[Cite as *Penzol-Kronstain v. Vaudrin*, 2010-Ohio-4895.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94280

ANA M. PENZOL-KRONSTAIN, ET AL.

PLAINTIFFS-APPELLANTS

vs.

NICOLE VAUDRIN

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-670601

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

RELEASED AND JOURNALIZED: October 7, 2010

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ANN DYKE, J.:

{¶ 1} Plaintiffs-appellants, Ana M. Penzol-Kronstain and her minor daughter, Monica Ines Kronstain ("plaintiffs"), appeal the jury's denial of an award for pain and suffering. For the reasons set forth below, we affirm.

{¶ 2} On September 15, 2008, plaintiffs filed the instant action against defendant-appellee, Nicole Vaudrin ("defendant"), asserting claims of negligence and negligence per se and seeking damages as a result of a motor vehicle accident. Defendant timely answered on October 10, 2008.

{¶ 3} The jury trial of this matter commenced on October 14, 2009. At trial, the evidence demonstrated that on September 18, 2004, defendant was driving her vehicle when she struck the rear of plaintiff's vehicle at the intersection of Hilliard Boulevard and River Oaks Road in Rocky River, Ohio. Plaintiff Ana

testified that her vehicle was pushed forward into the intersection. The defendant testified that plaintiff's vehicle sustained minimal damage and defendant's vehicle did not present any damage as a result of the accident. Ana testified that immediately upon the impact, she suffered a "terrible" and "really large pain" in the back of her head. She, however, refused an ambulance when asked by police. Instead, all parties left the scene, driving away in the vehicles involved in the accident.

{¶ 4} Three days later, plaintiff Ana sought treatment with Dr. Reyes, a doctor in practice with Dr. Anthony Musca, complaining of neck and back pain because the pain was "severe," and inhibited her daily activities. This was Ana's first visit with Dr. Musca's office. Ana continued to see Dr. Musca for the next year and during their visits, Dr. Musca prescribed pain medication as well as Ultracet and Flexeril. Ana, however, refused to take any prescription medication. Instead, from September to December 2004, Ana engaged in physical therapy at the Highland Treatment Center. Additionally, Dr. Musca prescribed an MRI of her cervical spine in October of 2004 and again in March of 2005. Ana refused these tests on her neck. On March 7, 2005, she obtained an MRI of her lumbar that showed a disc herniation at the L4/5 area of the spine. Ana ceased treating with Dr. Musca in September of 2005.

{¶ 5} From her last treatment with Dr. Musca until August of 2006, Ana did not seek any treatment or care from any other physician or facility even though

she testified that she continued to have severe pain that inhibited her sleep and daily activities.

{¶ 6} In August of 2006, Ana sought treatment with Dr. William R. Bohl, who recommended an MRI, as well as a discogram, but Ana rejected these tests. Ana agreed to take x-rays of her back but these did not show anything definitively. Again, Ana merely sought physical therapy from September of 2006 through July of 2007.

{¶ 7} In August of 2009, Ana traveled to Rock Hill, New York, to have an "upright MRI" performed on her neck by Scott Rosa, a chiropractor. Vaudrin's medical expert, Dr. Kim Stearns, testified that an upright MRI is not an accepted diagnostic tool within the greater Cleveland medical community. To this day, Ana maintains she experiences pain and is still seeking treatment for her injuries.

{¶ 8} On October 16, 2009, the jury returned a verdict in favor of plaintiffs in the amount of $25,000. More specifically, the jury awarded plaintiffs $12,500 for past medical bills and $12,500 for future medical bills. With respect to pain and suffering, each member of the jury indicated on the record and the verdict form that no compensation would be awarded.

{¶ 9} Plaintiffs now appeal and present two assignments of error for our review. Their first provides:

{¶ 10} "The jury verdict is against the manifest weight of the evidence where the jury accepts and awards compensation for past and future medical bills but

fails to award for other legally recoverable elements of damage such as pain and suffering."

{¶ 11} As an initial matter, we note that an appellate court will not reverse a judgment as being against the manifest weight of the evidence where the judgment is supported by some competent, credible evidence going to all essential elements of the case. *C.E. Morris Co. v. Foley Const. Co.* (1978), 54 Ohio St.2d 279, 376 N.E.2d 578, syllabus. That is, an appellate court should not substitute its judgment for that of the trial court when there exists competent and credible evidence supporting the findings of fact and conclusions of law rendered by the trial judge. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.

{¶ 12} In this case, we find no merit to plaintiffs' argument that the jury's verdict was against the manifest weight of the evidence because the jury awarded plaintiffs damages for past and future medical expenses but declined to award damages for pain and suffering. This court has previously held that "it does not follow that in a matter wherein a jury awards damages for medicals and lost wages * * * an award for pain and suffering must follow. Evidence relative to pain and suffering in damage evaluations is within the province of the fact-finder." *Baughman v. Krebs* (Dec. 10, 1998), Cuyahoga App. No. 73832. If the jury determines that any pain and suffering is de minimis or unrelated to the accident, it is within its purview to deny compensation for pain and suffering. *DeCapua v. Rycklik*, Cuyahoga App. No. 91189, 2009-Ohio-2029, ¶36; *Pesic v. Pezo*,

Cuyahoga App. No. 90855, 2008-Ohio-5738, ¶38; *Uhlir v. State Farm Ins.* 164 Ohio App.3d 71, 2005-Ohio-5545, 841 N.E.2d 344, ¶25.

{¶ 13} In *Uhlir*, supra, we were presented with the same issue plaintiffs posit here. We found that the jury could have found the Uhlirs' testimony regarding the extent of their pain and suffering lacked credibility. *Uhlir*, supra at ¶21. The court cited evidence that the Uhlirs did not seek emergency room care until a day after the accident and carried on with their errands immediately following the accident. Id. at ¶23. Additionally, the Uhlirs were not prescribed pain medicine and did not seek care with a chiropractor until a month after the accident. Id. Therefore, the court determined that, from the evidence in the record, the jury could have reasonably concluded that any pain and suffering the Uhlirs experienced was de minimis or unrelated to the accident. Id. at ¶25.

{¶ 14} Additionally, in *Werner v. McAbier* (Jan. 13, 2000), Cuyahoga App. Nos. 75197 and 75233, we affirmed a jury's denial of damages for pain and suffering due to the plaintiff's lack of believability concerning the extent of her injuries. The plaintiff described the impact of the accident as severe even though photographs depicted the damage to the defendant's vehicle as small. The defendant further provided that at the point of impact he was traveling only five miles per hour and that no passengers in his vehicle suffered injuries. Also, the plaintiff acknowledged working full-time following the crash and only missing "minimal" time from work. Under these circumstances, we found that the jury's verdict was not against the manifest weight of the evidence.

{¶ 15} In the case sub judice, we too find that the jury likely found Ana's testimony regarding her pain and suffering lacked credibility, and thus, reasonably concluded that any pain and suffering she experienced was de minimis. Although Ana described the accident as "chaos" and a "disaster," photographs revealed minimal damage to her vehicle. Furthermore, defendant testified that there was no damage to her vehicle, the airbags did not deploy, and she did not seek repairs following the accident. Moreover, the defendant was not injured and both parties drove away in their vehicles from scene of the accident.

{¶ 16} Also, Ana testified that her injuries were so severe that her daily activities were inhibited but she admitted that she never took any pain medication or any other medications prescribed by her doctors. She also refused to take an MRI and a discogram of her cervical spine even though repeatedly recommended by her physicians. Furthermore, Ana testified that she experienced "terrible" and "intense" pain immediately when the accident occurred. Yet, she refused ambulance assistance at the scene and never went to the emergency room. Instead, she saw Dr. Reyes in Dr. Musca's office, a doctor she had never met before, three days after the accident. In light of the foregoing, it was reasonable for the jury to believe that Ana exaggerated her pain, and therefore, found damages for pain and suffering to be de minimus.

{¶ 17} Finally, we reject plaintiffs' assertions that this case is similar to those presented in *Hardy v. Osborn* (1988), 54 Ohio App.3d 98, 560 N.E.2d 783 and *Buford v. Goss* (Dec. 16, 1993), Cuyahoga App. No. 64473. In both cases, we

reversed jury verdicts awarding damages for medical expenses to an injured plaintiff without an award of damages for pain and suffering. Those cases, however, are distinguishable from the instant matter.

{¶ 18} *Buford* concerned a default judgment entered by the court and not a jury trial. Likewise, in *Hardy*, the pain and suffering was indisputable. The plaintiff suffered from the objective injuries of a facial laceration that required plastic surgery and significant dental damages such as broken teeth. In this matter, Ana complains of the subjective injury of soft-tissue damage to her neck and back. Accordingly, we find both *Buford* and *Hardy* inapplicable to the instant matter.

{¶ 19} Plaintiffs' first assignment of error is overruled.

{¶ 20} Their second error provides:

{¶ 21} "The trial court erred in failing to instruct the jury to return a verdict consistent with Ohio law awarding some amount for pain and suffering where medical bills, both past and future, were accepted by the jury."

{¶ 22} In light of our decision in plaintiffs' first assignment of error, we find that the trial court did not error in denying their request to instruct the jury that it must award damages for pain and suffering. Therefore, this assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellants 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.

ANN DYKE, JUDGE

MARY EILEEN KILBANE, P.J., and
COLLEEN CONWAY COONEY, J., CONCUR