[Cite as *Collins v. Colonna*, 2010-Ohio-3613.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93901

PATRICIA COLLINS

PLAINTIFF-APPELLANT

vs.

ANASTASIA COLONNA

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-604997

BEFORE: Rocco, P.J., Stewart, J., and Celebrezze, J.

RELEASED AND JOURNALIZED: August 5, 2010

ATTORNEY FOR APPELLANT

James A. Jenkins
2000 Standard Building
1370 Ontario Street
Cleveland, Ohio 44113

ATTORNEY FOR APPELLEE

Shannon M. Fogarty
Davis & Young
1200 Fifth Third Center
600 Superior Avenue, E.
Cleveland, Ohio 44114-3564

KENNETH A. ROCCO, P.J.:

{¶ 1} In this action resulting from a motor vehicle accident, plaintiff-appellant Patricia Collins, administratrix of the estate of her daughter Stephanie Collins, appeals from the trial court order that denied her motion for a judgment notwithstanding the verdict (JNOV), or alternatively, for a new trial, following a jury verdict in her favor against defendant-appellee Anastasia Colonna, but with a jury award in the amount of zero dollars.

{¶ 2} Appellant presents four assignments of error. She argues the trial court abused its discretion in denying her motion because the jury's award of zero damages was not supported by the evidence and because the court failed to independently weigh the evidence. She further argues the trial court erred in denying her motion in limine and in permitting Colonna to introduce improper

evidence that prejudiced the jury.

{¶ 3} After a thorough review of the record, this court cannot find reversible error. Consequently, the trial court's order is affirmed.

{¶ 4} This court notes at the outset that appellant's decedent, Stephanie Collins, died during the pendency of this action for reasons completely unrelated to the motor vehicle accident at issue. That being said, the evidence presented at trial established the following facts.

{¶ 5} On February 6, 2004, Collins drove to work, arriving at approximately 11:00 a.m. It was a sunny winter day.

{¶ 6} Collins parked the Nissan Pathfinder she drove in the lot near her place of employment. Collins, who was thirty-five years old, worked as a dancer at a club called "Caesar's Circus." As Collins began to exit her vehicle, she looked into her rearview mirror and noticed Colonna driving into the lot in her Chevrolet Blazer. Colonna worked as a bartender in the club.

{¶ 7} At the time, the two women were friends, so Collins intended to wait for Colonna to walk with her. However, Collins noticed that, as Colonna prepared to turn into the adjoining parking space, "she hit ice and the car went out of control into the back end of the Pathfinder * * *." Collins had time to close her driver's door before the impact.

{¶ 8} According to Colonna, although the accident shocked the two of them, they exited their vehicles "laughing and joking about it." They went into

the club to perform their duties. During her shift, Collins telephoned James O'Brien, an attorney who visited the club on a regular basis; he advised her to file a police report.

{¶ 9} Collins followed his advice; she filed the report with the Cleveland police at "17:58,"or just before 6:00 p.m. In the report, Collins estimated Colonna's speed at the time of the impact at 10 miles per hour.

{¶ 10} At approximately 3:00 a.m. on February 7, 2004, Collins went to the emergency room at the hospital near her home, complaining of "sharp pains in the right buttock," along with "back and right hip pain." The medical personnel took x-rays of her lumbosacral spine; the results were "normal." Collins received treatment that consisted of an analgesic, a muscle relaxant, and an anti-inflammatory medication.

{¶ 11} On February 20, 2004, Collins sought treatment with Dr. Albert Musca. O'Brien referred her to Musca. Collins did not seek treatment with her regular primary care physician.

{¶ 12} According to Musca's medical notes, Collins reported she had been involved in a motor vehicle accident in which her "thorax was thrust forward, backward and to her right. Her head probably struck the steering wheel. The right first premolar tooth of the lower jaw was injured. The back of her right knee was thrust against the seat supporting her," causing "an ecchymosis" which had been "the size of a grapefruit" but was "no longer present." Collins also claimed

she had "shortness of breath" for two days after the accident.

{¶ 13} Collins complained during Musca's initial examination of pain, tenderness and muscle spasm in several areas of her body. On her second visit, she complained she walked "with a limp favoring the right lower extremity," and that she could not "walk on heels or toes of either foot" without pain. She exhibited limitations in her ranges of motion in several areas, including her neck, chest, hip, thigh, knee, and back.

{¶ 14} Musca diagnosed Collins with "acute myofascitis of the neck and the thoracic, lumbar and sacral segments of the back," with "acute sprains" of the right hip and right knee, "acute myofasciitis of the right thigh" and chest, "posttraumatic cephalgia," and "dislocation of the right first premolar tooth of the right jaw." Musca opined that these injuries "related to the vehicle accident on February 6, 2004." He referred her for treatments that consisted of "ultrasound, sine wave, electrical massage, physical massage, hydroculator," and "infrared therapy."

{¶ 15} The record reflects Collins's final visit with Musca took place in late June 2004. He noted that her various pains had "improved."

{¶ 16} Collins continued to work at the club until August 2004. In December 2004, she became involved in another accident when she lost control of her motor vehicle and "flipped" it.

{¶ 17} Collins eventually instituted the instant action in 2006. She claimed

she had suffered personal injuries of a permanent nature due to Colonna's negligence in driving her vehicle into Collins's in a "violent collision."

{¶ 18} The matter proceeded to a jury trial. Appellant testified, and presented the testimony of her husband, O'Brien, and Musca. Appellant also presented her daughter's testimony by way of deposition taken on May 15, 2006.

{¶ 19} In her deposition testimony, Collins estimated Colonna's speed at the time the accident occurred at "20 to 30 miles per hour." Collins stated the impact of Colonna's vehicle into hers jolted Collins "to the back, to the front, and to the side." She further claimed she "smashed" her face into the dashboard, causing her bottom lip to split and bleed, "jarred" her right leg, and hurt her hip and neck. Collins asserted her front windshield and one of her mirrors sustained damage, and her insurance company declared the vehicle "totaled."[1]

{¶ 20} Collins testified that neither she nor Colonna actually worked after the incident. Rather, they went inside, sat down, and called their insurance companies and O'Brien. Collins stated their manager "helped pry the trucks apart" and picked up "some of the glass and stuff" and O'Brien took her to the police station. She felt no pain at first because she "went home right after" the accident.

{¶ 21} Collins testified later that night she developed a headache and her

[1]Appellant presented no tangible evidence at trial to support this assertion.

"lower back was killing" her, so she went to the emergency room. She followed up with Musca because she "already knew of him." Collins asserted that the back of her knee was "black and blue" when she consulted with Musca. She claimed that the physical therapy he prescribed did not help her pain, so "Dr. Musca started cortisone shots," but those did not "do anything."

{¶ 22} When confronted with Musca's note that her pain had improved by the time of her last visit, Collins explained it by asserting that, although none of Musca's treatments was successful for her, he wanted her "on harder drugs that weren't working as good as the weaker ones," so, in his mind, her refusal to accept them meant her pain had improved. Collins further asserted that Musca recommended she undergo back surgery, and that another doctor found a "hairline fracture in [her] neck."

{¶ 23} Collins gave conflicting testimony concerning her ability to work after the accident. She admitted, however, that she continued to dance at the club for several months. She also admitted that she "plead guilty" to "D.U.I." as a result of her December 2004 accident, but claimed she suffered no real injuries even after she "flipped [her] car" in the incident.

{¶ 24} After appellant presented her case, Colonna presented the testimony of insurance investigator Mark Spitzer. Spitzer testified he videorecorded Collins while she was working at the club on July 1, 2004 and on August 6, 2004. The videorecording was played for the jury.

{¶ 25} Colonna also testified. She stated that Collins did not appear injured after the accident. Colonna also testified that Collins eventually told her "she was filing a claim against [Colonna's] insurance company, gave [Colonna] a set price on what she was going to go for, told [Colonna] that [she] should not fight the claim, just let it go through and that [they] would split * * * the settlement money." Colonna stated she refused, then notified her insurance company of Collins's proposal.

{¶ 26} At the conclusion of trial, the journal entry of verdict states, "Jury returned verdict for the Plaintiff in the amount of $0.00."

{¶ 27} Appellant filed a motion for JNOV, or in the alternative, for a new trial. She argued that the verdict was not supported by the weight of the evidence. Colonna filed a brief in opposition.

{¶ 28} The trial court decided to conduct an oral hearing on the matter. Appellant asserted that the jury must have lost its way in this case, since, "after only 30 minutes of deliberation," it returned an improper verdict form to the court. In addressing appellant's assertion, the court stated in pertinent part as follows:

{¶ 29} "When I look at the forms supplied by counsel, I didn't look beyond the first one. That was the jury verdict form. It happened to be for the Plaintiff. As I – their question was, 'Judge, there is no form. What if we want to find for the Defendant? There is no form for the Defendant.' And I didn't realize that, but there was a form there. It was just underneath it. I responded, 'You have

everything that you're entitled to.' I didn't want to get into an explanation, but that's what happened. It was amazing that they did that, but that's what they did. They crossed out, 'For the Plaintiff' and wrote in 'For the Defendant.' I guess they wanted to find for the Defendant."

{¶ 30} The trial court implied that it rejected this verdict form. Therefore, faced with a choice to find in favor of only appellant, the jury rendered a verdict, but awarded her "zero" damages. With this background, the trial court ultimately denied appellant's motion.

{¶ 31} Appellant presents four assignments of error.

{¶ 32} "I. The trial court abused its discretion in denying Appellant's Motion for Judgment Notwithstanding the Verdict where there was insufficient evidence to support the jury's verdict.

{¶ 33} "II. The trial court abused its discretion in denying Appellant's Motion for a New Trial as it failed to independently weigh the evidence and assess the credibility of witnesses.

{¶ 34} "III. The trial court erred in overruling Plaintiff's Motion in limine and allowing the Defense to play a surreptitiously recorded videotape of the deceased Plaintiff filmed two weeks after Plaintiff had concluded her medical treatment.

{¶ 35} "IV. The trial court erred in permitting the character

assassination of the deceased Plaintiff by allowing defense counsel to attack her credibility through improper questioning of decedent's father about a misdemeanor conviction predating the trial by ten years, a theft conviction from January 4, 2006 and a D.U.I. from ten months after the accident."

{¶ 36} In her first and second assignments of error, appellant argues the jury's verdict is unsupported by the evidence in the record; therefore, the trial court improperly denied her motion for JNOV or, alternatively, for a new trial. Appellant contends that the trial court's failure to explain its decision supports her argument.

{¶ 37} This court reviews the trial court's ruling on a motion for judgment notwithstanding the verdict de novo. *Kanjuka v. MetroHealth Med. Ctr.*, 151 Ohio App.3d 183, 2002-Ohio-6803, 783 N.E.2d 920, ¶14. A motion for a judgment notwithstanding the verdict pursuant to Civ.R. 50(B) tests the legal sufficiency of the evidence to go to the jury. *Brooks v. Brost Foundry Co.* (May 3, 1991), Cuyahoga App. No. 58065.

{¶ 38} The motion "should be denied if there is substantial evidence upon which reasonable minds could come to different conclusions on the essential elements of the claim." *Fedrowisch v. Hoffman*, Cuyahoga App. No. 90691, 2008-Ohio-4707, ¶14. The motion should be granted only when the evidence is legally insufficient to support the verdict. Id.

{¶ 39} A cause of action for negligence requires the plaintiff to show the existence of a duty, a breach of that duty, and an *injury proximately resulting* therefrom. (Emphasis added.) Id., citing *Menifee v. Ohio Welding Prod., Inc.* (1984), 15 Ohio St.3d 75, 77, 472 N.E.2d 707.

{¶ 40} Appellant argues that the jury heard only one opinion on causation, and Musca's opinion was that Collins's injuries were the result of the motor vehicle accident caused by Colonna. She thus asserts no grounds existed for the jury to render a verdict for "zero" damages. The record, however, demonstrates that there was substantial evidence upon which reasonable minds could come to different conclusions on the elements of appellant's damages claim.

{¶ 41} Appellant's evidence of the extent of the damage to the vehicles in the accident consisted of only Collins's assertion that the "insurance company" declared her truck "totaled." However, appellant presented no tangible evidence at trial to support this assertion.

{¶ 42} The jury was presented, on the other hand, with Colonna's photographs of Collins's vehicle. The photographs showed an older, much-used vehicle displaying only minor damage to the rear driver's-side bumper and taillight.

{¶ 43} Moreover, the jury was presented with evidence that proved that, at the time of the accident, the women involved did not consider it significant.

Neither complained of any injury; indeed, Colonna testified they "joked" about the collision. Colonna also testified Collins worked her shift after the accident. Collins presented no tangible evidence to demonstrate otherwise.

{¶ 44} According to the evidence presented, only after Collins finished her shift and had consulted with an attorney did she decide to make the police report. On cross-examination, the attorney who advised her to do so admitted Collins owed him some money. Furthermore, Collins did not seek treatment with her primary care physician; rather, she sought that same attorney's referral for a doctor, and she made an appointment two weeks after the accident with a general surgeon, viz., Musca.

{¶ 45} Although Musca testified that the motor vehicle accident was the cause of Collins's "injuries," he also admitted that all of his information came from Collins. Each succeeding time she mentioned the accident, Collins provided greater severity to the injuries she alleged she sustained. She continued this practice even during her deposition. In view of the minor nature of the collision, she may have undermined her own credibility with the jury.

{¶ 46} Thus, substantial evidence was presented at trial upon that reasonable minds could come to different conclusions as to whether Collins actually sustained any injuries in the accident with Colonna or, indeed, that Collins required medical treatment. The trial court, therefore, properly denied appellant's motion for judgment notwithstanding the verdict. *Fedrowisch*, ¶18.

{¶ 47} Appellant's first assignment of error is overruled.

{¶ 48} Appellant additionally argues the trial court abused its discretion when it denied her motion for a new trial. Pursuant to Civ.R. 59(A)(6), she challenges the jury verdict regarding damages as against the manifest weight of the evidence. She asserts that the trial court's lack of an explanation for its decision to deny her motion supports her argument. In light of the trial court's statements at the hearing on her motion, her assertion remains unpersuasive.

{¶ 49} A motion for a new trial is reviewed differently at the appellate level than at the trial level; a reviewing court must view the evidence in a light most favorable to the trial court's decision, rather than in favor of the nonmoving party. *Jenkins v. Krieger* (1981), 67 Ohio St.2d 314, 423 N.E.2d 856. This court does not weigh the evidence in reviewing a decision on a motion for a new trial. *Mannion v. Sandel* (2001), 91 Ohio St.3d 318, 744 N.E.2d 759.

{¶ 50} When an appellate court reviews the denial of a motion for a new trial, the appellate court reviews whether the trial court's decision constituted an abuse of discretion. Id. Absent some indication that the trial court's exercise of its discretion was unreasonable, arbitrary, or unconscionable, the judgment of the trial court will not be disturbed. *Malone v. Courtyard by Marriot L.P.* (1996), 74 Ohio St.3d 440, 448, 1996-Ohio-311, 659 N.E.2d 1242.

{¶ 51} The trial court must weigh the evidence and pass on the credibility of the witnesses in a more limited sense than would a jury; the court is to determine,

in light of its broad discretion, whether a manifest injustice has occurred. *Edwards v. Haase* (Aug. 1, 2001), Medina App. No. 3121-M, citing *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, 262 N.E.2d 685, paragraph three of the syllabus.

{¶ 52} In exercising its discretion, the trial court should "abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result." *Fedrowisch,* at ¶22, citing *Bland v. Graves* (1993), 85 Ohio App.3d 644, 651, 620 N.E.2d 920. A motion for a new trial must be denied when a verdict is supported by competent, substantial, and apparently credible evidence. *Verbon v. Pennese* (1982), 7 Ohio App.3d 182, 183, 454 N.E.2d 976.

{¶ 53} "It is the function of the jury to assess the damages, and generally, it is not for a trial or appellate court to substitute its judgment for that of the trier of fact." *Betz v. Timken Mercy Med. Ctr.* (1994), 96 Ohio App.3d 211, 218, 644 N.E.2d 1058. "Generally, a new trial should be granted pursuant to Civ.R. 59(A)(6) only where it appears that the jury awarded inadequate damages because it failed to consider an element of damages established by uncontroverted testimony." *Fedrowisch*, at ¶23, citing *Baum v. Augenstein* (1983), 10 Ohio App.3d 106, 107-108, 460 N.E.2d 701.

{¶ 54} In this case, the verdict is supported by competent, credible evidence upon which a reasonable jury could conclude that Collins suffered no actual

injuries in the accident with Colonna, that Collins simply sought to create a basis upon which to obtain money from Colonna's insurance company, and that Collins offered to "split" with Colonna whatever settlement she obtained.

{¶ 55} Although the trial court is not required to articulate its reasons for its decision to deny a motion for a new trial, in this case, the court's comments at the hearing provide an indication. The court viewed the jury's verdict as the only one available, since the jury could not find the form that allowed a verdict in favor of Colonna. Cf., *Antal v. Olde Worlde Products, Inc.* (1984), 8 Ohio St.3d 144, 459 N.E.2d 223, at the syllabus. There was substantial evidence upon which a jury could conclude that Collins suffered no actual injury in the accident, and, thus, the medical treatment she received did not "proximately result" from it. Under these circumstances, the trial court did not abuse its discretion in denying appellant's motion for a new trial. *Fedrowisch*; *Gomcsak v. U. S. Steel Corp.,* Lorain App. No. 07CA009208, 2008-Ohio-2247; cf., *Schlundt v. Wank* (Apr. 17, 1997), Cuyahoga App. No. 70978.

{¶ 56} Appellant's second assignment of error, accordingly, also is overruled.

{¶ 57} In her third assignment of error, appellant argues that the trial court improperly "overruled" her motion in limine. The record reflects appellant filed this motion in an effort to exclude from evidence the videotape recording Spitzer made of Collins as she performed at Caesar's Circus in July and August 2004.

{¶ 58} Appellant's argument is rejected for two reasons.

{¶ 59} First, the record does not reflect the trial court made any ruling on appellant's motion. The record instead reflects that, during her opening argument to the jury, appellant acknowledged the videotape and sought to deflect its potential impact, and, further, that when Colonna introduced the videotape, appellant never objected. Thus, she waived her argument on appeal. *State v. Grubb* (1986), 28 Ohio St.3d 199, 503 N.E.2d 142.

{¶ 60} Second, appellant presents no authority to support her assignment of error as required by App.R.16(A)(7).

{¶ 61} Appellant's third assignment of error is overruled.

{¶ 62} Appellant argues in her fourth assignment of error that the trial court improperly permitted Colonna to ask appellant's husband on cross-examination about their daughter's prior convictions for passing bad checks, DUI, and theft. She contends the evidence was inadmissible pursuant to Evid.R. 609.

{¶ 63} A trial court has broad discretion in the admission and exclusion of evidence. *State v. Hymore* (1967), 9 Ohio St.2d 122, 128, 224 N.E.2d 126. Thus, the trial court's decision to admit evidence will be upheld absent an abuse of discretion. *Lambert v. Wilkinson*, Ashtabula App. No. 2007-A-0032, 2008-Ohio 2915, ¶40.

{¶ 64} Evid.R. 402 states: "All relevant evidence is admissible, except as otherwise provided by [federal and state law.]" Evid.R. 401 defines "relevant

evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

{¶ 65} Appellant is correct when she asserts the evidence of her daughter's previous encounters with the law did not fall under Evid.R. 609. Evid.R. 609 pertains to "evidence of character and conduct of" the particular witness who is testifying at the time. Since Collins's father was testifying, Evid.R. 609 would enable Colonna to challenge *his* credibility, but that rule did not apply to Colonna's questions concerning his knowledge of *Collins's* criminal past. Rather, different rules of evidence applied.

{¶ 66} Evid.R. 405(B) states that, "[i]n cases in which character or a trait of character of a person is an essential element of a * * * defense, proof may * * * be made of specific instances of [the person's] conduct."

{¶ 67} Evid.R. 404(A) provides that "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion * * *." However, Evid.R. 404(B) permits using other-acts evidence for other purposes, "such as proof of motive, opportunity, *intent, preparation, plan*, knowledge, identity, or absence of mistake or accident." (Emphasis added.) Evid.R. 404 is applicable in civil cases. *Lambert v. Wilkinson*, at ¶42, citing Weissenberger's Ohio Evidence Treatise (2007) 135, Section 404.4.

{¶ 68} Colonna's defense focused on her assertion that Collins planned to perpetrate a fraud on Colonna's insurance company. Evidence of Collins's previous involvement in "crimen falsi" thus "tended to establish [her] character trait for [engaging in fraud] more probable than it would have been without the evidence. [Collins's] character trait for such tendency was an essential element of the defense * * *." *Tasin v. Sifco Industries, Inc.* (Nov. 10, 1988), Cuyahoga App. No. 54498.

{¶ 69} Moreover, Collins's involvement in a motor vehicle accident in December 2004 was relevant to her credibility. While she admitted she was at fault in causing the later, more serious, accident, she claimed she suffered no injuries. Under such circumstances, the trial court did not abuse its discretion in permitting Colonna to ask questions about Collins's character by mentioning specific instances of her conduct.

{¶ 70} Accordingly, appellant's fourth assignment of error also is overruled.

{¶ 71} The trial court's order and the jury's verdict are affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said 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.

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KENNETH A. ROCCO, PRESIDING JUDGE

MELODY J. STEWART, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR.