Intro [00:00:02]:

Welcome to Appealing Strategies, the podcast where we provide practical tips to trial and appellate lawyers on strategies for winning on appeal. Here are your hosts, Douglas Lang and Booker Shaw.

Douglas Lang [00:00:18]:

Welcome to Appealing Strategies, sponsored by Thompson Coburn LLP. Hello, I'm Doug Lang, a retired appellate judge, an appellate lawyer practicing at Thompson Coburn, along with my Thompson Coburn colleague Booker Shaw, also a retired appellate judge and practicing appellate lawyer. Between the two of us, we've resolved thousands, yes, literally thousands of appeals, and we're going to discuss some lessons we learned as judges and in the practice of law. Also joining us is Dawn Wright, who is a Thompson Coburn partner who practices in our Dallas office. Dawn has devoted her legal career to representing clients regarding tort claims made against them in all facets of the law and industry. Dawn's clients include major products manufacturers and chemical distributors in products liability and mass tort litigation. Additionally with us is Carl Pesce, a Thompson Coburn partner who offices in our St. Louis office, and he also heads our Products Liability practice group. Like Dawn, his practice is defending clients in high stakes products liability and commercial litigation.

Today we will discuss some significant considerations about how a party can attack an adverse jury verdict in the trial court and on appeal. In that regard, our focus is on the argument by the defendant that the jury return an adverse verdict against the defendant, but the plaintiff failed to present more than a scintilla of evidence to support his claim. That is a no evidence point a defendant would be raising as to liability, damages or both. Typically, from a defense standpoint, that translates into a no evidence point on appeal. It argues the plaintiff did not produce any evidence that supports its claim. Today we will discuss a 2025 5th Circuit case, styled *Johnson vs. Moring* and a 2024 6th Circuit case styled *Stanley vs. Macomb County, Michigan*. Both cases deal with a gotcha type problem under Federal Rule 50(a) and (b) that requires the party to assert a motion for judgment as a matter of law after the claimant or plaintiff has been heard fully on an issue during the jury trial, that is after the party rests. If the trial judge agrees no evidence was presented by the plaintiff to support its claim, the court may enter a judgment as a matter of law on that particular claim or defense that the claiming party takes nothing. It's Rule 50(a)(1). By the way, the rulings we're going to talk about are as to federal court, but they're applicable across the country. Now, Judge Shaw, how does a trial judge go about deciding if any competent evidence was submitted in support of the claim of the plaintiff or in the case of a defense, the defense of a defendant?

Booker Shaw [00:04:05]:

Well, thank you, Judge Lang. The trial court must find that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on the issue. However, once a party makes a motion for judgment as a matter of law, the opposing party must be given an opportunity to cure any deficiency in its proof that is put on more evidence. And that's from *Echeverria v. Chevron USA Inc.,* 391 F.3d 607, 611, a 5th Circuit case from 2004. The burden is on the party moving for judgment as a matter of law, and the court must view all of the evidence in a light most favorable to the movement. And that from *Russell v. McKinney Hosp. Venture,* 235 F.3d 219, 222, a Fifth Circuit case from 2000. The court shall indulge all reasonable inferences in favor of the nonmovant.

The bottom line is, the court shall grant a motion for judgment as a matter of law only if there is a complete absence of pleading or proof on an issue material to the claim or defense. The point is, a mere scintilla of evidence is not sufficient to present a question for the jury. And that's from *Hunter v. Knoll Rig & Equip. Co.,* 70 F.3d 803, 808. Another 5th Circuit case from 1995.

Douglas Lang [00:05:43]:

Judge Shaw, do you want to talk about what a scintilla of the evidence means? Of course, those who have tuned in who are experienced trial lawyers would understand that. But for others who are observing, could you tell us about the meaning of scintilla?

Booker Shaw [00:06:04]:

Well, Judge, a scintilla of evidence is a tiny amount, a spark, a hint of evidence, which historically was sufficient to make a submissible case. That is no longer the case now, though. It was meant historically to maximize the right to a trial. Courts now require substantial evidence, which is enough relevant evidence that a reasonable mind could accept it as adequate.

Douglas Lang [00:06:35]:

Is there more to this decision the trial judge must make other than that definition?

Booker Shaw [00:06:41]:

Yes. Yes, there is, Judge. In considering a motion for judgment as a matter of law, the court cannot make credibility determinations or weigh the evidence. And that's from the *Russell* case, 235 F.3d at 222, and *Reeves v. Sanderson Plumbing Products*, which is at 530 U.S. 133, 150, 120 Supreme Court 1997 and 147 L.Ed.2d 105 from 2000. The court shall view all of the evidence in the record, from *Reeves*, 530 U.S. at 150.

However, critical here is that if the trial judge does not grant the motion, then in order to preserve the issue for appeal, the motion must be raised again after an adverse jury verdict. The trial court could deny that motion as well. However, if the renewed motion is not filed, the law is that one cannot raise this point on appeal.

Douglas Lang [00:07:51]:

So that's a critical point that if the motion where judgment as matter of law is raised after the plaintiff rests and the jury comes back with an adverse decision, you've got to raise it again or you waive it. Is that generally what we're talking about?

Booker Shaw [00:08:14]:
You better.

Douglas Lang [00:08:15]:
Yeah, absolutely. Now let's move to an example of how this works. Dawn, what were the basic facts of the first case we're talking about the 2025 Fifth Circuit case, *Johnson v. Moring*?

Dawn M. Wright [00:08:32]:
Thanks, Judge Lang. This case involved a woman who filmed a scuffle between two deputies in Louisiana and a motorcycle driver. The woman claimed that one of the deputies pointed his taser at her and she sued him for intentional infliction of mental distress. The case proceeded to trial, and at the close of the evidence, the deputy moved for a judgment as a matter of law under 50(a). The court deferred the ruling on that motion pending the jury verdict. The jury returned a verdict in favor of the plaintiff and awarded $185,000 in damages. The court then denied the 50(a) motion. But the defendant never pursued a 50(b) motion in this matter.

Douglas Lang [00:09:23]:
So on appeal, Moring challenged the legal sufficiency of the evidence, that is, that there was no evidence admitted in the record on the issues on which they, the plaintiff, had the burden of proof. However, no motion for judgment as a matter of law was made. What was the result?

Dawn M. Wright [00:09:47]:

Well, the court said that Federal Rule 50(b) permits the entry post verdict of a judgment for the verdict loser if the court finds that the evidence was legally insufficient to sustain the verdict. It cited to the *Ortiz vs. Jordan* case out of 2011. But absent a 50(b) motion, an appellate court is powerless to review the sufficiency of the evidence after trial. This is true as in this case, where the district court expressly reserved a party's pre verdict motion for a directed verdict and then denied the motion after the verdict was turned. Rule 50(b) is not just an idle motion, they said. It's an essential part of the rule, firmly grounded in the principles of fairness. All of the arguments challenge the sufficiency of the evidence at trial. But since they failed to file a 50(b) motion after the verdict, they are powerless to review the sufficiency of the evidence. The point here is that unless a motion for summary judgment as a matter of law is filed after the party with a burden of proof rests as well as after the adverse verdict, a no evidence point will not be allowed.

Douglas Lang [00:11:03]:
It's about that simple, right? Is it like what Judge Shaw said, you better. You better file that motion afterwards. Carl, we're obviously addressing the no evidence point. That means the defendants contended there was no evidence to support his liability. Correct? I'd like to address with you the *Stanley vs. Macomb County, Michigan* case. It has a different twist to it, but nevertheless a lesson on waiver of a point on appeal. What is this case about?

Carl Pesce [00:11:45]:
Well, thank you, Judge Lang. Well, the takeaway from the Stanley case is that even the winner of a jury trial can lose the benefits of Rule 50 if they don't properly raise it. Here, the county didn't renew its motion after the verdict as required by Rule 50(b). And normally that would be the end of the analysis because if the motion for judgment as a matter of law isn't renewed, the no evidence point is waived. Oddly enough, this case demonstrates another waiver problem. In

order for the court of appeals to even address whether the no evidence point was waived, the appellee, the winner of below, would have would have to assert the no evidence point actually fails because of the failure to renew. Here, the plaintiff appellee Stanley didn't raise that in his brief on appeal. So essentially, the county got a free pass to be heard on its appeal. The no evidence point wasn't waived because Stanley didn't claim that the county waived the no evidence point by its failure to assert a motion for JMOL, and the court went on to address the defendant's point raised in the appeal of no evidence.

Now, a quick overview of the pertinent facts of that case are that plaintiff Stanley sued Macomb County under section 1983, alleging that it unconstitutionally retaliated against him for previously suing the county. After Stanley finished his case in chief, county moved for judgment as a matter of law under Rule 50(a). The district court denied the motion. After the jury verdict in favor of Stanley, the county didn't renew its motion for judgment as a matter of law under Rule 50(b). The county appealed, challenging the sufficiency of the evidence supporting the jury verdict. Importantly, here on appeal, the plaintiff Stanley didn't argue that the county waived this challenge by not complying with Rule 50(b). So when the appellate court reviewed the no evidence point asserted by the county, the appellate court noted Rule 50(b) requires that a party move for a JMOL under 50(a) to renew it and to renew that motion within 28 days of the verdict to preserve appellate review of its entitlement to a judgment as a matter of law. As we learned from Dawn and *Moring*, the failure to renew the motion under 50(b) precludes the movement from challenging the sufficiency of the evidence on appeal. However, the Sixth Circuit explained that the Rule 50(b) requirement is a non-jurisdictional claims processing rule, meaning it can be forfeited if the nonmovant fails to invoke it on appeal. So putting those rules together, although the county's failure to renew its motion for judgment as a matter of law ordinarily would have barred the county's sufficiency of the evidence challenge, because Stanley didn't raise the Rule 50(b) defect on appeal, he forfeited that benefit of that objection. The 6th Circuit declined to excuse the plaintiff Stanley's forfeiture and reach the merits of whether the county actually was entitled to judgment as a matter of law. Now, in the end for the plaintiff, the court concluded that Stanley had presented sufficient evidence, but had he raised the waiver in his appellate brief, the court would have never got to that analysis.

Douglas Lang [00:15:33]:

Judge Shaw, would you please sum up for us?

Booker Shaw [00:15:37]:

Well, waiver can happen and bad things can happen to you in federal court. So what we have here, Judge, is kind of a gotcha when a party with the burden of proof rests, if you believe no evidence was presented that supports the elements of the claim or defense, you must make a motion for JMOL at that time. And if the jury makes a decision adverse to your client, you must make a motion for JMOL after the verdict as well. If you don't do that, you will and should draw an objection from your adversary on appeal that because you did not make your Rule 50(b) motion both after the party rests and after the verdict, it does not matter if there is no evidence; you did not preserve your no evidence point and you lose. On the other hand, as Mr. Pesce pointed out and Macomb County case shows, even if you fail to make the two crucial motions, if the adversary does not raise the rule 50(b) error and waiver, the court may nevertheless take up the no evidence point. There are two gotchas apparent from these cases.

Douglas Lang [00:16:56]:

Thank you, Judge Shaw. Also thanks to Dawn Wright and Carl Pesce, trial partners at Thompson Coburn who specialize in tort litigation. The next podcast, and there will be one because we are doing a series of these will be on issues about trial tactics and preserving points of appeal. Remember, if you don't preserve your point on appeal, you're likely to be out of luck. So folks, until next time, thank you.

Outro [00:17:29]:

Thank you for listening. Please be sure to follow us on your favorite podcast player. If you have questions, visit thompsoncoburn.com to connect with our team.