

IN THE
SUPREME COURT OF OHIO

CASE NO: 06-1201

KATHLEEN M. BRYAN-WOLLMAN,)	
)	
Plaintiff-Appellee,)	On Appeal from the Cuyahoga
)	County Court of Appeals,
)	Eighth Appellate District
v.)	APP. NO. 86429
)	
CORRINE C. DOMONKOS,)	
)	
Defendant-Appellant.)	Trial Court Case No. 513286
)	

APPELLANT'S REPLY BRIEF
OF CORRINE C. DOMONKOS

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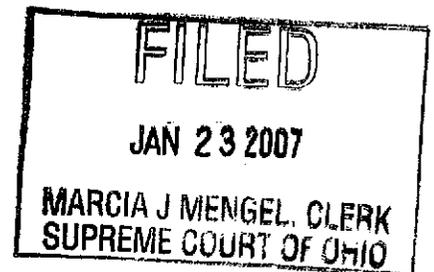


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ARGUMENT

I. Under the Ohio Constitution, in Order to Reverse a Case for a New Trial Based Upon the Manifest Weight of the Evidence, the Judgment of the Appellate Court Must be Unanimous in a Civil Action.

In contra to Appellant's argument that the Eight District Court of Appeals did not have jurisdiction under the Ohio Constitution to remand the cause for a new trial, Appellee argues that the remand was based upon the "sufficiency" not the "manifest weight" of the evidence. Appellee writes "(t)he issue of "weight of the evidence" was not even presented to the Court of Appeals for review." Therefore, Appellee argues, the Constitutional provision relied upon by Appellant is not invoked. In support of this thesis, Appellee selectively quotes his assignments of error. In point of fact, Appellees' Second Assignment of Error was:

The trial court abused its discretion in denying Appellants' Motion for a New Trial as it **failed to independently weigh the evidence and assess the credibility of witnesses.** (emphasis added.)

Therefore, it is clear that the Appellee did assign as error the manifest weight of the evidence standard for a new trial. Additionally, how Appellee framed her assignment of error and what the Court used as the standard of review are two different things. First, one should note that the majority wrote:

"On at least two occasions¹ the trial court observed on the record that the **manifest weight of the evidence** established that plaintiffs were entitled to a minimum the medical bills from the emergency room visit." (Opinion, vol 613, pg. 0116.)

¹While the opinion does not specify the "two occasions," the occasions are most likely when 1) the jury first requested a defense verdict form and 2) when the jury asked "how is the jury to proceed if, based upon a preponderance of evidence, the defendant's negligence did not proximately cause injury to the plaintiff."

The opinion concludes that

In such cases, a defense verdict is **against the manifest weight of the evidence** because it is not supported by **competent, credible evidence.**" (Id. at 117.)

The Court then reversed the case for a new trial. (Id.)

Ohio Civil Rule 59(A) governs new trials, it reads as follows:

CIV R 59 NEW TRIALS

(A) Grounds

A new trial may be granted to all or any of the parties and on all or part of the issues upon any of the following grounds:

- (1) Irregularity in the proceedings ***
- (2) Misconduct of the jury ***
- (3) Accident or surprise ***
- (4) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.
- (5) Error in the amount *** when the action is upon contract ***
- (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 judgement is contrary to law;
- (8) Newly discovered evidence,***
- (9) Error of law ***

In addition to the above grounds, a new trial may also be granted in the sound discretion of the court for good cause shown. *** (Emphasis added.)

The use of the phrase "manifest weight of the evidence" as well as terms "competent" and "credible" indicates that the review was not for sufficiency, as alleged by Plaintiff, but instead involved weighing the evidence.

Weight of the evidence concerns "the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other. 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.*" State v. Thompkins, (1997) 78 Ohio St.3d 380,

(bold added) superceded on other grounds by State v. Smith (1997) 80 Ohio St.3d 89.

“Sufficiency” is 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.” Thompkins, 78 Ohio St.3d 380.

Secondly, the standard used by the Court of Appeals was not the “sufficiency” standard.

The opinion states:

Where a motion for a new trial is denied, there must be competent, credible evidence in the record to support the jury’s verdict. (citations omitted.) A motion for a new trial with reverence to the weight or sufficiency of the evidence imposes upon that court a duty to review the evidence and pass upon the credibility of witnesses. Rohde v. Farmer (1970) 23, Ohio St.2d 82. (Opinion, Vol 613, pg. 115, 116.)²

Therefore, Appellees’ argument that the Constitution provision relied upon by Appellant does not apply is not supported by the record herein.

Additionally, it is clear from the opinion that the Eighth District reached their decision not on the sufficiency of the evidence but instead on the “greater amount of credible evidence and its effect of inducing belief.” This is clearly evident when one considers the dissent which points out that:

- Appellee testified that she sustained injury to her lower back in 1983 and she never fully recovered.

²At the time Rohde v. Farmer (1970) was decided, Brittain v. Ind. Comm. of Ohio (1917) 95 Ohio St. 391, was still good law. Brittain held that the words “weight of evidence,” in Const. art. 4, § 6, providing that no judgment shall be reversed except by concurrence of all judges of Court of Appeals on weight of evidence, are equivalent to “sufficient evidence.” After 80 years of being good law, Brittain was overruled by State v. Thompkins (1997) 78 Ohio St.3d 380.

- Dr. Patterson conducted an examination of her upper back and neck. On request of Appellee's counsel, Dr. Patterson issued two separate reports with different causal statements. Credibility of this witness is clearly at issue and should be evaluated by the jury.
- Dr. Mann testified that the auto accident had nothing to do with Appellee's present condition.
- Dr. Balraj testified that her personality profile suggested a high likelihood of somatization disorder.

(I would also point out that Appellee took issue with the record keeping of the emergency room personnel.)

"Although Dr. Stearns testified that Wollman had sustained some injury as a result of the accident, there were multiple opinions to the contrary." (Opinion, Dissent, vol. 613, pg. 124.)

The above facts clearly demonstrates why the framers of the Constitution required a unanimous opinion to reverse a jury verdict. After all, if three highly trained and respected jurists cannot come to the same conclusion based upon the evidence presented at trial, how can one legitimately argue that the lay jury made an incorrect decision. Therefore, this case must be reversed and the jury verdict reinstated. To hold otherwise would be to make impotent the protections afforded to litigants under the Ohio Constitution.

II. When a Motion for New Trial is Granted under Civil Rule 59(A)(6), it is Proper to Remand Only for Non-disputed Damages, When Practicable.

Appellee argues that both Appellant's and Appellees' experts opine that she suffered from "cervical and lumbar strains" from the accident and points to the emergency room records as support. No further agreement among physicians is alleged by the Appellee. Appellee merely argues that the other physicians for the defense "performs "hundreds" of medical examinations for the Bureau of Workers' Compensation at a rate of \$400.00 an hour" and they offer "alleged"

expert opinions. Should this case be reversed for a new trial, the reversal should be limited to Appellee's cervical and lumbar strains for the reasons set forth in Appellant's Brief.

III. It is not Proper to Reverse a Case Under the Manifest Weight of the Evidence Standard, When the Records Upon Which an Expert Based Their Opinion is Called into Question by the Testimony of the Appellee.

A trial court may not exclude expert testimony simply because court disagrees with the expert's conclusions; instead, if the expert followed methods and principles deemed valid by discipline to reach his opinion, court should allow the testimony, with the traditional adversary process weeding out shaky opinions. Valentine v. PPG Industries, Inc. (2004, 4th App. Dist) 158 Ohio App. citing Rules of Evid., Rule 702. Dr. Kim Stearns, testified on behalf of defense and opined that Mrs. Wollman sustained cervical and lumbar strain, which should have resolved within a two to three month period. As the Appellee called into question her medical records, this would make a jury question as to whether or not the doctor's testimony is reliable.

Therefore, it was improper for the majority to remand for a new trial merely because the doctors testimony was "uncontroverted expert testimony." Further, there was evidence that Appellee's doctor changed his report on advice of Appellee's counsel. There was nothing "uncontroverted" about the expert testimony in this case. Therefore, it was improper for the Appellate Court to substitute their judgment for that of the jury.

CONCLUSION

For the foregoing reasons, Defendant-Appellant Corrine C. Domonkos, moves this Court for an order reversing the decision of the Eight District Court of Appeals and reinstating the trial court's order denying Appellee a new trial.

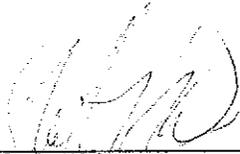
Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was sent this 19 day of January, 2007 to James A. Jenkins, Attorney for Plaintiff-Appellee, 2000 Standard Building, 1370 Ontario Street, Cleveland, OH 44113 by regular U.S. Mail.



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