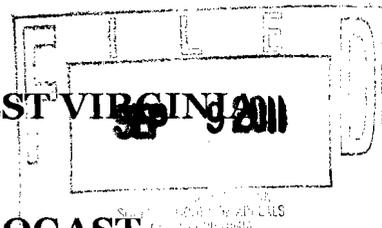


11-1260



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No. 11-

REBECCA ARBOGAST and KEVIN M. ARBOGAST,
Plaintiffs below, Respondents

v.

BIG LOTS STORES, INC., Defendant below, Petitioner

Hon. J.D. Beane
Circuit Court of Wood County
Civil Action 06-C-609

PETITION FOR APPEAL

Counsel for Petitioners

Carol P. Smith
H.F. Salsbery
Frost Brown Todd LLC
Laidley Tower, Suite 401
500 Lee Street East
Charleston, WV 25301
304-345-0111

Counsel for Respondents

Richard D. Dunbar
Dunbar & Fowler, PLLC
P.O. Box 123
Parkersburg, WV 26102
304- 863-8430

FILED IN OFFICE
JUL 18 2011
CAROLE JONES
CLERK CIRCUIT COURT

TABLE OF CONTENTS

I.	ASSIGNMENT OF ERRORS	1
II.	KIND OF PROCEEDING AND NATURE OF RULING BELOW.....	1
III.	STATEMENT OF THE CASE	4
IV.	SUMMARY OF ARGUMENT	14
V.	STATEMENT REGARDING ORAL ARGUMENT.....	15
VI.	ARGUMENT.....	16
	A. The trial court erred in finding Plaintiffs presented uncontradicted evidence where ample and convincing evidence was presented at trial supporting the jury’s decision to discredit 1) Plaintiffs’ testimony, 2) the alleged cause of Plaintiff’s pain and suffering and/or impairment of ability to enjoy life, and 3) Plaintiffs’ theory of recovery.	16
	1. Pre-existing pain and suffering and impairment of ability to enjoy life.	16
	2. Exhibit 3 – the store video of the incident.....	17
	3. Medical Records and Reports.....	18
	4. Evidence of other causes of knee injury.	19
	B. The trial court abused its discretion by invading the province of the jury.	20
	C. The trial court’s decision to set aside the jury verdict and award Plaintiffs a new trial was an abuse of discretion	22
VII.	CONCLUSION.....	25

TABLE OF AUTHORITIES

Cases

<i>Biddle v. Haddix</i> , 154 W.Va. 748, 179 S.E.2d 215 (1971).	20
<i>Bourne v. Mooney</i> , 163 W.Va. 144, 254 S.E.2d 819 (1979).	20
<i>Bressler v. Mull's Grocery Mart</i> , 194 W.Va. 618, 461 S.E.2d 124 (1995).	21
<i>Lenox v. McCauley</i> , 188 W.Va. 203, 423 S.E.2d 606 (1992).	24
<i>Marsch v. American Electric Power Co.</i> , 207 W.Va. 174, 182, 530 S.E.2d 173, 183 (1999),	3, 15, 22
<i>Richmond v. Campbell</i> , 148 W.Va. 595, 136 S.E.2d 877 (1964)	21
<i>Snover v. McGraw</i> , 172 Ill.2d 438, 667 N.E.2d 1310 (1996).....	22
<i>Walker v. Monongahela Power Co.</i> , 147 W.Va. 825, 131 S.E.2d 736 (1963).....	20, 24

I. ASSIGNMENT OF ERRORS

1. Where conflicting evidence was presented regarding whether Plaintiff's pain and suffering and/or impairment of capacity to enjoy life was caused by the actions of the Defendant, the trial court erred in finding Plaintiffs presented uncontradicted evidence, setting aside the jury's verdict and granting Plaintiff a new trial on damages.

2. Where the issues of liability and damages were properly presented to and considered by a jury, the trial court abused its discretion by awarding Plaintiffs a new trial on the issue of damages.

3. Where there was no evidence that the jury was influenced by mistake, prejudice or improper motives in reaching its verdict, the trial court abused its discretion by awarding Plaintiffs a new trial on the issue of damages.

II. KIND OF PROCEEDING AND NATURE OF RULING BELOW

This is a case which was fairly contested at trial on both liability and damages. Liability was an issue because there was a fact question as to whether plaintiff or the Big Lots employees was negligent in causing the

incident---did Plaintiff step backwards into the dolly or did the Big Lots employee negligently bump her?

The more vigorously contested issue was whether the bumping incident caused injury to Plaintiff and, if so, the extent of that injury. At the time of the incident, Plaintiff had, by her own admission, already been on up to 40 different pain medications over the course of seven years due severe pain as a result of a nerve injury. There was competent and credible evidence presented that the incident was de minimus, with Plaintiff walking out of the store without assistance, driving herself home, not seeking any type of medical treatment until a week later, and having no complaints of knee pain for significant spans of time thereafter.

The jury determined liability adverse to Big Lots and awarded Plaintiff her medical bills. The jury also found the Plaintiff had not suffered any pain and suffering causally related to the incident, would not suffer future pain and suffering causally related to the incident, nor was her ability to enjoy life impaired due to the incident. Ample testimony and medical evidence was presented from which the jury could reasonably conclude Plaintiff was not entitled to an award of pain and suffering. Simply stated, Plaintiff's effort to convince the jury she sustained significant injury to her knee as a result of the incident failed. Plaintiffs

moved for a new trial claiming the jury's award of "o" for pain and suffering and "o" for loss of enjoyment of life was inadequate.

The case is now before this Court on Big Lots appeal of a July 16, 2010 Order setting aside the jury verdict and granting plaintiffs' Motion for a New Trial on the single issue of damages.

The trial court's Order is simply wrong in finding Plaintiffs' evidence of pain and suffering "uncontradicted." The Order fails to recognize or mention, for example, the facts that 1) Plaintiff was already being treated for severe pain due to a nerve injury unrelated to the incident at issue, and 2) the objective medical testing and records which directly contradicted Plaintiff's testimony. The Order granting Plaintiffs a new trial on the issue of damages invades the province of the jury and is an abuse of the trial court's discretion. Accordingly, the trial court's Order should be reversed and the jury verdict should be reinstated.

The issues raised in this matter are controlled by this Court's decision in *Marsch v. American Electric Power Company*, 207 W.Va. 174, 530 S.E.2d 173 (1999). The *Marsch* decision was not referenced or discussed by the trial court in its Order granting a new trial.

III. STATEMENT OF THE CASE

Plaintiffs' claim arose out of an incident on November 1, 2004 at the Big Lots store in Parkersburg, West Virginia. Plaintiff was standing at the checkout counter paying for her cleaning supplies when contact was made between Plaintiff and a Big Lots employee pushing a folded day-bed mattress on a dolly as the Big Lots employee was exiting the store.

At trial, there can be no doubt the jury was provided with, literally, a good "picture" of the incident: A series of photographs of the incident taken at 3-second intervals by the store surveillance camera was shown to the jury. Trial Exhibit 3. Tr. at 147, 238, 247-248. Additionally, the jury heard testimony of those present at the store at the time of the incident. This testimony portrayed two very different scenarios of what actually occurred.

Big Lots Account

Sue Hersman, the Big Lots cashier waiting on Plaintiff at check out testified that Big Lots furniture manager John Potts was pushing a day-bed mattress on a dolly down an aisle in the middle of the store toward the exit. Mr. Potts was behind Plaintiff. Tr. 140. Ms. Hersman called out to "Potts". Tr. 142. Plaintiff glanced to her left in the direction of Mr. Potts and then looked back at Ms. Hersman. Tr. at 142, 152. Ms. Hersman believes Plaintiff saw Mr. Potts coming down the aisle with the

merchandise. Tr. at 152. Mr. Potts continued down the aisle to where Plaintiff was standing and accidentally bumped into her. Tr. at 143. Ms. Hersman testified that upon being bumped, Plaintiff spoke but did not cry out. Tr. at 143. The store manager was notified pursuant to company policy. Tr. at 145. Upon reflection and after having viewed Exhibit 3, Ms. Hersman testified Plaintiff may have unintentionally stepped backward into the path of the oncoming dolly. Tr. at 149-150.

John Potts, the furniture manager at the Parkersburg Big Lots store, testified he was pushing a 2-wheeled dolly to transport a daybed – a soft mattress, smaller than a twin mattress, folded in half and covered in plastic -- out of the store for a customer. Tr. at 155. Mr. Potts testified he did not see Plaintiff as he was pushing the dolly until he noticed he had bumped into something. Tr. 163-164. Mr. Potts said he bumped into the back of Plaintiff's left leg, above the ankle and below the calf. Tr. 165. Mr. Potts apologized to Plaintiff, asked her if she was okay, and offered to call a doctor or an ambulance. Tr. at 166. Mr. Potts recalled Plaintiff did not cry out or gasp when bumped. Tr. at 166. She said "No, no, I am fine." Tr. at 166. Pursuant to standard procedure, store manager John Richardson was called to the front of the store and Mr. Potts backed away after asking Plaintiff several times if there was anything he could do. Tr. at 167.

John Richardson, the Big Lots store manager, was called on the store public address system to the front of the store following the incident. Tr. at 239. Mr. Richardson asked if Plaintiff needed any help and she said no. Tr. at 240, 250. An incident report was not prepared at the time but Mr. Richardson believes he took down Plaintiff's contact information. Tr. at 242. A claim form was completed sometime later. Tr. at 243. Mr. Richardson did not remember the exact conversation but is "pretty sure" he offered to call emergency assistance. Tr. at 253. Upon watching the surveillance tape under cross examination, Mr. Richardson testified it appeared to him that Plaintiff backed into the path of Mr. Potts. Tr. at 249.

Plaintiffs' Account

Plaintiff testified she was hit by a "chunky, square" piece of upholstered furniture the size of a loveseat being pushed on a flat bed dolly with "big caster wheels [and a] plank bottom." Tr. at 123-124. Plaintiff testified the incident caused an explosion of pain in her left leg causing her to "yell out, 'Oh, god'... I couldn't help it. I just felt an explosion of pain in my leg and I yelled that out...." Tr. at 69. She looked down immediately and there were already red marks on her knee: a big red mark on the side and a small red mark at the bottom of Plaintiff's kneecap. Tr. at 70, 73. Plaintiff testified she was feeling panic and dread, and was trying to get

herself to calm down. Tr. at 71, 255. All Plaintiff could say was “I hope I am okay. I hope I am okay.” Tr. at 71.

Plaintiff testified that all Mr. Potts said was “I’m sorry,” and that neither he nor any other Big Lots employee said anything else and/or offered to help her. Tr. 73, 126-127. They just stood there. Tr. at 71. Plaintiff testified she had to request that the manager be called to the front of the store, and had to request that the manager take down her contact information. Tr. at 71-72.

Plaintiff left the store unassisted and drove herself home. Tr. at 73-74. None of the Big Lots employees saw Plaintiff limping as she exited the store. Tr. 154, 172, 241-242. Upon reaching her car, Plaintiff cried and tried to get herself calmed down so she wouldn’t make her husband hysterical when she called him to tell him what had happened. Tr. at 74. Plaintiff made it home safely, made dinner that evening, and iced and elevated her leg. Tr. at 75.

Plaintiff felt her leg was getting worse the next day. Tr. at 76. Plaintiff called the Big Lots store regarding the store’s policy on injuries. Tr. at 76-77. Plaintiff decided against going to the emergency room to have her left leg examined because she thought it would be a waste of time. Tr.

at 77. “I know that when you are under a doctor’s treatment and you are already on narcotics, they are not going to give you anything.” Tr. at 77.

Instead, Plaintiff went to the Mountaineer Pain Relief and Rehabilitation Center one week following the incident, on November 8, 2004, with complaints about her left knee. [Tr. at 78.] Dr. Shramowiat at the Mountaineer Pain Relief and Rehabilitation Center had already been treating Plaintiff for seven years (since 1997) for severe, chronic pain unrelated to the allegations in Plaintiffs’ Complaint . Tr. at 187. In 1997 Plaintiff was diagnosed with reflection sympathetic dystrophy (RSD) in the upper extremity following nerve damage to her left arm. Tr. at 187-188. RSD causes severe pain. Tr. at 188. At different times, Plaintiff has been on 40 different pain medications in an effort to find “the best help and the least side effects.” Tr. at 99, 116-117. Originally on Oxycontin, Plaintiff has been on methadone for the greater part of her treatment. Tr. at 210. Dr. Shramowiat believes Plaintiff will require pain medication for her RSD for the rest of her life. Tr. at 211-212.

Plaintiff sought to convince the jury a knee replacement would be required. [Tr. at 54, 55, 60, 61, 203, 204, 206, 207, 290, 291, 292.] The basis of Plaintiff’s claim for needing a knee replacement hinged on whether the Big Lots incident resulted in a tear to the meniscus in Plaintiff’s left

knee. Accordingly, Plaintiff tried to convince the jury she suffered a torn meniscus as a result of the Big Lots incident. [Tr. at 52, 80, 131.] Medical records from Dr. Shramowiat, Dr. Snead and Dr. Dauphin were entered into evidence providing plenty of evidence to support the jury's rejection of Plaintiff's contention she needed a knee replacement.

As reflected in Dr. Shramowiat's Progress Notes dated November 8, 2004, Plaintiff reported she "felt significant pain explode throughout the left knee" when a Big Lots "employee had run a flatbed dolly that was loaded into her left knee." Tr.Ex. 4(c), notes dated 11/8/04. Dr. Shramowiat's physician's assistant ordered an x-ray and an MRI of Plaintiff's left leg. Tr. at 191. The November 8, 2004 x-ray of Plaintiff's left leg was negative, T.E. 4(a); and the November 17, 2004 MRI taken just two weeks after the incident at Big Lots showed no evidence of a meniscus tear. Tr.Ex. 4(b), Tr. at 80, 213. Dr. Shramowiat's initial diagnosis of Plaintiff was "non specific injury to her left knee." Tr. at 214. Plaintiff completed a course of 20 physical therapy visits and began using a cane for walking. Tr. at 81-82.

Dr. Shramowiat's Progress Notes indicate Plaintiff continued treating for pain management as she had been since 1997. Tr. at 188, Tr.Ex. 4. Following a report of pain in the left knee on February 7, 2005, no mention

of knee pain is found in Dr. Shramowiat's Progress Notes again for another 6 1/2 months, on August 29, 2005. Tr.Ex. 4(c).¹ Dr. Shramowiat ordered a repeat MRI, and scheduled Plaintiff to return in one month. Tr.Ex. noted dated 8/29/05.

Plaintiff next saw Dr. Shramowiat on October 3, 2005, and a follow up MRI was done on October 7, 2005. Tr. at 199. Again, there was no evidence of ligament or meniscus tear. Tr. at 213-214; Tr.Ex. 4(c) notes dated 11/02/05. Plaintiff continued treating with Dr. Shramowiat on a monthly basis and continued medicating interchangeably with Methadone, Lexapro, Celebrex, Ambien, Mobic (all of which were prescribed to manage the pain due to the nerve injury.) Tr.Ex. 4(c).

A third MRI was done three and on-half years after the accident on June 5, 2008. Tr. at 202. According to Dr. Shramowiat, the June 5, 2008 MRI appears to communicate, posteriorly, indicative of a small tear small tear. Tr. at 202.

Dr. Shramowiat testified that he thinks Plaintiff will need a knee replacement. Tr. at 219. Dr. Shramowiat testified that whether and when Plaintiff should have a knee replacement is a determination that should be

¹ The August 29, 2005 Progress Notes affirm that there was no evidence of a meniscus tear in the earlier MRI. Tr.Ex. 4(c) dated August 29, 2005.

made by an orthopedist. Tr. 220-222. The jury heard evidence that since the incident on November 8, 2004 at Big Lots, Plaintiff has undergone examinations on her knee by two orthopedists (Snead and Dauphin), neither of which has recommended knee replacement surgery. Thus, the evidence on this point was clearly “contradicted.”

Plaintiff was examined by Dr. Snead on April 5, 2006 for an orthopedic evaluation. Plaintiff reported “that the dolly struck her on the outside of the left knee, her knee buckled and she caught herself on a countertop. Tr.Ex. 4(d). Dr. Snead found no swelling of the left knee. Dr. Snead noted Plaintiff’s medical history and found that Plaintiff “sustained some type of a soft tissue injury to the outside of the left knee.... There does not seem to be any ligament or meniscus injury and so I am not really sure what the anatomical diagnosis would be in this case.” Tr.Ex. 4(d). Dr. Snead offered no further treatment .

Plaintiff underwent an IME by Dr. Dauphin on October 31, 2007. Dr. Dauphin’s report detailed a comprehensive review of Plaintiff’s medical history and Plaintiff’s physical condition. Tr.Ex. 4(e).

In his Review of Records, Dr. Dauphin noted Plaintiff’s extensive history of treatment for pain management prior to the incident at Big Lots due to her RSD. Tr.Ex. 4(e). Additionally, Dr. Dauphin noted Plaintiff was

involved in a motor vehicle accident sometime in early February, 2005 [note this motor vehicle accident was just 3 months after the incident at Big Lots], for which Plaintiff was seeking Dr. Shramowiat's signature on a letter regarding how temperature and stress exacerbates her previous conditions. Tr.Ex. 4(e) at 3.

Dr. Dauphin noted that Plaintiff's visits to Dr. Shramowiat on April 6, 2005, June 1, 2005 and July 6, 2005 were for pain in Plaintiff's arms only and made no mention of knee pain. Tr.Ex. 4(e) at 3.

Dr. Dauphin noted a Board of Pharmacy review report revealing that Plaintiff "was obtaining narcotics from Dr. Shramowiat and Dr. Davis in the same facility and also from Dr. Steven Byrd who was not one of her treating physicians." Tr.Ex. 4(e) at 4.

Among other findings, Dr. Dauphin concluded there was no meniscus tear to the knee and that most of the pain medication was prescribed for Plaintiff's elbows and arms rather than for her knee. Tr.Ex. 4(e).

Plaintiff presented evidence at trial for knee-related medical expenses incurred to date of \$13,877.46. Tr.Ex. 2. Additionally, Dr. Shramowiat testified Plaintiff would require pain medication for the rest of her life. Tr. at 204-205.

At the conclusion of a two-day trial with seven witnesses and four exhibits, the jury found Big Lots was liable for the negligent acts of its employee, John Potts. See, Verdict. The jury awarded \$13,877.46 for past hospital and medical expenses and \$15,000 for future medical expenses. The jury awarded nothing for past pain and suffering, future pain and suffering, past loss of enjoyment of life and future loss of enjoyment of life.

Plaintiffs moved for a new trial arguing that the jury verdict failing to award anything for pain and suffering and loss of enjoyment of life was prima facie inadequate. Plaintiffs argued, despite the medical evidence described above, the evidence of pain and suffering and impairment of capacity to enjoy life was uncontradicted.

By Order dated July 16, 2010, the trial court ruled in favor of Plaintiffs, set aside the jury verdict and awarded Plaintiffs a new trial on the issue of damages only. Inexplicably, the trial court found Plaintiff's evidence of pain and suffering and impairment of the capacity to enjoy regular activities was uncontroverted. In addition, the trial court found that the uncontradicted evidence established that Plaintiff would continue to have pain and impairment in the future.

The trial court found it "certainly reasonable that medical expenses are incurred precisely because of pain and suffering and the evidence in this

case clearly indicates that the \$15,000.00 awarded for future medical expenses was intended for the Plaintiff's control of pain." 7/16/10 Order.

IV. SUMMARY OF ARGUMENT

1. The trial court erred in finding Plaintiff's evidence of pain and suffering and impairment was uncontradicted. Ample evidence in the form of witness testimony and medical reports was presented at trial allowing the jury to reject Plaintiff's claims that any pain and suffering and loss of enjoyment of life suffered by Plaintiff was caused by the bumping incident at the Big Lots store on November 1, 2004.

2. The trial court abused its discretion by invading the province of the jury. When presented with conflicting testimony, it is the jury's function to weigh the evidence and to resolve questions of fact. An award of damages is a factual determination reserved for the jury. The amount of compensation for pain and suffering is within the sound discretion of the jury, and there is no authority for a court to substitute its opinion for that of the jury. When a case with conflicting evidence and circumstances has been fairly tried, under proper instructions, the jury's verdict should not be set unless plainly contrary to the evidence or without sufficient evidence to support it.

3. The trial court failed to adhere to well-established West Virginia law regarding the award of damages. A jury may award pain-related medical expenses and simultaneously determine that evidence of pain and suffering was insufficient to support a monetary award. The evidence supported the jury's decision to award no damages for pain and suffering and impairment of ability to enjoy life. Evidence was presented that Plaintiff's pain and suffering and impairment of ability, if any, to enjoy life was not related to the bumping incident but caused by other factors.

V. STATEMENT REGARDING ORAL ARGUMENT

Based on the Court's analysis and holdings in *Marsch v. American Electric Power Company*, 530 S.E.2d 173 (W.Va. 1999), oral argument is not necessary unless the Court determines issues exist which need to be addressed. Should the Court decide to hear oral argument, this matter is appropriate for a Rule 19 argument and disposition by memorandum decision.

VI. ARGUMENT

- A. The trial court erred in finding Plaintiffs presented uncontradicted evidence where ample and convincing evidence was presented at trial supporting the jury's decision to discredit 1) Plaintiffs' testimony, 2) the alleged cause of Plaintiff's pain and suffering and/or impairment of ability to enjoy life, and 3) Plaintiffs' theory of recovery.**

The trial court's Order granting Plaintiffs' Motion for a New Trial on the Issue of Damages incorrectly found:

Plaintiff presented uncontradicted evidence of past pain and suffering and past impairment of capacity to enjoy life. In addition, the medical testimony of Dr. Michael Shramowiat also established the fact that the Plaintiff, Rebecca Arbogast, would continue to have pain and impairment into the future. This testimony was not contradicted by the Defendant.

The trial court's finding is clearly erroneous based on the facts and evidence presented to the jury at trial as reflected in the trial transcript as well as the exhibits entered into evidence at trial.

1. Pre-existing pain and suffering and impairment of ability to enjoy life.

Plaintiff, her husband and her daughter testified extensively about Plaintiff's pain and suffering due to a 1997 arm injury which pre-existed and had nothing to do with the incident at Big Lots. Tr. at 100, "I can't hardly remember [1998] because I was on almost 40 different drugs. And I was so busy with side effects, and I just basically didn't function much at

all.” Tr. at 99. Dr. Shramowiat testified Plaintiff 1) has been treating for chronic arm pain since 1997 and 2) will require pain medication for her arm injury for the rest of her life. Tr. 187, 211-212. Dr. Dauphin’s opined that most of Plaintiff’s pain medications were prescribed for her elbows and arms; reported the fact that there was no mention of the alleged knee injury for a period of time in Dr. Shramowiat’s progress notes to be significant; and, questioned why Plaintiff’s use of Methadone (prescribed for the pre-existing arm injury) was not adequate to cover all of Plaintiff’s discomfort. Exhibit 4(e) at 5.

2. Exhibit 3 – the store video of the incident.

The jury was shown no fewer than 5 times a video of the bumping incident -- a series of photographs taken at three second intervals by the store surveillance camera (Exhibit 3). Tr. 146, 238, 247, 248, 250. Plaintiff’s version of the incident (in which she claims to have experienced an explosion of pain², immediate panic and dread³, a buckling of her knee⁴, having to catch the counter for support⁵, and exclaiming “oh god, oh god”⁶) is difficult, if not impossible, to discern from any objective viewing of Exhibit 3. Rather, the events as depicted by Exhibit 3 as well as the

² Tr. at 44, 69; Tr.Ex. 4(c) Progress Note dated 11/8/04.

³ Tr. at 71, 74, 255.

⁴ Tr. at 124, 125.

⁵ Tr. at 44, 124-125.

⁶ Tr. at 69.

testimony of Sue Hersman, John Potts and John Richardson constitute evidence sufficient to contradict Plaintiffs' testimony and to challenge Plaintiffs' credibility and theory of recovery. Moreover, this evidence is adequate evidence, in and of itself, to contradict Plaintiff's claim for pain and suffering.

3. Medical Records and Reports.

Medical reports entered into evidence did not support Plaintiff's complaint of constant knee swelling and pain for 3 1/2 years. Plaintiff testified that, on November 8, 2004 when she first went to Dr. Shramowiat's office for an examination of her knee injury as a result of the incident at Big Lots, "the knot was still there, that big golf ball knot was still there, and the bruising and swelling and stuff." Tr. at 79. To the contrary, Dr. Shramowiat's Progress Note dated 11/8/04 reflects "[s]ome slight swelling is noted laterally." Tr. Ex. 4(c) note dated 11/8/04. Further, Plaintiff testified her pain got worse and worse during the Spring and Summer of 2005, and that the pain in her left knee "has never stopped hurting." Tr. at 83. To the contrary, Dr. Shramowiat's Progress Notes for Plaintiff during the Spring and Summer of 2005 *make no mention of any knee pain*, which again direct evidence from Plaintiff's own treating physician supporting the jury's verdict. Tr.Ex. 4(c), Progress Notes dated

4/6/05; 6/1/05; 7/6/05; 8/10/05. Plaintiff testified that the swelling in her left knee goes down, but it never goes away. Tr. at 98. Dr. Snead's April 5, 2006 examination of Plaintiff found "patient's left knee was not swollen." Tr.Ex. 4(d) at 2. Dr. Dauphin's October 30, 2007 examination of Plaintiff's knee to be "stable in all planes and there is no effusion." Tr.Ex. 4(e) at 4.

Despite Plaintiff's repeated references to a tear in her meniscus⁷ as a result of the incident at Big Lots, none of the medical records (including a November 17, 2004 MRI, an October 5, 2005, Dr. Snead's April 5, 2006 impairment evaluation and Dr. Dauphin's October 30, 2007 IME)⁸ supported Plaintiff's claim that the incident at Big Lots caused a tear to her meniscus which would require a knee replacement.

4. Evidence of other causes of knee injury.

Finally, the jury heard evidence suggesting any injury to Plaintiff's knee could have been caused by events other than the incident at Big Lots. Plaintiff and her daughter testified about a knee injury in the 1980's caused by knee boarding on a raft. Tr. at 75, 234-235. Sue Hersman testified she saw Plaintiff in the store prior to the day of the bumping incident walking with a cane. Tr. at 153.

⁷ "[The MRI] showed what they thought could have been a meniscal tear", Tr. at 80; "[Dr. Shramowiat] thought it was a meniscal tear", Tr. at 80; "[Dr. Dauphin] said sometime there is a real tear there", Tr. at 131.

⁸ Tr. 213, Tr.Ex. 4(b), Tr.Ex. 4(c), Tr.Ex. 4(d), Tr.Ex. 4(e).

B. The trial court abused its discretion by invading the province of the jury.

Where the evidence is conflicting, turning on the credibility of witnesses, or where the evidence, though undisputed, is such that reasonable people may properly draw different conclusions from it, such questions are proper questions for jury determination. *Biddle v. Haddix*, 154 W.Va. 748, 179 S.E.2d 215 (1971). When presented with conflicting testimony, it is the jury's function to weigh the evidence and to resolve questions of fact. *Bourne v. Mooney*, 163 W.Va. 144, 254 S.E.2d 819 (1979). Indeed, the trial court properly instructed the jury in accordance with well-settled WV law that it was within the purview of the jury to give credibility to the witnesses as it deemed appropriate. Tr. at 265-267. Within that purview, the jury properly determined that Plaintiffs' complaints of pain and suffering and impairment of the ability to enjoy life were not credible and that Plaintiffs' complaints of pain and suffering and impairment of the ability to enjoy life were not as a result of the Big Lots incident.

When a case with conflicting evidence and circumstances has been fairly tried, under proper instructions, the jury's verdict should not be set unless plainly contrary to the evidence or without sufficient evidence to support it. *Walker v. Monongahela Power Co.*, 147 W.Va. 825, 131 S.E.2d 736 (1963). Plaintiffs make no argument or allegation that the jury was

improperly instructed; sufficient evidence in the form of testimony, pictures and medical records support the jury's findings, and, under well-established West Virginia case law, the jury's verdict in this case should not have been set aside.

An award of damages is a factual determination reserved for the jury. *Bressler v. Mull's Grocery Mart*, 194 W.Va. 618, 461 S.E.2d 124 (1995). "Compensation for pain and suffering is an indefinite and unliquidated item of damages and there is no rule or measure upon which it can be based. The amount of compensation for such injuries is left to the sound discretion of the jury, and there is no authority for a court to substitute its opinion for that of the jury. A mere difference in opinion between the court and the jury as to the amount of recovery in such cases will not warrant the granting of a new trial on the grounds of inadequacy unless the verdict is so small that it clearly indicates that the jury was influenced by improper motives." Syl. Pt. 2, *Richmond v. Campbell*, 148 W.Va. 595, 136 S.E.2d 877 (1964). The jury's decision to award Plaintiff nothing for pain and suffering and impairment of ability to enjoy life as a result of the bumping incident was well within the jury's discretion. There is no suggestion or evidence of improper motives. Accordingly, the Order granting Plaintiffs a new trial on

the issue of damages is contrary to WV law and should not be allowed to stand.

C. The trial court's decision to set aside the jury verdict and award Plaintiffs a new trial was an abuse of discretion.

The trial court found it to be “clear that the jury was misled by a mistaken view of the case as it awarded 100% of Plaintiff's past medical expenses while awarding ‘-o-‘ for past pain and suffering and loss of enjoyment of life.” 7/19/10 Order. This finding by the trial court is a misunderstanding of the law and is wrong. As this Court specifically recognized in *Marsch v. American Electric Power Co.*, 207 W.Va. 174, 182, 530 S.E.2d 173, 183 (1999), “a jury may award pain-related medical expenses and may simultaneously determine that evidence of pain and suffering was insufficient to support a monetary award.” *Marsch*, 207 W.Va. at 182, 530 S.E.2d at 183 citing with approval, *Snover v. McGraw*, 172 Ill.2d 438, 667 N.E.2d 1310 (1996).

The issues on damages in *Marsch* are identical to the issues here, and this Court's analysis and findings in *Marsch* are controlling. Mr. Marsch was injured as a result of falling through and unguarded opening on the job. The jury found the employer to be negligent, and awarded Mr. Marsch past and future medical expenses, lost wages, impairment of future

earnings and punitive damages. The jury awarded no damages for past, present or future pain and suffering, loss of enjoyment of life, loss of ability to perform household services, and loss of consortium.

Mr. Marsch appealed the jury's verdict arguing that adequate testimony of pain and suffering incurred during the fall was presented and that the jury's verdict failing to award anything for pain and suffering was prima facie inadequate. *Marsch*, 207 W.Va. at 181, 530 S.E.2d at 182.

If the Appellants had presented their evidence of pain and suffering with no contradicting evidence presented by the Appellee, the jury's zero pain and suffering award would have been unfounded. However, the Appellee did indeed present the jury with evidence that the Appellant was released from the hospital the day of the accident, that he returned to work the day following the accident, that he thereafter performed strenuous work in his own home. The Appellee also introduced evidence of prior and subsequent injuries.

Likewise here, if Plaintiffs had presented their evidence of pain and suffering with no contradicting evidence, only then would the jury's zero pain and suffering award would have been unfounded. However, here Big Lots presented the jury with evidence challenging Plaintiff's credibility, Plaintiff's extensive history of treatment for pain unrelated to the incident at Big Lots, and evidence of prior and subsequent injuries. Accordingly, evidence was presented supporting the jury's decision not to award damages for pain and suffering as a result of the bumping incident.

Where, as here, a damage issue has been tried by a jury, the allegation of inadequate damages should be weighed on appeal by viewing the evidence most strongly in favor of the defendant. *Lenox v. McCauley*, 188 W.Va. 203, 423 S.E.2d 606 (1992). “In determining whether the verdict of a jury is supported by the evidence, every reasonable and legitimate inference, fairly arising from the evidence in favor of the party for whom the verdict was returned, must be considered, and those facts, which the jury might properly find under the evidence, must be assumed as true.” Syl. Pt. 3, *Walker v. Monongahela Power Co.*, 147 W.Va. 825, 131 S.E.2d 736 (1963).

Evidence was admitted at trial challenging Plaintiff's overall credibility. Overwhelming evidence was introduced discounting the existence of knee pain, and indicating that whatever pain and suffering Plaintiff experienced, and would continue to experience, was due to her pre-existing nerve injury. Additionally, evidence was introduced that Plaintiff may have sustained injury to her knee wholly unrelated to the bumping incident at Big Lots. Assuming facts addressed at trial as true, the evidence permits a conclusion by the jury that whatever pain and suffering and impairment of the ability to enjoy life Plaintiff experienced was not causally related to the bumping incident at Big Lots. Consequently, one

cannot conclude that the jury's failure to award damages for pain and suffering and impairment of ability to enjoy life renders the verdict inadequate as a matter of law. Therefore, the trial court abused its discretion in setting aside the jury verdict and awarding Plaintiffs a new trial.

VII. CONCLUSION

The trial court committed error in finding Plaintiffs' evidence was uncontradicted. Not only was the evidence contradicted, the weight of the evidence supported the jury's decision. The trial court abused its discretion by invading the province of the jury and, in the absence of mistake, setting aside the jury's verdict. The trial court erred in ignoring this Court's decision in *Marsch* holding that a jury could properly return a verdict for medical expenses but award nothing for pain and suffering, which is exactly what the jury did here.

Accordingly, Big Lots respectfully requests that this Court grant the petition for appeal; reverse the trial court's Order granting Plaintiffs a new trial on damages; and reinstate the jury verdict in its entirety.

Big Lots Stores, Inc.
By Counsel,



H.F. Salsbery (WVSB#3235)
Carol P. Smith (WVSB #5058)
Frost Brown Todd LLC
Laidley Tower, Suite 401
500 Lee Street, East
Charleston, WV 25301
Phone: 304-345-0111
Fax: 304-345-0115
Email: csmith@fbtlaw.com