

[Cite as *Meluch v. O'Brien*, 2010-Ohio-3310.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93296

KATHI L. MELUCH, ET AL.

PLAINTIFFS-APPELLEES

VS.

ERIN O'BRIEN

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-559170

BEFORE: Kilbane, P.J., Sweeney, J., and Cooney, J.

RELEASED: July 15, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Erin O'Brien ("O'Brien"), appeals the trial court's order granting appellee, Kathi Meluch's ("Meluch"),¹ motion for new trial. O'Brien also appeals the trial court's order granting Meluch's motion to require O'Brien's counsel responsible to pay for the cross-examination of one of Meluch's expert witnesses during his trial deposition. After reviewing the appropriate law and facts, we reverse.

Procedural and Factual History

{¶ 2} The split-second motor vehicle accident now giving rise to this appeal, has spanned well over four years of civil and criminal litigation in three different courts, including two previous appeals. Despite its lengthy procedural history, the facts underlying the litigation are relatively straightforward.

{¶ 3} On March 24, 2004, O'Brien was attempting to exit a Speedway gas station at the corner of Bagley and Columbia Roads in Olmsted Falls, Ohio, in a black Chevrolet Trailblazer. She pulled out in front of a stopped vehicle and proceeded across the left-hand turn lane, where Meluch's vehicle was traveling. Meluch, who was driving a black Volvo, collided with O'Brien.

¹All claims against Meluch's husband, Larry, were disposed of in his favor at summary judgment.

{¶ 4} Meluch's husband, Larry, who was then a sergeant with the Olmsted Falls Police Department, was on patrol in the vicinity.² Sergeant Meluch called EMS for both O'Brien and Meluch and requested that another officer be dispatched to the scene to complete the accident report and any subsequent investigation. O'Brien was cited at the scene for failure to yield from a private driveway, and she was found guilty in Berea Municipal Court. She appealed, and this court vacated her conviction because Olmsted Falls Mayor's Court improperly certified the matter when transferring it to Berea Municipal Court. See *Olmsted Falls v. O'Brien*, 8th Dist No. 84926, 2005-Ohio-1317.

{¶ 5} On April 5, 2005, Kathi and Larry Meluch ("the Meluchs") filed a complaint against O'Brien alleging that she was negligent in causing the motor vehicle accident. O'Brien answered, denied liability, and counterclaimed for negligence against Kathi Meluch. Additionally, O'Brien advanced claims for spoliation of evidence and civil conspiracy against Larry Meluch personally and against the city of Olmsted Falls.

{¶ 6} On October 16, 2006, the trial court granted summary judgment in favor of the Meluchs on the parties' competing negligence claims. The

²Larry Meluch has since been promoted to lieutenant with the Olmsted Falls Police Department.

trial court also granted summary judgment in favor of the Meluchs on O'Brien's spoliation and civil conspiracy claims.

{¶ 7} On February 19, 2008, this court reversed the trial court's decision granting summary judgment in favor of the Meluchs on the negligence claims and remanded the case to the trial court for a determination on those claims. See *Meluch v. O'Brien*, 8th Dist. No. 89626, 2007-Ohio-6633. In so doing, we held material questions of fact existed as to whether Meluch was driving at a lawful speed and whether she crossed the double yellow line of traffic dividing north and southbound vehicles on Columbia Road when she collided with O'Brien. *Id.* at ¶22. In short, we concluded that Meluch failed to rebut the scientific evidence of O'Brien's expert, Wilbur Meredith ("Meredith"), concluding that Meluch was the cause of the accident. *Id.*

{¶ 8} On January 5, 2009, the trial court granted Meluch's December 5, 2008 motion to require O'Brien's counsel to pay for the cross-examination of Meluch's expert witness, Duret Smith, M.D. ("Dr. Smith"). The case was then transferred to a visiting judge for further disposition.

{¶ 9} On January 13, 2009, the case proceeded to jury trial.

{¶ 10} On January 23, 2009, a jury found in favor of O'Brien and against Meluch, specifically finding that Meluch was 100 percent negligent in causing the accident, and awarding O'Brien \$175,000 in damages.

{¶ 11} On January 30, 2009, Meluch filed a motion for judgment notwithstanding the verdict, or in the alternative, motion for new trial, arguing inter alia that there was sufficient evidence to show that O'Brien was contributorily negligent.

{¶ 12} On February 9, 2009, O'Brien opposed Meluch's motion.

{¶ 13} On April 16, 2009, after an oral hearing on the motions, the trial court agreed. It denied Meluch's motion for judgment notwithstanding the verdict, but granted Meluch's motion for new trial. On the record, the trial court stated at length its reasons for granting the motion for new trial and stated in its journal entry that "[t]he court finds that the jury lost its way and the verdict is against the manifest weight of the evidence. * * * The case is returned to [the trial judge] for further proceedings."

{¶ 14} On May 14, 2009, this appeal followed, asserting two assignments of error.

Analysis

{¶ 15} O'Brien's first assignment of error states:

"The trial court erred in granting Kathi Meluch's motion for new trial despite substantial evidence supporting the jury's determination that she was the sole cause of the accident at issue."

{¶ 16} We review the ruling on a motion for new trial for an abuse of discretion. *Diperna v. Sartin*, 8th Dist. No. 90158, 2008-Ohio-3031. A

reviewing court may reverse a trial court if it abused its discretion in ordering a new trial. *McLeod v. Mt. Sinai Med. Ctr.*, 166 Ohio App.3d 647, 2006-Ohio-2206, 852 N.E.2d 1235. The Ohio Supreme Court has previously held that “[w]here a trial court is authorized to grant a new trial for a reason which requires the exercise of a sound discretion, the order granting a new trial may be reversed only upon a showing of abuse of discretion by the trial court.” *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, 262 N.E.2d 685, paragraph one of the syllabus. An abuse of discretion “connotes more than an error of law or judgment; it implies that the court’s attitude is unreasonable, arbitrary or unconscionable.” *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶ 17} While deference must be given the trial court’s decision, some courts have applied a more stringent standard when dealing with the setting aside of a jury verdict as against the weight of the evidence. *Bland v. Graves*, 85 Ohio App.3d 644, 620 N.E.2d 920. Thus, “a more searching inquiry is required to prevent the trial court from ‘encroaching on the jury’s important fact-finding function.’” *Id.* (Internal citations omitted.) We hold that when a trial court relies upon statements that are clearly at odds with the facts in the record in granting a motion for new trial, such a ruling is clearly unreasonable and is an abuse of discretion.

{¶ 18} Meluch premised her motion for new trial in part on Civ.R. 59(A)(6). In *Gwen v. Regional Transit Auth.*, 8th Dist. No. 82920, 2004-Ohio-628, we stated:

“Civ.R. 59(A)(6) provides that a trial court may order a new trial if it is apparent that the verdict is not sustained by the manifest weight of the evidence. * * * A trial court abuses its discretion in granting a motion for new trial after a jury verdict where substantial evidence supports its verdict. * * * A court may not set aside such a verdict based upon a mere difference of opinion. A judgment may not be vacated on the ground that a verdict is against the weight of the evidence except as a matter of law. * * * A new trial will not be granted where the verdict is supported by competent, substantial and apparently credible evidence. * * * The court does not undertake to judge the credibility of the evidence, but only to judge whether it has the semblance of credibility. * * *.” *Id.* at ¶23, 24, 25. (Internal citations omitted.)

{¶ 19} The record in this case fails to indicate that the court’s decision is supported by credible evidence, or that the judgment was vacated on the weight of the evidence as a matter of law. A careful review of the evidence reveals that the trial court, in granting Meluch’s motion for new trial after an oral hearing, stated that “[O’Brien] didn’t stop, she didn’t see the car, she had no idea how fast the other car was going, and couldn’t because she never saw it. * * *.” (Posttrial tr. 25-26.) This statement is directly contravened by O’Brien’s testimony that she stopped twice and looked both ways each time before exiting the Speedway gas station driveway:

“I waited two light cycles, I think. And then I pulled closer to the exit. The car that was just to my left motioned me out. I crept forward a little bit, and I looked [in] both directions and didn’t see anyone. I crept forward a little bit more and again looked out in both directions. I didn’t see anyone. I pulled out and that was about it.” (Tr. 466.)

{¶ 20} In addition to the above misstatement, the trial court also misstated that O’Brien crossed two lanes of traffic instead of one. The evidence at trial from all parties was that there is only one lane of traffic before the left turn lane on Columbia Road. Here, as in *Gwen*, a court may not set aside such a verdict based upon a mere difference of opinion. In this case, the trial court relied exclusively on its perception of factual differences in the testimony and O’Brien’s credibility — not on questions of law.

{¶ 21} The dissent argues that O’Brien’s testimony must be read in context in order to be fully understood. We could not agree more. When reading O’Brien’s statements in context with the rest of her testimony, it is clear that contrary to the trial court’s recitation of the facts, O’Brien stopped twice before exiting the Speedway parking lot. It is also clear that no matter how many times O’Brien stopped, she could not have seen Meluch proceeding through the far turn lane because O’Brien’s view was obstructed by stopped

traffic in the lane closest to her. The jury heard all of this testimony as well, and even asked the trial court two questions seeking to clarify who had the right-of-way and who the preferred driver was according to the jury instructions. (Tr. 821, 828.)

{¶ 22} The first question was, “Does Mrs. Meluch lose her right of way if she crossed the yellow line or was speeding?” This question was answered by the court as follows: “[T]o keep her right of way as a preferred party, to travel uninterrupted, the driver must operate her vehicle in a lawful manner. If she does not do so, she loses the right of way and her status as a preferred party. If a preferred party loses the right-of-way by not proceeding in a lawful manner, each party then must use ordinary care under the circumstances.” (Tr. 822.)

{¶ 23} The second question was, “We need clarification in sentence number four regarding who is the preferred driver. Is Mrs. Meluch the preferred driver or Mrs. O’Brien?” This question was answered by the court as follows: “Mrs. Meluch would be the preferred driver.” (Tr. 828.)

{¶ 24} Armed with the answers to these crucial questions, the jury still found Meluch 100 percent at fault. The trial court’s assessment that “for some reason, the jury got totally confused” is based solely on its perception that the jury did not properly weigh O’Brien’s actions. It then misstated O’Brien’s actions in recapitulating them in support of its ruling. Notably,

the trial court did not state that the verdict was contrary to law, or that it was given under the influence of passion or prejudice.

{¶ 25} It is well established that a trial court may not substitute its judgment for that of the jury when there is substantial evidence to support the jury's verdict as in the case sub judice. *Dillon v. Bundy* (1991), 72 Ohio App.3d 767, 773-774, 596 N.E.2d 500. Cognizant as we are of this long-held rule, we cannot permit the trial court "to baldly invade the province of the jury and ignore [the] evidence." *Propst v. Foney*, (Dec. 31, 1992), 8th Dist. Nos. 61324 and 61325 (see dissent of Karpinsky, J. at 4). Absent evidence that the verdict in favor of O'Brien and finding Meluch 100 percent negligent had been given under the influence of passion or prejudice, or that it is contrary to law, we cannot sustain the trial court in granting a new trial. *Evans v. Morgan* (Aug. 17, 2000), 8th Dist. No. 76840, at 3. Here, the question of credibility is left for the jury to resolve; and, in this case, the jury apparently believed the testimony offered by the plaintiff. *Id.*

{¶ 26} The dissent makes much of the notion that Meluch had the legal right of way and, therefore, the trial court's decision was properly based upon questions of law, and not fact. This ignores the jury's assessment of the credibility of the witnesses and its interpretation of the evidence. The jury apparently disagreed, as a factual matter, that Meluch maintained the legal right-of-way. It was wholly within the province of the jury to decide which

version of facts to believe. See, e.g., *Blatnik v. Avery Dennison Corp.*, 148 Ohio App.3d 494, 2002-Ohio-1682, 774 N.E.2d 282, at ¶72.

{¶ 27} Further, the trial court's own reasoning in reversing the jury verdict and granting the motion for new trial was focused solely on its perception of O'Brien's actions (i.e., whether, when, and how often she stopped and looked before proceeding out of the parking lot), not Meluch's. While admitting that Meluch may also have been at fault, the trial court did not focus its analysis on the question of Meluch's own negligence — clearly, the jury did that — but on its recollection of O'Brien's actions. Whether we agree with it or not, we believe the negligence question was answered by the jury's verdict in finding Meluch 100 percent at fault. This verdict is not contrary to law and was not rendered under the influence of passion or prejudice. See *Morgan*.

{¶ 28} In deciding a motion for a new trial based on the weight of the evidence, the trial court must weigh the evidence and pass upon deciding the credibility of witnesses. The court may not set aside a verdict on the weight of the evidence simply because its opinion differs from the jury's opinion. See *Gwen*; see, also, *Poske v. Mergl* (1959), 169 Ohio St. 70, 157 N.E.2d 344. In elaborating on the principle first set forth in *Poske*, the court in *Rohde*, stated as follows:

“There is a basic difference between the duty of a trial court to submit a case to the jury where reasonable minds could differ and the right of a trial court to grant a new trial on the basis of its conclusion that the verdict is not sustained by sufficient evidence. The former does not involve any weighing of evidence by the court; nor is the court concerned therein with the question of credibility of witnesses. However, in ruling on a motion for new trial upon the basis of a claim that the judgment is not sustained by sufficient evidence, the court must weigh the evidence and pass upon the credibility of the witnesses, not in the substantially unlimited sense that such weight and credibility are passed on originally by the jury but in the more restricted sense of whether it appears to the trial court that manifest injustice has been done and that the verdict is against the manifest weight of the evidence.”

***Rohde* at ¶3 of syllabus. (Internal citations omitted.)**

{¶ 29} The trial court in the instant case relied exclusively on its assessment of the credibility of the O’Brien’s testimony in rendering its decision. Under *Rohde*, this is a clear abuse of discretion, since the weight of the evidence and credibility of the witnesses are jury questions. *Id.* Quite

simply, in granting Meluch's motion for new trial, the trial court relied on credibility questions that were outside its province, and which the jury had already resolved. To the extent it did so, it abused its discretion. The dissent's legal analysis of Meluch's actions has no bearing on the trial court's factual misstatements surrounding O'Brien's testimony.

{¶ 30} It is well settled in Ohio that a judgment may not be vacated on the ground that a verdict is against the weight of the evidence except as a matter of law. *Id.* See *Dyer v. Hastings* (1950), 87 Ohio App. 147, 94 N.E.2d 213. The trial court's reliance on misstatements of fact in granting Meluch's motion for new trial are clearly contradicted by the record. They are not based on questions of law, but on its perception of the facts as they appeared in the record.

{¶ 31} "Absent evidence that the verdict was given as a result of passion or prejudice, that it is not sustained by the weight of the evidence, or that it is contrary to law, we cannot sustain the trial court in granting a motion for new trial." *Evans*. It is not the function of the trial court, or any court, to reverse a jury verdict simply because it disagrees with some of the facts supporting the verdict, especially when a jury has heard those facts and judged the credibility of the witnesses for itself. *Poske*.

{¶ 32} In this case, the jury was asked specifically in the interrogatories accompanying the verdict forms whether they found, by a preponderance of

the evidence, that O'Brien was at fault; and, if so, by what percentage. The jury clearly indicated "no" when answering this interrogatory, and six of the eight jurors also found that Meluch was the sole cause of O'Brien's injuries.

{¶ 33} A review of the record in this case indicates that this verdict is supported by competent, credible evidence. Ohio law in this jurisdiction is well settled that a trial court abuses its discretion in granting a motion for new trial after a jury verdict where substantial evidence supports the verdict.

See *Pearson v. Cleveland Acceptance Corp.* (1969), 17 Ohio App.2d 239, 242, 246 N.E.2d 602.

{¶ 34} O'Brien's first assignment of error is sustained.

{¶ 35} Appellant's second assignment of error states:

"The trial court erred in granting Kathi Meluch's motion to transfer the cost of the trial deposition of her own expert witness to plaintiff Erin O'Brien."

{¶ 36} On August 27, 2008, the parties convened to take the videotape trial deposition of defense expert Dr. Smith. During his deposition, Dr. Smith underwent just under one hour of direct examination by Meluch's counsel, and just under one and one-half hours of cross-examination by O'Brien's counsel. At that time, Dr. Smith asked to be excused. O'Brien's counsel agreed to suspend the deposition as an accommodation to Dr. Smith,

whose counsel agreed that the deposition would be reconvened. (Deposition of Dr. Smith, tr. 136-137.)

{¶ 37} On December 17, 2008, the deposition was resumed. On December 11, 2008, just days before the deposition resumed, Meluch's counsel filed a motion to limit the time period of Dr. Smith's continued cross-examination to 30 minutes and to tax the costs to O'Brien's counsel. Meluch's counsel argued that O'Brien's counsel had ample time to cross-examine Dr. Smith on matters affecting his alleged bias and credibility, including any alleged pecuniary interest in the case, and that further cross-examination on matters affecting Dr. Smith's credibility would be unduly burdensome.

{¶ 38} On January 5, 2009, the trial court granted the motion without analysis. O'Brien contends that the trial court abused its discretion in requiring her to pay for the cost of the continued cross-examination of Dr. Smith. We agree.

{¶ 39} Ordinarily, trial courts enjoy tremendous discretion in their regulation of discovery proceedings. *Pappas v. Ippolito*, 177 Ohio App.3d 625, 2008-Ohio-3976, 895 N.E.2d 610, at ¶23.

{¶ 40} However, Evid.R. 611(B) permits cross-examination on all matters affecting credibility. *Susanu v. Cliche* (2001), 143 Ohio App.3d 776, 758 N.E.2d 1224. A party is entitled to impeach a witness by showing bias or

pecuniary interest. Id. The rule prescribes no time limit for witness cross-examination. Deposing expert witnesses is essential for trial preparation. While the funds expended by a party in doing so are necessary and vital to the litigation, the trial court abused its discretion by requiring O'Brien's counsel to pay for a cross-examination that is clearly permitted by Evid.R. 611 and essential for trial preparation. Requiring counsel to pay for the cross-examination of a defendant's expert witness, and limiting the continued cross-examination to only 30 minutes so that the total cross-examination is limited to 2 hours, hinders trial preparation and penalizes a party by requiring them to first think of costs and time constraints before thorough trial preparation.

{¶ 41} For these reasons, we conclude that the trial court abused its discretion when it granted Meluch's motion for costs. O'Brien's second assignment of error is sustained.

{¶ 42} For the foregoing reasons, the judgment of the trial court ordering a new trial is reversed, and the jury verdict in favor of Erin O'Brien in the amount of \$175,000, together with the costs of the suit are hereby reinstated.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, PRESIDING JUDGE

JAMES J. SWEENEY, J., CONCURS;

COLLEEN CONWAY COONEY, J., CONCURS IN PART, DISSENTS IN PART (SEE SEPARATE OPINION).

COLLEEN CONWAY COONEY, J., CONCURRING IN PART, DISSENTING IN PART:

{¶ 43} I concur in the majority's resolution of the second assignment of error. However, I respectfully dissent from the decision to reverse the trial court's granting of a new trial. The majority concludes that the trial court relied "upon statements that are clearly at odds with the facts in the record." In granting the new trial, the trial court held an oral hearing and stated at the conclusion of the hearing that "[O'Brien] didn't stop, she didn't see the car, she had no idea how fast the other car was going, and couldn't because she never saw it." The majority asserts that this statement is contrary to O'Brien's testimony indicating that she stopped twice and looked both ways each time before exiting the gas station driveway.

{¶ 44} The court's statement that "O'Brien didn't stop," taken out of context, supports the majority's conclusion. However, a careful review of the entire record supports a different conclusion. During the trial, O'Brien testified:

"Q: And is it fair to say that your vision of traffic coming in from the left turn lane would have been obscured by the vehicles that were right there?

"A: Yes.

* *

"Q: You never saw Kathi Meluch's vehicle prior to impact; correct?

"A: Correct.

* *

"Q: You never saw it move any distance because your first notice of her vehicle was the actual impact; correct?

"A: Correct.

"Q: Okay. You never saw it travel across these yellow lines that we see on what's been marked as Defendant's Exhibit A for identification, correct?

"A: That's correct.

"Q: You don't know whether or not she entered in here, north of the yellow hatch marks or some time before or after; correct?

"A: Correct.

"Q: Because you didn't see her vehicle at all, correct?

"A: Till just a second before it, correct.

"Q: And you can't say to this jury, you have no idea what speed she would have been traveling at that point of impact, correct?

"A: Correct."

(Tr. 486-87.)

{¶ 45} O'Brien had previously testified, as quoted by the majority, that she waited two light cycles, moved closer to the exit, and a driver who was stopped motioned her to exit the driveway. She then stated, and it is worth repeating:

{¶ 46} “I crept forward a little bit, slowly and cautiously, and looked in both directions and didn’t see anyone. I crept forward a little bit more and again looked in both directions. I didn’t see anyone. Then I pulled out and that was about it.”

{¶ 47} When the trial court stated that O’Brien did not stop, the court was referring to that critical point in time when O’Brien entered the turning lane. It is irrelevant how many times she stopped and looked before entering the turning lane because the impact did not occur until she reached the turning lane. What is significant is that she admitted entering Meluch’s lane without seeing her until the moment of impact. The trial court properly found that, based on this evidence, O’Brien’s own negligence was a proximate cause of her injuries. The trial court also properly noted that Meluch may have also been negligent and that her negligence may have been another proximate cause of O’Brien’s injuries. Specifically, the court stated:

“And as I indicated why the evidence is uncontroverted, that the plaintiff herself was negligent to some extent, and if believed, that the defendant was negligent, that there should have been some apportionment of negligence under the theory of comparative negligence under the law. I don’t think that reasonable minds could come to any other conclusion.

“It is this court’s opinion that for some reason the jury got totally confused, that they were — that they lost their way, and therefore, this court is ruling that the defendant’s motion for judgment notwithstanding the verdict is denied. I don’t believe that the court can say or should say what the apportionment of the negligence should be between these two parties.

{¶ 48} “However, the court does believe that the defendant’s motion for new trial should be granted and is granted. It is clear to this court that the jury lost its

way and that the verdict of the jury is against the manifest weight of the evidence.”

{¶ 49} The majority claims that the trial court relied on its perception of factual differences and not on questions of law. I disagree. The court knew, as a matter of law, that Meluch had the right of way because she was driving in the turning lane when O’Brien pulled in front of her. The court answered the jury’s question on this issue, instructing them that Meluch had the right of way.

{¶ 50} “[A]n injury may have more than one proximate cause. * * * [W]hen two factors combine to produce damage or illness, each is a proximate cause.” *Musil v. Truesdell*, Cuyahoga App. No. 93407, 2010-Ohio-1579, quoting *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 587-588, 575 N.E.2d 828. Here, even if Meluch had been speeding and crossed the yellow hash marks, her negligence, if any, was only one proximate cause of O’Brien’s injuries. Based on O’Brien’s own testimony that she did not see Meluch as she pulled into the turning lane where Meluch was proceeding, it is clear that the jury lost its way when it concluded that O’Brien was zero percent negligent and Meluch was 100 percent negligent.³ Therefore, the jury’s finding that Meluch was 100 percent negligent was against the manifest weight of the evidence, and the court properly granted a new trial. Accordingly, I would affirm the granting of a new trial.

³Even the majority agrees that O’Brien could not have seen Meluch “because O’Brien’s view was obstructed by stopped traffic in the lane closest to her.” Yet O’Brien pulled out, without having a clear view.

