[Cite as *Griffith v. Veale*, 2008-Ohio-5704.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

SHARON K. GRIFFITH, et al.	C. A. No. 24036
Appellants	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
SHIRLEY C. VEALE	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellee	CASE No. CV 2005 12 7494

DECISION AND JOURNAL ENTRY

Dated: November 5, 2008

Per Curiam.

{¶1} Plaintiff Sharon K. Griffith has appealed from the order of the Summit County Common Pleas Court denying her motion for a new trial. This Court affirms.

I

{¶2} Ms. Griffith was a passenger in a minivan driven by her husband when it collided with a car driven by defendant Shirley C. Veale. According to her husband, son, and daughter, Ms. Griffith lost consciousness immediately after the collision. She was conscious, however, when emergency medical personnel arrived at the scene and complained to them about numbness in her left arm, as well as neck and back pain. At some point while she was being attended by the emergency medical personnel, she lost consciousness or fainted for approximately 30 seconds. The emergency medical personnel put a cervical collar on her and took her to Akron General Medical Center.

{¶3} At the hospital, Ms. Griffith again complained about numbness in her left arm. She was admitted and spent four days in the hospital, complaining about fainting, back pain, leg pain, and left arm numbness.

{¶4} Over the next 3½ years, Ms. Griffith was treated by a physiatrist, a chiropractor, and a neurologist, as well as by her primary care physician, for conditions allegedly related to the automobile collision. Those conditions included traumatic brain injury, an abrasion of the right side of her scalp, weakness of the left shoulder and left hand, aggravation of a previous lumbar spinal stenosis, and neck pain.

{¶5} Ms. Griffith and her husband sued Ms. Veale for Ms. Griffith's alleged injuries and her husband's alleged loss of consortium. Ms. Veale conceded liability for any damages caused by the collision. The jury before whom this matter was tried returned a verdict awarding Ms. Griffith no damages, and she and her husband moved for a new trial under Rule 59(A)(6) of the Ohio Rules of Civil Procedure, arguing that the jury's verdict was against the manifest weight of the evidence. The trial court denied their motion, and they have appealed to this Court.

II

Assignment of Error

> "The Trial Court abused its discretion in denying Appellants' Motion for New Trial where Appellee's and Appellants' experts testified that Appellant sustained injuries as a proximate result of Appellee's negligence and where Appellants' medical records also provided unrefuted evidence that she sustained injuries."

{¶6} In their sole assignment of error, the Griffiths argue that the trial court incorrectly denied their motion for a new trial. We disagree.

{¶7} "When an appellate court reviews the grant or denial of a motion for a new trial as against the weight of the evidence, the appellate court does not directly review whether the judgment was against the manifest weight of the evidence." *Brown v. Mariano*, 9th Dist. No.

05CA008820, 2006-Ohio-6671, at ¶5 (quoting *Snyder v. Singer*, 9th Dist. No. 99CA0020, 2000 WL 631981, at *3 (May 17, 2000)). Rather, this Court "reviews the [trial] court's decision on that matter for an abuse of discretion." *Id*. This Court recently described the trial court's function in determining whether to grant a motion for new trial based on the weight of the evidence:

> A trial judge should "abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result." "[I]t is the function of the jury to assess the damages, and generally, it is not for a trial or appellate court to substitute its judgment for that of the trier-of-fact." "Where a verdict is supported by competent substantial and apparently credible evidence, a motion for new trial will be denied."

Petryszak v. Greegor, 9th Dist. No. 07CA0076, 2008-Ohio-4776 at ¶8 (citations omitted).

{¶8} In denying Ms. Griffith's motion for a new trial, the trial court wrote that "[t]he sole question put to the jury was what, if any, of Plaintiff's injuries were proximately caused by Defendant's negligence." It noted that, although Ms. Veale "did not refute Plaintiff's claim that she suffered some injury as a result of the accident," the jury was still entitled to completely reject the Griffiths' claim: "Negligence may occur without causing any personal injuries."

{¶9} The trial court recited some of the evidence the Griffiths presented in support of Ms. Griffith's claimed injuries. It also noted, however, that, while a neurologist who testified on behalf of Ms. Veale acknowledged that Ms. Griffith had "probably suffered some soft tissue injury" in the collision, he "could find nothing at all with this lady objectively that [he] felt was related to this accident." It further noted that a psychologist who testified on behalf of Ms. Veale opined that Ms. Griffith had "intentionally produced false or exaggerated symptoms—exaggerating her head injury and the impact on her functional abilities." The court pointed out that, according to the defense psychologist, Ms. Griffith's scores on tests administered to her "were consistent with a severe dementia functioning level, which obviously put them in doubt."

{¶10} The trial court also noted that, while Ms. Griffith claimed very limited ability to use her left arm and hand, Ms. Veale presented a surveillance video that contradicted Ms. Griffith's claim. "It showed Plaintiff carrying packages, getting into the driver's seat of a car without any help, pulling her seat belt on, shutting the car door—all activities that she claimed she could not do as a result of the injuries she received from the accident."

{¶11} The trial court, in its opinion, concluded that "there was competent, credible evidence presented to the jury which supports its finding that Plaintiff was not injured in the accident." Inasmuch as it supported that conclusion by reciting evidence in the record tending to prove that Ms. Griffith's claimed injuries were non-existent, this Court cannot conclude that it abused its discretion by denying her motion for a new trial. Ms. Griffith's assignment of error is overruled.

III

{¶12} Ms. Griffith's assignment of error is overruled. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the

period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellants.

LYNN C. SLABY
FOR THE COURT

SLABY, P. J.
WHITMORE, J.
CONCUR

DICKINSON, J.
DISSENTS, SAYING:

{¶13} In *State v. Wilson*, 113 Ohio St. 3d 382, 2007-Ohio-2202, the Ohio Supreme Court held that, if a trial court's judgment in a civil case is "supported by some competent, credible evidence going to all the essential elements of the case," an appellate court is not authorized to reverse the judgment "as being against the manifest weight of the evidence." *Id*. at ¶24 (quoting *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St. 2d 279, syllabus (1978)). In other words, in determining whether a decision in a civil case is supported by the weight of the evidence, an appellate court is not permitted to weigh the evidence. I have written elsewhere about the problems I see with the decision in *Wilson*. *Huntington Nat'l Bank v. Chappell*, 9th Dist. No. 06CA008979, 2007-Ohio-4344, at ¶17-75 (Dickinson, J., concurring).

{¶14} In ruling on Ms. Griffith's motion for a new trial in this case, the trial court applied the "competent, credible evidence" test adopted in *Wilson*. In affirming, the majority has approved the trial court's use of that test. Because I do not believe the *Wilson* decision should be extended to prohibit trial judges from weighing the evidence when a party moves for a new trial under Rule 59(A)(6) of the Ohio Rules of Civil Procedure, I would reverse and remand for the

trial court to weigh the evidence and determine whether the jury's verdict was a manifest injustice.

{¶15} In *Rohde v. Farmer*, 23 Ohio St. 2d 82 (1970), the Ohio Supreme Court considered the test a trial judge should apply in determining whether to grant a motion for new trial under then Section 2321.17(F) of the Ohio Revised Code, the statutory predecessor of Rule 59(A)(6). Section 2321.17(F) authorized a trial court to grant a new trial if a jury's verdict was "not sustained by sufficient evidence." *Rohde*, 23 Ohio St. 2d at 90-91. Under Ohio law, at least in criminal cases, the legal concepts of "sufficiency of the evidence" and "weight of the evidence" are now "quantitatively and qualitatively different." *State v. Thompkins*, 78 Ohio St. 3d 380, 386 (1997). As explained by Supreme Court in *Rohde*, however, the phrase "sufficient evidence," as used by the legislature in Section 2321.17(F), was synonymous with what we would now term, at least in a criminal case, manifest weight: "[T]he language of R.C. § 2321.17(F), 'sustained by sufficient evidence,' does not mean merely sufficient evidence to compel the submission of the case to the jury, but means sufficient, in the opinion of the trial court, to conclude as a matter of fact that the judgment is not against the weight of the evidence." *Rohde*, 23 Ohio St. 2d at 92. The Supreme Court further explained the test a trial judge should apply in determining whether the jury's verdict is supported by the weight of the evidence: "[T]he trial court, in determining such question, must review the evidence and pass on the credibility of the witnesses; not in the substantially unlimited sense that such weight and credibility is passed on originally by the jury, but in the more restricted sense of whether it appears to the trial court that a manifest injustice has been done, and that the verdict is against the manifest weight of the evidence." *Id*. at 92.

{¶16} In *Rohde*, the Supreme Court also explained that, in considering the weight of the evidence, a trial judge is required to exercise discretion: "A motion for a new trial with reference to the weight or sufficiency of the evidence is addressed to the sound discretion of the trial court and imposes upon that court a duty to review the evidence and pass upon the credibility of witnesses." *Rohde*, 23 Ohio St. 3d at 90 (quoting *Berry v. Roy*, 172 Ohio St. 422, 424 (1961)). It further explained that, when a trial judge exercises his or her discretion and grants a new trial based on the weight of the evidence, an appellate court, in determining whether the trial judge has abused that discretion, should view the evidence most favorably to the judge's action rather than to the jury's verdict: "This rule of appellate review is predicated, in part, upon the principle that the discretion of the trial judge in granting a new trial on the weight of the evidence may be supported by his having seen and heard the witnesses and having formed a doubt as to their credibility, or having determined from the surrounding circumstances and atmosphere of the trial, that the jury's verdict resulted in manifest injustice." *Id*. at 94 (citing *Mooney v. Carter*, 160 P.2d 390, 391 (Colo. 1945)).

{¶17} In *Malone v. Courtyard by Marriott*, 74 Ohio St. 3d 440 (1996), the Ohio Supreme Court reviewed a case in which an appellate court reversed a trial judge's grant of a new trial under Rule 59(A)(6). The Supreme Court reiterated that an appellate court's standard of review when considering a trial judge's ruling on a new trial based on the weight of the evidence is abuse of discretion and again explained: "This deference to a trial court's grant of a new trial stems in part from the recognition that the trial judge is better situated than a reviewing court to pass on questions of witness credibility and the 'surrounding circumstances and atmosphere of the trial.'" *Id*. at 448 (quoting *Rohde*, 23 Ohio St. 2d at 94). The Supreme Court concluded that the trial judge had not abused his discretion in granting a new trial in that case

and that, therefore, the appellate court had incorrectly reversed the trial court's order doing so: "A reasonable person confronted by such a set of facts could validly conclude that the jury's verdict for [plaintiff] was against the manifest weight of the evidence." *Id*. at 449.

{¶18} As I noted at the outset, in *State v. Wilson*, 113 Ohio St. 3d 382, 2007-Ohio-2202, the Ohio Supreme Court held that, when an appellate court is itself asked to reverse a trial court's judgment in a civil case based on the weight of the evidence, the appellate court is not permitted to weigh the evidence. In discussing what it termed the "civil manifest-weight-of-the-evidence standard," the Supreme Court, in *Wilson*, among other things, wrote that an appellate court applying that standard "has an obligation to presume that the findings of the trier of fact are correct," and explained that "[t]his presumption arises because the [trier of fact] had an opportunity 'to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.'" *Id*. at ¶24 (quoting *Seasons Coal Co. Inc. v. Cleveland*, 10 Ohio St. 3d 77, 80 (1984)). This is nearly identical to the reason given by the Supreme Court in *Malone* and *Rohde* for the requirement that an appellate court, when reviewing a trial judge's grant of a new trial based on the weight of the evidence, view the evidence most favorably to the trial judge's action rather than to the jury's original verdict. To the extent that the superior vantage point of the trier of fact is a ground for the Supreme Court's holding in *Wilson* that an appellate court called upon to review the weight of the evidence in a civil case is not permitted to weigh the evidence, that ground does not apply when a trial judge is asked to grant a new trial under Rule 59(A)(6).

{¶19} In *Malone*, the Supreme Court noted that the purpose of an order for a new trial under Rule 59(A)(6) "is to prevent 'miscarriages of justice which sometimes occur at the hands of juries,' by presenting the same matter to a new jury." *Malone*, 74 Ohio St. 3d at 448.

Requiring a trial judge asked to grant a new trial under Rule 59(A)(6) to apply the "competent, credible evidence" test, which, as the Supreme Court noted in *Wilson*, "tends to merge the concepts of weight and sufficiency," destroys the trial court's ability to prevent such "miscarriages of justice." *Wilson*, 2007-Ohio-2202, at ¶26.

{¶20} I would not extend the holding in *Wilson* to require trial judges asked to grant a new trial under Rule 59(A)(6) to apply the "competent, credible evidence" test, thereby requiring them to refrain from exercising their discretion by weighing the evidence that was before the jury. Rather, I would reiterate that the proper procedure for a trial judge called upon to consider a motion for new trial under Rule 59(A)(6) is the procedure described by the Supreme Court in *Rohde*: "[W]here there is a motion for a new trial upon the ground that the judgment is not sustained by [the weight of the] evidence, a duty devolves upon the trial court to review the evidence adduced during the trial and to itself pass upon the credibility of the witnesses and the evidence in general. It is true that, in the first instance, it is the function of the jury to weigh the evidence, and the court may not usurp this function, but, when the court is considering a motion for a new trial upon the [weight] of the evidence, it must then weigh the evidence. A court may not set aside a verdict upon the weight of the evidence upon a mere difference of opinion between the court and jury. . . . But, where a court finds a judgment on a verdict manifestly against the weight of the evidence, it is its duty to set it aside." *Rohde*, 23 Ohio St. 2d at 92 (quoting *Poske v. Mergl*, 169 Ohio St. 70, 73-74 (1959) (internal citations omitted)).

{¶21} In *Antal v. Olde Worlde Prods. Inc.*, 9 Ohio St. 3d 144, syllabus (1984), the Supreme Court held that, when a trial court grants a motion for new trial based on the weight of the evidence, it "must articulate the reasons for doing so in order to allow a reviewing court to determine whether the trial court abused its discretion in ordering a new trial." As noted by the

majority, the trial judge in this case filed a six page opinion explaining her denial of Ms. Griffith's motion for a new trial. Review of that opinion reveals that, rather than exercising her discretion to weigh the evidence and determine whether the jury's verdict was "manifestly against the weight of the evidence," she restricted her review to a determination that the jury's verdict was supported by "competent, credible evidence." Accordingly, I would reverse the trial court's denial of Ms. Griffith's motion for a new trial and remand for the trial judge to weigh the evidence and determine whether the jury's verdict was "manifestly against the weight of the evidence."

{¶22} I note that the majority's approval of the trial judge's use of the "competent, credible evidence" test in this case conflicts with the decision of the First District Court of Appeals in *Green v. Bailey*, 1st Dist. No. C-070221, 2008-Ohio-3569, at ¶12 ("In determining whether a verdict is manifestly against the weight of the evidence as provided in Civ.R. 59(A)(6), 'the [trial] court must review the evidence and pass on the credibility of the witnesses; not in the substantially unlimited sense that such weight and credibility are passed on originally by the jury, but in the more restricted sense of whether is appears to the trial court that a manifest injustice has been done, and that the verdict is against the manifest weight of the evidence.'")(quoting *Rohde v. Farmer*, 23 Ohio St. 2d 82, paragraph three of the syllabus) and with the decision of the Second District Court of Appeals in *Stephenson v. Upper Valley Family Care Inc.*, 2d Dist. No. 07CA12, 2008-Ohio-2899, at ¶74 ("[T]he [trial] court must review the evidence and pass in a limited way on the credibility of the witnesses."). See App. R. 25.

APPEARANCES:

ROBERT J. VECCHIO, and ANTHONY J. VEGH, Attorneys a Law, for appellants.

DAVID G. UTLEY, Attorney at Law, for appellee.