

[Cite as *Kinasz v. Davis*, 2015-Ohio-602.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101417

MARY KINASZ

PLAINTIFF-APPELLANT

vs.

BRANDON J. DAVIS

DEFENDANT-APPELLEE

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-13-798778

BEFORE: Blackmon, J., E.A. Gallagher, P.J., and Kilbane, J.

RELEASED AND JOURNALIZED: February 19, 2015

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PATRICIA ANN BLACKMON, J.:

{¶1} Appellant Mary Kinasz (“Kinasz”) appeals the jury’s award for non-economic damages and assigns the following error for our review:

The jury’s verdict awarding the plaintiff-appellant \$10,000 in non-economic damages for her injuries sustained in the automobile accident was contrary to the manifest weight of the evidence.

{¶2} Having reviewed the record and pertinent law, we affirm the trial court’s judgment. The apposite facts follow.

{¶3} Kinasz retired from the police force in 1988 and was placed on partial permanent disability due to a lower back injury and frost bite to the hands and feet that she suffered while on the job. In 2006, she was involved in a car accident and sustained injuries. She complained of neck and back pain, numbness, and pain radiating down her limbs.

{¶4} On March 14, 2011, 61-year old Kinasz sustained injuries in another accident when her vehicle struck the side of the vehicle driven by appellee Brandon J. Davis (“Davis”), resulting in a crash. Davis stipulated to liability; therefore, only the issue of damages was tried before the jury.

{¶5} As a result of the crash, Kinasz’s airbags deployed and her car caught on fire. She lost consciousness and was pulled from the car by a witness. After she was pulled from the car, she was confused and disoriented and brought to MetroHealth Hospital for assessment. She was released the next morning.

{¶6} MetroHealth records indicate that after the March 2011 accident, Kinasz complained of neck and jaw pain, lumbar spasms, pain in the left knee, black specks in vision,

blurred vision, confusion, headaches, and nausea. A CT Scan was performed, and according to the MetroHealth radiologist she had a L-4 transverse fracture in her neck. Kinasz followed up with treatment with her personal physician. Her personal physician referred her for physical therapy and to an orthopaedic doctor, Dr. Bergfeld.

{¶7} About a month after the accident, Dr. Bergfeld's notes indicate that Kinasz "was feeling much better. Some mild discomfort in neck and knees. Knees have full range of motion. Knee X-rays unremarkable, some arthritis." Kinasz then switched to a new orthopaedic doctor, Dr. Fumich, because she claimed Dr. Bergfeld was never available.

{¶8} Neither Dr. Fumich nor Dr. Bergfeld testified at trial. Only her treating neurologist, Dr. Harold Mars, testified. He testified that he first saw Kinasz on October 1, 2011, over six months after the accident. Her chief complaints were numbness, arm spasms, tingling, neck pain, headaches, back pain, memory and concentration problems.

{¶9} In Dr. Mars's opinion, Kinasz had a herniated disc in her lower back that was compressing her nerve root, which would account for the pain she was suffering. He also testified that Kinasz had a herniated disc in her cervical area. He stated that these conditions were responsible for the pain and tightness she had in her back and neck, and numbness in her left leg. She also reported confusion, forgetfulness, and constant headaches, which he attributed to post-concussion syndrome. He stated that to a reasonable degree of medical certainty, Kinasz's problems were related to the March 2011 accident and were permanent.

{¶10} On cross-examination, Dr. Mars admitted that until the day before his deposition, he did not know that Kinasz had been in a prior accident in 2006, and that she made similar claims of neck and back pain and numbness. He did not know that her treating doctor for the 2006 accident had been unable to resolve her lower back pain and at the time he stopped treating

in 2007, Kinasz's back pain was worse than after the accident. The 2006 doctor had referred her to two surgeons for potential back surgery; Kinasz did not follow through with the surgery. Given this information regarding her prior injuries, Dr. Mars concluded that the current accident could have aggravated the injuries from the prior accident.

{¶11} The defense presented two expert witnesses: neurologist Dr. Joseph P. Hanna and orthopaedic surgeon Dr. Manuel A. Martinez. Both experts personally examined Kinasz and reviewed her various X-rays, MRIs, and CT Scan to render an opinion. They both testified that Kinasz's complaints of headaches, dizziness, numbness, and neck pain were vague subjective complaints, there was no objective findings to support these symptoms, and that her medical records indicated she had complained of similar symptoms to her doctors prior to the accident. Both experts noted that Kinasz had suffered from lower back pain for over a decade prior to the accident and had complained of neck and back pain when she was treated for the 2006 accident.

{¶12} Although Kinasz's doctor claimed she had a herniated disc in the cervical area of her spine, the defense experts both stated they only saw a bulging, not a herniation, and that the bulging was not compressing any nerves that would account for the symptoms she was experiencing. The experts also stated that the bulging in her cervical area was due to degenerative disc disease due to aging. An X-ray from 2006 showed that Kinasz was losing spine space in her cervical spine; Dr. Martinez stated that over time, the bulging of the area would occur as a normal progression of the aging process. Both defense experts saw no fracture in the neck area; Dr. Martinez noted that because there were "sclerotic" or bold ends in the disc, the problem was one that had been there for awhile.

{¶13} Both defense experts agreed that Kinasz had herniated discs in the region of her lower lumbar, and they both agreed that one of the discs was pressing on a nerve root. However,

prior MRIs from the 2006 accident showed that Kinasz had prior problems in this same area. According to Dr. Martinez, the current MRI showed a normal progression of degeneration and arthritis in that area and that over time, a bulging disc will herniate.

{¶14} Although Kinasz also complained of pain in her left knee and ankle, both defense experts found her complaint to be subjective. Dr. Martinez was able to rotate her left knee in the same manner as her right knee without causing pain. Although her doctor had testified she had a meniscus tear in the left knee, the defense experts stated there was no tear because there was an absence of fluid in the knee area. Instead, the defense experts stated the changes in the cartilage in her knee was compatible with arthritis and degeneration.

{¶15} Dr. Hanna stated he did not agree with Kinasz's treating doctor that Kinasz's mental issues, such as forgetfulness, headaches, and confusion, were post-concussion symptoms. He stated she had excellent recall of the accident when questioned and did not "portray" herself as cognitively impaired when he spoke with her. He stated more sophisticated testing would have to be done to determine if she was cognitively impaired because her current complaints were subjective.

{¶16} In conclusion, both defense experts stated that Kinasz probably did sustain some contusions and sprains after the accident. However, they claimed these were injuries that would have resolved approximately six weeks after the accident. They both testified to a reasonable degree of medical certainty that her current problems were due to prior injuries, arthritis, and the normal progression of degeneration due to aging. They both agreed that although the accident may have irritated these existing problems, any irritation would have been temporary, not permanent.

{¶17} The jury awarded Kinasz a total of \$30,000, which broken down resulted in an award of \$20,000 in economic damages and \$10,000 in non-economic damages.

Damages

{¶18} In her sole assigned error, Kinasz argues the non-economic damages awarded by the jury are against the manifest weight of the evidence.

{¶19} Non-economic damages are not presumed even if the plaintiff establishes proof of actual economic damages. *See Uhler v. State Farm Ins. Co.*, 164 Ohio App.3d 71, 2005-Ohio-5545, 841 N.E.2d 344, ¶ 21 (8th Dist.); *Metter v. Konrad*, 8th Dist. Cuyahoga No. 85271, 2005-Ohio-4290, ¶ 15. “Evidence relative to pain and suffering in damages evaluations is within the province of the fact-finder.” *Baughman v. Krebs*, 8th Dist. Cuyahoga No. 73832, 1998 Ohio App. LEXIS 5925 (Dec. 10, 1998). We are not at liberty to disturb the trier of fact’s assessment of damages absent an affirmative finding of passion and prejudice or a finding that the award is manifestly excessive or inadequate. *Moskovitz v. Mt. Sinai Med. Ctr.*, 69 Ohio St.3d 638, 655, 1994-Ohio-324, 635 N.E.2d 331. This is a high legal hurdle for a plaintiff, for we have held that a damages award will not be found to be against the manifest weight of the evidence unless it is “so gross as to shock the sense of justice and fairness, cannot be reconciled with the undisputed evidence in the case, or is the result of an apparent failure by the jury to include all the items of damage making up the plaintiff’s claim.” *Tenaglia v. Russo*, 8th Dist. Cuyahoga No. 87911, 2007-Ohio-833, ¶ 22, citing *Iames v. Murphy*, 106 Ohio App.3d 627, 666 N.E.2d 1147 (1st Dist.1995).

{¶20} Based on the differing opinions between Kinasz’s expert and the defense experts, the jury may well have found that Kinasz’s testimony regarding the extent of her pain and

suffering was not credible or was attributable in part to circumstances not related to the present accident.

{¶21} Kinasz had sought previous extensive treatment for her back problems due to an injury at work and a prior automobile accident in 2006. She made the same complaints regarding her back and neck after the 2006 accident. Defense experts also indicated that some of Kinasz's problems were related to degenerative conditions.

{¶22} Therefore, there is evidence in the record from which a reasonable jury could have concluded that the pain and suffering Kinasz experienced as the result of the accident was not the total reason for her pain and suffering; therefore, the jury only awarded her an amount limited to the pain from the accident. We conclude the jury's damage award was not against the manifest weight of the evidence. Accordingly, Kinasz's sole assigned error is overruled.

{¶23} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga Court of Common Pleas 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.

PATRICIA ANN BLACKMON, JUDGE

EILEEN A. GALLAGHER, P.J., and
MARY EILEEN KILBANE, J., CONCUR