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INTRODUCTION

The certified conflict issue before this Court is 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. Appellee's argument in favor of maintaining the *status quo* is essentially "this is the way we have done it for 100 years and there is no need to change now." Appellee argues that there is no justification for a shift in Ohio law, as proposed by Appellants. However, Appellee blatantly disregards the conflict that is created between Civ.R. 12(C) and Civ.R. 50 by maintaining the *status quo*. Appellee cites to cases decided by this Court in 1912, 1949, 1952, and 1966 for the proposition that a trial court should continue to consider the allegations in the pleadings when considering a motion for directed verdict made at the close of opening statement. See, *Cornell v. Morrison* (1912), 87 Ohio St. 215; *Maggio v. City of Cleveland* (1949), 151 Ohio St. 136; *Vest v. Kramer* (1952), 158 Ohio St. 78; *Archer v. City of Port Clinton* (1966), 6 Ohio St.2d 74. Clearly these cases were decided in the era prior to the adoption of the rules of civil procedure and thus prior to the creation of the aforementioned internal conflict. More importantly, however, is the fact that there was a different standard of pleading practice prior to the adoption of the rules of civil procedure in 1970. This is an important distinction that Appellee ignores.

Next Appellee argues that the trial court failed to grant a full opportunity to amend, supplement, and/or qualify his opening statement. This argument is a fallacy of distraction to the certified issue in conflict before this Court, because Appellee had no witnesses to make a prima facie case of negligence against Appellants. The issue is not before this Court. Moreover, as set forth hereinafter, the issue is inconsequential to the trial court's decision.

Finally, Appellee argues that the concept of demurrer existed prior to the adoption of the rules of civil procedure and was the available means, akin to Civ.R. 12(C), for seeking judgment on the pleadings. Plaintiff further argues that demurrer was a redundancy to directed verdict on the opening statement, which also existed prior to 1970. Appellee inferentially concludes, therefore, that any current redundancy between Civ.R. 12 and Civ.R. 50 is permissible. However, Appellee misconstrues the concept of a demurrer as set forth hereinafter.

LAW AND ARGUMENT

A. Allegations versus Facts: The Difference Between Allegations and Facts in the Context of a Notice Pleading Standard

If this Court were to hold that the “pleadings” must be considered by a trial court when ruling on directed verdict at the close of opening statement, it would perpetuate a misconception that facts contained in a petition under the former code pleading standard, and allegations set forth in a complaint under the notice pleading standard adopted by the rules of procedure, are one in the same. They are not. The sufficiency of a case is based upon facts, not allegations. While a complaint drafted in the modern era of notice pleading may contain facts, it is not required. The only requirement is that the pleading set forth a “short and plain statement of the claim (vis-à-vis allegation) showing that the party is entitled to relief.” Civ.R. 8(A) Therefore, it is incumbent upon a plaintiff to set forth with particularity in opening statement the essential facts expected to be proven that support the allegations contained in the pleadings.

In *Brinkmoeller v. Wilson* (1975), 41 Ohio St.2d 223, which Appellee also cites in support of his position, this Court recognized the distinction between facts and allegations and the importance of trial courts basing a directed verdict ruling on facts. “A trial court should exercise great caution in sustaining a motion for a directed verdict on the opening statement of counsel; 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.” (emphasis added) *Id.* syllabus. Often a complaint will contain mixed allegations of fact. Therein lies the difficulty of requiring a trial court to take into consideration the pleadings in the context of directed verdict. What often begin as allegations of fact can change throughout the course of discovery into fiction. It is not until discovery has run its full course throughout the pretrial process that allegations of fact can be established as true. It is upon these known proven facts that a plaintiff rests his case during trial, and it is these known proven facts that a plaintiff must set forth in his opening statement to make a prima facie case in order to survive directed verdict.

Looking back to 1912, this Court recognized the utility of directed verdict as a procedural mechanism for averting waste of judicial time and resources. In *Cornell* this Court held:

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 averments of his petition, 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 averments of the petition 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.

Cornell, supra.

Like the *Cornell* Court, the trial court in this matter recognized its right and authority to dispose of Appellee's case against Appellants on directed verdict, so as to prevent the unnecessary delay of a long and tedious trial and the waste of the time of the court and jury in considering allegations of negligence that Appellee was unable to establish in his case-in-chief.

B. Opportunity to Amend, Supplement and/or Qualify Appellee's Opening Statement

Plaintiff bears the burden of proof in a medical negligence lawsuit. See, *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127. In the case *sub judice*, Appellee could not establish the "fact" of Appellant's negligence in his case-in-chief, in accordance with his burden of proof, because Appellee did not have an expert witness to offer such an opinion. Appellee was relying, to his detriment and ultimate misfortune, on the expert testimony of Co-Defendant Dr. Jones' witness to establish that which Appellee was required to prove. However, Dr. Jones did not establish during his opening statement that the evidence of Appellant's negligence would arise in Appellee's case-in-chief. This is the fatal flaw in Appellee's argument. Quite simply, Appellee did not have the expert witness testimony to meet the requisite burden of proof in his case-in-chief.

Appellee references a stipulation [to correct omission in record] entered into among the parties in order to clarify comments made by counsel, which the court reporter was unable to accurately transcribe. Appellee argues that for the purpose of ruling on directed verdict the trial court should have allowed Appellee to incorporate, as a supplement to his opening statement, the comments made by counsel for Dr. Jones during Jones' opening. However, incorporation as argued by Appellee is inappropriate, because incorporation contemplates that which the party seeking to incorporate intends to prove and not that which another party will prove. The proper time for supplementation of the opening statement is prior to the court taking the issue under

advisement for ruling, which the trial court did prior to continuing with Dr. Jones' opening statement. The trial court's purpose in continuing with Dr. Jones' opening statement in the face of the pending motion was not to afford Appellee the opportunity to further supplement his argument against directed verdict, but rather to avoid a waste of the jury's time while the court contemplated its ruling.

Assuming arguendo that Appellee was not permitted to properly supplement his opening statement with those propositions set forth by Dr. Jones, there still would not have been sufficient facts before the trial court for Appellee to make a prima facie case of Appellant's negligence. Again, Dr. Jones did not establish in his opening that the evidence of Appellant's negligence would arise in Appellee's case-in-chief. Notwithstanding the arguments on both sides of this issue, Appellee's arguments concerning incorporation of Dr. Jones' comments are *ignoratio elenchi* to the certified question before this Court.

C. Demurrer and Redundant Civil Procedure Prior to 1970

Appellee argues that a redundancy in procedure existed prior to the adoption of the rules of civil procedure in 1970 and that, therefore, there is no need to reverse common law precedent and challenge the manner in which trial courts review motions for directed verdict. Appellee asserts that formerly a redundancy existed between demurrer and directed verdict on the opening statement of counsel.

Demurrer is defined as "A pleading stating that although the facts alleged in a complaint may be true, they are insufficient for the plaintiff to state a claim for relief and for the defendant to frame an answer." *Black's Law Dictionary* 444 (7th Ed.1999) "A demurrer is substantially an answer raising a question of law." *Hauer v. Provident Sav. Bank & Trust Co.* (1959), 111 Ohio App. 214, citing 31 Ohio Jurisprudence 661. The *Hauer* Court added "it [demurrer] thus is not

concerned with facts.” *Id.* In other words, a demurrer is a pleading requesting dismissal for failure to state a claim upon which relief can be granted, notwithstanding the facts. A demurrer is the same as a motion to dismiss for failure to state a claim made pursuant to Civ.R. 12(B)(6), which is procedural in nature and tests the sufficiency of the complaint.

Civ.R. 50(A)(4) provides: "When a motion for a directed verdict has been properly made, and the trial court, after construing the evidence most strongly in favor of the party against whom the motion is directed, finds that upon any determinative issue reasonable minds could come to but one conclusion upon the evidence submitted and that conclusion is adverse to such party, the court shall sustain the motion and direct a verdict for the moving party as to that issue." A motion for directed verdict requires a court to consider the facts asserted by the opposing party and to accept such facts as true. "A motion for directed verdict * * * does not present factual issues, but a question of law, even though in deciding such a motion, it is necessary to review and consider the evidence." *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 514, 2002-Ohio-2842, quoting *O'Day v. Webb* (1972), 29 Ohio St.2d 215, paragraph three of the syllabus. Herein lies the essential difference illustrating that there was no redundancy in civil procedure prior to 1970. A demurrer and motion for directed verdict required different analysis with the former being strictly a question of law and the latter being a question of asserted facts.

Appellee adds that motions for summary judgment also existed long before adoption of the rules of civil procedure, but a motion for summary judgment may take into consideration facts outside the pleadings. Again, this is significant difference from the directed verdict standard of review and clearly shows that there was no redundancy prior to 1970 in this motion practice.

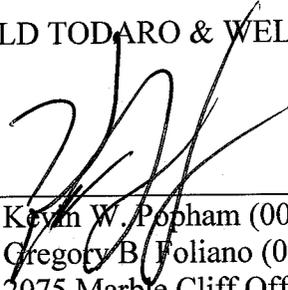
CONCLUSION

For all of the foregoing reasons, and for the reasons previously set forth, Appellants respectfully request that this Honorable Court reverse the decision of the Fourth District Court of Appeals, answer the certified question in the negative, vis-à-vis that a trial court shall not consider the pleadings when ruling on a motion for directed verdict made at the close of opening statement, and remand this matter to the Fourth District Court of Appeals with instructions to consider whether Appellee's opening statement taken without consideration of the complaint was sufficient to withstand directed verdict made pursuant to Civ.R. 50(A).

Respectfully submitted,

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

By: _____


Kevin W. Popham (0066335)
Gregory B. Foliano (0047239)
2075 Marble Cliff Office Park
Columbus, OH 43215
kpopham@arnoldlaw.net
Phone: (614) 485-1800
Fax: (614) 485-1944
Counsel for Appellants

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 21st day of November, 2012.

Kenneth S. Blumenthal, Esq.
Jonathan R. Stoudt, Esq.
Rourke & Blumenthal, LLP
495 S. High Street, Suite 450
Columbus, OH 43215
Counsel for Plaintiff-Appellee

Frederick A. Sowards, Esq.
Hammond Sowards & Williams
556 E. Town Street
Columbus, OH 43215
Counsel for Defendant Michael Jones, D.O.



Kevin W. Popham