

ORIGINAL

In the Supreme Court of Ohio

*PAULA EASTLEY, Admrx. of the
Estate of Steven Hieneman,*

Plaintiff-Appellee,

v.

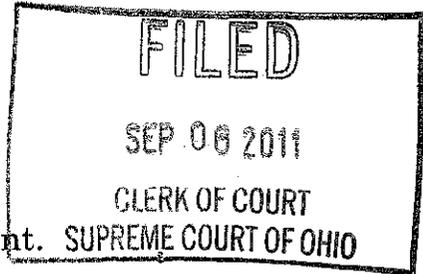
PAUL HOLLAND VOLKMAN, M.D., et al.,

Defendants,

-and-

*DENISE HUFFMAN,
d/b/a Tri-State Health Care,*

Defendant-Appellant.



DISCRETIONARY APPEAL FROM THE COURT OF APPEALS
FOURTH APPELLATE DISTRICT, SCIOTO COUNTY, OHIO
CASE No 09CA3308

**BRIEF OF AMICUS CURIAE THE OHIO ASSOCIATION OF
CIVIL TRIAL ATTORNEYS IN SUPPORT OF APPELLANT**

MARK H. GAMS (#0025362)
M. JASON FOUNDS* (#0069468)
**Counsel of Record*
GALLAGHER, GAMS, PRYOR, TALLAN
& LITRELL, L.L.P.
471 East Broad Street, 19th Floor
Columbus, OH 43215-3872
Tel: (614) 228-5151
Fax: (614) 228-0032
E-mail: mgams@ggptl.com
jfound@s@ggptl.com
*Counsel for Defendant-Appellant,
Denise Huffman, d/b/a Tri-State
Health Care*

TIMOTHY J. FITZGERALD* (#0042734)
**Counsel of Record*
GALLAGHER SHARP
Bulkley Building, Sixth Floor
1501 Euclid Avenue
Cleveland, OH 44115-2108
Tel: (216) 241-5310
Fax: (216) 241-1608
E-mail: tfitzgerald@gallaghersharp.com
*Counsel for Amicus Curiae, The Ohio
Association of Civil Trial Attorneys*

JAMES L. MANN (#0007611)
MANN & PRESTON, L.L.P.
18 East Second Street
Chillicothe, OH 45601
Tel: (740) 775-2222
Fax: (740) 775-2627
*Counsel for Defendant-Appellant,
Denise Huffman, d/b/a Tri-State
Health Care*

JOHN McLAUGHLIN* (#0052021)
**Counsel of Record*
RENDIGS, FRY, KIELY & DENNIS,
LLP
One West Fourth Street, Ste. 900
Cincinnati, OH 45202-3688
Tel: (513) 381-9368
Fax: (513) 381-9206
E-mail: jfm@rendigs.com
*Counsel for Defendant-Appellee,
State Farm Fire & Casualty
Company*

THOMAS M. SPETNAGEL* (#0003820)
**Counsel of Record*
SPETNAGEL & McMAHON
42 East Fifth Street
Chillicothe, OH 45601
Tel: (740) 774-2142
Fax: (740) 774-2147
tomspetnagel@spetnagelandmcmahon.com
*Counsel for Plaintiff-Appellee, Paula
Eastley, Admr. of the Estate of Steven
Hieneman*

STANLEY C. BENDER (#0012323)
BENDER LAW OFFICES
P.O. Box 950
Portsmouth, OH 45662
Tel: (740) 353-4191
Fax: (740) 353-1649
*Counsel for Plaintiff-Appellee, Paula
Eastley, Admr. of the Estate of Steven
Hieneman*

TABLE OF CONTENTS

Page:

TABLE OF AUTHORITIES iii

I. STATEMENT OF INTEREST OF THE AMICUS CURIAE 1

II. STATEMENT OF THE CASE AND FACTS 3

III. ARGUMENT 4

Proposition of Law:

A PARTY IS NOT REQUIRED TO FILE A MOTION FOR A DIRECTED VERDICT, A MOTION [FOR JUDGMENT] NOTWITHSTANDING THE VERDICT AND/OR A MOTION FOR A NEW TRIAL AS A PRE-REQUISITE TO ASSERTING AN ASSIGNMENT OF ERROR ON APPEAL THAT A CIVIL JURY’S VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE. 4

A. The Filing of a Motion for New Trial Pursuant to Civ.R. 59(A)(6) Is Not a Prerequisite to Preserving an Appeal Challenging the Weight/Sufficiency of the Evidence Supporting a Jury Verdict in a Civil Case. 4

1. *An appellate court has the authority to address and resolve manifest weight of the evidence arguments in appeals from civil jury verdicts.* 4

2. *A motion for a new trial is not a prerequisite to obtaining appellate review of the sufficiency or weight of the evidence pursuant to R.C. §2321.01.* 6

3. *The practice in federal court does not weigh in favor of Ohio’s adopting a rule making a new trial motion a prerequisite to obtaining appellate review of the sufficiency or weight of the evidence.* 8

4. *Revised Code §2321.01 confers substantive rights on litigants and is compatible with Ohio’s Civil and Appellate Rules and prevailing practice.* 9

B. Motions Pursuant to Civ.R. 50 for a Directed Verdict and for Judgment Notwithstanding the Verdict Do Not Involve an Evaluation of the Weight or Sufficiency of the Evidence. 11

CONCLUSION 13

CERTIFICATE OF SERVICE 15

TABLE OF CONTENTS (cont'd.)

Page:

APPENDIX

Ohio Constitution, Art. IV, §3(B)(3)	A1
R.C. §2321.01	A1
Civ.R. 50	A1
Civ.R. 59	A3

TABLE OF AUTHORITIES

Page(s):

CASES:

<i>Bicudo v. Lexford Properties, Inc.</i> , 157 Ohio App.3d 509, 2004-Ohio-3202	12
<i>Bryan-Wollman v. Domonko</i> , 115 Ohio St.3d 291, 2007-Ohio-4918	5
<i>Chemical Bank of New York v. Neman</i> (1990), 52 Ohio St.3d 204	12
<i>Crane v. Perry Cty. Bd. of Elections</i> , 107 Ohio St.3d 287, 2005-Ohio-6509	11
<i>Dixon v. Montgomery Ward</i> (C.A.6 1986), 783 F.2d 55	9
<i>Everett, Waddell & Co. v. Sumner</i> (1877), 32 Ohio St. 562	6
<i>Gevedon v. Ivey</i> , 172 Ohio App.3d 567, 2007-Ohio-2970	2
<i>Gonzalez v. Henceroth Enterprises, Inc.</i> , 135 Ohio App.3d 646, 653, 1999-Ohio-961	2, 7
<i>Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.</i> , 95 Ohio St.3d 512, 2002-Ohio-2842	12
<i>Gruener v. Ohio Cas. Ins. Co.</i> (C.A.6, 2008), 510 F.3d 661	9
<i>Hanna v. Wagner</i> (1974), 39 Ohio St.2d 64	3, 12
<i>Helmick v. Republic-Franklin Ins. Co.</i> (1988), 39 Ohio St.3d 71	12
<i>Hoskins v. Simones</i> , 173 Ohio App.3d 186, 2007-Ohio-4084	11

TABLE OF AUTHORITIES (cont'd.)

Page(s):

<i>Housh v. Peth</i> (1955), 99 Ohio App. 485	7, 11
<i>Huntington Natl. Bank v. Chappell,</i> 183 Ohio App.3d 1, 2007-Ohio-4344	2
<i>English v. Indus. Comm.</i> (1932), 125 Ohio St. 494	6
<i>Jacob Laub Baking Co. v. Middleton</i> (1928), 118 Ohio St. 106	6
<i>Knapp v. Edwards Laboratories</i> (1980), 61 Ohio St.2d 197	11
<i>Malone v. Courtyard by Marriott L.P.,</i> 74 Ohio St.3d 440, 1996-Ohio-311	12
<i>Neal v. Blair</i> (Jun. 10, 1999), Lawrence App. No. 98CA37, 1999 Ohio App. LEXIS 2633	8
<i>Osler v. City of Lorain</i> (1986), 28 Ohio St.3d 345	2
<i>Pennington v. Western Atlas, Inc.</i> (C.A.6, 2000), 202 F.3d 902	9
<i>Proctor v. Kardassilaris,</i> 115 Ohio St. 3d 71, 2007-Ohio-4838	11
<i>Reed v. Key-Chrysler Plymouth</i> (1998), 125 Ohio App. 3d 437	2, 5
<i>Rohde v. Farmer</i> (1970), 23 Ohio St.2d 82	2
<i>Snow v. Cincinnati Street RY. Co.</i> (1947), 80 Ohio App. 369	6
<i>Spradlin v. City of Canton</i> (1961), 171 Ohio St. 531	2, 6, 7, 10

TABLE OF AUTHORITIES (cont'd.)

Page(s):

State ex. rel. Loyd v. Lovelady,
108 Ohio St.3d 86, 2006-Ohio-161 9

State v. Hughes
(1975), 41 Ohio St.2d 208 10

State v. Wallace
(1975), 43 Ohio St. 2d 1 10

State v. Wilson,
113 Ohio St.3d 382, 2007-Ohio-2202 1

Village of Coalton v. Atkins
(Sept. 26, 1990), Jackson App. No. 608, 1990 Ohio App. LEXIS 4471 7

Wagner v. Roche Laboratories,
77 Ohio St.3d 116, 1996-Ohio-85 12

Walker v. David Davies, Inc.
(1973), 34 Ohio App.2d 139 2, 7, 9

Walker v. Holland
(1997), 117 Ohio App.3d 775 3, 12

CONSTITUTIONAL PROVISIONS:

Art. IV, §3(B)(3), Ohio Constitution 2, 5, 7, 13

Art. IV, §5(B), Ohio Constitution 9

STATUTES:

G.C. 11576-1 2, 6

R.C. §2321.01 2, 5-7, 9-13

R.C. §2321.18 5

TABLE OF AUTHORITIES (cont'd.)

Page(s):

RULES OF PROCEDURE:

App.R. 4(B) 10

App.R. 9(B)(4) 11

App.R. 12(C) 4, 5

Civ.R. 50 2, 9, 11, 12

Civ.R. 50(A) 11

Civ.R. 50(B) 8, 11, 12

Civ.R. 59 9

Civ.R. 59(A) 8

Civ.R. 59(A)(2) 8

Civ.R. 59(A)(6) 2-4, 7, 8, 13

Civ.R. 59(A)(8) 8

MISCELLANEOUS AUTHORITIES:

Painter & Polis, OHIO APPELLATE PRACTICE (2009-2010), Section 7:19 5

Painter & Polis, OHIO APPELLATE PRACTICE (2010-2011), Section 7:19 5

I.

STATEMENT OF INTEREST OF THE AMICUS CURIAE

The Ohio Association of Civil Trial Attorneys (“OACTA”) is a statewide organization whose 800+ members consist of attorneys, supervisory or managerial employees of insurance companies, and corporate executives of other corporations who devote a substantial portion of their time to the defense of civil damage suits and the management of claims brought against individuals, corporations and governmental entities. OACTA's mission is to provide a forum where its members can work together and with others on common problems to propose and develop solutions that will promote and improve the fair and equal administration of justice in Ohio.

In furtherance of this mission, OACTA maintains a robust amicus curiae program by which it can provide expert legal services to support suitable litigation efforts of its constituents. These amicus curiae efforts are limited to those cases addressing significant and wide-ranging legal principles that may impact the fair and efficient administration of justice in Ohio. This case is such a case.

This case affords the Court with the opportunity to clarify confusion as to what a litigant must do, either during trial or post-trial, to preserve appellate review of the weight or sufficiency of the evidence¹ and whether a litigant must always file a motion in the trial court challenging the weight or sufficiency² of the evidence supporting a jury verdict as a prerequisite to obtaining

¹See App. Op., at ¶59 (Kline, J. dissent).

²This Court, in *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶26, observed that in civil cases, unlike criminal cases, the Court’s precedent defining the manifest weight of the evidence standard “tends to merge the concepts of weight and sufficiency.” On prior occasions, the Court has expressed the similar view that, for purposes of granting a new trial,

(continued...)

meaningful review of the sufficiency or weight of the evidence on appeal. While this issue may, at first blush, appear to be simply a question of procedure, it is a question that has constitutional implications. This is so because Art. IV, §3(B)(3) of the Ohio Constitution provides that “[n]o judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.” This constitutional provision came into play in the case at bar when one of the three appellate judges misapprehended that the absence of a motion in the trial court challenging the weight and sufficiency of the evidence did not preserve the issue for appeal, leaving plain error as the only grounds for reversal of the verdict. The majority of the appellate court agreed that the jury’s verdict was against the manifest weight of the evidence. However, the jury’s decision was upheld because the one dissenting judge triggered Section 3(B)(3), Article IV of the Ohio Constitution requiring a unanimous decision in order to reverse a jury’s verdict on weight of the evidence grounds.

But the filing of a motion for a new trial is not a prerequisite to obtain appellate review of the sufficiency or weight of the evidence in civil cases. See, *Gonzalez v. Henceroth Enterprises, Inc.*, 135 Ohio App.3d 646, 653, 1999-Ohio-961; *Walker v. David Davies, Inc.* (1973), 34 Ohio App.2d 139, 145. It hasn’t been a prerequisite in Ohio for more than 60 years when the General Assembly enacted G.C. 11576-1, which now appears in R.C. §2321.01. *Spradlin v. City of*

²(...continued)

weight of the evidence is synonymous and interchangeable with sufficiency of the evidence. See, *Osler v. City of Lorain* (1986), 28 Ohio St.3d 345, 351; *Rohde v. Farmer* (1970), 23 Ohio St.2d 82, 92. The merging of the two concepts has been met with opposition from some courts due to confusion between the grounds for granting a new trial pursuant to Civ.R. 59(A)(6) based on weight of the evidence and for entering judgment as a matter of law due to the legal insufficiency of the evidence under Civ.R. 50, and because it tends to eliminate any meaningful weight of the evidence challenge and review on appeal in civil cases. See, e.g., *Huntington Natl. Bank v. Chappell*, 183 Ohio App.3d 1, 2007-Ohio-4344, at ¶17-75 (Dickenson, J., concurring); *Gevedon v. Ivey*, 172 Ohio App.3d 567, 2007-Ohio-2970, at ¶58-61. See also, *Reed v. Key-Chrysler Plymouth* (1998), 125 Ohio App. 3d 437, 440-441.

Canton (1961), 171 Ohio St. 531, 532. The contrary view, as espoused by one of the four sitting judges in the Fourth Appellate District, creates an impediment – at least in that appellate district for now – to a litigant’s right to pursue a weight/sufficiency of the evidence argument on appeal in order to secure a new trial³ where the first jury clearly lost its way and created a manifest miscarriage of justice.

For the reasons stated and developed more fully herein, OACTA maintains and submits that the rule of law in Ohio should remain, as it has for the past 60+ years, that a motion for new trial pursuant to Civ.R. 59(A)(6) is not required in order to preserve appellate review of a jury verdict on the grounds that it is not sustained by the manifest weight or sufficiency of the evidence.

II.

STATEMENT OF THE CASE AND FACTS

OACTA adopts the Statement of the Case and Facts appearing in the merit brief of Defendant-Appellant Denise Huffman, d/b/a Tri-State Health Care (“Huffman”).⁴ To the extent other facts are pertinent to OACTA’s position, they are discussed in the context of the legal argument.

³In a civil case tried to a jury, when the court of appeals finds the jury verdict to be against the weight of the evidence, its only recourse is to remand the case to the trial court for a new trial. See, *Hanna v. Wagner* (1974), 39 Ohio St.2d 64, 66; *Walker v. Holland* (1997), 117 Ohio App.3d 775, 794.

⁴While the underlying facts and circumstances leading to the death of Steven Hieneman as recited in the court of appeals opinion are no doubt tragic, those facts should not dictate or influence the resolution of the legal issue presented by the proposition of law accepted by the Court in this appeal.

III.
ARGUMENT

Proposition of Law:

A PARTY IS NOT REQUIRED TO FILE A MOTION FOR A DIRECTED VERDICT, A MOTION [FOR JUDGMENT] NOTWITHSTANDING THE VERDICT AND/OR A MOTION FOR A NEW TRIAL AS A PRE-REQUISITE TO ASSERTING AN ASSIGNMENT OF ERROR ON APPEAL THAT A CIVIL JURY'S VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

A. The Filing of a Motion for New Trial Pursuant to Civ.R. 59(A)(6) Is Not a Prerequisite to Preserving an Appeal Challenging the Weight/Sufficiency of the Evidence Supporting a Jury Verdict in a Civil Case.

1. An appellate court has the authority to address and resolve manifest weight of the evidence arguments in appeals from civil jury verdicts.

There should be no question that Ohio's courts of appeals have jurisdiction and authority to pass upon an assignment of error regarding the manifest weight of the evidence in appeals from civil jury verdicts. Yet, this case puts that precept in some doubt. App. Op., at ¶24-28; and at ¶58 (Kline, J. dissent) The uncertainty is predicated upon App.R. 12(C). Appellate Rule 12(C) only applies to civil cases tried to the bench, not a jury. Appellate Rule 12(C) provides as follows:

In any civil action or proceeding which was tried to the trial court without the intervention of a jury, and when upon appeal a majority of the judges hearing the appeal find that the judgment or final order rendered by the trial court is against the manifest weight of the evidence and do not find any other prejudicial error of the trial court in any of the particulars assigned and argued in the appellant's brief, and do not find that the appellee is entitled to judgment or final order as a matter of law, the court of appeals shall reverse the judgment or final order of the trial court and either weigh the evidence in the record and render the judgment or final order that the trial court should have rendered on that evidence or remand the case to the trial court for further proceedings; provided further that a judgment shall be reversed only once on the manifest weight of the evidence. (Emphasis added)

As noted by the majority, App.R. 12(C) does not prohibit an appellate court from reviewing

a manifest weight of the evidence challenge arising from a civil case that has been tried to a jury. App. Op., at ¶26. Because of the unanimity requirement of Art. IV, §3(B)(3) of the Ohio Constitution, the review permitted by App.R. 12(C) is limited to civil bench trials. But, App.R. 12(C) “does not expressly provide that in civil actions tried by the jury, there will be no manifest weight challenge.” App. Op., at ¶26.

On the occasion when this Court has addressed an appellate court’s resolution of an appeal in a civil case based upon a jury verdict found to be against the manifest weight of the evidence, the Court did not hold that appellate courts lack authority to do so. See, *Bryan-Wollman v. Domonko*, 115 Ohio St.3d 291, 2007-Ohio-4918. Instead, the Court held that a reversal on grounds that the jury verdict was against the weight of the evidence had to be unanimous pursuant to Art. IV, §3(B)(3) of the Ohio Constitution.

There is statutory and constitutional authority that permits appellate review of weight of the evidence. See, *Reed*, 125 Ohio App.3d at 440, citing Art. IV, Section 3(B)(3) of the Ohio Constitution and R.C. §§2321.01 and 2321.18. Appellate courts in Ohio have the authority to pass upon assignments of error based upon the manifest weight of the evidence in civil cases tried to a jury, provided any reversal is unanimous.⁵

⁵The dissent also cited to Painter & Polis, OHIO APPELLATE PRACTICE (2009-2010), Section 7:19 as questioning whether an appellate court has authority to even address a manifest weight of the evidence challenge on appeal from a civil jury verdict. App. Op., at ¶58 (Kline, J., dissent). But Section 7:19 of that well-respected treatise on appellate law and procedure has been revised and updated in the most current edition to make it clear that appellate courts *do have authority* to pass upon manifest weight of the evidence challenges in both civil bench and jury trials, the difference being the type and scope of relief the court of appeals is permitted to grant to an appellant. See, Painter & Polis, OHIO APPELLATE PRACTICE (2010-2011), Section 7:19, at 165-166.

2. A motion for a new trial is not a prerequisite to obtaining appellate review of the sufficiency or weight of the evidence pursuant to R.C. §2321.01.

Prior to statutory amendments enacted in 1945 and 1949, there was case law authority in Ohio that required the filing of a motion for a new trial as a prerequisite to an appeal challenging the manifest weight of the evidence supporting a jury verdict in civil cases. See, *English v. Indus. Comm.* (1932), 125 Ohio St. 494, paragraph one of the syllabus; *Jacob Laub Baking Co. v. Middleton* (1928), 118 Ohio St. 106, paragraph five of the syllabus; *Everett, Waddell & Co. v. Sumner* (1877), 32 Ohio St. 562, paragraph one of the syllabus. But that all changed with the 1945 and 1949 amendments adopted by the General Assembly, in particular the enactment of Section 11576-1 of the General Code, now R.C. §2321.01. See, *Spradlin*, 171 Ohio St. at 532-533; *Snow v. Cincinnati Street RY. Co.* (1947), 80 Ohio App. 369, paragraph one of the syllabus.

Revised Code Section 2321.01 now provides as follows:

A motion for a new trial is not necessary as a prerequisite to obtain appellate review of the sufficiency or weight of the evidence submitted to the trial court where such evidence to be considered appears as a part of the record filed in the appellate court.

This section applies to any action or proceeding pending in the courts on October 27, 1949.

As noted by the *Spradlin* Court: “The majority of this court is of the opinion that Section 2321.01, Revised Code, liberalizes rather than restricts the law with regard to the requirements for the filing of a motion for a new trial.” 171 Ohio St. at 532. Consequently, based upon the General Assembly’s enactment of R.C. §2321.01 and its predecessor G.C. §11576-1, “it is clear that, where there *is* evidence to be considered which appears as a part of the record filed in the appellate court, **a motion for new trial is not necessary for an appellate review of the sufficiency or weight of the evidence * * ***” Id. at 533 (italics sic, bold and underline added).

And the law since the enactment of R.C. §2321.01 has consistently been in accord with the

holding in *Spradlin*. See, *Gonzalez*, 135 Ohio App.3d at 653; *Walker*, 34 Ohio App.2d at 145; *Housh v. Peth* (1955), 99 Ohio App. 485, 489. In rejecting the proposition – embraced by the dissenting judge here⁶ – that the plaintiff had in effect waived her assignment of error that the jury’s verdict was against the manifest weight of the evidence by failing to move for a new trial pursuant to Civ.R. 59(A)(6), the Ninth Appellate District in *Gonzalez* observed, as follows:

* * * [The Defendant] asserts that a trial court is denied an opportunity to review the errors presented on appeal without a motion for new trial on the grounds that the verdict was against the manifest weight of the evidence. It asks this court to find that plaintiff’s failure to file a motion for new trial within the fourteen days allowed for a Civ.R. 59(A) motion constitutes waiver of her right to raise the same issue for the first time on appeal. This court declines that invitation for several reasons.

The Ohio Rules of Civil Procedure and the Ohio Appellate Rules of Procedure do not require a party to move for a new trial in order to preserve an argument. If this court were to so hold, it would be tantamount to requiring a motion for a new trial prior to any civil appeal. See Civ.R. 59(A)(9). Moreover, it would in effect reduce the thirty-day window for appeal to fourteen days. Accordingly, this court refuses to hold that a Civ.R. 59(A)(6) motion is required at the trial court in order to argue at the appellate level that the verdict was against the manifest weight of the evidence.

135 Ohio App.3d at 653.

Contrary to the established statutory authority of R.C. §2321.01 and above case law, the majority in this case notes that, by virtue of Article IV, §3(B)(3) of the Ohio Constitution, one judge can prevent reversal of a case on weight or sufficiency of evidence grounds by invoking a rule of law “that provides before a party can raise a manifest weight of the evidence assignment of error on appeal, the party must preserve the issue by moving for a directed verdict, a new trial,

⁶This is not the first time that there has been disagreement between appellate judges in the Fourth Appellate District on the issue of whether a motion for new trial is a prerequisite to appellate review of and reversal of a jury verdict on weight of the evidence grounds triggering Art. IV., §3(B)(3) of the Ohio Constitution. See, *Village of Coalton v. Atkins* (Sept. 26, 1990), Jackson App. No. 608, 1990 Ohio App. LEXIS 4471, at *15, footnote 6.

and/or a JNOV.” App. Op., at ¶24. After dismissing the case law relied upon by the dissent,⁷ the majority cogently observes that “we believe it would [not] be wise to erect such a hurdle for appellants and to create a significant additional workload for the trial courts.” App. Op., at ¶24.

If the dissent were to be the rule in Ohio’s courts, then litigants will be forced to file post-trial motions simply to preserve an issue for appeal based upon the manifest weight of the evidence. If that prerequisite becomes the rule, wouldn’t litigants be required to file motions for new trial addressing any of the other provisions of Civ.R. 59(A).⁸ Litigants will be forced to incur the expense and delay of filing post-trial motions that may be futile. Courts will be confronted with additional burdens and workload from the filing of motions that will need to be heard and resolved even though the trial court would not grant the motion.

3. *The practice in federal court does not weigh in favor of Ohio’s adopting a rule making a new trial motion a prerequisite to obtaining appellate review of the sufficiency or weight of the evidence.*

In federal court, the filing of a motion for new trial has been made a prerequisite to

⁷The dissent relied upon the case of *Neal v. Blair* (Jun. 10, 1999), Lawrence App. No. 98CA37, 1999 Ohio App. LEXIS 2633 as support for the position that a party who fails to file a motion for new trial pursuant to Civ.R. 59(A)(6) forfeits any challenge on appeal – with the exception of a plain error analysis – to the weight of the evidence. App. Op. ¶62 (Kline, J. dissent) But in *Neal*, the plaintiff filed both a motion for judgment notwithstanding the verdict pursuant to Civ.R. 50(B) and a motion for a new trial pursuant to Civ.R. 59(A)(6), which the trial court denied. On appeal, the plaintiff challenged only the Civ.R. 50(B) motion and not the denial of the motion for new trial. After discussing the different standards between the two motions, the court of appeals noted correctly that “the appellants’ manifest weight of the evidence arguments are not cognizable in challenging a trial court’s ruling on a motion for judgment notwithstanding the verdict.” *Id.*, at *10. Because the plaintiffs appealed from only the denial of their Civ.R. 50(B) motion for judgment notwithstanding the verdict, they waived any error concerning whether the jury’s verdict was against the manifest weight of the evidence. *Id.*, at *12-13. *Neal* does not stand for the proposition that it is cited for by the dissent.

⁸Obviously, the issue in this case does not involve circumstances where the evidence is not already reflected in and part of the record, such as when jury misconduct or new evidence is discovered after trial where a post-trial motion pursuant to Civ.R. 59(A)(2) and (8) would be necessary to preserve the issue for appeal.

obtaining appellate review of the sufficiency or weight of the evidence. See, e.g., *Gruener v. Ohio Cas. Ins. Co.* (C.A.6, 2008), 510 F.3d 661, 665; *Pennington v. Western Atlas, Inc.* (C.A.6, 2000), 202 F.3d 902, 911, citing *Dixon v. Montgomery Ward* (C.A.6 1986), 783 F.2d 55.

Although a different rule of practice may persist in federal court, that is because there is no statutory provision anywhere in the United States Code comparable to R.C. §2321.01. Therefore, this Court should not adopt for Ohio what may be the prevailing practice presently in the federal courts and jurisdictions. In Ohio, the General Assembly has made it clear by its enactment of R.C. §2321.01 that the filing of “[a] motion for a new trial is not necessary as a prerequisite to obtain appellate review of the sufficiency or weight of the evidence submitted to the trial court where such evidence to be considered appears as a part of the record filed in the appellate court.” Congress has not adopted legislation governing the issue in the federal courts.

4. Revised Code §2321.01 confers substantive rights on litigants and is compatible with Ohio’s Civil and Appellate Rules and prevailing practice.

There is no impediment to recognition and enforcement of R.C. §2321.01 pursuant to Art. IV, §5(B) of the Ohio Constitution – the Modern Courts Amendment. The General Assembly did not impinge upon this Court’s rulemaking power when it gave litigants a statutory right to obtain appellate review of the sufficiency or weight of the evidence without first filing a motion for new trial. As noted by the *Walker* court in addressing R.C. §2321.01, “[t]here is nothing to the contrary either in the civil rules or the appellate rules.” 34 Ohio App.2d at 145. Indeed, an examination of Civ.R. 50 and Civ.R. 59 clearly reflects that there is no conflict with anything in those rules and the terms of R.C. §2321.01, even if the statute is treated as simply procedural.

But R.C. §2321.01 actually confers substantive rights upon litigants to secure appellate review of jury verdicts on weight and sufficiency of evidence grounds. See, *State ex. rel. Loyd v. Lovelady*, 108 Ohio St.3d 86, 2006-Ohio-161, at ¶¶7-15 (holding that the Modern Courts

Amendment will not invalidate statutes that “are necessarily packaged in procedural wrapping [where] it is clear ... that the General Assembly intended to create a substantive right to address potential injustice”). The General Assembly’s enactment of R.C. §2321.01 (and its predecessor General Code section) was clearly intended to abrogate the existing case law from this Court and Ohio’s appellate courts depriving litigants of the right to secure appellate review of jury verdicts that were not supported by the weight and sufficiency of the evidence. See, *Spradlin*, 171 Ohio St. at 532:

Prior to the enactment of [Section 11576-1, General Code, now R.C. §2321.01] in 1945, a motion for a new trial was required to be filed as a prerequisite to the perfecting of an appeal from a judgment to review the sufficiency or the weight of the evidence.

Section 2321.01, Revised Code, abrogates this requirement.

A comparable issue was before this Court in *State v. Hughes* (1975), 41 Ohio St.2d 208. In *Hughes*, the Court held that a statute outlining the procedure prosecutors had to follow to appeal trial court judgments superseded the less restrictive process contained in App.R. 4(B). 41 Ohio St. 2d at 210-11. Even though the statute “specif[ied] the procedure to be followed in bringing an appeal,” the *Hughes* Court reasoned that it also regulated a “substantive right” of the state’s prosecutors to appeal unfavorable judgments. *Hughes*, 41 Ohio St. 2d at 211. See also, *State v. Wallace* (1975), 43 Ohio St. 2d 1, 2 (recognizing that while the statute at issue in *Hughes* was “facially procedural,” it conferred “a substantive legislative grant giving the state a right of appeal in criminal cases”). So too does R.C. §2321.01 confer upon litigants the right to appeal an unfavorable judgment entered on a jury verdict on sufficiency or weight of the evidence grounds without first having to file a motion for new trial.

By ensuring that all litigants, civil as well as criminal, have substantial protection from unjust verdicts which are not supported by the weight of the evidence or sufficient evidence, R.C.

§2321.01 “creates, defines and regulates the rights” of parties by giving them the right to appeal directly to the court of appeals, and is therefore more akin to a substantive law. *Proctor v. Kardassilaris*, 115 Ohio St. 3d 71, 2007-Ohio-4838, at ¶17 (citation omitted).

Obviously, even under the express terms of R.C. §2321.01, an appellant who wishes to challenge the manifest weight or sufficiency of the evidence in the court of appeals in order to secure a new trial must make sure that “such evidence to be considered appears as a part of the record filed in the appellate court.” See, *Housh*, 99 Ohio App. at 489. But that is the prevailing rule and practice in Ohio’s courts of appeals. See, App.R. 9(B)(4)(“If the appellant intends to present an assignment of error on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the weight of the evidence, the appellant shall include in the record a transcript of proceedings that includes all evidence relevant to the findings or conclusion.”) Otherwise, the court of appeals must “presume the regularity of the trial court proceedings” and will affirm. See, e.g. *Crane v. Perry Cty. Bd. of Elections*, 107 Ohio St.3d 287, 2005-Ohio-6509, at ¶39, citing *Knapp v. Edwards Laboratories* (1980), 61 Ohio St.2d 197; *Hoskins v. Simones*, 173 Ohio App.3d 186, 2007-Ohio-4084, at ¶28.

B. Motions Pursuant to Civ.R. 50 for a Directed Verdict and for Judgment Notwithstanding the Verdict Do Not Involve an Evaluation of the Weight or Sufficiency of the Evidence.

In his opinion, the dissenting judge took issue with Huffman’s failure to renew a motion for directed verdict at trial pursuant to Civ.R. 50(A) or file a motion for judgment notwithstanding the verdict after trial pursuant to Civ.R. 50(B) in order to preserve consideration on appeal of her manifest weight of the evidence argument. App. Op. at ¶59-62 (Kline, J., dissent). As asserted by the dissent, this was fatal to Huffman’s manifest weight of the evidence argument because a party’s failure to renew a motion for a directed verdict at the close of all the evidence or file a

timely motion for judgment notwithstanding the verdict waives appellate review of any weight of the evidence assignment of error. App. Op. at ¶60 (Kline, J. dissent), citing *Chemical Bank of New York v. Neman* (1990), 52 Ohio St.3d 204, 206; *Helmick v. Republic-Franklin Ins. Co.* (1988), 39 Ohio St.3d 71, 72; *Bicudo v. Lexford Properties, Inc.*, 157 Ohio App.3d 509, 2004-Ohio-3202, at ¶39-41.⁹ But motions pursuant to Civ.R. 50 do not involve an assessment or review of the weight of the evidence. *Wagner v. Roche Laboratories*, 77 Ohio St.3d 116, 119, 1996-Ohio-85; *Malone v. Courtyard by Marriott L.P.*, 74 Ohio St.3d 440, 445, 1996-Ohio-311. Civ.R. 50 motions do not present factual issues but are purely questions of law. *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, at ¶4.

Because of this qualitative difference between a weight or sufficiency of the evidence argument – which, if successful, can only result in a new trial¹⁰ – and a legal determination as to whether the evidence warrants submission of the case to the jury – which, if successful, results in taking the case away from the jury and entry of a final judgment in favor of the moving party – the *Chemical Bank / Helmick* rule should not apply when a litigant is seeking to obtain appellate review of the sufficiency or weight of the evidence giving rise simply to a remand for a new trial. The waiver rule set forth in *Chemical Bank* and *Helmick* involving motions for judgment as a matter of law pursuant to Civ.R. 50, if extended to weight and sufficiency grounds seeking a new trial, also cannot be reconciled with the clear and unambiguous language of R.C. §2321.01.

⁹The dissent cites the *Bicudo* case in support of the proposition that a litigant who fails to make a motion for judgment notwithstanding the verdict forfeits those arguments on appeal. But *Bicudo* actually holds that a litigant who fails to raise arguments in the trial court in *opposition* to a Civ.R. 50(B) motion cannot raise those arguments for the first time on appeal.

¹⁰See, *Hanna*, 39 Ohio St.2d at 66; *Walker*, 117 Ohio App.3d at 794.

IV.
CONCLUSION

Appellate courts in Ohio have the authority to address and resolve an assignment of error challenging a civil jury verdict based upon the manifest weight of the evidence. When a jury verdict is found to be against the weight of the evidence, the appellate court is empowered to reverse and remand the case for a new trial, *provided* that in accordance with Art. IV, §3(B)(3) of the Ohio Constitution, the three judges are unanimous in the opinion and judgment reversing the verdict. The filing of a new trial motion is not a prerequisite to pursuing an assignment of error on appeal and obtaining appellate review of the sufficiency or weight of the evidence pursuant to R.C. §2321.01. There is no impediment under the Modern Courts Amendment to application of R.C. §2321.01 to cases such as the one at bar. For all of the reasons stated more fully above, public policy favors this Court adopting the overwhelming majority opinion in Ohio and following its own precedent.

WHEREFORE, The Ohio Association of Civil Trial Attorneys, for all of the reasons stated more fully herein, it is respectfully submitted that the decision by the Fourth Appellate District should be reversed. The filing of a motion for new trial pursuant to Civ.R. 59(A)(6) was not a prerequisite to obtaining appellate review of the weight of the evidence in this civil jury trial.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Timothy J. Fitzgerald", written over a horizontal line.

TIMOTHY J. FITZGERALD* (#0042734)

**Counsel of Record*

GALLAGHER SHARP

Bulkley Building, Sixth Floor

1501 Euclid Avenue

Cleveland, OH 44115-2108

Tel: (216) 241-5310

Fax: (216) 241-1608

E-mail: tfitzgerald@gallaghersharp.com

*Counsel for Amicus Curiae The Ohio
Association of Civil Trial Attorneys*

CERTIFICATE OF SERVICE

A copy of the foregoing *Brief of Amicus Curiae The Ohio Association of Civil Trial Attorneys in Support of Appellant* has been served this 6th day of September, 2011, via U.S. mail, postage prepaid, upon the following:

Mark H. Gams, Esq.
M. Jason Founds, Esq.
GALLAGHER, GAMS, PRYOR, TALLAN
& LITRELL, L.L.P.
471 East Broad Street, 19th Floor
Columbus, OH 43215-3872

- and -

James L. Mann, Esq.
MANN & PRESTON, L.L.P.
18 East Second Street
Chillicothe, OH 45601

*Counsel for Defendant-Appellant, Denise
Huffman, d/b/a Tri-State Health Care*

John McLaughlin, Esq.
RENDIGS, FRY, KIELY & DENNIS, LLP
One West Fourth Street, Ste. 900
Cincinnati, OH 45202-3688

*Counsel for Defendant-Appellee, State Farm
Fire & Casualty Company*

Thomas M. Spetnagel, Esq.
SPETNAGEL & MCMAHON
42 East Fifth Street
Chillicothe, OH 45601

- and -

Stanley C. Bender, Esq.
BENDER LAW OFFICES
P.O. Box 950
Portsmouth, OH 45662

*Counsel for Plaintiff-Appellee, Paula
Eastley, Admr. of the Estate of Steven
Hieneman*


TIMOTHY J. FITZGERALD (#0042734)

APPENDIX

Ohio Constitution, Art. IV, §3(B)(3):

A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2(B)(2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

Ohio Rev. Code §2321.01 Appellate review without motion for new trial.

A motion for a new trial is not necessary as a prerequisite to obtain appellate review of the sufficiency or weight of the evidence submitted to the trial court where such evidence to be considered appears as a part of the record filed in the appellate court.

This section applies to any action or proceeding pending in the courts on October 27, 1949.

[Effective Date: 10-01-1953]

Civ.R. 50. Motion for a Directed Verdict and for Judgment Notwithstanding the Verdict

(A) Motion for directed verdict.

(1) *When made.* A motion for a directed verdict may be made on the opening statement of the opponent, at the close of the opponent's evidence or at the close of all the evidence.

(2) *When not granted.* A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts.

(3) *Grounds.* A motion for a directed verdict shall state the specific grounds therefor.

(4) *When granted on the evidence.* When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue.

(5) *Jury assent unnecessary.* The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(B) Motion for judgment notwithstanding the verdict. Whether or not a motion to direct a verdict has been made or overruled and not later than fourteen days after entry of judgment, a party may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion; or if a verdict was not returned such party, within fourteen days after the jury has been discharged, may move for judgment in accordance with his motion. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment. If the judgment is reopened, the court shall either order a new trial or direct the entry of judgment, but no judgment shall be rendered by the court on the ground that the verdict is against the weight of the evidence. If no verdict was returned the court may direct the entry of judgment or may order a new trial.

(C) Conditional rulings on motion for judgment notwithstanding verdict.

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (B) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than fourteen days after entry of the judgment notwithstanding the verdict.

(D) Denial of motion for judgment notwithstanding verdict. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

(E) Statement of basis of decision. When in a jury trial a court directs a verdict or grants judgment without or contrary to the verdict of the jury, the court shall state the basis for its decision in writing prior to or simultaneous with the entry of judgment. Such statement may be dictated into the record or included in the entry of judgment.

[Effective: July 1, 1970.]

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 of the court, jury, magistrate, or prevailing party, or any order of the court or magistrate, or abuse of discretion, by which an aggrieved party was prevented from having a fair trial;
- (2) Misconduct of the jury or prevailing party;
- (3) Accident or surprise which ordinary prudence could not have guarded against;
- (4) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice;
- (5) Error in the amount of recovery, whether too large or too small, when the action is upon a contract or for the injury or detention of property;
- (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;
- (8) Newly discovered evidence, material for the party applying, which with reasonable diligence he could not have discovered and produced at trial;
- (9) Error of law occurring at the trial and brought to the attention of the trial court by the party making the application.

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

When a new trial is granted, the court shall specify in writing the grounds upon which such new trial is granted.

On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and enter a new judgment.

(B) **Time for motion.** A motion for a new trial shall be served not later than fourteen days after the entry of the judgment.

(C) **Time for serving affidavits.** When a motion for a new trial is based upon affidavits they shall be served with the motion. The opposing party has fourteen days after such service within which to serve opposing affidavits, which period may be extended for an additional period not exceeding twenty-one days either by the court for good cause shown or by the parties by written stipulation. The court may permit supplemental and reply affidavits.

(D) **On initiative of court.** Not later than fourteen days after entry of judgment the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party.

The court may also grant a motion for a new trial, timely served by a party, for a reason not stated in the party's motion. In such case the court shall give the parties notice and an opportunity to be heard on the matter. The court shall specify the grounds for new trial in the order.

[Effective: July 1, 1970; amended effective July 1, 1996.]