Nos. 22023, 22024 & 22025 -- In re: State of West Virginia Public Building Asbestos Litigation

Cleckley, Justice, concurring:

I am pleased to concur in Justice McHugh's fine opinion. I particularly agree with his analysis regarding the broad discretion and the scope of authority of the trial court to set aside a jury's verdict as being against the weight of the evidence. I write separately, however, just to make explicit what is implicit in the analysis of the opinion: that a trial court in West Virginia has authority in determining a motion for a new trial under Rule 59 of the West Virginia Rules of Evidence to weigh the persuasive quality of the evidence and that our prior cases to the contrary are overruled.[1] Several of our prior cases, such as Addair v. Majestic Petroleum Co., Inc., 160 W. Va. 105, 232 S.E.2d 821 (1977), held that the trial court's authority to review a jury's verdict was the same as that of an appellate court. This case sounds the death knell for Addair and its progeny. Indeed, several of Addair's express or implicit declarations would not stand the test of time and its holding limiting the scope of the reviewing authority of

[1]We merely are upholding the right of a trial court to grant a new trial when it believes that substantial justice has not been done on the theory that it is an exercise of the trial court's inherent power.

the trial court to only that of an appellate court had long been a rule searching for a rationale. Today's decision puts a long overdue end to the fruitless search. By broadening the authority of trial courts and limiting that of the appellate court, we strike a decent note for judicial restraint and judicial economy.

As suggested above, our prior cases indicated that the test for granting a new trial approximated the test for a directed verdict. Although today's decision does not go so far to state that the trial court may order a new trial where there is any evidence which would support a judgment in favor of the nonmoving party, any

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[2]Clearly, granting a trial court broad latitude in granting or denying motions for a new trial is consistent with the principles of judicial economy. Here, the trial court, before losing jurisdiction of a case, is permitted to correct errors that it or the jury might have made during the course of the trial. Furthermore, giving the trial court this power to achieve justice may encourage litigants more forcefully to pursue the issues below rather than in a full blown and costly appeal.

[3]Some jurists have suggested there is some similarity between these two tests and the difference is one of degree. There can be little disagreement that they differ substantially to the extent of control over jury verdicts exercised by the trial court. See Philip A. Trautman, Motions Testing the Sufficiency of Evidence, 42 Wash. L. Rev. 787 (1967).

[4]Under this theory, a trial court becomes a "thirteenth juror" upon hearing a motion for a new trial. The trial court weighs the evidence independently to determine whether there is sufficient evidence to support the verdict.

notion that the tests for a new trial and for a directed verdict are equated is, of course, laid to rest. What we have done is take an intermediate position which I will now attempt to summarize.

The decision to grant or deny a new trial rests within the sound discretion of the trial court, and we review this decision for a clear abuse of discretion. See Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 109 S. Ct. 2909, 106 L.Ed.2d 219 (1989). Absent a clear abuse of discretion, we will not disturb this decision; indeed, our position is the same as the federal test that the trial court's decision "'is not reviewable upon appeal, save in the most exceptional circumstances[.]'" Lindner v. Durham Hosiery Mills, Inc., 761 F.2d 162, 168 (4th Cir. 1985), quoting Aetna Cas. & Sur. Co. v. Yeatts, 122 F.2d 350, 354 (4th Cir. 1941).

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[5]The federal test is summarized in the famous statement of Judge Parker in Aetna Casualty & Surety Co. v. Yeatts, 122 F.2d at 352:

> "On such a motion it is the duty of the judge to set aside the verdict and grant a new trial, if he is of opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict."

See also Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 36, 101 S. Ct. 188, 190, 66 L.Ed.2d 193, 197 (1980) (order granting new

Justice McHugh correctly states that this power of the trial court should be exercised sparingly. Even if the trial court disagrees with the verdict, it should accept the jury's findings on credibility matters unless the verdict is clearly against the manifest weight of the evidence where the jury acted under some mistake or under some improper motive, bias, or feelings. The most important feature of the rule we adopt today is that enforcement of these limitations of the trial court's authority is committed largely to the self-restraint of the trial court and reversals on appeal are to be rare. Greater latitude should be allowed a trial court in granting a new trial than in denying a new trial.

This decision is committed to the discretion of the trial court because it "is in a position to see and hear the witnesses and is able to view the case from a perspective that an appellate court can never match." Weil v. Seltzer, 873 F.2d 1453, 1457 (D.C. Cir. 1989). Given the trial court's intimate familiarity with the proceedings, the trial court "may weigh evidence and assess

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trial is not appealable and "rarely, if ever, will justify the issuance of a writ of mandamus").

[6]The mere fact there is little discussion of the merits of the evidence in the trial court's granting or denial of a motion for a new trial is not grounds for reversal. See Ellis v. International

credibility in ruling on the motion for a new trial." Wilhelm v. Blue Bell, Inc., 773 F.2d 1429, 1433 (4th Cir. 1985), cert. denied, 475 U.S. 1016, 106 S. Ct. 1199, 89 L.Ed.2d 313 (1986). There are many critical events that take place during a trial that cannot be reduced to record, which may affect the mind of the judge as well as the jury in forming the opinion as to the weight of the evidence and the character and credibility of the witnesses. These considerations can and should not be ignored in determining whether a new trial was properly granted. The Eleventh Circuit has observed that these principles are particularly apt even in cases where the motion is denied. See Blu-J, Inc. v. Kemper C.P.A. Group, 916 F.2d 637 (11th Cir. 1990). Thus, in future cases, it is with this circumscribed scope of appellate review that we should review the granting or denial of a new trial.

Playtex, Inc., 745 F.2d 292 (4th Cir. 1984).