[Cite as *Myzk v. Miller*, 2015-Ohio-1196.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

FLOYD MYZK AND VERDA CINDIA,	:	JUDGES:
	:	
	:	Hon. William B. Hoffman, P.J.
Plaintiffs - Appellants	:	Hon. Sheila G. Farmer, J.
	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	
CHRISTAN MILLER	:	Case No. 2014 AP 05 0019
	:	
	:	
Defendant - Appellee	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Tuscarawas County Court of Common Pleas, Case No. 2012 CT 04 0322
JUDGMENT:	Affirmed
DATE OF JUDGMENT:	March 25, 2015

APPEARANCES:

For Plaintiffs-Appellants	For Defendant-Appellee
EUGENE H. NEMITZ, JR. 136 2nd Street N.E. New Philadelphia, OH 44663	WILLIAM M. SHACKELFORD KELLY M. JACKSON 625 Alpha Drive - Box #011B Highland Heights, OH 44143

Baldwin, J.

{¶1} Plaintiffs-appellants Floyd Myzk and Verda Cindia appeal from the December 19, 2013 Judgment Entry of the Tuscarawas County Court of Common Pleas memorializing the verdict in favor of defendant-appellee Christan Miller and the March 4, 2014 Judgment Entry overruling plaintiffs-appellants' Motions for Judgment Notwithstanding the Verdict under Civ.R. 50(B) and for a New Trial under Civ.R. 59(A)(6) and (7).

STATEMENT OF THE FACTS AND CASE

{¶2} On April 12, 2010, the vehicle in which appellants were traveling was rear-ended by a vehicle driven by appellee Christan Miller. Appellants filed a complaint against appellee. Appellant Myzk alleged that he had injuries to his neck, cervical, thoracic and lumbar spine while appellant Cindia alleged that she had injuries to her cervical spine, thoracic spine and lumbar spine. The matter proceeded to a jury trial on the issue of damages only because liability was admitted.

{¶3} At trial, testimony was adduced that appellee told the Trooper who investigated the accident that she was going 30 miles an hour at the time of the accident. The Trooper testified that appellant Myzk, when asked if he was injured, said that he did not think so but was sore.

{¶4} Appellant Cindia, who was eighty years old at the time of trial, testified that her head hit the head rest and that her head and neck hurt, but that she declined to go to the hospital after the accident. She testified that she indicated that she would go to her doctor. Appellant Cindia testified that the next day she was unable to get out of bed because her shoulders, neck and back were sore. She further testified that the second day after the accident she also was unable to get out of bed. According to appellant

Cindia, she called her doctor, Dr. Joseph Lach, the fifth or sixth day after the accident and saw him seven days after the accident. She testified that he prescribed her pain medication and that she had arthritis before the accident, but that the accident made it worse.

{¶5} After Dr. Lach, appellant Cindia saw Dr. Michael Brown, a chiropractor, who she had seen previously for back and neck troubles. Appellant Cindia testified that she saw Dr. Brown after the accident because she was very sore and that, after a while, she started getting headaches from the accident. Appellant Cindia testified that she saw Dr. Brown frequently right after the accident, but that the visits had decreased. She stated that the treatments that he gave her helped.

{¶6} Appellant Cindia also testified that the injuries affected her ability to lift things and to mop. She indicated that the accident had aggravated her back, neck and head. According to appellant Cindia, she took three trips by car after the accident to, among other places, Iowa, Mt. Rushmore and Florida. One of the trips was the October after the accident and the trip to Florida was in December of 2012.

{¶7} On cross-examination, appellant Cindia testified that she was able to get out of the car after the accident and walk back and talk to appellee. She admitted that she had no emergency treatment at the scene of the accident and that she had taken a second trip to Florida in 2011. When asked if she was still able to get together with her friends for lunch and go grocery shopping, she indicated that she was. Appellant Cindia further testified that before the accident, she had curvature in her spine.

{¶8} The next witness to testify was appellant Myzk. He testified that after appellee's car struck his, he took his seat belt off and went to speak with appellee. He testified that he felt "very sore" after the accident, but that the real soreness did not set

in until the next day. Trial Transcript at 107. According to appellant Myzk, the soreness made it hard for him to get out of a chair and to lie down. The pain subsided on the third day. Appellant Myzk also saw Dr. Lach a week after the accident and was given a pain killer that he was on for about a week and then used from time to time as needed. He testified that he was in pain from back problems on the day of trial and that he did not have the same kind of pain before the accident.

{¶9} Appellant Myzk testified that he saw Dr. Brown twice a week after the accident and then the visits leveled off to once a week after about a month. According to him, the treatments provided by Dr. Brown helped. When asked what type of injuries he suffered in the accident, he testified that he had a sort of "whiplash" and that conditions in his spine and back were aggravated. Trial Transcript at 111. Appellant Myzk testified that he drove on the trips to Iowa in 2010 and Florida in 2011 with appellant Cindia and that his back hurt when he stood while helping appellant Cindia with the cooking.

{¶10} On cross-examination, appellant Myzk testified that at the time of the accident he lived alone in a two story house and that after the accident, he was able to go up and down the stairs to shower and get dressed. He also prepared his own meals. Appellant Myzk also admitted that he did not receive any medical treatment at the scene of the accident and did not go to the hospital. He also admitted that he maintained a garden after the accident.

{¶11} The videotaped deposition testimony of Dr. Joseph Lach was played for the jury. He testified that he was Board Certified in Internal Medicine and that he first saw appellant Myzk on April 19, 2010 for recurrent headaches and neck pain. According to Dr. Lach, appellant Myzk did not complain of back pain at the time. Dr. Lach diagnosed appellant Myzk with intermittent neck pain with some headaches and

prescribed pain medication. He next saw appellant Myzk on May 3, 2010 for neck pain and saw him again on May 25, 2010 for the same pain. Dr. Lach testified that he thought that appellant Myzk had a cervical strain with continued pain and ordered an MRI. The MRI showed degenerative disc disease, which is a form of osteoarthritis that over time causes pain and disability. The MRI also showed spondylosis, which is a condition where the vertebra are not exactly lined up on top of each other, and an arthritic accumulation of calcium deposits which happens over time.

{¶12} Dr. Lach further testified that he saw appellant Myzk next on September 2, 2011 for non-accident related problems and saw him throughout the fall of 2010. His records did not reflect any continuing ongoing complaints about injuries from the accident. According to Dr. Lach, appellant Myzk did not complain of back problems until October 31, 2011 and had a recent back injury. A lumbar MRI performed after such visit showed spinal stenosis, which is often caused by progressive osteoarthritis, and degenerative disc disease. Dr. Lach also identified pre-accident records and testified that a 1983 record stated that appellant Myzk had degenerative joint disease and cervical radiculiitis, which is a general term for arthritis. Dr. Lach also identified a medical report from a prior treating doctor from November 14, 1991 that indicated that appellant Myzk had chronic lumbar and neck pain. During his deposition, Dr. Lach testified that an accident could cause an arthritic condition that was asymptomatic to become symptomatic.

{¶13} Dr. Lach was next questioned about appellant Cindia. He testified that he saw her on April 19, 2010 for neck pain and that he was “working with a diagnosis of myofascial strain.” Trial Transcript at 153. He testified that her tissues were likely irritated by the accident. He further testified that he noted a whiplash type of injury and

decreased rotation of the neck. Appellant Cindia did not see him again until June 15, 2010 for neck pain and chest wall discomfort and was given pain medication and came in again in November of 2010 complaining of headaches. Dr. Lach testified that an August 2011 cervical MRI showed that appellant Cindia had a C4-C5 neck fusion, degenerative disc disease at multiple levels and an arthritic accumulation of calcium deposits over time.

{¶14} Dr. Lach was questioned about appellant Cindia's treatment prior to the accident. He testified that in August of 2003, she treated with both his office and a chiropractor for neck and head problems and that notes from April 13, 2006 indicated that she complained of recurrent neck pain and arm and shoulder pain. He testified that in October of 2008, he diagnosed appellant Cindia with right shoulder bursitis and that appellant Cindia had suffered an injury to her back in December of 2009 from a near fall.

{¶15} Dr. Lach also testified that post-traumatic osteoarthritis that was usually caused by outside forces or trauma could cause degenerative bone changes. He testified that the accident probably contributed to the headaches that appellant Cindia was complaining about on November 1, 2010. Dr. Lach testified that appellant Cindia saw him on July 12, 2011 and reported that she still had intermittent neck pain and discomfort and that she reported the same pain on November 15, 2011 that related to the accident in this case. He admitted that appellant Cindia had been coming to his practice for several years before the accident with complaints of neck pain and that the same type of chest wall discomfort that she complained about after the accident she had complained about a week before the accident.

{¶16} The videotaped deposition testimony of Dr. Michael Brown, who is a chiropractor, was also played for the jury. He testified that he first saw appellant Cindia on June 24, 2003 for neck and shoulder pain and headaches. Between 2003 and April of 2010, he saw her a total of 25 times. Dr. Brown testified that he saw appellant Cindia six of these times for her neck problems between June 24, 2003 and July 31, 2003. On December 12, 2003, she complained that her back was out and she also complained of back issues in June of 2004 and February and April of 2005. He also saw appellant Cindia in August of 2004 for neck pain and rib pain and on June 7, 2005 for shoulder and neck pain. Dr. Brown testified that, on February 13, 2006, appellant Cindia complained that her neck was out and was that she was treated until March 28, 2006 for the same. She came in again on November 29, 2007 complaining of neck pain.

{¶17} After the accident, appellant Cindia complained of neck pain and pain down her spine and also of headaches, neck stiffness, back pain and other problems. Dr. Brown, when asked, indicated that all were related to the accident. Dr. Brown testified that he had been treating appellant Cindia for such injuries from May 13, 2010 until the time of trial and believed that the accident caused permanent injury to her based on diagnostic studies that he had performed. He described the injury as "ligamentous laxity of the cervical spine." Trial Transcript at 184. Dr. Brown also testified that, after the accident, he diagnosed appellant Cindia with cervical, thoracic, lumbopelvic sprain and strain with attenuated pain and also with a right upper extremity injury. He testified that her sprains and strains might have taken longer to resolve than the usual eight to twelve weeks because of her age, sex, and the fusion at C4-C5.

{¶18} Dr. Brown testified that appellant Cindia had pre-existing degenerative disc disease and degenerative joint disease that he believed were aggravated by the

accident. He admitted that people typically become more arthritic as they age and testified that he expected to treat appellant Cindia for the injuries that she received as a result of the motor vehicle accident for the rest of her life on a monthly basis.

{¶19} On cross-examination, Dr. Brown admitted that he did not treat appellant Cindia until one month after the accident and that he had treated her for neck and back pain in 2003, 2004, 2005, 2006 and 2007. When asked if there was ligamentous laxity in her spine before the accident, he testified that he believed that there probably was. While an advanced motion x-ray was done on appellant Cindia's neck in March 28, 2011, Dr. Brown admitted that there was no such x-ray taken prior to the accident to determine the extent of her ligamentous laxity. He also agreed that there were no pre-accident records to determine the changes that may have taken place in appellant Cindia's spine before the accident.

{¶20} Dr. Brown was next questioned about appellant Myzk. He testified that he had seen him prior to the April 12, 2010 accident in this case and that he first saw appellant Myzk on March 28, 2006 for mid back pain. He saw appellant Myzk four times for that initial complaint and then saw him again on September 18, 2006 for low back problems. The last time that Dr. Brown saw appellant Myzk before the accident was on September 29, 2006.

{¶21} When he saw appellant Myzk on April 12, 2010 after the accident, appellant Myzk complained of neck pain. Dr. Brown testified that he had treated him for neck pain during three prior visits. Dr. Brown stated that he did not note any significant injury in the cervical area prior to the accident. According to Dr. Brown, appellant Myzk indicated that later on the day of the accident, he was sore and that it got worse the next day. Appellant Myzk's complaints were pain in his neck and down his spine. Dr. Brown

testified that an advanced motion x-ray done on September 3, 2011 showed that appellant Myzk had significant degeneration and osteoarthritis and ligamentous damage in his spine. The following testimony was adduced when Dr. Brown was asked what injuries that he treated appellant Myzk for were caused by the accident:

{¶22} "Well, on the initial visit I diagnosed Mr. Myzk as having a cervical, thoracic, lumbopelvic sprain and strain with attended pain and intersegmental restrictions at multiple levels which means the vertebrae weren't moving exactly right, and also the right extremely ridiculitis." Trial Transcript at 247.

{¶23} Dr. Brown testified that he saw appellant Myzk during the next month for a total of seven or eight times and that he treated him for injuries related to the accident through October 2, 2012. According to Dr. Brown, during his last visit, appellant Myzk described having pain from the base of his skull to the top of his shoulders and also having pain in the lower back region and in both buttocks and thighs.

{¶24} On cross-examination, Dr. Brown admitted that he had no advanced motion x-ray study on appellant Myzk prior to the accident for comparison purposes and admitted that a report that he had received indicated that the advanced motion x-ray found no significant instability or abnormal motion in appellant Myzk's cervical region. He also agreed that there was a gap in his treatment of appellant Myzk between October 26, 2010 and August 4, 2011. He also testified that he was unaware that Dr. Lach's records note an October of 2011 back injury. According to Dr. Brown, the arthritis and degenerative changes in appellant Myzk's spine pre-existed the accident.

{¶25} At the conclusion of the evidence and the end of deliberations, the jury, on December 18, 2013, returned with a verdict in favor of appellee. The verdicts were memorialized in a Judgment Entry filed on December 19, 2013. On January 15, 2014,

appellants filed a Motion for Judgment Notwithstanding the Verdict pursuant to Civ.R. 50(B) and Motion for New Trial pursuant to Civ.R. 59(A)(6) and (7). Appellee filed a brief in opposition to the same on January 31, 2014 and appellants filed a reply on February 24, 2014. Pursuant to a Judgment Entry filed on March 4, 2014, the trial court denied appellants' motions.

{¶26} Appellants now raise the following assignments of error on appeal:

{¶27} 1. JUDGMENT FOR DEFENDANT AND AGAINST PLAINTIFFS RESULTING FROM A TRIAL BY JURY IN THIS CASE MUST BE REVERSED AS AGAINST THE WEIGHT OF THE EVIDENCE

{¶28} 2. THE DEFENDANT DID NOT HAVE SUBSTANTIAL, COMPETENT EVIDENCE TO SUPPORT HER CASE. THUS, THE TRIAL COURT SHOULD HAVE GRANTED PLAINTIFF'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

{¶29} 3. PURSUANT TO RULE 59(A) OF THE OHIO RULES OF CIVIL PROCEDURE (MOTION FOR NEW TRIAL), "IN ORDER TO SET ASIDE A DAMAGE AWARD AS INADEQUATE AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, A REVIEWING COURT MUST DETERMINE THAT THE VERDICT IS SO GROSS AS TO CHOCK THE SENSE OF JUSTICE AND FAIRNESS OR CANNOT BE RECONCILED WITH THE UNDISPUTED EVIDENCE IN THE CASE."

{¶30} 4. THE TRIAL COURT LIMITING THE CLOSING ARGUMENTS FOR THE TWO (2) PLAINTIFFS AND ONE (1) DEFENDANT TO 20 MINUTES PER SIDE ABUSED HIS DISCRETION.

I

{¶31} Appellants, in their first assignment of error, argue that the jury's verdict was against the weight of the evidence.

{¶32} In *Eastley v. Volkman,* 132 Ohio St.3d 328, 2012–Ohio–2179, 972 N.E.2d 517, the Ohio Supreme Court clarified the standard of review appellate courts should apply when assessing the manifest weight of the evidence in a civil case. *SST Bearing Corp. v. Twin City Fan Companies, Ltd.,* 1st Dist. Hamilton No. C110611, 2012–Ohio–2490, ¶ 16. The Ohio Supreme Court held the standard of review for manifest weight of the evidence for criminal cases stated in *State v. Thompkins,* 78 Ohio St.3d 380, 678 N.E.2d 541 (1997), is also applicable in civil cases. *Eastley,* at ¶ 17–19, 972 N.E.2d 517. A reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine "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." *Eastley,* at ¶ 20 quoting *Twearson v. Simon,* 141 Ohio App.3d 103, 115, 750 N.E.2d 176 (9th Dist.2001); *See also Sheet Metal Workers Local Union No. 33 v. Sutton,* 5th Dist Stark No.2011 CA00262, 2012–Ohio–3549 citing *State v. Martin,* 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). "In a civil case, in which the burden of persuasion is only by a preponderance of the evidence, rather than beyond a reasonable doubt, evidence must still exist on each element (sufficiency) and the evidence on each element must satisfy the burden of persuasion (weight)." *Eastley,* at ¶ 19.

> In weighing the evidence, the court appeals must always be mindful of the presumption in favor of the finder of fact. In determining whether the judgment below is

> manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the findings of fact. * * * If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment.

{¶33} *Easterly,* at ¶ 21, citing *Seasons Coal Co., Inc. v. Cleveland,* 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191–192 (1978).

{¶34} Appellants specifically contend that the greater amount of credible evidence clearly shows that they suffered significant injuries as a result of the accident in this case. Appellants point to the damage to their motor vehicle and also argue that both Dr. Lach and Dr. Brown testified that most of their injuries were related to the accident.

{¶35} However, testimony was adduced that neither appellant received any emergency treatment right after the accident and did not see a doctor until a week later. There was testimony that appellant Myzk told the Trooper at the scene that he was not injured. Dr. Lach testified that he did not diagnose appellant Myzk with any back pain at the time of the initial visit and that appellant Myzk did not complain of back pain until October 31, 2011, more than a year and a half after the accident. There was medical testimony that appellant Myzk had pre-existing neck and lumbar problems and that an MRI ordered by Dr. Lach after the accident showed degenerative disc disease caused

by osteoarthritis, spondylosis and an accumulation of calcium in the spine over time. Moreover, Dr. Brown, who had treated appellant Myzk in the past for back problems, testified that appellant Myzk initially complained of neck pain and did not complain of pain in the lumbar region. He testified that there was an over nine month gap in his treatment of appellant Myzk, that the advanced motion study on such appellant was done over a year after the accident and that he had not previous study for comparison purposes. Dr. Brown did not see appellant Myzk until a month after the accident.

{¶36} With respect to appellant Cindia, Dr. Lach testified that he saw her on April 19, 2010 and that he next saw her on June 15, 2010. There was testimony that an MRI done in 2011 showed that appellant Cindia had a neck fusion at C4-C5 and also multi level degenerative disc disease and an arthritis accumulation of calcium deposits over time. Dr. Lach testified that, in August of 2003, appellant Cindia had treated for neck problems and that, in April of 2006, she complained about recurrent neck pain and arm and shoulder pain. He also testified that he diagnosed her with right shoulder bursitis in October of 2008 and a thoracic strain from a near fall in December of 2009. Dr. Brown, who is a chiropractor and saw appellant Cindia a month after the accident, testified that he had treated her for neck and back pain between 2003 and 2007 and that she had pre-existing degenerative disc disease and arthritis. He admitted that the advanced motion study x-ray was done nearly a year after the accident and that he had no earlier study compare it with.

{¶37} In addition, there was testimony that appellants took a number of long distance trips after the accident and that appellant Myzk drove during the same. Both testified that they were able to perform daily activities.

{¶38} Based on the foregoing, we find that the jury's verdict is not against the weight of the evidence. We find that the jury did not lose its way in rendering a defense verdict.

{¶39} Appellants' first assignment of error is, therefore, overruled.

II

{¶40} Appellants, in their second assignment of error, argue that the trial court erred in denying their Motion for Judgment Notwithstanding the Verdict.

{¶41} Civ.R. 50(B) governs motions for judgment nothwithstanding the verdict:

> Whether or not a motion to direct a verdict has been made or overruled and not later than fourteen days after entry of judgment, a party may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion; or if a verdict was not returned such party, within fourteen days after the jury has been discharged, may move for judgment in accordance with his motion. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment. If the judgment is reopened, the court shall either order a new trial or direct the entry of judgment, but no judgment shall be rendered by the court on the ground that the verdict is against the weight of the evidence. If no verdict was returned

> the court may direct the entry of judgment or may order a new trial.

{¶42} The standard for granting a motion for judgment notwithstanding the verdict pursuant to Civ.R. 50(B) is the same as that for granting a motion for a directed verdict pursuant to Civ.R. 50(A). *Texler v. D.O. Summers Cleaners & Shirt Laundry Co.,* 81 Ohio St.3d 677, 679, 1998-Ohio-602, 693 N.E.2d 271. Judgment notwithstanding the verdict is proper if upon viewing the evidence in a light most favorable to the nonmoving party and presuming any doubt to favor the nonmoving party, reasonable minds could come to but one conclusion, that being in favor of the moving party. *Wagoner v. Obert,* 180 Ohio App.3d 387, 401–402, 2008–Ohio–7041, 905 N.E.2d 694 (5th Dist.), citing *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.,* 95 Ohio St.3d 512, 2002–Ohio–2842, 769 N.E.2d 835, ¶ 3. "Neither the weight of the evidence nor the credibility of the witnesses is for the [trial] court's determination in ruling upon [a JNOV]." *Osler v. Lorain,* 28 Ohio St.3d 345, 347, 504 N.E.2d 19 (1986), quoting *Posin v. A.B.C. Motor Court Hotel,* 45 Ohio St.2d 271, 275, 344 N.E.2d 334 (1976).

{¶43} The decision to grant or deny a Civ.R. 50(B) motion for judgment notwithstanding the verdict is reviewed de novo by an appellate court. *Wagoner, supra,* at 401.

{¶44} We note that this Court had held as follows**:**

> A jury is free to accept or reject any or all of the testimony of any witness, including testimony of an expert witness. *Weidner v. Blazic* (1994), 98 Ohio App.3d 321, 335, 648 N.E.2d 565. Further, even when the evidence is undisputed, the jury possesses the inherent right to reject

> the evidence presented. *Krauss v. Kilgore* (July 27, 1998), Butler App. No. CA–97–05–099, unreported, at 15, citing *Lantham v. Wilson* (Aug. 12, 1991), Madison App. No. CA90–11–024, unreported.

{¶45} *Gerrick v. Anheuser Busch Co.,* 5th Dist. Stark No. 2000CA00140, 2000 WL 1838903 (Dec. 11, 2000) at 2.

{¶46} Appellants argue that appellee did not have substantial competent credible evidence to support her case and that, therefore, the trial court erred in denying their motion. However, as is set forth above is our discussion of appellants' first assignment of error, there was substantial evidence, if believed, that the accident was not the proximate cause of appellants' injuries. The jury, as trier of fact, was in the best position to assess the credibility of the witnesses, including the medical experts. We find that, upon reviewing the evidence in a light most favorable to appellee, reasonable minds could to differing conclusions as to causation.

{¶47} Appellants' second assignment of error is, therefore, overruled.

III

{¶48} Appellants, in their third assignment of error, argue that the trial court erred in denying their Motion for New Trial pursuant to Civ.R. 59(A)(6) and (7).

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

Grounds

{¶50} 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:…

{¶51} (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;

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

{¶53} The question of whether to grant a new trial upon the basis of the weight of the evidence is within the sound discretion of the trial court. *Yungwirth v. McAvoy,* 32 Ohio St.2d 285, 286, 291 N.E.2d 739 (1972); see, also, *Rhode v. Farmer,* 23 Ohio St.2d 82, 262 N.E.2d 685 (1970). The Ohio Supreme Court has consistently held the term "abuse of discretion" implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶54} In order to set aside a damage award as inadequate and against the manifest weight of the evidence, a reviewing court must determine that the verdict is so gross as to shock the sense of justice and fairness, cannot be reconciled with the undisputed evidence in the case, or is the result of an apparent failure by the jury to include all the items of damage making up the plaintiff's claim. *Bailey v. Allberry,* 88 Ohio App.3d 432, 435, 624 N.E.2d 279 (2nd Dist.1993).

{¶55} 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.,* 74 Ohio St.3d 440, 448, 1996-Ohio- 311, 659 N.E.2d 1242.

{¶56} A jury's award is supported by some competent, credible evidence going to the essential elements of the case, that award will not be reversed by a reviewing court as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.,* 54 Ohio St.2d 279, 280, 376 N.E.2d 578 (1978). In the area of damages in a personal injury case, neither a reviewing court nor a trial court can

substitute its judgment for that of the jury. *Litchfield v. Morris,* 25 Ohio App.3d 42, 44, 495 N.E.2d 462 (10th Dist.1985).

{¶57} We find that the trial court did not err in denying appellants' Motion for a New Trial. As is discussed above, there was substantial competent evidence supporting the jury's determination that the accident was not the proximate cause of appellant's injuries. As noted by appellee in her brief, "[t]here was substantial, competent evidence regarding no injuries or treatment at the scene, the delay in seeking any treatment, the pre-existing neck and back issues for both [appellants], the pre-accident medical and chiropractic treatment of both [appellants] and the differing testimony of [appellants'] experts."

{¶58} In short, we cannot say that the jury's verdict was against the manifest weight of the evidence. Moreover, we find that some competent and credible evidence supports the jury's verdict. Therefore, the trial court did not abuse its discretion in denying the motion for a new trial.

{¶59} Appellants' third assignment of error is, therefore, overruled.

IV

{¶60} Appellants, in their fourth and final assignment of error, argue that the trial court erred in limiting closing arguments to twenty minutes per side.

{¶61} It is within a trial court's sound discretion to limit the duration of closing arguments, as long as the time given is reasonable under the circumstances of the case and of such length as not to impair the right of argument or to deny a full and complete defense. *Braeunig v. Russell,* 170 Ohio St. 444, 166 N.E.2d 240 (1960), citing 53 American Jurisprudence, Section 461, at 364. The decision of the trial court will not be interfered with in the absence of a clear abuse of discretion. An abuse of discretion

connotes an attitude by the court that is arbitrary, unconscionable, or unreasonable. *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

{¶62} We note that appellants' counsel never objected when the trial court stated that it was going to limit closing arguments to twenty minutes per side. Errors which arise during the course of a trial, which are not brought to the attention of the trial court by objection or otherwise, are waived and may not be raised upon appeal. *Stores Realty Co. v. Cleveland,* 41 Ohio St.2d 41, 43, 322 N.E.2d 629 (1975). Moreover, because the issues in this trial were limited to the issue of damages, we find that the trial court's decision was not arbitrary, unconscionable or unreasonable.

{¶63} Appellants' fourth assignment of error is, therefore, overruled.

{¶64} Accordingly, the judgment of the Tuscarawas County Court of Common Pleas is affirmed.

By: Baldwin, J.

Farmer, J. concurs

Hoffman, P. J. dissents

Hoffman, P.J., concurring in party and dissenting in part

{¶65} I concur in the majority's analysis and disposition of Appellants' fourth assignment of error.

{¶66} I respectfully dissent from the majority's decision to overrule Appellants' third assignment of error. [1] I do so for a number of reasons, not the least of which are the severity of the impact and resulting physical damage to Appellant's vehicle; the fact aggravation of pre-existing injuries presents a legally compensable claim(s); and Appellee's concession during closing argument some of Appellants' medical expenses and pain and suffering were reasonable, therefore [purporting] a verdict for Mr. Myzk of eight to ten thousand dollars and for Ms. Cindia in the eighteen to twenty thousand dollar range.

[1] Based on my proposed disposition of Appellants' third assignment of error, I would find Appellants' first and second assignments of error moot.