[Cite as *Williams v. Williams,* 2009-Ohio-6162.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

TROY WILLIAMS,	)	
	)	CASE NO. 08 MA 248
PLAINTIFF-APPELLANT,	)	
	)	
- VS -	)	O P I N I O N
	)	
FRED WILLIAMS,	)	
	)	
DEFENDANT-APPELLEE.	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from Common Pleas Court, Case No. 05CV2363.
JUDGMENT:	Affirmed.
APPEARANCES:	
For Plaintiff-Appellant:	Attorney Timothy Rudge 6550 Seville Drive, Suite B Canfield, Ohio 44406
For Defendant-Appellee:	Attorney Adam Carr 5824 Akron-Cleveland Road, Suite A Hudson, Ohio 44236

JUDGES:
Hon. Joseph J. Vukovich
Hon. Gene Donofrio
Hon. Cheryl L. Waite

Dated: November 18, 2009

VUKOVICH, P.J.

¶{1} Plaintiff-appellant Troy Williams appeals the decision of the Mahoning County Common Pleas Court denying his motion for a new trial after a jury returned a verdict with no damages. Appellant urges that the trial court erred in failing to order a new trial on the grounds that the verdict was not sustained by the weight of the evidence. For the following reasons, the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

¶{2} On November 24, 2004, the vehicle driven by defendant-appellee Fred Williams slid into the back of appellant's vehicle, which was stopped at an intersection in Youngstown. Appellant's vehicle was pushed into the car in front of him. (Damage to the vehicle is not at issue here.) On June 30, 2005, appellant filed suit against appellee. The parties stipulated that appellee's negligence caused the accident. The remaining issues of proximate cause and damages were tried before a jury with a magistrate presiding.

¶{3} Appellant testified that the impact was fairly hard, noting that his vehicle was ten to twelve feet from the car in front of him. He said that his car suffered damage to the front and rear, but he was able to drive his vehicle home. (Tr. 8, 25). Appellant testified that his body was thrown forward into the dashboard and the steering wheel. He claimed that he hit his knee on the dashboard, but he then admitted that he specifically testified at his deposition that he did not hit his knee on anything. (Tr. 23).

¶{4} Appellant testified that he was limping after the accident, but he told appellee he was fine as he walked over to a nearby apartment building. (Tr. 9, 25). He did not recall what he told police about his injuries, but the police report listed no injuries. (Tr. 24-25). Appellant testified that he did not receive treatment at the scene and did not go to the emergency room until the next afternoon. (Tr. 10). He said that he went to the hospital due to a stiff neck, a sore back, and pain in his shoulder and right knee. (Tr. 11-12). He stated that he was prescribed ibuprofen and told to see a family doctor; he saw Dr. Paris a week later.

¶{5} Appellant missed no work as a result of the accident. He indicated that if there were any janitorial jobs he could not perform, he asked his employees for assistance; however, he did not specify how his job was affected by the injuries. (Tr.

32). Appellant itemized $9,449.81 as follows: $1,528.75 from the emergency room visit; $5,235 from Dr. Paris's office visits and therapy; $2,441.06 for MRIs; and, $245 for consultation with a surgeon. (Tr. 18-20).

¶{6} Appellant testified that his back resolved itself after a month but his right shoulder still bothers him and he suffers pain in his right knee, which often gives out. (Tr. 16-17). However, he admitted that he first saw a physician for knee pain in 1988, when he was fourteen years old. (Tr. 30). When he was twenty years old, he injured his right knee and had to wear a brace during sports. This was diagnosed as a ligament injury and a strain. Additionally, in 2002, he ruptured the patellar tendon in his right knee while playing sports and required surgery. (Tr. 31). He noted that he had played basketball the day before the accident. (Tr. 33).

¶{7} Dr. Paris testified that he first saw appellant on December 2, 2004. (Tr. 38). He initially diagnosed appellant with cervical, dorsal, trapezius and right knee sprains and/or strains. (Tr. 39-40). Physical therapy in his office was prescribed. (Tr. 40). When he did not feel better a month later, Dr. Paris ordered MRIs. The radiologist opined that appellant suffered one mild disc bulge in his cervical vertebrae and tears to the medial meniscus and the cruciate ligament in his right knee. (Tr. 40-41).

¶{8} Appellant was referred to an orthopedic surgeon for his knee. However, the surgeon opined that the tear was questionable and diagnosed appellant with merely a sprain. (Tr. 48, 64). Dr. Paris, however, did not change the tear diagnosis, which was made by the radiologist. (Tr. 49). He opined that the tear would not heal itself and would probably get worse. (Tr. 65). Dr. Paris testified that he believed to a reasonable degree of medical certainty that the medical procedures rendered in the emergency room and by his office were directly and proximately caused by the car accident and that said care was necessary. (Tr. 50-51).

¶{9} Regarding the 2002 knee surgery, he opined that the current problems would not have existed then or the prior surgeon would have noted them in his report. (Tr. 51). Dr. Paris was unaware of the 1994 right knee medial ligament strain. He also testified that the X-rays showed degenerative changes in appellant's knee, which occurred over time, which were not caused by the accident, and which could cause pain. (Tr. 57-58).

¶{10} On October 6, 2008, all eight jurors signed a verdict awarding $0 in damages to appellant, and judgment was entered on the verdict that same day by the magistrate and the trial court. On October 9, 2008, appellant filed a timely motion for a new trial under Civ.R. 59(A)(6), alleging the $0 verdict was not sustained by the weight of the evidence. Appellee filed a brief in opposition.

¶{11} On November 7, 2008, the magistrate filed a decision denying the motion for new trial and finding that the verdict was not against the weight of the evidence, the jury did not lose its way, and there was substantial evidence upon which reasonable minds could reach different conclusions. Appellant filed timely objections to the magistrate's decision, reiterating the reasons within the motion for a new trial concerning the weight of the evidence.

¶{12} On December 15, 2008, the trial court denied the motion for a new trial and thus upheld the magistrate's decision. The court noted the rule of construing the evidence in the light most favorable to the nonmovant and found the verdict was not against the weight of the evidence due to the conflicting evidence that was apparently presented. Appellant filed a premature but timely appeal. See App.R. 4(C) ("A notice of appeal filed after the announcement of a decision, order, or sentence but before entry of the judgment or order that begins the running of the appeal time period is treated as filed immediately after the entry.").

PROCEDURAL ISSUES

¶{13} Appellee raises various procedural arguments. For instance, in filing the praecipe, appellant asked for a partial transcript, seeking only transcription of his own testimony and that of Dr. Paris. Appellee asks us to presume the regularity of the proceedings below and urges that appellant cannot argue weight of the evidence without submitting an entire transcript of the proceedings before the magistrate. See Hon. Robert A. Nader, Who Bears the Burden? (1997), 20 Lake Legal Views 1 (all evidence is required to evaluate weight of the evidence). Appellee notes that without the entire transcript, appellant fails to show what verdict forms and instructions were provided to the jury or whether appellant preserved any objections thereto.

¶{14} Similarly, appellant's argument (in support of his claim that he should have at least received payment for the emergency room visit) was partially based upon his claim that defense counsel admitted in closing argument that the jury should pay for the emergency room bill. Appellee responds that defense counsel *first* argued that

any injury was not proximately caused by the accident *and then alternatively* argued that if the jury did in fact find proximate cause, then only the emergency room bill should be paid. Obviously, appellant's claim as to what defense counsel stated in closing cannot be addressed where closing arguments are not transcribed. Moreover, as appellee points out, it cannot be discerned what other evidence may have been submitted to the jury.

¶{15} As to that other evidence presented, appellee could have utilized App.R. 9(C), which provides: "If the appellee considers a transcript of other parts of the proceedings necessary, the appellee, within ten days after the service of the statement of the appellant, shall file and serve on the appellant a designation of additional parts to be included." However, supplementation would not be necessary for appellee to argue its position on appeal because the portions ordered by appellant do not require reversal.

¶{16} In any event, *App.R. 9(A) specifically states that a weight of the evidence argument requires the appellant to order a transcript of all evidence relevant to the finding or conclusion said to be contrary to the weight of the evidence*. Thus, an appellant ordering a partial transcript in a weight of the evidence appeal should file an App.R. 9(D) statement that the portions not transcribed were merely procedural portions that contained no factual matters. Here, though, appellant's argument is based upon even the non-testimonial portions of the trial such as closing argument, jury instructions, and presentation of the verdict forms. Thus, the transcript is incomplete based upon the arguments presented.

¶{17} *Regardless, there is an even more prohibitive problem to our reviewing the transcripts and the weight of the evidence*. As appellee urges, appellant's failure to submit a transcript to the trial court when objecting to the magistrate's decision waived the error presented on appeal. Notably, rather than seeking a transcript to support his objection and then asking the court to wait for the transcript to be prepared, appellant filed premature notice of appeal of a non-existent judgment, thus prompting the court to rule a week later.

¶{18} The procedure for objecting to a magistrate's decision is contained in Civ.R. 53(D)(3)(b). Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law, unless the party has

objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b). Civ.R. 53(D)(3)(b)(iv). Besides requiring timely filing and specific objection, division (D)(3)(b) also states that an objection to a factual finding, whether or not specifically designated as a finding of fact, shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or by an affidavit of that evidence if a transcript is not available. Civ.R. 53(D)(3)(b)(iii) (also providing that the objecting party shall file the transcript or affidavit with the court within thirty days after filing objections).

¶{19} Moreover, the Supreme Court has stated that where the objecting party fails to provide the trial court with the transcript of the proceedings before the referee, the appellate court is precluded from considering the transcript of the referee's hearing submitted with the appellate record. *State ex rel. Duncan v. Chippewa Twp. Trustees* (1995), 73 Ohio St.3d 728, 730. In such case, the reviewing court is only permitted to determine if the application of the law was proper or if it constituted an abuse of discretion. Id. As a result, an appellant cannot rely on evidence from the transcript of a referee's hearing where that transcript was not before the court when ruling on the objections. Id., citing *State v. Ishmail* (1978), 54 Ohio St.2d 402, ¶1 of syllabus ("A reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter.").

¶{20} As appellee points out, this court has further explained that if no transcript has been presented to the trial court for ruling on the objections from the magistrate's decision, then no transcript can be presented in this court. *Petty v. Equitable Prod. & Eastern States Oil & Gas, Inc.*, 7th Dist. No. 05MA80, 2006-Ohio-887, ¶19, 22. In this event, both the trial court and the appellate court are bound by the magistrate's factual findings. Id. at ¶23. The appellate court can thus review only any legal issues raised. Id. at ¶24.

¶{21} Consequently, appellant cannot rely on the contents of the transcript of the hearing before the magistrate to support his position, and we should not even review the transcript. Since the entire appellate argument is based upon the weight of the evidence and general arguments of good cause, which are factual matters, there is nothing left to review. This is especially true since appellant never sought findings of fact from the magistrate from which we could conduct the aforementioned *Duncan* review of the law to the facts found by the magistrate. See Civ.R. 53(D)(3)(a)(ii).

¶{22} Because appellant's argument (that the weight of the evidence requires a new trial) cannot be addressed without resort to the transcript of proceedings before the jury, our analysis could stop here. Rather than rely on that narrow ground, we will also address the assignment of error and find it to be devoid of merit for the reasons hereinafter set forth.

ASSIGNMENT OF ERROR

¶{23} Appellant's sole assignment of error provides:

¶{24} "THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF-APPELLANT IN DENYING HIS MOTION FOR A NEW TRIAL."

¶{25} Pursuant to Civ.R. 59(A)(6), a new trial may be granted on the grounds that the judgment is not sustained by the weight of the evidence. A new trial may also be granted in the sound discretion of the court for good cause shown. Civ.R. 59(A). A trial court's decision to overrule a motion for a new trial is reviewed for abuse of discretion. *Mannion v. Sandel* (2001), 91 Ohio St.3d 318, 321. We defer to the trial court, or in this case the magistrate, who witnessed the testimony first-hand. Id. Thus, in reviewing the trial court's denial of a motion for a new trial based upon a factual question, we construe the evidence in a light most favorable to the trial court's action rather than to the original jury's verdict. *Jenkins v. Krieger* (1981), 67 Ohio St.2d 314, 320; *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, 94.

¶{26} Appellant argues that the trial court should have granted a new trial because the judgment was not sustained by the weight of the evidence. He emphasizes that the defense stipulated to negligence and that his medical expert testified that the injuries were directly and proximately caused by the accident. He states that the jury at least should have awarded him the medical bills from the emergency room in the light of the nature of the accident. Appellant urges that the $0 damage award cannot be reconciled with the undisputed evidence. He cites two cases out of this court that he believes require a new trial here. See *Hoschar v. Welton*, 7th Dist. No. 06CO20, 2007-Ohio-7196; *Scibelli v. Pannunzio*, 7th Dist. No. 02CA175, 2003-Ohio-3488.

¶{27} Appellee responds that there is substantial evidence from which reasonable minds could reach different conclusions as to proximate cause, the absence of which would allow a $0 verdict. Appellee notes that Dr. Paris's opinion is based upon his belief that appellant was truthful about the cause of his injuries and

points out that Dr. Paris was unaware of most of appellant's prior medical records regarding his knee. Appellee states that appellant's credibility was impeached, noting that he testified that his right knee hit the dashboard but then admitted that he twice testified at deposition that his knee did not hit anything. Appellee points out that no injuries were reported at the scene. Appellee disputes that emergency treatment was required, characterizing the accident as low impact and noting that appellant did not present himself to the emergency room until the next afternoon. Appellee cites cases believed to be more on point and distinguishes some of the cases cited by appellant.

¶{28} In one case, this court affirmed the trial court's grant of a new trial on grounds of weight of the evidence where the jury awarded no damages. *Scibelli v. Pannunzio*, 7th Dist. No. 02CA175. That case is distinguishable for various reasons. First, the defendant's own expert there admitted that the delay in diagnosis caused the loss of additional teeth. Id. at ¶12. Second, the experts' opinions were not reliant on the plaintiff's credibility and thus could be considered uncontroverted on the loss of additional teeth injury. Id. at ¶22-23, distinguishing *Holub v. Hagan* (Nov. 10, 1993), 9th Dist. No. 15987 (holding that opinion is not uncontroverted where expert's opinion was based upon plaintiff's own opinion and version of events). Third, we deferred to the trial court's judgment, noting our limited standard of review. Id. at ¶30.

¶{29} To the contrary, in this case: (1) neither appellee nor any defense expert admitted that any of appellant's injuries were proximately caused by the accident; (2) appellant's expert's causation opinion had to rely on appellant's own statements as to how he was injured and thus it was not uncontroverted; and, (3) we would not be deferring to the court's judgment by granting a new trial; rather, we would be deferring by upholding the denial of new trial.

¶{30} In another case, this court reversed the denial of a motion for new trial following a defense verdict on damages and remanded for a new trial only on the issue of damages arising from emergency transportation and care on the day of the accident. *Hoschar,* 7th Dist. No. 06CO20 at ¶43. However, in *Hoschar*, the plaintiff had been transported to the emergency room by ambulance from the scene after a high speed collision, and the defendant did not dispute the propriety of this treatment. Id. at ¶1, 22-23, 35.

¶{31} As appellee points out, there was no indication here that this was a high speed collision. Rather, the police report showed that appellee tried to stop but slid on

wet pavement into the back of appellant's stopped vehicle. Moreover, appellant told appellee he was fine and reported no injuries to the police officer. He was not transported by ambulance to the emergency room. In fact, he drove his car home and did not go to the hospital until the next afternoon.

¶{32} Appellee also points to the credibility problems with appellant's testimony as to how he received his injuries. For instance, he testified at deposition that he did not hit his knee on anything, but testified at trial that he hit it on the dashboard. Moreover, appellant had degenerative changes in his knee, he had a long-history of knee problems, his knee problems each originated from playing sports, and he played basketball the day before the accident. The jury may have rationally believed that he once again hurt himself playing sports and used the accident as an opportunity to seek medical treatment.

¶{33} As appellee urges, this case is more akin to another case this court reviewed. See *Sims v. Dibler*, 172 Ohio App.3d 486, 2007-Ohio-3035. In *Sims*, the plaintiff admitted negligence in causing the accident, and trial proceeded on the issue of proximate cause for back injuries and damages. It was revealed at trial that the plaintiff had reported no injuries at the scene, drove himself home after the accident, and had an extensive prior history of back injuries. Defense counsel established numerous credibility problems with the plaintiff's testimony, and it was primarily his testimony that was used to prove proximate cause. The jury found no proximate cause and awarded no damages. This court upheld the trial court's denial of the plaintiff's motion for a new trial. Id. at ¶44-45 (noting that the jury could disbelieve plaintiff and his expert), citing *Sauto v. Nacht* (Apr. 16, 1998), 8th Dist. No. 73118 (which also upheld trial court's denial of new trial in a low speed collision case with no damages awarded).

¶{34} In comparing the cases out of this court and in considering the evidence presented here, the trial court did not abuse its discretion in upholding the jury's unanimous verdict. The jury apparently disbelieved appellant's claim that he suffered the claimed physical injuries as a proximate result of the accident. It is not a manifest injustice to allow the verdict to stand under the circumstances existing herein.

¶{35} For the foregoing reasons, the judgment of the trial court is hereby affirmed.

Donofrio, J., concurs.
Waite, J., concurs.