evidence of pain in at least some degree is

undisputed and supported by competent, credible evidence. Therefore we conclude that the trial court acted reasonably by finding that the failure to award Regan some amount for pain and suffering is contrary to the weight of the evidence. The court did not err by granting a new trial on that singular issue limited to past physical pain and suffering damages proximately resulting from the collision and that are associated with or an extension of the complaints Regan made at the time of the collision, at the hospital or at and surrounding the first round of chiropractic treatment.

**{¶ 16}** The first assignment of error is overruled.

**B. Waiver**

**{¶ 17}** The second assignment of error alleges that Regan waived his objection to the jury's interrogatory answers by failing to raise the issue before the jury was discharged. Smith contends that if an award is made to a party in a general verdict but answers to interrogatories show that the award did not include a necessary type of damages, the party must object before the jury is discharged so the omission can be cured.

**{¶ 18}** It is true that an objection to inconsistent interrogatory answers is waived unless the party raises it before the jury is discharged. *O'Connell v. Chesapeake & Ohio R. Co.*, 58 Ohio St.3d 226, 229, 569 N.E.2d 889 (1991). But here the Fousts did not object to inconsistent jury interrogatories. Rather, they argued that the jury's verdict is against the weight of the evidence. Smith contends that this argument is really an objection to inconsistent jury interrogatories. We disagree. Addressing this question in *Drehmer*, we found that "the jury didn't fail to include an award for pain and suffering, but instead affirmatively rejected it in its response to the interrogatory, entering a finding of '$-0-' for

that claim." *Drehmer*, 163 Ohio App.3d 248, 2005-Ohio-4732, 837 N.E.2d 802, at ¶ 14. We agree that in retrospect it would have been better for either counsel or the court to suggest sending the matter back to the jury with instructions to award some amount for pain and suffering, but under the circumstances of the discharge of the jury and immediate motion for a new trial in this case we do not find reversible error in that regard.

**{¶ 19}** The second assignment of error is overruled.

**{¶ 20}** The trial court's order is affirmed to the extent that it orders retrial only of the issue of the past physical pain and suffering damages that Regan can prove proximately resulted from the collision and that are associated with or an extension of the complaints Regan made at the time of the collision, at the hospital or at and surrounding the first round of chiropractic treatment.

. . . . . .

FROELICH, P.J., and FAIN, J., concur.

Copies mailed to:

Walter W. Messenger
Robert M. O'Neal
Christopher Johnson
Robert Byrne
Margaret Schutte
Hon. Timothy N. O'Connell