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From the Desk of
TIMOTHY A. BAUGHMAN
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May 15, 2015

Anne M. Boomer
Administrative Counsel
Michigan Supreme Court
925 W Ottawa St
PO Box 30048
Lansing, MI 48909

Re: ADM File No. 2013-35

Dear Ms. Boomer:

The court has proposed an amendment to MCR 7.211 that would provide that not only need not a motion to remand be filed to present for appeal the argument that the verdict was against the great weight of the evidence when the verdict was issued by a judge at a bench trial, but no motion for new trial needs be filed in the trial court. This only makes sense, as the trial judge has spelled out his or her reasons for the verdict in rendering it. But it only makes sense if claims that the verdict was against the great weight make sense *at all* in bench trials—whatever sense they make in jury trials, see *People v Lemmon*, 456 Mich 625 (1998)—and I submit they make none. Rather than this amendment, I would suggest that the Court abrogate great weight claims, at least in bench trials.

It is my view that given the responsibility of the jury to determine the weight and credibility of evidence, the doctrine of a verdict being against the “great weight” of the evidence, when that verdict survives a claim that the evidence is *insufficient* as a matter of law (and I would think the principle would be the same in civil cases, though by the civil standard of review)—that is, that no reasonable juror could find guilt proven beyond a reasonable doubt, see *People v Hampton*, 407 Mich 354 (1979)—makes no sense, and is an intrusion on the authority and responsibility of the jury. To be absolutely clear, my view is that a verdict that is based on sufficient evidence under the *Hampton* standard [or a civil verdict under the civil standard] should not be subject to reversal on “great weight” grounds. If in a jury trial the “testimony contradicts indisputable physical facts or laws,” “testimony is patently incredible or defies physical realities,” “a witness's testimony is material and is so inherently implausible that it could not be believed by a reasonable juror,” or “the witnesses testimony has been seriously ‘impeached’ and the case marked by ‘uncertainties and

discrepancies,” see *People v Lemmon*, then it seems to me that the proper question is whether that the evidence, then, is insufficient to support the verdict under the standard for sufficiency, remembering that “this does not mean that ‘[a] judge’s disagreement with the jury’s verdict,’ or a ‘trial judge’s rejection of all or part of the testimony of a witness or witnesses, entitles a defendant to a new trial’—or, I would say, a finding of insufficiency of the evidence. But sufficiency should be the sole evidentiary inquiry.

Be that as it may in jury cases, if the great weight doctrine *should* exist, it exists as check on a runaway jury, somewhat short of an insufficiency finding. It is a judicial check on the jury. It makes no sense to apply that judicial check to *judges*, who, unlike juries, render findings of fact and conclusions of law when rendering verdicts. MCR 2.517. And review of the fact-finding is whether a trial court’s findings of fact are clearly erroneous, with its conclusions of law reviewed de novo. “A finding is clearly erroneous if there is no evidentiary support for it or if this Court is left with a definite and firm conviction that a mistake has been made.” Further, “The trial court’s findings are given great deference because it is in a better position to examine the facts.” *Charles A. Murray Trust v. Futrell*, 303 Mich.App. 28, 50 (2013).

If, then, the trial court’s findings of fact are not clearly erroneous, and its conclusions of law are correct—and if its findings are given the appropriate great deference—and those findings support the verdict rendered, on what basis in this situation could an appellate court say that the verdict was against the great weight of the evidence, without simply second-guessing the trial judge’s determinations of weight and credibility? The doctrine becomes a judicial check on the judiciary, when that check, in the form of currently existing standards of review of findings of fact and conclusions of law, already exists.

I would hasten to point out that the Court *itself* has taken notice of the bench trial/great weight anomaly, as has the Court of Appeals. This Court has said that “unlike a jury, a trial judge must list the facts upon which he bases his decision and . . . an appellate court may reverse the judgment whenever any of those findings are clearly erroneous. *Thus, a ‘great weight of the evidence’ challenge would seem to be irrelevant in the bench trial setting*” (emphasis supplied). *Hadfield v. Oakland County Drain Com’r*, 430 Mich. 139, 187 (1988). And see *Amb’s v. Kalamazoo County Road Com’n*, 255 Mich.App. 637, 652 (2003), where the court took note of this Court’s statement in *Hadfield*: “the Michigan Supreme Court observed that ‘a ‘great weight of the evidence’ challenge would seem to be irrelevant in the bench trial setting,’ a proposition this Court has impliedly acknowledged by addressing a ‘great weight of the evidence’ argument in a bench trial under the ‘clearly erroneous’ standard. See *Phardel v. Michigan*, 120 Mich.App. 806, 811-813, 328 N.W.2d 108 (1982). *Therefore, we will address plaintiffs’ ‘great weight’ argument under the ‘clearly erroneous’ standard*” (emphasis supplied).

The law would be better served, I believe, by candidly recognizing that which the Court said in *Hadfield*—a great weight of the evidence challenge is irrelevant in the bench trial setting—and simply abolishing any notion of review for “great weight” of the evidence, at least in bench trial cases. To that end, I would suggest the rule read:

Rule 7.211 Motions in Court of Appeals

(C) Special Motions. ***

(1) Motion to Remand.

(c) In a case tried without a jury, *no challenge to the verdict as being against the great weight of the evidence may be brought, either by motion to remand or motion or new trial.*

I thank the Justices for their attention.

Sincerely,

/s/TIMOTHY A. BAUGHMAN
Chief, Research, Training, and Appeals