To the Clerk: THIS IS A FINAL APPEALABLE ORDER. Please serve upon all parties not in default for failure to appear; Notice of the Judgment and its date or entry upon the Journal

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
JOURNAL ENTRY
Hon. D. Chris Cook, Judge

Date April 29, 2022 Case No. 19CV197715

DANIEL McCLOUD
Plaintiff

Alexander L. Pal
Plaintiff's Attorney

VS

JEANNINE L. PAYNE
Defendant

Sean M. Kenneally
Defendant's Attorney

This matter is before the Court on the following motions; the Court rules as follows:

1) *Plaintiff's Motion for Prejudgment Interest, filed February 24, 2022.*
DENIED.

2) *Defendant's Combined Motion to Quash Subpoena and Motion for Protective Order, filed March 3, 2022.*
DENIED AS MOOT.

3) *Defendant's Motion for a New Trial, filed March 16, 2022.*
DENIED.

IT IS SO ORDERED. See Judgment Entry. No Record.

JUDGE D. CHRIS COOK

cc: Pal, Esq.
Kenneally, Esq.

LORAIN COUNTY COURT OF COMMON PLEAS
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I. INTRODUCTION

This matter is before the Court on the following motions; the Court rules as follows:

1) *Plaintiff's Motion for Prejudgment Interest, filed February 24, 2022. The Defendant responded in opposition on March 4, 2022; Plaintiff replied on March 10, 2022.*
DENIED.

2) *Defendant's Combined Motion to Quash Subpoena and Motion for Protective Order, filed March 3, 2022. The Plaintiff replied in opposition and moved to strike on March 10, 2022.*[1]
DENIED AS MOOT.

3) *Defendant's Motion for a New Trial, filed March 16, 2022. The Plaintiff filed a brief in opposition on April 4, 2022. Defendant filed a Reply on April 7, 2022.*
DENIED.

II) PROCEDURAL HISTORY

On February 17, 2022, after a three-day jury trial, the jury returned a verdict in favor of Plaintiff in the amount of $100,000.00. On the same day, the Court entered judgment in favor of the Plaintiff and against the Defendant in the amount of $100,000.00, together with interest at the statutory rate.

[1] The Court denied Defendant leave to file a sur-reply.

On March 21, 2022, after considering the parties' motions and briefs, the Court granted Plaintiff additional costs in the amount of $937.80.

On April 12, 2022, a hearing was had on the three above-noted motions; they are now ripe for disposition.

III) ANALYSIS

1) PLAINTIFF'S MOTION FOR PREJUDGMENT INTEREST AND REQUEST FOR ORAL HEARING AFTER DISCOVERY

In this motion, Plaintiff, Daniel McCloud ("McCloud"), seeks prejudgment interest of $12,309.58 on the jury verdict of $100,000.00. The gravamen of McCloud's motion is that 1) Defendant, Jeannine Payne ("Payne"), did not engage in good-faith settlement negotiations; 2) failed to cooperate with discovery and judicial economy; and 3) attempted to unnecessarily delay these proceedings.

With one relatively minor exception, this Court disagrees.

Prejudgment interest in this situation is governed by R.C. 1343.03(C)(1), which reads in pertinent part,

> If, upon motion of any party to a civil action that is based on tortious conduct, that has not been settled by agreement of the parties, and in which the court has rendered a judgment, decree, or order for the payment of money, the court determines at a hearing held subsequent to the verdict or decision in the action that the party required to pay the money failed to make a good faith effort to settle the case and that the party to whom the money is to be paid did not fail to make a good faith effort to settle the case, interest on the judgment, decree, or order shall be computed as follows . . .

The Ohio Supreme Court and Ninth District Court of Appeals have interpreted this statute in a number of cases. For instance,

> We review a trial court's determination regarding whether a party made a 'good faith effort' to settle for an abuse of discretion." *Kane v. Saverko,* 9th Dist. No. 23908, 2008–Ohio–1382, at ¶ 9. Abuse of discretion connotes more than simply an error in judgment; the court must act in an unreasonable, arbitrary, or unconscionable manner. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140. As a threshold matter, however, we must first examine whether the components of R.C. 1343.03(C) have been satisfied. *Kane* at ¶ 9. Such a

determination constitutes a question of law, which this Court reviews de novo. *Porter v. Porter,* 9th Dist. No. 21040, 2002–Ohio–6038, at ¶ 5.

Coon v. Technical Constr. Specialties, Inc., 9th Dist., Summit No. 24542, 2010-Ohio-417, ¶ 17.

And, the Ohio Supreme Court has held that,

> A party has not 'failed to make a good faith effort to settle' under R.C. 1343.03(C) if he has (1) fully cooperated in discovery proceedings, (2) rationally evaluated his risks and potential liability, (3) not attempted to unnecessarily delay any of the proceedings, and (4) made a good faith monetary settlement offer or responded in good faith to an offer from the other party. If a party has a good faith, objectively reasonable belief that he has no liability, he need not make a monetary settlement offer." *Moskovitz v. Mt. Sinai Med. Ctr.* (1994), 69 Ohio St.3d 638, 658–59, 635 N.E.2d 331, quoting *Kalain v. Smith* (1986), 25 Ohio St.3d 157, 495 N.E.2d 572, syllabus.
>
> [T]he question of whether [a party] possessed a good faith, objectively reasonable belief that [it] had no liability must focus on the belief as it existed prior to trial." (Emphasis omitted.) *Kohler v. Deel* (1997), 119 Ohio App.3d 710, 714–15, 696 N.E.2d 250.

Coon, supra, at ¶ 26.

In order to more efficiently evaluate McCloud's claims, this Court will re-order his arguments and address them *seriatim*.

COOPERATION IN THE DISCOVERY PROCESS

In his brief, McCloud argues that Payne failed to cooperate during the initial discovery by engaging in "gamesmanship." At the oral hearing, however, McCloud abandoned this argument and conceded that he could not identify with specificity any instances where Payne obstructed or impeded discovery.

As such, this prong of McCloud's argument is both without merit and waived.

UNNECESSARY DELAY OF THE PROCEEDINGS

In this argument, McCloud urges that Payne's failure to consent to his efforts to transfer the case to the Cuyahoga County Court of Common Pleas for consolidation with a

similar matter pending there interfered with his effort to "streamline" discovery and promote judicial economy.

First, as noted by Payne, the Court found merit in Payne's motion to dismiss as there was a cogent argument made by Payne that jurisdiction in fact rested in Cuyahoga County. This Court stated,

> This Court finds, upon a cursory review of Defendant's renewed motion to dismiss, that it may be meritorious.[2]

Ultimately, the Court denied Payne's motion to dismiss, but it was hardly frivolous.[3] In addition to the above at oral argument, McCloud, for all intent and purposes, also abandoned this prong of his argument.

As such, this Court finds no merit in McCloud's assertion that Payne failed to cooperate in discovery.

EVALUATION OF RISKS AND POTENTIAL LIABILITY & FAILURE TO MAKE A GOOD-FAITH MONETARY SETTLEMENT OFFER

McCloud's final argument combines the second and fourth prongs of the *Moskovitz* test by urging that Payne failed to rationally evaluate the risks and potential liability and failed to make a good-faith effort to settle or respond to McCloud's good-faith demand.

This Court disagrees.

The main arguments McCloud advances in support of this contention is that Payne violated an Ohio traffic law, her vehicular operation and the accident itself were video recorded by a fellow motorist, McCloud had to have surgery on his rotator cuff, Payne failed to call an expert relative to the rotator cuff, and Payne's liability insurer did not dispute liability relative to McCloud's property damages claim.

In response, Payne reasserts her position that this Court lacks jurisdiction, that the jury found comparative negligence on the part of McCloud and that McCloud had primarily chiropractic care and had low-levels of pain upon discharge. Payne also argues that there was a 15-month gap in McCloud's medical treatment and that he had prior surgery

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[2] See: Entry Denying Payne's Motion to Dismiss, 2/8/2022.

[3] It is here that the Court will note its agreement with one element of McCloud's argument of bad faith, to wit: Payne's second, or re-filed motion to dismiss. The second motion was essentially a regurgitated iteration of the first. But, because McCloud could simply refile his initial opposition brief and he failed to seek any sanctions, he waived the right to seek them herein.

on his right shoulder. In addition, Payne argues that is was not reasonable for McCloud to make a new demand after his surgery of double his prior demand where he gave Payne only two weeks to reply.

Finally, at oral argument, Payne posited that it is not uncommon for a liability carrier to settle the usually smaller property damage claim while reserving the right to contest the personal injury claim.

In considering whether to award McCloud prejudgment interest, this Court focuses primarily upon the facts developed at trial and the party's pre-trial negotiation posture relative to their respective evaluation of the case. After making these determinations, the Court must apply the *Moskovitz* factors in *pari materia* with the mandates of R.C. 1343.03(C)(1) to reach its decision.

First, McCloud argues that liability is clear because Payne violated a traffic ordinance by operating her vehicle in a restricted area of the roadway. Payne counters that McCloud too violated traffic laws when he pulled out of a private driveway into oncoming traffic without the right-of-way.

Both parties are correct.

Clearly, Payne violated a traffic law by operating her vehicle in a restricted part of the roadway. She was attempting to pass on the left of traffic that was stopped and backed-up at an intersection. In so doing, she entered a restricted part of the roadway not intended for vehicular travel. In essence, she was not operating her vehicle in a legal lane of travel when she struck McCloud's vehicle.

On the other hand, McCloud pulled-out into stopped traffic from a private roadway to make a left-hand turn and did not see Payne's vehicle. He too had a duty to proceed cautiously and failed to do so.

Without a doubt, the jury agreed with both party's explanation of how and/or why the accident occurred as they found McCloud comparatively negligent but nevertheless awarded him damages.[4]

Regardless, given the manner in which the accident occurred and the jury's finding of comparative negligence, the Court does not find that Payne's decision to contest liability was made in bad faith.

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[4] Interestingly, while finding McCloud comparatively negligent, they did not allocate a percentage of causation for the accident to him by expressing any ratio of his liability. Of course, they could have taken this into account in determining the damages award.

Second, McCloud argues that as the collision was caught on video, liability was clear.

This argument is also without merit.

Payne never denied that a collision occurred or argued that it happened in some way or manner other than what the video depicted. Instead, she argued that the operation of her vehicle in the restricted zone was not the primary cause of the accident but was at most a contributing factor given McCloud's own negligence.

As noted above, given the facts and jury finding, this Court cannot say that that determination was made in bad faith.

Third, McCloud argues that he suffered a significant injury to his rotator cuff that required surgery, thus, his demand of $100,000.00, reduced to a final demand of $75,000.00, was reasonable.

In response to this argument, Payne's position is compelling. First, McCloud had very minimal medical treatment after the accident. He went to the emergency room where he was treated and released, went to Dr. Templeton where he received anti-inflammatory medication, then treated for a time with a chiropractor.

Significantly, Dr. Templeton noted in his records, **"I cannot state with a reasonable degree of medical certainty that aggravation of left shoulder bursitis was specifically caused related to the motor vehicle accident . . ."** (Emphasis added.) Moreover, when he was released from his chiropractic treatment, he noted his pain level as "low."

All of these factors led McCloud to initially demand the sum of $49,000.00 to settle against which Payne ultimately offered $30,000.00. As such, the parties (at that point) were only $19,000.00 apart. Put another way, Payne offered approximately 61% of McCloud's demand to settle – hardly an inconsequential or bad-faith offer.

Fourth, McCloud argues that as Payne failed to retain her own expert to refute his expert's (Dr. Zanotti) report on the necessity of the rotator cuff surgery and causation, it was conclusively established as necessary and related to the accident.

Again, this Court disagrees.

As pointed out by Payne, almost 15 months elapsed since McCloud was discharged from his chiropractic treatment and sought the services of Dr. Zanotti. This gap in treatment alone justified Payne's reluctance to increase her settlement offer, particularly in light of McCloud's age and prior, right-shoulder surgery.

In addition, this Court agrees with Payne that the manner in which the new, $100,000.00 demand was made was not reasonable. Recall that after the rotator cuff surgery, on April 15, 2021, McCloud made a new demand of $100,000.00 to settle but only gave Payne two-weeks to meet the demand. This time limit was clearly unreasonable given the substantial increase in the amount of the demand and the lack of time for Payne to investigate the propriety of the surgery – let alone seek her own expert opinion on the issue.

As such, this Court cannot say that Payne failed to rationally evaluate her risks or negotiate in good faith, particularly in light of her offer of $30,000.00.

Fifth, McCloud argues that as Payne's liability carrier paid his property damage claim, it was bad faith to contest his personal injury claim.

Again, this Court disagrees.

As noted by Payne at oral argument, it is not uncommon for insurance companies to settle relatively minor property claims while contesting a claimant's personal injury claims. After all, the monetary value of property claims are generally not contested and easily ascertainable whereas valuing personal injury claims are often difficult, subjective, and speculative.

Moreover, to accept McCloud's approach would be to disincentivize insurance companies from partially settling claims – a hardly desirable objective for anyone.

As such, the mere fact that Payne's carrier chose to settle McCloud's property damage claims should not be construed as a total concession to liability nor used against it to compel a more favorable offer or imply bad faith as to the personal injury claims.

Finally, regarding the jurisdictional issue raised by Payne, this Court agrees that consideration of that factor merited inclusion in Payne's settlement calculus. After all, if this Court erred in failing to dismiss this case on jurisdictional grounds (as noted, a close call) then Payne owes McCloud nothing.

Given the primary factors present in this case, to wit: questionable jurisdiction, comparative negligence, successful initial treatment, a 15-month gap in treatment, McCloud's age and prior surgery, and perhaps most importantly, a $30,000.00 offer against a final settlement demand of $75,000.00 (40%), this Court cannot conclude that Payne failed to make a good faith offer to settle.

2) DEFENDANT'S COMBINED MOTION TO QUASH SUBPOENA AND MOTION FOR PROTECTIVE ORDER

Because this Court has determined that McCloud is not entitled to prejudgment interest given the facts of the case and settlement posture of the parties, Payne's motion to quash and for protective order are denied as moot.

3) DEFENDANT'S MOTION FOR A NEW TRIAL

The final issue for determination is Payne's motion for a new trial. As discussed *infra,* the motion for a new trial is not well-taken.

In arguing for a new trial, Payne asserts that the Court erred by: 1) Allowing Dr. Daniel Zanotti ("Dr. Zanotti") to testify about McCloud's neck; and 2) failing to give a jury instruction concerning reliance on a hand signal from another motorist.

Neither of these issues merit a new trial.

DR. ZANOTTI'S TESTIMONY ABOUT PLAINTIFF'S NECK

The gravamen of this argument is that the testimony by Dr. Zanotti regarding McCloud's neck was a surprise and should have been wholly excluded as his expert report contained no information about a neck injury. This argument is made pursuant to Civ. R. 59(A)(1), "Irregularity in the proceedings . . . that prevented a party from having a fair trial."

Payne also argues in passing that the jury instruction on "eggshell plaintiff" was improper pursuant to Civ. R. 59(A)(9) "An error of law occurring at trial," and that the result of these two errors led to an excessive award. Civ. R. 59(A)(4), "Excessive or inadequate damages . . . given under the influence of passion or prejudice."

Payne, however, fails to develop any argument, cite any case law, or elaborate in any manner her Civ. R. 59(A)(9) & (4) arguments and this Court will not create them for her.[5]

> This Court will not address underdeveloped arguments that an appellant fails to separately assign as error. *See State v. Miller*, 9th Dist. Summit No. 25200, 2010-Ohio-3580, 2010 WL 3025596, ¶ 7, citing *Ulrich v. Mercedes–Benz USA, L.L.C.,* 187 Ohio App.3d 154, 2010-Ohio-348, 931 N.E.2d 599, ¶ 24.

[5] Payne admittedly devotes one additional paragraph to these issues in her Reply Brief, but even therein fails to support the argument sufficient for this Court to address it.

State v. Jenks, 9th Dist., Summit No. 28533, 2017-Ohio-7045, at ¶ 12.[6]

> Where an appellant fails to develop an argument in support of his assignment of error, this Court will not create one for him. *See State v. Harmon*, 9th Dist. Summit No. 26426, 2013-Ohio-2319, 2013 WL 2457186, ¶ 6, citing App.R. 16(A)(7) and *Cardone v. Cardone*, 9th Dist. Summit No. 18349, 1998 WL 224934, *8 (May 6, 1998). "If an argument exists that can support [an] assignment of error, it is not this [C]ourt's duty to root it out." *Cardone* at *8.

Jenks, at ¶ 16.

Regarding Payne's primary argument that Dr. Zanotti's testimony about McCloud's neck injury was a surprise, this Court disagrees.

Both parties correctly cite to Civ. R. 59(A) in arguing their respective positions as to why this Court should, or should not, grant a new trial.

> Depending upon the basis of a motion for a new trial, this Court reviews the trial court's decision to grant or deny the motion under either a de novo or an abuse of discretion standard of review. *Calame v. Treece*, 9th Dist. Wayne No. 07CA0073, 2008-Ohio-4997, ¶ 13, citing *Rohde v. Farmer*, 23 Ohio St.2d 82 (1970), paragraphs one and two of the syllabus. '[If] the basis of the motion involves a question of law, the de novo standard of review applies, and when the basis of the motion involves the determination of an issue left to the trial court's discretion, the abuse of discretion standard applies.' *Dragway 42, L.L.C. v. Kokosing Constr. Co., Inc.*, 9th Dist. Wayne No. 09CA0073, 2010-Ohio-4657, ¶ 32.

Designers Choice v. Attractive Flooring, 9th Dist., Lorain No. 19CA011576, 2020-Ohio-4617, at ¶ 10.

The Ninth District Court of Appeals has also given trial courts guidance on the proper standard of review when considering a motion for a new trial under Civ. R. 59(A)(1),

> Among the reasons listed in Civ.R. 59(A), a new trial is warranted upon a finding of sufficient prejudicial error; that which prevents a fair trial." *Telxon Corp. v. Smart Media of Delaware, Inc.*, 9th Dist. Summit Nos. 22098, 22099, 2005-Ohio-4931, 2005 WL 2292800, ¶ 14. Civ.R. 59(A)(1) permits a new trial based on an

[6] This Court acknowledges that *Jenks* is a criminal case, but the legal concept is equally applicable to this civil case and additionally, *Jenks* cites to civil cases in support of this proposition of law.

> * * * abuse of discretion, by which an aggrieved party was prevented from having a fair trial[.] We review a trial court's granting of a new trial pursuant to Civ.R. 59(A)(1) for an abuse of discretion. *Texlon Corp.* at ¶ 13. An abuse of discretion 'implies that the court's attitude is unreasonable, arbitrary or unconscionable.' *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Under this standard of review, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.*, 66 Ohio St.3d 619, 621, 614 N.E.2d 748 (1993).

Marquez v. Jackson, 9th Dist., Lorain No. 16CA011049, 2018-Ohio-346, at ¶ 24.

This issue presents a matter of first impression as both parties make compelling arguments in support of their respective positions.

Payne is correct that Dr. Zanotti's expert report does not discuss any issues relative to McCloud's neck injury. Payne is also correct that Civ. R. 26(E) required McCloud to supplement Dr. Zanotti's report to include information about his neck injury if he wanted to introduce that evidence. And, Lorain County Court of Common Pleas Loc. R. 11(A)(1) references Civ. R. 26(B)(7) regarding the exchange of expert reports.

Specifically, Civ. R. 26(B)(7)(c) requires that an expert report be exchanged and that it, ". . . disclose a complete statement of all opinions and the basis and reasons for them as to each matter on which the expert will testify."

Based upon the forgoing, it would appear fairly obvious that since Dr. Zanotti's expert report did not disclose issues involving McCloud's neck, he should have been precluded from offering such testimony to the jury.

But the inquiry is not that simple and here is where the conflict arises: Local R. 11(A)(1) consistent with Civ. R. 26(B)(7)(d) discusses the use of medical records of a "Healthcare Provider" in lieu of an expert report. The Civil Rule provides, in pertinent part, ". . . A witness who has provided medical . . . care **may testify as an expert and offer opinions as to matters addressed in the healthcare provider's records.**" (Emphasis added.)

As urged by McCloud, his medical records[7] are replete with complaints about his neck, both at the scene of the accident and immediately thereafter at the emergency room. And, McCloud's first medical provider (and Payne's expert witness) Dr. Jessie

[7] Which were timely provided to Payne. Civ. R. 26(B)(7).

Templeton's ("Templeton") records note neck pain. Finally, Dr. Zanotti's medical records discuss McCloud's neck complaints at almost every single office visit.

As such, Payne cannot seriously argue that she had no notice of McCloud's neck injury or that it was a complete shock that McCloud sought to introduce testimony about the neck injury when that complaint was present from the beginning and referenced throughout his medical records.

So here is the conundrum – Civ. R 26(B)(7)(c) requires an expert report to contain all of the information that the expert will testify about but Civ. R 26(B)(7)(d) provides for the use of a healthcare provider's medical records ". . . in lieu of an expert report . . ." As such, the question presented is thus: what happens when the proponent of expert testimony provides both an expert report and medical records from a healthcare provider where the expert report does not contain some information in the medical records?

Put another way:

> MAY A HEALTHCARE PROVIDER TESTIFY AT TRIAL CONSISTENT WITH THE HEALTHCARE PROVIDER'S EXPERT REPORT AND MEDICAL RECORDS WHERE THE EXPERT REPORT DOES NOT CONTAIN ALL OF THE INFORMATION IN THE MEDICAL RECORDS

This Court believes that the answer should be yes.

As noted by Payne, the expert report notifies the opposing party what the expert will say at trial; the purpose of Civ. R 26(E) is to avoid ambush at trial; and, an opposing party may reasonably expect that an expert's testimony will be consistent with his original responses provided in discovery.

By providing Payne with Dr. Zanotti's medical records in addition to his expert report, McCloud clearly put Payne on notice of the neck injury and Payne should have deduced that Dr. Zanotti would testify about the neck injury consistent with the medical records even though it was not addressed in the expert report.

Moreover, as the medical records were provided in discovery, there can be no claim of ambush and no reason that Dr. Zanotti should have been precluded from testifying consistent with both his expert report and his medical records. It is fairly obvious that a healthcare provider can testify at trial consistent with his/her medical records, whether or not a separate expert report is provided.

Despite reaching this conclusion, the Court is cognizant that both the Civil Rules and Local Rules regarding the use of healthcare provider records contemplate the use of such records "in lieu" of an expert report. This phraseology, however, should not be so narrowly construed to mean that a party must select one or the other. In other words, if an expert report is provided, that should not automatically foreclose the introduction of health care records that were timely provided. Conversely, if a party initially provides only healthcare records, that should not foreclose the ability to later provide an expert report in addition to the healthcare records or to supplement same.

Further, relative to the issue at bar, the Court is cognizant of three additional factors that weigh against granting a new trial: 1) Payne could have, but chose not to, depose Dr. Zanotti; 2) the Court prohibited Dr. Zanotti from testifying about permanency relative to the neck injury because neither the expert report nor McCloud's medical records discussed permanency; and 3) the significant injury McCloud suffered was to his rotator cuff that required surgery, not the neck aggravation complaints As such, the aggravation to his neck was a secondary complaint that was not the primary factor upon which the jury awarded damages.

To that last point, one of the factors that the Court must consider is whether the error, if there was one, in admitting the neck testimony, would have affected the outcome of the trial such that the admission of this expert testimony prevented Payne from receiving a fair trial.

On this point, the Ohio Supreme Court has stated,

> In situations such as this one, appellate courts should defer to trial judges, who witnessed the trial firsthand and relied upon more than a cold record to justify a decision. *Mannion v. Sandel* (2001), 91 Ohio St.3d 318, 322, 744 N.E.2d 759.

Harris v. Mt. Sinai Med. Ctr., 116 Ohio St.3d 139, 2007-Ohio-5587, at ¶ 36.

In reviewing the totality of the record and considering the evidence of the rotator cuff surgery compared to the aggravated neck injury, this Court cannot say that the testimony regarding the neck injury, even if improperly admitted, prevented Payne from receiving a fair trial.

See also: *Somerick v. YRC Worldwide Inc.,* 9th Dist., Summit No. 29239, 2020-Ohio-2916, at ¶ 6,

Material prejudice exists when, after weighing the prejudicial effect of the errors, the reviewing court is unable to find that without the errors the fact finder would probably have reached the same decision.

IS THE NINTH DISTRICT COURT OF APPEAL'S DECISION IN *ALONSO v. THOMAS* APPLICABLE HEREIN[8]

In the *Alonso* matter, a case this Court is rather familiar with, a similar evidentiary issue arose. One of plaintiff's experts testified about spousal support damages that were not disclosed in his expert report.

The Ninth District agreed with the defendant's argument that this Court should have stricken the testimony and given the jury a curative instruction. By failing to do so, the Ninth District determined that this Court abused its discretion finding that ". . . substantial justice has not been done . . . because the jury would probably not have reached the same conclusion as to the amount of damages had Mr. Badnell's calculations for lost spousal support not been admitted."

Despite the Ninth District's determination in a similar situation that this Court abused its discretion by admitting expert testimony outside of the expert report, I believe the case at bar can be distinguished from *Alonso*.

First, unlike the defendant in *Alonso,* who had no notice whatsoever that the expert would testify about the amount and duration of spousal support not included in his expert report, Payne was on notice of McCloud's neck injury as it was disclosed multiple times in Dr. Zanotti's (and others) medical records. Hence, where the defendant in *Alonso* made a strong claim of surprise and ambush, Payne cannot.

Second, the expert in *Alonso* testified about specific amounts and duration of spousal support that was not disclosed in his report. This detailed testimony clearly was considered and significant to the jury when they made their damages award. Conversely, Dr. Zanotti testified about the neck injury as a secondary aggravation, as it was the rotator cuff surgery that was the primary driver for the damages award and he did not attach any monetary value to that injury.

Finally, in *Alonso,* this Court identified post-trial the significance of allowing the extraneous spousal support testimony to go to the jury and ordered a new trial or remitter.[9] Here, however, as noted *infra,* this Court does not find that the admission of

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[8] See: *Ann Alonso v. Joan Jacobs Thomas, et al.,* 9th Dist., (19CA011483), Lorain No. 15CV185791, 2020-Ohio-6660.

[9] The plaintiff accepted the remitter, the defendant did not.

the testimony about McCloud's neck, even if improper, was materially prejudicial to Payne.

THE REFUSAL TO GIVE THE HAND-RELIANCE JURY INSTRUCTION

Payne's next argument in support of a new trial hinges on this Court's refusal to instruct the jury concerning reliance on a hand signal from another motorist.

The Ninth District Court of Appeals and Ohio Supreme Court are in accord regarding the propriety of jury instructions and a trial's court discretion in charging the jury appropriately.

> A trial court must charge a jury with instructions that are a correct and complete statement of the law. *Marshall v. Gibson* (1985), 19 Ohio St.3d 10, 12, 482 N.E. 2d 583. However, the precise language of a jury instruction is within the discretion of the trial court. *Youssef v. Parr, Inc.* (1990), 69 Ohio App.3d 679, 690, 591 N.E.2d 762. In reviewing jury instructions on appeal, this Court has previously stated: '[A]n appellate court reviews the instructions as a whole. If, taken in their entirety, the instructions fairly and correctly state the law applicable to the evidence presented at trial, reversible error will not be found merely on the possibility that the jury may have been misled. Moreover, misstatements and ambiguity in a portion of the instructions will not constitute reversible error unless the instructions are so misleading that they prejudicially affect a substantial right of the complaining party.' (Citations omitted.) *Wozniak v. Wozniak* (1993), 90 Ohio App.3d 400, 410, 629 N.E.2d 500; see, also, *Kokitka v. Ford Motor Co.* (1995), 73 Ohio St.3d 89, 93, 652 N.E.2d 671.

Callahan v. Akron Gen. Med. Cnt., 9th Dist., Summit No. 22387, 2005-Ohio-5103, at ¶ 6.

The court continued,

> A trial court has no obligation to give jury instructions in the language proposed by the parties, even if the proposed instruction is an accurate statement of the law. *Henderson v. Spring Run Allotment* (1994), 99 Ohio App.3d 633, 638, 651 N.E.2d 489. 'Instead, the court has the discretion to use its own language to communicate the same legal principles.' *Id.* Thus, absent an abuse of discretion, this court must affirm the trial court's language of the jury instructions.

Callahan, at ¶ 7.

Payne urges here that this Court should have given a jury instruction regarding a motorist who relies upon a hand signal from another motorist to relieve himself of liability for an accident. The instruction at issue reads as follows,

> One who seeks to make a left turn, in the face of traffic coming from the opposite direction, cannot absolve himself from the obligation to proceed with due care by claiming that he depended upon a signal of a motorist going in the opposite direction, who stopped to allow the one making a left turn to pass in front of him.

Van Jura v. Row, 175 Ohio St. 41, 191 N.E. 2d 536 (1963), syllabus No. 1.

First, though not dispositive, this Court notes that this legal axiom is not a jury instruction contained in the Ohio Jury Instructions ("OJI") and thus, while not precluded from use, is not necessarily favored. On this issue, the Ohio Supreme Court has noted,

> The instructions found in Ohio Jury Instructions are not mandatory, but rather, are recommended instructions based primarily upon case law and statutes.

State v. Martens (1993), 90 Ohio App.3d 338, 343, 629 N.E.2d 462.

Second, this Court disagrees with Payne's assertion that "Plaintiff testified extensively that he proceeded out due to the signal from the driver." There was some evidence that in his deposition, McCloud testified that he saw a motorist motion him out, but he clarified that statement and his motivation for proceeding across traffic at trial and did not definitively testify that he relied upon the hand signal of the other motorist.

Moreover, at no time during the trial did McCloud testify or argue to the jury that he was not at fault for the accident because another motorist waived him out. He testified to the jury and argued that he was not at fault because Payne was traveling in a restricted part of the roadway that did not constitute a legal lane of travel.

In addition, while this Court did not give the instruction Payne requested, the Court allowed her to argue that McCloud also had a duty to keep a lookout for traffic and an obligation to use care while cutting across traffic to make his left-hand turn.

Finally, as noted by McCloud, this Court limited him in closing argument from attempting to place any blame on the "good Samaritan" or shift responsibility to the motorist who waived him through.

IV. CONCLUSION

Based upon the foregoing, this Court finds as a matter of law that Plaintiff, Daniel McCloud, is not entitled to prejudgment interest as Defendant, Jeannine Payne, appropriately and reasonably evaluated the risks attendant in this case and negotiated in good faith. As a result, Defendant's motion to quash and for protective order is moot.

Regarding Payne's motion for a new trial based upon the testimony of Dr. Zanotti and the jury instruction that was not given, this Court finds no error such that she was denied a fair trial or suffered material prejudice from either decision.

JUDGE D. CHRIS COOK

THIS IS A FINAL APPEALABLE ORDER