

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

Kelli N. Staley,	:	
Plaintiff-Appellee/ Cross-Appellant,	:	
	:	
Patrick W. Staley,	:	No. 12AP-1085
Plaintiff-Appellee,	:	(C.P.C. No. 09CVC-5-8102)
	:	
v.	:	(REGULAR CALENDAR)
	:	
Allstate Property Casualty Insurance Company et al.,	:	
Defendants-Appellees,	:	
	:	
Heather N. Kupser,	:	
Defendant-Appellant/ Cross-Appellee.	:	
	:	

D E C I S I O N

Rendered on August 6, 2013

Stephen A. Moyer, for appellee Kelli N. Staley.

Todd J. McKenna, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BROWN, J.

{¶ 1} Heather N. Kupser, defendant-appellant/cross-appellee, appeals the judgment of the Franklin County Court of Common Pleas, in which the court sustained

the objections of Kupser to the magistrate's decision granting the Civ.R. 50(A) motion of Kelli N. Staley, plaintiff-appellee/cross-appellant ("Staley"), and her husband Patrick W. Staley, plaintiff-appellee (referred to singularly as "Staley"), and denied Kupser's objections to the magistrate's decision granting Staley's Civ.R. 59(A) motion for new trial. Staley has filed a cross-appeal. Kupser also has filed a motion to dismiss Staley's cross-appeal on the basis that the cross-appeal addressed only an interlocutory order, which ultimately was harmless error from Kupser's perspective. This court also issued a show cause order on March 7, 2013 directing the parties to show cause why their appeals should not be dismissed for lack of a final, appealable order. At the outset, we find the trial court's judgment was a final, appealable order, deny Kupser's motion to dismiss, and proceed to address the parties' assignments of error.

{¶ 2} On June 4, 2007, Staley and Kupser were involved in a car accident. Staley's car was "totaled." Staley's underinsured/uninsured motorist ("UM/UIM") insurer, Allstate Insurance, paid Kupser's policy limits of \$50,000 to Staley. Staley underwent surgery for a disc herniation in August 2007 and received an epidural injection to relieve continuing pain in January 2008. In May 2009, Staley and her husband filed a personal injury action against Kupser and Allstate. With regard to Allstate, the complaint alleged that Kupser's automobile insurance had insufficient policy limits to fully compensate Staley and her husband for their injuries, and they sought compensation under the underinsured motorists coverage in the Allstate policy.

{¶ 3} A trial was held before a magistrate. Allstate did not participate in trial and agreed to be bound by the jury verdict. At the close of Staley's case, Staley moved for a directed verdict on the issue of proximate cause, asserting that if the jury were to find Kupser negligent, then the jury would be required to find that Kupser's negligence was the proximate cause of Staley's injuries. The magistrate granted the motion.

{¶ 4} The jury returned a verdict in favor of Staley and awarded her lost wages and medical expenses, but awarded her nothing for pain and suffering. Staley orally moved for judgment notwithstanding the verdict ("JNOV"), asserting that the jury erred by failing to award damages for pain and suffering. The magistrate reconvened the jury and instructed them to award damages for pain and suffering in an amount greater than

zero dollars. The jury awarded pain and suffering damages in the amount of \$1. On September 28, 2010, the trial court entered its judgment.

{¶ 5} Staley moved for a new trial as to damages only, pursuant to Civ.R. 59, arguing the jury's award for pain and suffering was insufficient. On November 3, 2010, the magistrate granted Staley's motion for new trial, concluding that the jury's award for pain and suffering was inadequate because Staley presented uncontroverted evidence that the collision was the proximate cause of Staley's medical bills and lost wages.

{¶ 6} Kupser filed objections to the magistrate's decision, arguing that the magistrate erred by granting a new trial on damages and by granting a directed verdict on the issue of proximate cause. On February 25, 2011, the trial court issued a decision in which it sustained Kupser's objections, finding the magistrate erred by granting Staley's motion for a directed verdict because reasonable minds could have arrived at more than one conclusion as to the proximate cause of Staley's injuries. The trial court ordered the issues of proximate cause and damages be retried. In a March 30, 2011 nunc pro tunc decision, the court clarified that, in addition to sustaining Kupser's objection to the magistrate's Civ.R. 50(A) ruling, it was overruling Kupser's objection to the magistrate's decision granting a new trial on the issue of damages under Civ.R. 59. Kupser appealed, and in *Staley v. Allstate Property Cas. Ins. Co.*, 10th Dist. No. 11AP-279, 2011-Ohio-6171, this court found the trial court's decision was not a final, appealable order because the trial court failed to adopt, modify or reject the magistrate's decision, in whole or in part, and the decision did not include any language indicating it was a judgment.

{¶ 7} Upon remand, the trial court issued a new judgment entry granting a new trial "under Civil Rule 59(A)(6) as to damages" and "under Civil Rule 50(A) as to the proximate cause of Plaintiff's injuries and medical bills." The entry also included Civ.R. 54(B) language indicating that there was no just reason for delay. Kupser and Staley appeal the judgment of the trial court. Kupser asserts the following assignments of error:

1. THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING A NEW TRIAL, WHERE THERE WAS COMPETENT, CREDIBLE EVIDENCE TO SUPPORT THE JURY'S VERDICT.

2. GRANTING A DIRECTED VERDICT ON PROXIMATE CAUSE IN PLAINTIFF-APPELLEE'S FAVOR, WAS

HARMLESS TO PLAINTIFF, AS IT FAVORED THE PLAINTIFF-APPELLEE. APPELLANT-DEFENDANT DID NOT OBJECT TO PAYING THE FINAL VERDICT AS RENDERED, AND IS MOOT.

3. THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING A NEW TRIAL ON DAMAGES ONLY, WHEN LIABILITY WAS ALSO STRONGLY CONTESTED.

{¶ 8} Staley asserts the following cross-assignment of error:

THE TRIAL COURT ABUSED ITS DISCRETION IN REVERSING THE MAGISTRATE'S DIRECTED VERDICT ON PROXIMATE CAUSE, AS DEFENDANT FAILED TO PRESENT ANY COMPETENT, CREDIBLE EVIDENCE TO SUPPORT HER ALTERNATIVE THEORIES OF PROXIMATE CAUSE.

{¶ 9} Kupser argues in her first assignment of error that the trial court abused its discretion when it granted a new trial, where competent, credible evidence supported the jury's verdict. Staley's motion for new trial was premised upon the following grounds in Civ.R. 59:

(4) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice;

* * *

(6) The judgment is not sustained by the weight of the evidence; however, only one new trial may be granted on the weight of the evidence in the same case;

(7) The judgment is contrary to law.

{¶ 10} Where a trial court is authorized to grant a new trial for a reason that requires the exercise of sound discretion, the order granting a new trial may be reversed only upon a showing of abuse of discretion by the trial court. *Rohde v. Farmer*, 23 Ohio St.2d 82 (1970), paragraph one of the syllabus. In ruling on a motion for new trial on the grounds that the judgment is not sustained by the weight of the evidence, the trial court must engage in a limited weighing of the evidence and must consider the credibility of the witnesses. *Id.* at paragraph three of the syllabus. This requires the trial court to exercise

its discretion, and an order granting or denying a new trial on this basis will not be reversed absent an abuse of discretion. *Antal v. Olde Worlde Prods., Inc.*, 9 Ohio St.3d 144, 145 (1984); *Harper v. Lefkowitz*, 10th Dist. No. 09AP-1090, 2010-Ohio-6527, ¶ 6. An abuse of discretion occurs where a court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983), citing *State v. Adams*, 62 Ohio St.2d 151, 157 (1980).

{¶ 11} In order to set aside a damage award as inadequate and against the manifest weight of the evidence, a reviewing court must determine that the verdict is so gross as to shock the sense of justice and fairness, cannot be reconciled with the undisputed evidence in the case, or is the result of an apparent failure by the jury to include all the items of damage making up the plaintiff's claim. *Bailey v. Allberry*, 88 Ohio App.3d 432, 435 (2d Dist.1993). Thus, in reviewing a motion for a new trial, a court does so with deference to the trial court's decision, recognizing that "the trial judge is better situated than a reviewing court to pass on questions of witness credibility and the 'surrounding circumstances and atmosphere of the trial.'" *Malone v. Courtyard by Marriott L.P.*, 74 Ohio St.3d 440, 448 (1994), quoting *Rohde* at 94.

{¶ 12} In the present case, Kupser argues that the manifest weight of the evidence presented at trial supported the jury's verdict of \$1 for pain and suffering. Kupser asserts the evidence demonstrated that Staley did not initially appear hurt according to witnesses; Staley first noticed pain only when attempting to move a child car seat; she had to be persuaded to take an ambulance; she did not complain of back pain in the emergency room; she had degenerative disc disease in her back on more than one level; she admitted she was injured in a prior 2006 accident; and her back surgeon testified that her disc injury could have hypothetically been present prior to the accident. Therefore, appellant contends, there may have been some doubt by the jury as to the extent of Staley's pain and suffering and whether it arose exclusively as a result of the accident.

{¶ 13} The magistrate found in his decision that Kupser presented no competent evidence of any prior injury due to Staley's employment as a nurse or her leisure pursuits, of an intervening cause that had any effect on Staley's disc herniation after the accident, but prior to her disc surgery, or any other injury that lead to her back surgery. Therefore, the magistrate reasoned, the jury was required to find some amount of damages for pain

and suffering, and an award of \$1 was clearly inadequate. On objections, the trial court found that the magistrate's decision granting a new trial was proper under Civ.R. 59(A)(6) because the award for \$1 for pain and suffering was not sustained by the uncontroverted evidence that Staley had an epidural injection and back surgery related to the accident.

{¶ 14} Based upon the evidence and testimony at trial, we find the trial court did not abuse its discretion when it granted Staley's motion for a new trial on damages. We first point out that there was uncontroverted testimony at trial that Staley endured pain and suffering after the accident, and Kupser presented no evidence that Staley did not endure such. Staley testified she felt pain across her chest that shot into her back, she was very sore the first night and in more pain the next day, her pain increased each day and was "horrible," her back muscles cramped, the pain relievers progressively lost their effectiveness, she had shooting pain in her legs, she underwent a discectomy, and she received an epidural injection five months after her surgery. Craig Griffith, who works with Staley's husband and arrived at the accident scene to help Staley, testified that Staley told him at the scene that her back was burning or hurting. Joann Ridge, Staley's mother, testified that, when she spoke to her daughter the afternoon of the accident, Staley said she was in pain. She saw Staley later the same day of the accident, and Staley said she was sore from the accident. In the six to eight times she saw her daughter before surgery, she could tell she was in a lot of pain. Ridge also testified that after the surgery, Staley was in a lot of pain and totally incapacitated. Patrick Staley testified that his wife's soreness from the accident started to set in the evening of the accident. He said Staley suffered from burning pain in her back and cried a lot because of the pain. He testified that her pain got progressively worse several weeks after the accident, and her pain incapacitated her for the first five days after surgery. After surgery, the pain increased, and Dr. Milan Herceg, the orthopedic surgeon who performed the operation on Staley's herniated disc, gave her an epidural injection five months after surgery. Dr. Herceg testified that disc herniations are very painful.

{¶ 15} The evidence was also uncontroverted that Staley suffered greatly beyond the physical pain after the accident. She testified extensively about her inability to care for her two-year-old daughter and how difficult it was for her. She also was unable to carry out her usual daily and work activities. Ridge testified that she had to do Staley's laundry

and household chores. Ridge also had to assist with caring for Staley's daughter. Ridge said Staley could not pick up her child, play with her outside or put her in a highchair, and Staley had a hard time dressing herself, bending, and putting on her shoes due to pain. Patrick Staley testified his wife was unable to lift their child after the accident, and he had to take on many of Staley's roles as mother. Therefore, the evidence was clear and undisputed that Staley endured pain and suffering after the accident.

{¶ 16} Kupser's arguments in her brief relate mostly to whether the pain was proximately caused by the accident. In *Wilson v. Johnson*, 118 Ohio App. 101, 103 (7th Dist.1962), the Seventh District Court of Appeals set forth the following analysis of the role of an appellate court in determining the adequacy of a verdict:

There is * * * a hesitancy to disturb as inadequate any verdict where the evidence discloses that the injury complained of might have resulted from another, earlier accident or from a cause unrelated to the accident. * * * It is similarly held where the extent of the injury is a much controverted issue.

{¶ 17} In *Haller v. Daily*, 2d Dist. No. 19420, 2003-Ohio-1941, the Second District Court of Appeals recognized that a jury has three options when faced with a claim for medical expenses and pain and suffering: (1) the medical expenses and pain and suffering were caused by the accident for which the defendant was liable, (2) medical expenses were caused by the accident, but no pain and suffering was caused by the accident, and (3) neither medical expenses nor pain and suffering were caused by the accident for which the defendant was liable. *Id.* at ¶ 16-17. The question, therefore "is whether there is evidence in the record from which a jury could reasonably have found the intermediate proposition." *Id.* at ¶ 17.

{¶ 18} In *Welch v. Ameritech Credit Corp.*, 10th Dist. No. 04AP-1123, 2006-Ohio-2528, this court concluded that a verdict is not automatically against the manifest weight of the evidence when there is an award for medical expenses without an award for pain and suffering, because the assessment of damages is a matter within the province of the jury. *Id.* at ¶ 43, citing *Weidner v. Blazic*, 98 Ohio App.3d 321, 334 (12th Dist.1994). The jury, as the trier of fact, is responsible for determining the credibility of a witness and may believe all, part or none of a witness' testimony, giving a witness little or no weight at all. *Id.*, citing *Parsons v. Washington State Community College*, 10th Dist. No. 05AP-1138,

2006-Ohio-2196, ¶ 21. Thus, a verdict awarding damages for medical expenses without an award for pain and suffering will not be against the manifest weight of the evidence if the record contains objectively discernible reasons, based upon which the jury could have rejected the plaintiff's claims and concluded that the collision was not the proximate cause of the plaintiff's injuries. *Welch* at ¶ 43.

{¶ 19} Courts have looked at various factors in determining whether a jury could reasonably award little or no damages for pain and suffering despite awarding medical expenses. For example, in finding that a jury could have reasonably found the plaintiff did not incur pain and suffering from injuries which were the direct result of the car accident, the court in *Mensch v. Fisher*, 11th Dist. No. 2002-P-0055, 2003-Ohio-5701, cited the following facts: cross-examination of the plaintiff's expert doctor and plaintiff revealed that the plaintiff had no physical restrictions placed upon her, she engaged in numerous physical activities with no resulting physical pain, the accident itself was minor, and the plaintiff reported no injury or physical pain shortly after it occurred.

{¶ 20} In *Burris v. Burnworth*, 7th Dist. NO. 06 JE 52, 2007-Ohio-4619, the court found the evidence showed that the jury could reasonably have found the plaintiff incurred de minimis pain and suffering even though she incurred medical expenses. The evidence showed that the plaintiff had been suffering from fibromyalgia before the accident, which is a chronic condition characterized by widespread pain in many body areas; she had a history of back and neck problems; the emergency room doctor found no obvious external injuries or tenderness and found she was able to both elevate that shoulder and move her neck well; the injuries resolved fairly quickly; the vehicles involved in the accident were traveling at slow speeds; and the plaintiff visited her personal doctor shortly after the accident, but his notes did not mention an automobile accident.

{¶ 21} In *Welch* at ¶ 40, we found that, although the jury awarded medical expenses, evidence supporting damages for pain and suffering was controverted, citing the following facts: the plaintiff sustained serious injuries in several earlier collisions; the plaintiff sought and received extensive treatment pre-dating the collision at issue for the same problems she claimed to have suffered after the present collision; there were no objective signs of injury when the plaintiff was treated at the emergency room; the plaintiff's credibility was called into question at trial; the testimony of the physicians and

medical experts were necessarily based on the plaintiff's subjective complaints and the subjective reports of her family.

{¶ 22} In the present case, we find Kupser's arguments are unavailing and unsupported by the manifest weight of the evidence. Although Kupser claims Staley did not initially appear hurt at the scene of the accident, that she only felt pain after reaching for her child's car seat and had to be persuaded to go to the hospital, these characterizations are incomplete interpretations of the evidence. Staley testified that immediately after impact, she felt burning across her chest from the airbag. She also said when she bent down to remove her child seat at the scene, she felt pain across her chest that shot into her back. The pain was unlike any she had ever felt before. Griffith testified that Staley did not immediately complain of pain when he first saw her at the scene; however, when she got back into her car to get a child car seat, he saw her cringe, reach for her back, and make a sound, as if in pain. When he asked her if she was okay, she said her back was burning or hurting, and he convinced her that she needed to have a doctor examine her. Thus, it is clear that Staley felt some pain immediately, followed by increased pain she experienced when she reached for the car seat. Staley testified clearly that she believed her injuries stemmed directly from the accident and had never experienced any pain in her back prior to the accident, and there was no evidence presented to the contrary. Any slight delay in not feeling the pain in her back is not persuasive evidence that the pain was not the direct result of the accident.

{¶ 23} Furthermore, that Staley had degenerative disc disease in her back on more than one level was of little relevance to the disc herniation at issue. Dr. Herceg testified that degenerative disc disease and a disc herniation are two different conditions, and there was absolutely no testimony linking the present herniation with degenerative disc disease. Equally of little persuasiveness is that Dr. Herceg testified that Staley's disc injury in her back could have been present prior to the accident. Dr. Herceg testified his records contained no indication that Staley had any disc issues prior to the accident. Dr. Herceg stated that he believed, within a reasonable degree of medical certainty, that Staley suffered the herniation as a proximate result of the accident. Although he said that Staley also had a degenerative condition at the L5-S1 level, which was the level adjacent to where the herniation surgery was performed, when asked whether her herniation could have

existed before the accident, he responded, "Hypothetically, that is possible." However, he said it was "highly unlikely" for a patient to have no symptoms with the degree of herniation found on her MRI. Dr. Herceg's speculative testimony falls short of constituting convincing evidence to support that the disc herniation was degenerative or existed prior to the accident. Furthermore, Staley testified that, prior to the accident, she had never had any back problems. Crystal Harry, Staley's work supervisor at her nursing job, also testified that, prior to the accident, she had never seen Staley have any back problems that affected her job performance. Thus, although some degenerative issues might have existed prior to the accident, the weight of the evidence established that Staley's pain commenced only after the accident, and the only evidence to a reasonable degree of medical certainty was that the herniation resulted from the accident in question.

{¶ 24} Kupser's contention that Staley admitted she was injured in a prior 2006 accident is misleading. Staley "admitted" only that she was dizzy, so she agreed to be transported to the hospital for x-rays on her neck and shoulder. She testified that there was never any pain or tests completed related to her back. She also said she had never felt a pain similar to the pain she felt after the present accident. Staley's mom, Ridge, also testified that Staley was not injured in the 2006 accident.

{¶ 25} Therefore, despite Kupser's attempts to portray evidence as suggesting other causes of Staley's pain and herniation, her contentions are unsupported. The undisputed evidence was that Staley first felt pain in her back within minutes of the accident, and the pain continued until her discectomy. Staley testified that the pain progressively worsened after surgery until she received an epidural injection five months after surgery. Staley testified that the day following the injection was the first day she had been free of pain since the date of the accident. Dr. Herceg's expert medical testimony was unchallenged, and he opined that, within a reasonable degree of medical certainty, Staley's pain was the result of the accident.

{¶ 26} In addition, the factors described in the above-cited cases are not present here. Staley had physical restrictions after the accident; her physical activities were seriously curtailed; she worked after the accident with significant pain and restrictions; the accident was not minor; Staley reported injury and pain shortly after the accident; there was no evidence that Staley had any pre-existing herniation or degenerative

conditions in the same location as her injury; she had no history of back problems; she had an objective injury verified by an MRI; her injuries did not resolve quickly; she reported the incident and pain to her primary care doctor; there was no evidence that she injured her back in the prior car accident; she did not receive any back treatment prior to the current condition that involved a disc issue; Staley's credibility was never seriously challenged at trial; and Dr. Herceg's testimony was not only based upon Staley's subjective complaints but on MRI and surgical findings.

{¶ 27} For all of the foregoing reasons, we find the verdict for \$1 in damages for pain and suffering could not be reconciled with the undisputed evidence that Staley suffered a significant period of pain. Therefore, the trial court did not abuse its discretion when it granted Staley's motion for new trial on damages. Kupser's first assignment of error is overruled.

{¶ 28} Kupser argues in her second assignment of error that the trial court's granting of a new trial based upon Civ.R. 50(A) was error because a directed verdict on proximate cause favored appellee.

{¶ 29} Kupser states in her merit brief that "[Staley] benefited from the allegedly erroneous ruling by the Magistrate, and since the Appellant is willing to pay the resulting verdict, that issue is really moot. It was raised below only to avoid waiver of a possible error. Again, it is harmless in this case, since the Appellant does not challenge that issue in this appeal." In her reply brief, Kupser states that "[Kupser] is no longer pursuing any error in the court[']s 'Amended Judgment Entry' as the trial court appears to have properly reversed itself on the issue of proximate cause in this case. It is apparent that after further review, the court decided the issue of causation should have gone to the jury, and so Appellant no longer objects." In light of her representations that she no longer objects to the trial court's actions, we overrule Kupser's second assignment of error.

{¶ 30} Kupser argues in her third assignment of error that the trial court abused its discretion in granting a new trial on damages only, when liability was also strongly contested. To clarify, we first note that the trial court granted a new trial as to proximate cause as well. Notwithstanding, Kupser asserts that the entire case should be re-tried because factors in the accident itself may have some relevancy to the alleged injuries sustained, including the fact that Kupser and her child were not injured. However, Kupser

did not assert an objection to the magistrate's decision requesting a new trial as to the issue of liability. Pursuant to Civ.R. 53(D)(3)(b)(iv), "[e]xcept for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b)." Thus, by failing to raise the issue of a new trial as to liability, Kupser waived all but plain error. *See In re A.L.D.*, 10th Dist. No. 08AP-238, 2008-Ohio-3626, ¶ 18. In a civil proceeding, "plain error involves those extremely rare cases where exceptional circumstances require its application to prevent a manifest miscarriage of justice, and where the error complained of, if left uncorrected, would have a material, adverse effect on the character of, and public confidence in, judicial proceedings." *In re Moore*, 10th Dist. No. 04AP-299, 2005-Ohio-747, ¶ 8, citing *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 122 (1997).

{¶ 31} In the present case, Kupser presents no authority for the proposition that it is plain error for a trial court to order a retrial on damages only. Civ.R. 59(A) provides explicitly that "[a] new trial may be granted to all or any of the parties and on all or part of the issues." Also, in *Mast v. Doctor's Hosp. N.*, 46 Ohio St.2d 539, 541 (1976), the Supreme Court of Ohio held that "App.R. 12(D), in conjunction with Civ.R. 42(B), authorizes a Court of Appeals to order the retrial of only those issues, claims or defenses the original trial of which resulted in prejudicial error, and to allow issues tried free from error to stand." This court has also found no error in granting a new trial on the issue of damages only. *See Harper* at ¶ 36-38. Therefore, we can find no plain error in the trial court's determination not to retry the liability portion of the case. Kupser's third assignment of error is overruled.

{¶ 32} Staley argues in her assignment of error on cross-appeal that the trial court abused its discretion when it sustained Kupser's objection to the magistrate's decision to grant directed verdict on proximate cause because Kupser failed to present any competent, credible evidence to support her alternative theories of proximate cause. Staley maintains that, to present a claim that the proximate cause of her herniated disc was something other than the accident in question, Kupser was required to present expert medical testimony. The trial court found that the magistrate erred in granting directed

verdict on the issue of proximate cause because, despite the lack of any expert testimony offered by Kupser, Civ.R. 50(A) requires construing the evidence most strongly in favor of the party against whom the motion is directed.

{¶ 33} We find the trial court erred when it found the magistrate erred in granting directed verdict on the issue of proximate cause. A defendant is not required to present contrary expert medical testimony to withstand a directed verdict on causation. "[A] defendant is not obligated to put on testimony about the cause of an injury or to provide an alternative theory about causation. Defendants can avoid a directed verdict on this subject *through cross-examination*, presentation of contrary evidence that the negligence was not the probable cause of the injury, or presenting evidence of alternative causes of the injury. *Stinson v. England* (1994), 69 Ohio St.3d 451, 456-457, 633 N.E.2d 532, 538." (Emphasis sic.) *Parsons v. Kelley*, 5th Dist. No. 98CAE10052 (Aug. 23, 1999), citing *Werth v. Davies*, 120 Ohio App.3d 563, 569 (1st Dist.1997). *See also Shadle v. Morris*, 5th Dist. No. 2012CA00073, 2013-Ohio-906 (to avoid directed verdict on causation of plaintiff's disc herniation, defendant was not required to present own expert medical testimony; rather, through cross-examination, the defendant could cause the jury to question the conclusion that the injuries were the result of the accident). While expert testimony on causation must be in terms of probability, on cross-examination reasonable possibility may be used to impeach or to challenge the expert's theory when supported by evidence or facts in the case. However, where evidence of an alternative cause is presented, expert testimony of its probable nature must be presented by the defense to controvert the evidence presented by the plaintiff. *Stinson* at 456.

{¶ 34} In this case, when giving Kupser the benefit of all reasonable inferences to be drawn from the evidence, as a trial court must when reviewing a motion for directed verdict, Kupser did not raise issues that could cause reasonable minds to reach differing conclusions as to causation. While Dr. Herceg testified on cross-examination that there are many ways this kind of condition can occur and that he did not have a prior MRI to compare to the one he evaluated, this testimony was based on broad possibilities in answer to hypothetical's based on generalities and not upon facts or evidence in the record of this case. It was much too general to call into question that her injury was caused by the 2007 accident.

{¶ 35} Staley, on cross-examination, was questioned about her hospital visit after a 2006 accident. She testified she had mild neck pain and shoulder pain but was taken to the hospital because she was dizzy. She did not testify she had back pain. Defense questioned Dr. Herceg about the prior auto accident, but Dr. Herceg did not believe there was a prior back injury. In answering whether the 2007 accident caused the herniated disc, Dr. Herceg testified that it would be highly unlikely for a patient to have had no symptoms prior to the accident if the injury shown on the MRI pre-existed the accident. For these reasons, we find the trial court erred when it determined that the magistrate erred in granting a directed verdict on the issue of proximate cause.

{¶ 36} Accordingly, Kupser's three assignments of error are overruled, Staley's cross-assignment of error is sustained, Kupser's motion to dismiss the cross-appeal is denied, and the judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part, and this cause is remanded to that court for further proceedings in accordance with law, consistent with this decision.

*Motion to dismiss denied;
judgment affirmed in part and reversed in part;
cause remanded.*

CONNOR and DORRIAN, JJ., concur.
