No. 33597 – *Betty K. Neely and Johnny L. Neely v. Belk Incorporated, Crown American Crossroads, LLC d/b/a Crossroads Mall, and Newport Trading Company, Inc.*

Albright, Justice, dissenting:

FILED
June 26, 2008
released at 3:00 p.m.
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

In reversing the learned trial judge's decision to grant a new trial in this case, the majority seeks to emasculate the standard of review that was carefully crafted by this Court to differentiate the standard by which we consider an appeal from a grant of a new trial from those cases in which the trial court refused to grant a new trial. *See* Syl. Pt. 3, *In re State Public Bldg. Asbestos Litigation*, 193 W.Va. 119, 454 S.E.2d 413 (1994). By ignoring the significance of that separate standard, the majority has thumbed its collective nose at the long-standing jurisprudence of this state which clearly evinces a strong preference for *not* overturning a trial judge's decision to grant a new trial.

The adoption of a distinct standard of review for those cases in which a new trial has been granted was compelled by the recognition that a trial judge is uniquely situated to assess the verdict as against all the evidence presented at trial. And, where a circuit court judge is convinced that "the verdict is against the clear weight of the evidence, is based on false evidence or will result in a miscarriage of justice," this Court expressly authorized that trial judge to "set aside the verdict, even if supported by substantial evidence, and grant a new trial." *Id*. at 122, 454 S.E.2d at 416, syl. pt. 3, in part. Or so I thought.

The ruling reached in this case suggests that a decision to grant a new trial will be reversed with more ease and less deference to the trial court's conclusion than the standard we adopted in the *Asbestos Litigation* decision presumably requires. Only when the trial court has clearly abused its discretion in granting a new trial is this Court supposed to even consider appellate review of those cases. In this case, the majority's determination that an abuse of discretion occurred is simply an excuse for second-guessing the studied decision of the trial court judge who was undeniably in the best position to assess the verdict returned by the jury as against the evidence introduced at trial.

The basis for affording enhanced weight to a trial court's decision to grant a new trial emanates from the charge placed upon the trial judge to oversee not only the trial process but also the jury verdict:

> 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 of the 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.*

Syl. Pt. 1, *Cook v. Harris*, 159 W.Va. 641, 225 S.E.2d 676 (1976) (emphasis supplied). Consequently, a trial judge's determination that a new trial should be awarded based on one

of the three grounds this Court identified for setting aside a jury verdict in *Asbestos Litigation*[1] is not to be taken lightly.

In this case, an experienced, well-respected trial judge engaged in the weighing of the evidence required by a motion for a new trial and reached the determination that the jury's verdict was against the clear weight of the evidence. Appellants attempt to discredit the trial court's weighing of the evidence primarily by taking issue with the trial court's statement in its ruling that "[i]t was not disputed at trial that the door had fallen on the Plaintiff and no party offered any evidence to explain the cause of the fall." Maintaining that the issue of whether the door came off its hinges and fell on Ms. Neely was in fact heavily disputed at trial, Appellants argue that this incorrect finding supports its position that the trial judge erred in ruling that the verdict was against the clear weight of the evidence.

Rather than arguing that the door injury did not occur at all, the tack taken by Appellants at trial was to question the extent to which the door came off its hinges and to accordingly question the amount of damages sustained by Ms. Neely related to the incident. Assuming then that the jury was considering the degree to which the door came loose from its hinges and whether the Plaintiff suffered any resulting harm from that alleged

[1]Those three grounds arise when the verdict: (1) is against the clear weight of the evidence; (2) is based on false evidence; or (3) will result in a miscarriage of justice. *See* Syl. Pt. 3, *Asbestos Litigation*, 193 W.Va. 119, 454 S.E.2d 413.

disengagement, the trial judge may have inartfully selected the words by which he sought to express a lack of dispute at trial that the door in question somehow fell on or struck Ms. Neely. Clearly, there was evidence suggesting that an injury resulted when the door came loose in some fashion from its hinges and struck Ms. Neely on the leg. The store employees, after examining the leg of Ms. Neely immediately after the incident and espying both some redness and some swelling on one of her legs, encouraged her to seek medical treatment, which she did.

Having been in that unique position of hearing all the evidence adduced at trial and being witness to issues of credibility, the trial judge was convinced that the jury reacted to a possibly "exaggerat[ed]" presentation of damages by deciding not to award her *any* of the damages to which she might be entitled. As the trial judge observes in his order, "the correct result would be to reduce the damages to a level that the jury believed would fairly compensate the Plaintiff, but it would not be correct to find against the Plaintiff on the issue of liability because she presented a questionable case on damages." Having determined that the Plaintiff successfully put on a *prima facie* case of negligence, which the trial court noted was "largely unchallenged by any Defendant," the trial court came to the conclusion that the issue was one of damages and not liability.

In overturing the trial court's decision to grant a new trial the majority has wrongly engaged in a reweighing of the evidence. This is the very object which this Court

has long sought to avoid by limiting the occasions in which a grant of a new trial should be overturned. Accordingly, I most respectfully dissent.

I am authorized to state that Justice Starcher joins in this dissenting opinion.