[Cite as *Barstow v. Evans*, 2010-Ohio-1153.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CAROLYN BARSTOW

Plaintiff-Appellant

-vs-

DONALD EVANS

Defendant-Appellee

JUDGES:
Hon. Julie A. Edwards, P. J.
Hon. Sheila G. Farmer, J.
Hon. John W. Wise, J.

Case No. 2009 CA 00199

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 2008 CV 03568
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 22, 2010

APPEARANCES:

For Plaintiff-Appellant

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Wise, J.

{¶1} Plaintiff-Appellant Carolyn Barstow appeals the July 6, 2009, Judgment Entry of the Stark County Court of Common Pleas denying her motion for a new trial.

{¶2} Defendant-Appellee is Donald Evans.

STATEMENT OF THE FACTS AND THE CASE

{¶3} This case arises out of an accident which occurred on or about August 24, 2006. On that date, Plaintiff-Appellant Carolyn Barstow and a friend accompanied Defendant-Appellee Donald Evans and a friend to a country-western show in Canton, Ohio. When the show was over, Appellee Evans got the car and pulled up to the front of the building to pick up the two women. Before Appellant Barstow was completely in the vehicle, Appellee began to pull away from the curb and the rear passenger side tire rolled over Appellant's right foot causing bodily injury. (T. at 163). Thereafter, Appellee drove Appellant to Medina General Hospital where she was diagnosed as having a fractured ankle. (T. at 165).

{¶4} On August 15, 2008, Plaintiff-Appellant Carolyn Barstow filed a Complaint for personal injury in the Stark County Court of Common Pleas.

{¶5} The case proceeded to jury trial on June 1, 2009. Appellee stipulated to negligence and the jury was asked to quantify damages.

{¶6} During the two days of trial, the jury heard testimony from seven witnesses for Appellant, including Appellant’s treating physician and Appellant herself. The jury also heard testimony from Appellee Donald Evans.

{¶7} On June 2, 2009, the jury returned a verdict for Defendant-Appellee with 6 of the 8 jurors signing the verdict form. Along with the verdict for the Defendant form, 6

of the 8 jurors signed a jury interrogatory form which sets forth the following amounts due to Plaintiff-Appellant from Defendant-Appellee:

{¶8} Pain and suffering to date: $2,000.00.

{¶9} Medical expenses to date: $14,000.00.

{¶10} Loss of enjoyment of life to date: $3,000.00.

{¶11} Future pain and suffering: zero.

{¶12} Future loss and enjoyment of life: $6,000.00.

{¶13} Total: $25,000.00.

{¶14} Prior to the verdict being read, the trial court brought the inconsistency of the general verdict form being in favor of the Defendant to the attention of counsel. Both sides consented to the trial court entering judgment in favor of Plaintiff-Appellant in the amount awarded by the jury. No objection was raised.

{¶15} On June 16, 2009, Plaintiff-Appellant filed a Motion for Additur, or in the Alternative, Motion for New Trial.

{¶16} On July 6, 2009, the trial court overruled Plaintiff-Appellant's Motion for New Trial.

{¶17} It is from this decision Appellant now appeals, assigning the following errors for review.

ASSIGNMENTS OF ERROR

{¶18} "I. THE TRIAL COURT SHOULD HAVE ORDERED A NEW TRIAL SINCE THE JURY WAS INSTRUCTED TO FIND FOR THE PLAINTIFF BUT INSTEAD COMPLETED A GENERAL VERDICT FORM FOR THE DEFENDANT.

{¶19} "II. THE TRIAL COURT SHOULD HAVE ORDERED A NEW TRIAL SINCE THE JURY'S AWARD FOR PAIN AND SUFFERING AND LOSS OF ENJOYMENT OF LIFE WAS TOTALLY INADEQUATE AND WAS A RESULT OF PASSION AND PREJUDICE AGAINST PLAINTIFF."

I., II.

{¶20} We shall address Appellant's assignments of error together as they both assign error to the trial court's denial of her motion for a new trial.

{¶21} Civ.R. 59 provides in pertinent part:

{¶22} "**(A) Grounds**

{¶23} "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:

{¶24} "(1) Irregularity 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;

{¶25} "(2) Misconduct of the jury or prevailing party;

{¶26} "(3) Accident or surprise which ordinary prudence could not have guarded against;

{¶27} "(4) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice;

{¶28} "(5) Error in the amount of recovery, whether too large or too small, when the action is upon a contract or for the injury or detention of property;

{¶29} "(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;

{¶30} "(7) The judgment is contrary to law;

{¶31} "(8) Newly discovered evidence, material for the party applying, which with reasonable diligence he could not have discovered and produced at trial;

{¶32} "(9) Error of law occurring at the trial and brought to the attention of the trial court by the party making the application.

{¶33} "In addition to the above grounds, a new trial may also be granted in the sound discretion of the court for good cause shown."

{¶34} "This court reviews a trial court's judgment on a Civ.R. 59 motion for new trial under the abuse of discretion standard." *Effingham v. XP3 Corp.,* 11th Dist. No. 2006-P-0083, 2007-Ohio-7135 at paragraph 18. The Ohio Supreme Court has consistently held the term "abuse of discretion" implies that the court's attitude is unreasonable, arbitrary or unconscionable. See, e.g. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶35} Thus, in reviewing a motion for a new trial, we do so with deference to the trial court's decision, recognizing that "the trial judge is better situated than a reviewing court to pass on questions of witness credibility and the surrounding circumstances and atmosphere of the trial." *Malone v. Courtyard by Marriott L.P.* (1996), 74 Ohio St.3d 440, 448.

{¶36} Initially, Appellant argues that a new trial should have been granted based on inconsistency between the general verdict form and the jury interrogatories. Upon

review, as set forth above, we find that the trial court corrected the inconsistency by entering judgment in favor of Appellant. Appellant consented to this action by the trial court. Furthermore, Appellant raised no objection. A fundamental rule of appellate procedure is that a reviewing court will not consider as error any issue that a party failed to bring to the trial court's attention. *Schade v. Carnegie Body Co.* (1982), 70 Ohio St. 2d 207, 210, 436 N.E.2d 1001. Thus, a party waives the right to contest an issue on appeal if that issue was in existence prior to or at the time of trial and the party did not raise it at the appropriate time in the trial court below. *Van Camp v. Riley* (1984), 16 Ohio App. 3d 457, 463, 476 N.E.2d 1078. We therefore find that Appellant waived this issue.

{¶37} Appellant also argues that the low awards for pain and suffering and loss of enjoyment of life in the case sub judice were the result of passion and/or prejudice against Appellant for suing a friend. However, Appellant, in her brief argument for this assignment, does not state any support for this proposition other than "the amount awarded by the jury is so inadequate that it appears to be the result of passion or prejudice and therefore, a new trial is warranted." (Appellant's Brief at 7).

{¶38} Upon review, we find that the jury in this case awarded Appellant the full amount of her medical expenses, and while Appellant argues that $2,000.00 for past pain and suffering, $3,000.00 for past loss of enjoyment of life and $6,000.00 for future loss of enjoyment is inappropriately low, we cannot find that the jury's verdict is not supported by the evidence.

{¶39} The jury in this case had before it evidence that Appellant had had a stroke and a number of leg and hip operations. Her stroke left her with weakness on

her right side, which included her right foot. The jury therefore could have found that Appellant's pre-existing medical conditions were the actual cause of any future medical problems and expenses and not the accident herein.

{¶40} As a reviewing Court, we must presume the jury has followed the instructions given to it by the trial court. *State v. Fox* (1938), 133 Ohio St. 154, 12 N.E.2d 413, and must presume a jury verdict is based upon the evidence presented at trial and not based upon the influence of passion or prejudice. *Prudential Insurance Company of America v. Hashman* (1982), 7 Ohio App.3d 55.

{¶41} Having found that there was competent, credible evidence to support the jury's award, we do not find that the trial court erred in denying Appellant's motion for a new trial.

{¶42} Appellant's first and second assignments of error are overruled.

{¶43} For the foregoing reasons, the judgment of the Court of Common Pleas, Stark County, Ohio, is affirmed.

By: Wise, J.

Edwards, P. J., and

Farmer, J., concur.

/S/ JOHN W. WISE_____

/S/ JULIE A. EDWARDS_____

/S/ SHEILA G. FARMER_____

JUDGES

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

CAROLYN BARSTOW	:	
	:	
Plaintiff-Appellant	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
DONALD EVANS	:	
	:	
Defendant-Appellee	:	Case No. 2009 CA 00199

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

Costs assessed to Appellant.

/S/ JOHN W. WISE_____

/S/ JULIE A. EDWARDS_____

/S/ SHEILA G. FARMER_____

JUDGES