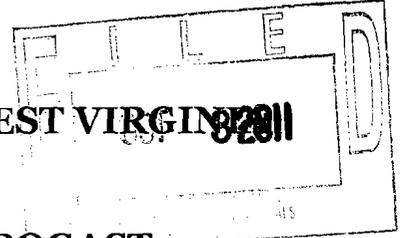


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA
Docket No. 11-1260



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

REPLY BRIEF
IN SUPPORT OF PETITION FOR APPEAL

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PETITIONER'S REPLY

Pursuant to Rule 10(g) of the Revised Rules of Appellate Procedure and this Court's Order entered September 13, 2011, Petitioner Big Lots Stores, Inc., by counsel, submits this reply brief to address certain points and omissions occasioned in the Plaintiffs'/Respondents' brief.

I. ASSIGNMENTS OF ERROR

Strangely, Plaintiffs chose not to address any of the assignments of error upon which this Petition for Appeal is based. This failure only serves to highlight; a) the assignments of error; b) the trial court's abuse of discretion; and, c) the need for this Court to reinstate the jury's verdict in its entirety.

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.

Plaintiffs' fails to address the conflicting evidence presented at trial and specifically discussed in the Petition for Appeal (i.e., credibility, prior injuries, scene videotape, subsequent injuries, medical records.)

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.

Plaintiffs do not take issue with the presentation of liability and damages to the jury. Rather, Plaintiffs object to the jury's findings. In other words, Plaintiffs do not take issue with the process; Plaintiffs just don't like the result.

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.

There is no evidence that the jury was influenced by mistake, prejudice or improper motives. The jury's verdict should stand.

II. KIND OF PROCEEDING AND NATURE OF RULING BELOW

The issue on Appeal is whether it was proper for Judge John D. Beane of the Circuit Court of Wood County to set aside the jury's verdict and grant Plaintiffs' motion for a new trial on the issues of damages – a decision rendered more than 2 years after the Wood County jury rendered its verdict.

Following a two-day trial during which the jury heard testimony of seven witnesses and viewed a store videotape of the incident, scene photos, medical records, reports and bills, the Wood County jury awarded Plaintiff \$13,877.46 for past medical expenses and \$15,000.00 for future medical expenses. [Verdict Form.] The jury awarded “\$0” for past pain and suffering, future pain and suffering, past loss of enjoyment of life and future loss of enjoyment of life. [Verdict Form.]

Plaintiffs moved for a new trial arguing that a jury verdict failing to award anything for pain and suffering and loss of enjoyment of life is prima facie inadequate. Two years later, 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. 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.

The issues raised are controlled by this Court’s decision in *Marsch v. American Electric Power Company*, 207 W.Va. 174, 530 S.E.2d 173 (1999). Neither Plaintiffs nor the trial court address, or even mention, *Marsch*. As set forth herein and under West Virginia law, the trial court’s Order should be reversed and the jury verdict should be reinstated.

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. [See, Petition for Appeal 4-14.]

Fortunately, the jury was able to see what happened: A series of photographs of the incident taken at 3-second intervals by the store surveillance camera was shown to the jury a number of times at trial. 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. [See, Petition for Appeal, 4-8.] Without more, the suggestion that Plaintiff's evidence was uncontradicted is unfounded.

Plaintiff's argument that evidence of past pain and suffering, future pain and suffering, past loss of enjoyment of life and future loss of enjoyment of life due to the Big Lots incident was uncontradicted is not supported by the record -- and is just wrong. Testimony and medical records evidencing Plaintiff's medical history and treatment were

introduced at trial. [Petition for Appeal, 8-12.] That evidence adequately supports the jury's verdict.

IV. SUMMARY OF ARGUMENT

Pursuant to Rule 10(g), see headings.

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

Plaintiffs want to ignore the evidence. A five-sentence excerpt from a six-page IME Report by Dr. Dauphin is the one and only reference to the trial record found in Plaintiffs' Response. [Plaintiff's Response at 5 and 9.] First, this same IME Report supports reinstating the jury's verdict.

[Petition for Appeal at 11, 12, 19.] Second, Plaintiffs unilaterally edit the selected quote by Dr. Dauphin to add the word "pain" in an effort to stage the argument. [Plaintiff's Response at 5.]

Conducted three years after the incident at Big Lots, Dr. Dauphin's IME was based on a medical examination as well as a review of the records that were provided, with the expressed assumption that the material provided was true and correct. [Tr.Ex. 4(e) at 6.] The IME Report Disclaimer specifically provides that additional information may or may not change the opinions rendered in the evaluation. [Tr.Ex. 4(e) at 6.]

Here, unlike Dr. Dauphin, the jury was provided with additional information. The jury was provided with two days of testimony and evidence by which the jury could evaluate the facts from a number of sources and Plaintiff's credibility. The jury got to see the store surveillance tape of the incident. [Tr.Ex. 3.] The jury got to compare Plaintiff's version of events with three store employee's version of what happened. The jury heard testimony from Plaintiff's treating physician Dr. Shramowait. Tr. at 184-230. The jury was then charged with determining what actually happened. Tr. at 263.

When presented with conflicting testimony, it is the jury's function to weigh the evidence and to resolve questions of fact. *Smith v. Cross*, 223 W.Va. 422, 340, 675 S.E.2d 898, 906 (2009). It is the jury's recollection and interpretation of the evidence that controls in the case. Tr. at 264. The jury was instructed to "draw such reasonable inferences from the testimony

and exhibits as [the jury felt] were justified in light of common experience.” Tr. at 264. The jury was directed to judge the credibility or believability of each witness and the weight to be given a witness’s testimony. Tr. at 265. As instructed, the jury was asked to consider how truthful each witness was and how convincing his or her testimony was in light of all of the evidence and circumstances shown. Tr. at 266.

Regarding damages, the jury was instructed that the party asking for damages has the burden of producing the evidence to satisfy the jury by a preponderance of the evidence that the damages requested have been proven. Tr. at 269-270. More specifically, the jury was instructed that if it was uncertain as to whether any element of damages was caused by the alleged negligent act of the defendant, ***or if it appeared just as probable that any injury or element of damage complained of by the Plaintiff resulted from a cause other than the alleged negligence of the Defendant, then Plaintiff could not recover for that element of damage.*** Tr. at 273, (emphasis added.)

On appeal from an allegedly inadequate damage award, the evidence concerning damages is to be viewed most strongly in favor of the defendant. *Maynard v. Napier*, 180 W.Va. 591, 378 S.E.2d 456 (1989) citing, Syllabus Point 1, *Kaiser v. Hensley*, 173 W.Va. 548, 318 S.E.2d 598 (1983).

A. The trial court erred in finding Plaintiffs presented uncontradicted evidence of pain and suffering and impairment of capacity to enjoy life.

Ample evidence at trial which contradicted Plaintiffs' claim for pain and suffering and impairment of ability to enjoy life as a result of the incident at Big Lots. Plaintiffs fail to address this evidence upon which the jury based its decision.

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

Plaintiffs refuse to address Plaintiff's significant and severe pre-existing pain and suffering as a result of the 1997 arm injury which had nothing to do with the incident at Big Lots. In her own words, Plaintiff told the jury, "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 will require pain medication for her arm injury for the rest of her life. Tr. 187, 211-212 (underscore added.) Plaintiffs' Response to Petition for Appeal never mentions Plaintiff's pre-existing pain due to her arm injury.

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

Plaintiffs want to ignore, and fail to address, what actually happened. Indeed, Plaintiffs devote only two sentences of the Response to Petition for Appeal to the actual incident. [Response, p.4.] Plaintiff's version of the

incident described at trial (in which she claims to have experienced an explosion of pain¹, immediate panic and dread², a buckling of her knee³, having to catch the counter for support⁴, and exclaiming “oh god”⁵) 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 testimony of the Big Lots employees constitute evidence fatal to Plaintiffs’ credibility and theory of recovery.

3. Medical Records and Reports.

Plaintiffs argue “(Big Lots) presented no medical experts that contradicted the testimony of (Plaintiff’s) past or future pain and suffering or impairment of ability to enjoy one’s life.” [Response to Petition for Appeal, at 5 (underscore in the original).] To the contrary, each and every medical report entered into evidence challenged Plaintiffs’ credibility and theory of recovery. Taken as a whole, the medical records torpedo Plaintiffs’ complaints of constant knee swelling and pain for 3 1/2 years and/or pain and suffering attributable to the incident at Big Lots for which the Plaintiffs are entitled to damages.

¹ Tr. at 44, 69; Tr.Ex. 4(c) Progress Note dated 11/8/04.

² Tr. at 71, 74, 255.

³ Tr. at 124, 125.

⁴ Tr. at 44, 124-125.

⁵ Tr. at 69.

For example, what Plaintiff described to the jury as “that big golf ball knot was still there, and the bruising and swelling and stuff.” [Tr. at 79] was reflected in Dr. Shramowiat’s Progress Note as “[s]ome slight swelling is noted laterally.” Tr. Ex. 4(c) note dated 11/8/04. This is a contradiction.

Plaintiff’s testimony that her pain got worse and worse during the Spring and Summer of 2005, and “has never stopped hurting.” [Tr. at 83] was not supported in the Progress Notes of her own treating physician with whom she was treating on a monthly basis. Tr.Ex. 4(c), Progress Notes dated 4/6/05; 6/1/05; 7/6/05; 8/10/05. Again, the medical evidence does not back Plaintiffs’ claim.

Plaintiff’s testimony that the swelling in her left knee goes down, but it never goes away [Tr. at 98] finds no support in either of the two orthopedic examinations performed: Dr. Snead’s April 5, 2006 examination of Plaintiff found “patient’s left knee was not swollen.” Tr.Ex. 4(d) at 2. On October 30, 2007, Dr. Dauphin found Plaintiff’s knee to be “stable in all planes and there is no effusion.” Tr.Ex. 4(e) at 4. These medical records contradict Plaintiff’s testimony.

4. Evidence of other causes of knee injury.

Plaintiffs refuse to address evidence that Plaintiff’s knee could have been caused by events other than the incident at Big Lots including: a) a

knee injury in the 1980's caused by knee boarding on a raft (Tr. at 75, 234-235); b) testimony of Plaintiff's presence in the store prior to the day of the bumping incident walking with a cane (Tr. at 1530; and, c) a report noting Plaintiff was involved in a motor vehicle accident in February, 2005 (3 months after the Big Lots incident).

The jury heard this evidence and was permitted to consider it in weighing the evidence. Plaintiffs simply refuse to address it. This evidence directly contradicts Plaintiffs' evidence and testimony. The trial court's finding of "uncontradicted evidence" is clearly erroneous based on the facts and evidence presented to the jury at trial.

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

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.

Marsch v. American Elec. Power Co., 530 S.E.2d at 182, citing *Richmond v. Campbell*, 18 W.Va. 595, 136 S.E.2d 877 (1964).

More specifically and directly on point, “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). See also, *Lenox v. McCauley*, 188 W.Va. 203, 423 S.E.2d 606 (1992) (jury’s award was not inadequate when the evidence was viewed most strongly in favor of appellee); *Hewett v. Frye*, 184 W.Va. 477, 480, 401 S.E.2d 222, 225 (1990)(“viewed most strongly in favor of the appellee, the evidence permitted a conclusion by the jury that the appellant’s psychological and mental disturbances were not causally related to the accident.”)

The evidence introduced at trial permitted a conclusion by the jury that Plaintiff’s pain and suffering and loss of enjoyment of life were not causally related to the bumping incident at Big Lots. Absent any evidence of improper motives on the part of the jury (and there isn’t any), the trial court abused its discretion in substituting its opinion two years later for that of the jury.

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

“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). Viewing the evidence in a light most favorable to Big Lots and assuming all facts introduced by Big Lots at trial as true, the evidence supports 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

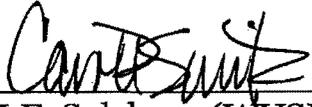
The trial court committed error in finding Plaintiffs' evidence was uncontradicted. Not only was the evidence contradicted, the weight of the evidence supported the jury's decision.

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 two years after trial.

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,

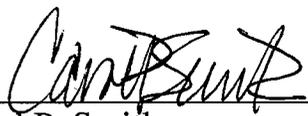


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CERTIFICATE OF SERVICE

I, Carol P. Smith, Esq., hereby certify that on October 3, 2011, I served the forgoing "Reply Brief in Support of Petition for Appeal" by depositing a true copy thereof in the United States mail, postage prepaid, addressed as follows:

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