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 Nov. 3, 2023 Case No. 21CV204302

ALBERT DIDONATO
Plaintiff

Mark Obral
Plaintiff's Attorney

VS

KATHLEEN L. ROIG
Defendant

Anne Markowski
Defendant's Attorney

This matter is before the Court on Plaintiff's Motion for New Trial, filed October 6, 2023, and Defendant's Brief in Opposition, filed October 27, 2023. The Court previously Ordered that no reply brief would be considered. Oral hearing had on November 2, 2023.

The Motion for New Trial is well-taken and hereby GRANTED.

Telephonic pre-trial is scheduled for **November 9, 2023, at 1:30 p.m.** The parties are instructed to call into the Court at 440-329-5417 and be prepared to discuss a new trial date. The Court's Order of October 12, 2023, awarding Defendant's counsel costs, is hereby vacated.

THIS IS A FINAL, APPEALABLE ORDER. R.C. 2505.02(B)(3); See also: *GTE Automatic Elec. v. ARC Indus.*, 47 Ohio St. 2d 146, 149, (1976).

IT IS SO ORDERED. See Judgment Entry.

JUDGE D. CHRIS COOK

cc: Obral, Esq.
Markowski, Esq.

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

Date Nov. 3, 2023 Case No. 21CV204302

ALBERT DIDONATO
Plaintiff

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VS

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I. INTRODUCTION

This matter is before the Court on Plaintiff's Motion for New Trial, filed October 6, 2023, and Defendant's Brief in Opposition, filed October 27, 2023. The Court previously Ordered that no reply brief would be considered.

II. PROCEDURAL HISTORY

On September 8, 2023, after a four-day jury trial, the jury returned a verdict in favor of Defendant, Kathleen L. Roig.

On September 15, 2023, the Court entered judgment in favor of Defendant, taxed costs to Plaintiff, and designated its Order as a final appealable order.

On October 12, 2023, after considering the parties' motions and briefs, the Court granted Defendant's counsel costs in the amount of $922.05.

On November 2,2023, a hearing was had on Plaintiff's motion for new trial, which is now ripe for disposition.

III. ANALYSIS

PLAINTIFF'S MOTION FOR A NEW TRIAL

The sole issue for determination is Plaintiff, Albert DiDonato's ("DiDonato"), motion for a new trial. As discussed *infra,* the motion for a new trial is well-taken.

In arguing for a new trial, DiDonato advances two arguments: first, that the jury verdict in favor of the Defendant, Kathleen L. Roig ("Roig"), is inadequate, appearing to have been given under the influence of passion or prejudice. Civ.R. 59(A)(4). And second, that the judgment is not sustained by the weight of the evidence. Civ.R. 59(A)(6).

DiDonato's first argument is overruled; his second has merit.

STANDARD OF REVIEW

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 given trial courts further guidance on the proper standard of review when considering a motion for a new trial under both Civ.R. 59(A)(4) and Civ.R. 59(A)6).

> The granting of a motion for a new trial on either ground rests in the sound discretion of the trial court and will not be disturbed on appeal unless there has been an abuse of discretion. *Monroe v. Ohio Dept. of Rehab. & Corr.* (1990), 66 Ohio App.3d 236, 240 *Verbon v. Pennese* (1982), 7 Ohio App.3d 182, 184. An abuse of discretion will be found when the court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

Pena v. Northeast Ohio Emerg. Affil., Inc., 108 Ohio App.3d 96, 103, 9th Dist. No. 94CA005906 (1995).

The Ninth District continued,

> A new trial should be granted pursuant to Civ.R. 59(A)(6) when the jury's award of inadequate damages resulted from its failure to consider an element of damages that was established by uncontroverted evidence. *Dillon v. Bundy* (1992), 72 Ohio App.3d 767, 773. A new trial should also be awarded if the jury's verdict was not supported by competent, substantial, and credible evidence. *Id.* at 773–774; *Verbon,* 7 Ohio App.3d at 183.

Pena, at ¶ 104.

And finally,

> An appellate court reviewing whether a trial court abused its discretion in ruling on a motion for a new trial pursuant to Civ.R. 59(A)(4) must consider (1) the amount of the verdict, and (2) whether the jury considered improper evidence, improper argument by counsel, or other inappropriate conduct which had an influence on the jury. *Dillon,* 72 Ohio App.3d at 774. To support a finding of passion or prejudice, it must be demonstrated that the jury's assessment of the damages was so overwhelmingly disproportionate as to shock reasonable sensibilities. *Jeanne v. Hawkes Hosp. of Mt. Carmel* (1991), 74 Ohio App.3d 246, 257; *Pearson v. Cleveland Acceptance Corp.* (1969), 17 Ohio App.2d 239, 245. The mere size of the verdict is insufficient to establish proof of passion or prejudice. *Jeanne,* 74 Ohio App.3d at 257; *Pearson,* 17 Ohio App.2d at 245.

Id.

THE FACTS

Based upon the evidence established at trial and presented by the parties in their respective briefs, the substantive facts of this case are not in material dispute.

On September 15, 2019, Roig failed to stop at a red light at the intersection of Grafton and Fuller Roads in Elyria, Ohio, where she collided with DiDonato. The accident was a serious collision between Roig's and DiDonato's vehicles that resulted in Didonato's vehicle being a total loss.

EMS responded and transported DiDonato to Elyria Medical Center emergency room where he was treated. The evidence demonstrates that DiDonato complained of neck and back pain. After his discharge from the emergency room, DiDonato began treating with a Chiropractor, Dr. Tocco. Dr. Tocco testified that as a result of the accident,

DiDonato suffered from a substantial aggravation of the cervical disc protrusion of C4-5 and a cervical sprain/strain, with muscle spasm, myofascitis related to the accident, and thoracic sprain/strain and lumbar sprain/strain.

DiDonato treated with Dr. Tocco for four months after which he was referred for an MRI, as his condition was not improving. There is legitimate debate and conflicting evidence as to what the MRI shows. DiDonato proffered expert testimony that the MRI shows disc herniation "as a result of the motor vehicle accident." DiDonato also treated with Dr. Yonan, a pain management specialist, and continues to treat with Dr. Tocco to this day.

Conversely, Roig proffered expert testimony by Dr. Krewson who testified that the MRI did not show disc herniation related to the accident but evidence of disc degeneration.

> THE JUDGMENT IN THIS CASE IN FAVOR OF DEFENDANT RESULTED IN INADEQUATE DAMAGES, BUT IT DOES NOT APPEAR THAT IT WAS GIVEN UNDER THE INFLUENCE OF PASSION OR PREJUDICE

DiDonato moves this Court for a new trial based upon two prongs of Civ.R 59(A), subsections (4) & (6). But, somewhat strangely, he does not clearly distinguish and argue these two subsections in his brief, but instead, argues: 1) that the verdict was against the manifest weight of the evidence;[1] 2) the verdict shocks the sense of justice and fairness;[2] and 3) Plaintiff's motion for directed verdict on the fact that Plaintiff was injured should have been granted.[3]

Instead of addressing the arguments made by DiDonato as outlined in his motion, the Court will address the actual legal vehicles that provide the relief sought. After all, neither Civ.R 59(A)(4) or (A)(6) contemplate a verdict that "shocks the sense of justice"[4] or concerns itself with the grant or denial of a directed verdict.

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[1] Plaintiff's MFNT, Page 8, Item B.
[2] Plaintiff's MFNT, Page 12, Item C.
[3] Plaintiff's MFNT, Page 14, Item D.
[4] There is a reference to this concept in the *Hunter* case cited by DiDonato, a Fifth District case, and *Jeanne*, a 10th District case (cited by this Court), neither which is not controlling here. Instead, this Court is guided by precedent established by the Ohio Supreme Court and the Ninth District Court of Appeals, and neither of those courts apply this standard.

CIV.R. 56(A)(4)

To succeed on a motion for a new trial based upon Civ.R. 56(A)(4), DiDonato must establish two elements: 1) that the jury awarded inadequate damages; and 2) that the inadequate damages were influenced by passion or prejudice.

Based upon the facts of this case, many of which are not contested, DiDonato can establish the first prong, that is, the defense verdict was clearly inadequate to compensate him for his injuries. But, DiDonato cannot satisfy the second prong of the rule as the record is completely devoid of any evidence that the jury's defense verdict was borne of passion or prejudice. In fact, in his motion, DiDonato completely abandons this prong of the test and does not once point to any evidence, or make any argument that the jury was swayed by passion or prejudice.

THE DEFENSE VERDICT WAS CLEARLY INADEQUATE

The evidence adduced at trial overwhelmingly demonstrates that DiDonato was involved in a serious motor vehicle accident with Roig, that Roig was wholly at fault for the accident, and that as a result of the accident DiDonato was injured. Those injuries no doubt entitled him to *some*[5] amount of damages to compensate him, at a minimum, for the pain, suffering, and inconvenience he experienced. The defense verdict, however, denied DiDonato any compensation whatsoever.

In arguing for a new trial, DiDonato relies upon the judicial construct of "manifest weight" and infuses this legal theory into both his Civ.R. 59(A)(4) & (6) arguments. The Ohio Supreme Court has given trial courts guidance on this issue. The seminal case from the Supreme Court is *Eastley v. Volkman,* 132 Ohio St.3d 328, 2012-Ohio-2179. In that case, the Court stated,

> In civil cases, the concepts of sufficiency of the evidence and weight of the evidence continue to be sources of confusion, particularly as to what standard of review should apply when a verdict is challenged as being against the manifest weight of the evidence. But there is no reason why the fundamental logical differences between evidential sufficiency and weight cease to exist in civil cases.

Id. at ¶ 10.

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[5] Given DiDonato's prior existing condition, primary chiropractic treatment, minimal lose of life activities, and conflicting evidence as to the extent of his back injuries, this Court offers no opinion as to what amount of damages is appropriate to compensate DiDonato, other than to conclude that -0- is not enough.

The high court went on to discuss the nuanced difference between "sufficiency" and "weight" and defined sufficiency as a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law.

> * * * In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law."

Id. at ¶ 11.

Conversely, the court identified manifest weight as

> . . . the inclination of the *greater amount of credible evidence,* offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief.*"

Id. at ¶ 12.

The Supreme Court also noted that the Ninth District is one of the few Ohio Appellate Courts that acknowledged the difference between sufficiency and manifest weight in civil cases.

> For example, the Ninth District stated how a review on manifest weight is to be conducted: "The [reviewing] 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." * * *

Id. at ¶ 20. Citing, *Tewarson v. Simon,* 141 Ohio App.3d 103, 115, (9th Dist. 2001), quoting *Thompkins,* 78 Ohio St.3d at 387; *State v. Martin,* 20 Ohio App.3d 172, 175.

As for the Ninth District, it has stated,

> When this court considers the weight of the evidence, "we are always mindful of the presumption in favor of the trial court's factual findings. [T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of

> the facts." (Internal quotations and citations omitted.) *T.S. v. R.S.*, 9th Dist. Summit No. 27955, 2017-Ohio-281, ¶ 4. The trier of fact is free to believe "all, part, or none of the testimony of any witness who appeared before it[,]" and "[t]he mere fact that testimony is uncontroverted does not necessarily require a [trier of fact] to accept the evidence if the [trier of fact] found that the testimony was not credible." *Bradley v. Cage*, 9th Dist. Summit No. 20713, 2002 WL 274638.

Chuparkoff v. Ohio Title Loans, 9th Dist. Summit No. 29008, 2019-Ohio-209, at ¶ 15.

Another Ohio Supreme Court case, also cited by DiDonato, is instructional. In *Harris v. Mt. Sinai Med. Cntr.,* 116 Ohio St.3d 139, 2007-Ohio-5587, the court discussed many factors attendant to a trial court's duties when deciding whether to grant a new trial, including the role of passion or prejudice in improperly influencing the jury.

> The important consideration for trial judges considering a motion on either of these bases is the evidence *establishing grounds for a new trial,* not the evidence supporting the jury's verdict. Thus, where competent, credible evidence exists to support the trial court's finding of an excessive verdict **given under passion or prejudice** or misconduct of counsel, the order granting a new trial is not an abuse of discretion and should remain undisturbed. As we stated in *Pesek v. Univ. Neurologists Assn., Inc.* (2000), 87 Ohio St.3d 495, "if 'there is room for doubt whether the verdict was rendered upon the evidence, or may have been influenced by improper remarks of counsel, that doubt should be resolved in favor of the defeated party.' " Id. at 502, quoting *Warder, Bushnell & Glessner Co. v. Jacobs* (1898), 58 Ohio St. 77, 85. 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.

Harris, at ¶ 36, emphasis added.

Like the trial judge in the *Mannion* case above, this Court also "witnesse[d] the trial firsthand" and has no doubt that DiDonato proved that he was injured, that Roig caused the accident that resulted in his injuries, and that he was entitled to some modicum of damages.

The problem for DiDonato in moving the Court for a new trial under Civ.R. 59(A)(4) is that nowhere in his motion does he posit any argument or point to any evidence of *how* or *why* the jury was improperly influenced by passion or prejudice. Clearly, there were no instances of misconduct by defense counsel. At all times, she was professional, respectful, and ethical.

As noted above, the Supreme Court has provided trial courts with a roadmap to follow when considering this issue,

> As the court in *Stephens* noted, "The determination of whether alleged misconduct of counsel was sufficient to taint the verdict with passion or prejudice ordinarily lies within the sound discretion of the trial court." *Id.*, citing *Lance v. Leohr* (1983), 9 Ohio App.3d 297, 298. In exercising this discretion, trial courts have a " 'duty in the executive control of the trial to see that counsel do not create an atmosphere which is surcharged with passion or prejudice and in which the fair and impartial administration of justice cannot be accomplished.' " *Pesek*, 87 Ohio St.3d at 501, quoting *Jones v. Macedonia–Northfield Banking Co.* (1937), 132 Ohio St. 341, 351. This duty includes ordering a new trial when misconduct of counsel affected the outcome * * *

Harris, at ¶ 38.

In his motion for a new trial, DiDonato does not point to a single example of defense counsel's "misconduct" that might justify a new trial, nor does he even address the issue.

Regardless, while the jury clearly lost its way in failing to award DiDonato any damages, there is no evidence in the record or argument by him as to *how* or *why* it lost its way, and there is nothing that he, or the Court, can point to that remotely demonstrates that the defense verdict in this case resulted from the improper influence of passion or prejudice.

Finally, recall that the *Pena* case, a Ninth District Court of Appeals decision, addresses this issue on point.

> . . . pursuant to Civ.R. 59(A)(4) must consider (1) the amount of the verdict, **and (2) whether the jury considered improper evidence, improper argument by counsel, or other inappropriate conduct which had an influence on the jury** . . . To support a finding of passion or prejudice, it must be demonstrated that the jury's assessment of the damages was so overwhelmingly disproportionate as to shock reasonable sensibilities . . . **The mere size of the verdict is insufficient to establish proof of passion or prejudice**.

Pena, at ¶ 104, emphasis added.

Here, the amount of the verdict, -0-, is clearly inadequate. But, the record is devoid of any indication that the jury considered improper evidence, improper argument by defense counsel, or any other inappropriate conduct which may have had an untoward

influence on the jury. In fact, the *only* evidence or issue that can be speculated as to the role passion or prejudice may have played in the defense verdict is the verdict itself. And that, without more, is not enough.

The motion for new trial pursuant to Civ.R. 59(A)(4) is denied.

CIV.R. 56(A)(6)

DiDonato also moves the Court for a new trial pursuant to Civ.R. 59(A)(6), urging that the defense verdict and resulting judgment of -0- is not sustained by the weight of the evidence.

I agree.

> THE VERDICT IN FAVOR OF THE DEFENDANT WHICH RESULTED IN NO DAMAGES FOR PLAINTIFF IS NOT SUSTAINED BY THE WEIGHT OF THE EVIDENCE

On this issue, recall the Ninth District's instruction,

> A new trial should be granted pursuant to Civ.R. 59(A)(6) when the jury's award of inadequate damages resulted from its failure to consider an element of damages that was established by uncontroverted evidence. *Dillon v. Bundy* (1992), 72 Ohio App.3d 767, 773. A new trial should also be awarded if the jury's verdict was not supported by competent, substantial, and credible evidence. *Id.* at 773–774; *Verbon,* 7 Ohio App.3d at 183.

Pena, supra, at 104.

In the case at bar, as urged by DiDonato, there was a substantial amount of uncontroverted evidence that this was a serious accident, that he was injured and transported to the hospital, and that he underwent months of chiropractic and pain management treatment. The evidence regarding the MRI and *extent* of the injuries is contested and fair game for dispute, but evidence of *some injury* is not.

Also recall that DiDonato had a preexisting back problem having had surgery just a few months before the accident. There was competent, substantial, and credible evidence that this accident aggravated DiDonato's preexisting back issues and he should have been compensated, in some amount, for that.

When reviewing a trial court's decision to grant a new trial under Civ.R. 59(A), recall the Supreme Court's instruction to appellate courts regarding the deference to be given the trial courts,

> When in the exercise of discretion a trial court decides to grant a new trial and that decision is supported by competent, credible evidence, **a reviewing court must defer to the trial court.** In such a case, the reviewing court may not independently assess whether the verdict was supported by the evidence, because the issue is not whether the verdict is supported by competent, credible evidence, but rather whether the court's decision to grant the new trial is supported by competent, credible evidence.

Harris, supra, at ¶ 46, emphasis added.

Moreover, the Supreme Court, recognizing the Ninth District's favored approach, instructs as follows relative to a manifest weight review,

> * * * because "manifest weight of the evidence" refers to a greater amount of credible evidence and relates to persuasion, it does not matter that the burden of proof differs in criminal and civil cases. In a civil case, in which the burden of persuasion is only by a preponderance of the evidence, rather than beyond a reasonable doubt, evidence must still exist on each element (sufficiency) and the evidence on each element must satisfy the burden of persuasion (weight).

Eastley, supra, at ¶ 19.

The high court continued,

> Several courts of appeals do apply the *Thompkins* standard for manifest weight of the evidence in civil as well as criminal cases. For example, the Ninth District stated how a review on manifest weight is to be conducted:
>
> > " 'The [reviewing] 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.' "

Id. at ¶ 20.

And,

> In weighing the evidence, the court of appeals must always be mindful of the presumption in favor of the finder of fact.
>
> > "[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts. * * *
>
> "If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment."

Id. at ¶ 21.

And finally,

> When a court of appeals determines that a jury verdict is against the weight of the evidence, it should remand the case for a new trial. See *Hanna v. Wagner*, 39 Ohio St.2d 64, 66, (1974). A court of appeals panel has the power to so act, provided it acts unanimously and reverses only once on manifest weight of the evidence. These restrictions protect the jury verdict and safeguard against arbitrary remand.

Id. at ¶ 22.

This Court grounds its decision to grant a new trial primarily on the seven factors enumerated by DiDonato in his motion[6], factors that are almost wholly uncontested and demonstrate that a circumspect review of the facts cut against a defense verdict and compel the conclusion that the jury lost its way:

1) Roig was at fault for the collision.

2) Roig admits that DiDonato was injured.

3) EMS transported DiDonato to the emergency room.

4) DiDonato clearly suffered injury and pain at the scene of the accident and thereafter.

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[6] These factors are on Page 11 of DiDonato's brief and are paraphrased by the Court.

5) DiDonato had no prior neck pain before the accident.

6) The medical records document months of treatment and associated pain.

7) DiDonato's doctors confirmed injury directly related to the collision.

Additional factors supporting a new trial include the fact that DiDonato's vehicle was a total loss, he was in serious, obvious distress immediately after the collision, and even Roig's expert, Dr. Krewson, agreed that DiDonato's MRI was medically necessary and that there were anomalies in some of his discs, though Dr. Krewson attributed that to degeneration. In addition, recall that DiDonato recently had surgery before the accident and he posited substantial, credible evidence that the collision aggravated his preexisting condition.

Roig argues in her brief that while Dr. Krewson admitted that DiDonato did have pain in his neck, "he gave no opinion as to the cause of that pain" nor did he testify that the accident, "proximately caused neck pain . . ."[7]

The problem with this observation, which, parenthetically, is accurate, is that it fails to account for the undisputed fact that DiDonato never experienced neck pain prior to the accident. While it is true that the jury is not required to make an inference from established facts, it must also be true that a jury cannot simply disregard that which has been established by the greater weight of the evidence.

One final observation on the issue: this Court witnessed the entire trial and notes for the record that the thrust of Roig's defense, understandably, was not that DiDonato was uninjured or should receive no compensation, but that his injuries were nowhere near as serious or debilitating as he was making them out to be.

In fact, while not evidence, Roig's counsel suggested DiDonato be compensated in the amount of $10,000.00, if the jury found in his favor. Understanding the nature of the evidence and seriousness of the collision, Roig's counsel took a reasonable, rational approach in her closing argument as opposed to suggesting that DiDonato should receive nothing.

Again, recall the Supreme Court's mandate on this point,

> 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.

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[7] Roig's brief in opposition, Page 6, Para 3.

Harris, at ¶ 36, emphasis added.

This Court posits that even completely disregarding its observations and anecdotal conclusions, review of the "cold record" alone more than supports the determination that the jury lost its way and a new trial should be granted.

IV. CONCLUSION

Based upon the foregoing, this Court finds, as a matter of law, pursuant to Civ.R. 59(A)6), that the jury lost its way, that the defense verdict is against the manifest weight of the evidence, and that DiDonato is entitled to a new trial.

JUDGE D. CHRIS COOK

THIS IS A FINAL APPEALABLE ORDER