[Cite as *Ayad v. Gereby*, 2010-Ohio-1415.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92541

BRAHIM (ABE) AYAD, ET AL.

PLAINTIFFS-APPELLANT

vs.

STEFANIA GEREBY

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-655200

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

RELEASED: April 1, 2010

JOURNALIZED:

ATTORNEY FOR APPELLANT

Harvey J. McGowan
1245 East 135th Street
East Cleveland, Ohio 44112-2413

ATTORNEYS FOR APPELLEE

Patrick F. Roche
David S. Brown
Davis & Young
1200 Fifth Third Center
600 Superior Avenue, East
Cleveland, Ohio 44114-2654

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).

JAMES J. SWEENEY, J.:

{¶ 1} Plaintiff-appellant, Brahim (Abe) Ayad ("Abe"), appeals a judgment awarding defendant-appellee, Stefania Gereby ("Gereby"), $71,500 in damages as a result of an automobile accident involving Gereby and Abe's son, Mustafa Ayad ("Mustafa"). After reviewing the facts of the case and pertinent law, we affirm.

{¶ 2} On October 2, 2007, Gereby was traveling west on Center Ridge Road in Westlake, Ohio when she tried to make a left turn into Pat Catan's. Gereby thought she was clear of oncoming traffic; however, Mustafa, who was driving east on Center Ridge Road, collided with Gereby's vehicle. Police arrived on the scene and cited Mustafa for speeding and driving under a suspended license.

{¶ 3} On March 27, 2008, Abe, who owned the car Mustafa was driving at the time of the accident, and Mustafa filed a property damage and personal injury claim against Gereby. On April 17, 2008, Gereby filed counterclaims against Abe and Mustafa, also alleging personal injuries stemming from the accident.

{¶ 4} On October 15, 2008, Abe and Mustafa filed a motion for leave to file a summary judgment motion regarding Gereby's counterclaims; they also filed the summary judgment motion at the same time. On October 20, 2008, the court denied the motion for leave and struck the summary judgment motion from the record.

{¶ 5} On October 29, 2008, Abe and Mustafa voluntarily dismissed their claim against Gereby after settling with Gereby's insurance company.

{¶ 6} On November 10, 2008, Gereby's counterclaims went to trial before a jury. However, on this same day, Mustafa filed for bankruptcy, and Gereby was forced to dismiss her counterclaim against him. The case proceeded to trial on Gereby's counterclaim against Abe for negligent entrustment.

{¶ 7} On November 14, 2008, the jury rendered a verdict in favor of Gereby and awarded her $110,000. However, the jury attributed 35% of the negligence causing the car accident to Gereby, thus reducing her total damage award to $71,500.

{¶ 8} On November 19, 2008, Abe filed a post-judgment motion for the following: judgment notwithstanding the verdict, a new trial, and a court modification of the verdict award. Additionally, on December 12, 2008, Abe filed a notice of appeal. On December 23, 2008, this Court remanded the case to the trial court for the limited purpose of ruling on Abe's post-judgment motion. The trial court denied the motion, and this appeal is now before us.

{¶ 9} Defendant raises four assignments of error for our review.

{¶ 10} "I. That the original trial Judge Nancy Margaret Russo erred in denying plaintiff/appellants [sic] leave to file motion for summary judgment and striking the plaintiff/appellant's motion for summary judgment."

{¶ 11} Civ.R. 56(B) states, in pertinent part, that a defending party may move for summary judgment at any time; however, "[i]f the action has been set for pretrial or trial, a motion for summary judgment may be made only with leave of court." According to the 1976 Staff Notes to Civ.R. 56(B), the purpose of this rule is to

"prevent delays in the trial of actions occasioned by the late filing of motions for summary judgment * * * and leave the entertainment of a motion for summary judgment to the discretion of the court once the action has been set for a pretrial or for trial. Under the rules of superintendence, the judge to whom an action is assigned is responsible for its expeditious determination."

{¶ 12} We apply an abuse of discretion standard when reviewing a trial court's ruling on a motion for leave to file summary judgment. To show that the court abused its discretion, the party moving for leave must show that the court's decision was unreasonable, arbitrary, or unconscionable. *Sultaana v. Giant Eagle,* Cuyahoga App. No. 90294, 2008-Ohio-3658.

{¶ 13} Although Abe assigns as error the court's denying his motion for leave, which is a purely procedural issue, he argues that the court should have granted his summary judgment motion because Gereby was at fault in the accident, which is a substantive issue. As the merits of his summary judgment motion are not before this Court, we only address whether the court abused its discretion in denying Abe's motion for leave. We note that the substantive arguments that Abe makes in his summary judgment motion are addressed on appeal under assignments of error two and three.

{¶ 14} On June 17, 2008, the court held a case management conference during which it set the final pretrial for October 27, 2008 and the trial for November 10, 2008. The court held a settlement conference on August 7, 2008, and the associated journal entry states "all other dates and orders remain in effect." Abe

filed his motion for leave on October 15, 2008. Pursuant to Civ.R. 56(B) it was within the court's discretion to deny this motion because the trial date was set. See *State ex rel. Lantz v. Indus. Comm*. (1993), 66 Ohio St.3d 29, 31, 607 N.E.2d 456 (holding that a party has no *right* to file a motion for summary judgment, as Civ.R. 56 "permits a motion for summary judgment 'only with leave of court' if the case has been set for trial or pretrial, and not as a matter of course"). (Emphasis in original.) See, also, *Washington v. Concordia Care*, Cuyahoga App. No. 84211, 2005-Ohio-3165, at ¶26-27 (holding that the plaintiff "failed to establish that the trial court abused its discretion by denying her request for an extension * * * of time to file her brief in opposition to [defendant's] motion for summary judgment").

{¶ 15} Nothing in the record suggests that the court acted arbitrarily, capriciously, or unconscionably when it denied Abe's motion for leave to file summary judgment. Accordingly, we overrule Abe's first assignment of error.

{¶ 16} "II. That the visiting trial Judge Ralph McAllister erred in denying plaintiff/appellant's motion [for] judgment JNOV in a departure from fairness and non-biased determination by the court."

{¶ 17} Pursuant to Civ.R. 50(A)(4), the trial court shall issue a directed verdict when, "after construing the evidence most strongly in favor of the party against whom the motion is directed, [the court] finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party * * *." The standard for granting a judgment notwithstanding the verdict is the same as the standard for

granting a directed verdict. *McNees v. Cincinnati St. Ry. Co.* (1949), 152 Ohio St.268, 89 N.E.2d 138.

{¶ 18} In *Wagner v. Roche Laboratories* (1996), 77 Ohio St.3d 116, 671 N.E.2d 252, the Ohio Supreme Court held that a motion for a directed verdict tests the legal sufficiency of the evidence, which is a question of law. "This does not involve weighing the evidence or trying the credibility of witnesses." Id. at 119 (citing *Ruta v. Breckenridge-Remy Co.* (1982), 69 Ohio St.2d 66, 430 N.E.2d 935). We review a trial court's ruling on a motion for a directed verdict or a judgment notwithstanding the verdict under a de novo standard. *Condello v. Raiffe*, Cuyahoga App. Nos. 83076 and 83556, 2004-Ohio-2554.

{¶ 19} In *Gulla v. Straus* (1950), 154 Ohio St. 193, 198, 93 N.E.2d 662, the Ohio Supreme Court set forth the elements of negligent entrustment: "It is a well settled rule of law that the owner of a motor vehicle may be held liable for an injury to a third person resulting from the operation of the vehicle by an inexperienced or incompetent driver, upon the ground of negligence, if the owner knowingly, either through actual knowledge or through knowledge implied from known facts and circumstances, entrusts its operation to such a driver."

{¶ 20} Although it is unclear from Abe's brief what his arguments are under this assignment of error, he appears to be alleging that the court erred for the following reasons:

(a) As Gereby "is solely responsible and the proximate cause of the accident" her negligent entrustment counterclaim is without merit because there was insufficient evidence of Mustafa's negligence;

(b) Because Ayad's claims against Gereby were settled out of court, "it is clear that [Abe] was entitled to the relief of summary judgment";

(c) Excerpts of Mustafa's deposition were improperly admitted at trial;

(d) It was improper to prohibit the testimony of multiple witnesses proffered by Abe;

(e) It was improper to allow the videotaped deposition of Gereby's treating physician; and

(f) No evidence was presented that Abe gave Mustafa permission to use the vehicle.

{¶ 21} We first address sub-arguments (a) and (f), as they are properly raised under this assignment of error.

{¶ 22} At trial, Gereby presented the following evidence:

{¶ 23} At the time of the accident, Mustafa was 20 years old and driving under a suspended license. This was his second driving license suspension. Prior to the accident, Mustafa had multiple speeding tickets and other driving infractions, including a conviction for operating a motor vehicle while intoxicated. Abe testified that he knew about his son's "traffic problems," including the license suspensions.

{¶ 24} As a result of the accident, Mustafa was cited for speeding and driving under a suspended license. Westlake Police Officer Keenan Cook testified that at the scene of the accident, Mustafa stated that he had been driving 45 miles per hour. The speed limit in this area is 35 miles per hour. Officer Cook's "Traffic Crash Report" from the accident states that "witnesses stated [Mustafa] was traveling at a high rate of speed [and] struck [Gereby's car], sending it approximately 83 ft. east."

{¶ 25} One eyewitness testified that she saw Mustafa "traveling extremely fast" on Center Ridge Road, then heard the impact of the accident seconds later. A second eyewitness testified that she was stopped in traffic on Center Ridge Road when she heard Mustafa's car "coming behind me going very fast." She saw Gereby's car trying to turn left, and thought that because Mustafa was driving so fast, Gereby would not be able to see him coming. She then saw Mustafa's car hit Gereby's car. Asked how fast Mustafa was driving, this witness testified, "I mean, he was going very fast. I would say he was going highway speeds because I could hear him behind me before he ever even passed me. I could hear the noise of him coming."

{¶ 26} It is undisputed that the car was in Abe's name at the time of the accident. As to whether Abe gave Mustafa permission to use the car, Abe testified at trial as follows:

{¶ 27} "Q: And regarding the automobile, he was driving — he drove that car as well as you did. Whenever he needed this car, he drove the car, correct?

{¶ 28} A: No, sir.

{¶ 29} Q: Do you remember my taking your deposition on August 21, 2008 when you came to my office with Mr. McGown, and I asked you a series of questions?

{¶ 30} A: Yes, sir.

{¶ 31} Q: Okay. And I asked you the question, line 16: And how was it that your son happened to be driving the car that night?

{¶ 32} Your answer: He drove the car as well as I did. Whoever needed the car drove the car, period.

{¶ 33} Correct, sir?

{¶ 34} A: Yes, sir. Not without my permission, though. See, sir, it was his car. I put it in my name so I can control him. I can't take his license away.

{¶ 35} THE COURT: Wail 'til the next question.

{¶ 36} THE WITNESS: Yes, sir.

{¶ 37} Q: Mr. Ayad, you know at the time this accident happened that your son had received some speeding tickets before the accident?

{¶ 38} A: That's why the car was in my name, yes, sir."

{¶ 39} Abe's trial testimony was inconsistent with his prior statement that Mustafa routinely drove the car as needed. This prior statement is an admission by a party opponent and is allowed as evidence at trial. Evid.R. 801(D)(2). In addition, Gereby presented evidence that during Mustafa's June 2, 2008

deposition, Mustafa stated that his father owned the car that was involved in the accident, but that he typically drove the vehicle with his father's permission.

{¶ 40} This evidence is sufficient to show that Mustafa was an incompetent driver; Abe knew of his son's incompetence; Abe allowed Mustafa to drive the car; and Mustafa was driving negligently — if not recklessly — when he hit Gereby's car. As these are the elements that Gereby must show to succeed on her negligent entrustment claim, we find no error in the court's denial of Abe's motion for a directed verdict.

{¶ 41} We next turn to the four other issues Abe raises under this assignment of error.

{¶ 42} First, Abe argues that because Gereby's insurance company settled his and Mustafa's claim against Gereby, Abe should be granted summary judgment on her claim against him. It is a long-standing rule in Ohio that "the fact that the defendant is covered by liability insurance is deemed irrelevant and not admissible in evidence; and the disclosure of this fact at any time is prejudicial to the defendant. * * * When a person against whom a claim is brought makes a settlement with the claimant, such person does not thereby acknowledge liability." *Chitlik v. Allstate Ins. Co.* (1973), 34 Ohio App.2d 193, 195, 198, 299 N.E.2d 295 (citing *Emrick v. Penna. Rd. Y. M. C. A*. (1942), 69 Ohio App. 353, 43 N.E.2d 733; *Frank v. Corcoran* (1926), 25 Ohio App. 356, 158 N.E. 501).

{¶ 43} Accordingly, this argument has no merit.

{¶ 44} Second, Abe argues that excerpts of Mustafa's deposition were improperly admitted at trial. The record shows that the court reporter who was present at Mustafa's deposition for this case testified, without objection,[1] about what Mustafa said at that deposition. Specifically, she read into the record Mustafa's sworn statement that he typically drove the car in question with his father's permission.

{¶ 45} We review trial court rulings regarding the admission or exclusion of evidence under an abuse of discretion standard. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343. Pursuant to Civ.R. 32(A), "[e]very deposition intended to be presented as evidence must be filed at least one day before the day of trial or hearing unless for good cause shown the court permits a later filing." Additionally, "[t]he deposition of a witness * * * may be used by any party for any purpose if the court finds" that the witness is unavailable for a variety of reasons. Civ.R. 32(A)(3).

{¶ 46} Challenges to the admission or exclusion of evidence must be made by "a timely objection or motion to strike, * * * stating the specific ground of objection, if the specific ground was not apparent from the context." Evid.R. 103(A)(1). As Abe did not argue at trial that Mustafa's deposition excerpts were inadmissible under Civ.R. 32, or any other legal authority, this argument is waived

[1]We note that Abe's counsel objected to 19 of the 20 exhibits that Gereby's counsel offered into evidence at the close of Gereby's case. However, counsel did not object to the testimony as it was being offered. We do not consider this umbrella objection precise or timely enough to cover the testimony about Mustafa's prior statements.

on appeal. See Civ.R. 32(D)(4) (stating, in pertinent part, that "[e]rrors * * * in the manner in which the * * * deposition is * * * filed * * * are waived unless a motion to suppress the deposition * * * is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained"). See, also, *State v. Self* (1990), 56 Ohio St.3d 73, 564 N.E.2d 446.

{¶ 47} Accordingly, this argument is without merit.

{¶ 48} Third, Abe argues that the court erred when it prohibited the testimony of multiple witnesses he proffered. The record shows that after Gereby rested her case, Abe proffered a witness list of 11 of his family members, who were prepared to testify that he did not give Mustafa permission to drive the car. The following discussion took place on the record:

{¶ 49} "THE COURT: Well, I've heard considerable evidence here to the effect that it was not his son's automobile. It was owned by [Abe]. Perhaps this would be the time for us to decide that you might call a couple of those witnesses. You pick the two best ones you think of, and you may call them.

{¶ 50} "* * *

{¶ 51} "Well, you pick two of them. We'll go from there. And I'm making an exception for you here because you were ordered to have this witness list to opposing counsel several days ago * * *."

{¶ 52} The court then changed its mind after determining that this last minute witness list put "opposing counsel at a distinct disadvantage, unfair disadvantage, by giving him a witness list now, all people who can very best be described as

apparently very, very biased since they're all members of the household. * * * And so since these witnesses are all late, the witness list, all the witnesses on that witness list who were not previously identified will not be permitted to testify."

{¶ 53} One of the purposes of the Ohio Rules of Civil Procedure is to prevent unfair surprise. Civ.R. 26(A). See, also, *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 482 N.E.2d 1248. Accordingly, a trial court will not abuse its discretion by excluding testimony of undisclosed witnesses. See *Paugh & Farmer, Inc. v. Menorah Home for Jewish Aged* (1984), 15 Ohio St.3d 44, 46, 472 N.E.2d 704 (holding that "the trial judge did not abuse its discretion in excluding the testimony of appellant's expert" when the appellant did not file the expert's report within the court ordered deadline).

{¶ 54} In the instant case, Abe filed a witness list as part of his trial brief on November 6, 2008. The 11 family members who the court prohibited from testifying are not on this witness list.

{¶ 55} Accordingly, this argument is without merit.

{¶ 56} Abe's final argument under this assignment of error is that the court erred by allowing the videotaped deposition of Gereby's treating physician. Abe essentially argues that Gereby failed to file her doctor's video deposition one day prior to trial, as required by Civ.R. 32(A). However, when this doctor's video testimony was presented at trial, Abe objected on entirely different grounds; namely, that Gereby's counsel notified him of the deposition too late, and as a result, Abe's counsel did not appear at the deposition.

{¶ 57} The record shows that Gereby's counsel notified Abe's counsel on November 4, 2008, that the doctor's testimony would be videotaped on November 7, 2008. One day after the video was made, Abe's counsel replied to Gereby's counsel that due to the short notice, he would be unable to attend the videotaping. From these facts, the court admitted the video testimony, finding that "it could have been worked out," and Gereby had a right to present it.

{¶ 58} Civ.R. 32 governs the "[u]se of depositions in court proceedings." An alleged error under this rule regarding filing depositions with the court is not properly before us on appeal because Abe did not raise this issue in the proceedings below. See Civ.R. 32(D)(4), supra. Civ.R. 30, on the other hand, governs the general procedure for how depositions may be taken. Civ.R. 30(B)(1) states that a "party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action." Civ.R. 30(B)(2) states that "[i]f any party shows that when the party was served with notice the party was unable, through the exercise of diligence, to obtain counsel to represent the party at the taking of the deposition, the deposition may not be used against the party."

{¶ 59} The issues in the instant case are whether Gereby gave notice of the deposition in a reasonable time and whether Abe could not, with due diligence, attend. The 1970 Staff Notes to Civ.R. 30 state that a reasonable time for notice "is a case-by-case determination and the problem is usually settled amicably by counsel. * * * The rule protects parties against the quick deposition by stating that

depositions taken when the party could not through due diligence obtain representation shall not be used against the party."

{¶ 60} A review of the record shows that on October 6, 2008, Gereby served Abe with medical records she intended to use at trial that identified her treating physician. This doctor is also identified on Gereby's witness list. It is common for videotaped depositions of doctors to be used at trial in lieu of live testimony. See Civ.R. 32(A)(3)(e) and Civ.R. 30(B)(3). While we acknowledge that three days notice of a deposition is not an abundance of time, we cannot say that the court abused its discretion, as Abe's counsel did not show that he exercised due diligence in attempting to attend or reschedule the deposition. He did not notify Gereby's counsel that he would not be able to attend the deposition until after it took place and he did not object to the doctor's testimony until the video was played for the jury.

{¶ 61} Accordingly, this argument is without merit. The second assignment of error is overruled in toto.

{¶ 62} "III. That the decision of the jury was a departure from the justice and equity to which the plaintiff/appellant was entitled as influenced by the visiting judge and represented a decision against the manifest weight of the evidence."

{¶ 63} When reversing a civil judgment as being against the manifest weight of the evidence, "it is * * * important that * * * a court of appeals be guided by a presumption that the findings of the trier-of-fact were indeed correct." *Seasons Coal Co., Inc. v. City of Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.

"Judgments supported by some competent, credible evidence going to all the essential elements of the case 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.* (1978), 54 Ohio St.2d 279, 280, 376 N.E.2d 578.

{¶ 64} Under this assignment of error, Abe repeats the arguments he made under his first two assignments of error, which we overruled. In addition, Abe argues that "there has not been a scintilla of evidence presented that even hints that [Abe] permitted [Mustafa] to use his vehicle and/or had prior knowledge that he was using the vehicle that day." Abe also argues that Mustafa was not driving negligently, as he had the right of way.

{¶ 65} Under Abe's second assignment of error, we concluded that Gereby presented sufficient evidence to show that Abe gave Mustafa permission to drive the car. We now must determine whether the jury's finding in favor of Gereby was against the manifest weight of the evidence. Mustafa testified that his father gave him permission to use the car. Furthermore, Abe initially stated that Mustafa used the car whenever he needed it. Then Abe changed his testimony to state that Mustafa did not have his permission to use the car. This is an issue of credibility for the jury to decide, which we will not disturb on appeal. "The choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123, 489 N.E.2d 277.

{¶ 66} Additionally, there is ample evidence in the record to show that Mustafa was negligent when he hit Gereby's car, including: his admission that he was driving ten miles over the posted speed limit; that his driver's license was suspended at the time of the accident; that he received traffic citations for speeding and driving under a suspended license at the scene of the accident; and the testimony of two witnesses who saw and heard him driving extremely fast when he crashed into Gereby's car.

{¶ 67} Accordingly, there is competent, credible evidence in the record to prove the elements of negligent entrustment, thus the judgment is not against the manifest weight of the evidence. Abe's third assignment of error is overruled.

{¶ 68} Abe's fourth and final assignment of error states as follows:

{¶ 69} "IV. That the visiting trial court judge by his actions in court including before the jury, in denying the lawful and proper requests of the plaintiff/appellant's counsel so departed from the propriety and unbiased demeanor of the court so as to represent [an] open bias and departure from impartiality resulting in the deprivation of the plaintiff/appellant's right to a fair trial."

{¶ 70} Abe's entire argument under this assignment of error follows: "Is there any doubt that there was an error of judgment and abuse of Ayad by the visiting judge? All submission contained in Assignments of Error 1-3 is incorporated as if fully rewritten herein as a part of the Assignment."

{¶ 71} Elsewhere in Abe's brief, he identifies portions of the record and alleges that the judge's actions deprived him of a fair trial. For example, Abe

alleges that the court's statements of "This is an American courtroom," and "go somewhere else," were improper as they "were intended to play against Ayad's Arab/Palestinian race and Muslim religion and were made in front of the jury." Additionally, the court sanctioned Abe for an outburst after warning him several times to control himself and remain quiet.

{¶ 72} A review of the transcript shows that the court's statements and sanctions against Abe occurred when the jury was not in the courtroom. Furthermore, Abe's brief contains neither argument nor legal authority to support his contention that he did not receive a fair trial. Accordingly, this assignment of error is overruled pursuant to App.R. 12(A)(2) and 16(A); see, also, *Kremer v. Cox* (1996), 114 Ohio App.3d 41, 60, 682 N.E.2d 1006.

{¶ 73} Judgment affirmed.

It is ordered that appellee recover from appellant her 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.

JAMES J. SWEENEY, JUDGE

MARY EILEEN KILBANE, P.J., and
PATRICIA A. BLACKMON, J., CONCUR