

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

TWILA KELLOG	:	JUDGES:
	:	Hon. Sheila G. Farmer, P.J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	Hon. Julie A. Edwards, J.
-vs-	:	
	:	
TYRA PHILPOTT	:	Case No. 2009CA00010
	:	
Defendant-Appellant	:	<u>O P I N I O N</u>

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 2008CV03157
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JUDGMENT:	Affirmed
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DATE OF JUDGMENT ENTRY:	September 21, 2009
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APPEARANCES:

For Plaintiff-Appellee

STACIE L. ROTH
236 Third Street, SW
Canton, OH 44702

For Defendant-Appellant

DANIEL J. FUNK
ANDREA K. ZIARKO
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North Canton, OH 44720

Farmer, P.J.

{¶1} On March 20, 2005, appellant, Tyra Philpott, and appellee, Twila Kellogg, were involved in a motor vehicle accident. Appellant turned left into appellee's path, causing a collision. Appellee sustained injuries.

{¶2} On July 17, 2008, appellee filed a negligence complaint for her personal injuries resulting from the accident. A jury trial commenced on November 17, 2008. The jury found in favor of appellee in the amount of \$3,429.98 for medical expenses, and zero for lost wages, pain and suffering, loss of enjoyment of life, future pain and suffering, and future loss of enjoyment of life.

{¶3} On December 2, 2008, appellee filed a motion for judgment notwithstanding the verdict or, in the alternative, additur or new trial on the issue of damages. By judgment entry filed December 30, 2008, the trial court granted appellee a new trial, finding the verdict was inadequate and not sustained by the weight of the evidence presented.

{¶4} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

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{¶5} "THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING APPELLEE A NEW TRIAL."

I

{¶6} Appellant claims the trial court erred in granting appellee's motion for new trial. Specifically, appellant claims the jury award was supported by credible evidence and was not a result of passion or prejudice. We disagree.

{¶7} Civ.R. 59(A)(4) and (6) state the following:

{¶8} "(A) A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds: (4) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice; (6) The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case."

{¶9} To support a finding of passion and prejudice, the record must demonstrate that the jury's assessment of the damages was so overwhelmingly disproportionate that it shocks the sensibilities of reasonable people. *Pena v. Northeast Ohio Emergency Affiliates, Inc.* (1995), 108 Ohio App.3d 96, 104. In assessing whether a verdict is contrary to the weight of the evidence, trial courts are vested with wide discretion to determine whether a manifest injustice has been done. *Rohde v. Farmer* (1970), 23 Ohio St.2d 82. Generally, a new trial should be granted pursuant to Civ.R. 59(A)(6) where it appears that the jury awarded inadequate damages because it failed to consider an element of damages established by uncontroverted expert testimony. *Baum v. Augenstein* (1983), 10 Ohio App.3d 106.

{¶10} Our standard of review on a motion for new trial is abuse of discretion. Civ.R. 59. In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217. We must look at the totality of the circumstances in the case sub judice, and determine whether the trial court acted unreasonably, arbitrarily or unconscionably.

{¶11} In its judgment entry filed December 30, 2008, the trial court stated the following in finding a new trial was warranted:

{¶12} "Upon full review, the Court finds that the jury's award of \$3,429.00 is inadequate and is not sustained by the weight of the evidence presented. The verdict is not commensurate with the testimony regarding Plaintiff's past wage loss, pain and suffering, emotional distress, and future damages. Therefore, the Court finds that Plaintiff is entitled to a new trial."

{¶13} Following the accident, appellee sought the services of Dr. Brent Ungar, DC, a chiropractor. From the evidence presented, it is apparent that the jury rejected Dr. Ungar's testimony. The jury awarded appellee \$3,429.98 which did not even cover her remaining medical bills when taking her total medical bills and subtracting out Dr. Ungar's bill ($\$10,323.05 - 6,683.97 = \$3,639.08$). T. at 177.

{¶14} Appellant relies on a brief exchange during Dr. Ungar's cross-examination to support her position that a new trial is not warranted:

{¶15} "Q. Then the x-rays of the lumbar spine shows mild dextro scoliosis and that was not caused by the accident, is it?

{¶16} "A. Yes, it could be due to severe muscle spasm you can get a mild dextro scoliosis, a curvature, an antalgic position from acute muscle spasm.

{¶17} "Q. Is it your opinion that it is?

{¶18} "A. I said it could be. My opinion is that when I did my evaluations she had spasms of the back. Now, he would have to see a before and after x-ray before the trauma to determine if it was from muscle spasm or not. So this particular case all he's stating is there is a curve of the spine, could have been her standing there in the

spasmodic form leaning to the side to give us that curve. That's consistent with my findings when I examined her." T. at 184.

{¶19} However, after a review of the record, we find the trial court's decision that "the verdict is not commensurate with the testimony regarding Plaintiff's past wage loss, pain and suffering, emotional distress, and future damages" to be correct. Even discounting all of Dr. Ungar's testimony, there is unrefuted evidence in the record to support an award for wage loss, pain and suffering, emotional distress, and future damages.

{¶20} Appellee received a laceration to her forehead from hitting the steering wheel upon impact. T. at 210. She was treated at the emergency room and released. T. at 212-213. The next morning, appellee was unable to move her neck due to stiffness. T. at 215. While at work, "blood was coming out of my tear ducts and it was all coming down through my face." T. at 214-215. She returned to the hospital on two occasions. T. at 215, 218. She was ultimately diagnosed with a concussion and neck and back sprains and strains. T. at 148, 219. Although she returned to work, appellee became stiffer and developed constant headaches. T. at 223. She described the pain as follows:

{¶21} "A. I had constant 24/7 headaches for weeks. I mean it seemed like - - and I was trying to work because it was getting more stressful at work because every day and what I had learned the day before wasn't there. So I would have to go all over that and do what we were going to do that day plus I am continuing to do my job. And it just became so overwhelming to me I couldn't do it.

{¶22} "Q. You couldn't do your job?

{¶23} "A. No.

{¶24} "Q. What part of the job could you not do?

{¶25} "A. It was just like keeping up. I couldn't work as fast as I had been doing previously. I couldn't keep up.

{¶26} "Q. By that point, Twila, about how long had you been at Altercare at that point?

{¶27} "A. For about 16 months.

{¶28} "Q. Was this just a new area where you were just now learning a new type of training?

{¶29} "A. Yes.

{¶30} "Q. For the Medicare and Medicaid billing?

{¶31} "A. Yes.

{¶32} "Q. I don't want to minimize this, but aside from the headaches what you were having 24/7, can you give us an idea what, if any, neck pain you were having?

{¶33} "A. I had a lot of neck pain and pain through my shoulder blade, right next to my shoulder blade. And it didn't take very long for the pain in my lower back to go away with Dr. Ungar. It was longer for the shoulder pain and that. But the neck pain just - - I still have it all the time.

{¶34} "Q. Were there things, Twila, that in between the time period you were seeing Dr. Ungar and you are seeing the therapist and getting the treatment that you couldn't do at all?

{¶35} "A. Well, I wasn't trying to do stuff that I had done before because I wasn't able to. I was in too much pain. Even when I got better and I started trying to do the

things I was doing before I had to modify the way I did things because I couldn't do the lifting and I couldn't do that kind of stuff like I did before.

{¶36} "Q. Can you give us an example how you would modify things?

{¶37} "A. Well, I'm an avid gardener. Like I said, I'm a day lily hybridizer and I do a lot of gardening. And before it was no big problem. I have a big wheelbarrow. I could fill that thing up, wheel it all over the yard, up the hill, down the hill clear full. It was no problem because I worked in the steel mill. All my life I was used to heavy lifting. I was still lifting 100 pounds when I left the steel mill in '02. And after this accident I couldn't do that. I put a little bit in the wheelbarrow and I'd wheel it around just to get the gardening work done.

{¶38} "Q. What about the headaches? Would they prevent from (sic) you from doing anything other than what we talked about at work?

{¶39} "A. Well, it's like the computer would bother me. I would get on the computer because I did a lot of computer work at home too because I'm a photographer and I do a lot of pictures and photos with my grandkids and I work with them on Photoshop. So that would make the headaches worse if I stayed on there trying to do that kind of stuff." T at 222-224.

{¶40} Appellee had a lot of trouble trying to figure out a way to continue gardening so she could do it without being in constant pain. T. at 225. She testified, "That's what I dreamed about all my life, retiring and doing my garden." Id. At the time of trial, over three years after the accident, appellee testified her "neck has never stopped bothering me. I have - - it's just there. Something I live with every day." T. at

228. Although her neck pain has improved since the accident, "it's still a problem for me. It's not like it was before, it's not gone." *Id.*

{¶41} Shortly after the accident, appellee left her job at Altercare because she "just couldn't handle it any more. I was getting further and further behind in my work. My work was piling up and it just became so stressful with everything that I couldn't do it." *Id.* Appellee had to turn down a job at Republic Steel because she could not do the "lifting at that time that was required for that job." *T.* at 226. She eventually got a job at Timken that did not require any lifting. *Id.*

{¶42} All of this testimony is basically unrefuted. It is clear the jury lost its way and failed to consider wage loss, pain and suffering, emotional distress, and future damages. Appellee clearly suffered in the days following the accident, and continues to experience pain to this day.

{¶43} Upon review, we find the trial court did not err in granting appellee a new trial.

{¶44} The sole assignment of error is denied.

{¶45} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed.

By Farmer, P.J.

Wise, J. and

Edwards, J. concur.

s/ Sheila G. Farmer

s/ John W. Wise

s/ Julie A. Edwards

JUDGES

SGF/sg 0825

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

TWILA KELLOG

Plaintiff-Appellee

-vs-

TYRA PHILPOTT

Defendant-Appellant

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JUDGMENT ENTRY

CASE NO. 2009CA00010

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio is affirmed. Costs to appellant.

s/ Sheila G. Farmer

s/ John W. Wise

s/ Julie A. Edwards

JUDGES