[Cite as *Berry v. Paint Valley Supply, L.L.C.*, 2017-Ohio-4254.]

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

Nathaniel Berry, Individually and as Administrator of the Estate of Heather Renee Berry, Deceased,	:	Case No. 16CA19
Plaintiff-Appellant,	:	
v.	:	DECISION AND JUDGMENT ENTRY
Paint Valley Supply, LLC, et al.,	:	**RELEASED: 05/31/2017**
Defendants-Appellees.	:	

APPEARANCES:

Douglas J. Suter and A.J. Hensel, Hahn Loeser & Parks, L.L.P., Columbus, OH, for appellant.

M. Jason Founds, Gallagher, Gams, Pryor, Tallan & Littrell, L.L.P., Columbus, OH, for appellee Paint Valley Supply, L.L.C.

Ray C. Freudiger and David J. Oberly, Marshall, Dennehey, Warner, Coleman & Goggin, Cincinnati, OH, for appellee Bradley Williams.

Harsha, J.

{¶1} Nathaniel Berry instituted a wrongful-death action on behalf of his wife, who was killed by a large grain delivery truck operated by Bradley Williams at Paint Valley Supply, L.L.C. ("Paint Valley"). Following a lengthy trial the jury returned a verdict finding in favor of Paint Valley and Williams.

{¶2} In his first assignment of error Mr. Berry asserts that the trial court erred in permitting Williams's counsel to elicit improper and prejudicial lay testimony from a police officer at trial, and then to mischaracterize the police officer as an expert in closing argument. Because Mr. Berry failed to object at trial, he forfeited all but plain error.

{¶3} Moreover, Mr. Berry invited any potential error by asking the police officer on cross-examination whether he had cited Williams for the accident and whether he had training in the operation of commercial vehicles. Williams's counsel then elicited testimony on redirect examination of the police officer that confirmed the officer had a commercial driver's license and opined that he would not have done anything differently than Williams in driving the truck. That testimony was not on the forbidden subject of the cause of the accident.

{¶4} Furthermore, despite Mr. Berry's complaint about closing argument, the police officer had been qualified as an expert on operating commercial vehicles. And the trial court instructed the jury that the parties' closing arguments did not constitute evidence.

{¶5} Finally, Williams's accident reconstruction expert testified that Williams exercised ordinary care in the operation of his delivery truck on the date of the accident and that Mrs. Berry was the negligent party on that date. Under these circumstances this is not one of the extremely rare civil cases in which plain error challenging the legitimacy of the underlying judicial process itself occurred. We overrule Mr. Berry's first assignment of error.

{¶6} Next Mr. Berry contends that the trial court erred in overruling his motion for directed verdict against Williams because the uncontroverted evidence at trial established that Williams was negligent per se based on his violation of R.C. 4511.38. But Mr. Berry cites no authority holding that the statute applies to accidents occurring on private property, and precedent establishes otherwise. Because Mrs. Berry's death

resulted from an accident occurring on Paint Valley's private access ramp, R.C. 4511.38 did not apply. We overrule Nathaniel's second assignment of error.

{¶7} Mr. Berry also argues that the trial court erred in denying his motion for judgment notwithstanding the verdict, or in the alternative, for new trial because the jury verdicts were against the manifest weight of the evidence. But Williams's expert testified that Mrs. Berry's negligence in talking on her cell phone and stepping onto the access ramp was the cause of the accident that resulted in her death, and that Williams was not negligent in operating his delivery truck after observing that Mrs. Berry was off the ramp, not within his path when he began backing up. In addition, Williams testified that his backup lights were operating on the date of the accident. The jury could have properly credited this testimony to conclude that Williams was not negligent and that although Paint Valley failed to maintain the appropriate standard of care, Heather's negligence in talking on her cell phone and moving into the path of the backing delivery truck was the sole proximate cause of her death. Under these circumstances, the jury did not clearly lose its way and create such a manifest miscarriage of justice that we must reverse its verdicts. We overrule Mr. Berry's third assignment of error and affirm the judgment of the trial court.

I. FACTS

{¶8} In March 2015, Nathaniel Berry, individually and as the administrator of the estate of his deceased wife, Heather Berry, filed a complaint in the Highland County Court of Common Pleas raising several claims, including negligence, wrongful-death, and survivorship claims, against Paint Valley, Bradley Williams, and William Baldwin, Sr. The defendants filed motions for partial summary judgment, and Mr. Berry

dismissed several claims. The trial court granted summary judgment in favor of Baldwin on Mr. Berry's claims against him.

{¶9} The case proceeded to a jury trial on Mr. Berry's remaining claims against Paint Valley and Williams, and produced the following evidence. Michael Reveal owned Paint Valley, a feed, seed, and farm supply store in existence from 2000 until it went out of business in 2012. Paint Valley bought grain to create feed. Before 2007, trucks delivering grain to Paint Valley's receiving pit could either drive straight in or back up a store access ramp adjacent to a public alley. In 2007, a delivery truck broke a corner board near weight scales in the pit, which forced delivery vehicles to exclusively back up the ramp to deliver grain until the incident in 2010.

{¶10} Nathaniel Berry is a farmer who started working for Paint Valley when he was still in high school in 2006. In 2008, he married Heather, his childhood sweetheart. Mr. Berry estimated that Mrs. Berry had been at the Paint Valley store about 360 times from 2007 until 2010 and that trucks had backed up the store ramp about 750 times to a grain pit when delivering grain. According to Paint Valley employee Scott Stephens, as a frequent visitor, Mrs. Berry was aware that trucks travelled up the ramp to Paint Valley on a regular basis.

{¶11} Bradley Williams is a farmer, who with his grandfather, William Baldwin, Sr., supplied grain to Paint Valley to make animal feed. On the evening of May 7, 2010, Reveal contacted Williams and asked him if he could deliver a load of corn to Paint Valley the next day. The next morning, Reveal told Mr. Berry and Stephens that they would get a delivery of corn that day.

{¶12} On the morning of May 8, 2010, Mrs. Berry dropped her husband off at Paint Valley, but returned when he advised her that he had forgotten the keys to the warehouse. Mrs. Berry gave him the keys, and he opened the warehouse and gave the keys back to her so she could drive home. She then either received or initiated a personal cell phone call with her father's girlfriend. Meanwhile Mr. Berry began operating a forklift to move a pallet of feed. Mrs. Berry, who was still on her cell phone, began walking towards the back of the store.

{¶13} That morning Williams drove a 1980 Chevrolet C-60 farm truck with a white cab and a red bed to deliver the corn to Paint Valley. The truck was 20 ft., 7 inches long, 8 ft., 8 inches high, and 8 ft. wide. The truck with the corn weighed 25,950.

{¶14} When Williams turned the truck down the alley adjacent to Paint Valley's ramp to its grain pit, he was travelling at less than five miles per hour and his truck was making a lot of noise. According to Williams he observed Mrs. Berry standing on the ramp on her cell phone looking in the general direction of the truck and alley. At that time, Mrs. Berry was only about four to six feet away from the truck. Williams then stopped his truck at the intersection of the alley with another alley and, in accordance with his normal practice, prepared to back up Paint Valley's ramp to the grain pit.

{¶15} Williams checked both his driver's-side and passenger-side mirrors and saw that the ramp and alley were clear with no obstructions. He also saw Mrs. Berry now standing off the truck ramp in the back of a parked pickup truck. Williams testified that she was still looking in the direction of his truck. According to Williams Mrs. Berry's action in moving off the truck ramp after he first saw her indicated that she knew that he was going to back up and she had removed herself from the potential danger area by

getting off the ramp. Williams testified that he felt that Mrs. Berry had ample warning of his truck because she had seen it, heard it because it was very noisy, and had moved off the ramp before he started to back it up. Although Williams did not honk his horn, yell at, or get out of his truck to warn her, he testified that his backup lights were functioning and a person who bought the truck soon thereafter confirmed that the backup lights worked.[1]

{¶16} Normally, a truck would take about 13 seconds to back up the ramp to the grain pit. According to one of Mr. Berry's experts, it would have taken Mrs. Berry only about 2.2 seconds to step back onto the ramp from the side of it where Williams had seen her when he had started to back up. Williams testified that he backed his truck about halfway up the ramp when he felt a bump and immediately stopped. He had run over Mrs. Berry. Mr. Berry pulled his wife out from under the truck and Williams began doing CPR on her, but she died soon thereafter.

{¶17} Mr. Berry testified that when the delivery truck first entered the alley adjacent to the ramp, he saw his wife on her cell phone next to the ramp. He next saw her on her cell phone standing off the ramp in front of a dumpster. Finally, he saw her on her cell phone standing on the ramp with her back towards the approaching truck, which was only a couple feet away from her before it ran her over. Mr. Berry testified that when he saw his wife off the ramp with the truck proceeding to back up to deliver corn, he didn't think that he needed to warn her because she was not in the truck's path.

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[1] Mr. Berry presented evidence to the contrary. Gary Moore, a commercial motor carrier inspector with the Ohio State Highway Patrol, testified that he inspected Williams's truck after the accident and concluded that the reverse lights were inoperable. (Tr. Day 2, p. 59)

Mr. Berry admitted testifying in a prior deposition that he figured that she had seen the truck coming down the alley and did not need a warning from him.

{¶18} Stephens testified that on that date, he saw Mrs. Berry standing talking on her cell phone off the ramp in the back of his parked pickup truck. He did not think that she would walk onto the truck ramp at that time, as Williams's truck pulled into the alley to deliver corn. Stephens then proceeded to open the pit doors so that Williams could dump the corn into the pit. Even though Stephens was 100-125 feet away from Williams's truck, he could hear it coming because of its loud, rumbling noise. He heard Williams rev up to back his truck up the ramp, heard a noise, and then saw Williams run over Mrs. Berry.

{¶19} Reveal testified that he did not give his employees, including Mr. Berry and Stephens, any formal training or instructions on how to serve as a spotter for delivery trucks backing up the ramp to the grain pit. On the date of the incident, Stephens never got into a position to spot for Williams as he began to back up his delivery truck. Stephens testified that he had been asked by truckers to spot them as they backed up on the ramp ten times in three years.

{¶20} According to Reveal, right after the accident, Mr. Berry repeatedly blamed his wife's cell phone for causing it, referring to "[t]hat f***ing cell phone." Mr. Berry also said that he did not blame either Williams or Reveal for the accident. Mr. Berry continued to work for Paint Valley after the accident and even after he sued them, until it went out of business in 2012. Even at trial he did not affirmatively testify that Paint Valley or Williams were responsible for his wife's death.

{¶21} Appellees presented the testimony of Douglas Heard, an accident-reconstruction expert, who testified that Williams exercised ordinary care in the operation of his delivery truck on the date of the accident and that Mrs. Berry did not. In his report Heard found that Williams had seen Mrs. Berry before backing up and saw that she was in a place of safety off the ramp. He concluded that the cause of the accident was Mrs. Berry's inattention as she walked onto the ramp with her back towards the truck while on her cell phone as the truck was backing up the ramp.

{¶22} John Salyer, a Hillsboro police officer, also testified on behalf of appellees. He served as the primary investigative officer on the accident that killed Mrs. Berry. On direct examination Officer Salyer testified that he concluded that the truck driven by Williams could legally be operated on the road and was not unsafe. On cross-examination Mr. Berry's counsel asked the police officer whether he had any training in the operation of commercial vehicles and he replied that he had. He also asked the police officer whether traffic laws applied to Williams's farm truck and whether he cited Williams for driving an overweight truck. On redirect examination Officer Salyer testified, without objection, that: (1) he had a commercial license; (2) he understood the way Williams backed up his truck that day; (3) he wouldn't have done anything differently; and (4) if he had been driving the truck, the accident still would have occurred.

{¶23} Conversely, Mr. Berry presented the testimony of experts on the cause of the accident. Robert Aherin, an expert in the field of agricultural and occupational safety and health, prepared a report that concluded Paint Valley's and Williams's negligence caused the injuries and death. Aherin determined that Paint Valley was

negligent because it did not provide a trained spotter to assist Williams in backing his truck up the ramp to the grain pit. Aherin also determined that Williams was negligent by failing to exit his truck and alert Mrs. Berry that he was going to back up, not having operational backup lights or activating his warning flashers, and not being equipped with a backup alarm or an operating horn.

{¶24} At the conclusion of the evidence Mr. Berry moved for a directed verdict against Bradley Williams on the issue of negligence per se based on his alleged violation of R.C. 4511.38. The trial court overruled the motion finding that the statute is not applicable because the accident occurred on private as opposed to public property.

{¶25} The jury returned unanimous verdicts for Paint Valley and Williams and against Mr. Berry, individually and as administrator of his wife's estate. In its answers to interrogatories, the jury determined that: (1) Williams was not negligent; (2) Mrs. Berry was a licensee; (3) Paint Valley failed to maintain the appropriate standard of care; (4) Paint Valley's failure to maintain the appropriate standard of care was not a proximate cause of Mrs. Berry's injuries and death; (5) Mrs. Berry was negligent; (6) her negligence was a proximate cause of her injuries and death; and (7) her negligence was the 100% proximate cause of her death. The trial court entered a judgment in favor of the defendants.

{¶26} Mr. Berry then filed a motion for judgment notwithstanding the verdict and, alternatively, for a new trial. He claimed that based on the evidence at trial, Paint Valley, Williams, and Mrs. Berry were all negligent on the date of the accident because: (1) Williams violated R.C. 4511.38 by failing to exercise vigilance and failing to provide any warning at all to Mrs. Berry before backing up; and (2) Paint Valley's failure to

maintain the appropriate standard of care, as determined by the jury, was clearly a proximate cause of Mrs. Berry's injuries and death. For his alternative motion for a new trial, he argued that the verdicts were against the manifest weight of the evidence. After Paint Valley and Williams filed memoranda in opposition, the trial court denied the motions.

II. ASSIGNMENTS OF ERROR

{¶27} Mr. Berry assigns the following errors for our review:

> I. THE TRIAL COURT ERRED IN PERMITTING DEFENDANT-APPELLEE BRADLEY WILLIAMS' COUNSEL TO ELICIT IMPROPER AND PREJUDICIAL TESTIMONY FROM A LAY POLICE OFFICER AT TRIAL AND THEN MISCHARACTERIZE THE POLICE OFFICER AS AN "EXPERT" IN CLOSING ARGUMENT.
>
> II. THE TRIAL COURT ERRED IN OVERRULING PLAINTIFF'S-APPELLANT'S MOTION FOR DIRECTED VERDICT AS TO DEFENDANT BRADLEY WILLIAMS AT THE CLOSE OF ALL EVIDENCE AT TRIAL.
>
> III. TRIAL COURT ERRED IN DENYING PLAINTIFF'S-APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND, ALTERNATIVELY, FOR A NEW TRIAL.

III. LAW AND ANALYSIS

A. Officer Salyer's Testimony and Closing Argument

{¶28} In his first assignment of error Mr. Berry asserts that the trial court erred in permitting Williams's counsel to elicit improper and prejudicial testimony from a police officer at trial and then to mischaracterize him as an expert during closing argument. According to Berry the officer's status and the content of his testimony unduly influenced the jury.

{¶29} Mr. Berry failed to object to Officer Salyer's testimony and the closing argument about this testimony, so as he readily concedes on appeal, he has forfeited all

but plain error. *See State v. Neal*, 2016-Ohio-64, 57 N.E.2d 272, ¶ 36 (4th Dist.) (failure to object to testimony and closing argument at trial forfeited all but plain error on appeal).

{¶30} To prevail on a claim of plain error Nathaniel must establish that an error occurred, that the error was plain, and that but for the error, the outcome of the trial clearly would have been otherwise. *See generally State v. Mammone*, 139 Ohio St.3d 467, 2014-Ohio-1942, 13 N.E.3d 1051, ¶ 69. In addition, "[a]n appellate court 'must proceed with the utmost caution' in applying the doctrine of plain error in a civil case." *Risner v. Ohio Dept. of Natural Resources, Ohio Div. of Wildlife*, 144 Ohio St.3d 278, 2015-Ohio-3731, 42 N.E.2d 718, ¶ 27, quoting *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 121, 679 N.E.2d 1099 (1997). "Plain error should be strictly limited 'to the *extremely rare* case involving *exceptional* circumstances when the error, left unobjected to at the trial court, rises to the level of challenging the legitimacy of the underlying judicial process itself.' " (Emphasis sic.) *Risner* at ¶ 27, quoting *Goldfuss*, at 122.

{¶31} We conclude Mr. Berry has not established this to be one of the extremely rare civil cases that challenges the legitimacy of the underlying judicial process and warrant reversal based on plain error.

{¶32} First, Mr. Berry invited any purported error that occurred when Williams's counsel elicited redirect testimony from Officer Salyer, who confirmed that he had a commercial driver's license and opined that he would not have done anything differently than Williams had in backing up the truck. On cross-examination, Mr. Berry's counsel previously asked Officer Salyer whether he had cited Williams for the accident and whether he had training in the operation of commercial vehicles. Because Mr. Berry's

counsel "opened the door," Williams's counsel acted properly in eliciting further testimony on these subjects. *See Martin v. Jones*, 2015-Ohio-3168, 41 N.E.3d 123, ¶ 71, quoting *State ex rel. Kline v. Carroll*, 96 Ohio St.3d 404, 2002-Ohio-4849, 775 N.E.2d 517, ¶ 27 (" 'Under [the invited-error] doctrine, a party is not entitled to take advantage of an error that he himself invited or induced' "). He thereby forfeited his claim of plain error regarding Officer Salyer's testimony on appeal. *Martin* at ¶ 71, citing *State v. Rohrbaugh*, 126 Ohio St.3d 421, 2010-Ohio-3286, 934 N.E.2d 920, ¶ 10 (even plain error is waived where error is invited).

{¶33} Second, Officer Salyer did not improperly testify about the cause of the accident. " '[P]olice officers who have not been qualified as accident-reconstruction experts may not give opinions on the cause of an accident, but rather, may testify only about their collection of data and observations at the accident scene.' " *State v. Brady*, 7th Dist. Mahoning No. 13 MA 88, 2014-Ohio-5721, ¶ 43, quoting *Roy v. Gray*, 197 Ohio App.3d 375, 2011-Ohio-6768, 967 N.E.2d 800, ¶ 11 (1st Dist.). Officer Salyer was not qualified as an accident-reconstruction expert, but he did not testify about the cause of the accident that killed Mrs. Berry. Instead, he testified only that he was trained on the operation of commercial vehicles and that had he been driving Williams's truck, he would not have done anything differently.

{¶34} Third, Mr. Berry attacks Williams's counsel's statement in closing argument that characterized Officer Salyer as an expert and counsel's statement that Salyer did not cite or find fault with Williams. However, the police officer was qualified as an expert on operating commercial vehicles—he had a commercial driver's license and he received training on the subject. *See Whitmer v. Zochowski*, 2016-Ohio-4764, 69

N.E.3d 17, ¶ 105 (10th Dist.) ("To qualify as an expert under Evid.R. 702(B), a witness need not be the best witness on the subject or demonstrate complete knowledge of the field in question"). And insofar as the argument might be considered an improper comment on causation, the trial court specifically instructed the jury that the attorneys' closing arguments did not constitute evidence. *See Pang v. Minch*, 53 Ohio St.3d 186, 559 N.E.2d 1313 (1990), paragraph four of the syllabus ("A presumption always exists that the jury has followed the instructions given to it by the trial court").

{¶35} As for the argument that Salyer's status as a police officer unduly prejudiced the jury, we find nothing in the record to support that speculation. The testimony of investigating officers is routine in accident cases and to the extent Salyer's testimony may have been overreaching, it was invited as already noted.

{¶36} Finally, shortly after the accident occurred Mr. Berry blamed his wife's cell phone and not Williams or Paint Valley. And Williams's accident-reconstruction expert testified that Williams exercised ordinary care in the operation of his delivery truck on the date of the accident and that Mrs. Berry did not. There was also evidence from which the jury could reasonably infer that Williams's truck had functioning backup lights that should have warned Mrs. Berry on the date of the accident.

{¶37} Under these circumstances we agree with Williams that this is not one of the extremely rare civil cases in which plain error challenging the legitimacy of the underlying judicial process itself occurred. We overrule Mr. Berry's first assignment of error.

B. Motion for Directed Verdict on Williams's Negligence

{¶38} In his second assignment of error Mr. Berry contends that the trial court erred in overruling his motion for directed verdict on his claims against Williams at the close of all the evidence. He claimed that he was entitled to a directed verdict because the uncontroverted evidence at trial established that Williams was negligent per se based on his violation of R.C. 4511.38.

{¶39} Under Civ.R. 50(A)(4), the court should grant a motion for directed verdict if "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." "A motion for directed verdict does not present a question of fact or raise factual issues, although the trial court is required to review and consider the evidence." *See Mender v. Chauncey*, 2015-Ohio-4105, 41 N.E.3d 1289, ¶ 10 (4th Dist.), citing *Ruta v. Breckinridge-Remy Co.*, 69 Ohio St.2d 66, 430 N.E.2d 935 (1982), paragraph one of the syllabus. A motion for directed verdict tests the legal sufficiency of the evidence rather than its weight or the credibility of witnesses. *Mender* at ¶ 10, citing *Ruta*, at 68-69. "Because a motion for directed verdict presents a question of law, appellate review of a trial court's decision on the motion is de novo." *Bennett v. Admr., Ohio Bur. of Workers' Comp.*, 134 Ohio St.3d 329, 2012-Ohio-5639, 982 N.E.2d 666, ¶ 14.

{¶40} Mr. Berry's motion for directed verdict against Williams was premised on an alleged violation of R.C. 4511.38(A), which provides in part that "[b]efore backing, operators of vehicle[s] * * * shall give ample warning, and while backing they shall exercise vigilance not to injure person or property *on the street or highway*." (Emphasis

added.) R.C. 4511.01(EE) defines "street" or "highway" to mean "the entire width between the boundary lines of every way open to the use of the public as a thoroughfare for purposes of vehicular travel."

{¶41} Courts have consistently construed R.C. 4511.38 to apply only to public property and not to private property. *See generally Buell v. Brunner*, 10 Ohio App3d 41, 42, 460 N.E.2d 649 (12th Dist.1983) ("The final words in paragraph two of R.C. 4511.38, 'on the street or highway,' must be construed as applicable to the entire sentence in which they appear"); *Luong v. Schultz*, 97 Ohio App.3d 472, 474, 646 N.E.2d 1164 (8th Dist.1994).

{¶42} Mr. Berry argues that R.C. 4511.38(A) applies because Williams started backing his truck when he was still in a public alley. But none of the cases he cites for this proposition so hold. *See, e.g., Cerny v. Domer*, 13 Ohio St.2d 117, 235 N.E.2d 132 (1968) (backing truck on highway, which resulted in collision with car before it was completely off the highway).

{¶43} In *State v. Hill*, 5th Dist. Licking No. 06-CA-72, 2007-Ohio-1436, ¶ 19, the court applied *Buell* and held that a defendant backing out of her driveway into a public street did not violate R.C. 4511.38—even though a trooper testified that the defendant had completely backed out of the private drive—because the "injury to person or property did not occur on the public street or highway"; it instead occurred by the car falling in a ditch that was completely on private property.

{¶44} Similarly, the death suffered here occurred completely on the private access ramp on Paint Valley's property rather than in the public alley. Based on the plain language of the statute, it was inapplicable to the negligence claim against

Williams, and the trial court did not err in denying Mr. Berry's motion for directed verdict. We overrule Mr. Berry's second assignment of error.

C. Motion for Judgment Notwithstanding the Verdict or, in the Alternative, Motion for New Trial

{¶45} The third assignment of error argues that the trial court erred in denying the motion for judgment notwithstanding the verdict or, in the alternative, motion for new trial.

{¶46} A motion for judgment notwithstanding the verdict, like a motion for directed verdict, tests the sufficiency of the evidence and therefore presents a question of law which we review de novo. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 25. In deciding a motion for judgment notwithstanding the verdict under Civ.R. 50(B) the court must construe the evidence in favor of the nonmoving party. *Martin*, 2015-Ohio-3168, 41 N.E.3d 123, at ¶ 35. The court must grant the motion only if the court finds upon any determinative issue that reasonable minds could come to but one conclusion and the moving party is entitled to judgment as a matter of law. *Vance v. Consol. Rail Corp.*, 73 Ohio St.3d 222, 231, 652 N.E.2d 776 (1995); *Bungard v. Jeffers*, 2014-Ohio-334, 8 N.E.3d 336, ¶ 11 (4th Dist.). In its application of the rule, the trial court may not weigh the evidence or judge witness credibility. *Id.*

{¶47} Conversely in ruling upon a motion for new trial based on a claim that a jury verdict is not sustained by the weight of the evidence, the court's role is different. *See, e.g., Watershed Mgt. v. Neff*, 2014-Ohio-3631, 20 N.E.3d 1011, ¶ 58 (4th Dist.). The court weighs the evidence and all reasonable inferences, considers the credibility of

witnesses, and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. *Eastley* at ¶ 20.

{¶48} Insofar as he relied on R.C. 4511.38(A), Mr. Berry's negligence claim against Williams lacks merit for the reasons discussed in our disposition of his second assignment of error.

{¶49} However, although R.C. 4511.38 has no application on private property to constitute negligence per se, a driver must nonetheless exercise ordinary care, including giving warning of his intention to back if the driver knows or should know of the presence of anyone behind, in backing a vehicle on private property. *See Adams v. Floro*, 6th Dist. Ottawa No. OT-87-36, 1988 WL 69155, *2 (June 30, 1988); *Orender v. Souders*, 4th Dist. Jackson No. 642, 1991 WL 62151, *4 (trial court did not commit reversible error in referring to R.C. 4511.38 in negligence case involving damages to a vehicle caused by an accident with a vehicle on private property because "the statutory language does not appear to be in conflict or, for that matter, impose a higher standard of care than that of reasonableness under the circumstances").

{¶50} Nevertheless, Williams's accident-reconstruction expert, Douglas Heard, testified that Williams exercised reasonable care in operating his truck on the date of the accident and that Mrs. Berry did not. Williams did not back up until he saw that Mrs. Berry, who had been looking in his general direction, had moved away from the truck ramp. And the jury could reasonably infer from the evidence that notwithstanding some evidence that Williams gave no warning that his backup lights were operating when he backed up. The two other witnesses—Mr. Berry and Stephens—did not see anything

before the accident that concerned them enough to timely warn Mrs. Berry or Williams. Mr. Berry thought that his wife had seen the truck. He also initially blamed her cell phone for the accident rather than Williams or Paint Valley.

{¶51} Although the jury concluded that Paint Valley did not maintain the appropriate standard of care, it did not find Paint Valley's conduct was a proximate cause of the death. The jury instead found that Mrs. Berry's negligence was the sole proximate cause of her injuries and death.

{¶52} The jury's findings were supported by the evidence, including Heard's testimony and reports. The jury could have concluded that Mrs. Berry was so distracted by talking on her cell phone that she would not have responded to any warning by Paint Valley employees not to walk on the truck ramp even if they had acted more diligently in spotting for Williams as he backed up. Mrs. Berry apparently moved back onto the ramp with her back to the truck in about two seconds after Williams began backing the loud, noisy truck with a noticeable red bed, and before Williams, Mr. Berry, or Stephens realized that she had done so.

{¶53} Based on the evidence, reasonable minds could have come to more than one conclusion on Mr. Berry's claims against Williams and Paint Valley. Therefore the jury did not clearly lose its way or create a manifest miscarriage of justice by returning verdicts in favor of them. The trial court properly overruled his motion for judgment notwithstanding the verdict or, in the alternative, motion for new trial. We overrule the third assignment of error.

IV. CONCLUSION

{¶54} The trial court did not commit reversible error. Having overruled all the assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay 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 Highland 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.

Abele, J. & Hoover, 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.