[Cite as *Wheatley v. Howard Hanna Real Estate Servs.*, 2015-Ohio-2196.]

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

RHONDA WHEATLEY Appellant v. HOWARD HANNA REAL ESTATE SERVICES, et al. Appellee	C.A. No. 13CA010505 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO CASE No. 13CV178927

DECISION AND JOURNAL ENTRY

Dated: June 8, 2015

SCHAFER, Judge.

{¶1} Plaintiff-Appellant, Rhonda Wheatley, appeals the orders and judgments of the Lorain County Court of Common Pleas (1) denying her motion for summary judgment, (2) finding that Defendant-Appellees, Howard Hanna Real Estate Services ("Howard Hanna") and Linda Shubeck (collectively, "Appellees"), are not liable for negligence, and (3) denying her motion for judgment notwithstanding the verdict. For the reasons that follow, we affirm.

I.

{¶2} This matter implicates the theft of Mrs. Wheatley's jewelry from her house while it was listed for sale by Howard Hanna through Mrs. Shubeck, its agent. The theft occurred during an open house that Mrs. Shubeck arranged. Although the open house was primarily targeted to other real estate brokers, the advertising yard signs for the event did not include a "brokers-only" designation. Mrs. Shubeck did not inform Mrs. Wheatley that members of the public may be present during the event or that it would be advertised to the public on

Howard Hanna's website. Before the open house, Mrs. Shubeck advised Mrs. Wheatley to secure any valuables that were conspicuously placed around the house.

{¶3} Mrs. Shubeck set up an information desk for the event's attendees in the kitchen, which was near the back of the house and away from the foyer. However, there was a direct line of sight from the kitchen to the foyer. Either Mrs. Wheatley or her husband, Jeffrey Wheatley, was present for at least part of the open house's duration. During the time that they were present, individuals in addition to real estate brokers arrived for the event. Neither Mrs. Wheatley nor her husband demanded that Mrs. Shubeck immediately eject these non-brokers from the house.

{¶4} Eventually, an individual arrived through the front door and immediately proceeded to the stairs. Mrs. Wheatley was standing in the hallway leading from the kitchen to the foyer and saw the individual arrive. She went to the foyer and called up to the individual as he stood at the top of the stairs, which opened down to the foyer. Mrs. Wheatley called to Mrs. Shubeck to alert her to the new arrival and then engaged the individual in conversation.

{¶5} The individual identified himself by the name, "Sam," and he said that he had a real estate agent who represented him. "Sam" gave Mrs. Shubeck a business card for his purported real estate agent. Mrs. Wheatley, after hearing that "Sam" was not a real estate agent, did not instruct Mrs. Shubeck to eject him and rather she left the house. Mrs. Shubeck then showed "Sam" around the first floor and followed him as he went up the stairs twice more.

{¶6} A couple days after the open house event, Mrs. Shubeck called Mr. Wheatley and told him that Howard Hanna learned of several thefts from its recent brokers' open house events. Upon learning this, the Wheatleys looked around their house to assess whether anything was taken, and they discovered that almost all of Mrs. Wheatley's jewelry, valued at over $50,000.00, was missing. Before the open house event, Mrs. Wheatley had placed the jewelry in a safe. The

safe was located on the second floor inside the master bedroom's closet. Although the jewelry was stored away, the safe was not locked at the time of the open house. Additionally, Mrs. Wheatley did not tell Mrs. Shubeck about either her jewelry collection or its placement in the safe before the open house.

{¶7} Mrs. Wheatley theorized that "Sam" was the person who took her jewelry. She subsequently filed a complaint alleging that Appellees were liable for the loss of her jewelry on the basis of their negligence. After exchanging discovery and conducting several depositions, Mrs. Wheatley filed a motion for summary judgment claiming that there was no genuine issue of material fact as to Appellees' negligence. The trial court denied the motion.

{¶8} This matter then proceeded to a jury trial. After the submission of evidence, the jury returned a verdict in Appellees' favor. The jurors also completed two of the eight interrogatories that were submitted to them. The first interrogatory asked the jurors to answer the following: "Do you find by a preponderance of the evidence that Defendant Linda Shubeck was negligent?" All eight jurors indicated that their response was "no" to this interrogatory. The third interrogatory asked the jurors to answer the following: "Do you find by a preponderance of the evidence that Defendant Howard Hanna was itself negligent separate and apart from the negligence of its employee Linda Shubeck?" Six of the eight jurors indicated that their response was "no" to this interrogatory. The other six interrogatories, including ones relating to proximate cause, damages, and Mrs. Wheatley's comparative negligence, were not completed.

{¶9} After the trial court's entry of the verdict, Mrs. Wheatley moved for judgment notwithstanding the verdict, or in the alternative, for a new trial. The trial court denied both requests. Mrs. Wheatley subsequently filed this timely appeal, asserting three assignments of error for our review. To facilitate our analysis, we consider the assignments of error out of order.

II.

ASSIGNMENT OF ERROR III

> IS THE VERDICT ABSOLVING A REALTOR OF LIABILITY BECAUSE THE OWNER FAILED TO LOCK A SAFE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE WHEN CONDUCTING A BROKER'S ONLY OPEN HOUSE, THE REALTOR PERMITTED THE PUBLIC TO ENTER, ADMITTED THAT IT MADE NO EFFORT TO PROTECT THE CONTENTS OF THE HOUSE WHICH WERE STOLEN, AND ADMITTED IT COULD HAVE PREVENTED THE THEFT[?]

{¶10} In her third assignment of error, Mrs. Wheatley claims that the jury's verdict in Appellees' favor was against the manifest weight of the evidence. After reviewing the record, we disagree.

{¶11} We apply the same manifest weight standard in both criminal and civil cases. *See Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶ 17 (noting that there are "several reasons why" the *Thompkins* standard applies in civil cases); *Ray v. Vansickle*, 9th Dist. Lorain Nos. 97CA006897, 97CA006907, 1998 WL 716930 (Oct. 14, 1998) ("An appellate court conducts the same manifest weight analysis in both criminal and civil cases."). When conducting a manifest weight review, we are required to consider the whole record, "weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the [the judgment] must be reversed and a new trial ordered." *State v. Otten*, 33 Ohio App.3d 339, 340 (9th Dist.1986). Moreover, in carrying out this review, we must make " '[e]very reasonable presumption * * * in favor of the judgment' " and interpret ambiguous elements of the record in a way that is "most favorable to sustaining the trial court's verdict and judgment.' " *Tewarson v. Simon*, 141 Ohio App.3d 103, 115 (9th Dist.2001), quoting *Karches v. Cincinnati*, 38 Ohio St.3d 12, 19 (1988). As with criminal cases,

a reversal on manifest weight grounds in civil cases is likewise "reserved for the exceptional case in which the evidence weighs heavily against the judgment." *A.S. v. P.F.*, 9th Dist. Lorain No. 13CA010379, 2013-Ohio-4857, ¶ 5, citing *Otten* at 340.

{¶12} To recover on a negligence claim, " 'the plaintiff must prove (1) that the defendant owed the plaintiff a duty, (2) that the defendant breached that duty, and (3) that the breach of that duty proximately caused the plaintiff's injury.' " *Lubanovich v. McGlocklin*, 9th Dist. Medina No. 12CA0090-M, 2014-Ohio-2459, ¶ 5, quoting *Chambers v. St. Mary's School*, 82 Ohio St.3d 563, 565 (1998). Before addressing the quality of evidence offered to prove Mrs. Wheatley's negligence claim, we need to outline the contours of our review. Preliminarily, we note that existence of a duty is a question of law reserved for the trial court and not the jury. *Mussivand v. David*, 45 Ohio St.3d 314, 318 (1989); *see also Hackett v. TJ Maxx*, 9th Dist. Summit No. 24978, 2010-Ohio-5824, ¶ 16. The trial court instructed the jury that Appellees had the following duty to Mrs. Wheatley:

> In representing [Mrs. Wheatley] in an agency relationship, Linda Shubeck and/or Howard Hanna shall be a fiduciary of [Mrs. Wheatley] and therefore have a duty to use their best efforts to further the interest of [Mrs. Wheatley] including, but not limited to, doing all of the following:
>
> (A) Exercising reasonable skill and care in representing [Mrs. Wheatley] and carrying out the responsibilities of the agency relationship;
>
> (B) Disclosing to [Mrs. Wheatley] any material facts of the transaction of which Linda Shubeck and/or Howard Hanna is aware or should be aware in the exercise of reasonable skill and which would not be something that the plaintiff could be reasonably expected to timely discover on her own.

Appellees do not contest this instruction regarding their duty on appeal.[1]

[1] Appellees did not file a motion for summary judgment challenging the existence of their duty to Mrs. Wheatley regarding the protection of her personal property and the disclosure of the open house event's nature. Our resolution of this matter does not take a position on whether such a duty did indeed exist on Appellees' part. Rather, due to the nature of the arguments on

{¶13} With the existence of a duty established by the trial court's charge, we must turn to the breach and proximate causation elements. To properly consider those issues, we must first review the jury's general verdict in Appellees' favor and their responses, or non-responses, to the jury interrogatories. The Supreme Court of Ohio has noted that "the answering of [jury] interrogatories is even more important than the general verdict." *Aetna Cas. & Sur. Co. v. Niemiec*, 172 Ohio St. 53, 55 (1961). This statement is not mere hyperbole since interrogatories "test the jury's factual determinations and express the jury's true intention," *Reeves v. Healy*, 192 Ohio App.3d 769, 2011-Ohio-1487, ¶ 30 (10th Dist.), and their inconsistency with the general verdict can mandate a judgment "in accordance with the answers, notwithstanding the general verdict," further deliberations, or a new trial, Civ.R. 49(B). In sum, "[t]he purpose of using interrogatories is to test the general verdict. The overall goal is to have the jury return a general verdict and interrogatory answers that complement the general verdict." *Colvin v. Abbey's Restaurant, Inc.*, 85 Ohio St.3d 535, 538 (1999); *see also* Civ.R. 49(B) ("When the general verdict and the answers are consistent, the appropriate judgment upon the verdict and answers shall be entered[.]"). We construe the jury's responses to jury interrogatories in harmony with the general verdict insofar as "it is reasonably possible to do so[.]" *Midwest Specialties, Inc. v. Firestone Tire & Rubber Co.*, 42 Ohio App.3d 6, 10 (9th Dist.1988).

{¶14} With these principles in mind, we note that the jurors did not complete any of the interrogatories regarding proximate causation or Mrs. Shubeck's comparative negligence. Rather, they simply responded that they did not find either Mrs. Shubeck or Howard Hanna negligent. Harmonizing these responses to the general verdict in Appellees' favor, we find that

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appeal and the proceedings below, we are restrained to accepting the trial court's charge on the issue of duty.

the jury did not reach the issues of proximate causation or comparative negligence because it found that Appellees did not breach their duty to Mrs. Wheatley and there was no need for further deliberation. Accordingly, our review here is limited to the evidence offered by the parties regarding the breach element.

{¶15} After reviewing the record, we find that credible, competent evidence was offered to show that Appellees did not breach their duty to Mrs. Wheatley. *See C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279 (1978), syllabus ("Judgments supported by some competent, credible evidence * * * will not be reversed by a reviewing court as being against the manifest weight of the evidence."). Mrs. Shubeck testified that she advised Mrs. Wheatley to remove all valuables from plain sight in the home and that she walked through the house before the event to determine whether anything valuable was plainly visible. Mrs. Shubeck further indicated that she met the alleged thief, "Sam,"[2] shortly after his entrance into the house and that she walked around the house with him as he toured it. Moreover, the testimony at trial established that neither Mr. Wheatley nor Mrs. Wheatley informed Mrs. Shubeck about the safe. The jury could conclude from these items of evidence that Mrs. Shubeck, and consequently her principal, Howard Hanna, properly satisfied their standard of care as it related to Mrs. Wheatley's personal property, including her jewelry.

{¶16} Mrs. Wheatley focuses on the nature of the open house event itself and Mrs. Shubeck's failure to properly describe the type of attendees who would be present. Although the event's description as a brokers' open house was plainly a misnomer and Mrs. Shubeck could

[2] We note that there is limited proof in the record showing that the jewelry was stolen during the time of the open house event or even that "Sam" was the thief. Moreover, Mr. Wheatley testified that after the event, he checked the safe and observed that it looked "exactly the way that I left it in the morning." He also acknowledged that it did not look like anyone had opened it during the event.

have told Mrs. Wheatley that the general public could be drawn to the house, we find these facts to not be so material as to render the jury's verdict unsustainable. During her testimony at trial, Mrs. Wheatley stated that had she known members of the public would have been present during the event, she would have stayed at the house to ensure that no one was "snooping around." But, this would have made no difference since she was indeed present when "Sam" was at the event and after he identified himself as a non-broker, she left the house.

{¶17} Moreover, the failure to properly explain the nature of the open house event cannot be considered in isolation. The jury learned that Mrs. Shubeck advised Mrs. Wheatley to put valuables out of sight before the event, which alerted Mrs. Wheatley to the possibility of petty theft. Jurors also received evidence indicating that Mrs. Wheatley walked through the house to ensure that no valuables were in plain sight. Furthermore, they learned that Mrs. Wheatley herself was present when "Sam" entered and toured the house, that she knew he was not a realtor, and that she did not order Mrs. Shubeck to eject him. In light of this, we cannot say that Mrs. Shubeck's inaccurate description of the open house was so significant as to make the jury's verdict against the manifest weight of the evidence.

{¶18} In support of her contention, Mrs. Wheatley also points out that Mrs. Shubeck admitted to not looking after Mrs. Wheatley's personal property during the open house and to not excluding non-brokers from the event. But, to satisfy its standard of care, a party need not take all necessary steps to reduce the threat of harm to others; it needs to only take reasonable steps. *See Delta Fuels, Inc. v. Consol. Environmental Servs., Inc.*, 6th Dist. Lucas No. L-11-1054, 2012-Ohio-2227, ¶ 37 ("There is also a calculus of what constitutes a reasonable risk that dictates the degree of caution an individual is bound to exercise. This involves a balance between the probability that an untoward event will occur, the gravity of the harm that will result

and the burden of taking adequate precaution to prevent harm."); *Wise v. Wise*, 196 Ohio App.3d 533, 2011-Ohio-4772, ¶ 11 (9th Dist.) ("An individual generally possesses a duty of due care. The duty of due care requires one to exercise 'that degree of care which an ordinarily reasonable prudent person exercises, or is accustomed to exercising, under the same or similar circumstances.' "), quoting *Mussivand*, 45 Ohio St.3d at 318-319. The jury could decide that additional security steps, such as verifying entrants' identification or remaining within view of the safe at all times, were not required of Mrs. Shubeck or Howard Hanna in meeting their duty to Mrs. Wheatley. *See, e.g., Peyer v. Ohio Water Serv. Co.*, 130 Ohio App.3d 426, 430 (7th Dist.1998) (noting that although the existence of a duty is a question of law, "the scope and extent of a duty is a question of fact"). Instead, the jury could find that such steps would be unnecessary and unduly burdensome, especially in light of the reduced degree of risk faced and Appellees' primary purpose of marketing and selling Mrs. Wheatley's house.

{¶19} The record reveals that there is some credible, competent evidence showing that Appellees undertook at least some efforts to secure Mrs. Wheatley's personal property. Specifically, Mrs. Shubeck advised Mrs. Wheatley to store away her valuables and walked through the house before the open house event to ensure that no valuables were conspicuously placed. Moreover, Mrs. Shubeck walked through the house with "Sam," and Mrs. Wheatley was present when "Sam" arrived and did not ask for his ejection. In light of these facts, we cannot find that the jury's verdict was against the manifest weight of the evidence, even though there is contrary evidence supporting Mrs. Wheatley's theory of the case. *See Bedard v. Gardner*, 2d Dist. Montgomery No. 20430, 2005-Ohio-4196, ¶ 24 ("A verdict is not against the weight of the evidence merely because the judge would have decided the case differently.").

{¶20} Accordingly, we overrule Mrs. Wheatley's third assignment of error.

ASSIGNMENT OF ERROR II

> DID THE TRIAL COURT ERR WHEN IT DENIED OWNER'S MOTION FOR A JNOV WHEN HOWARD HANNA HAD A DUTY TO USE REASONABLE CARE TO PROTECT THE CONTENTS OF THE OWNER'S HOME DURING A "BROKER'S ONLY["] OPEN HOUSE THAT WAS OPEN TO THE PUBLIC AND HOWARD HANNA ADMITTED BOTH THAT THEY BREACHED THIS DUTY AND COULD HAVE PREVENTED THE THEFT OF OWNER'S JEWELS DESPITE OWNER'S FAILURE TO LOCK THE SAFE[?]

{¶21} In her second assignment of error, Mrs. Wheatley contends that the jury lost its way in rendering verdict against her and claims that she was entitled to judgment notwithstanding the verdict. We disagree.

{¶22} After the jury's verdict is entered in the trial court's judgment, the losing party may move to have the judgment set aside. Civ.R. 50(B). Judgment notwithstanding the verdict pursuant to Civ.R. 50(B) "is proper if upon viewing the evidence in a light most favorable to the non-moving party and presuming any doubt to favor the nonmoving party reasonable minds could come to but one conclusion, that being in favor of the moving party." *Williams v. Spitzer Auto World, Inc.*, 9th Dist. Lorain No. 07CA009098, 2008-Ohio-1467, ¶ 9. However, " ' where there is substantial evidence to support [the non-moving party's] side of the case, upon which reasonable minds may reach different conclusions, the motion [for judgment notwithstanding the verdict] must be denied.' " *Jackovic v. Webb*, 9th Dist. Summit No. 26555, 2013-Ohio-2520, ¶ 15, quoting *Osler v. City of Lorain*, 28 Ohio St.3d 345, 347 (1986), quoting *Posin v. A.B.C. Motor Court Hotel*, 45 Ohio St.2d 271, 275 (1976). When considering the motion, a court must consider neither the weight of the evidence nor the credibility of the witnesses. *Osler* at syllabus. We review a trial court's ruling on a motion for judgment notwithstanding the verdict de novo. *Goodyear Tire & Rubber Co. v. Aetna Cas. & Sur. Co.*, 95 Ohio St.3d 512, 2002-Ohio-2842, ¶ 4.

{¶23} Mrs. Wheatley raises the same arguments in support of her request for judgment notwithstanding the verdict as she does in support of her manifest weight analysis. As indicated in our resolution of the third assignment of error, the jury's finding in favor of Appellees was not against the manifest weight of the evidence and there was ample evidence to find that Appellees did not breach their duty to Mrs. Wheatley. Consequently, Mrs. Wheatley was not entitled to judgment notwithstanding the verdict. *See Dragway 42, L.L.C. v. Kokosing Constr. Co., Inc.*, 9th Dist. Wayne No. 09CA0073, 2010-Ohio-4657, ¶ 45 ("[Appellant] asserts that it was entitled to have its JNOV motion granted based upon its previous arguments [including manifest weight]. As we have determined the previous arguments were without merit, we conclude this argument must fail as well."); *Galehouse v. Geiser*, 9th Dist. Wayne No. 05CA0037, 2006-Ohio-766, ¶ 32 ("Given our analysis and disposition of [the assignment of error relating to manifest weight of the evidence], we find it unnecessary to review Appellant's [assignment of error relating to judgment notwithstanding the verdict] in depth.").

{¶24} Accordingly, we overrule Mrs. Wheatley's second assignment of error.

ASSIGNMENT OF ERROR I

> DID THE TRIAL COURT ERR WHEN IT FAILED TO GRANT OWNER SUMMARY JUDGMENT ON THE ISSUE OF NEGLIGENCE WHEN HOWARD HANNA HAD A DUTY AS TO TAKE REASONABLE PRECAUTIONS TO PROTECT OWNER'S PROPERTY DURING A "BROKER'S ONLY" OPEN HOUSE THAT WAS OPEN TO THE PUBLIC AND WHEN HOWARD HANNA ADMITTED IT MADE NO EFFORTS TO PROTECT OWNER'S PROPERTY?

{¶25} In her first assignment of error, Mrs. Wheatley argues that she was entitled to summary judgment because there was no genuine issue of material fact regarding Appellees' duty, breach of that duty, and resulting damage. We disagree.

{¶26} The denial of a party's summary judgment motion is reviewable after the trial court enters judgment on an adverse jury verdict. *Dragway 42*, 2010-Ohio-4657, at ¶ 47. Nevertheless, the Supreme Court has counseled us that, within this context, "[a]ny error by a trial court in denying a motion for summary judgment is rendered moot or harmless if a subsequent trial on the same issues raised in the motion demonstrates that there were genuine issues of material fact supporting a judgment in favor of the [non-moving] party[.]" *Continental Ins. Co. v. Whittington*, 71 Ohio St.3d 150 (1994), syllabus; *see also Martin v. Design Constr. Sys., Inc.*, 9th Dist. Summit No. 23422, 2009-Ohio-2860, ¶ 17 (finding that summary judgment motion was properly denied where non-moving party established its entitlement to directed verdict on the same issue). Having found that the jury verdict in favor of Appellees was not against the manifest weight of the evidence, we find that *Continental Ins.* is squarely applicable here and precludes us from second-guessing the trial court's denial of Mrs. Wheatley's motion for summary judgment. *Compare State ex rel. Rogers v. Elbert*, 180 Ohio App.3d 284, 2008-Ohio-6746, ¶ 47 (proceeding to address merits of summary judgment motion since judgment in favor of non-moving party was against the manifest weight of the evidence) *with Glenmoore Builders, Inc. v. Smith Family Trust*, 9th Dist. Summit No. 24299, 2009-Ohio-3174, ¶ 58 ("We determined above that the jury's verdict was not against the manifest weight of the evidence when it found in favor of [the non-moving party]. * * * Given our [manifest weight analysis], we conclude that there were genuine issues of material fact at the time of trial which the jury resolved in favor of [the non-moving party]."). Consequently, since there were indeed genuine issues of material fact, as indicated in our discussion of the third assignment of error, we find that the trial court properly denied Mrs. Wheatley's motion for summary judgment.

{¶27} Accordingly, we overrule Mrs. Wheatley's first assignment of error.

III.

{¶28} Having overruled all of Mrs. Wheatley's assignments of error, we affirm the judgment of the Lorain County Court of Common Pleas.

Judgment affirmed.

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 Lorain, 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(C). 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 Appellant.

JULIE A. SCHAFER
FOR THE COURT

HENSAL, P. J.
CARR, J.
CONCUR.

APPEARANCES:

JONATHAN E. ROSENBAUM, Attorney at Law, for Appellant.

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