[Cite as *Lytle v. Pukys*, 2015-Ohio-1354.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

LORI LYTLE, et al.

Plaintiffs-Appellants

-vs-

THOMAS PUKYS

Defendant-Appellee

JUDGES:
Hon. William B. Hoffman, P. J.
Hon. John W. Wise, J.
Hon. Patricia A. Delaney, J.

Case No. 2014 CA 00115

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 2013 CV 01395
JUDGMENT:	Affirmed in Part; Reversed in Part
DATE OF JUDGMENT ENTRY:	March 31, 2015

APPEARANCES:

For Plaintiffs-Appellants

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For Defendant-Appellee

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Wise, J.

{¶1} Appellants Lori Lytle and Donald Lytle appeal the May 22, 2014, decision of the Stark County Common Pleas Court denying its Motion for a New Trial and reducing Appellant Lori Lytle's damage award.

{¶2} Appellee is Thomas Pukys.

STATEMENT OF THE FACTS AND CASE

{¶3} This case arises out of a two-car accident which occurred on June 14, 2010. On that day, Appellant Lori Lytle was a passenger in a vehicle being driven by her husband, Appellant Donald Lytle, when Appellee Thomas Pukys improperly changed lanes, causing a collision. As a result of the accident, Appellant Lori Lytle sustained injuries to her knees requiring medical and hospital care and treatment. Her treatment included hospital-emergency room care, orthopedic care and surgery, and physical therapy. Lori Lytle's medical bills totaled approximately $18,000.00.

{¶4} Appellants filed their Complaint in the Stark County Court of Common Pleas on August 19, 2011, alleging causes of action for negligence and loss of consortium. Appellants dismissed their original lawsuit on May 24, 2012, and re-filed on May 23, 2013.

{¶5} The case proceeded to jury trial on April 23, 2014.

{¶6} During the trial, Appellant Lori Lytle claimed that she suffered an aggravation of a preexisting arthritic condition in her left knee in the collision of July 14, 2010. Appellant presented the testimony of her treating physician, Dr. Mark Sheppard, who opined the collision caused her to suffer a re-tear of the meniscus of her left knee.

{¶7} Appellee's medical expert, Dr. Barry Greenberg, testified that Appellant suffered nothing more than a mild knee contusion which resolved in a manner of days or weeks. Dr. Greenberg further testified that Appellant's torn meniscus occurred prior to the June 14, 2010, collision. (Dr. Greenberg T. at 38 and 39). Dr. Greenberg testified that prior to the June, 2010, collision Appellant had two prior arthroscopic procedures to her left knee in 2006. He noted that the operative records from the two prior procedures, showed significant arthritis and chondromalacia, which he described as a "morbid softening of the cartilage." In addition, he stated that both prior surgical procedures were done to repair a torn meniscus. (Dr. Greenberg, T. at 17-19).

{¶8} Dr. Greenberg noted that between the 2006 surgeries and 2010, Appellant continued to experience problems with her knee, which caused pain and required her to return for treatment which included injections. Prior to the accident, Appellant had last treated on April 23, 2010. Dr. Greenberg described Appellant as still treating with Dr. Sheppard on the day of the collision. He described Appellant's examination at the emergency room the day after the collision as a "normal examination." He stated that it was significant that Appellant showed no bruises when seen at the emergency room. (Dr. Greenberg, T. at 16). He said that Appellant’s symptoms, when seen at the emergency room, were not consistent with the torn meniscus she claimed to have suffered. He pointed out that an injury, such as a torn meniscus, would have produced an immediate hemorrhage inside the knee which would have been present when Appellant was examined in the emergency room the day of the collision. Finally, when asked to compare Dr. Sheppard's records of April 23, 2010, to his first examination of Appellant after the collision, Dr. Greenberg stated there appeared to be "no change in his observations relative

to seeing this lady before, as well as after the accident". (Dr. Greenberg, T. at 24-27). Finally, Dr. Greenberg described the mechanism which he opined lead to Appellant's torn meniscus. Rather than an acute tear from the collision, Dr. Greenberg testified the injury was the result of a continuous break down of the old and damaged cartilage resulting in a grinding away process as Appellant walked, which eventually degenerated the meniscus until a tear developed unrelated to the collision. (Dr. Greenberg, T. at 30-31).

{¶9} Following deliberations, the jury returned a verdict finding Appellant Donald Lytle and Appellee Thomas Pukys each fifty per cent (50%) negligent and awarding Appellant Lori Lytle, the sum of Two Thousand Five Hundred Dollars ($2,500.00). This jury award was specifically designated, in Jury Interrogatory No. 6, as for "medical and hospital bills and related expenses incurred".

{¶10} The jury specifically awarded Zero Dollars ($0.00) to Lori Lytle for "pain, suffering and discomfort experienced" or for "disability and impairments", including loss of enjoyment of life and limitation or restriction in performing usual activities.

{¶11} The jury also returned a general verdict form in favor of Appellant Donald Lytle but awarded him Zero Dollars ($0.00) on his claim for loss of consortium.

{¶12} On May 2, 2014, Appellants filed a Motion for New Trial, on damages only.

{¶13} On May 22, 2014, the trial court denied the Motion for New Trial and reduced Appellant Lori Lytle's damage award by fifty per cent (50%) to One Thousand Two Hundred Fifty Dollars ($1,250.00).

{¶14} Appellants now appeal, assigning the following errors for review:

ASSIGNMENTS OF ERROR

{¶15} "I. THE TRIAL COURT ERRED IN REFUSING TO GRANT A NEW TRIAL TO PLAINTIFF, LORI LYTLE, ON THE ISSUE OF DAMAGES.

{¶16} "II. THE TRIAL COURT ERRED IN REDUCING LORI LYTLE'S JURY VERDICT BY FIFTY PER CENT (50%)."

I.

{¶17} In their First Assignment of Error, Appellants argue that the trial court erred in denying Appellants' motion for a new trial on the issue of damages. We disagree.

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

> **(A) Grounds**
>
> 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:
>
> (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;
>
> (2) Misconduct of the jury or prevailing party;
>
> (3) Accident or surprise which ordinary prudence could not have guarded against;
>
> (4) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice;

(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;

(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;

(7) The judgment is contrary to law;

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

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

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

{¶19} 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. *See, e.g. Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶20} When 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).

{¶21} 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) (emphasis in original).

{¶22} 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, 659 N.E.2d 1242 (1994).

{¶23} This Court has previously held that where a substantial injury is sustained and there is unrefuted evidence of pain and suffering, courts have found that an award for medical expenses without any valuation for pain and suffering is against the manifest weight of the evidence. *Garaux v. Ott,* 5th Dist. Stark No. 2009 CA 00183, 2013–Ohio–1895; *Brozovic v. Grandjean,* 5th Dist. Stark No. 2005CA00151, 2005–Ohio–6950, *Cooper v. Moran,* 11th Dist. Lake No. 2010–L–141, 2011–Ohio–6847; *Hardy v. Osborn,* 54 Ohio App.3d 98, 560 N.E.2d 783 (8th Dist.1988); *Staley v. Allstate Property Cas. Ins.*

Co., 10th Dist. Franklin No. 12AP–1085, 2013–Ohio–3424; *Kubilus v. Owens,* 12th Dist. Butler No. CA2007–03–065, 2008–Ohio–3728; *Couture v. Toldeo Clinic, Inc.,* 6th Dist. Lucas No. L–07–1277, 2008–Ohio–5632. However, this Court also has found that where the evidence is contradicted concerning the cause of the plaintiff's complaints of pain, a $0.00 damage award for pain and suffering does not require a new trial even when the jury awarded damages for other things, such as medical expenses and/or lost wages. *See, e.g. Seymour v. Pierson,* 5th Dist. Stark No. 2005CA00218, 2006–Ohio–961; *Chambers v. Jenkins,* 5th Dist. Stark No. 2007CA00131, 2008–Ohio–638 (verdict not against the weight of the evidence where plaintiff's testimony and medical notes were in contradiction and no evidence was presented to differentiate between ongoing symptoms and possible aggravation of preexisting conditions); *Thomas v. Vesper,* 5th Dist. Ashland No. 02COA20, 2003–Ohio–1856 (jury chose to give more weight to defense's independent medical exam).

{¶24} In the case sub judice, in addition to the testimony from Appellant and her expert, the jury also heard testimony from Appellee's expert who stated that it was his opinion that Appellant did not suffer any new injury to her knee as a result of the collision. In light of the contradictory testimony, the jury could easily have found that Appellant did not sustain a substantial injury, or any new injury, for that matter. As the trier fact, the jury was free to accept the opinion of Appellee's expert as opposed to Appellant's expert.

{¶25} We therefore find that the jury's award in this case was supported by some competent, credible evidence going to the essential elements of the case, and the trial court did not err in denying Appellants' motion for a new trial.

{¶26} Appellants' First Assignment of Error is overruled.

II.

{¶27} In their Second Assignment of Error, Appellants argue that the trial court erred in reducing Lori Lytle's damage award by 50%. We agree.

{¶28} In this case, Appellant Lori Lytle was a passenger in the vehicle driven by her husband. No comparative negligence defense was raised against Lori Lytle because she was just a passenger. As such, she is not subject to a reduction of the jury award. Because Appellee was found to be at fault, albeit 50%, Appellant Lori Lytle is permitted to recover 100% of her jury award, which in this case was $2,500.00.

{¶29} Appellants' Second Assignment of Error is sustained.

{¶30} For the foregoing reasons, the decision of the Court of Common Pleas of Stark County, Ohio, is affirmed in part and reversed in part.

By: Wise, J.

Hoffman, P. J., and

Delaney, J., concur.

JWW/d 0310