

**IN THE SUPREME COURT OF OHIO**

Paula Eastley, Adm. Of the  
Estate of Steven Hieneman

Plaintiff-Appellee,

v.

Paul Volkman, M.D.

and

Denise Huffman, d/b/a  
Tri-State Health Care

Defendants-Appellants.

Case No. 11-0606

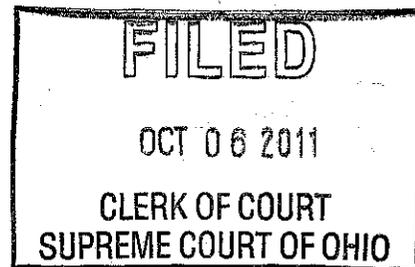
On Appeal from the Scioto  
County Court of Appeals,  
Fourth Appellate District.  
Case No. 09-CA-3308

---

**MERIT BRIEF OF APPELLEE, PAULA EASTLEY,  
ADMINISTRATOR OF THE ESTATE OF STEVEN HIENEMAN**

---

M. Jason Founds (0069468) (COUNSEL OF RECORD)  
Mark H. Gams (0025362)  
Gallagher, Gams, Pryor, Tallan & Littrell, L.L.P.  
471 East Broad St., 19<sup>th</sup> Floor  
Columbus, Ohio 43215-3872  
(614) 228-5151/(614) 228-0032 (Fax)  
mgams@ggptl.com



COUNSEL FOR APPELLANT, DENISE HUFFMAN, DBA TRI-STATE HEALTH CARE

James L. Mann (0007611)  
Mann & Preston, L.L.P.  
18 East Second St.  
Chillicothe, Ohio 45601  
(740) 775-2222/(740) 775-2627 (Fax)

CO-COUNSEL FOR APPELLANT, DENISE HUFFMAN, DBA TRI-STATE HEALTH CARE

Thomas M. Spetnagel (0003820) (COUNSEL OF RECORD)  
Spetnagel and McMahon  
42 East Fifth St.  
Chillicothe, Ohio 45601  
(740) 774-2142/(740) 774-2147 (Fax)  
tomspetnagel@spetnagelandmcmahon.com

COUNSEL FOR APPELLEE, PAULA EASTLEY, ADMINISTRATOR OF THE ESTATE OF  
STEVEN HIENEMAN

Stanley C. Bender (0012323)  
Bender Law Offices  
P.O. Box 950  
Portsmouth, Ohio 45662  
(740) 353-4191/(740) 353-1649 (Fax)

CO-COUNSEL FOR APPELLEE, PAULA EASTLEY, ADMINISTRATOR OF THE ESTATE  
OF STEVEN HIENEMAN

Timothy J. Fitzgerald (0042734)(COUNSEL OF RECORD)  
GALLAGHER SHARP  
Bulkey Building, Sixth Floor  
(216) / (216) 241-1608 (Fax)

COUNSEL FOR AMICUS CURIAE, OACTL

John McLaughlin (0052021) (COUNSEL OF RECORD)  
Rendigs, Fry, Kiely & Dennis LLP  
One West Fourth Street, Suite 900  
Cincinnati, Ohio 45202-3688  
(513) 381-9368/(513) 381-9206 (Fax)

COUNSEL FOR APPELLEE, STATE FARM FIRE & CAUSALTY COMPANY

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
STATEMENT OF FACTS.....	1
ARGUMENT.....	6

**Appellant’s Proposed Proposition of Law No. I:**

**A party is not required to file a motion for a directed verdict, a motion notwithstanding the verdict and/or file a motion for a new trial as a prerequisite to asserting an assignment of error on appeal that a civil jury’s verdict was against the manifest weight of the evidence..... 6**

CONCLUSION.....	10
PROOF OF SERVICE.....	10

TABLE OF AUTHORITIES

	<u>Page</u>
CASES:	
<i>Berry v. Ivy</i> , 2011-Ohio-3073.....	8
<i>C.E. Morris Co. v. Foley Construction Co.</i> (1978), 54 Ohio St. 2d 279.....	6,7
<i>Gevedon v. Ivey</i> , 2007-Ohio-2790, 172 Ohio App.ed 567.....	7
<i>Helmick v. Republic-Franklin Insurance Company</i> , (1988), 39 Ohio St.3d 71.....	6
<i>State v. Thompkins</i> , 78 Ohio St.3d 80.....	7
<i>State v. Tillery</i> , 2002-Ohio-1587.....	8
<i>State v. Wilson</i> , 713 Ohio St.3d 382.....	6,7
<i>Tibbs v. Florida</i> (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652.....	7
<i>Zucco Painting v. DeLorean</i> , 2011-Ohio-3743.....	8

## STATEMENT OF THE FACTS

### A. Preface.

Neither Appellant nor Amicus Curiae chose to tell the Court in their statement of facts the reasons why Appellee brought this action following the death of her son. They make no mention of the singular factual circumstances surrounding the partnership of Denise Huffman, a person who never attended high school, with Paul Volkman, a doctor whose incompetence had become so pronounced that he could no longer obtain malpractice insurance. Whatever their individual deficiencies, together Huffman and Volkman together operated a pain management clinic that within a few months grew to become the top-ranked pill mill for volume in the entire United States. Appellee's son is one of over a dozen death by overdose victims associated with the Clinic. Although counsel's reticence on this topic is understandable, the fact remains that Appellant's efforts in this appeal are directed at undoing a jury's assignment of responsibility upon a person who is in a federal prison for crimes associated with that customer's death. For her part, Appellee chooses to expound upon the facts in this case as she believes they directly impact the legal arguments being presented to this Court.

### B. The Pain Clinic.

On April 20, 2005, Steven Heineman died at age 33. His death certificate ascribed his death to the acute combined effects of Oxycodone, Diazepam and Alprazolam. Dr. Paul Volkman had prescribed those drugs to the Decedent on the previous day during an encounter at the Tri-State pain clinic in Portsmouth, Ohio. The details about how Denise Huffman acquired the financial resources and insider knowledge to set up the clinic are not known. Ms. Huffman had dropped out of school after finishing the 8<sup>th</sup> grade. Much later she briefly attended a course at a business college in order to learn how to work in a medical office. Later she worked with a

doctor for about one and one-half years and received on-the-job training in basic charting, patient reception, answering phones, and taking notes.<sup>1</sup> (TR 68, 116-118, 131-132, 136-137.)

In 2001 Ms. Huffman launched her ill-fated foray into the quasi-health care fields with the opening of a pain management clinic that she named Tri-State Healthcare. Ms. Huffman was the sole proprietor. Ms. Huffman targeted her clinic's services at chronic pain patients. She herself had previously been a patient at a pain clinic in South Shore, Kentucky. Ms. Huffman learned about the pain clinic business after she became friends with the clinic's owner and began working in the clinic on an informal basis. In April of 2003, she moved the clinic's location to Portsmouth, Ohio. (TR 140-142, 145-146, 149, 160.)

Ms. Huffman acted as the business administrator for the pain clinic. She kept the medical records for the pain clinic's patients. She collected payments from the patients and paid the bills. Ms. Huffman decided that the clinic would provide services on a strict cash-only basis. Ms. Huffman's clinic did not accept any type of insurance. The doctors she hired to staff her clinic were solely engaged in prescribing controlled substances to the clinic's patients. None of them had privileges at local hospitals. Ms. Huffman supplied prescription pads to the doctors with the name Tri-State Healthcare printed at the top. Ms. Huffman did not enter into written contracts with the clinic's doctors. She did not have a written contract with Dr. Volkman. She paid \$5,500.00 in cash directly to him at the end of every week. (TR 165-168, 170, 173-175, 214.)

C. Mrs. Eastley's Son.

Mrs. Eastley was a 19 year old single mother when she gave birth to the Decedent. He was her only child. The Decedent manifested learning and behavioral problems at a young age

---

<sup>1</sup> For uniformity, Appellee will follow Appellant's practice of using "TR" for references to the Trial Court Record and "AR" for the Appellate Record (citations to the Appellate Record also follow Appellant's page numbering).

and was later diagnosed as being bipolar. He was held back a grade in primary school and was enrolled in a learning disability program at school and later dropped out in the 11<sup>th</sup> grade. When Mrs. Eastley found out that the Decedent was getting powerful drugs through Tri-State, she contacted the pain clinic and spoke to Ms. Huffman. Mrs. Eastley asked Ms. Huffman to tell the doctor to stop seeing her son. Ms. Huffman just hung up on her. Mrs. Eastley persisted and told Ms. Huffman that her son was bipolar and that the clinic should stop prescribing narcotics to him. Ms. Huffman replied to the effect that it was none of her business and that her son was a grown man who could make his own decisions. Mrs. Eastley even went down to the pain clinic and tried to speak with Dr. Volkman, but he just told her to get away from him. (TR 91-93, 96-97, 99.)

Ms. Huffman admitted that she personally knew the Decedent and had talked to him "quite a bit." She had also seen his medical chart maintained at the pain clinic. The Decedent's medical records revealed that he was mentally ill and are replete with instances of abusing controlled substances, overdosing, and narcotic addiction. (TR 187-188, 209, Ex. A.) On May 29, 2003, the Decedent contacted Ms. Huffman's clinic and confessed to taking narcotic drugs at more than twice the prescribed dose and complained that he had consequently run out of the medication. He wanted Tri-State to give him more drugs until his next appointment with Dr. Volkman. Ms. Huffman's clinic promptly increased the Decedent's supply of opiates (percocet) in order "to accommodate [the patient]." (TR 187-188; Ex. A.)

Ms. Huffman admitted to speaking with Mrs. Eastley about the Decedent. Ms. Huffman also admitted that she did not exercise any supervision or control over the doctors' activities at her clinic. In particular, Tri-State did not monitor, record, or provide any oversight of the types or amounts of controlled substances prescribed to its patients at the pain clinic. Ms. Huffman

described Tri-State as a business that housed medical offices and offered medical services provided by doctors. Although Ms. Huffman managed the business-side of the Clinic, health care decisions fell within the doctor's judgment. (TR 188, 195; Huffman Depo. TR, 134 & 146-147.)

D. Legal Proceedings.

On August 16, 2005, Paula Eastley, as Administrator of the Estate of Steven Heineman, filed a complaint for wrongful death against Paul Holland Volkman, M.D. and Tri-State Healthcare LLC. Mrs. Eastley alleged that Dr. Volkman caused the death of her son by prescribing to him excessive and contra-indicated doses of narcotics and other drugs. Mrs. Eastley asserted claims of professional negligence against Dr. Volkman and vicarious liability against Tri-State on the grounds that Dr. Volkman acted as its agent and employee.

On March 21, 2007, the trial court granted Mrs. Eastley leave to file an amended complaint. In the amended complaint, Mrs. Eastley joined Denise Huffman as a party defendant. Mrs. Eastley alleged that Ms. Huffman operated Tri-State as a business where patrons could obtain and fill prescriptions for narcotics. Mrs. Eastley claimed that Ms. Huffman negligently operated her business by failing to exercise ordinary care for the safety of her invitees. Mrs. Eastley also claims that Ms. Huffman engaged in a conspiracy with Dr. Volkman to distribute dangerous drugs to the public for money.

The parties commenced a jury trial on February 4, 2008. At the conclusion of plaintiff's evidence, Ms. Huffman moved for a directed verdict "on the grounds that there is no evidence in the record from which the jury could conclude that Denise Huffman was negligent." (TR 202.) The trial court denied the motion and Ms. Huffman presented some evidence in her defense. At the close of all evidence, Ms. Huffman failed to renew her motion for a directed verdict on the evidence (or on any other grounds).

At the conclusion of the trial the jurors answered three interrogatories and returned verdicts in favor of Mrs. Eastley as against Ms. Huffman and Dr. Volkman. In Interrogatory No. 1, the jury found that Denise Huffman dba Tri-State Healthcare was negligent in proximately causing the death of Steven Heineman. In Interrogatory No. 2, the jury found that Paul Volkman, M.D. was negligent in proximately causing the death of Steven Heineman. In Interrogatory No. 3, the jury awarded \$1,000,000.00 as compensation. The jury returned a verdict against Ms. Huffman in the amount of \$500,000.00 and against Dr. Volkman in the sum of \$500,000.00.

On September 23, 2010 the Fourth District Court of Appeals affirmed the verdict against Huffman dba Tri-State Healthcare. The majority of the Fourth District Court of Appeals agreed with Appellant that the jury's verdict was against the manifest weight of the evidence under a theory of ordinary negligence. However, the jury's decision was upheld because one judge dissented and Section 3(B)(3), Article IV of the Ohio Constitution required a unanimous decision. The Dissent noted that Appellant had not renewed her motion for a directed verdict nor had she filed a motion for new trial or JNOV. She had further failed to object to the instructions of law given by the trial judge on ordinary negligence. Given the record of the case below, the Dissent rightfully concluded that Appellant had waived all but plain error and that the proceedings below did not rise to the level of plain error, i.e., the case is not so extraordinary as to seriously undermine the basic fairness, integrity, or public reputation of the judicial process.

## ARGUMENT

### Appellant's Proposed Proposition of Law No. I:

**“A party is not required to file a motion for a directed verdict, a motion notwithstanding the verdict and/or file a motion for a new trial as a prerequisite to asserting an assignment of error on appeal that a civil jury’s verdict was against the manifest weight of the evidence.”**

Appellant’s proposed proposition of law is not well made and should be rejected. Appellant complains on appeal that the dissenting Judge in the lower court erred when he concluded that Appellant had waived her right to challenge the jury’s verdict on a manifest weight of the evidence argument. The Dissent concluded that Appellant waived her rights by failing to renew her motion for a directed verdict on the sufficiency of the evidence at the close of the case, or by failing to preserve that argument by filing a motion notwithstanding the verdict and/or a motion for a new trial. In doing so, the dissenting judge merely reaffirmed the long-standing rule that a motion for directed verdict which is denied at the close of the plaintiff’s evidence must be renewed at the close of all evidence in order to preserve the error for appeal. *Helmick v. Republic-Franklin Insurance Company*, (1988), 39 Ohio St.3d 71.

Appellant argues that there is qualitative difference between weight of the evidence and sufficiency of the evidence and that a directed verdict motion that challenges the sufficiency of the evidence cannot be merged into a manifest weight of the evidence argument. Given that there exists a real difference between weight of the evidence and sufficiency of the evidence, Appellant urges the Court to ignore the rule of *Helmick* in this case.

In making that argument, Appellant fails to take into account the emerging trend that distinguishes the manifest weight of the evidence standard when the test is applied to civil cases. Unlike a criminal case, in civil cases the manifest weight of evidence standard does “tend to

merge the concepts of weight and sufficiency.” *State v. Wilson*, 113 Ohio St. 3d 382. This Court has already explained this concept in some detail in *Wilson, supra*,

#### “1. The Civil Standard

“As mentioned previously, the civil manifest-weight-of-the-evidence standard was explained in *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, syllabus (“Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence”). A finding of an error in law is a legitimate ground for reversal, but a difference of opinion on credibility of witnesses and evidence is not.” *Id.* at 81, 10 OBR 408, 461 N.E.2d 1273.

#### “2. The Criminal Standard

The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. *Id.* at 386. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. *Id.* at 386-387. In other words, a reviewing court asks whose evidence is more persuasive--the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. *Id.* at 387. ‘When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a ‘thirteenth juror’ and disagrees with the factfinder's resolution of the conflicting testimony.’ *Id.* at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652.

#### “B. The Civil Standard Affords More Deference to the Fact-Finder

“Both *C.E. Morris Co.*, 54 Ohio St.2d 279 and *Thompkins* instruct that the fact-finder should be afforded great deference. However, the standard in *C.E. Morris Co.* tends to merge the concepts of weight and sufficiency. Thus, a judgment supported by “some competent, credible evidence going to all the essential elements of the case” must be affirmed. *C.E. Morris Co.* Conversely, under *Thompkins*, even though there may be sufficient evidence to support a conviction, a reviewing court can still reweigh the evidence and reverse a lower court's holdings. *State v. Thompkins*, 78 Ohio St.3d 380. Thus, the civil-manifest-weight-of-the-evidence standard affords the lower court more deference than does the criminal standard.”

In *Gevedon v. Ivey*, 2007-Ohio-2790, 172 Ohio App.3d 567, ¶56, ¶60, the Second District Court of Appeals discussed the opinion in *Wilson*:

... “The Ohio Supreme Court outlined the "criminal" manifest -weight standard, which was taken directly from *Thompkins*, and distinguished it from the "civil" manifest -weight standard. \* \* \* Based on the comments in *Wilson*, we conclude that the issues of "sufficiency of the evidence" and "manifest weight" have been essentially merged in civil cases, leaving appellate courts with the option of conducting a "civil" manifest -weight analysis, in which the court reviews the trial court's rationale and the evidence the trial court has cited in support of its decision. If competent, credible evidence exists to support the trial court's decision, it must be affirmed.”

The trend toward merger on the civil standard is rapidly accelerating. Many recent cases on appeal involving the dual issues of sufficiency and weight have followed this development. See, for example: *Zucco Painting v. DeLorean*, 2011-Ohio-3743, Medina App. No. 10CA0053M (decided August 1, 2011), at ¶6, “It has been observed that this standard tends to merge the concepts of sufficiency and weight of the evidence and is highly deferential to the finder of fact.” And, *Berry v. Ivy*, 2011-Ohio-3073, Cuyahoga App. No. 96093, (decided June 23, 2011), ¶10: “The civil standard ‘tends to merge the concepts of weight and sufficiency.’ In determining whether a civil judgment is against the manifest weight of the evidence, an appellate court does not reweigh the evidence.”

This trend has been developing throughout the decade. In 2002, the Court of Appeals in *State v. Tillery*, 2002-Ohio-1587, flatly stated: “Simply put, the criminal sufficiency standard does not apply to civil proceedings. It is clear from the language of *Thompkins* that this standard is applicable, without modification, only to the review of criminal cases.” Citing to the First Appellate District, the Court concluded:

“While the *Thompkins* standard is only applicable to the review of criminal cases, we note that the weight standard set forth in *C.E. Morris Co.* is much like the standard of review for sufficiency of the evidence set forth in *Thompkins*. **It appears, therefore, that in civil**

**cases an appellate court is precluded from recognizing any qualitative or quantitative distinctions between the weight of the evidence and sufficiency of the evidence.** [Footnote omitted.] While this may be inconsistent with the standard we use in criminal appeals, we are nevertheless constrained by the holding set forth in *C.E. Morris Co.*” (Emphasis in the original.)

*Id.*, at 1594.

Therefore, contrary to the position argued by Appellant, a manifest weight of the evidence assignment of error calls upon the Court to evaluate the evidence no differently than the legal sufficiency of the evidence standard *in civil cases*. The Dissent simply followed the trend and applied the most recent pronouncements from this Court to find that Appellant’s failure to preserve her defense on the sufficiency of the evidence could not be remedied by reasserting it under a weight of the evidence assignment.

As demonstrated above, the evidence produced in this case at trial was not only legally sufficient to raise a genuine issue as to Ms. Huffman’s liability but also constitutes some competent, credible evidence to support the trier of fact’s conclusions. Therefore, the Dissent below correctly observed that the Appellant, having moved for a directed verdict at the close of the opponent’s evidence, but having failed to renew that motion at the close of all of the evidence, waived her argument that the evidence presented against her was against the manifest weight of the evidence. In the absence of plain error, the Dissent made the correct decision.

CONCLUSION

While appellate courts in Ohio have authority to pass upon an assignment of error challenging a civil jury verdict based upon the manifest weight of the evidence, an appealing party waives that remedy if it fails to either renew its previous motion for a directed verdict on the evidence or file a motion for JNOV or new trial. In that case, the party is limited to simply requesting that the Court of Appeals conduct a review for plain error. This has long been the express practice in federal court and the implied practice in Ohio when the matter involves a civil action. Qualitatively, the appellate review of the sufficiency or weight of the evidence argument has become a distinction without a difference in these situations. Thus, for all of the reasons stated more fully above, Appellee respectfully submits that the decision of the Fourth Appellate District should be affirmed.

Respectfully submitted,

By: Thomas M. Spetnagel / *ms* 0068012  
Thomas M. Spetnagel, Counsel of Record

By: Stanley C. Bender / *sc* 0068012  
Stanley C. Bender

COUNSEL FOR APPELLEE, PAULA EASTLEY,  
ADMINISTRATOR OF THE ESTATE OF  
STEVEN HIENEMAN

Certificate of Service

I certify that a copy of this Merit Brief was sent by ordinary U.S. mail to those counsel listed below on this 6th day of October 2011.

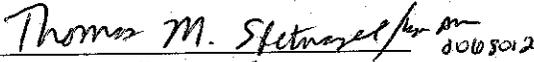
M. Jason Founds  
Mark H. Gams  
Gallagher, Gams, Pryor, Tallan & Littrell, L.L.P.  
471 East Broad St., 19<sup>th</sup> Floor  
Columbus, Ohio 43215-3872

James L. Mann  
Mann & Preston, L.L.P.  
18 East Second St.  
Chillicothe, Ohio 45601

Stanley C. Bender  
Bender Law Offices  
P.O. Box 950  
Portsmouth, Ohio 45662

Timothy J. Fitzgerald  
GALLAGHER SHARP  
Bulkey Building, Sixth Floor 16<sup>th</sup> Floor  
1501 Euclid Avenue  
Cleveland, Ohio 44115

John McLaughlin  
Rendigs, Fry, Kiely & Dennis L.L.P.  
One West Fourth Street, Suite 900  
Cincinnati, Ohio 45202-3688

  
Thomas M. Spetnagel

COUNSEL FOR APPELLEE, PAULA EASTLEY,  
ADMINISTRATOR OF THE ESTATE OF  
STEVEN HIENEMAN