

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

TAMMY MANN,	:	APPEAL NOS. C-220022
		C-220039
Plaintiff-Appellee/Cross-	:	TRIAL NO. A-1302870
Appellant,		
		<i>OPINION.</i>
and	:	
CHRIS MANN,	:	
Plaintiff,	:	
vs.	:	
ABUBAKAR ATIQ DURRANI, M.D.,	:	
and	:	
CENTER FOR ADVANCED SPINE	:	
TECHNOLOGIES, INC.,	:	
Defendants-Appellants/Cross-	:	
Appellees.		

Civil Appeals From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: August 2, 2023

Robert A Winter Jr., James F. Maus, and Benjamin M. Maraam II, for Plaintiff-Appellee/Cross-Appellant,

Taft Stettinius & Hollister LLP, Aaron M. Herzig, Russell S. Sayre, Philip D. Williamson, Anna M. Greve and Jada M. Colon, Lindhorst & Dreidame Co., LPA, Michael F. Lyon, James F. Brockman and Paul J. Vollman, for Defendants-Appellants/Cross-Appellees.

KINSLEY, Judge.

{¶1} Defendants-appellants/cross-appellees Abubakar Atiq Durrani, M.D., and the Center for Advanced Spine Technologies, Inc., (“CAST”) appeal from the trial court’s judgment awarding plaintiff-appellee/cross-appellant Tammy Mann \$438,335.35 in damages on her claims for negligence, failure to obtain informed consent, and fraudulent misrepresentation. In a single assignment of error, Durrani and CAST (collectively referred to as “defendants”) argue that the trial court erred in denying their motion for judgment notwithstanding the verdict, a new trial, or remittitur for a variety of reasons.

{¶2} Mann has filed a cross-appeal challenging the trial court’s granting of a setoff to defendants in the amount of \$42,049.73 based on her settlement of claims against now dismissed defendant Journey Lite and nonparty Medtronic.

{¶3} Following our review of the record, we hold that the trial court erred in admitting a video containing excerpts from various depositions of Durrani (referred to by the parties as the “collage”) that purported to attack Durrani’s credibility via a variety of topics. While certain aspects of the collage may have been independently admissible, based on both the manner in which the questions in the collage were asked and the answers provided by Durrani to those questions, we hold that, as a whole, the collage contained prejudicial and inadmissible testimony and was improperly admitted. Because the resulting error from the admission of the collage cannot be deemed harmless, we hold the trial court erred in denying defendants’ motion for a new trial on this ground.

I. Factual and Procedural Background

{¶4} After experiencing back pain for many years that gradually worsened and began to radiate into her left leg and foot, Mann was referred to Durrani in May of 2012 by her primary care physician Dr. Gieske. Durrani reviewed images from an MRI that Gieske had ordered, and Durrani recommended that Mann receive conservative treatment, including steroid injections and physical therapy. The conservative treatment provided no relief to Mann, who returned to Durrani for a follow-up visit. Durrani then provided Mann with options for two different surgeries. Mann elected to receive the less invasive surgery that would result in a quicker recovery time, which was an L5-S1 left-sided hemilaminectomy, foraminotomy, and decompression. The second surgery recommended by Durrani, which Mann elected not to undergo, was a fusion.

{¶5} Durrani performed surgery on Mann in September of 2012. Mann initially experienced relief from her leg pain following the surgery. With respect to her back pain, Durrani's notes from Mann's follow-up visits indicate that Mann's back pain was 50 percent better, but Mann denied receiving any relief in that area. Durrani referred Mann for a post-surgery MRI. After the technician reading her MRI questioned Mann about a metal artifact in her back, she sought treatment from a new surgeon, Dr. Rohmiller. Rohmiller first recommended that Mann receive physical therapy, but he ultimately performed an L5-S1 lumbar fusion on Mann in January of 2014. This fusion was the same surgery that Durrani had offered Mann but that she had elected not to undergo. Mann obtained some relief from her back pain following the fusion.

{¶6} In April of 2013, Tammy Mann and her husband Chris Mann filed suit against Durrani, CAST, and Journey Lite of Cincinnati, LLC. The claims against Journey Lite were settled prior to trial, but the claims against defendants for negligence, failure to obtain informed consent, fraudulent misrepresentation, battery, and loss of consortium proceeded to a jury trial in September of 2019.

{¶7} At trial, the Manns and defendants presented competing expert testimony as to whether Durrani deviated from the standard of care by exaggerating the findings in Mann's medical images and by performing an unnecessary surgery. Mann testified about her back problems and pain levels both before and after the surgeries performed by Durrani and Rohmiller. She also discussed the consent form that she signed prior to the Durrani surgery and what she understood about her condition and the surgery that was to be performed. Chris Mann testified about the impact of the surgery performed by Durrani on his relationship with Mann.

{¶8} The Manns additionally played a recording of the collage of testimony from Durrani. The collage did not contain any questions regarding the surgery performed on Mann, but rather contained questions on a multitude of topics, including Durrani's role as the director of spine surgery and as an attending orthopedic surgeon, the education he received in Pakistan and his family ties to that country, prior lawsuits filed against Durrani, the revocation of his medical licenses and suspension of his privileges to practice medicine, whether various statements on his resume and on his application for a medical license were truthful, whether papers that he had submitted had to be withdrawn because the information he submitted was false, and his practices as a surgeon, including the frequency of recommending surgery to patients on their first visit.

{¶9} The jury returned verdicts in favor of Mann on her claims for negligence, failure to obtain informed consent, and fraudulent misrepresentation. It additionally found that Mann suffered a permanent and substantial physical deformity and that she was entitled to punitive damages. But it returned verdicts in favor of the defendants on the claim for battery and on Chris Mann's claim for loss of consortium. The jury awarded Mann \$405,000 in compensatory damages (encompassing past and future medical expenses, past and future pain and suffering, and future loss of enjoyment of life), \$100,000 in punitive damages, and attorney fees.

{¶10} Post-trial, the defendants moved for a setoff based on a settlement agreement that Mann had reached with Journey Lite and nonparty Medtronic. Defendants also filed a motion for judgment notwithstanding the verdict, a new trial, or remittitur. The Manns also filed a motion for prejudgment interest.

{¶11} The trial court overruled the Manns' motion for prejudgment interest, but it granted the defendants' motion for a setoff, finding that they were entitled to a setoff in the amount of \$42,049.73. The trial court denied the defendants' motion for a judgment notwithstanding the verdict, a new trial, or remittitur, with the following exception. The court found, with respect to the jury's award of past medical expenses that had previously been paid by Anthem, that Anthem was the real party in interest with respect to those funds and that Anthem had not been properly served in the action. It placed the \$24,614.92 in past medical expenses that Anthem had paid in escrow and severed the disposition of those funds from the rest of the case.

{¶12} The trial court issued a final judgment awarding Mann \$338,335.35 in compensatory damages, \$100,000 in punitive damages, and \$62,071 in attorney fees.

II. Motion for Judgment Notwithstanding the Verdict, New Trial, or Remittitur

{¶13} In their sole assignment of error, defendants argue that the trial court erred in denying their motion for judgment notwithstanding the verdict, a new trial, or remittitur. They raise multiple arguments under this assignment of error, beginning with the contention that their motion for a new trial should have been granted based on the trial court's admission of evidence that was allegedly substantially more prejudicial than probative, including the collage, evidence of Durrani's medical license revocations, and other lawsuits that had been filed against Durrani.

A. Standard of Review

{¶14} Civ.R. 50 governs motions for judgment notwithstanding the verdict. *Adams v. Durrani*, 2022-Ohio-60, 183 N.E.3d 560, ¶ 19 (1st Dist.). We review the trial court's ruling on such a motion de novo and must construe the evidence in the light most favorable to the nonmoving party and only grant the motion if reasonable minds could come to but one conclusion which is in favor of the moving party. *Id.*

{¶15} A motion for a new trial is governed by Civ.R. 59. *Id.* at ¶ 20. "A court may grant a motion for a new trial for, among other things, an irregularity in the proceedings of the court, if the judgment is not sustained by the weight of the evidence, or any reason 'for good cause shown.'" *Id.*, quoting Civ.R. 59(A). We review a trial court's ruling on a motion for a new trial for an abuse of discretion, and we must construe the evidence in favor of the trial court's ruling, rather than in favor of the original jury's verdict. *Id.*

B. Admission of the Collage

{¶16} Defendants argue that the trial court erred in admitting the collage of deposition testimony because the prejudicial effect of the evidence in the collage substantially outweighed any probative value that it offered. They argue that the evidence should have been excluded under both Evid.R. 403(A) and 404(B).

{¶17} A trial court has broad discretion regarding the admission of evidence, and, absent an abuse of discretion and proof of material prejudice, we will not reverse a trial court's ruling on an evidentiary issue. *Hayes v. Durrani*, 1st Dist. Hamilton No. C-190617, 2021-Ohio-725, ¶ 13, quoting *State v. Lavender*, 2019-Ohio-5352, 141 N.E.3d 1000, ¶ 9 (1st Dist.).

{¶18} This court recently considered a similar challenge to the trial court's admission of the collage in *Stephenson v. Durrani*, 1st Dist. Hamilton Nos. C-220020 and C-220036, 2023-Ohio-2500.¹ In *Stephenson*, while recognizing that certain aspects of the collage either were admissible or could have been admissible if presented in conformity with the Rules of Evidence, we held that, in its entirety, the collage was "rife with prejudicial and inadmissible testimony" and was improperly admitted. *Id.* at ¶ 43.

{¶19} In so concluding, we explained that the collage contained an improper discussion about the revocation of Durrani's medical licenses and the suspensions of his privileges to practice medicine from various Cincinnati medical facilities and hospitals; that the questions in the collage concerning prior medical-malpractice lawsuits against Durrani and whether he failed to disclose those lawsuits on his

¹ While there seemingly exists more than one version of this collage, the parties stipulated to the version of the collage played at trial. Per that stipulation, the same version of the collage was played in this trial as was played at trial in *Stephenson*.

applications for medical licenses failed to withstand scrutiny under Evid.R. 403, particularly given that the questions asked and the answers received failed to establish that Durrani misled any licensing authorities; that questions pertaining to a dismissed misdemeanor assault charge filed against Durrani were improper because such evidence was not admissible pursuant to Evid.R. 404(B); that questions pertaining to a lawsuit filed against Durrani for the nonpayment of legal fees should not have been admitted at trial because they were irrelevant and prejudicial and failed to establish that the questioned act had, in fact, occurred; and that questions concerning various acts of resume inflation by Durrani were improper because, based on the answers provided to those questions, they were not clearly probative of Durrani's truthfulness and inflicted needless prejudice. *See id.* at ¶ 44-65.

{¶20} On the authority of *Stephenson*, we hold that the trial court here abused its discretion in admitting the collage in this case. *Id.* at ¶ 65 (holding that “[c]ertain aspects, standing alone, might have withstood review under an abuse of discretion. But collectively, the overall impact of the collage requires us to find that the trial court abused its discretion in connection with the collage’s admission in this case”).

C. Harmless-Error Analysis

{¶21} Having found error in the trial court’s admission of the collage, we must determine the impact of that error on the trial. “An improper evidentiary ruling constitutes reversible error only when the error affects the substantial rights of the adverse party or the ruling is inconsistent with substantial justice.” *Setters v. Durrani*, 2020-Ohio-6859, 164 N.E.3d 1159, ¶ 22, quoting *Beard v. Meridia Huron Hosp.*, 106 Ohio St.3d 237, 2005-Ohio-4787, 834 N.E.2d 323, ¶ 35. In considering whether a

party's substantial rights were affected, we must consider whether the trier of fact would have reached the same conclusion had the errors not occurred. *Id.*

{¶22} On this record, we cannot find that the error resulting from the improper admission of the collage was harmless. First, the record contained uncontroverted evidence that Mann obtained relief from her leg pain as well as conflicting evidence as to whether she experienced relief from her back pain following the surgery performed by Durrani. *See Stephenson*, 1st Dist. Hamilton Nos. C-220020 and C-220036, 2023-Ohio-2500, at ¶ 84 (where the plaintiff, who suffered nearly life-long back pain, acknowledged “certain successes” from the surgery performed by Durrani, the evidentiary record contained a much closer call on Durrani’s liability than other cases without such acknowledgment).

{¶23} Second, the record contained competing expert testimony as to whether Durrani exaggerated the findings on Mann’s medical images and whether those images supported the surgery recommended and performed by Durrani. As we have recognized in previous medical-malpractice cases filed against Durrani, where the record contains competing expert testimony on the central issues of the case, Durrani’s credibility is likely to be a key factor considered by the jury when rendering its verdict. *Houchell v. Durrani*, 1st Dist. Hamilton No. C-220021, 2023-Ohio-2501, ¶ 73; *Setters* at ¶ 21.

{¶24} On this point, the Manns’ counsel highlighted the evidence contained in the collage during closing argument, first stating that Durrani denied having any malpractice cases or other lawsuits pending against him at the time he filled out his license applications and then editorializing that “You know, he just can’t own up to the truth. Some people, the truth, they aren’t friends with the truth. They’re just very

incompatible with the truth.” Counsel further stated, “And I think when you compare the video that we did have on what I would consider much more benign matters than this case, with one exception, what’s the most important thing Dr. Durrani owns? His medical license. He doesn’t have it anymore. * * * He can’t even tell the truth on the form to keep his license.”

{¶25} The jury’s assessment of Durrani’s credibility was assuredly impacted by the admission of the evidence in the collage, and we cannot say that the outcome of the trial would have been the same but for its admission. We therefore hold that the trial court abused its discretion by failing to grant defendants’ motion for a new trial on the basis of the improper admission of the collage. The defendants’ assignment of error is accordingly sustained. Our resolution of this issue renders moot the remaining arguments proffered by the defendants in support of their assignment of error as well as the assignment of error raised by Mann in her cross-appeal.

Conclusion

{¶26} For the reasons set forth in this opinion, the trial court’s judgment denying the defendants’ motion for a new trial is reversed. This cause is remanded for proceedings consistent with the law and this opinion.

Judgment reversed and cause remanded.

CROUSE, P.J., and BERGERON, J., concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.