[Cite as *Tyler v. State Farm Ins. Co.*, 2004-Ohio-1225.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ADAMS COUNTY

MARION TYLER, et al.,	:	
Plaintiffs-Appellants,	:	Case No. 03CA765
vs.	:	
STATE FARM INSURANCE CO. et al.,	:	DECISION AND JUDGMENT ENTRY
Defendants-Appellees.	:	

APPEARANCES:

COUNSEL FOR APPELLANTS: Tina R. Mills, The Law Firm of Tina R. Mills, L.L.C., 4351 Gleneste Withamsville Road, Cincinnati, Ohio 45245

COUNSEL FOR APPELLEE MICHAEL G. MILLER: John R. Haas, Ruggiero & Haas, P.O. Box 150, Portsmouth, Ohio 45662

CIVIL APPEAL FROM COMMON PLEAS COURT
DATE JOURNALIZED: 3-10-04

ABELE, J.

{¶1} This is an appeal from an Adams County Common Pleas Court judgment. The jury returned a verdict in favor of Michael G. Miller, defendant below and appellee herein, on the claims brought against him by Marion Tyler and Sonya Mangus, plaintiffs below and appellants herein.

{¶2} The following errors are assigned for review:

FIRST ASSIGNMENT OF ERROR:

"THE TRIAL COURT ERRED IN NOT INTERVIEWING A JUROR WHO ATTEMPTED DURING THE COURSE OF THE TRIAL TO RETAIN DEFENSE COUNSEL TO REPRESENT HIM IN A NON-RELATED MATTER."

SECOND ASSIGNMENT OF ERROR:

"THE INTRODUCTION OF EVIDENCE THAT THE PLAINTIFF MARION TYLER HAD THE RESIDUE OF DRUGS IN HIS SYSTEM AT THE TIME OF THE ACCIDENT WAS REVERSIBLE ERROR AS THE EVIDENCE WAS UNDULY PREJUDICIAL."

THIRD ASSIGNMENT OF ERROR:

"THE INTRODUCTION OF EVIDENCE THAT THE PLAINTIFF SONYA MANGUS HAD THE RESIDUE OF DRUGS IN HER SYSTEM AT THE TIME OF THE ACCIDENT WAS REVERSIBLE ERROR AS THE EVIDENCE WAS UNDULY PREJUDICIAL, IRRELEVANT, AND PROHIBITED CHARACTER EVIDENCE."

FOURTH ASSIGNMENT OF ERROR:

"THE JURY'S VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, AS THEY DID NOT AWARD PLAINTIFFS' [sic] COMPENSATION FOR DAMAGES THAT DEFENSE COUNSEL STIPULATED WERE REASONABLE AND WHICH WERE CLEARLY NECESSARY."

{¶3} On December 15, 1998, appellants were enroute to Lexington, Kentucky to pick-up bridesmaid's dresses for their upcoming wedding. They stopped behind a car on Route 41 in Adams County when appellee's vehicle rear-ended them.

{¶4} Appellants commenced the instant action on December 14, 2000 and charged that appellee negligently caused the accident and, as a result, they sustained "serious, debilitating and permanent injuries." Appellants asked for damages in excess of $25,000. Their complaint also set out a claim against State Farm Insurance Co. (State Farm) for compensation under an uninsured-underinsured motorist provision.[1] Appellee admitted that he negligently caused the accident, but denied liability for any damages.

[1] The complaint does not specify to whom the auto insurance policy was issued. State Farm later answered and admitted that

{¶5} The matter came on for jury trial in November, 2002. Appellants testified extensively as to their various alleged injuries and, particularly in the case of Marion Tyler, the debilitating pain that allegedly accompanied those injuries. Walter Broadnax, M.D., a physician specializing in neurology and pain management, testified that he examined Appellant Marion Tyler and found him to be permanently and totally disabled. Dr. Broadnax testified that Tyler suffered considerable pain and described his condition as "very sad."

{¶6} James Duffy, M.D., an orthopedic surgeon, examined both appellants and could find no debilitation. Dr. Duffy did not believe Tyler to be disabled or impaired, and that the pain complained of by Appellant Sonya Mangus stemmed solely from a "unique voluntary ability to grind her . . . upper back."

{¶7} Also, other evidence was adduced to cast doubt on the extent of appellants' claimed injuries. Appellee testified that the collision between the two vehicles was very minor. He described the accident simply as his truck having clipped appellants' truck. Appellee also testified that he received no injury at all from the accident. Appellant Marion Tyler admitted in his own testimony that the hospital x-rayed him, found nothing wrong, discharged him the following day and recommended that he rest and take over-the-counter Motrin.

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it had issued such a policy to Marion E. Tyler, the father of Appellant Marion Tyler.

{¶8} After three days of testimony, the jury awarded no damages to appellants. Appellants subsequently filed separate motions for new trial and for judgment notwithstanding the verdict asserting that the jury verdict should not stand for a variety of reasons. The trial court found none of their arguments to be persuasive and overruled both motions. This appeal followed.[2]

I

{¶9} Appellants' first assignment of error concerns an incident that involved a juror and defense counsel. Although there is no record of this incident in the transcript, appellee conceded in his memorandum contra motion for new trial/JNOV that a juror asked one of his attorneys for her business card. Appellee further

[2]Before we review the merits of the assignments of error, we pause to address a threshold jurisdictional problem. Neither the November 19, 2002 judgment nor the April 3, 2003 entry disposed of appellants' claim against State Farm. We note that this Court has appellate jurisdiction to review final appealable orders. See Section 3(B)(2), Article IV of the Ohio Constitution. A final order is one which, inter alia, determines the entire action. See R.C. 2505.02(B)(1). Because appellants' claim against State Farm is still pending, and because neither of the aforementioned judgments contain the "no just reason for delay" language of Civ.R. 54(B), it appears that the judgment appealed herein is neither final nor appealable. See Chef Italiano Corp. v. Kent State Univ. (1989), 44 Ohio St.3d 86, 541 N.E.2d 64. We note, however, that the claim against State Farm is based on an uninsured-underinsured motorist provision in an auto insurance policy. Consequently, State Farm would have no liability on that provision unless appellee were found liable for damages and either had no coverage or inadequate coverage. Because the jury returned a verdict in favor of appellee, State Farm has no liability under its policy. Thus, the claim against State Farm has been rendered moot and gives us appellate jurisdiction to review this matter. See General Accident Ins. CO. v. Insurance Co. of America (1989), 44 Ohio St.3d 17, 21, 540 N.E.2d 266; Wise v. Gursky (1981), 66 Ohio St.2d 241, 421 N.E.2d 150, at the syllabus.

stated that his attorney immediately indicated that she could not speak to the juror and then brought the matter to the trial court's attention. The record does not show that any further action was taken.

{¶10} Although appellants did not (1) object, (2) ask the trial court to interview the juror involved, (3) or request a mistrial[3], appellants nevertheless argue on appeal that the court should have interviewed the juror in order to preserve "the integrity of the judicial system." The court's failure to do so, they conclude, constitutes reversible error. We disagree.

{¶11} First, as we note above, nothing in the transcript shows precisely what occurred during the course of the proceedings. The onus is on appellants to either make a record in the transcript or to provide us with an App.R. 9(C) statement. Otherwise, there is nothing for us to review and we have no choice but to presume the correctness of the proceedings. See Alford v. Nelson (Oct. 12, 1994), Jackson App. No. 93CA720; also see State v. Polick (1995), 101 Ohio App.3d 428, 431, 655 N.E.2d 820; State v. Remy, Ross App. No. 03CA2664, 2003-Ohio-2600 at ¶ 29.

{¶12} Second, appellants concede in their brief that they did not object to the manner in which the trial court handled the matter. When litigants fail to object at a time when a trial court could correct an error, they are generally deemed to have waived that error for purposes of appeal. See generally State v. Johnson

[3] This incident was raised as one of the bases for the motion for new trial and JNOV.

(Mar. 6, 1995), Athens App. No. 93CA1601; State v. Wiseman (Oct. 22, 1985), Jackson App. No. 498. Although the plain error doctrine can apply in civil contexts when the error "seriously affects the basic fairness, integrity, or public reputation of the judicial process," see Goldfuss v. Davidson, 79 Ohio St.3d 116, 122-23, 679 N.E.2d 1099, we find nothing to indicate that it should be applied in this case. Appellants do not argue that they suffered prejudice -- only that the trial court should have interviewed the juror involved. Without some showing of prejudice, or a more complete record of what transpired below, we should not invoke the plain error doctrine.

{¶13} Appellants counter by citing State v. Phillips (1995), 74 Ohio St.3d 72, 88, 656 N.E.2d 643, wherein the Ohio Supreme Court held that," [w]hen a trial court learns of an improper outside communication with a juror, it must hold a hearing to determine whether the communication biased the juror." Their reliance on that case is misplaced. We note that Phillips is a criminal, capital, case. The Ohio Supreme Court quoted the United States Supreme Court to the effect that, "[i]n a criminal case, any private communication * * * with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial." Id. (citations omitted). A criminal capital case involves heightened due process considerations when compared to an ordinary civil case for money damages. Appellants have not cited to us any authority for the proposition that trial

courts must automatically conduct such inquiries in civil cases and we have found nothing to that effect in our own research.

{¶14} Moreover, as appellee aptly notes in his brief, this Court is not inclined to view favorably the tactical use of alleged juror misconduct to void a subsequent jury verdict that is not to a litigant's liking. In Bennett v. Gearhart (Jun. 17, 1996), Ross App. No. 94CA2073, we faced a similar instance of alleged juror misconduct for which no objection was lodged when the alleged misconduct occurred. The alleged misconduct was, however, cited on appeal as a reason for reversal. We wrote:

> "the lower court noted in its entry . . . that "the note was discussed in chambers by the court and counsel" and that "*[a]ll counsel agreed* that the note called for no further action by the court and no further action was taken ..." (Emphasis added.) Cross-appellants agreed that no further action needed to be taken as a result of the incident at the jury view. They cannot come back now, after a verdict was returned against them, and assert that some sort of action should have been taken or that the failure to take such action warrants a new trial. Cross-appellants expressly waived any irregularity on this point and they are stuck with that waiver. Even if they had not expressly waived the issue in that manner, we still would hold that their waiver was implicit. The issue was apparently discussed by the court and counsel just prior to closing arguments being given. If cross- appellants were concerned about the possible misconduct of the juror, they could have gone on record at that time and made their objections. They failed to do so and thus waived the issue. A timely objection to juror misconduct must be made. Counsel cannot be permitted to go forward in silence hoping that the verdict will be favorable to him and then, if it is unfavorable, come in and procure a new trial on that ground." (Emphasis added.) (Citations omitted.)

{¶15} It is unclear in the case sub judice whether appellants expressly agreed that no further action needed to be taken or whether they acquiesced in that decision. In either case, however, the result is the same - the appellants waived any potential error.

If appellants were concerned about the possible taint of a juror they should have objected and/or asked for a discharge of that juror during the trial.

{¶16} For all these reasons, we find no merit in the first assignment of error and it is accordingly overruled.

II

{¶17} We jointly consider appellants' second and third assignments of error in which they argue that the trial court erred by allowing into evidence testimony that they each had drug residue in their system at the time of the accident.

{¶18} In the case of Marion Tyler, we note that appellants themselves "opened the door" to this evidence. During the direct examination of Dr. Broadnax, the appellants' witness testimony was elicited that Tyler's urine sample contained residues of opiates and marijuana. Appellants cannot object to admission of this evidence when it was first introduced during the direct examination of their own witness. Insofar as Sonya Mangus is concerned, she admitted during cross-examination that opiates were found in her system. We find no objection and, thus, no reversible error in its admission. See Evid.R. 103(A)(1).

{¶19} We note that appellants did in fact file a pre-trial motion in limine to exclude this evidence. However, a trial court's denial of that motion is not dispositive. The grant or denial of a motion in limine does not preserve any error for review. State v. Hill (1996), 75 Ohio St.3d 195, 202-203, 661 N.E.2d 1068. In order to preserve the error, the evidence must be

presented at trial, and a proper objection lodged. State v. Brown (1988), 38 Ohio St.3d 305, 528 N.E.2d 523, at paragraph three of the syllabus; State v. Grubb (1986), 28 Ohio St.3d 199, 503 N.E.2d 142, at paragraph two of the syllabus. An appellate court will then review the correctness of the trial court's ruling on the objection rather than the in limine ruling. See Wray v. Herrell (Feb. 24, 1994), Lawrence App. No. 93CA08; also see State v. Hapney, Washington App. Nos. 01CA30 & 01CA31, 2002-Ohio-3250, at ¶ 55.

{¶20} In summary, the appellants allowed the admission of evidence of drug residue either through acts of commission (questioning Dr. Broadnax) or acts of omission (failing to object when Sonya Mangus was asked about the drugs). Either way, we find no error in the admission of this evidence.

{¶21} For all these reasons, we hereby overrule appellants' second and third assignments of error.

III

{¶22} Appellants fourth assignment of error asserts that the jury verdict that awarded them no damages is against the manifest weight of the evidence.

{¶23} At the outset we note that appellee admitted negligence and that the parties stipulated the medical expenses charged to appellants were reasonable. The sole purpose of the trial was to determine whether appellants' treatment was necessary and whether they deserved compensation for the injuries they claimed to have suffered. The jury found that appellants' were not entitled to

compensation. They argue that this finding is against the manifest weight of the evidence. We disagree.

{¶24} Our review of the record reveals that appellants adduced considerable evidence regarding their alleged injuries and, particularly in the case of Marion Tyler, the severe and debilitating pain that accompanied those injuries. Dr. Broadnax also gave testimony that Tyler suffers considerable pain and is permanently disabled. By the same token, however, the record reveals that considerable evidence was adduced that appellants were not seriously injured.

{¶25} The gist of appellee's testimony was that the accident was little more than a "fender-bender" which should not have produced the nature of the injuries that appellants allegedly suffered. Appellee further testified that he received no injuries as a

{¶26} result of the collision. Dr. Duffy testified that Tyler was neither disabled nor impaired, and that Mangus' pain stemmed solely from her "voluntary" ability to grind her shoulders.[4] Steven S. Wunder, M.D., testified that an MRI performed on Tyler showed no nerve damage. Although Dr. Wunder conceded that Tyler might be experiencing pain even if the MRI was negative, he also opined that Tyler's complaints could also stem from the pending litigation.

{¶27} Perhaps the most damaging evidence against appellants came from their own testimony. After Sonya Mangus testified as to

[4] Mangus disputed this opinion and testified that the grinding in her shoulder was not voluntary.

the deleterious effects the accident had on her fiance, defense counsel cross-examined her regarding similar testimony she gave in a deposition for litigation stemming from a 1997 auto accident. This suggested either that Tyler's injuries originated with the earlier accident (rather than this one) or that their complaints were fabricated and repeated for purposes of litigation. Tyler was also cross-examined with a deposition from his prior litigation with similar results. In several instances, Tyler asserted that he suffered from the same sort of injuries in 1997 that he was complaining of in this case. When questioned about that, Tyler became confused and gave answers which appear obfuscatory. Moreover, when he related details from his prior accident, Tyler explained that he was released from the hospital after only two days but lay in bed recuperating for months – interrupted only by an occasional sojourn at water skiing.

{¶28} Tyler further testified that his prior accident in Kentucky stemmed from a tread that came off a tank like vehicle (half-track) driven by an Iraqi arms dealer. He testified that he quickly settled that particular lawsuit, however, because the Iraqi arms dealer "blew up his boat" with "C-4" explosives and Tyler was afraid that he would also try and kill him. Tyler also testified at one point about having nightmares caused by "minority groups that were just crazy."

{¶29} Judgments supported by some competent and credible evidence will not be reversed on appeal as being against the manifest weight of the evidence. Shemo v. Mayfield Hts. (2000), 88

Ohio St.3d 7, 10, 722 N.E.2d 1018; Vogel v. Wells (1991), 57 Ohio St.3d 91, 96, 566 N.E.2d 154; C.E. Morris Co. v. Foley Construction Co. (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, at the syllabus. This standard of review is highly deferential and even "some" evidence is sufficient to sustain the judgment and to prevent a reversal. See Barkley v. Barkley (1997), 119 Ohio App.3d 155, 159, 694 N.E.2d 989; Willman v. Cole, Adams App. No. 01CA725, 2002-Ohio-3596, ¶¶ 24; Simms v. Heskett (Sep. 18, 2000), Athens App. No. 00CA20.

{¶30} We also note that questions concerning the weight of the evidence and the credibility of witnesses are to be determined by the trier of fact. Cole v. Complete Auto Transit, Inc. (1997), 119 Ohio App.3d 771, 777-778, 696 N.E.2d 289; Jacobs v. Jacobs, Scioto App. No. 02CA2846, 2003-Ohio-3466 at ¶ 31; GTE Telephone Operations v. J & H Reinforcing & Structural Erectors, Inc., Scioto App. No. 01CA2808, 2002-Ohio-2553, at ¶ 10. The underlying rationale for deferring to the trier of fact on these issues is that the trier of fact is better able than this Court to view the witnesses, to observe their demeanor, gestures and voice inflections and to use those observations in weighing credibility. See Myers v. Garson (1993), 66 Ohio St.3d 610, 615, 614 N.E.2d 742; Seasons Coal Co. v. Cleveland (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273. Thus, a jury is free to believe all, part or none of the testimony of any witness who appears before it. Rogers v. Hill (1998), 124 Ohio App.3d 468, 470, 706 N.E.2d 438; Stewart v. B.F. Goodrich Co. (1993), 89 Ohio App.3d 35, 42, 623 N.E.2d 591; also

see State v. Nichols (1993), 85 Ohio App.3d 65, 76, 619 N.E.2d 80; State v. Harriston (1989), 63 Ohio App.3d 58, 63, 577 N.E.2d 1144.

{¶31} In the case sub judice, although both appellants deny fabricating their injuries for purposes of these proceedings, it is clear from the verdict that the jury found little credibility in their testimony and did not believe that they were entitled to any compensation. We find sufficient evidence in the record to support that finding and we will not overturn the jury's verdict.

{¶32} We also note two final points in closing. First, although appellants claim that they are at least entitled to reimbursement for emergency costs incurred at the scene of the accident, the jury may well have concluded that the accident was so minor, and the alleged injuries so fabricated, that even emergency care expenses were not necessary. We will not second-guess the jury's judgment on that issue. Furthermore, appellants did not summarize their expenses for the jury and did not ask for a damage award. Instead, they left "it up to them" (the jury) to arrive at an appropriate amount.

{¶33} We also point out that this is not a case in which appellants claim that an injury from the previous accident (involving the Iraqi arms dealer) was aggravated by this accident. Rather, the gist of appellants' testimony was that Tyler had recovered from the injuries he allegedly received in that incident. Moreover, during a colloquy on a motion for directed verdict, appellants made the following representation to the court:

> "Eddie's position was and is, and will continue to be, that his injuries are a result of the 1998 automobile collision,

> and not based on an aggravation of a pre-existing. Eddie testified under oath that his injuries were different from the 1997 collision to the 1998 collision."

Also, no expert testimony established that any prior injuries were aggravated and the jury received no instructions on the issue. Thus, the jury could not award damages on that basis even if they believed that Appellant Marion Tyler did suffer an injury apart from the prior accident.

{¶34} For all these reasons, we find no merit in the fourth assignment of error and it is accordingly overruled.

{¶35} Having reviewed the errors assigned and argued in appellants' brief, we hereby affirm the trial court's judgment.

JUDGMENT AFFIRMED.

Kline, P.J. & Harsha, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele
Judge