

No. 28891 *Delmar Taylor and Helen Taylor v. Elkins Home Show, Inc., a West Virginia Corporation; United Contracting Corporation, a West Virginia Corporation*

FILED

RELEASED

January 11, 2002

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

January 14, 2002

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McGraw, Chief Justice, dissenting:

I disagree with the majority opinion on two main points. I see no reason why the Court should not extend the reasoning of *Fayette County National Bank v. Lilly*, 199 W. Va. 349, 484 S.E.2d 232 (1997), to final orders granting judgment as a matter of law under Rule 50. *Lilly* requires that orders granting summary judgment “set out factual findings sufficient to permit meaningful appellate review.” A well reasoned order by the lower court is just as helpful in the context of appellate review of a ruling on a motion for judgment as a matter of law, and should therefore be required.

Second, I have even greater reservations about the Court’s rationalization for the lower court’s award of such judgment in this case. Specifically, in this case there was evidence of defects in the trailer’s foundation, as well as evidence concerning the cost of replacing the foundation. The majority opinion suggests that the plaintiffs had a burden to show that replacement, rather than a less costly repair, was necessary to correct the defects. The jury could have easily inferred the necessity of replacing the foundation from the evidence presented.

This Court should have held that the lower court abused its discretion in failing to award a new trial, rather than affirming the lower court’s decision. In an analogous case concerning breach of

warranty, the Eleventh Circuit Court of Appeals held that the trial court should have remedied an insufficiency of proof by granting a new trial rather than ordering judgment for the seller, where the defect in proof was possibly remediable upon retrial. *See Network Publications, Inc. v. Ellis Graphics Corp.*, 959 F.2d 212 (11th Cir. 1992); *see also* 9A Wright & Miller, *Federal Practice and Procedure* §2538, at 357 (2d ed. 1995). This case would have benefitted, in my opinion, from a similar approach. Therefore I must respectfully dissent.