[Cite as *Austin v. Chukwuani*, 2017-Ohio-106.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104590

JAMES AUSTIN

PLAINTIFF-APPELLEE

vs.

OKWULDILI CHUKWUANI

DEFENDANT

[Appeal By American Family Insurance Company]

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-14-834183

BEFORE: Celebrezze, J., E.T. Gallagher, P.J., and Laster Mays, J.

RELEASED AND JOURNALIZED: January 12, 2017

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FRANK D. CELEBREZZE, JR., J.:

{¶1} Defendant-appellant, American Family Mutual Insurance Company ("appellant"), appeals the judgment entered upon a jury verdict in favor of plaintiff-appellee, James Austin ("Austin"), for negligence. Specifically, appellant challenges the jury's award of economic damages, arguing that the verdict is against the manifest weight of the evidence. Appellant further argues that the trial court erred in denying its post-judgment motions for judgment notwithstanding the verdict, remittitur, and a new trial. After a thorough review of the record and law, this court affirms.

I. Factual and Procedural History

{¶2} The instant matter arose from a motor vehicle accident. Austin owned and operated a trucking company that provided delivery services. Austin's delivery business was a two-man operation; Austin typically made deliveries with his brother-in-law, Clinton Gwin ("Gwin"). In December 2010, Austin's delivery business had a contract with Spirit Deliveries making deliveries for Best Buy.

{¶3} On December 30, 2010, Austin and Gwin were making a delivery in Solon, Ohio. Austin parked the truck, moved into the back of the truck, and prepared to deliver an appliance. While Austin was standing in the back of the truck, a vehicle driven by Okwuldili Chukwuani collided into the truck. As a result of the collision, Austin was thrown from the back of the truck to the front.

{¶4} Austin was transported to St. Vincent's Charity Hospital where he was diagnosed with a lumbosacral strain, an injury to his lower back. Austin followed up with his primary care doctor who recommended physical therapy. Austin had magnetic resonance imaging ("MRI") conducted on his back on February 23, 2011. When Austin continued to experience pain in his lower back, his primary care doctor referred him to Dr. Sami Moufawad, a pain management specialist.

{¶5} Dr. Moufawad initially evaluated Austin on March 23, 2011, roughly three months after the accident. Dr. Moufawad reviewed Austin's MRI and testified that the MRI "showed degenerative disc disease at L4-L5 and L5-SI. [Austin] also had disc bulge and arthritis in the facet joint." Dr. Moufawad testified that the findings from Austin's MRI were "not unusual" for a person of Austin's age.[1] Based on his examination of Austin, Dr. Moufawad determined that Austin "had evidence of lumbar tension sign, meaning the nerve root was under pressure." Dr. Moufawad provided the following diagnoses regarding Austin's injuries: "[Austin] developed radiculitis or pinching of the nerve going down to his leg. And [Austin] had suffered from an aggravation of these preexisting findings that we saw on the MRI, meaning his degenerative disc disease and the facet arthritis and the disc bulge." Dr. Moufawad concluded that Austin "had [a] substantial aggravation of the preexistent condition as a result of the motor vehicle accident. And as a result of that, he also developed a sciatica pain or radiculopathy."

[1] The record reflects that Austin was 57 years old at the time of the accident.

{¶6} Dr. Moufawad treated Austin from March 2011 through July 2011; August 2013 through December 2013; and for a final time on February 4, 2015. Dr. Moufawad's treatment for Austin's back injuries consisted of three steroid injections,[2] medication, and home exercises. Dr. Moufawad also discussed the possibility of completing additional physical therapy.

{¶7} Regarding the accident's effect on Austin's ability in the future, Dr. Moufawad testified that Austin could not return to working at his delivery business, which involved delivering heavy appliances. Dr. Moufawad further opined that Austin would be unable to return to work because of the pain that he was experiencing in his lower back.

{¶8} On October 13, 2014, Austin filed a complaint against Chukwuani and appellant alleging that Chukwuani negligently and/or recklessly operated the vehicle that crashed into his delivery truck.

{¶9} Austin carried underinsured motorist coverage with appellant in the amount of $1,000,000. Austin's policy provided coverage for $5,000 in medical payments. Appellant made medical payments to Austin in the amount of $5,000.

{¶10} Chukwuani's insurance coverage provided for liability limits of $100,000. On April 22, 2015, pursuant to the insurance policy, Chukwuani's provider offered $100,000 to Austin. Appellant waived its subrogation rights for the $100,000 tendered by Chukwuani's provider.

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[2] Austin received injections on March 28, 2011; April 4, 2011; and April 11, 2011.

{¶11} A jury trial commenced on June 15, 2015. Dr. Moufawad, Gwin, and Austin testified on his behalf. Appellant did not call any witnesses at trial. At the close of all the evidence, appellant moved for a directed verdict. The trial court denied appellant's motion.

{¶12} The trial court provided the following instructions to the jury:

> Regarding permanent or future damages, you are not to speculate. The law deals in probabilities and not mere possibilities. In determining permanent or future damages, you may consider only those things that you find from the evidence are reasonably certain to continue. (Tr. 264.)
>
> * * *
>
> As it relates to earnings. You will consider whatever loss of earnings the evidence shows that [Austin] had sustained as a proximate result of the injury. You will also consider whatever loss, if any, of earnings the plaintiff will, with reasonable certainty sustain in the future as a proximate cause of the injury. *The measure of such damage is what the evidence shows with reasonable certainty to be the difference between the amount [Austin] was capable of earning before he was injured, and the amount he is capable of earning in the future in his injured condition.*
>
> You may consider the age of [Austin], his record of employment and earnings, his intelligence and ability to work, together with any prospects for advancements which you find have been established by the greater weight of the evidence. (Tr. 266.)

(Emphasis added.)

{¶13} The jury returned a verdict in favor of Austin and awarded him a total of $206,400 in damages: $156,400 in economic damages and $50,000 in noneconomic damages. The jury's damage award was offset against the $100,000 payment tendered by Chukwuani's provider and the $5,000 medical payments appellant tendered to Austin. Austin's final damage award against appellant was $101,400.

{¶14} On July 2, 2015, appellant filed a motion for judgment notwithstanding the

verdict and remittitur, or, in the alternative, a motion for a new trial. The trial court denied appellant's motions on November 3, 2015.

{¶15} Appellant filed a notice of appeal on December 2, 2015. This court dismissed the appeal for lack of a final appealable order, finding that the record did not reflect that Gwin's claims against appellant had been dismissed.

{¶16} On June 10, 2016, appellant filed the instant appeal assigning two errors for review:

> I. The trial court erred in denying [appellant's] motion for judgment notwithstanding the verdict, for remittitur or, in the alternative, for a new trial as there was no competent evidence admitted at trial to support the jury's verdict.
>
> II. The jury's verdict was against the manifest weight of the evidence.

II. Law and Analysis

A. Post-judgment Motions

{¶17} In its first assignment of error, appellant argues that the trial court erred by denying its motions for judgment notwithstanding the verdict ("JNOV"), remittitur, or, in the alternative, a new trial.

1. JNOV

{¶18} Appellant argues that there is no competent or credible evidence supporting the jury's $156,400 economic damages award. Appellant does not contest the $13,655 awarded to Austin for the payments he made to the employees that replaced him on his delivery truck. Rather, appellant contends that the jury awarded the remaining $142,745 to Austin based on pure speculation. We disagree.

{¶19} A motion for judgment notwithstanding the verdict challenges the legal sufficiency of the evidence; a motion for remittitur challenges the weight of the evidence. *Brady v. Miller*, 2d Dist. Montgomery No. 19723, 2003-Ohio-4582, _ 12, citing *Menda v. Springfield Radiologists, Inc.*, 2d Dist. Clark No. 2001-CA-91, 2002-Ohio-6785, and *Schafer v. RMS Realty*, 138 Ohio App.3d 244, 741 N.E.2d 155 (2d Dist.2000). Civ.R. 50 sets forth the standard of granting a motion for directed verdict:

> When a motion for directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to each party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.

The same standard applies to a motion for JNOV. *Chem. Bank of New York v. Neman*, 52 Ohio St.3d 204, 207, 556 N.E.2d 490 (1990). This court employs a de novo standard of review in evaluating the grant or denial of a motion for JNOV. *Grau v. Kleinschmidt*, 31 Ohio St.3d 84, 90, 509 N.E.2d 399 (1987). "The trial court does not weigh or consider the credibility of the witnesses, but rather, reviews and considers the sufficiency of the evidence as a matter of law." *Siebert v. Lalich*, 8th Dist. Cuyahoga No. 87272, 2006-Ohio-6274, ¶ 15. A motion for JNOV should only be granted if the movant is entitled to judgment as a matter of law when the evidence is construed most strongly in favor of the nonmovant. *Id*. at ¶ 14.

{¶20} Appellant emphasizes that although Austin testified that he was forced to withdraw money from his savings and retirement accounts, Austin neither specified the amount that he actually withdrew nor presented evidence, such as financial records or

receipts, confirming that he did, in fact, withdraw the money. However, appellant ignores Austin's testimony regarding his pre- and post-accident income.

{¶21} Generally, once a plaintiff establishes a right to damages, plaintiff's right will not be denied merely because the damages cannot be calculated with mathematical certainty.

> "However, damages will not be awarded based on mere speculation and conjecture. * * * The plaintiff must show entitlement to damages in an amount ascertainable with reasonable certainty. * * * In assessing prospective damages, the trier of fact can only consider damages which are reasonably certain to follow the injury complained of."

(Citations omitted.) *Marzullo v. J.D. Pavement Maintenance*, 2011-Ohio-6261, 975 N.E.2d 1, ¶ 40 (8th Dist.), quoting *Barker v. Sundberg*, 11th Dist. Ashtabula No. 92-A-1756, 1993 Ohio App. LEXIS 5112, 4 (Oct. 25, 1993). In order to recover lost earnings, a plaintiff must establish the lost earnings with reasonable certainty. *AGF, Inc. v. Great Lakes Heat Treating Co.*, 51 Ohio St.3d 177, 555 N.E.2d 634 (1990). Based on the following testimony, we find that the jury's economic damages award is supported by competent and credible evidence.

{¶22} Austin testified about the income he made when he was able to work on the delivery truck. Austin asserted that he would make $700 on a bad week, $1,000 on a good week, and $1,200 on an excellent week. Furthermore, during his July 29, 2013

deposition, Austin stated that when he was able to work on his delivery truck in 2010, he could earn $1,000 per week on a "decent week," "as long as he hustled."

{¶23} Austin testified that after the accident, *he had no income for eight months*. Austin asserted that he never returned to working on his delivery truck after the accident because he was unable to lift or deliver heavy appliances.

{¶24} Austin testified that after the accident, *he was only making $100 per week from the delivery business* that was not even enough to pay his personal bills. Austin stated that he dissolved his delivery business and sold his truck in 2012 because the business was no longer profitable.

{¶25} Austin testified that *he earned $1,000 every two weeks in 2012*. Austin testified that at the time of the June 2015 trial, *his income was one-fourth of the income he had before the accident*.

{¶26} Austin was 57 years old at the time of the accident; he was 62 years old at the time of trial. Austin testified at trial that the last time he worked was on August 26, 2013. During his deposition, Austin testified that he had planned to work at his delivery business until he was 65 years old. However, Austin explained that he exhausted his savings account and had to withdraw money from his retirement account in order to pay his bills.[1]

{¶27} Austin's testimony was corroborated by the testimony of Dr. Moufawad and Gwin. Dr. Moufawad testified that Austin was unable to return to his delivery business

where he would be required to deliver heavy appliances. Dr. Moufawad further explained that Austin attempted to return to work in a "light dut[y]" position delivering boxes of potato chips, but was unable to do so. Accordingly, Dr. Moufawad opined that Austin would not be able to return to work due to his lower back pain.

{¶28} Gwin testified that he worked on the delivery truck with Austin for 20 years before the accident. Gwin stated that there was no aspect of the delivery business that Austin could not perform before the accident. Gwin explained, "[Austin] was the driver. I mean [he] was the installer. Deliver refrigerators, stoves. There were dish washers, microwaves, and things like that." Gwin asserted that he returned to working on the delivery truck approximately eight weeks after the accident, and continued working on the truck for roughly eight months thereafter.

{¶29} Gwin testified that Austin never returned to working on the truck after the accident. Gwin explained that the delivery business was only profitable as a two-man operation, and that Austin would not be able to make a living on his income from the business if he was not working on the truck. Gwin stated that Austin eventually closed the delivery business. Gwin testified about the impact that the accident had on Austin: "[Austin's] appearance has changed. He's got a cane now. He can't walk. Now he complains about his back hurting. Now he's unable to, you know, do the things that he used to do"; "[Austin's] pace is a lot slower now. He's limping. He's not the person that he was prior to the accident, not at all, not at all." (Tr. 209.)

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[1] There was no evidence introduced regarding the withdrawals.

{¶30} After reviewing the record, we find that it contains substantial competent evidence to support Austin's claim of economic damages, including lost income, upon which reasonable minds could reach different conclusions. Accordingly, the trial court properly denied appellant's motion for JNOV.

2. Remittitur

{¶31} Appellant argues that it is entitled to remittitur in the amount of $142,745 — bringing the $156,400 economic damages award to $13,655 — because the jury's verdict is not supported by sufficient evidence. Appellant further contends that the jury's economic damages award is "clearly excessive."

{¶32} Initially, we note that appellant's argument combines and confuses the issues of JNOV and remittitur. While JNOV pertains to the sufficiency of the evidence, remittitur pertains to the manifest weight of the evidence. *Brady*, 2d Dist. Montgomery No. 19723, 2003-Ohio-4582, at _ 12.

{¶33} We review a trial court's ruling on motions for remittitur under an abuse of discretion standard. *Shepard v. Grand Trunk W. RR. Inc.*, 8th Dist. Cuyahoga No. 92711, 2010-Ohio-1853, ¶ 81. Under an abuse of discretion standard, the trial court's decision will be reversed only if it is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶34} The Ohio Supreme Court has identified four requirements that must be met before a court may order remittitur: (1) unliquidated damages must be assessed by a jury; (2) the jury's verdict must not have been influenced by passion or prejudice; (3) the

damages award must be excessive; and (4) the prevailing party must consent to a reduction in damages. *Wightman v. CONRAIL*, 86 Ohio St.3d 431, 444, 715 N.E.2d 546 (1998).

{¶35} In support of its argument that the jury's economic damages award is excessive, appellant submits that "it cannot be overlooked that the maximum amount of evidence produced for [Austin's] economic loss is $13,655. Therefore, an award assessed by the jury of $156,400 (an amount over eleven times the submitted damages) is clearly excessive." Appellant's brief at 11. Appellant's argument is misplaced. As noted above, appellant overlooks Austin's testimony regarding his income before and after the accident.

{¶36} Austin testified that before the accident, he would make $1,000 on a "good" or "decent" week from his delivery business. Furthermore, Austin asserted that after the accident, he had no income for eight months and only earned $100 per week from his delivery business. Austin stated that he earned $1,000 every two weeks in 2012. Austin testified that his income at the time of trial was one-fourth of his income before the accident.

{¶37} Appellant does not contradict Austin's testimony regarding his pre- and post-accident income. Rather, appellant merely argues that the checks totaling $13,655 were the only evidence of economic loss that Austin presented. Appellant's argument is belied by the record.

{¶38} Based on Austin's testimony, we cannot say that the jury's economic

damages award was excessive. Accordingly, the trial court did not abuse its discretion by denying appellant's motion for remittitur.

3. Motion for a New Trial

{¶39} In the alternative to its arguments regarding JNOV and remittitur, appellant argues that the matter should be remanded to the trial court for a new trial. We disagree.

{¶40} The standard of review we apply to a trial court's ruling on a motion for new trial filed under Civ.R. 59 depends on the grounds for the motion. For example, a motion for new trial premised upon a procedural irregularity under Civ.R. 59(A)(1) is reviewed for an abuse of discretion. *Harris v. Mt. Sinai Med. Ctr.*, 116 Ohio St.3d 139, 2007-Ohio-5587, 876 N.E.2d 1201, ¶ 35-36. A motion for a new trial premised upon "error of law occurring at the trial and brought to the attention of the trial court" under Civ.R. 59(A)(9), however, is reviewed under a de novo standard. In *McLeod v. Mt. Sinai Med. Ctr.*, 166 Ohio App.3d 647, 2006-Ohio-2206, 852 N.E.2d 1235 (8th Dist.), *rev'd on other grounds*, *McLeod v. Mt. Sinai Med. Ctr.*, 116 Ohio St.3d 139, 2007-Ohio-5587, 876 N.E.2d 1201, this court explained that when a jury's verdict is supported by substantial competent and credible evidence, the verdict is presumed to be correct and the trial court must refrain from granting a new trial. *Id*. at ¶ 27, citing *Schlundt v. Wank*, 8th Dist. Cuyahoga No. 70978, 1997 Ohio App. LEXIS 1517 (Apr. 17, 1997).

{¶41} As noted above, we find that the jury's economic damages award is supported by competent and credible evidence. Thus, we must presume that the jury's

verdict is correct. Accordingly, we cannot say that the trial court abused its discretion by denying appellant's motion for a new trial.

{¶42} For all of the foregoing reasons, we find no merit to appellant's first assignment of error. Accordingly, appellant's first assignment of error is overruled.

B. Manifest Weight

{¶43} In its second assignment of error, appellant argues that the jury's verdict is against the manifest weight of the evidence.

{¶44} When reviewing the manifest weight of the evidence in a civil case, this court weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the finder of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 20. A verdict supported by some competent, credible evidence going to all the essential elements of the case must not be reversed as being against the manifest weight of the evidence. *Domaradzki v. Sliwinski*, 8th Dist. Cuyahoga No. 94975, 2011-Ohio-2259, ¶ 6; *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus.

{¶45} Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *Black's Law Dictionary* 1594 (6th Ed.1990).

{¶46} We are guided by a presumption that the findings of the trier of fact are correct. *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). This presumption arises because the trier of fact had an opportunity "to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Id*.

{¶47} In support of its manifest weight challenge, appellant reiterates its argument that the checks totaling $13,655 were the only documented evidence of economic damages that Austin produced at trial. Once again, appellant neglects Austin's testimony regarding his pre- and post-accident income.

{¶48} In light of Austin's testimony regarding his income and Dr. Moufawad's testimony regarding Austin's inability to return to work, we find that the jury's verdict and economic damages award is supported by competent and credible evidence. Accordingly, the jury's verdict is not against the manifest weight of the evidence.

{¶49} Appellant's second assignment of error is overruled.

III. Conclusion

{¶50} After thoroughly reviewing the record, we find that the trial court properly denied appellant's post-judgment motions for JNOV, remittitur, and a new trial. Furthermore, the jury's verdict is not against the manifest weight of the evidence.

{¶51} Judgment affirmed.

It is ordered that appellee recover of appellant 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.

FRANK D. CELEBREZZE, JR., JUDGE

EILEEN T. GALLAGHER, P.J., and
ANITA LASTER MAYS, J., CONCUR