No. 31314 – *Rebecca M. Arbogast and Kevin Mark Arbogast v. Mid-Ohio Valley Medical Corp., a corporation, d/b/a Mid-Ohio Valley Urgent Care*

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Albright, J., concurring in part, dissenting in part:

I concur with the decision of the majority reversing the judgment as a matter of law on the issue of liability entered by the lower court contrary to the verdict of the jury.[1] The reason for the trial court's action does not satisfactorily appear on the record.

I dissent from the decision of the majority to require the lower court to reinstate the verdict without offering the trial court an opportunity to amend its order of a new trial to include the issue of liability and state with particularity the trial court's reasons, if any, for awarding such a new trial on all issues. This Court's celeritous reinstatement of the jury

[1]Amendments to Rule 50 of the Federal Rules of Civil Procedure discontinued the terms "directed verdict" and "judgment notwithstanding the verdict," in favor of the phrase "judgment as a matter of law." In West Virginia, the designation of a Rule 50 motion as a "motion for judgment notwithstanding the verdict" also changed to a "judgment as a matter of law" in the amendment to Rule 50 effective April 6, 1998. *See Miller v. Triplett*, 203 W. Va. 351, 356 n.8, 507 S.E.2d 714, 719 n.8 (1998). In *Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 457 S.E.2d 152 (1995), this Court observed that "[t]he amendment did not, however, affect either the standard by which a trial court reviews motions under the rule or the standard by which an appellate court reviews a trial court's ruling." 193 W. Va. at 482 n.7, 457 S.E.2d at 159 n.7.

verdict without affording such an opportunity is, in my view, shortsighted and in violation of precedents meticulously fashioned by the Court over the years.

It is abundantly clear that the trial court perceived something in the evidence and its consideration by the jury that generated the judge's lack of confidence in the verdict. In reacting to that lack of confidence, the trial court awarded judgment as a matter of law on the issue of liability and a new trial on the issues of damages, both of which are the subject of this appeal. Having found that judgment as a matter of law is not justified, the majority has failed to fairly consider whether the lesser remedy of a new trial on the issue of liability might be in order. Instead, the majority has substituted its own judgment without soliciting further input from the trial court. In doing so, I believe the majority has failed to consider the essential differences between the standard of review for a judgment as a matter of law and the standard of review for the granting of a new trial. In *Gonzalez v. Conley*, 199 W. Va. 288, 484 S.E.2d 171 (1997), this Court identified this significant distinction and explained as follows:

> The distinction between the effect of entering a judgment notwithstanding the verdict as opposed to granting a new trial is substantial and thus, warrants a different standard of review. . . . When a trial judge vacates the jury verdict by entering judgment notwithstanding the verdict, the trial judge is entering a final judgment which ends litigation on the issue upon which judgment has been entered. "In performing this analysis, the credibility of the witnesses will not be considered, conflicts in testimony will not be resolved, and the weight of the evidence will not be evaluated." *Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 482, 457 S.E.2d 152, 159 (1995). *See also Alkire*

> *v. First National Bank of Parsons*, 197 W. Va. 122, 128, 475 S.E.2d 122, 128 (1996). . . .
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> > Conversely, when a trial judge vacates a jury verdict and grants a new trial, he or she does not enter a final judgment. Thus, a trial judge granting a new trial has more discretion in determining whether such action is warranted. . . . In [weighing evidence and considering credibility], the trial judge does not invade the function of the fact finder because the trial judge granting a new trial is simply sending the issue back to the fact finder. Though this Court has made clear that the power to grant a new trial should be used sparingly, this Court will not review a trial judge's decision to grant a new trial unless the trial judge abuses his or her discretion.

199 W. Va. at 291-92, 484 S.E.2d at 174-75 (internal citations omitted).

This Court has previously vested substantial discretion in trial judges to consider granting a new trial, observing that a judge may set aside a jury verdict, provide reasons for that determination, and order a new trial. In syllabus point three of *Young v. Duffield*, 152 W. Va. 283,162 S.E.2d 285 (1968), *overruled on other grounds, Tennant v. Marion Health Care Found.*, 194 W. Va. 97, 459 S.E.2d 374 (1995), this Court held: "The judgment of a trial court in setting aside a verdict and awarding a new trial is entitled to peculiar weight and its action in this respect will not be disturbed on appeal unless plainly unwarranted." Syllabus point four of *Young* explained: "An appellate court is more disposed to affirm the action of a trial court in setting aside a verdict and granting a new trial than when such action results in a final judgment denying a new trial." Syllabus point five continued: "Courts are not required to believe that which is contrary to physical facts and if

the verdict of the jury is based upon testimony which is contrary to physical facts, it will be set aside and a new trial awarded."

In *Tennant v. Marion Health Care Foundation, Inc.*, 194 W. Va. 97, 459 S.E.2d 374 (1995), this Court explained the standard of review for the grant of a new trial as follows:

> [I]n reviewing challenges to findings and rulings made by a circuit court, we apply a two-pronged deferential standard of review. We review the rulings of the circuit court concerning a new trial and its conclusion as to the existence of reversible error under an abuse of discretion standard, and we review the circuit court's underlying factual findings under a clearly erroneous standard. Questions of law are subject to a *de novo* review.

194 W. Va. at 104, 459 S.E.2d at 381.

In *In re State of West Virginia Public Building Asbestos Litigation*, 193 W. Va. 119, 454 S.E.2d 413 (1994), *cert. denied sub nom., W.R. Grace & Co. v. West Virginia*, 515 U.S. 1160 (1995), this Court explained as follows:

> Although the trial judge should rarely grant a new trial, the trial judge, nevertheless, has broad discretion to determine whether or not a new trial should be granted: "Courts do not grant new trials unless it is reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done. . . . Ultimately the motion invokes the sound discretion of the trial court, and appellate review of its ruling is quite limited." Wright & Miller, *supra* at § 2803 at 32-33 (footnotes omitted). However, it has been pointed out:

> There are few subjects in the entire field of procedure that have been subject to so much change and controversy in recent years as the proper scope of review of an order granting or denying a motion for a new trial. The trial court has very broad discretion and the appellate courts will defer a great deal to his exercise of this discretion. This much is settled.
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> Wright & Miller, *supra* at § 2818 at 118.

193 W. Va. at 124, 454 S.E.2d at 418.

In the syllabus of *Cook v. Harris*, 159 W. Va. 641, 225 S.E.2d 676 (1976), explained the rationale for such conclusions, as follows:

> A trial judge is not merely a referee but is vested with discretion in supervising verdicts and preventing miscarriages of justice, with the power and duty to set a jury verdict aside and award a new trial if it is plainly wrong even if it is supported by some evidence, and when a trial judge so acts, his decision, being in discharge of his power and duty to pass upon the weight of the evidence to that limited extent, is entitled to peculiar weight and will not be disturbed on appeal unless clearly unwarranted.

This Court has also recognized that "[t]he trial court has opportunities to observe many things in the course of a trial which the printed record presented to an appellate court does not disclose . . . ." *Browning v. Monongahela Transp. Co.*, 126 W. Va. 195, 203, 27 S.E.2d 481, 485 (1943).

While the majority in the case sub judice premises its conclusions upon error regarding the granting of the judgment as a matter of law, the preferred resolution of this matter would entail a reversal of the judge's entry of the liability verdict in favor of the plaintiff and a remand for further consideration and articulation of grounds for a new trial. On remand, the rationale for any action regarding the grant of a new trial could be explained with specificity.

By simply reversing the lower court's determination, the majority has ignored the reality that the judge likely observed some discrepancy or inconsistency that in his view merited a new trial. The majority chose to focus its entire attention upon the error in granting the judgment as a matter of law on the issue of liability and ignored the broader issue. By reinstating the jury verdict, the majority has violated the spirit, if not the letter, of this Court's own rule that we shall give deference to the judge's determinations on the issue of granting new trials. More importantly, we have substituted our judgment for that of the trial court on issues about which the trial court is likely better informed.

While I cannot express an opinion on the ultimate liability issue without knowing the judge's reasons for setting aside the jury verdict, I vehemently disagree with the majority's decision that the trial court's action justifies reinstatement of the jury verdict. A remand with instructions would have been a more appropriate resolution and would have served the purpose acclaimed by Justice Cleckley in his concurring opinion in *In re State*

Public Bldg. Asbestos Litigation, that "[b]y broadening the authority of trial courts [to grant new trials] and limiting that of the appellate court [to review the same], we strike a decent note for judicial restraint and judicial economy." 193 W. Va. at 132, 454 S.E.2d at 426.