

A P P E L L A T E

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PA SUPERIOR COURT INDICATES THAT FILING A MOTION FOR COMPULSORY NON-SUIT ALONE MAY PRESERVE THE RIGHT TO REQUEST JNOV AFTER TRIAL

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Pennsylvania lawyers must be alert to situations in which they may waive their appellate rights, especially where the requirements for preserving those rights are murky. One of those murky areas in the Pennsylvania state courts involves a motion for judgment notwithstanding the verdict (JNOV) if the plaintiff prevails at trial.

Is filing a motion for a compulsory non-suit at the end of the plaintiff's case sufficient to preserve such a claim, or must the defendant file a motion for a directed verdict at the close of all the evidence, as is required in federal court? In a recent opinion, a panel of the Pennsylvania Superior Court held that the right to seek JNOV was preserved by the filing of a motion for compulsory non-suit, even though the defendant apparently did not move for a directed verdict. *Youst v. Keck's Food Service, Inc.*, 2014 PA Super 121 (June 11, 2014).

The Yousts filed an action for nuisance (among other things) against a neighboring landowner, Keck's Food Service, Inc. They complained that Keck's caused their farm property to flood when Keck's removed a dam and installed large drainage pipes on its property. At trial, Keck's moved for a compulsory non-suit, but the court denied that motion. There is no suggestion in the court's opinion that Keck's also moved for a directed verdict at the close of the evidence. The jury found in favor of the Yousts, and Keck's filed a post-trial motion seeking JNOV. After the trial court denied that motion, Keck's appealed.

Before examining the merits of Keck's appeal, the Superior Court panel considered whether Keck's had preserved its right to request JNOV post-trial "by moving for a compulsory non-suit at trial and assert-

ing that the Yousts had failed to satisfy their burden of production of establishing a nuisance." The panel quoted a statement in an earlier Superior Court opinion, *Thomas Jefferson Univ. v. Wapner*, that "to preserve the right to request a JNOV post-trial, a litigant must first request a binding charge to the jury or move for directed verdict at trial." But, significantly, the panel altered that quotation by inserting the words "or a compulsory non-suit" in brackets after "directed verdict" and before "at trial."

This appears to be the first Superior Court opinion to expressly state that filing a motion for a compulsory non-suit is sufficient to preserve the right to seek JNOV post-trial. The holding is consistent with the language of the civil rules and their commentary, but inconsistent with a holding of the Superior Court's sister court, the Commonwealth Court.

Pennsylvania Rule of Civil Procedure 226 permits a court to direct a verdict at the close of all evidence, but it includes an Explanatory Comment stating, "the rule contains no express requirement of the filing of a motion for directed verdict as a condition precedent for the filing of [a] Motion for Post-Trial Relief." Rule 227.1, in turn, provides that "post-trial relief may not be granted unless the grounds therefor ... were raised in pre-trial proceedings or by motion, objection, point for charge, request for findings of fact or conclusions of law, offer of proof, or other appropriate method at trial." Thus, in order to preserve post-trial claims, such as a motion for JNOV, an issue must be raised "in pre-trial proceedings or by motion or other appropriate method at trial" — but not necessarily by a motion for directed verdict.

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Despite the language of the civil rules, the Commonwealth Court held in 2007 that a motion for directed verdict *is* a prerequisite to filing a post-trial motion for JNOV, at least if the JNOV motion is grounded in a claim that the evidence presented at trial was insufficient to support the plaintiff's claims. Prior to *Youst*, the Superior Court's statements on the issue had been ambiguous.

The Pennsylvania Supreme Court has not addressed whether filing a motion for directed verdict is a mandatory prerequisite to preserve a JNOV claim, but the apparent split between the Commonwealth's two intermediate appellate courts created by the *Youst* decision makes it more likely that the Supreme Court will take up the issue in the near future. Until the Supreme Court resolves the split, the safest route for litigators still is to file both a motion for a compulsory non-suit and a motion for a directed verdict. If for some reason that is not done, the *Youst* decision provides support for an argument to the Superior Court that filing a motion for a compulsory non-suit may be sufficient to preserve a JNOV claim. ♦

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