

ORIGINAL

SUPREME COURT OF OHIO

Sandy Parrish, Admin.,

Plaintiff-Appellee,

vs.

Christopher J. Skocik, D.O. et al.,

Defendants-Appellants.

12-0623

Supreme Court Case No.

On Appeal from the Ross
County Court of Appeals, Fourth
Appellate District
Case No. 11CA3238

NOTICE OF ORDER CERTIFYING A CONFLICT

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FILED
APR 13 2012
CLERK OF COURT
SUPREME COURT OF OHIO

Appellants Christopher J. Skocik, D.O. and Family Medicine of Chillicothe, Inc. hereby give notice to the Supreme Court of Ohio of the April 3, 2012 Decision and Entry of the Fourth Appellate District Court of Appeals, Case No. 11CA3238, certifying a conflict between its decision of February 15, 2012 and those of other appellate districts on the issue of whether a trial court is required to consider the allegations contained in the pleadings, along with the opening statement, when ruling on a motion for directed verdict made at the close of opening statement.

Attached hereto as Exhibits A-H are the following:

- A. *Parrish v. Jones*, Case No. 11CA3238, Fourth Appellate District April 3, 2012 Decision and Entry on Motion to Certify Conflict;
- B. *Parrish v. Jones*, Case No. 11CA3238, Fourth Appellate District February 15, 2012 Decision and Judgment Entry;
- C. *Blankenship v. Kennard*, 10th Sit. App.No. 92AP-415, 1993 WL 318825 (Aut. 17, 1993);
- D. *Campbell v. Pritchard*, 73 Ohio App.3d 158 (12th Dist. 1991);
- E. *Lippy v. Soc. Natl. Bank*, 100 Ohio App.3d 37 (11th Dist. 1995);
- F. *Crowe v. Hoffman*, 13 Ohio App.3d 254 (8th Dist. 1983);
- G. *U.S. Aviation Underwriters, Inc. v. B.F. Goodrich Co.*, 2002-Ohio-5429, 149 Ohio App.3d 599 (9th Dist.); and
- H. *Lambert v. Metrohealth Med. Ctr.*, 2007-Ohio-83 (8th Dist. App. No. 87861).

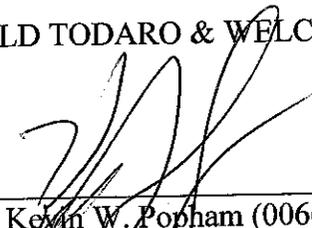
These cases represent a clear conflict between various district courts on the issue as certified by the Fourth Appellate District Court of Appeals. Accordingly, Appellants Christopher J. Skocik,

D.O. and Family Medicine of Chillicothe, Inc. hereby give notice and request that this Honorable Court review the issue and accept jurisdiction over the conflict pursuant to S. Ct. Prac. R. IV, §4.

Respectfully submitted,

ARNOLD TODARO & WELCH CO., L.P.A.

By:



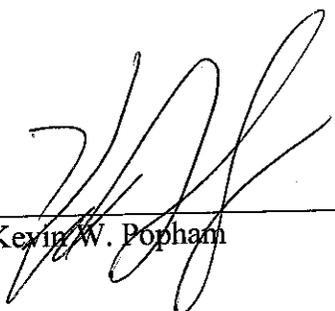
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served upon all parties or counsel of record by regular U.S. mail, postage prepaid, this 13th day of April, 2012.

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Counsel for Defendant Michael Jones, D.O.



Kevin W. Popham

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

2012 APR -3 AM 11:22

ROSS COUNTY COMMON PLEAS
CLERK OF COURTS
TY D. HINTON

Sandy Parrish, Administrator, et al., :

Case No. 11CA3238

Plaintiffs-Appellants, :

**DECISION AND ENTRY ON
MOTION TO CERTIFY CONFLICT**

v. :

Michael E. Jones, et al., :

Defendants-Appellees. :

APPEARANCES:

Kenneth S. Blumenthal, Rourke & Blumenthal, LLP, Columbus, Ohio, for appellant.

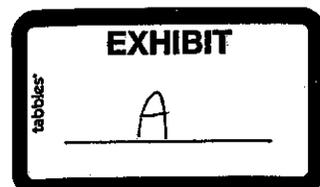
Gregory B. Foliano and Kevin W. Popham, Arnold Todaro & Welch Co., L.P.A., Columbus, Ohio, for appellees Christopher J. Skocik and Family Medicine of Chillicothe, Inc.

Harsha, A.J.

Appellees Christopher Skocik, D.O. and Family Medicine of Chillicothe, Inc.

("Family Medicine") have filed a motion to certify a conflict to the Supreme Court of Ohio for review and final determination. Upon consideration, we **GRANT** the motion.

Dr. Skocik and Family Medicine contend that our decision and judgment in this case is in conflict with other appellate district cases on the issue of whether a trial court is required to consider the allegations contained in the pleadings, along with the opening statement, when ruling on a motion for directed verdict made at the close of opening statement. In our decision and opinion, we relied upon *Archer v. Port Clinton*, 6 Ohio St.2d 74, 76, 215 N.E.2d 707 (1966), to support our conclusion that the trial court must consider *both* the opening statement and the complaint in determining



whether a directed verdict is appropriate. Other appellate courts have also held that the pleadings must be considered before a directed verdict can be granted following the opening statement. See, e.g., *Sapp v. Stoney Ridge Truck Tire*, 86 Ohio App.3d 85, 93, 619 N.E.2d 1172 (6th Dist. 1993) and *Brentson v. Chappell*, 66 Ohio App.3d 83, 89, 583 N.E.2d 434, 438 (8th Dist. 1990).

However, in *Blankenship v. Kennard*, 10th Dist. No. 92AP-415, 1993 WL 318825 (Aug. 17, 1993), the Tenth District Court of Appeals held that the trial court only needs to consider the opening statement when deciding whether to grant a directed verdict. Other courts have taken a similar position. See, e.g., *Campbell v. Pritchard*, 73 Ohio App.3d 158, 596 N.E.2d 1047 (12th Dist. 1991) and *Lippy v. Soc. Ntl. Bank*, 100 Ohio App.3d 37, 651N.E.2d 1364 (11th Dist. 1995).

Article IV, Section 3(B)(4) of the Ohio Constitution provides:

Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals in the state, the judges shall certify the record of the case to the supreme court for review and final determination.

See, also, App.R. 25.

Before we can certify a judgment for review and final determination, three conditions must be met before and during the certification of a case to the Supreme Court of Ohio pursuant to Article IV, Section 3(B)(4):

1. The certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict must be upon the same question;
2. The alleged conflict must be on a rule of law – not facts;
and

3. The journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeal.

Whitelock v. Gilbane Bldg. Co., 66 Ohio St.3d 594, 596, 613 N.E.2d 1032 (1993).

Appellant Sandy Parrish agrees that a conflict exists between our decision and the Tenth District but argues that we should deny the motion to certify a conflict because the legal issue has already been decided by the Supreme Court of Ohio. In *Whipp v. Industrial Commission of Ohio*, 136 Ohio St. 531, 533, 27 N.E.2d 141 (1940), the Supreme Court of Ohio held that a conflict between two courts of appeals is of no consequence when the Supreme Court of Ohio has already established a rule. Mr. Parrish contends that the Supreme Court of Ohio expressly stated in *Archer* that “[a] motion for a directed verdict in favor of a defendant interposed after the opening statement raises a question of law on the facts presented by that statement *and the petition*, all of which must be conceded.” *Id.* at 76, citing *Vest, a Minor v. Kramer*, 158 Ohio St. 78, 107 N.E.2d 105 (1952) (emphasis added). And, because this Court followed the rule set forth by the Supreme Court, it is unnecessary to certify a conflict.

This Court has a duty to follow the decisions of the Supreme Court of Ohio and cannot ignore or modify the decisions of the highest court in this state. Therefore, we believe we were correct in applying *Archer* in this case. However, we also recognize that other appellate districts have reached the opposite conclusion over the past several decades. We further find that this situation is the very one contemplated by the Ohio Constitution’s certification procedure, *i.e.* a legal issue requiring statewide resolution.

Based on the foregoing, we **GRANT** the motion to certify a conflict. Pursuant to

Sup.Ct.Prac.R. IV 2(A), this Court determines that a conflict exists between the districts on the issue of whether a trial court is required to consider the allegations contained in the pleadings, along with the opening statement, when ruling on a motion for directed verdict at the close of opening statement.

Abele, P.J. & Kline, J.: Concur.

FOR THE COURT


William H. Harsha
Administrative Judge

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

2012 FEB 15 AM 10:19

FILED
ROSS COUNTY COMMON PLEAS
CLERK OF COURTS
TY D. HINTON

SANDY PARRISH, ADMINISTRATOR,
ET AL.,

Case No. 11CA3238

Plaintiffs-Appellants,

v.

DECISION AND
JUDGMENT ENTRY

MICHAEL E. JONES, ET AL.,

Defendants-Appellees.

APPEARANCES:

Kenneth S. Blumenthal and Jonathan R. Stoudt, Rourke & Blumenthal, LLP, Columbus, Ohio, for appellant.

Gregory Foliano and Kevin Popham, Arnold Todaro & Welch Co., LPA, Columbus, Ohio, for appellees Christopher J. Skocik, D.O., and Family Medicine of Chillicothe, Inc.

Frederick A. Sowards, Hammond Sowards & Williams, Columbus, Ohio, for appellee Michael E. Jones.

Harsha, J.

{11} Sandy Parrish filed this case alleging medical negligence and the wrongful death of his late wife. His appeal initially contests the trial court's directed verdict in favor of Christopher Skocik, D.O. and Family Medicine of Chillicothe (Family Medicine) following opening statements. Mr. Parrish asserts that he was not required to specifically set forth all the elements of his case against Dr. Skocik in his opening statement, and it was therefore sufficient to survive a motion for a directed verdict. Mr. Parrish also argues that the trial court erred by not allowing him the opportunity to amend, supplement or explain his opening statement and by failing to consider the allegations in his complaint before ruling on the motion for directed verdict. Because



the trial court failed to consider the complaint, which sets forth sufficient facts to establish a cause of action for medical negligence, we find that the trial court erred in granting Dr. Skocik's and Family Medicine's motion for directed verdict.

{12} Mr. Parrish also appeals the trial court's denial of his motion for a new trial. He claims the directed verdict in favor of Dr. Skocik and Family Medicine prevented him from receiving a fair trial on his remaining claim against Michael Jones, D.O. because Dr. Jones was able to assert Dr. Skocik's negligence as a defense. Specifically, he contends that the absence of Dr. Skocik's expert witnesses, who were expected to offer criticisms of Dr. Jones medical treatment, forced Mr. Parrish to defend Dr. Skocik's actions alone. However, it was Mr. Parrish's burden to prove his medical negligence claims against Dr. Jones. This burden included introducing whatever evidence was necessary, including expert testimony, to establish negligence. Even though the trial court erroneously granted the motion for directed verdict, that mistake neither absolved nor increased that burden. Therefore the court did not err in denying Mr. Parrish's motion for a new trial.

I. FACTS

{13} Acting individually and as the administrator of his wife's estate, Mr. Parrish filed a series of complaints asserting that Dr. Skocik, Family Medicine, Dr. Jones, and several other medical providers are liable for the wrongful death of Mrs. Parrish and medical negligence in her treatment. Mrs. Parrish was admitted to Adena Regional Medical Center for acute peripheral nerve disorder. Her physician, Dr. Jones, diagnosed her with Guillain-Barre Syndrome and after consulting with a specialist, placed her on the medication Lovenox to prevent blood clots from forming in her legs.

Subsequently, Dr. Jones discharged Mrs. Parrish to Chillicothe Nursing and Rehabilitation Center where she continued to receive care; however, she did not continue to receive Lovenox. While at the facility, Dr. Skocik was assigned to provide medical care to Mrs. Parrish. Unfortunately, four days after her arrival at the rehabilitation center, Mrs. Parrish passed away from a pulmonary embolism.

{14} Mr. Parrish alleges in his complaint that various medical professionals negligently provided medical care and treatment to his wife by failing "to exercise the degree of skill, care and diligence an ordinarily prudent physician and/or health care provider would have exercised under like or similar circumstances." He explicitly contends that the defendants failed to properly treat, to prescribe anti-coagulation therapy, to adequately monitor, to timely respond with medical intervention, and to properly diagnose Mrs. Parrish's injury and condition. And as a result of this negligence, Mr. Parrish alleges Mrs. Parrish suffered a premature death.

{15} The case proceeded to a jury trial and at the conclusion of Mr. Parrish's opening statement, Dr. Skocik and Family Medicine moved for a directed verdict on the ground that Mr. Parrish failed to state a cause of action against them. The trial court heard brief arguments on the motion and subsequently granted the directed verdict. Consequently, Mr. Parrish tried his case against Dr. Jones only and the jury returned a verdict in favor of Dr. Jones. Following the verdict, Mr. Parrish moved for a new trial, which the trial court denied. This appeal followed.

II. ASSIGNMENTS OF ERROR

{16} Mr. Parrish presents two assignments of error for our review:

{¶17} I. "THE TRIAL COURT ERRED IN GRANTING DEFENDANTS[] CHRISTOPER SKOCIK, D.O AND FAMILY MEDICINE OF CHILLICOTHE, INC.'S MOTION FOR DIRECTED VERDICT MADE AFTER PLANITIFF-APPELLANT'S OPENING STATEMENT."

{¶18} II. "THE TRIAL COURT ERRED IN DENYING PLAINTIFF-APPELLANT'S MOTION FOR NEW TRIAL."

III. DIRECTED VERDICT

{¶19} Mr. Parrish claims that the trial court erred in granting a directed verdict in favor of Dr. Skocik and Family Medicine for three reasons. First he argues that his opening statement was sufficient to survive a directed verdict because he was not required to specifically set forth all the elements of his case. Furthermore, even if he was required to do that, he asserts that the trial court did not give him an opportunity to amend, supplement or explain his opening statement prior to granting the motion for directed verdict. Finally, he maintains that the trial court erred by failing to consider the complaint, along with his opening statement, before making its ruling.

A. Legal Standard for Medical Negligence

{¶110} To establish a cause of action for medical negligence, a plaintiff must demonstrate three elements: (1) the existence of a standard of care within the medical community; (2) breach of that standard of care by the defendant; and (3) proximate cause between the defendant's breach and the plaintiff's injury. *Bruni v. Tatsumi*, 46 Ohio St.2d 127, 131, 346 N.E.2d 673 (1976); *Rhoads v. Brown*, 4th Dist. No. 09CA18, 2010-Ohio-3898, ¶ 32. Expert testimony is generally required to prove these elements

when they are beyond the common knowledge and understanding of the jury. *Rhoads*, at ¶ 32.

B. Standard for Directed Verdict

{¶11} We first consider whether the trial court was required to consider the allegations in Mr. Parrish's complaint, along with his opening statement, when ruling on the motion. A motion for directed verdict presents a question of law, rather than factual issues. *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, 769 N.E.2d 835, ¶ 4. As a question of law, we apply a de novo standard of review on appeal. *See id.*

{¶12} Under Civ.R. 50(A)(1) a party may move for a directed verdict on the opening statement of the opponent, at the close of the opponent's evidence or at the close of all the evidence. When a party moves for a directed verdict on the opening statement, the trial court "should exercise great caution in sustaining [the] motion." *Brinkmoeller v. Wilson*, 41 Ohio St.2d 223, 325 N.E.2d 233 (1975), syllabus. To grant such a motion, "it must be clear that all the facts expected to be proved, and those that have been stated, do not constitute a cause of action or a defense, and the statement must be liberally construed in favor of the party against whom the motion has been made." *Id.* Moreover, we have previously held that both the opening statement and the complaint must be considered in determining whether a directed verdict is appropriate. *See Taylor v. U.S. Health Corp.*, 4th Dist. No. 96-CA-2457, 1997 WL 346160, *5 and *Wright v. Suzuki Motor Corp.*, 4th Dist. Nos. 03CA3 & 03CA4, 2005-Ohio-3494, ¶ 99; *see also Archer v. Port Clinton*, 6 Ohio St.2d 74, 76, 215 N.E.2d 707(1966). If the

opening statement along with the allegations in the complaint amount to a justiciable claim for relief when construed liberally, the court must deny that motion. *Wright*, supra.

{¶13} In this case, the trial court did not consider the allegations in the complaint when it granted Dr. Skocik's and Family Medicine's motion for directed verdict. The record shows the trial court heard brief arguments from counsel for Mr. Parrish and Dr. Skocik on the motion. During this exchange, the court clarified that Dr. Skocik was basing his motion on Mr. Parrish's opening statement alone, to which he affirmatively responded. Subsequently, the trial court reviewed the transcript from Mr. Parrish's opening statement and granted the motion for directed verdict. In its judgment entry addressing Mr. Parrish's motion for a new trial, the trial court cites *Blankenship v. Kennard*, 10th Dist. No. 92AP-415, 1993 WL 318825, which states no other allegations are to be incorporated into an opening statement; the entry also confirmed that the court granted the motion for directed verdict based solely on Mr. Parrish's opening statement. However, this district does not follow *Blankenship* and the failure to apply the rule in *Archer, Taylor and Wright* resulted in the court improperly granting the motion because it used the wrong legal standard to decide the motion.

{¶14} Accordingly, we find that the trial court erred by granting Dr. Skocik and Family Medicine's motion for directed verdict and sustain Mr. Parrish's first assignment of error. As this argument proves dispositive of Mr. Parrish's first assignment of error, we decline to address his remaining arguments. We also decline to review the merits of the motion in light of the allegations contained in the complaint. The law requires the trial court to consider all the necessary factors before rendering its decision. Even though we apply a de novo standard of review to that judgment, the Supreme Court of

Ohio has explicitly directed us to act as a reviewing court, not one that makes the determination. *Murphy v. Reynoldsburg*, 65 Ohio St.3d 356, 360, 604 N.E.2d 138 (1992). See also *Commercial Sav. Bank v. City of Jackson*, 4th Dist. No. 97CA798, 1997 WL 626410, *7.

IV. MOTION FOR A NEW TRIAL

{¶15} In his second assignment of error, Mr. Parrish claims that he was prevented from receiving a fair trial on his claim against Dr. Jones following the directed verdict in favor of Dr. Skocik and Family Medicine and therefore the trial court erred by denying his motion for a new trial. Specifically, he asserts that Dr. Jones was able to argue Dr. Skocik's negligence as a defense to his own liability without any response from Dr. Skocik's experts, who were expected to testify in support of Dr. Skocik's acts and offer criticisms of Dr. Jones. Consequently, Mr. Parrish claims that the act of defending Dr. Skocik wrongly fell to him, which resulted in an unfair trial. We disagree.

A. Standard of Review

{¶16} Mr. Parrish bases his argument on subsections (1), (7) and (9) of Civ.R. 59(A), which provide: "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 * * * (7) The judgment is contrary to law * * * (9) Error of law occurring at the trial and brought to the attention of the trial court by the party making the application."

{¶17} Depending on the basis of the motion for a new trial, we review the trial court's decision under either a de novo or an abuse of discretion standard of review. *Rohde v. Farmer*, 23 Ohio St.2d 82, 262 N.E.2d 685 (1970), paragraphs one and two of syllabus. "Where a trial court is authorized to grant a new trial for a reason which requires the exercise of sound discretion, the order granting a new trial may be reversed only upon a showing of abuse of discretion by the trial court." *Id.* at paragraph one of syllabus. However, "[w]here a new trial is granted by a trial court, for reasons which involve no exercise of discretion but only a decision on a question of law, the order granting a new trial may be reversed upon the basis of a showing that the decision was erroneous as a matter of law." *Id.* at paragraph two of syllabus. Accordingly, appellate courts must review a motion for a new trial made on the basis that there was an error of law at trial under the de novo standard. *See Sully v. Joyce*, 10th Dist. Nos. 10AP-1148 & 10AP-1151, 2011-Ohio-3825, ¶ 8.

{¶18} Mr. Parrish argues that he did not receive a fair trial because the trial court erroneously granted Dr. Skocik and Family Medicine's motion for directed verdict. The decision to grant or deny a motion for directed verdict involves a question of law. Therefore we review his motion for a new trial under a de novo standard of review.

B. Fairness of the Trial

{¶19} Although we agree that the trial court erroneously granted Dr. Skocik and Family Medicine's motion for directed verdict, we do not agree that that this error caused Mr. Parrish to receive an unfair trial. "In a civil case, the plaintiff normally has the burden of producing evidence to support his case, and the defendant has the burden of producing evidence of any affirmative defenses." *State v. Robinson*, 47 Ohio

St.2d 103, 107, 351 N.E.2d 88 (1976). Accordingly, it was Mr. Parrish's burden to establish each element of his medical negligence claim. Dr. Jones was free to defend this claim by asserting Dr. Skocik's negligence. Mr. Parrish admits that he had notice that Dr. Jones "intended to push blame" onto Dr. Skocik. Although he claims that he did not receive a fair trial because Dr. Skocik was not there to defend his own actions, it was Mr. Parrish's burden to prove his case against Dr. Jones by providing his own expert testimony. The fact that Mr. Parrish intended to rely on Dr. Skocik's expert witnesses to counter Dr. Jones defense does not absolve him of the ultimate burden to prove his case and counter any defenses presented by Dr. Jones. In essence Mr. Parrish claims it was unfair to allow Dr. Jones to try "the empty chair" at the last minute. However, if Dr. Skocik had settled with Mr. Parrish right before trial, the burden to prove that Dr. Jones' negligent conduct caused Mrs. Parrish's death would have remained with Mr. Parrish. Because he was the plaintiff, this burden was his throughout whatever course the proceedings took. There was nothing "unfair" about the trial against Dr. Jones in spite of the erroneous directed verdict in favor of Dr. Skocik and Family Medicine. Therefore, we overrule his second assignment of error.

V. CONCLUSION

{120} In conclusion, we sustain Mr. Parrish's first assignment of error and reverse the directed verdict in favor Dr. Skocik and Family Medicine. Upon remand the trial court is to revisit its decision in light of the allegations contained in the amended complaint. We overrule Mr. Parrish's second assignment of error and affirm the trial court's judgment concerning his motion for a new trial.

JUDGMENT AFFIRMED IN PART, REVERSED
IN PART, AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED IN PART AND REVERSED IN PART and that the CAUSE IS REMANDED. Appellants and Appellees shall split the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Court of Common Pleas to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, P.J. & Kline, J.: Concur in Judgment and Opinion.

For the Court

BY:



William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.

Not Reported in N.E.2d, 1993 WL 318825 (Ohio App. 10 Dist.)
(Cite as: 1993 WL 318825 (Ohio App. 10 Dist.))

Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Tenth District, Franklin County.
Scott A. BLANKENSHIP et al., Plaintiffs-Appellants,
v.
Jay KENNARD et al., Defendants-Appellees.

No. 92AP-415.
Aug. 17, 1993.

APPEAL from the Franklin County Court of Common Pleas.

TYACK, J.

*1 On April 16, 1991, Scott A. Blankenship filed a lawsuit against Jay Kennard, M/I Homes and two other named defendants. The pleadings were amended on two occasions and eventually a trial commenced on January 11, 1993. At the end of opening statements, the trial judge in open court sustained a motion for a directed verdict on two grounds. First, counsel for Mr. Blankenship had never alleged a specific damage figure in the pleadings. Second, the opening statement on behalf of Mr. Blankenship did not set forth allegations which could be construed as stating a claim for relief as to Mr. Kennard.

Mr. Blankenship (hereinafter "appellant") has now pursued a timely appeal, assigning two errors for our consideration:

"I. THE TRIAL COURT COMMITTED ERROR WHEN IT GRANTED A DIRECTED VERDICT AFTER THE APPELLANT'S OPENING STATEMENT WITH REGARD TO THE LIABILITY OF APPELLEE KENNARD, AND IMPROPERLY FOUND THAT A CAUSE OF ACTION AGAINST APPELLEE KENNARD DID NOT EXIST.

ERLY FOUND THAT A CAUSE OF ACTION AGAINST APPELLEE KENNARD DID NOT EXIST.

"II. THE TRIAL COURT ERRED IN APPLYING OHIO REV. CODE SECTION 2309.01 TO GRANT A DIRECTED VERDICT AGAINST APPELLANT, BECAUSE THE OHIO SUPREME COURT HAS RULED SECTION 2309.01 AS INVALID AND OF NO FURTHER FORCE OR EFFECT."

Addressing the second assignment of error first, subsequent to the trial court's ruling, two significant opinions were issued. We issued our opinion in *Frazier v. Children's Hosp. of Columbus* (Mar. 25, 1993), Franklin App. No. 92AP-1634, unreported (1993 Opinions 1031), and the Supreme Court of Ohio issued its opinion in *Rockey v. 84 Lumber Co.* (1993), 66 Ohio St.3d 221. Both opinions indicate that a trial court should not sustain a motion for a directed verdict after opening statement based upon the failure of a plaintiff to amend the pleadings to include a specific damage figure. Thus, if the directed verdict granted here rested solely upon the failure of the plaintiff to amend the pleadings a third time prior to trial, the directed verdict would have been inappropriate.

However, the trial court also found that a directed verdict should be granted because the plaintiff failed to allege a claim against Mr. Kennard in opening statement. The trial court granted the directed verdict on this theory in accord with Civ.R. 50 and the case law construing that rule.

The opening statement as it pertained to Mr. Kennard was:

"The first defendant over there is Mr. Kennard, the man without a coat on, and sometime in September of 1989 he entered into a contract for the purchase of a home located at 5248 Windflower Court with M I Homes, who was going to build the



Not Reported in N.E.2d, 1993 WL 318825 (Ohio App. 10 Dist.)
(Cite as: 1993 WL 318825 (Ohio App. 10 Dist.))

home pursuant to the contract, and in connection with the purchase of that home there was an agreement that Mr. Kennard could supply his own carpeting; and there was a-the evidence will show there was an approximately \$2,500 reduction in the purchase price as a result.

“ * * *

“The testimony will show that Mr. Kennard had the carpet delivered-let me backup for a minute and tell you that, so you will know where we are going to.

*2 “Mr. Blankenship fell on some carpet and hurt himself. This has all got to do with who is responsible for where the carpet was and why. Mr. Kennard hired Mr. Samson to install the carpet at the premises, and the carpet was so installed.

“Mr. Lions was the assistant supervisor on the job site for M I Homes at the time and was in the home at or about the time that Scott fell.

“Now, the evidence will further show that on March 14, 1990, the date that Scott was injured, the home was just about finished, the construction was just about done, and Mr. Kennard was just about ready to move into the home. I believe they closed like on the 17th of March, and he did move in. * * * ” (Tr. 2-3.)

The opening statement did not allege any negligence as to Jay Kennard or any other theory as to Mr. Kennard. In fact, appellant has been candid enough to admit this in his brief.

Appellant suggests instead that the allegations in his pleadings should be incorporated into the opening statement by reference, thereby augmenting that which was stated in open court and making the opening statement sufficient. We are not inclined to incorporate other allegations into the opening statement given in court. By the time the actual fact-finding process has begun, a plaintiff should be able to make a statement in court which concisely states the reason why a named defendant

should be held liable. Simple fairness for those who are being sued demands no less. If counsel cannot or does not make such a statement, the trial court is well within its discretion to sustain a motion for a directed verdict.

Further, appellant's theory would render Civ.R. 50(A) meaningless for all practical purposes. The only time when a directed verdict could be granted at the close of opening statement would be when the complaint also failed to state a claim upon which relief could be granted. Presumably, in such circumstances, the complaint would already have been dismissed or summary judgment would have been granted long before trial. For Civ.R. 50 to be meaningful in allowing a directed verdict at the close of opening statement, the rule must contemplate a review of what was actually set forth in opening statement.

Therefore, the second assignment of error is overruled.

In light of our ruling as to the second assignment of error, the first assignment of error is also overruled. The error as to the first assignment of error was not prejudicial because the directed verdict was sustainable on other grounds.

As a result, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BOWMAN and DESHLER, JJ., concur.

Ohio App. 10 Dist., 1993.
Blankenship v. Kennard
Not Reported in N.E.2d, 1993 WL 318825 (Ohio App. 10 Dist.)

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H
Court of Appeals of Ohio, Twelfth District, Clermont County.
CAMPBELL et al., Appellants,
v.
PRITCHARD et al., Appellees.

No. CA90-09-082.
Decided April 15, 1991.

Repairman brought action against building owners to recover for injuries suffered in slip-and-fall. The Court of Common Pleas, Clermont County, granted owners' motion for directed verdict at the close of opening statement, and repairman appealed. The Court of Appeals, Jones, P.J., held that opening statement did not set forth a cause of action in negligence.

Affirmed.

Koehler, J., dissented and filed opinion.

Jurisdictional motion overruled, 62 Ohio St.3d 1410, 577 N.E.2d 362.

West Headnotes

[1] Trial 388 ↪ 142

388 Trial
388VI Taking Case or Question from Jury
388VI(A) Questions of Law or of Fact in General
388k142 k. Inferences from evidence.
Most Cited Cases

Trial 388 ↪ 178

388 Trial
388VI Taking Case or Question from Jury
388VI(D) Direction of Verdict
388k178 k. Hearing and determination.
Most Cited Cases
In ruling on motion for directed verdict, trial

court must construe evidence in favor of nonmoving party and determine whether reasonable minds can come to but one conclusion on the evidence submitted, that conclusion being adverse to the nonmoving party. Rules Civ.Proc., Rule 50(A)(1).

[2] Negligence 272 ↪ 1076

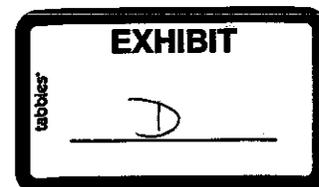
272 Negligence
272XVII Premises Liability
272XVII(C) Standard of Care
272k1075 Care Required of Store and Business Proprietors
272k1076 k. In general. Most Cited Cases

(Formerly 272k52, 272k32(2.8))
Property owners owed business invitee duty to exercise ordinary and reasonable care for his safety and protection, and that duty included maintaining the property in a reasonably safe condition and warning the invitee of latent or concealed defects of which the owners had or should have had knowledge.

[3] Negligence 272 ↪ 1104(6)

272 Negligence
272XVII Premises Liability
272XVII(D) Breach of Duty
272k1100 Buildings and Structures
272k1104 Floors
272k1104(6) k. Water and other substances. Most Cited Cases
(Formerly 272k136(16))

Evidence presented in opening statement did not set forth cause of action in negligence where opening statement indicated that repairman had fallen on building owners' property, that there was no mat on the floor, that there was water and a loose tile, and that the owners had "knowledge of the condition," where there was no indication of which condition the owners had knowledge of or how they acquired that knowledge, no statement as to the cause of the fall, and no statement as to when



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the owners acquired knowledge or that the condition existed for sufficient time that failure to discover and remedy the condition would constitute breach of duty.

[4] Trial 388 ↪168

388 Trial

388VI Taking Case or Question from Jury

388VI(D) Direction of Verdict

388k167 Nature and Grounds

388k168 k. In general. Most Cited

On motion for directed verdict, court does not determine whether one version of the facts presented is more persuasive than another and determines whether only one result can be reached under the theories of law presented in the complaint.

[5] Appeal and Error 30 ↪212

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(B) Objections and Motions, and Rulings Thereon

30k208 Sufficiency of Evidence

30k212 k. Direction of verdict. Most

Cited Cases

Party against whom motion for directed verdict is granted waives his right to protest absence of trial court's reasons for its decision by failing to timely raise the error to the trial court. Rules Civ.Proc., Rule 50(E).

[6] Appeal and Error 30 ↪237(1)

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(B) Objections and Motions, and Rulings Thereon

30k234 Necessity of Motion Presenting Objection

30k237 At Trial or Hearing

30k237(1) k. In general. Most Cited

Cases

Plaintiffs who did not seek amendment of their opening statement at trial court level could not raise for the first time on appeal claim that court erred in not permitting them to amend their opening statement before granting directed verdict.

****1047 *160** Nippert & Nippert and Alfred K. Nippert, Jr., Zimmer, Kapor & Simon Co., L.P.A., and David W. Kapor, Cincinnati, for appellants.

Rendigs, Fry, Kiely & Dennis and Todd M. Powers, Cincinnati, for appellees.

JONES, Presiding Judge.

Plaintiffs-appellants, Paul Campbell and Betty Lou Campbell, appeal a directed verdict granted to defendants-appellees, William L. Pritchard, Roger C. Pritchard and Pritchard Brothers, an Ohio partnership. The court granted appellees' motion for a directed verdict on the opening statement of appellants' counsel in appellants' negligence**1048 action against appellees. On appeal, appellants present four assignments of error which read as follows:

Assignment of Error No. 1

"The Trial Court erred the Plaintiff/Appellants failing to state the basis for it's ruling [*sic*]."

Assignment of Error No. 2

"The Trial Court erred when it found that the opening statement lacked negligence, notice and approximate cause [*sic*]."

Assignment of Error No. 3

"The Trial Court erred the Plaintiff/Appellants by not overruling Defendants motion, Rule 50E is unsupportable and should be reversed [*sic*]."

Assignment of Error No. 4

"The Trial Court erred for failure to give Plaintiff[s] an opportunity to amend opening statement."

As we construe the assignments of error, appel-

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lants set forth three principal arguments in support of their position. First, appellants claim the trial court erred in granting a directed verdict at the close of counsel's opening statement. Second, appellants claim the trial court erred by failing to state the basis for its decision as required by Civ.R. 50(E). Third, appellants claim the trial court erred by not allowing them an opportunity to amend their opening statement.

*161 The issues raised in the case *sub judice* focus on appellants' opening statement which, in its entirety, is as follows:

"THE COURT: Mr. Nippert, you may present your opening statement.

"NIPPERT: Thank you, Your Honor.

"Ladies, we met a little earlier in *voir dire* and I really appreciate your attentiveness at that time. It was a lengthy morning for you and I really appreciate it. I know you're going to be able to pay good attention to this case.

"This case originated the beginning of April in 1986. The plaintiff, Mr. Paul Campbell, who you'll have a chance to meet later, was making his appointed rounds as the plant's repairman for Hauck's Appliance Services. He will tell you how, in the course of his duties, he would get into his van, drive over to the Hauck's operation, pick up his directions for the day and then go to various places.

"He will also tell you that this was his regular routine on a daily basis. He is the fellow you would call if your dryer didn't dry or your washer or other appliances didn't function. That is the man you would have called, that is what he did for years. He is 45 years old, he is married, has three daughters. He is a graduate of Covington Bible College.

"He will tell you the details about the day he was injured. Now, he was the only one there. He will tell you the kind of day it was, he'll just kind of walk you through it. He'll tell you about the tile. He'll tell you about the mat and he'll tell you about

the number of times he had been into the various buildings at Milford Commons before. And he will tell you that he had seen loose tiles in other buildings before in the months that he had been working for Hauck's, servicing Milford Commons.

"See, one major difference, the day in question and in this building from other buildings is there was no mat on the floor. Mr. Campbell, the evidence will show, was carrying a tool box, that he went to the building at the request of the apartment management. As the stipulation indicated, he was a business invitee, he was not a trespasser, he was not a door-to-door salesman-

"POWERS: Objection, Your Honor.

"THE COURT: Mr. Nippert, I want a short, concise opening statement. Don't argue your case, sir.

"NIPPERT: Yes, Your Honor.

"He will tell you that the reason he was sent to this particular building was to change timing wheels on dryers. So you got less drying time for the drying. And he will tell you when he looked up, what he saw after he fell, the *162 water and the tile, which is now loose. We believe the evidence will show that the defendants had knowledge of this condition, either real or actual or just circumstantial.

**1049 "You'll be instructed by the judge regarding the law. It will be a difficult case for you because the only person there was Paul Campbell. You will hear other testimony, undoubtedly, from others. Those people weren't there. If a tree falls in the forest, does it make noise?

"THE COURT: Can I interrupt you again, Mr. Nippert?

"NIPPERT: Yes, Your Honor.

"THE COURT: Don't argue. What is your evidence going to show us?

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“NIPPERT: That most of the other people who will be called were either employees of the defendant or they have been employed or are provided by companies that have a close financial connection with the defendant.

“It will be up to you ladies to fulfill the obligation to separate the wheat from the shaft [*sic*, chaff] and I am certain that you will because I wouldn't burden this Court, nor you, if I didn't believe it was.”

[1] A motion for a directed verdict may be made on the opening statement of opposing counsel. Civ.R. 50(A)(1). In ruling on a motion for a directed verdict, the trial court must construe the evidence in favor of the nonmoving party and determine whether reasonable minds can come to but one conclusion on the evidence submitted, that conclusion being adverse to the nonmoving party. *Cox v. Oliver Machinery Co.* (1987), 41 Ohio App.3d 28, 534 N.E.2d 855; Civ.R. 50(A)(4). In *McCormick v. Haley* (1973), 37 Ohio App.2d 73, 75-76, 66 O.O.2d 132, 133-134, 307 N.E.2d 34, 36-37, the court held that: “The same test is to be applied regardless of the stage at which the motion is made. With respect to a motion made at the time of the opening statement, the test is applied to the evidence the party indicates, in his opening statement, will be offered.”

Furthermore, the Ohio Supreme Court has noted that a trial court should exercise caution in sustaining a motion for a directed verdict on the opening statement of counsel. *Brinkmoeller v. Wilson* (1975), 41 Ohio St.2d 223, 70 O.O.2d 424, 325 N.E.2d 233. In order to sustain such a motion, “ * * * it must be clear that all the facts expected to be proved, and those that have been stated, do not constitute a cause of action or a defense, and the statement must be liberally construed in favor of the party against whom the motion has been made.” *Id.* at syllabus. Despite this rather strict standard, courts have nevertheless upheld directed verdicts granted on the opening statement of counsel when appropriate. See, e.g., *163 *Mitchell v. Cleveland*

Elec. Illum. Co. (1987), 30 Ohio St.3d 92, 30 OBR 295, 507 N.E.2d 352; *Crowe v. Hoffman* (1983), 13 Ohio App.3d 254, 13 OBR 316, 468 N.E.2d 1120.

[2] The parties stipulated that appellant Paul Campbell was a business invitee on appellees' property. Accordingly, appellees owed a duty to exercise ordinary and reasonable care for Campbell's safety and protection. This duty included maintaining the subject property in a reasonably safe condition and warning Campbell of latent or concealed defects of which appellees had or should have had knowledge. *Baldauf v. Kent State Univ.* (1988), 49 Ohio App.3d 46, 550 N.E.2d 517.

[3][4] The opening statement indicated that the case at bar involved a fall by Campbell on appellees' property. There was a statement that there was no mat on the floor of the building in which Campbell fell. In addition, the opening statement indicated that after Campbell fell he saw “water and the tile, which [was] now loose.” There was also a statement that appellees had knowledge of “this condition,” although there is no indication of which condition appellees had knowledge of or when they acquired such knowledge of the condition.

Presumably, appellants were attempting to show that Campbell entered the building, that there was a condition in the building, *i.e.*, water, loose tiles or the absence of a mat, which appellees had knowledge of, and that Campbell fell as a direct and proximate result of the condition in the building. There was no statement, however, as to the cause of Campbell's fall, no statement as to when appellees acquired knowledge**1050 of the condition, and no statement that the condition existed for a sufficient time in which any failure on appellees' part to discover and remedy the condition constituted a breach of duty to Campbell.

A motion for a directed verdict examines the materiality of the evidence rather than the conclusions to be drawn from the evidence. *Cox, supra*, 41 Ohio App.3d at 29, 534 N.E.2d at 857. Thus, the court does not determine whether one version of the

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facts presented is more persuasive than another; it determines whether only one result can be reached under the theories of law presented in the complaint. *Id.* We conclude that the evidence presented in appellants' opening statement, even construed most strongly in appellants' favor, does not constitute a cause of action in negligence, and that reasonable minds could come to but one conclusion which is adverse to appellants. Accordingly, we find that the trial court did not err in granting appellees' motion for a directed verdict on the opening statement of appellants' counsel.

In their second issue, appellants submit that the trial court failed to follow the requirements of Civ.R. 50(E), which provides that:

*164 "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."

After appellees moved for a directed verdict, the trial court took a short recess, after which the court informed the parties it would grant the motion. The court directed counsel for appellees to submit an entry. Although the court did not dictate the basis for its decision into the record, the judgment entry stated that:

"The court, having considered this motion, as well as the opening statement of [appellants], and construing said opening statement liberally in favor of [appellants], finds that the facts described in [appellants'] opening statement as those which [appellants] expected to prove at trial, even when taken as true, do not set forth the elements necessary to establish a cause of action in that [appellants'] opening statement failed to describe facts which, if resolved in [appellants'] favor, would establish negligence on the part of [appellees] and a proximate causal relationship between any said negligence and [appellant's] acci-

dent."

[5] Although Civ.R. 50(E) provides that the trial court shall state the basis for its decision to direct a verdict, the party against whom the motion is granted waives his right to protest the absence of this requirement by failing to timely raise the error to the trial court. *Darcy v. Bender* (1980), 68 Ohio App.2d 190, 192, 22 O.O.3d 285, 286, 428 N.E.2d 156, 157. Appellants did not timely object to the court's basis as set forth in the judgment entry. If further explanation was required, it was incumbent upon appellants to request such from the trial court. *Grange Mut. Cas. Co. v. Fleming* (1982), 8 Ohio App.3d 164, 8 OBR 223, 456 N.E.2d 816. Even so, the trial court's basis as set forth in the judgment entry is minimally sufficient to meet the requirements of Civ.R. 50(E). See *id.*

[6] Appellants' third issue claims that the trial court erred by not permitting them to amend their opening statement in order to sufficiently set forth a cause of action and overcome appellees' motion for a directed verdict. We have reviewed the record and find that appellants neither moved to amend their opening statement nor sought to otherwise supplement the facts presented therein. It is well established that errors in the trial court which could have been brought to the trial court's attention but were not are waived and cannot be raised for the first time on appeal. *Funk v. Hancock* (1985), 26 Ohio App.3d 107, 109, 26 OBR 317, 319, 498 N.E.2d 490, 492; *165 *Standifer v. Arwood* (1984), 17 Ohio App.3d 241, 245, 17 OBR 508, 512, 479 N.E.2d 304, 309. Having failed to seek an amendment of their opening statement at the trial court level, appellants cannot raise the issue for the first time on appeal.

**1051 We find no merit in any of appellants' arguments. Accordingly, the assignments of error are overruled and the judgment of the trial court is affirmed.

Judgment affirmed.

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WILLIAM W. YOUNG, J., concurs.
 KOEHLER, J., dissents.

KOEHLER, Judge, dissenting.

In this cause, the majority affirms the trial court's abrogation of appellants' right to a jury trial, a right which, by the Constitution of the state of Ohio and the Civil Rules, is declared to be inviolate.

Civ.R. 50 varies from traditional Ohio practice only in slight detail (see Staff Note). However, Ohio differs from other jurisdictions in that it allows a directed verdict before any evidence is adduced. Compare Ohio Civ.R. 50(A) and Fed.R.Civ.P. 50(a). Directing a verdict for one party at the close of opposing counsel's opening statement is a permissible procedural technique to promote judicial economy and to terminate unnecessary litigation. Nevertheless, as the majority observes, in doing so the trial court should exercise great caution. Appellants' right to a fair trial is paramount.

In modern practice, the defending party has many opportunities to attack the viability of the asserted cause of action in a motion to dismiss or a motion for summary judgment. To withdraw the case from the jury because of the insufficiency of counsel's opening statement I believe is error. Even though in this cause the facts could and should have been presented with more exactitude and the statement might have been more direct and explicit, the cause of action asserted was readily perceived even by the majority and the opposing party was not prejudiced in any manner.

For reasons which follow, I believe the trial court abused its discretion and that the judgment entered was contrary to law.

Initially and most important, my review of the record in this cause and of the majority opinion reveals that neither the trial court nor this court gave any consideration to the pleadings. Appellants' first amended complaint appears wholly sufficient to

support the two causes of action. Whether my evaluation of the complaint is proper does not matter. The failure of the trial court to consider the pleadings in ruling on the motion for directed verdict on opening statement constitutes error and requires the judgment below to be reversed and the cause remanded.

*166 The majority cites the most recent Supreme Court decision on the issue before us for the proposition that directed verdicts on opening statements of counsel will be upheld when appropriate, *Mitchell v. Cleveland Elec. Illum. Co.*, *supra*. Although Justice Wright did not specifically address the issue in his opinion, he clearly indicates that the opening statement and the complaint must be considered in the determination of a justifiable cause. See, also, *Archer v. Port Clinton* (1966), 6 Ohio St.2d 74, 76, 35 O.O.2d 88, 90, 215 N.E.2d 707, 709 (a motion for directed verdict after the opening statement "raises a question of law on the facts presented by that statement and the petition, all of which must be conceded"). Accordingly, I believe that this error should be raised *sua sponte* and the parties should be required to brief and argue the issue. See 89 Ohio Jurisprudence 3d (1989) 268, Trial, Section 222, and the authorities cited therein.

Second, the majority, in its analysis of the opening statement, concludes that the "evidence" presented fails to support the cause of action for negligence. I disagree with this conclusion. Even if the pleadings were not to be considered, I believe the opening statement, construed most favorably to appellants, would allow reasonable minds to anticipate that appellants would introduce evidence to support a negligence action.

Third, in my view, the trial court's final judgment entry fails to comply with the mandatory language of Civ.R. 50(E). It affords neither counsel below nor this court with the basis for the court's ruling. The majority finds the judgment entry in this cause to be "minimally sufficient" to meet the requirements of Civ.R. 50(E). **1052 Had the same standard of review been applied to the opening

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statement, it too would have been minimally sufficient to withstand a motion for directed verdict.

Finally, the trial court afforded appellants' counsel no opportunity to amend or modify his opening statement and the rules provide no basis for further inquiry of the court's rationale. In this circumstance, I find no authority set forth for the proposition which the majority relies upon-if not raised or requested, the remedy is waived. To the contrary, because counsel may inadvertently overlook some important facts that the plaintiff will have the burden of establishing, " 'he should be given a full and fair opportunity to explain and qualify his statement and make such additions thereto as, in his opinion, the proofs at his command will establish.' " *Crowe v. Hoffman, supra*, 13 Ohio App.3d at 256, 13 OBR at 319, 468 N.E.2d at 1122, quoting *Cornell v. Morrison* (1912), 87 Ohio St. 215, 222-223, 100 N.E. 817, 819.

Since I would raise the principal and controlling issue *sua sponte* and find the assigned error to have merit, I dissent.

Ohio App. 12 Dist., 1991.
Campbell v. Pritchard
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Court of Appeals of Ohio,
Eleventh District, Trumbull County.

LIPPY, Appellant,
v.
SOCIETY NATIONAL BANK et al., Appellees.

No. 92-T-4725.
Decided Jan. 17, 1995.

Purchaser of property found to have soil, surface and ground water contamination brought suit on behalf of himself and his partnership against lender and consultant hired to perform environmental assessment of the property. The Trumbull County Court of Common Pleas granted defendants' motion for directed verdict after plaintiff's opening statement, and plaintiff appealed. The Court of Appeals, 88 Ohio App.3d 33, 623 N.E.2d 108, affirmed in part, reversed in part, and remanded. On reconsideration, the Court of Appeals, Mahoney, J., held that: (1) plaintiff's opening statements stated claim of negligence against lender; (2) plaintiff, in his individual capacity, sufficiently stated breach of contract claim against consultant for recovery of economic losses suffered as result of consultant's alleged negligence; and (3) partnership had no cause of action in tort for economic losses suffered as result of any alleged breach of contract between plaintiff and consultant.

Affirmed in part, reversed in part and remanded.

Christley, P.J., filed dissenting opinion.

West Headnotes

[1] Trial 388 ↪109

388 Trial
388V Arguments and Conduct of Counsel
388k109 k. Scope and Effect of Opening

Statement. Most Cited Cases

Trial court should exercise caution in sustaining motion for directed verdict on opening statement of counsel. Rules Civ.Proc., Rule 50(A)(1).

[2] Trial 388 ↪109

388 Trial
388V Arguments and Conduct of Counsel
388k109 k. Scope and Effect of Opening Statement. Most Cited Cases

To sustain motion for directed verdict on opening statement of opposing counsel, it must be clear that all facts expected to be proved, and those that have been stated, do not constitute cause of action or a defense, and statement must be liberally construed in favor of party against whom motion has been made. Rules Civ.Proc., Rule 50(A)(1).

[3] Fraud 184 ↪7

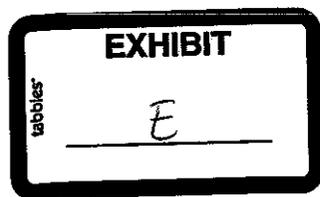
184 Fraud
184I Deception Constituting Fraud, and Liability Therefor
184k5 Elements of Constructive Fraud
184k7 k. Fiduciary or Confidential Relations. Most Cited Cases

Mere debtor-creditor relationship without more does not create fiduciary relationship.

[4] Trial 388 ↪109

388 Trial
388V Arguments and Conduct of Counsel
388k109 k. Scope and Effect of Opening Statement. Most Cited Cases

Borrower's opening statement stated claim of negligence against lender in recommending consultant to perform environmental site assessment for property being financed; opening statement set forth expected evidence which would prove that informal relationship arose between borrower and lender and that both parties understood a special confidence or trust was reposed thereon.



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 100 Ohio App.3d 37, 651 N.E.2d 1364
 (Cite as: 100 Ohio App.3d 37, 651 N.E.2d 1364)

[5] Trial 388 ↪ 109

388 Trial

388V Arguments and Conduct of Counsel

388k109 k. Scope and Effect of Opening Statement. Most Cited Cases

Borrower's opening statement stated claim of negligent misrepresentation against lender in recommending asbestos consultant to perform general environmental site assessment for property being financed; opening statement set forth expected evidence which would prove that lender misrepresented consultant's qualifications to perform general assessment, that lender failed to exercise reasonable care in determining whether consultant was experienced or qualified, and that borrower justifiably relied on representation. Restatement (Second) of Torts § 552.

[6] Contracts 95 ↪ 186(1)

95 Contracts

95II Construction and Operation

95II(B) Parties

95k185 Rights Acquired by Third Persons

95k186 Privity of Contract in General

95k186(1) k. In General. Most

Cited Cases

Where partner entered into agreement with consultant to perform environmental site assessment before formation of partnership, partnership had no cause of action in tort for economic losses suffered as result of a breach of that contract, absent privity of contract between partnership and consultant or nexus that could serve as substitute for contractual privity; consultant did not exercise any direct control or supervision over partnership, nor was there any agency relationship.

[7] Contracts 95 ↪ 186(1)

95 Contracts

95II Construction and Operation

95II(B) Parties

95k185 Rights Acquired by Third Persons

95k186 Privity of Contract in General

95k186(1) k. In General. Most Cited Cases

Any successive relationship of partnership to property for which partner had hired consultant to conduct environmental assessment before formation of partnership did not create privity of contract between partnership and consultant as required for partnership to assert cause of action in tort for economic losses suffered as result of any alleged breach of contract.

[8] Contracts 95 ↪ 324(1)

95 Contracts

95VI Actions for Breach

95k324 Nature and Form of Remedy

95k324(1) k. In General. Most Cited Cases

Any duty owed to land purchaser by consultant hired to perform environmental site assessment of property was one owed under contract with consultant, and thus purchaser's remedy against consultant for economic losses was action for breach of contract.

****1365 *39** James E. Burns and Edward F. Siegel, Shaker Heights, for appellant.

Walt Linscott and Michael A. Cyphert, Cleveland, Robert S. Fulton, Youngstown, for appellee Society Nat. Bank.

Richard P. McLaughlin and Robert J. Herberger, Youngstown, for appellee Universal Asbestos Management.

JOSEPH E. MAHONEY, Judge.

Plaintiff-appellant, Stephen R. Lippy, appeals from the trial court's judgment granting the directed verdict motions of defendants-appellees, Society National Bank ("Society") and Universal Asbestos Management, Inc. ("UAM"), made after appellant's opening statement. Having found merit to appellant's appeal, we reverse.

On September 19, 1991, appellant Lippy, on

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behalf of himself and on behalf of North Mar Center V ("North Mar"), an Ohio general partnership, filed a two-count complaint sounding in negligence against Society and UAM.

*40 The facts set forth in the complaint are as follows: Lippy contacted Society to finance the purchase of the Unirental property (an old, run down, abandoned gas station which a company was using to rent tools and equipment). Society conditioned its financing on an appraisal and an environmental site assessment.

Society gave appellant the names of two appraisers it used and the name of UAM to do the environmental site assessment. Society contacted UAM which, in turn, contacted appellant. UAM's experience was limited to asbestos abatement, and it had no previous experience in the type of environmental site assessment appellant needed. Nevertheless, appellant and the seller entered into a contract with UAM to perform the site assessment. UAM performed the assessment and issued its report wherein it concluded that "there are no environmental hazards present, and that at this time there are no problems with the underground fuel tanks" at the Unirental property. Society financed the purchase of the property. Subsequently, when the underground storage tanks were removed, extensive soil, surface and groundwater contamination was found.

In count one of the complaint, appellant alleged Society was negligent in its acts and omissions in conducting the financial arrangements for the purchase of the Unirental property, and its negligence proximately caused injury to appellant Lippy and North Mar. Appellant alleged that, by conditioning loan approval upon an environmental site assessment performed by UAM, Society caused appellant to rely on an unqualified environmental consultant's opinion and evaluation, which evaluation was the proximate cause of appellant's injury. Appellant further**1366 alleged Society owed a duty of care toward appellant in recommending a competent environmental consultant and breached that duty in

failing to use reasonable care in endorsing UAM for the site assessment of the Unirental property.

In count two of the complaint, appellant alleged that UAM was negligent in performing the environmental site assessment of the Unirental property.

Under both counts, the alleged damages suffered included remediation costs, economic loss, revenue loss, and loss of profits or impairment of earning capacity.

On June 4, 1992, the case proceeded to trial. At the conclusion of appellant's opening statement, appellees, respectively, moved for a directed verdict on the opening statement.

On June 15, 1992, the trial court filed its judgment entry, including opinion and findings, granting appellees' motions for a directed verdict.

Appellant filed a timely appeal. In a judgment entry dated May 24, 1993, this court reversed the trial court's judgment granting Society's motion for directed verdict, but affirmed the trial court's granting of UAM's motion for directed verdict. *Lippy v. Soc. Natl. Bank* (1993), 88 Ohio App.3d 33, 623 N.E.2d 108.

*41 On June 2, 1993, appellant filed a motion for reconsideration, arguing that this court erred in determining that appellant had failed to raise a claim of negligence based on Restatement of the Law 2d, Torts (1977) 126, Section 552, in the trial court and, thus, waived this argument. Appellant also argued that this court failed to fully consider the issue of whether there existed a nexus between North Mar and UAM that could serve as a substitute for privity and, thus, entitle North Mar to bring a cause of action in tort for economic damages suffered as a result of a breach of contract.

On June 3, 1993, Society also filed a motion for reconsideration requesting the dismissal of appellant's claims against Society.

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On June 24, 1994, this court granted appellant's motion for reconsideration on both issues, denied Society's motion for reconsideration, and vacated its opinion and judgment pronounced in *Lippy v. Soc. Natl. Bank* (1993), 88 Ohio App.3d 33, 623 N.E.2d 108.

Appellant now presents two assignments of error.

Under the first assignment of error, appellant argues that the trial court erred in granting Society's motion for a directed verdict on appellant's opening statement.

[1][2] A motion for a directed verdict is governed by Civ.R. 50. It is evident that a motion for a directed verdict may be made on the opening statement of opposing counsel, Civ.R. 50(A)(1); however, a trial court should exercise caution in sustaining such a motion on the opening statement of counsel. *Brinkmoeller v. Wilson* (1975), 41 Ohio St.2d 223, 70 O.O.2d 424, 325 N.E.2d 233. In ruling on a motion for a directed verdict, the court must construe the evidence in favor of the nonmoving party and determine whether reasonable minds could come to but one conclusion on the evidence submitted, that conclusion being adverse to the nonmoving party. Civ.R. 50(A); *Campbell v. Pritchard* (1991), 73 Ohio App.3d 158, 596 N.E.2d 1047, citing *Cox v. Oliver Mach. Co.* (1987), 41 Ohio App.3d 28, 534 N.E.2d 855. Thus, to sustain the motion, "it must be clear that all the facts expected to be proved, and those that have been stated, do not constitute a cause of action or a defense, and the statement must be liberally construed in favor of the party against whom the motion has been made." *Brinkmoeller* at syllabus.

Therefore, the issue to be determined is whether appellant's opening statement failed to state a claim of negligence against Society.

Appellant's opening statement focused on the relationship appellant had with Larry Stofira, an employee of Society, and a conversation appellant

initiated with Stofira in July 1989. The opening statement asserted the following:

*42 When appellant Lippy returned to the Warren area, Stofira cultivated a close business relationship with appellant. Stofira introduced appellant to area builders and helped appellant create a network in the hope that appellant would enter into a deal **1367 which Society could finance. Regarding the conversation of July 1989, appellant's counsel stated as follows:

"Well, in July 1989, Mr. Lippy went to Larry Stofira and said Larry, 'I got a problem. I have got this property. We have put it under contract'-and by the way, it was put under contract for purchase by Stephen R. Lippy Company which is customarily the way a buyer who is acting for somebody else holds up their purchase of the property. So you know, 'I am going to buy it, but someone else is actually going to buy it.'

"You will see the purchase contract that Mr. Lippy went to Mr. Stofira, 'Larry, I got a problem. I have got the money to do this deal. I have got this property identified. We spoke to the sellers. We come up with the price. It's a little high. We can live with the price. I want to know if Society wants to loan some of the money. The other concern I have is that it is a gas station. I don't know about the tanks. We have gone back and forth about how to figure out what the environmental condition of the property is. We don't know what to do. That's holding us up.' Stofira said, 'You need to do two things. You need to get the property appraised. If you want the bank to loan you any money, you need to get the property appraised. This is who you can use for appraisal.' Gave him two companies in the area to do company appraisal. Stephen chose one. Then Mr. Stofira said, 'You need to do an environment site assessment,' or some words like that. He wasn't familiar with the terms at the time, analysis site assessment. 'You need a site assessment.' 'What's that,' said Steve. Mr. Stofira gave a brief explanation of site assessment. Then he said, 'We have got somebody who does it.' He gave him

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the name of Universal Asbestos Management. Stephen said, 'Asbestos?' Mr. Stofira said, 'We worked with them in the past. I will have my guy call you. I will have my guy call you.'

"In the context of this transaction, Stephen came to Stofira and said, 'I have a problem.' Mr. Stofira, in effect, said 'Trust me. I will solve the problem for you,' and Mr. Stofira was good to his word. The next day, that day sometime very soon thereafter, Mr. Lippy got a phone call from Anthony Servone [sic]. Anthony Servone [sic] introduced himself as the friend of Larry Stofira's. 'I understand you need to do a site assessment.' They had a brief conversation.

"Mr. Stofira FAXed Mr. Lippy a proposal. 'This is what we are going to do for you. Mr. Lippy decided that this seemed to be a cost effective means of answering this big problem that was holding up the deal. They told us about the cost. Mr. Servone [sic], a month or so later, six weeks later, sent this report to Mr. Lippy and to the sellers that said he tested the ground water. He tested the *43 soils. 'We looked here. We looked there. We certify that there are no environment at [sic] problems or EPA violations on this property.' Great."

Appellant's counsel further stated that Society subsequently loaned the money based on the appraisal and the site assessment performed by UAM. Thereafter, when the underground storage tanks were being removed, it was discovered that the area was contaminated and required extensive clean up. Appellant's counsel described the problem:

"* * * They wound up having to take up three quarters of the soil on this site, in some places to a depth of twelve feet. This place was dirty. This place reeked. This place was a continuing environmental hazard. They were very surprised at what they found because they had trusted Society to choose somebody. They had trusted UAM to do the survey."

Counsel then explained:

"We are not here because their expectations were not fulfilled. We are not here because they were surprised. People don't get to be compensated simply because unexpected things happen to them. That's not the law. We are here today because Society Bank was negligent. We are here today because UAM was negligent. UAM was not qualified to do this work. UAM didn't even represent to the bank that they were qualified to do this work. UAM said to the bank, 'We are really good at asbestos related problems.' The bank had recently used UAM **1368 just prior to this on a job which had to do with an investigation of asbestos.

"Larry Stofira had no reason to believe UAM was qualified to do this work. Larry Stofira had no business telling Stephen Lippy he had to use UAM to do this work or to solve this particular problem he had. It was negligent of Larry Stofira to so choose this contractor for this vital job, and they knew that Mr. Lippy and his partners were going to rely on the information generated from this in order to know whether or not to buy the property."

Based on the foregoing opening statement, the trial court determined Society was entitled to a directed verdict because appellant failed to state a viable cause of action based on the holding of *Umbaugh Pole Bldg. Co. v. Scott* (1979), 58 Ohio St.2d 282, 12 O.O.3d 279, 390 N.E.2d 320. The court recognized that appellant's opening statement should be liberally construed and that caution should be exercised in directing a verdict on the opening statement. However, the court rejected appellant's argument based on *Stone v. Davis* (1981), 66 Ohio St.2d 74, 20 O.O.3d 64, 419 N.E.2d 1094, in that Society owed him a "special duty" because the relationship was one where appellant placed "special trust" in Society relying on Society for advice. The court found *Stone* was not applicable to invoke any *44 kind of "duty" sufficient to give rise to liability on the part of Society and that *Stone* was an exception to the general rule set forth in *Umbaugh*.

Appellant argues that the facts he outlined in his opening statement established a duty and breach

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of that duty by Society. We agree.

In *Umbaugh*, the court set forth the general rule regarding the debtor-creditor relationship at paragraph one of the syllabus:

“The relationship of debtor and creditor without more is not a fiduciary relationship. A fiduciary relationship may be created out of an informal relationship, but this is done only when both parties understand that a special trust or confidence has been reposed.”

[3] Thus, the general rule is that a mere debtor-creditor relationship without more does not create a fiduciary relationship. In *Stone*, the court set forth the exception to the general rule and found that a fiduciary duty existed between a bank and its loan customer where the bank gave advice on the subject of mortgage insurance during the mortgage loan process and, as a fiduciary, the bank was under a duty to disclose to the customer the mechanics of procuring mortgage insurance. In negligently failing to observe this duty, the bank may be found liable for any injury proximately caused to the customer. Citing *In re Termination of Employment* (1974), 40 Ohio St.2d 107, 115, 69 O.O.2d 512, 516, 321 N.E.2d 603, 608-609, the *Stone* court explained when a fiduciary duty arises:

“ ‘A “fiduciary relationship” is one in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust.’ ” *Id.*, 66 Ohio St.2d at 78, 20 O.O.3d at 66, 419 N.E.2d at 1097-1098.

Following its earlier holding in *Umbaugh*, *supra*, the court in *Stone* explained that the fiduciary duty need not arise out of contract but may arise out of an informal relationship where both parties understand that a special trust or confidence has been reposed. Accord *Blon v. Bank One, Akron, N.A.* (1988), 35 Ohio St.3d 98, 519 N.E.2d 363.

[4] Appellant's counsel set forth facts in his

opening statement upon which he expected the evidence would prove that an informal relationship arose between appellant and Society and that both parties understood a special confidence or trust was reposed thereon. The facts allege that appellant came to Society with a problem and Society's agent Stofira, in effect, said, “Trust me. I will solve the problem for you,” and he did. Appellant claimed that Stofira went beyond giving mere business advice that an environmental assessment was necessary and stated, “We have got somebody who does it,” and identified UAM. When appellant questioned about, “Asbestos?” Stofira assured him, “We worked with *45 them in the past,” and then went further. “I will have my guy call you. I will have my guy call you.” The next day Stofira's “guy” called and introduced himself **1369 as the friend of Stofira. These facts allege a special confidence and trust in the fidelity and integrity of Society's agent Stofira, which resulted in a position of superiority or influence acquired by the special trust. Thus, a question of fact, as to whether an informal fiduciary relationship existed, was raised which, if later supported by evidence, would be for the jury's determination.

Appellant argues that even if the court is wary of imposing a fiduciary relationship, Society was under a common-law obligation to be non-negligent in imparting information upon which it knew appellant would rely. In support of this argument, appellant relies on *Haddon View Invest. Co. v. Coopers & Lybrand* (1982), 70 Ohio St.2d 154, 24 O.O.3d 268, 436 N.E.2d 212, wherein the Supreme Court of Ohio recognized negligent misrepresentation as the basis for a cause of action.

In *Haddon View*, the plaintiffs were individual limited partners who detrimentally relied upon an accounting firm's representations made to its client, the limited partnership. The court held “that an accountant may be held liable by a third party for professional negligence when that third party is a member of a limited class whose reliance on the accountant's representation is specifically foreseen.”

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Id. at 157, 24 O.O.3d at 269, 436 N.E.2d at 215. The court also cited with approval 3 Restatement of the Law 2d, Torts (1977) 126, Section 552, which provides in part:

“(1) One who, in the course of his business, * * * supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

“(2) * * * the liability stated in Subsection (1) is limited to loss suffered

“(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

“(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.”

[5] Applying *Haddon View* to the case *sub judice*, appellant's counsel has set forth facts in his opening statement which, if supported by evidence, would state a cause of action for negligent misrepresentation and, thus, withstand Society's motion for a directed verdict. It is undisputed that Society is in the business, *inter alia*, of financing commercial and consumer transactions and that its agent, *46 Stofira, was involved in the transaction with appellant. It is also self-evident that Society had a pecuniary interest in the above transaction. From Stofira's statement, “We have got somebody who does it,” we believe that reasonable minds could infer that Stofira misrepresented that UAM was qualified to conduct the site assessment. Further, given that Society had recently used UAM to conduct an asbestos investigation, reasonable minds could infer that Society failed to exercise reasonable care in determining whether UAM was experienced or qualified to perform a general environmental site assess-

ment. Finally, whether appellant justifiably relied upon Stofira's representations should be left for a jury's determination.

Accordingly, after construing the facts set forth in the opening statement most strongly in favor of appellant, the nonmoving party, we cannot conclude that reasonable minds would come to but one conclusion, and that conclusion is adverse to appellant. Thus, the directed verdict for Society was improper.

The first assignment of error is sustained.

Under the second assignment of error, appellant contends that the directed verdict for UAM was also improper.

On August 14, 1989, UAM entered into an agreement with appellant and the seller of the Unirental property to perform the environmental site assessment on the property. The contract defined the terms and conditions of the assessment. Upon completing the assessment, UAM issued a report to appellant and the seller. Society considered UAM's report in approving appellant's loan.

**1370 Approximately eighteen months after UAM performed the site assessment, North Mar discovered petroleum hydrocarbons on the property during an excavation of the underground storage tanks. Appellant asserted in the opening statement that the “place was a continuing environmental hazard.”

The trial court directed a verdict for UAM based on the following three findings: (1) that there was no tort liability for a breach of contract, (2) that there was no privity of contract between North Mar and UAM, and (3) that appellant failed to state a claim. The court based its findings on *Floor Craft Floor Covering, Inc. v. Parma Community Gen. Hosp. Assn.* (1990), 54 Ohio St.3d 1, 560 N.E.2d 206.

Appellant disputes the trial court's findings. First, appellant argues that privity existed because

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he was an agent acting on behalf of his partners, which is analogous to an agent acting on behalf of an undisclosed principal.

However, there was no partnership formed at the time appellant entered into a contract with UAM. The partnership was not formed until December 1989 and not recorded until January 1990. Furthermore, in his opening statement, appellant's counsel stated:

*47 "Mr. Lippy's partners knew the gas station had potential for the environment problems and *didn't want to get involved in it*. What was Stephen to do? * * * He turned out to a man named Larry Stofira for advice." (Emphasis added.)

From this statement it appears that at the time appellant was seeking help for the potential environmental problems, the alleged partners "didn't want to get involved in it."

Appellant argues that *Floor Craft, supra*, is distinguishable because it involved design professionals and UAM is not a firm of design professionals. We disagree.

In *Floor Craft*, the plaintiff was a contractor that had installed flooring pursuant to a design by the defendant architectural firm. The material subsequently developed bubbles because the specified flooring and sealant were allegedly incompatible with the construction methods used in the project. The court held that since there was no direct contractual agreement between the contractor and the architectural firm, and there was no nexus that can serve as a substitute for contractual privity, the contractor failed to state a cause of action. The court concluded:

"[T]hat recovery for economic loss is strictly a subject for contract negotiation and assignment. Consequently, in the absence of privity of contract no cause of action exists in tort to recover economic damages against design professionals involved in drafting plans and specifications." *Id.*, 54 Ohio

St.3d at 8, 560 N.E.2d at 212.

The court found *Haddon View, supra*, distinguishable on its facts and law, and noted that *Haddon View* only partially withdrew the privity requirement with respect to malpractice actions taken against accountants. *Id.*, 54 Ohio St.3d at 3-4, 560 N.E.2d at 208-209.

[6] We find that although the case *sub judice* does not fit neatly within the confines of *Floor Craft*, it is sufficiently similar to find that there was no privity of contract as to North Mar. There was no direct contractual relationship between North Mar and UAM, nor was there any nexus that could serve as a substitute for contractual privity. UAM did not exercise any direct control or supervision over North Mar, nor was there any agency relationship between the parties. See *Clevecon, Inc. v. Northeast Ohio Regional Sewer Dist.* (1993), 90 Ohio App.3d 215, 628 N.E.2d 143 (holding that an architect's substantial amount of control in a design project was sufficient to raise a question of fact whether there was a nexus between the parties to substitute for privity of contract).

[7] Next, appellant argues that since he was in privity with UAM, North Mar succeeds to the warranties expressed to appellant by UAM. Again, we disagree.

*48 "In its broadest sense, 'privity' is defined as mutual or successive relationships to the same right of property, or such an identification of interest of one person with another as to represent the same legal right." Black's Law Dictionary (6 Ed.Rev.1990) 1199.

**1371 Privity of contract specifically refers to "[t]hat connection or relationship which exists between two or more *contracting parties*." (Emphasis added.) *Id.* Having already determined that there was no contractual connection or relationship between North Mar and UAM, there is no privity of contract despite any successive relationship to the same property. Hence, under *Floor*

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Craft, North Mar does not have a cause of action in tort for economic losses suffered as a result of any alleged breach of contract between appellant and UAM.

[8] However, as to appellant individually, we believe a cause of action in tort for economic losses exists. It is undisputed that appellant was in privity of contract with UAM, and that North Mar holds title to the Unirental property. It is also undisputed that appellant is a partner of North Mar and, as such, appellant is "a co-owner with his partners of specific partnership property holding as a tenant in partnership." R.C. 1775.24(A). Hence, appellant maintains an undivided interest in the Unirental property and any economic loss to that property resulting from the breach of contract with UAM is suffered by appellant. Further, we find that facts set forth in the opening statements of appellant's counsel, if proven, were sufficient to support the negligence action brought by appellant individually against UAM.

Finally, appellant argues that contrary to the trial court's finding, appellant's counsel set forth in his opening statement that there was a "continuing contamination" of the property, which implies that the contamination continued over time, and that this blanket assertion of facts to be proven satisfies his burden to show facts which would support a verdict. While we agree with appellant that he sufficiently stated a negligence claim against UAM, both individually and on behalf of North Mar, appellant's remedy for economic losses is an action for breach of contract, and any duty owed to appellant by UAM was one owed under the contract. To the extent that North Mar has failed to allege a breach of contract claim against UAM, it has failed to state a claim upon which relief can be granted against UAM.

Accordingly, the directed verdict in favor of UAM was proper as to North Mar only.

The second assignment of error is with merit in part.

Based on the foregoing, the trial court's judgment granting a directed verdict in favor of UAM is affirmed as to North Mar and reversed as to appellant Lippy, *49 individually. The trial court's judgment granting a directed verdict in favor of Society is reversed.

This matter is remanded for further proceedings according to law and consistent with this opinion.

Judgment accordingly.

NADER, J., concurs.
 CHRISTLEY, P.J., dissents.

CHRISTLEY, Presiding Judge, dissenting.

I again respectfully dissent from the majority opinion in reference to the first assignment regarding the liability of Society Bank. One, I find *Um- baugh Pole Bldg. Co. v. Scott* (1979), 58 Ohio St.2d 282, 12 O.O.3d 279, 390 N.E.2d 320, to be right on point. The trial judge was correct in finding that, as a matter of law, there were no facts put forth in the opening statement which created a "specific duty" and, thus, transformed the contemplated debtor/ creditor relationship between the bank and Lippy into a fiduciary relationship.

As is pointed out in *Umbaugh*, the mere "rendering of advice by the creditor to the debtors does not transform the business relationship into a fiduciary relationship." *Id.* at 287, 12 O.O.3d at 282, 390 N.E.2d at 323. I note, also, that just as in *Umbaugh*, there was no property or interest of the appellant entrusted to the bank; there was no continuing relationship with the bank contingent upon following this advice; there was nothing to indicate that this was anything but an arm's-length transaction being contemplated and negotiated between an experienced business person and the bank. The sole basis for the claim was the bank's good-faith suggestion of a candidate to perform the environmental site assessment.

**1372 As was more recently expressed by the

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First District Court of Appeals,^{FN1} there was "nothing in the circumstances as disclosed by the record that changed the relationship between the plaintiffs and Wilson from the standard one between mortgagor and servicing agent * * * into a fiduciary relationship. Certainly there was no mutual understanding that plaintiffs reposed a special confidence in Wilson or Northwestern, and we find no circumstances that would impose fiduciary duties as a matter of law."

FN1. *Warren v. Percy Wilson Mtge. & Fin. Corp.* (1984), 15 Ohio App.3d 48, 51, 15 OBR 76, 79, 472 N.E.2d 364, 367.

*50 The majority relies heavily on *Haddon View* as being supportive of the theory that a special duty existed on Society's part. However, the facts in *Haddon View* are that the plaintiffs there were limited partners in a partnership which was *already* a client of the accounting firm. The issue of plaintiffs' standing in *Haddon View* was answered affirmatively even though there was no direct privity of contract between the accounting firm and the individual limited partners; the court found that it was reasonably foreseeable that the limited partners would rely upon the accounting work done for the partnership itself.

In the instant case, the plaintiffs were, at best, *prospective* clients and no contract had been entered into by the bank with *anyone* relative to the sale. Further, the professional advice given in *Haddon View* was directly related to the business of the defendant, *i.e.*, accounting, while here, the advice was not about banking or financing, but rather about an entirely collateral matter—who could conduct an environmental site assessment? *Haddon View* was essentially a professional malpractice case, the instant case is not.

It is also arguable that even if a special duty and a subsequent fiduciary relationship could somehow be contrived, the mere offering of bad advice by the bank on a matter collateral to the loan approval would not rise to the level of negligence.

Taking on the role of a fiduciary does not make one a guarantor or insurer unless mandated by statute; instead, the fiduciary is required only to exercise the care and prudence of an ordinary man. See *Freeman v. Norwalk Cemetery Assn.* (1950), 88 Ohio App. 446, 45 O.O. 231, 100 N.E.2d 267, paragraph three of the syllabus.

In a situation where a fiduciary relationship is created by the facts of the relationship rather than by statute, *some act of negligence* must be established in order to create liability. What negligence has been shown here? The facts are that the bank had previously dealt successfully with UAM. Where is it shown that the bank should have foreseen that UAM would subsequently prove to be incompetent?

The majority's reliance on *Stone v. Davis* (1981), 66 Ohio St.2d 74, 20 O.O.3d 64, 419 N.E.2d 1094, is also misplaced. There, a *residential* loan was at issue. I see that as a significant distinction from the instant case where a commercial transaction was contemplated.

Further, the *Stone* court itself pointed out that "while a bank and its customer may be said to stand at arm's length in negotiating the *terms and conditions* of a mortgage loan, it is unrealistic to believe that this *equality of position* carries over into the area of loan processing * * *." (Emphasis added.) *Id.* at 78-79, 20 O.O.3d at 67, 419 N.E.2d at 1098.

*51 In the instant case, appellant and the bank officer were engaged in *preliminary* negotiations concerning the procurement of a commercial loan. Nothing more was at issue. Even the *Stone* court recognizes an "equality of position" under these circumstances. The bank's recommendation of the use of UAM was not, even by the most liberal reading of the opening statement, a "term" or "condition" much less part of any subsequent "loan processing." Further, it was not even a negotiated issue. Read in context, it was clearly a suggestion, nothing more.

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In addition, in *Stone*, the facts indicated that the federal truth-in-lending regulations involving the "duty of disclosure" created the "special duty" owed to a customer seeking mortgage insurance. No such statutory obligation existed in the instant case.

Nevertheless, there is no need to reach any conclusion as to negligence because there were no indications of record that this **1373 was other than an arm's-length commercial debtor-creditor negotiating session; there was no allegation that Lippy could only deal with Society, or that other dealings with Society were contingent upon placing this loan with Society, or that Society required him to deal with UAM as a condition of the deal. Even if Lippy may have thought so, there is nothing of record demonstrating the existence of any *mutual* understanding with Society which engendered this special trust or confidence, or that it was reasonable of Lippy to read a fiduciary relationship into his prospective dealing with Society. This was at most a classic example of networking, "I know a guy who * * *."

To impose such an interpretation on the facts outlined in appellant's opening statement, in essence, would change the established law regarding the presumed *nonfiduciary* relationship which currently exists between banks and their prospective and current commercial borrowers. This is particularly so when the advice given does not even reference banking or financial matters.

Therefore, I would find that as a matter of law, there were no facts which would have created a fiduciary relationship out of the prospective debtor-creditor relationship put forth in appellant's opening statement. I would, therefore, affirm the trial court on the first assignment.

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(Cite as: 13 Ohio App.3d 254, 468 N.E.2d 1120)



Court of Appeals of Ohio, Sixth District, Sandusky County.

CROWE et al., Appellants,
v.
HOFFMAN et al., Appellees.

April 1, 1983.

Pedestrian, who was injured when she tripped and fell on a public sidewalk, brought action against owners of property abutting the sidewalk. The Court of Common Pleas, Sandusky County, granted property owners' motion for directed verdict after pedestrian's counsel's opening statement, and pedestrian appealed. The Court of Appeals, Handwork, J., held that allegations in complaint and opening statement failed to state a cause of action upon which relief could be granted.

Judgment affirmed.

West Headnotes

[1] Municipal Corporations 268 ↪808(2)

268 Municipal Corporations
268XII Torts
268XII(C) Defects or Obstructions in Streets and Other Public Ways
268k808 Liabilities of Abutting Owners
268k808(2) k. Obstructions on sidewalk or driveway. Most Cited Cases

An owner of property abutting a public sidewalk is not liable to a pedestrian for injuries proximately caused by a defective or dangerous condition therein unless a statute or ordinance imposes on such owner a specific duty to keep the sidewalk adjoining his property in good repair, by affirmative acts such owner creates or negligently maintains the defective or dangerous condition, or the owner negligently permits the defective or dangerous condition to exist for some private use or benefit.

[2] Municipal Corporations 268 ↪816(2)

268 Municipal Corporations
268XII Torts
268XII(C) Defects or Obstructions in Streets and Other Public Ways
268k810 Actions for Injuries
268k816 Pleading
268k816(2) k. Allegations as to duty and liability of defendant in general. Most Cited Cases

Allegations that owners of property abutting a public sidewalk were liable to plaintiff pedestrian for injuries she sustained when she tripped and fell on the sidewalk failed to state a cause of action upon which relief could be granted.

[3] Trial 388 ↪109

388 Trial
388V Arguments and Conduct of Counsel
388k109 k. Scope and effect of opening statement. Most Cited Cases

Directing a verdict for one party at close of opposing counsel's opening statement is a proper procedural technique for ensuring judicial economy and terminating unnecessary litigation; by such motion moving party admits, for purpose of the motion, truth of facts contained in counsel's opening statement, as if an agreed statement of facts had been submitted and, before granting such motion, trial court must construe all facts set forth in counsel's opening statement and all reasonable inferences therefrom most strongly in favor of party against whom the motion is made, must exercise great caution in granting such motion, and must afford counsel a reasonable opportunity to supplement his statement by qualifying or explaining any additional facts he expects the evidence to establish.

***1120 Syllabus by the Court*

***254** 1. An owner of property abutting a public sidewalk is not liable to a pedestrian for injuries



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proximately caused by a defective or dangerous condition therein unless:

(a) a statute or ordinance imposes on such owner a specific duty to keep the sidewalk adjoining his property in good repair;

(b) by affirmative acts such owner creates or negligently maintains the defective or dangerous condition; or,

(c) such owner negligently permits the defective or dangerous condition to exist for some private use or benefit.

2. Directing a verdict for one party at the close of opposing counsel's opening statement is a proper procedural technique for ensuring judicial economy and terminating unnecessary litigation. By such motion the moving party admits, for the purpose of the motion, the truth of the facts contained in counsel's opening statement, as if an agreed statement of facts had been submitted. Before granting such motion, the trial court must construe all the facts set forth in counsel's opening statement, and all reasonable inferences therefrom, most strongly in favor of the party against whom the motion is made. The trial court must exercise great caution in granting such a motion and counsel should be afforded a reasonable opportunity to supplement his statement by qualifying or explaining**1121 any additional facts he expects the evidence to establish. Tommie L. Allen, Toledo, for appellants.

Alexander Hyzer, IV, Fremont, for appellees.

HANDWORK, Judge.

This case is before the court on appeal from the Sandusky County Court of Common Pleas. Said court granted appellees' motion for directed verdict after appellants' opening statement. Judgment on the directed verdict *255 was entered by the court on November 26, 1982, in which the court dismissed appellants' complaint for failure to state a cause of action upon which relief might be granted. The court stated, in part:

"On consideration of * * * [appellees'] motion for a directed verdict on the opening statement of [appellants'] counsel, and the court having given [appellants'] counsel ample opportunity to amend and amplify his opening statement, the court is satisfied that [the opening statements], when given an interpretation most favorable to [appellants], are insufficient to entitle [appellants] to recover on any theory of the law when applied to the facts so stated."

From said judgment, appellants have brought this appeal. Appellants urge our review of three "issues." FN1 These "issues" are as follows:

FN1. While a separate statement of the "issues" presented for review is appropriate in clarifying the posture of the case on appeal, see App.R. 16(A)(3), the proper form for presenting *assignments of error* is to designate them separately as such. See App.R. 16(A)(2). However, for the purpose of this appeal, we will treat appellants' "issues" as stating assignments of error.

"Issue No. 1:

"The trial court erred [*sic*] when it found that plaintiffs-appellants had failed to state a claim upon which relief could be granted.

"Issue No. 2:

"The trial court erred [*sic*] when it ruled the city of Fremont was a necessary party.

"Issue No. 3:

"The trial court erred [*sic*] when it ruled plaintiff failed to state a prima facie case on his opening statement."

We find no merit in any of appellants' "issues."

Appellants' complaint, in essence, alleges that plaintiff-appellant Janene Crowe was walking along the sidewalk abutting the property of defendants-ap-

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pellees, John E. and Kathryn S. Hoffman. The complaint further alleges that appellant Janene Crowe tripped and fell, sustaining injuries as a result, and that appellees were under a duty to keep the sidewalk abutting their property in good repair. A defect in said sidewalk, consisting of an elevation above the adjacent section in excess of two inches, was asserted to have proximately caused these injuries.

Although, in his opening statement, appellants' counsel did, to some degree, "flesh out" the contents of the complaint, the essential allegation remained the same, to wit: appellant Janene Crowe's injuries were proximately caused by a defect in the sidewalk, which appellees were under a legal duty to keep in good repair, but negligently failed to do so. A review of counsel's opening statement reveals that even if all the facts asserted therein were proven by the requisite degree of competent evidence, no issue would be presented for the jury to resolve under the law applicable to such facts.

[1] As applied to the facts *sub judice*, the law is clear. An owner of property abutting a public sidewalk is not, generally, liable for injuries sustained by a pedestrian thereon. *Eichorn v. Lustig's, Inc.* (1954), 161 Ohio St. 11, 117 N.E.2d 436 [52 O.O. 467]; *Purdom v. Sapadin* (1960), 111 Ohio App. 488, 168 N.E.2d 558 [15 O.O.2d 185]; *Bertram v. Kroger Co.* (App.1955), 135 N.E.2d 681, 72 Ohio Law Abs. 398, 401; *McCarthy v. Adams* (1932), 42 Ohio App. 455, 182 N.E. 324. To this general rule, there are three exceptions. First, when a **1122 pedestrian sustains injuries under such circumstances, the abutting property owner will be liable if a statute or ordinance imposes upon him a specific duty to keep the sidewalk adjoining his property in good repair. *Dennison v. Buckeye Parking Corp.* (1953), 94 Ohio App. 379, 115 N.E.2d 187 [52 O.O. 38]; *Thompson v. Parmly* (App.1948), 86 N.E.2d 627, 54 Ohio Law Abs. 25; *McCarthy v. Adams, supra*. Second, the property *256 owner will be liable if by *affirmative acts* he created or negligently maintained the defective or dangerous

condition causing the injury. *Eichorn v. Lustig's, Inc., supra*; *Bertram v. Kroger Co., supra*; *Cavanaugh v. Struthers Bowling Ctr.* (1954), 99 Ohio App. 530, 135 N.E.2d 283 [59 O.O. 424]; *McCarthy v. Adams, supra*. Third, the property owner will incur liability if he negligently permitted the defective or dangerous condition to exist for some private use or benefit. *Eichorn v. Lustig's, Inc., supra*; *Cavanaugh v. Struthers Bowling Ctr., supra*; *Thompson v. Parmly, supra*.

[2] None of the foregoing exceptions appears in the pleadings as allegations of fact, nor do they appear in counsel's opening statement as assertions to be proved by competent evidence. In short, in light of prevailing case law, appellants' complaint and counsel's opening statement demonstrate no cause of action upon which relief can be granted.^{FN2}

FN2. By the authority of R.C. 723.011, the city of Fremont enacted Section 521.06(A) of the Fremont Municipal Ordinances. Section 521.06(A) states, in pertinent part:

"No owner of any lot or land abutting upon any street shall refuse, fail or neglect to repair or keep in repair and free from nuisance and obstruction, the sidewalk in front of such lot or land after due notice of a resolution of [city] council ordering the repair of such sidewalk [...] * * * If the owner or person having charge of such land fails to comply with such notice, council shall cause the sidewalks to be repaired." (Emphasis added.)

Thus, in addition to pleading and proving that appellees were under a statutorily imposed duty to repair the defect in the sidewalk abutting their property, appellants would also have to plead and prove the following: (1) that the Fremont City Council passed a resolution specifically ordering appellees to repair the sidewalk; (2) that appellees had notice of said resolution; and, (3) that appellees

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refused or otherwise failed to obey such a resolution.

[3] Directing a verdict for the defendant at the close of the plaintiff's opening statement is a well-established procedural technique. See *Brinkmoeller v. Wilson* (1975), 41 Ohio St.2d 223, 325 N.E.2d 233 [70 O.O.2d 424]; *Archer v. Port Clinton* (1966), 6 Ohio St.2d 74, 76, 215 N.E.2d 707 [35 O.O.2d 88]; *Cornell v. Morrison* (1912), 87 Ohio St. 215, 100 N.E. 817. The propriety of and policy behind this procedure stems from a desire for judicial economy. The Ohio Supreme Court first discussed this procedure in *Cornell v. Morrison*, *supra*, at pages 222-223, 100 N.E. 817, stating:

"While it is certainly true that a court should exercise great caution in summarily disposing of a case upon the statement of counsel, yet that it has the right and authority to do so in a proper case, cannot be doubted. Otherwise the time of the court and jury would be wasted to no purpose, for the result, if the evidence were introduced, must necessarily be the same. It is perhaps true that counsel, in stating his case, may inadvertently overlook some important facts that he is required to establish by the evidence, and for that reason, after the sufficiency of his statement has been challenged, he should then be given full and fair opportunity to explain and qualify his statement and make such additions thereto as, in his opinion, the proofs at his command will establish. But when counsel has covered in detail all of the matters and things he proposes to offer in support of the essential * * * [allegations of his complaint], and he has been given such opportunity to explain and qualify his statement and make any proper additions thereto, and it still appears that such facts, if established by the evidence, would not sustain the [allegations] and would not authorize verdict and judgment in favor of the plaintiff, it is not only the right but the duty of the court to act and prevent the unnecessary delay of a long and tedious trial and the waste of the time of the court and jury, that should be given to other litigation. *Such a motion on the part of*

***1123 the defendant is an admission, for the purposes of the motion, that the facts proposed to be proven by plaintiff are true, and, therefore, it is in substance *257 and effect, for the purposes of the motion, an agreed statement of facts.*" (Emphasis added.) See, also, *Vest v. Kramer* (1952), 158 Ohio St. 78, 107 N.E.2d 105 [48 O.O. 38], paragraph two of the syllabus.

Construing counsel's opening statement as an agreed statement of facts, it is apparent that the trial court properly directed a verdict in favor of appellees. The question of law raised necessarily had to be resolved in appellees' favor, given those facts. Consequently, treating appellants' "issues" as setting forth assignments of error, we find that the same are not well-taken for the reasons herein discussed.

On consideration whereof, the judgment of the Sandusky County Court of Common Pleas is hereby affirmed.

Costs assessed against appellants.

Judgment affirmed.

CONNORS, P.J., and DOUGLAS, J., concur.

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H
Court of Appeals of Ohio,
Ninth District, Summit County.
UNITED STATES AVIATION UNDER-
WRITERS, INC., Appellant and Cross-Appellee,
v.
B.F. GOODRICH COMPANY, Appellee and
Cross-Appellant.

No. 20873.
Decided Oct. 9, 2002.

Insurer for airline, whose aircraft crashed due to ice buildup on wings and killed all on board, brought products liability action against manufacturer of de-icing equipment installed on aircraft, seeking contribution and indemnification after settling claims with victims' families. The Court of Common Pleas, Summit County, entered directed verdict in favor of manufacturer on design-defect claims and judgment on jury verdict in favor of manufacturer on claims of improper instruction. Insurer appealed. The Court of Appeals, Baird, J., held that: (1) fact that de-icing equipment was not in use and was not activated prior to crash precluded finding of causation; (2) any error in allowing manufacturer's opening argument was harmless; and (3) insurer did not satisfy its burden of demonstrating error on evidentiary rulings.

Affirmed.

West Headnotes

[1] Appeal and Error 30 ↪ 893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo
30k892 Trial De Novo
30k893 Cases Triable in Appellate
Court
30k893(1) k. In general. Most Cited
Cases

The Court of Appeals reviews a trial court's ruling on a motion for directed verdict de novo because it presents the court with a question of law. Rules Civ.Proc., Rule 50(A)(4).

[2] Trial 388 ↪ 139.1(3)

388 Trial
388VI Taking Case or Question from Jury
388VI(A) Questions of Law or of Fact in
General
388k139.1 Evidence
388k139.1(1) Province of Court and
Jury
388k139.1(3) k. Weight of evidence. Most Cited Cases

Trial 388 ↪ 140(1)

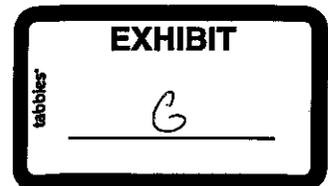
388 Trial
388VI Taking Case or Question from Jury
388VI(A) Questions of Law or of Fact in
General
388k140 Credibility of Witnesses
388k140(1) k. In general. Most Cited
Cases

Trial 388 ↪ 168

388 Trial
388VI Taking Case or Question from Jury
388VI(D) Direction of Verdict
388k167 Nature and Grounds
388k168 k. In general. Most Cited
A motion for directed verdict tests the sufficiency of the evidence, not the weight of the evidence or the credibility of witnesses. Rules Civ.Proc., Rule 50(A)(4).

[3] Trial 388 ↪ 139.1(7)

388 Trial
388VI Taking Case or Question from Jury
388VI(A) Questions of Law or of Fact in



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General

388k139.1 Evidence
 388k139.1(5) Submission to or Withdrawal from Jury
 388k139.1(7) k. "No" evidence; total failure of proof. Most Cited Cases

Trial 388 ↪ 139.1(9)

388 Trial

388VI Taking Case or Question from Jury
 388VI(A) Questions of Law or of Fact in General

388k139.1 Evidence
 388k139.1(5) Submission to or Withdrawal from Jury
 388k139.1(9) k. Substantial evidence. Most Cited Cases

Where there is substantial evidence upon which reasonable minds may reach different conclusions, a motion for directed verdict must be denied; however, when the party opposing the motion for directed verdict has failed to produce any evidence on one or more of the essential elements of a claim, a directed verdict is appropriate. Rules Civ.Proc., Rule 50(A)(4).

[4] Trial 388 ↪ 109

388 Trial

388V Arguments and Conduct of Counsel
 388k109 k. Scope and effect of opening statement. Most Cited Cases

When a party moves for a directed verdict on the opening statement of counsel, the trial court should exercise great caution in sustaining the motion; it must be clear that all the facts expected to be proved, and those that have been stated, do not constitute a cause of action or a defense, and the statement must be liberally construed in favor of the party against whom the motion has been made. Rules Civ.Proc., Rule 50(A)(4).

[5] Trial 388 ↪ 109

388 Trial

388V Arguments and Conduct of Counsel
 388k109 k. Scope and effect of opening statement. Most Cited Cases

The trial court does not commit error in granting a defendant's motion for directed verdict, made at the close of plaintiff's opening statement, if, engaging in every reasonable inference from facts favorable to the party against whom the motion is directed, the proposed proof would not sustain a claim upon which relief could be granted. Rules Civ.Proc., Rule 50(A)(4).

[6] Products Liability 313A ↪ 147

313A Products Liability

313AII Elements and Concepts

313Ak146 Proximate Cause

313Ak147 k. In general. Most Cited Cases
 (Formerly 313Ak34, 48Bk13)

Products Liability 313A ↪ 200

313A Products Liability

313AIII Particular Products

313Ak200 k. Aircraft. Most Cited Cases

(Formerly 313Ak34, 48Bk13)

That de-icing equipment was not in use and was not activated prior to airplane crash precluded finding of causation, and thus would not permit recovery against manufacturer of de-icing equipment in products liability action on theory that such equipment was defectively designed, even if crash would have occurred had equipment been activated. R.C. § 2307.73(A)(1, 2).

[7] Products Liability 313A ↪ 147

313A Products Liability

313AII Elements and Concepts

313Ak146 Proximate Cause

313Ak147 k. In general. Most Cited Cases

(Formerly 313Ak15)

A necessary element in all products liability cases is proof of a causal relationship between the alleged defect and the resulting injury. R.C. § 2307.73(A)(1, 2).

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[8] Trial 388 ↪43

388 Trial

388IV Reception of Evidence

388IV(A) Introduction, Offer, and Admission of Evidence in General

388k43 k. Admission of evidence in general. Most Cited Cases

The trial court has broad discretion in the admission and exclusion of evidence.

[9] Appeal and Error 30 ↪970(2)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k970 Reception of Evidence

30k970(2) k. Rulings on admissibility of evidence in general. Most Cited Cases

An appellate court will not disturb evidentiary rulings absent an abuse of discretion.

[10] Courts 106 ↪26(3)

106 Courts

106I Nature, Extent, and Exercise of Jurisdiction in General

106I(A) In General

106k26 Scope and Extent of Jurisdiction in General

106k26(3) k. Abuse of discretion in general. Most Cited Cases

(Formerly 106k26)

An abuse of discretion signifies more than merely an error in judgment; instead, it involves perversity of will, passion, prejudice, partiality, or moral delinquency.

[11] Appeal and Error 30 ↪946

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k944 Power to Review

30k946 k. Abuse of discretion. Most Cited Cases

When applying the abuse-of-discretion stand-

ard, an appellate court may not substitute its judgment for that of the trial court.

[12] Appeal and Error 30 ↪207

30 Appeal and Error

30V Presentation and Reservation in Lower Court of Grounds of Review

30V(B) Objections and Motions, and Rulings Thereon

30k207 k. Arguments and conduct of counsel. Most Cited Cases

Appeal and Error 30 ↪930(2)

30 Appeal and Error

30XVI Review

30XVI(G) Presumptions

30k930 Verdict

30k930(2) k. Instructions understood or followed. Most Cited Cases

Insurer could not show that trial court abused its discretion, in insurer's products liability action, by allowing manufacturer's opening argument that insurer continued to insure the airplanes it alleged were defectively designed, where insurer failed to object to the statement, and the jury was presumed to have followed trial court instructions that opening statements were not evidence and should not be treated as evidence.

[13] Trial 388 ↪109

388 Trial

388V Arguments and Conduct of Counsel

388k109 k. Scope and effect of opening statement. Most Cited Cases

Opening statements are not evidence and should not be considered as such.

[14] Appeal and Error 30 ↪930(2)

30 Appeal and Error

30XVI Review

30XVI(G) Presumptions

30k930 Verdict

30k930(2) k. Instructions understood

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or followed. Most Cited Cases

The jury is presumed to follow the instructions of the trial court.

[15] Appeal and Error 30 ↪766

30 Appeal and Error
 30XII Briefs

30k766 k. Defects, objections, and amendments. Most Cited Cases

By failing to support its argument on appeal with any legal authority demonstrating that the trial court abused its discretion in making certain evidentiary rulings, appellant did not satisfy its burden of demonstrating error.

[16] Appeal and Error 30 ↪901

30 Appeal and Error
 30XVI Review

30XVI(G) Presumptions
 30k901 k. Burden of showing error. Most Cited Cases

The appellant has the burden of affirmatively demonstrating error on appeal.

****124 *572** Donald S. Varian Jr., Akron, for appellant and cross-appellee.

S. Stuart Eilers, Elizabeth B. Wright and Andrew H. Cox, Cleveland, for appellee and cross-appellant.

BAIRD, Judge.

{¶ 1} Appellant, United States Aviation Underwriters, Inc. ("USAU"), appeals from the judgment of the Summit County Court of Common Pleas. We affirm.

I

{¶ 2} On January 9, 1997, Comair Airlines Flight 3272, en route from Cincinnati, Ohio, to Detroit, Michigan, crashed outside Monroe, Michigan, due to ice buildup on the wings of the aircraft. The twenty-six passengers and three members of the flight crew were killed in the crash.

{¶ 3} The airplane was an EMB-120 turboprop airplane, manufactured by Embraer Embresa Brasileira de Aeronautica, S.A. ("Embraer"). The B.F. Goodrich Co. ("Goodrich") is a manufacturer of pneumatic deicing boots, which were installed as equipment on Flight 3272. Pneumatic deicing boots are rubber tubes, which, when activated, inflate with air and expand, cracking and removing ice that has accumulated on the wing of an airplane.

{¶ 4} At the time of the crash, Comair was insured by the appellant insurance company, USAU. USAU settled the claims with the victims' families, and Embraer contributed to the settlements. On January 8, 1999, USAU filed a complaint against Goodrich in the Summit County Court of Common Pleas, seeking contribution and indemnification, alleging that the deicing boots and the deicing system were defective. The complaint specifically alleged eleven causes of action, concerning claims as to both a design defect and a failure to warn due to improper instructions. The matter proceeded to a jury trial, commencing on October 29, 2001.

{¶ 5} Goodrich moved for directed verdict after USAU's opening statement. The trial court granted the motion for directed verdict on the claims concerning a design defect, finding that, because USAU conceded that the deicing boots were not in use and had not been activated prior to the crash, USAU could not prove causation. The trial court denied the motion for directed verdict on the claims based upon improper instructions, and those claims were submitted to the jury. The jury found in favor of Goodrich, finding that Goodrich had not violated its duty to warn. The court subsequently dismissed the case on its merits.

***573 *573** This appeal followed. USAU raises four assignments of error for review. Goodrich submits two cross-assignments of error. We address USAU's first three assignments of error together for ease of review.

****125 II**

USAU's First Assignment of Error

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{¶ 7} “The trial court erred under the Ohio Supreme Court’s extremely high ‘great caution’ standard when it directed verdicts, following plaintiff’s opening statement, on the plaintiff’s design defect, negligence and breach of warranty causes of action stated against the defendant which provided the design for an aircraft which caused it to crash while flying in icing conditions, and the plaintiff described evidence to support each element of its causes of action.”

USAU’s Second Assignment of Error

{¶ 8} “The trial court erred under the Ohio Supreme Court’s extremely high ‘great caution’ standard when it directed verdicts, following plaintiff’s opening statement, on the plaintiff’s cause of action that the crash occurred as a result of the aircraft’s failure to conform with representations made by the defendant designer that the aircraft could safely fly in the icing conditions which caused the crash, and the plaintiff described evidence to support each element of its causes of action.”

USAU’s Third Assignment of Error

{¶ 9} “The trial court erred under the Ohio Supreme Court’s extremely high ‘great caution’ standard when it directed verdicts, following plaintiff’s opening statement, on the plaintiff’s design defect, negligence and breach of warranty causes of action stated against the manufacturer/supplier of an aircraft’s ice protection system components where the plaintiff described evidence to support each element of its causes of action.”

{¶ 10} In its first three assignments of error, USAU argues that the trial court erred when it granted directed verdicts after its opening statement. We disagree.

[1][2] {¶ 11} We review a trial court’s ruling on a motion for directed verdict de novo because it presents us with a question of law. *Schafer v. RMS Realty* (2000), 138 Ohio App.3d 244, 257, 741 N.E.2d 155. A motion for directed verdict tests the sufficiency of the evidence, not the weight of the evidence or the credibility of witnesses. *Wagner v.*

Roche Laboratories (1996), 77 Ohio St.3d 116, 119–120, 671 N.E.2d 252.

[3] *574 *149 Pursuant to Civ.R. 50(A)(4), a directed verdict is properly granted when “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 [.]” Where there is substantial evidence upon which reasonable minds may reach different conclusions, the motion must be denied. *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271, 275, 74 O.O.2d 427, 344 N.E.2d 334. However, when the party opposing the motion for directed verdict has failed to produce any evidence on one or more of the essential elements of a claim, a directed verdict is appropriate. *Hargrove v. Tanner* (1990), 66 Ohio App.3d 693, 695, 586 N.E.2d 141.

[4][5] {¶ 13} When a party moves for a directed verdict on the opening statement of counsel, the trial court “should exercise great caution in sustaining [the] motion.” *Brinkmoeller v. Wilson* (1975), 41 Ohio St.2d 223, 70 O.O.2d 424, 325 N.E.2d 233, syllabus. “[I]t must be clear that all the facts expected to be proved, and those that have been stated, do not constitute a cause of action or a defense, and the statement must be liberally construed in favor of the party against whom the motion has been made.” *Id.* The trial court does not commit error in granting a **126 defendant’s motion for directed verdict, made at the close of plaintiff’s opening statement, “if, engaging in every reasonable inference from facts favorable to the party against whom the motion is directed, the proposed proof would not sustain a claim upon which relief could be granted.” *Phillips v. Borg-Warner Corp.* (1972), 32 Ohio St.2d 266, 268, 61 O.O.2d 493, 291 N.E.2d 736.

{¶ 14} The Ohio Products Liability Act, R.C. 2307.71 et seq., defines a “product liability claim” as “a claim that is asserted in a civil action and that

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seeks to recover compensatory damages from a manufacturer or supplier for death, physical injury to person, emotional distress, or physical damage to property other than the product in question, that allegedly arose from any of the following:

{¶ 15} “(1) The design, formulation, production, construction, creation, assembly, rebuilding, testing, or marketing of that product;

{¶ 16} “(2) Any warning or instruction, or lack of warning or instruction, associated with that product;

{¶ 17} “(3) Any failure of that product to conform to any relevant representation or warranty.” R.C. 2307.71(M).

{¶ 18} A plaintiff cannot recover on a product liability claim unless he establishes, by a preponderance of the evidence, that the product was defective in manufacture or construction, was defective in design or formulation, was defective*575 due to inadequate warning or instruction, or was defective because it did not conform to a representation made by its manufacturer. R.C. 2307.73(A)(1). A plaintiff must also demonstrate that the defect was a proximate cause of the injuries or loss. R.C. 2307.73(A)(2); *State Farm Fire & Cas. Co. v. Chrysler Corp.* (1988) 37 Ohio St.3d 1, 6, 523 N.E.2d 489. Proximate cause “has been defined as: ‘That which immediately precedes and produces the effect, as distinguished from a remote, mediate, or predisposing cause; that from which the fact might be expected to follow without the concurrence of any unusual circumstance; that without which the accident would not have happened, and from which the injury or a like injury might have been anticipated.’ ” *Hunt v. Marksman Products* (1995), 101 Ohio App.3d 760, 763, 656 N.E.2d 726, quoting *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 143, 539 N.E.2d 614.

[6] {¶ 19} In this case, Goodrich moved for summary judgment prior to trial, claiming that USAU could not prove causation. The trial court

denied that motion, finding that there was insufficient evidence to determine whether the deicing boots were activated. USAU argues that the subsequent directed verdicts after opening statement were error because the trial court had determined the same issue just prior to trial, and the grant of the directed verdicts was a complete reversal from its summary judgment ruling. However, USAU conceded during opening statement that the deicing boots were not in use and had not been activated prior to the time of the crash. Goodrich then moved for directed verdict, arguing that USAU could not prove causation. USAU argued that Goodrich, as a supplier and manufacturer of the deicing equipment, may be found liable for the defective final product of the airplane, regardless of whether the deicing boots were in use. USAU claimed that Goodrich's deicing design left areas of the aircraft's wing unprotected, and that the crash still would have occurred, even if the pilots had activated the boots.

[7] {¶ 20} It is axiomatic that “[a] necessary element in all products liability cases is proof of a causal relationship between the alleged defect and the resulting **127 injury.” *Kelley v. Cairns & Bros., Inc.* (1993), 89 Ohio App.3d 598, 610, 626 N.E.2d 986, citing *Hargis v. Doe* (1981), 3 Ohio App.3d 36, 37, 3 OBR 38, 443 N.E.2d 1008. USAU cannot demonstrate that Goodrich's alleged defective design of the deicing system proximately caused the crash if Goodrich's deicing system had not been activated by the flight crew. Construing USAU's opening statement in favor of USAU, the proposed proof would not sustain a claim upon which relief could be granted because USAU cannot prove the essential element of proximate cause.

{¶ 21} USAU relies on *Leibreich v. A.J. Refrigeration, Inc.* (1993), 67 Ohio St.3d 266, 617 N.E.2d 1068, for the proposition that a manufacturer of a component part may be held liable for a defective final product. Here, USAU *576 contends that once Goodrich's deicing boots were incorporated into the plane, Goodrich may be liable for

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damages caused by the airplane itself, regardless of whether the boots were in use. USAU's reliance on *Leibreich* is misplaced.

{¶ 22} In *Leibreich*, the defendant manufactured a refrigeration unit that was incorporated into a florist's delivery truck. In order to keep the refrigeration unit running while the truck stopped for deliveries, it was necessary to keep the truck's transmission in neutral. One day, while the truck was in neutral, the parking brake failed, and the truck rolled down an incline, causing injuries. The Ohio Supreme Court reviewed the definition of a "manufacturer" under the Ohio Products Liability Act and found that the defendant manufacturer of the refrigeration unit in that case was a manufacturer for purposes of imposing strict liability because it assembled components into a design which created a product. *Leibreich* at 271, 617 N.E.2d 1068.

{¶ 23} We find that this case is distinguishable from *Leibreich*. In this case, Goodrich does not contend that it is not a manufacturer for purposes of imposing strict liability for a defective product. Moreover, in *Leibreich*, the refrigeration unit was in use at the time of the accident, whereas USAU conceded that the deicing boots were not activated and were not in use. The Supreme Court did not address the issue of causation as to whether the defendant manufacturer could be held liable for a design defect if the accident occurred while the refrigeration unit was off. Accordingly, USAU's argument is without merit.

{¶ 24} The directed verdict was properly granted on the design defect claims because USAU's proposed proof would not sustain a claim for a design defect. USAU's first, second, and third assignments of error are overruled.

USAU's Fourth Assignment of Error

{¶ 25} "The trial court's erroneous directed verdicts on the opening statement of counsel, and certain inconsistent evidentiary rulings which followed them, materially prejudiced the prosecution

of the plaintiff's remaining inadequate instructions cause of action stated against the defendant."

{¶ 26} In its fourth assignment of error, USAU asserts that the trial court's directed verdicts and certain evidentiary rulings were error and prejudiced its remaining cause of action on failure to warn due to inadequate instructions. We have already addressed USAU's arguments concerning the directed verdicts; therefore, we will address only the portion of USAU's argument that concerns the admission or exclusion of evidence.

[8][9][10][11] {¶ 27} The trial court has broad discretion in the admission and exclusion of evidence. **128 *State v. Hymore* (1967), 9 Ohio St.2d 122, 128, 38 O.O.2d 298, 224 N.E.2d 126. An appellate court will not disturb evidentiary rulings *577 absent an abuse of discretion. *Id.* An abuse of discretion signifies more than merely an error in judgment; instead, it involves "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621, 614 N.E.2d 748. When applying the abuse-of-discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Id.*

[12][13][14] {¶ 28} USAU essentially challenges two evidentiary rulings of the trial court. First, USAU argues that the trial court erred when evidence was admitted that Comair still flies the EMB-120 and that USAU still insures these airplanes. USAU contends that this evidence gave the jury an impression that USAU and its insured considered the plane to be safe. The portion of the record to which USAU refers in demonstrating this error contains the opening statements of counsel. This statement was made during Goodrich's opening statement. It is well settled that opening statements are not evidence and should not be considered as such. See *Eller v. Wendy's Internatl., Inc.* (2000), 142 Ohio App.3d 321, 333, 755 N.E.2d 906; *State v. Frazier* (1995), 73 Ohio St.3d 323, 338, 652 N.E.2d 1000. Moreover, counsel for USAU failed to object to the statement, and the trial

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court instructed the jury that opening statements are not evidence and should not be treated as evidence. The jury is presumed to follow the instructions of the trial court. *State v. Raglin* (1998), 83 Ohio St.3d 253, 264, 699 N.E.2d 482. Thus, USAU cannot show that the trial court abused its discretion with regard to counsel's statement that Comair still flies EMB-120's and USAU continues to insure them.

[15][16] {¶ 29} USAU also argues that the trial court erred in various rulings on the admission of government-issued airworthiness directives. USAU cites various portions of the transcript where evidence was either excluded or admitted, which USAU claims to be error. However, USAU fails to demonstrate how the trial court's rulings on these particular evidentiary rulings was an abuse of discretion. As the appellant, USAU has the burden of affirmatively demonstrating error on appeal. See *Angle v. W. Res. Mut. Ins. Co.* (Sept. 16, 1998), 9th Dist. No. 2729-M, at 2, 1998 WL 646548; *Frecska v. Frecska* (Oct. 1, 1997), 9th Dist. No. 96CA0086, at 4, 1997 WL 625488. Pursuant to App.R. 16(A)(7), an appellant must "demonstrate his assigned error through an argument that is supported by citations to legal authority and facts in the record." *State v. Taylor* (Feb. 9, 1999), 9th Dist. No. 2783-M, at 7, 1999 WL 61619. See, also, Loc.R. 7(A)(7). USAU has failed to support its argument with any legal authority demonstrating that the trial court abused its discretion in these evidentiary rulings. Accordingly, USAU's fourth assignment of error is overruled.

*578 Goodrich's First Cross-Assignment of Error
{¶ 30} "The trial court erred in denying Goodrich's motion for summary judgment."

Goodrich's Second Cross-Assignment of Error
{¶ 31} "The trial court erred in denying Goodrich's motions for a directed verdict on USAU's contribution claim at trial."

{¶ 32} Our dispositions of USAU's assignments of error render Goodrich's cross-assignments of error moot. We **129 therefore decline to address them. See App.R. 12(A)(1)(c).

III

{¶ 33} USAU's four assignments of error are overruled. Goodrich's cross-assignments of error are rendered moot. Accordingly, the judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

SLABY, P.J., and BATCHELDER, J., concur.

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H
CHECK OHIO SUPREME COURT RULES FOR
REPORTING OF OPINIONS AND WEIGHT OF
LEGAL AUTHORITY.

Court of Appeals of Ohio,
Eighth District, Cuyahoga County.
Mitchell LAMBERT, et al., Plaintiffs-Appellants
v.
METROHEALTH MEDICAL CENTER, et al., Def-
endants-Appellees.

No. 87861.
Decided Jan. 11, 2007.

Civil Appeal from the Cuyahoga County Court of
Common Pleas, Case No. CV-548206.
James L. Deese, Michael C. DeJohn, Kevin T. Too-
hig, Cleveland, OH, for appellants.

Shawn W. Maestle, Deirdre Henry, Weston Hurd
LLP, Cleveland, OH, for appellees.

Before CALABRESE, J., COONEY, P.J., and KIL-
BANE, J.

ANTHONY O. CALABRESE, JR., Judge.
*1 N.B. This entry is an announcement of the
court's decision. See App.R. 22(B), 22(D) and
26(A); Loc.App.R. 22. This decision will be jour-
nalized and will become the judgment and order of
the court pursuant to App.R. 22(E) unless a motion
for reconsideration with supporting brief, per
App.R. 26(A), is filed within ten (10) days of the
announcement of the court's decision. The time
period for review by the Supreme Court of Ohio
shall begin to run upon the journalization of this
court's announcement of decision by the clerk per
App.R. 22(E). See, also, S.Ct. Prac.R. II, Section
2(A)(1).

ANTHONY O. CALABRESE, JR., J.

{¶ 1} Plaintiff Mitchell Lambert (appellant) ap-
peals the court's granting and motion for a directed
verdict in appellant's medical malpractice claim.
After reviewing the facts of the case and pertinent
law, we affirm.

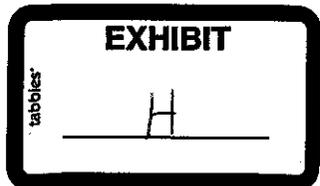
I.

{¶ 2} On December 6, 2000, appellant under-
went a cardiac catheterization and radiofrequency
ablation at MetroHealth to address heart problems
he was experiencing. During the outpatient proced-
ure, the catheter's sheath fractured, and the tip be-
came lodged in appellant's lung. On December 11,
MetroHealth performed a second surgical proced-
ure, successfully recovering the tip.

{¶ 3} On November 22, 2004, appellant filed a
multicount complaint against multiple defendants,
alleging, inter alia, the following: medical negli-
gence against MetroHealth; medical negligence
against the individual doctor who performed the
initial procedure; and product liability and breach
of warranty against the catheter manufacturers.
Subsequently, appellant settled his products liabil-
ity claim and voluntarily dismissed his claim
against the doctor, leaving MetroHealth as the sole
defendant in the action.

{¶ 4} During the discovery process, appellant
retained a cardiologist, Dr. C. William Balke, to
serve as an expert witness at trial. Subsequent to the
submission of Dr. Balke's expert report, Metro-
Health filed two motions in limine: first, to exclude
Dr. Balke's testimony because his report failed to
establish the essential elements of a medical mal-
practice claim; and second, to prohibit appellant
from litigating using a res ipsa loquitur theory,
based on insufficient evidence. On January 30,
2006, the court granted both of MetroHealth's mo-
tions, and the case proceeded to trial. However,
after appellant's opening statement, the court gran-
ted a directed verdict in favor of MetroHealth.

II.



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{¶ 5} In his first assignment of error, appellant argues that “the trial court committed prejudicial error when it granted Defendant’s Motion in Limine to Exclude Plaintiff’s Expert from Testifying at Trial.” Specifically, appellant argues that although Dr. Balke was not prepared to testify about the proximate cause element of medical malpractice, he should have been allowed to testify regarding other items addressed in his expert report. In other words, appellant claims it was error to exclude Dr. Balke’s entire testimony; rather, the court should have granted MetroHealth’s motion only in part.

*2 {¶ 6} To succeed in most ^{FN1} medical malpractice claims, the plaintiff is required to present expert testimony demonstrating the following: 1) the acceptable medical standard of care; 2) the defendant’s breach of that standard; and 3) that the breach proximately caused the plaintiff’s injuries. *West v. Cleveland Clinic Foundation* (June 15, 2000), Cuyahoga App. No. 77183, citing *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127. Furthermore, in *Becker v. Lake County Memorial Hosp. West* (1990), 53 Ohio St.3d 202, 207, the Ohio Supreme Court held that in malpractice cases “[m]edical experts must render opinions based upon probabilities, not merely in terms of possibilities.”

FN1. Under Ohio law, in medical malpractice claims where the medical procedures and terminology are within the common knowledge and understanding of the jury, no expert is required to testify. See *Darnell v. Eastman* (1970), 23 Ohio St.2d 13. In the instant case, the procedure in question is a cardiac catheterization, and it is clear that expert testimony is required. See, also, Evid.R. 702(A).

{¶ 7} In the instant case, appellant submitted Dr. Balke’s expert report pursuant to Loc. R. 21. 1, which states in part that the expert “will not be permitted to testify or provide opinions on issues not raised in his report.” Dr. Balke’s report states the following in the summary:

“As noted above, it is impossible to reconstruct or understand the events leading to the shearing of the tip of the sheath and its migration through the right side of the heart to the lower portions of the left lung from the records provided. The two major possible explanations range from equipment failure (i.e., sheath malfunction) to operator error. In addition, there are many irregularities in Mr. Lambert’s care that clearly represent care below the acceptable standard. The foregoing opinions are all asserted to a reasonable degree of medical certainty.”

{¶ 8} Appellant has conceded that the “many irregularities” in his care, such as alleged poor recordkeeping, being given a medication he was allergic to, and failure to provide cardiac risk assessment and modification, are not related to whether MetroHealth committed malpractice when the tip of the catheter became lodged in his lung. Given this, Dr. Balke’s report consisted of the following potential testimonial evidence—that with a reasonable degree of medical certainty, it was possible that the incident occurred because of MetroHealth’s negligence. Dr. Balke was unwilling to rule out a defective product as causing the injury, and he was unwilling to say that it was probable the injury was caused by MetroHealth falling below the standard of care during the procedure.

{¶ 9} In response to appellant’s expert report, MetroHealth filed a motion in limine to preclude Dr. Balke from testifying at trial, arguing that “Dr. Balke’s expert report did not contain any opinion that a deviation from the standard of care by Defendant Metro or its employees was the proximate cause of Mr. Lambert’s alleged injury.”

{¶ 10} A motion in limine is a “pretrial request that certain inadmissible evidence not be referred to or offered at trial.” Black’s Law Dictionary (7th Ed. We review a court’s determination of the admissibility of evidence for an abuse of discretion. *O’Brien v. Angley* (1980), 63 Ohio St.2d 159.

*3 {¶ 11} In the instant case, there is no ques-

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tion that Dr. Balke is, in general, qualified to testify as an expert witness about cardiology matters. However, Evid.R. 702(C) states that testimony must be "reliable scientific, technical, or other specialized information," for it to be presented by an expert witness. We established that to be "reliable" in a medical malpractice case, testimony must reflect that malpractice probably occurred, not just possibly occurred. See, also, *Stinson v. England* (1994), 69 Ohio St.3d 451, 455 (holding that "[i]nasmuch as the expression of probability is a condition precedent to the admissibility of expert opinion regarding causation, it relates to the competence of such evidence and not its weight").

{¶ 12} In the instant case, the following colloquy took place on the record before appellant's opening statement:

The Court: "I want you to make this proffer, or I invite you to make a proffer; that if permitted to testify, he would say that the physician for the defendant company committed malpractice. Can you make that proffer?"

Appellant's "I don't want to. I don't know if I want to counsel: put it in that terminology, your Honor."

{¶ 13} Thus, as to the specific facts of the instant case, Dr. Balke's opinion was not reliable because it was based on speculation and conjecture with regard to MetroHealth falling below the acceptable standard of care and the causation of appellant's injury. Furthermore, appellant offers no legal authority to support his argument that Dr. Balke's testimony should have been merely limited rather than eliminated. Accordingly, we cannot find that the court abused its discretion by excluding Dr. Balke's testimony, and appellant's first assignment of error is overruled.

III.

{¶ 14} In his second assignment of error, appellant argues that "the trial court committed prejudicial error when it granted Defendant's Motion in

Limine to Preclude Plaintiff's Use of Evidence of Res Ipsa Loquitur." Specifically, appellant argues that if Dr. Balke had testified, appellant would have been able to establish a prima facie case of res ipsa loquitur. Although we ruled that the court did not err in precluding Dr. Balke's testimony purporting to establish negligence, we realize that not having expert testimony is necessarily fatal to appellant's case. Therefore, we address this assignment of error as it relates to Dr. Balke's testimony purporting to establish res ipsa loquitur.

{¶ 15} Res ipsa loquitur is a Latin term meaning "the thing speaks for itself." Black's Law Dictionary (7th Ed.) 1311. Res ipsa loquitur is not a substantive rule of law; rather, it is an evidentiary theory which permits the jury to infer negligence when the following apply: 1) The instrument causing the injury was under the exclusive management and control of the defendant during the time in question; and 2) If the defendant had used ordinary care under ordinary circumstances, the injury would not have occurred. *Becker, supra*, 53 Ohio St.3d 202.

*4 "Whether sufficient evidence has been adduced at trial to warrant application of the rule is a question of law to be determined initially by the trial court, subject to review upon appeal. It is prejudicial error for the trial court to direct a verdict for defendant at the close of plaintiff's evidence where the evidence presented warrants the application of the rule."

Hake v. George Wiedemann Brewing Co. (1970), 23 Ohio St.2d 65, 67.

{¶ 16} A plaintiff arguing res ipsa loquitur in a medical malpractice case is required to present expert medical testimony that the injury would not have occurred but for the defendant's negligence, unless the negligence would be obvious to a layman. *Deskins v. Jaramillo* (Oct. 8, 1998), Cuyahoga App. No. 72824. See, also, *Morgan v. Children's Hospital* (1985), 18 Ohio St.3d 185; *Coleman v. Mullins* (July 16, 1997), Scioto App. No.

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96CA2462 (holding that “the doctrine of res ipsa loquitur may not be applied if the cause of the patient's injury is unknown”). As noted earlier, the standard of care for administering a heart catheter, and thus whether a medical professional fell below that standard of care, is not something that is common knowledge outside of the medical profession and requires expert testimony to establish. See Fn. 1.

{¶ 17} In the instant case, appellant argues that had Dr. Balke testified as an expert witness, he would have been able to establish the two elements required to prove res ipsa loquitur. We disagree. Assuming arguendo that Dr. Balke's testimony was admissible under Evid.R. 702, nothing in his expert report states that he would have been able to establish the second prong of the res ipsa loquitur test. He would have testified that, but for MetroHealth's negligence or the defective product, appellant's injury would not have occurred. Similar to our reasoning in appellant's first assignment of error, this evidence is simply not enough. Appellant was unable to offer any evidence or testimony that negligence probably occurred in his case. In fact, the expert report that appellant submitted relating to the product liability arm of this case opined that the catheter was indeed defective. It is equally as possible that the defective catheter was the only cause of appellant's injury, as it is possible that a combination of the defective catheter and MetroHealth's falling below the standard of care caused his injury. However, what is possible is not necessarily probable, and lacking reliable evidence of the probability of negligence is fatal to appellant's case.

{¶ 18} Accordingly, the court did not err by granting MetroHealth's motion in limine excluding appellant's res ipsa loquitur evidence, and his second assignment of error is overruled.

IV.

{¶ 19} In his third and final assignment of error, appellant argues that “the trial court committed prejudicial error when it granted Defendant's Motion for a Directed Verdict after Opening State-

ment.”

*5 {¶ 20} Pursuant to Civ.R. 50(A)(1), a party may move for a directed verdict following the opening statement of opposing counsel. To sustain such a motion, “ * * * it must be clear that all the facts expected to be proved, and those that have been stated, do not constitute a cause of action or a defense, and the statement must be liberally construed in favor of the party against whom the motion has been made.” *Brinkmoeller v. Wilson* (1975), 41 Ohio St.2d 223 at syllabus. Furthermore, courts should use great caution in granting a directed verdict on an opening statement, doing so “only in those cases where a party completely fails to propose relevant evidence on an essential element of that party's case.” *Howard v. Columbus Products* (1992), 82 Ohio App.3d 129, 136.

{¶ 21} In the instant case, appellant's opening statement was made without reference to an expert medical witness. The only mention of MetroHealth falling below the standard of care, and thus causing appellant's injury, was as follows: “Mitchell and Karina Lambert will testify that the Defendant Metro were [sic] negligent. * * * That they breached the standard of care. * * * And this was a substantial factor in bringing about the harm that I've already described.” Appellant and his wife are not qualified to establish the breach and causation elements in a medical malpractice claim centering around a heart catheter. Because appellant offered nothing else, his opening statement does not support any cause of action against MetroHealth, and the court did not err in granting the hospital's motion for a directed verdict. Appellant's final assignment of error is overruled.

Judgment affirmed.

It is ordered that appellees recover from appellants costs herein taxed.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

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A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, J., Concur.
COLLEEN CONWAY COONEY, P.J., Concur
with Separate Concurring Opinion.
COLLEEN CONWAY COONEY, P.J., Concurring.

{¶ 22} I concur with the majority and write separately to address the issue of res ipsa loquitur. The Ohio Supreme Court stated:

“Where it has been shown by the evidence ad-
duced that there are two equally efficient and
probable causes of the injury, one of which is not
attributable to the negligence of the defendant,
the rule of res ipsa loquitur does not apply. In
other words, where the trier of the facts could not
reasonably find one of the probable causes more
likely than the other, the instruction on the infer-
ence of negligence may not be given.” *Jennings
Buick, Inc. v. Cincinnati* (1980), 63 Ohio St.2d
167, 171, citations omitted.

{¶ 23} The expert report which Lambert sub-
mitted showed that there were two equally possible
causes of Lambert's injury—one a product defect and
the other medical negligence. Because there existed
an equally plausible cause for Lambert's injury, not
attributable to medical negligence, res ipsa loquitur
did not apply. Therefore, I agree to affirm the trial
court's decision.

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