

IN THE SUPREME COURT OF OHIO

Sandy Parrish, Administrator of the Estate of Karen Parrish, deceased.)	CASE NO. 2012-0623
)	
Plaintiff-Appellee)	<i>On Appeal from the Ross County Court of Appeals, Fourth Appellate District</i>
-v-)	
)	
Christopher J. Skocik, D.O., et al.)	<i>Court of Appeals Case No. 11CA3238</i>
)	
Defendants-Appellants)	

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STATEMENT OF FACTS

On December 30, 2004, Karen Parrish was admitted to Adena Regional Medical Center under the primary care of Michael E. Jones, D.O., a neurologist, for management of Guillain-Barre Syndrome with the Miller Fisher variant. (Third Amended Complaint, filed 11/5/08, ¶21; Tr, pp. 4-5). Dr. Saab, a pulmonologist consultant, was consulted and he proceeded to order 40 milligrams of Lovenox, an anticoagulant, in order to prevent the development of blood clots which could lead to fatal pulmonary emboli. (Tr., pp. 6-7). As a result of her immobility and obesity, Plaintiff-Appellee's decedent was at high risk for developing blood clots. (Tr., pp. 6-7). On January 7, 2005, after Mrs. Parrish had started to make significant progress, Dr. Jones discharged her Adena Regional Medical Center to Chillicothe Nursing and Rehabilitation Center where she came under the care of Defendant-Appellant Christopher Skocik, D.O.. (Tr., pp. 11-12).

Upon her discharge from Adena to the Chillicothe Nursing and Rehabilitation Center, Dr. Jones signed a Continuity of Care Order which failed to include Lovenox or any other anticoagulant or deep vein thrombosis prophylaxis. (Tr. p. 12, lines 17-23). Mrs. Parrish was discharged on a Friday night and her new attending physician at the rehab center, Dr. Skocik, was not scheduled to see and evaluate her until the following Thursday. (Tr., p. 13, lines 12-17). Only the medications ordered on the Continuity of Care Order were prescribed for Mrs. Parrish until further evaluation by Dr. Skocik. (Tr., p. 13, lines 7-10). As such, she stopped receiving Lovenox at the time of her transfer from Adena. (Tr., p. 14, lines 7-8). Three days later, on January 11, 2005, Mrs. Parrish was found unresponsive at the rehabilitation center and transferred back to Adena Regional Medical Center. (Tr., p. 14, lines 10-12). Resuscitation efforts were attempted but were unsuccessful and she was pronounced dead at 11:43 a.m. on

January 11, 2005. The cause of death was determined as hypoxia due to pulmonary emboli with saddle embolus and deep vein thrombosis. (Tr., p. 14, lines 12-15).

Plaintiff-Appellee Sandy Parrish, as Administrator of the Estate of Karen Parrish, brought this action against Dr. Jones, Adena, and others in December of 2005. (Complaint, 12/21/05). Dr. Skocik and his practice group Family Medicine of Chillicothe, Inc. were added as defendants once their roles were discovered, but were later voluntarily dismissed as it appeared that the negligence in this case centered on Dr. Jones' failure to list the anticoagulant Lovenox on the Continuity of Care Plan prior to Mrs. Parrish's transfer to the rehabilitation center. (Notice of Voluntary Dismissal, 7/8/08). However, on September 9, 2008, Appellee's counsel took the discovery deposition of Dr. Kenneth Writesel, a second expert identified by Dr. Jones, who opined that it was the negligence of Dr. Skocik in failing to properly assess and monitor Mrs. Parrish upon her admission to the rehabilitation center, and for failing to ensure that her risk for pulmonary embolism was mitigated. Specifically, during his September 9, 2008 deposition, Dr. Writesel testified as follows:

Q: Doctor, are you going to be at this trial giving criticism of Dr. Skocik?

A: Yes:

Q: Okay, what are your opinions about Dr. Skocik?

A: In regards to which?

Q: In regards to his care of Mrs. Parrish?

A: I feel that it was grossly mismanaged from the outset.

....

Q: So is it your opinion, sir, that Dr. Skocik somehow deviated from accepted standards of care by taking the position that he doesn't modify the medication orders until he actually exams and assesses the patient?

A: Absolutely.

Q: Is it your position, sir, that – okay. What’s the basis for you saying that?

A: He has the responsibility for the totality of that patient’s care once they enter that facility. That includes plan of care relative to medication regime. It includes oversight implementation of therapy modalities. It includes utilization and oversight of respiratory therapy if indicated and appropriate. It includes all nursing care provided to the patient. . . .

(Depo. of Dr. Writesel, 9/10/08, pp. 29-31). As such, Dr. Skocik and his employer were again added to the case via amended pleading filed in November of 2008. (Third Amended Complaint, filed 11/5/08). In a second deposition of Dr. Writesel taken on December 17, 2010, he reiterated these opinions critical of Dr. Skocik’s care, and further testified that had Mrs. Parrish continued to receive Lovenox regularly following her transfer to Chillicothe Nursing and Rehabilitation Center, she would have had a “60- or 70-percent probability of avoiding those clots” which ultimately took her life. (Depo. of Dr. Writesel, 12/17/20, p.82, lines 17-18).

This action proceeded to jury trial on Tuesday, January 11, 2011. As stated in the pleadings and in Plaintiff-Appellee’s trial statement, the issues of fact to be resolved at trial included (1) whether or not Dr. Jones and/or Dr. Skocik violated their respective standards of care in their treatment of Mrs. Parrish; (2) whether or not such negligence was the proximate cause of Mrs. Parrish’s death; and (3) the amount of damages resulting from her death. (Trial Brief, filed 12/29/10). After the jury had been seated, Plaintiff-Appellee’s counsel gave his opening statement, outlining the background facts of the case and summarizing the expected expert testimony critical of both defendant physicians. (Tr., pp. 3-20). As to the negligence of Dr. Skocik, counsel outlined that it would be Dr. Jones’s retained expert (Dr. Writesel) who would be offering testimony critical of his care and that Mrs. Parrish’s death was therefore his fault. (Tr. 17-20).

At the conclusion of Plaintiff-Appellee's opening statement, the attorneys for Dr. Skocik and Family Medicine of Chillicothe, Inc. moved for a directed verdict pursuant to Civ.R. 50 (A). (Tr., p. 21, lines 8-13). The Court took said motion into consideration and then allowed counsel for Dr. Jones to present his opening statement, who also outlined Dr. Writesel's expected criticisms of Dr. Skocik in the process. (Tr., pp. 27-28, 73, 75-76). After Defendant Jones's opening statement, the Court and counsel for the parties discussed the motion, and during this time Plaintiff-Appellee's counsel sought to incorporate the factual allegations against Dr. Skocik made in Dr. Jones's opening statement into his own opening statement for purposes of the pending motion. (Stipulation; Tr., p. 78 lines 3-4). The trial court did not address this attempt and, after hearing brief arguments on the issue, Judge Martin sustained Dr. Skocik's Motion and granted a directed verdict in his favor. (Tr., p. 80 lines 20-21; 1/18/11 Entry)

Because of this ruling, the trial proceeded but Plaintiff-Appellee's case was limited to his claim of medical negligence as against Dr. Jones. Dr. Jones was nonetheless permitted to introduce evidence of Dr. Skocik's negligence as a defense under O.R.C. 2307.23. The expert witnesses expected to testify on behalf of Dr. Skocik, Dr. Charles Cefalu, M.D. and Dr. John J. Wald, M.D., who had been critical of Dr. Jones in their deposition testimony, were not heard by the trier of fact. At the conclusion of the trial, the jury returned general verdict in favor of Dr. Jones and against Plaintiff-Appellee. (General Verdict, filed 1/22/11).

Plaintiff-Appellee's Civ.R. 59 motion for a new trial was denied by the trial court, which upheld the directed verdict based upon a perceived failure assert the "duty" element of Plaintiff-Appellee's cause of action against Dr. Skocik during counsel's opening statement. (See Entry, filed 4/5/11, p. 3). Plaintiff-Appellee thus appealed to the Fourth Appellate District, arguing that that the trial court erred in granting Dr. Scocik's motion for directed verdict at the

conclusion of the opening statement because (1) the opening statement was sufficient so as to set forth a claim against Dr. Skocik under *Cornell v. Morrison*, 87 Ohio St. 215, 100 N.E. 817 (1912) and *Brinkmoeller v. Wilson*, 41 Ohio St.2d 223, 325 N.E.2d 233 (1975) ; (2) counsel was not given the opportunity to amend, supplement and/or explain the opening statement prior to the granting of a directed verdict, as required by *Cornell, supra* and *Archer v. City of Port Clinton* 6 Ohio St.2d 74, 215 N.E.2d 707 (1966); and (3) the trial court had failed to consider the pleadings before determining that no triable issue of fact had been presented so as to preclude a directed verdict. Plaintiff/Appellant also appealed the trial court's overruling of the motion for new trial as against Dr. Jones, as the directed verdict led to a highly irregular and unjust trial predicated on an error of law.

In its February 15, 2012 Decision and Judgment Entry, the Fourth District Court of Appeals agreed that the directed verdict granted in favor Dr. Skocik was in error. Relying on the language set forth in *Brinkmoeller, supra*; *Archer, supra* and *Taylor v. U.S. Health Corp.*, 4th Dist. No. 96-CA-2457, 1997 WL 346160, 5 (June 20, 1997); the Court held that “[i]f 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.” As this argument was dispositive of the first assignment of error, the Fourth District declined to address the remaining arguments under *Cornell, supra* and *Brinkmoeller, supra*.

Defendant-Appellants Dr. Skocik and Family Medicine of Chillicothe, Inc. subsequently filed a Motion to Certify Conflict with the Fourth District Court of Appeals, arguing that its decision in this matter is in conflict with the Tenth Appellate District's holding in *Blankenship v. Kennard*, 10th Dist. App. No. 93AP-415, 1993 WL 318825 (Aug. 17, 1993). The parties also filed cross-appeals from the Fourth Districts decision, based upon both the legal issue at hand

and the trial court's denial of Plaintiff-Appellee's motion for a new trial. The Court has declined jurisdiction to hear these appeals. (See Supreme Court Entry, Case No. 2012-0531). The motion to certify, however, was granted, and on June 20, 2012 this Court agreed that a conflict exists, and determined to answer the following certified question of law:

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.

(Supreme Court Entry, filed June 20, 2012). Based upon the following, this Court should answer the certified question in the affirmative, and the Fourth District's decision in this matter should be upheld.

ARGUMENT

A. THE ELEVENTH DISTRICT CORRECTLY APPLIED LONGSTANDING OHIO LAW IN RULING THAT, PURSUANT TO *VEST* AND *ARCHER*, THE TRIAL COURT ERRED IN FAILING TO TAKE THE ALLEGATIONS OF THE COMPLAINT, TOGETHER WITH THE OPENING STATEMENT, INTO CONSIDERATION WHEN RULING UPON DEFENDANT-APPELLANTS' MOTION FOR DIRECTED VERDICT.

It is axiomatic that opening and closing statements are not evidence, but are only for the assistance of the jury. See 3 O.J.I. §305.03 (1). The opening statement serves only "to inform the jury in a concise and orderly way of the nature of the case and the questions involved and to outline the facts intended to be proved." 89 Oh. Jur. 3d Trial § 109; citing *Maggio v. City of Cleveland*, 151 Ohio St. 136, 84 N.E.2d 912 (1949). Further, as a number of Ohio courts have noted, "[t]here is no requirement that the opening statement must include averments of all of the essential elements of the case." Markus, Trial Handbook for Ohio Lawyers §7:3; quoting *Peters v. Fancher*, 12th Dist. No. 803, 1979 WL 208827, *1 (Dec. 5, 1979); see also *McManaway v. Fairfield Medical Center*, 5th Dist. No. 05 CA 34, 2006-Ohio-1915, ¶ 164 ("We note that opening statements are, as a general rule, not evidence to be considered by the jury. Thus,

counsel's failure to mention [appellee's] loss of consortium claim, during opening argument, does not entitle [appellant] to a directed verdict since opening statements are not evidence.”) (citations omitted).

The standards for granting a motion for directed verdict at the close of an opening statement were first clarified by this Court in *Cornell v. Morrison*. In the syllabus of its opinion, the *Cornell* court allowed for such measures in limited situations:

“Where it appears from the record that counsel for plaintiff, in the statement of the case to the jury, stated in detail all the evidence that plaintiff proposed to offer in support of the allegations in his petition, and where it further appears that after the sufficiency of his statement was challenged, he was 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 would establish, and with such explanation and qualification as counsel desire to make it is still apparent that the facts proposed to be proven would not sustain the essential averments of the petition and would not authorize a verdict and judgment for plaintiff, it is the duty of the trial court to sustain a motion to withdraw the case from the jury and enter a judgment dismissing plaintiff's petition and for costs.” *Cornell*, 87 Ohio St. 215, at paragraph two of the syllabus.

In reaffirming the precaution to be taken before granting such a measure, the Ohio Supreme Court again addressed motions for directed verdict made upon the opening statements in *Vest v. Kramer*, 158 Ohio St. 78, 107 N.E.2d 105 (1952). In doing so, the *Vest* court required that both the substance of the opening statement itself **and the pleadings** must be taken into consideration before directing a verdict at this stage. *See id.*, at paragraph two of the syllabus (“A motion by defendant for judgment on the pleadings and statement of counsel for the plaintiff is an admission by the defendant, for the purposes of the motion, **of the truth of the well**

pleaded facts, the statement of counsel and all proper inferences which may be drawn therefrom and leaves no disputed fact to be determined by the jury but only a question of law for the court.”)(emphasis added). This tenet was again emphasized by the Court in *Archer v. City of Port Clinton*, in which the Court stated 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.” *Archer*, 6 Ohio St.2d at 76 (emphasis added).

This Court has never reversed, abandoned or otherwise limited this requirement, which was clearly intended to promote the policy favoring decisions on the merits of a claim rather than upon procedural technicalities. In *Brinkmoeller v. Wilson*, decided almost decade after *Archer* (and after the adoption of the Ohio Rules of Civil Procedure), the Court again emphasized the caution with which a trial court should proceed before directing a verdict after the opening statement, holding that “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*, 41 Ohio St.2d at 223 (emphasis added). In affirming the judgment of the Court of Appeals and holding that the directed verdict had been granted in error, the *Brinkmoeller* court noted:

“It seems to us that a disputed question of fact on counsel for plaintiffs' opening statement **and the pleadings** is present and relates to which of the facts averred proximately caused or contributed to cause Mrs. Brinkmoeller's injuries. Reasonable minds surely could differ here on that issue. Plaintiffs should have been permitted to produce evidence to support those assertions.” *Id.* at 227 (emphasis added).

During the proceedings on January 11, 2011, no argument was made, and the trial court did not find, that the facts set forth in the pleadings failed to set forth an action against Dr. Skocik. The Civ.R. 50 motion was rather based solely on the wording of Plaintiff-Appellant's counsel's opening statement. However, all of the elements for a claim of medical negligence required by *Bruni* were sufficiently set forth against Dr. Skocik in Plaintiff's Third Amended Complaint. *See Bruni v. Tatsumi*, 46 Ohio St.2d 127, 346 N.E.2d 673 (1976), at paragraph one of the syllabus; (Third Amended Complaint, ¶¶ 21-23). As such, the Fourth District correctly held that the trial court erred in granted Defendant-Appellants' motion for directed verdict in this instance.¹

B. NOTHING IN THE LANGUAGE OF CIV.R. 50 ALTERS OR ADDRESSES THE COURT'S HOLDINGS IN *VEST* OR *ARCHER*, OR JUSTIFIES THE SHIFT IN LAW PROPOSED BY DEFENDANT-APPELLANTS.

Defendant-Appellants' sole basis for their argument to abandon this longstanding rule of Ohio law is that the holdings of *Vest* and *Kramer* were decided prior to the adoption of the Ohio

¹ It is worth noting that the trial court also failed to grant Plaintiff-Appellee's counsel a full opportunity to amend, supplement and/or qualify his opening statement upon Defendant-Appellants' objection, also in violation of the *Cornell* holding. *See Cornell*, 87 Ohio St. 215, at paragraph two of the syllabus. Further, the opening statement did in fact adequately set forth a cause of action for medical malpractice against Dr. Skocik, in that a duty was established ("Doctor Campellone will tell you that Lovenox needed to be given to Karen as soon as she got within that twenty-four hour time period, as soon as she got to Chillicothe Rehab***")(Tr., p. 15, lines 21-23), a breach of said duty ("***Doctor Writesel who I had mentioned, who will tell you that it was Doctor Skocik's fault. That it was Doctor Skocik's fault for not ordering the proper D.V.T. prophylaxis in time***"), as well as damages resulting therefrom ("if Karen was on the Lovenox as she should have been, the blood clots would not have formed and those blood clots would not have traveled to her lung and she would not have died.") (Tr., pp. 15, 18).

Rules of Civil Procedure. However, it is clear that Civ.R. 50 was not intended to alter or modify Ohio law in this regard. The plain language of the Rule makes no mention of any specific prerequisites which must be established during an opening statement, and gives trial courts no guidance whatsoever as to when a motion for directed verdict made at this stage is to be granted. While Civ.R. 50(A)(1) permits such a motion “may be made on the opening statement of the opponent,” the only provision discussing when a directed verdict is to be **granted** requires the trial court to “constru[e] the evidence most strongly in favor of the party against whom the motion is directed, [and] find[] 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.” Civ.R. 50(A)(4). As stated above, opening statements are not evidence, and Civ.R. 50(A)(4) is therefore silent as to when a directed verdict would be proper other than after the closing of a party’s case-in-chief.

Without any language in the rule addressing it, it is clear that the adoption of Civ.R. 50 was not intended to alter Ohio common law regarding motions for directed verdict. In the Staff Notes to Civ.R. 50, the committee noted as such:

“***In effect, Rule 50 reduced Ohio directed verdict and judgment notwithstanding the verdict practice to rule format. Rule 50 varies from traditional Ohio practice only in slight detail. In short, although Rule 50 follows the format of Federal Rule 50, the content of Rule 50 is more closely akin to established Ohio practice.” Civ.R. 50 (1970 Staff Notes).

Despite the shift from “code” pleading to notice pleading brought about by the adoption of the Ohio Rules of Civil Procedure in 1970, the opinions in *Vest* and *Archer* have continued to guide Ohio courts on the subject; and the vast majority of courts addressing the issue have held that the pleadings must be taken into account before granting a motion for directed verdict upon

an opening statement. See *Brentson v. Chappell*, 66 Ohio App.3d 83, 89, 583 N.E.2d 434 (8th Dist. 1990)(“Upon a review of this case, it is clear that a disputed question of fact in appellee's counsel's opening statement and the pleadings is present and relates to which of the facts averred proximately caused, or contributed to cause, appellee's injuries. Reasonable minds surely could differ on this issue; thus, appellee was entitled to produce evidence to support her assertions.”); *Graham v. Cedar Point, Inc.*, 124 Ohio App. 3d 730, 734, 707 N.E.2d 554 (6th Dist. 1997)(“Both the opening statement and the allegations in the complaint must be considered in determining whether a justiciable cause exists.”); *Peters*, 1979 WL 208827, *2 (“In deciding whether or not to grant a directed verdict on opening statement, the trial judge must consider both the pleadings and the statement in determining as a matter of law whether a cause of action has been established.”); *Sapp v. Stoney Ridge Truck Tire*, 86 Ohio App.3d 85, 93-94, 619 N.E.2d 1172 (6th Dist. 1993)(“Both the opening statement and the allegations in the complaint must be considered in determining whether a justiciable cause exists.”); *Taylor*, 1997 WL 346160, *6 (“[B]oth the opening statement and the complaint must be considered in deciding a motion for directed verdict.”); *Vistein v. Keeney*, 71 Ohio App.3d 92, 103, 593 N.E.2d 52 (11th Dist. 1990) (“When a motion for a directed verdict is made following the plaintiff's opening statement, the trial court is required to consider the pleadings and the statement in rendering its decision.”).

In fact, before issuing the rogue *Blankenship* decision upon which Defendant-Appellants base their argument, even the Tenth District Court of Appeals acknowledged that the *Archer* court's requirement that the pleadings be taken into consideration survived the adoption of the Rules of Civil Procedure. Compare *Gelzer Systems Co., Inc. v. Industrial Machinery & Supply*, 10th Dist. No. 84AP-1156, 1986 WL 2488, 2 (Feb. 20, 1986) (“The trial court did not err in permitting plaintiff to supplement the opening statement since this is the appropriate procedure,

and there should be a reference to the pleadings before sustaining the motion.”); *with Blankenship*, 1993 WL 318825 (Aug. 17, 1993).

In sum, neither the plain language nor the stated intent of Civ.R. 50 support Defendant-Appellants’ argument that the adoption of the Ohio Rules of Civil Procedure warrants the abandonment of rule first recognized by this Court more than fifty years ago. Furthermore, while the doctrine of stare decises may have relatively less import in matters of procedure instead of substantive rights, *Vest* and *Archer* have been repeatedly relied upon by Ohio Courts for more than five decades, and there is no indication that they were wrongly decided or that they defy practical workability. *See Westfiled v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, at paragraph one of the syllabus; *State v. Silverman*, 121 Ohio St.3d 581, 2009-Ohio-1576; ¶32. As such, this Court should adhere to this principle and answer the certified question in the affirmative.

C. THE ADOPTION OF THE OHIO RULES OF CIVIL PROCEDURE DID NOTHING TO SUBSTANTIALLY ALTER THE CIRCUMSTANCES PRESENTED BY A MOTION FOR DIRECTED VERDICT MADE AT THE CLOSE OF OPENING STATEMENT, AND AS SUCH THERE IS NO REASON TO ABANDON LONGSTANDING PRECEDENT IN THIS REGARD.

In their merit brief, Defendant-Appellants argue that because of this shift from “code” pleading to notice pleading, “[c]omparison of the tenets of Civ.R. 12 and 50 reveals that application of common law precedent to notice pleading standards makes directed verdict on the opening statement pursuant to Civ.R. 50(A) a nullity.” (See Brief of Appellants, p. 12). This argument assumes that the adoption of the Ohio Rules of Civil Procedure made the *Vest* and *Archer* rulings obsolete, because with consideration of the pleadings no case would be subject to a directed verdict after opening statement under Civ.R. 50 (A) unless is was also subject to dismissal or judgment on the pleadings under Civ.R. 12(B)(6) or Civ.R. 12 (C) for failure to state a claim upon which relief can be granted.

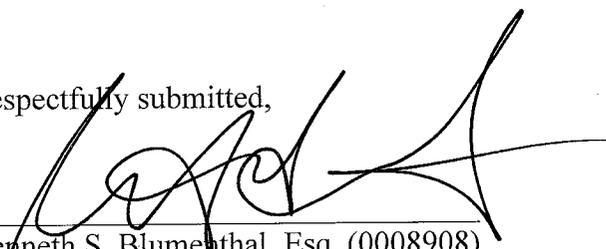
Any concerns as to the overlap between Civ.R 12 and Civ. R. 50 are greatly outweighed by the notion that cases should be decided on the merits rather than upon procedural technicalities. Further, despite the contentions of Defendants-Appellants, this perceived “redundancy” existed even prior to the passage of the Ohio Rules of Civil Procedure in 1970. After all, under “code” pleading, petitions which failed to allege facts setting forth a proper cause of action were subject to demurrer. *See, e.g. Swankowski v. Diethelm*, 98 Ohio App. 271, 273, 129 N.E.2d 182 (6th Dist. 1953)(“When a petition is challenged by a general demurrer***the issue thus raised is the legal sufficiency to state a *cause of action* against the defendant.”); *Lewis v. Bendinelli*, 26 Ohio Misc. 189, 270 N.E.2d 375 (Scioto C.P. 1970); *Squire v. Guardian Trust Co.*, 79 Ohio App. 371, 72 N.E.2d 137 (8th Dist. 1947). Furthermore, Ohio law recognized motions for summary judgment as early as 1959. *See Norman v. Thomas Emery’s Sons, Inc.*, 7 Ohio App.2d 41, 43, 218 N.E.2d 480 (1st Dist. 1966). As such, the *Blankenship* court’s questions regarding the usefulness of motions for directed verdict made upon the opening statement existed long before the 1970 adoption of the Ohio Rules of Civil Procedure, and prior to this Court’s rulings in both *Archer* and *Brinkmoeller*.

CONCLUSION

Based on the foregoing, Plaintiff-Appellee respectfully requests that this Honorable Court answer the certified question presented in the affirmative, and uphold the decision of the Fourth District Court of Appeals. The Ohio Rules of Civil Procedure did not intend to alter this Court’s decisions in *Vest and Archer*, and nothing in the language of the rules suggests otherwise. Further, any perceived conflict between Civ.R. 12 and Civ.R. 50 as to this issue existed long before the Rules were ever adopted. As has been the case for more than fifty years under Ohio law, a trial court should consider both the factual allegations presented in the pleadings, together

with the opening statement, when ruling on a motion for directed verdict made at the close of openings statements.

Respectfully submitted,



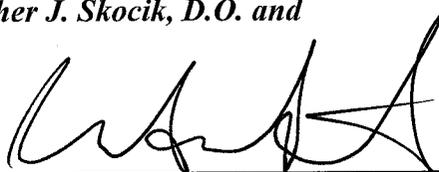
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and exact copy of the foregoing *Brief of Appellee* was served via U.S. regular mail on November 2, 2012 upon the following counsel of record:

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