

ORIGINAL

IN THE SUPREME COURT OF OHIO

PAULA EASTLEY, Adm. of the Estate :
of Steven Hieneman, :

Appellee, :

- v - :

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

- and - :

DENISE HUFFMAN, d\|b\|a :
Tri-State Health Care, :

Appellants. :

Case No. 2011-0606

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

REPLY BRIEF FOR APPELLANT DENISE HUFFMAN,
D/B/A TRI-STATE HEALTH CARE

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LAW AND ARGUMENT

PROPOSITION OF LAW:

A PARTY IS NOT REQUIRED TO FILE A MOTION FOR A DIRECTED VERDICT, A MOTION 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.

Appellee's Brief focuses primarily on disparaging Appellant instead of addressing the issues for which this Court accepted this appeal. The issues before this Court are what steps a party must take, if any, to preserve a manifest weight of the evidence challenge on appeal.

As set forth in Appellant's Brief, the Dissent's Opinion in the appellate court was unclear as to exactly what steps the Appellant was supposed to have taken to preserve her manifest weight of the evidence challenge for appeal:

¶62 For the present case, it does not matter whether Huffman's manifest weight of the evidence argument could be preserved only by moving for a new trial under Civ.R. 59(A)(6) (as *Neal* suggests) or if it could have been preserved by moving for a directed verdict under Civ.R. 50(A) or judgment notwithstanding the verdict under Civ.R. 50(B). Huffman failed to preserve any arguments under any of these procedural vehicles. Therefore, I would find that she has forfeited all but plain error for any argument based on the manifest weight of the evidence.

(Appellant's Brief, Appendix pp. 33-34)

Faced with the unclear lower court decision, Appellant's Brief addressed all three types of motions discussed by the Dissent in order to establish that none of the motions were necessary prerequisites to a manifest weight of the evidence challenge on appeal. An appellate court is empowered to reverse a jury's verdict if it is against the manifest weight of the evidence provided that, pursuant to Art. IV, §3(B)(3) of the Ohio Constitution, the panel's decision is unanimous. There was no authority in Ohio that required Appellant to file a Civ.R. 59 motion for a new trial, and, in fact, such a requirement is prohibited by R.C. §2321.01. Moreover, there is no authority that required Appellant to move for a directed verdict or file a motion for judgment notwithstanding the verdict pursuant to Civ.R. 50(A) and (B), respectively.

I. There Is No Ohio Authority That Requires A Party To Move For A Directed Verdict, Or Renew Such A Motion, In Order To Preserve A Right To Challenge A Jury's Verdict On Appeal As Being Against The Manifest Weight Of The Evidence.

Appellee's Brief eschewed discussion of two out of the three types of motions discussed in the Dissent. Appellee's Brief did not argue that Appellant was required to file a motion for a new trial pursuant to Civ.R. 59 or to file a motion for judgment notwithstanding the verdict pursuant to Civ.R. 50(B). Instead, Appellee's Brief limits itself to advocating that the failure to renew a motion for a directed verdict at the close of all evidence waives any potential assignment of error on appeal based on the manifest weight of the evidence.

Appellee's position is without merit. Appellee failed to cite any statutory or Civil Rule authority that requires a party to move for a directed verdict at all in order to preserve an opportunity to later challenge the jury's verdict as being against the manifest weight of the evidence. Likewise, Appellee failed to cite any statutory or Civil Rule authority that, if a party chooses to move for a directed verdict but fails to properly renew that motion once denied, then that party forfeits any right to a manifest weight of the evidence challenge on appeal.

Moreover, Appellee failed to cite a single case where an Ohio court held that a party's failure to move for a directed verdict or to renew a previously denied motion for directed verdict at the close of all evidence waives a manifest weight of the evidence challenge on appeal. In fact, this Court and nearly every Ohio appellate district have examples of cases where a party failed to renew a motion for directed verdict at the close of all evidence, but the reviewing Court, while noting the waiver of the right to appeal the denial of the directed verdict, nevertheless considered a manifest weight of the evidence assignment of error.¹ While none of the cases addressed the

¹ See, *Chemical Bank of New York v. Neman* (1990), 52 Ohio St.3d 204, 206-207; *Hollingsworth v. Time Warner Cable*, 1st Dist. No. C-050549, 168 Ohio App.3d 658, 2006-Ohio-4903, ¶¶20, 61; *Crothers v. Pioneer Mut. Ins. Co.*, 2nd Dist. No. 13511, 1993 Ohio App. LEXIS 4988, *4-5; *Upshaw v. Central Foundry Div.* (1992); 82 Ohio App.3d 636, 642-643; *Matlack v. Allied-Signal, Inc.*, 4th Dist. No. 92 CA 2, 1992 Ohio App. LEXIS 5679, *12, 16-20; *Baird Bros. Sawmill, Inc. v. Augusta Construction*, 7th Dist. No. 98 CA 152, 2000 Ohio App. LEXIS 2773, *16-20; *Bokar v. Lax*, 8th Dist. No. 75929, 2000 Ohio App. LEXIS 1654, *10-12; *State Auto. Mut. Ins. Co. v. Lytle*, 10th Dist. No. 84AP-424, 1985 Ohio App. LEXIS 5902, *3, 7; *Burk v.*

precise issue raised by the Appellee, the cases nevertheless demonstrate the longstanding procedural practice in Ohio of not requiring a motion for directed verdict as a procedural prerequisite to a manifest weight of the evidence assignment of error.

II. Appellee's Brief Misinterprets The Ramifications Of The Holding In *Helmick V. Republic-Franklin Ins. Co.* (1988), 39 Ohio St.3d 71.

Appellee's Brief is based on advocating an extension of this Court's Decision in *Helmick v. Republic-Franklin Ins. Co.* (1988), 39 Ohio St.3d 71. In *Helmick*, this Court held that if the trial court denies a party's motion for directed verdict made at the close of the plaintiff's case, then the party must renew that motion at the close of all evidence. If the party fails to renew the motion, then the party waives the right to challenge the denial of its motion on appeal.

However, *Helmick* was limited to challenging the denial of the motion for a directed verdict. There is nothing in *Helmick* that prevents a party from still challenging the sufficiency of the evidence post-verdict via a Civ.R. 50(B) motion JNOV, or from challenging the weight of the evidence to the trial court pursuant to Civ.R. 59(A)(6) or to the appellate court via a manifest weight of the evidence assignment of error on appeal. Appellee failed to cite any subsequent decision that would extend *Helmick* in such a manner.

Appellee's Brief argues that the decision in *Helmick* should be extended so that a failure to move for a directed verdict or to renew a previously denied motion for directed verdict would prevent a party from challenging the weight of the evidence on appeal. As previously noted, that has never been the rule in Ohio. Nor should it be given the numerous differences between the two theories.

A motion for directed verdict is a trial motion that seeks to prevent the case from reaching the jury due to a legal insufficiency of the evidence. It is concerned with the burden of proof and the legal sufficiency of the evidence. A motion for directed verdict applies the same standard as a pre-trial motion for summary judgment.

Enzo's of Elm Rd. Inc., 11th Dist. No. 99-T-3, 2000 Ohio App. LEXIS 5373, *5-7, 11-14; *Rader v. Carroll*, 12th Dist. No. CA-90-12-026, 1992 Ohio App. LEXIS 264, *5-7, 12.

"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."

Cater v. City of Cleveland (1998), 83 Ohio St.3d 24, 33.

In contrast, a manifest weight of the evidence challenge is an appellate assignment of error concerned with the weight of the evidence supporting the judgment in favor of the adverse party, and the burden of persuasion. It is concerned with what happened after the jury received the case. The evidence is not construed most favorably to either side. The court determines whether the judgment was supported by some competent and credible evidence. If it is, then the verdict should not be reversed on appeal as being against the manifest weight of the evidence. *Shemo v. Mayfield Hts.* (2000), 88 Ohio St. 3d 7, 10; *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St. 2d 279, at the syllabus; *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. 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. *Seasons Coal Co., Inc. v. Cleveland* (1984), 10 Ohio St.3d 77, 80-81

Moreover, an appellate court applies different standards of review. An appellate court applies a de novo standard of review for the appeal of a denial of a motion for directed verdict. *Goodyear Tire & Rubber Co. v. Aetna Cas. & Surety Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, ¶4. Weight of the evidence and credibility of witnesses are not considered. *Osler v. Lorain* (1986), 28 Ohio St.3d 345, 347; *Strother v. Hutchinson* (1981), 67 Ohio St.2d 282, 285.

For a manifest weight of the evidence challenge not originating from a motion for a new trial, the appellate court reviews the jury's decision and indulges every reasonable presumption in favor of the judgment and presumes that any findings of fact are correct. *Seasons Coal at 77, 80-81.* The court determines whether the judgment was supported by some competent and credible evidence. If it is, then the verdict should not be reversed on appeal as being against the manifest weight of the evidence. *Shemo at 7, 10; C.E. Morris at the syllabus.*

Despite these numerous differences, Appellee argues that, pursuant to this Court's decision in *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, the weight and sufficiency issues merge, and, therefore, the failure to challenge the sufficiency of the evidence at trial results in a waiver of the right to challenge the weight of the evidence on appeal. Even if Appellee were correct that the weight and sufficiency concepts actually merge in a civil case, Appellee is incorrect that the consequence is that a motion for directed verdict is a necessary prerequisite to filing a manifest weight of the evidence assignment of error on appeal. That was not the holding in *Wilson* or any other case since *Wilson*.

Further, Appellee is incorrect that 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." (Appellee's Brief, p. 9). As previously discussed, a motion for directed verdict and a manifest weight of the evidence challenge apply different standards and are made at different points in the proceedings. While the two arguments may often result in the same ultimate conclusion, they do so in a different manner and for different reasons.

CONCLUSION

There is no statutory, Civil Rule or caselaw authority in Ohio that requires a party to move for a directed verdict at trial, or to renew such a motion once denied, in order to preserve the party's right to challenge a jury's verdict on appeal as being against the manifest weight of the evidence. The rule of practice in Ohio has clearly been not to impose such a requirement, nor would such a requirement be warranted given the numerous differences between the two requests for relief.

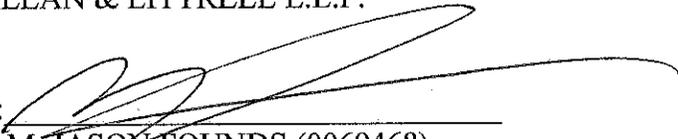
An appeal challenging the denial of a Motion for a Directed Verdict reviews a decision of law, made by the judge, prior to the verdict, under a de novo standard and does not involve weighing the evidence. An appeal raising a manifest weight of the evidence issue asks the court to review the decision on the facts, made by the jury, post verdict, under a standard of review presuming the jury's verdict is correct and allowing the court to overcome that presumption on appeal. The time of the error for each of these issues is different (pre-verdict vs. post verdict).

The issue to be reviewed is different (issue of law vs. issue of facts presented in the evidence).
The standard of review is different (de novo vs. presumption of correctness).

It is respectfully submitted that the decision by the Fourth District Court of Appeals be reversed.

Respectfully submitted,

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