

**BEFORE THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

**BELK INCORPORATED, CROWN
AMERICAN CROSSROADS, LLC
d/b/a CROSSROADS MALL AND
NEWPORT TRADING COMPANY, INC.,**

Appellants (Defendants below),

vs.

**BETTY K. NEELY and
JOHNNY L. NEELY,**

Appellees (Plaintiffs below).

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Docket No. 33597

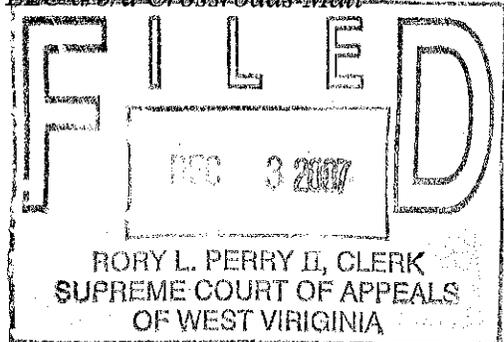
**CIVIL ACTION NO. 03-C-593
Circuit Court of Raleigh County
Judge Robert A. Burnside, Jr.**

APPELLANTS' JOINT APPEAL BRIEF

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I. INTRODUCTION

This is a personal injury action which went to trial in the Circuit Court of Raleigh County, West Virginia, arising from an alleged incident involving an entrance door at Belk Department Store at the Crossroads Mall in Beckley, West Virginia, on October 7, 2002. The trial of this matter lasted nearly two weeks - from October 24, 2006 to November 3, 2006. During the Defendants' case in chief, the jury was shown, among other things, a surveillance DVD of Plaintiff Betty Neely taken on two separate dates, nine months apart. The jury was also shown Ms. Neely's social security disability application in which she described activities that she was unable to do as of March 2, 2002. The DVD and the social security disability application were admitted into evidence and are attached as Exhibits A and B, respectively. The surveillance video and the social security disability application are pieces of evidence that clearly contradict each other. In addition, the jury heard testimony from the Plaintiffs, family members, and a friend which further contradicted the surveillance video and social security disability application. The evidence, taken together, showed that Ms. Neely was willing to exaggerate or fabricate her condition when it was favorable for her to do so. The clear weight of the evidence at trial showed that Ms. Neely may likewise have attempted to mislead the jury with her testimony as to whether the door fell and struck her.

Following the trial, the jury returned a verdict in favor of the Defendants: Belk Incorporated ("Belk"), Crown American Crossroads, LLC d/b/a Crossroads Mall ("Crossroads Mall"), and Newport Trading Company, Inc. ("Newport"), the company which performed maintenance and repairs on the Belk Department Store door at issue (collectively "Defendants" or "Appellants"). The jury specifically found that none of the Defendants were negligent and therefore found that they were not liable for the Plaintiffs' alleged injuries. As fully discussed

below, the evidence with which the jury was presented provided a rock solid foundation upon which it could base a determination that none of the Defendants were liable for Ms. Neely's alleged incident because (1) she did not suffer any damages and/or (2) there was no incident at all.

Plaintiffs Betty K. Neely and Johnny L. Neely (hereinafter "Plaintiffs" or "Appellees") subsequently filed a Motion to Set Aside the Verdict and Award a New Trial ("Motion") pursuant to Rule 59 of the West Virginia Rules of Civil Procedure. The trial court entered an order granting the instant Motion, concluding, among other things, "that the Plaintiff presented a *prima facie* case against all defendants on the issues of duty, breach, proximate cause, and damages" and "that the jury's verdict on the issue of liability is contrary to the clear weight of the evidence." See Belk Incorporated, et. al. v. Betty K. Neely, et al., Civil Action No. 03-C-593 (Circuit Court of Raleigh County, West Virginia, January 2, 2007 Order attached hereto as Exhibit C) ("Order"). Appellants contend that Plaintiffs did not present a *prima facie* case of negligence and thus the jury's verdict on the issue of liability is not contrary to the clear weight of the evidence. Accordingly, Appellants appeal the Circuit Court's Order.

Entry of this Order constitutes a blatant abuse of discretion on the part of the trial court. There was sharply conflicting evidence presented during trial and it was improper for the trial court to substitute its judgment for that of the jury. Furthermore, the clear weight of the evidence which was admitted during the trial (i.e. the surveillance DVD, Ms. Neely's social security disability application, and witness testimony, among other things) called into question Ms. Neely's credibility and supported the jury's verdict. Consequently, the Appellants request that this Honorable Court reverse the trial court's decision to grant Appellees' Motion and reinstate the jury verdict.

II. STATEMENT OF FACTS

On October 7, 2002 at approximately 5:30 p.m., Ms. Neely entered the Belk store and claimed she was struck on her right leg at the knee and right arm by one of the entrance doors. (Trl. Tr. Day 5, p. 17). Ms. Neely testified that the entrance door fell completely off its hinges and struck her knocking her to the ground. Id. She testified that “. . . the door hit me on my knee and the right side of my body, on my arm, and the door did fall all the way to the ground.” Id. After the alleged incident, Ms. Neely told her best friend and neighbor, Patty Redden, that “. . . the door fell entirely off its frame, *landed on top of her, and knocked her to the ground.*” (Trl. Tr. Day 7, p. 26; *See also*, Trl. Tr. Day 5, p. 17). Later, however, she informed Ms. Redden that the door did not land on top of her and did not knock her to the ground. (Trl. Tr. Day 7, p. 26).

Ms. Neely was accompanied by her daughter, Haley Clark, at the time of the alleged incident and there were no other witnesses to the alleged incident. (Trl. Tr. Day 4, p. 192-193). Ms. Clark testified at trial that the door fell completely to the ground, but that she did not have to get the door off Ms. Neely. Id. at 214. Following the alleged incident, Ms. Neely refused medical attention at the Belk store and walked out unassisted. (Trl. Tr. Day 5, p. 20). Ms. Neely has been treated by numerous doctors since the alleged incident and asserts that, as a result of the alleged incident, she has developed reflex sympathetic dystrophy (RSD) and complex regional pain syndrome (CRPS) in her right knee. (Id. at p. 44-48).¹

Contrary to Ms. Neely's testimony, and that of her daughter, two former Belk employees testified that the door did not fall off its hinges. Frankie Lawson and Avis Bailey (former Belk employees) were the first people to see the door after Ms. Neely reported the alleged incident and they testified that the door did not come completely off its hinges but was slightly askew, off

¹ Both conditions are largely diagnosed on Ms. Neely's subjective reports of pain. (Trl. Tr. Day 2, p. 184). See also testimony of Dr. Francis Saldahna and Dr. Timothy Deer presented by DVD on days six and seven of trial, respectively.

one of its lower hinges. (Trl. Tr. Day 3, pp. 177, 184, and 201). They further testified that they lifted the door off its hinges after the incident and laid it in the entryway to the store. (Id. at 186). Specifically, when questioned about the door at trial by Appellees' counsel, Ms. Lawson testified:

Q: Was it leaning or was it in its frame, was it on the ground?
Where was it?

A: It was -- it was in the thing but down at the bottom, about
12 or 14 inches up, it was protruding just a little --

Q: Okay.

A: -- and we lifted the door out and carried it over to the side.

Q: When you say you lifted it out, was it in the top hinge too?

A: The door was intact. The only -- only problem was down at
the bottom of the door was sticking out or protruding out.

(Id. at 201). Similarly, Ms. Bailey testified:

Q: Now, after Ms. Neely left the store, did you go look
at the door?

A: Yes.

Q: What did you see?

A: The bottom -- if we're coming in the door, the
bottom -- on the right-hand side, the bottom corner
was askew.

Q: The bottom of the right-hand corner of the door --

A: Yes.

Q: Was askew?

A: Yes.

Q: Was the door still in its frame?

A: Yes.

Q: Was the top of the door still attached with a pin to the top of the frame?

A: Yes.

(Id. at 184). She testified further:

Q: Okay. But you're clear that the door, as far as you knew, did not fall all the way off. Is that right?

A: I know it did not fall.

(Id. at 188).

Although Appellees offered testimony at trial that the door fell completely off its hinges and to the ground, conflicting accounts were presented to the jury with regard to whether the door knocked Ms. Neely to the ground. As detailed above, Ms. Neely testified at trial that “. . . the door hit me on my knee and the right side of my body, on my arm, and the door did fall all the way to the ground.” (Trl. Tr. Day 5, p. 17). However, Ms. Neely's best friend and neighbor, Patty Redden, testified that subsequent to the alleged incident Ms. Neely told her that “. . . the door fell entirely off its frame, *landed on top of her, and knocked her to the ground.*” (Trl. Tr. Day 7, p. 26; *See also*, Trl. Tr. Day 5, p. 17). The inconsistencies in Ms. Neely's accounts are also highlighted by the fact that immediately following the alleged incident, Ms. Neely informed Ms. Redden that the door landed on top of her and knocked her completely to the ground. Id. It was not until later, however, that she informed Ms. Redden that the door did not land on top of her and did not knock her to the ground. (Trl. Tr. Day 7, p. 26).

Moreover, the state of the door was addressed by Belk's store manager, Sandi Sluss. Ms. Sluss testified that Belk management checks the store grounds daily to ensure the safety of its employees and customers:

Q: And does Belk management perform safety checks on the doors?

A: We do safety checks over the whole store.

Q: Okay. And with respect to doors, what does that entail?

A: We have to – management has to open and close the store every day so that we can check the sidewalks in the wintertime, leaves in the fall, how the doors open and close. We just have to make sure that we do everything we can to make sure that it's safe.

Q: Okay, all right. And to your knowledge when the store was opened on October the 7th, 2002, were the doors opening and closing properly?

A: Yes.

Q: And, specifically, you had not had anyone report any problems with any of the doors at Belk on October 7th of 2002.

A: No.

Q: And you worked all day that day, correct?

A: Yes.

Q: The store was open all that day, correct?

A: Right.

Q: So customers were going in and out of those doors all day, correct?

A: Correct.

(Trl. Tr. Day 3, p. 33-34). Importantly, Appellees' own mechanical engineering expert, Dr. Donald Lyons, agreed at trial that "thousands of people enter those doors every day," and that "[I]t's possible that the customer that went through that door before Ms. Neely, that the door worked all right" (*Id.* at 139).

Belk employees had experienced problems locking the door prior to the alleged incident. (Id. at p. 17).² However, Ms. Sluss had the door's locking mechanism repaired by Newport prior to the alleged incident. (Id. at p. 29-30). Belk and Crossroads Mall produced evidence at trial that they relied on Newport to service and repair the door and to ensure that it was in good working order. (Id. at p. 35-36). Newport presented evidence that it adequately serviced and repaired the door at Belk's request. (Trl. Tr. Day 7, p. 96, 101). Appellants proved at trial that any problem with the door was not proximately caused by any action or inaction on the part of Appellants. Notably, the trial judge denied Plaintiffs' Motion for Directed Verdict on the issue at liability at the close of trial.

In addition, Appellants offered evidence in the form of the surveillance DVD which showed Betty Neely driving, shopping, and walking normally on two separate days, nine months apart (November 4, 2004 and August 9, 2005) – all things she swore under oath she could not do after the alleged incident at Belk. (*See* Exhibit A and Trl. Tr. Day 5, p. 15-16, 165-168). The surveillance video also showed Ms. Neely limping when she had a motive to do so – in and out of her counselor's office and in and out of the Department of Motor Vehicles where she obtained a handicap parking permit. (*See* Exhibit A).

Appellants presented additional evidence at trial which also sharply contradicted Ms. Neely's alleged injuries. Specifically, the jury was shown Ms. Neely's Social Security Disability application filed more than six months before the alleged incident at Belk. (*See* Betty's Neely's Social Security Disability Application (March 2, 2002), attached hereto as Exhibit B). On the application, which Ms. Neely's daughter – Haley Clark - helped her fill out, Ms. Neely represented that she could not, among other things, walk, drive, swim, garden, or do household chores (with the exception of laundry) before the alleged incident at Belk. (*See* Id. and Trl. Tr.

² There was no evidence that the locking problem caused the door to malfunction in any way.

Day 5, p. 15-16, 165-168 and Trl. Tr. Day 4, p. 222). Ms. Neely testified at trial and at deposition, however, that she could do all of those things before the alleged incident at Belk and could not do them after the alleged incident at Belk. (Trl. Tr. Day 5, p. 165-166).

During the course of the trial, the Plaintiffs put forth 18 witnesses including medical providers, Appellants' employees, a mechanical engineer (Plaintiffs' expert), a life care planner, their daughter, and Ms. Neely's best friend. In contrast, Appellants called just four witnesses and took less than a day to present their case. After viewing all of the evidence, the jury determined that Appellants were not liable under a negligence theory and therefore found that neither Ms. Neely nor her husband were entitled to the damages they sought.

III. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion by setting aside the jury's verdict because the clear weight of the evidence supported the jury's verdict.

2. The trial court abused its discretion by finding that the clear weight of the evidence rendered some or all of Defendants liable under a negligence theory in spite of Plaintiffs' failure to prove essential elements of a negligence claim.

3. The trial court abused its discretion by usurping the province of the jury and impermissibly substituting its judgment for that of the finders of fact.

IV. POINTS AND AUTHORITIES RELIED UPON

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)

Arbogast v. Mid-Ohio Valley Medical Corp., 214 W.Va. 356, 589 S.E.2d 498 (2003)

Bronson v. Riffe, 148 W.Va. 362, 135 S.E.2d 244 (1964)

Carter v. Monsanto Company, 212 W.Va. 732, 575 S.E.2d 342 (2002)

Charles Alan Wright, *Federal Practice and Procedure* § 553 (2d ed. 1982)

Foster v. Sakhai, 210 W.Va. 716, 727, 559 S.E.2d 53, 64 (2001)

Gerver v. Benavides, 207 W.Va. 228, 530 S.E.2d 701 (2000)

Gillingham v. Stephenson, 209 W.Va. 741, 551 S.E.2d 663 (2001)

In re State Public Building Asbestos Litigation, 193 W.Va. 119, 454 S.E.2d 413 (1995)

McClung v. Marion County Comm'n, 178 W.Va. 444, 360 S.E.2d 221 (1987)

McMillion v. Selman, 193 W.Va. 301, 456 S.E.2d 28 (1995)

Morrison v. Sharma, 200 W.Va. 192, 488 S.E.2d 467 (1997)

Orr v. Crowder, 173 W.Va. 335, 315 S.E.2d 593 (1983)

Pauley v. Bays, 200 W.Va. 459, 490 S.E.2d 61 (1997)

Sargent v. Malcolm, 150 W.Va. 393, 146 S.E.2d 561 (1966)

Tanner v. Rite Aid of West Virginia, Inc., 194 W.Va. 643, 461 S.E.2d 149 (1995)

Tennant v. Marion Health Care Foundation, Inc., 194 W.Va. 97, 459 S.E.2d 374 (1995)

Toler v. Hager, 205 W.Va. 468, 519 S.E.2d 166 (1999)

Walker v. Monongahela Power Company, 147 W.Va. 825, 131 S.E.2d 736 (1963)

W.Va. Code §58-5-1 (1998)

West Virginia Rules of Civil Procedure, Rule 59

V. DISCUSSION OF LAW AND ARGUMENT

A. STANDARD OF REVIEW

West Virginia Code §58-5-1 states “A party to a civil action may appeal to the Supreme Court of Appeals from a final judgment of any circuit court or from an order of any circuit court constituting a final judgment” This Court previously stated “we do not believe that W.Va. Code §58-5-1 (1998) forecloses us from hearing the appeal of an order granting a new trial. Accordingly, we hold that one may appeal to this Court a circuit court’s order granting a new trial and one may appeal such an order without waiting for the new trial to be had.” Foster v. Sakhai, 210 W.Va. 716, 727, 559 S.E.2d 53, 64 (2001). Consequently, this appeal to this Honorable Court is proper.

An appellate court reviews a circuit court’s ruling on a motion for a new trial under an abuse of discretion standard. Tennant v. Marion Health Care Foundation, Inc., 194 W.Va. 97, 459 S.E.2d 374 (1995). This Court discussed the applicable standard for reviewing a lower court’s ruling on a motion for a new trial in In re State Public Building Asbestos Litigation, 193 W.Va. 119, 454 S.E.2d 413 (1995) when it stated in Syllabus Point 3:

A motion for a new trial is governed by a different standard than a motion for a directed verdict. When a trial judge vacates a jury verdict and awards a new trial pursuant to Rule 59 of the West Virginia Rules of Civil Procedure, the trial judge has the authority to weigh the evidence and consider the credibility of the witnesses. If the trial judge finds the verdict is against the clear weight of the evidence, is based on false evidence, or will result in a miscarriage of justice, the trial judge may set aside the verdict, even if supported by substantial evidence, and grant a new trial. A trial judge’s decision to award a new trial is not subject to appellate review unless the trial judge abuses his or her discretion.

This Court has also held that trial judges should rarely grant new trials. Morrison v. Sharma, 200 W.Va. 192, 488 S.E.2d 467 (1997). Specifically, a new trial should be granted “only where it is

reasonably clear that prejudicial error has crept into the record or that substantial justice has not been done.” (*Id.* at 195, 470). In further support of that proposition, this Court has stated that, absent a showing of bias or prejudice, a new trial is unwarranted when: (1) there has been a full trial on the merits, (2) there is no obvious error during the original proceedings, and (3) the record shows it is extremely unlikely that prejudice could have affected the trial. *See Tennant*, 94 W.Va. 97, 459 S.E.2d 374 (1995).

The *Tennant* Court reaffirmed the Asbestos Litigation standard of review when it stated that “when a trial court abuses its discretion and grants a new trial on an erroneous view of the law, a clearly erroneous assessment of the evidence, or on an error that had no appreciable effect on the outcome, it is this Court’s duty to reverse.” *Tennant* at 106, 383. Finally, this Court has also stated that “[w]here the trial court improperly sets aside a verdict of a jury, such verdict will be reinstated by this Court and judgment rendered thereon.” *Bronson v. Riffe*, 148 W.Va. 362, 135 S.E.2d 244 (1964). Plaintiffs failed to assert that there was any prejudicial error during the trial that affected the outcome. Consequently, the trial judge should not have set aside the verdict and should not have awarded a new trial. The trial court failed to acknowledge the precepts set forth in *Tennant* and granted Plaintiffs’ Motion, concluding “that the jury’s verdict on the issue of liability is contrary to the clear weight of the evidence.”³ (*See Exhibit C*). Based

³ It is important to highlight the distinction between two key phrases consistently used in this brief – “sharply conflicting evidence” and “clear weight of the evidence” and their impact on the appeal. Appellants contend that “sharply conflicting evidence” was presented at trial which proved, among other things, that (1) the door did not fall on Ms. Neely and (2) Ms. Neely misrepresented or exaggerated her damages. As detailed herein, the evidence presented by the Appellants (for example, the surveillance DVD and the social security disability application) conflicted so sharply with the evidence presented by Appellees, that it called the credibility of Ms. Neely into question at trial. The jury saw how Ms. Neely presented herself in the courtroom over the eight trial days and was in a better position to make a judgment as to her credibility in light of the evidence presented. Indeed, the trial court acknowledged in the Order that “the more sharply the evidence conflicts, the more reluctant the judge should be to substitute his judgment for that of the jury.” *See Exhibit C*, p. 2. In fact, the “sharply conflicting evidence” conflicted so sharply in favor of Appellants that the jury was well within its right to determine that Ms. Neely was not credible at all. The “sharply conflicting evidence” weighed so heavily in favor of Appellants that the jury could have reasonably concluded that the door did not fall at all and that Appellants were not liable because Ms. Neely did

on Asbestos Litigation and its progeny, it is the duty of this Honorable Court to reverse the trial court's decision and reinstate the jury's verdict.

This Court has also broadly offered guidance with regard to determining whether a verdict is supported by the evidence adduced at trial. This Court has declared that “[i]n 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.” Walker v. Monongahela Power Company, 147 W.Va. 825, 131 S.E.2d 736 (1963). Additionally, in Syllabus Point 7 of Toler v. Hager, 205 W.Va. 468, 519 S.E.2d 166 (1999) this Court explained:

In determining whether there is sufficient evidence to support a jury verdict the court should: (1) consider the evidence most favorable to the prevailing party; (2) assume that all conflicts in the evidence were resolved by the jury in favor of the prevailing party; (3) assume as proved all facts which the prevailing party's evidence tends to prove; and (4) give to the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts proved.

Toler at Syl. Pt. 7, *citing* Syl. Pt. 5, Orr v. Crowder, 173 W.Va. 335, 315 S.E.2d 593 (1983); Syl. Pt. 6, McClung v. Marion County Comm'n, 178 W.Va. 444, 360 S.E.2d 221 (1987); Syl. Pt. 2, Tanner v. Rite Aid of West Virginia, Inc., 194 W.Va. 643, 461 S.E.2d 149 (1995).

Finally, this Court has weighed in on the critical role of the jury in the context of deciding whether it is appropriate to set aside a verdict and grant a new trial. In Pauley v. Bays, 200 W.Va. 459, 490 S.E.2d 61 (1997), this Court stated, “[w]e have also consistently held that the function of the jury is to weigh the evidence with which it is presented and to arrive at a conclusion regarding damages and liability. Pauley at 464, 66. As an element of that vital task,

not suffer any damages. Thus the “clear weight of the evidence,” which is the standard relied upon by the trial court in the Order, caused the jury to find in favor of the Appellants.

the jury must analyze the evidence and determine the credibility to be assigned to various components of that evidence.” *Id.* The United States Supreme Court agrees that the jury is the ultimate trier of fact. In Anderson v. Liberty Lobby, Inc., the Supreme Court explained that “[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge” See Pauley at 464, 66 citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). In fact, where a civil action has been fairly tried before a competent jury, it is an abuse of a trial judge’s discretion to vacate the verdict and grant a new trial. See generally Pauley, 200 W.Va. 459, 490 S.E.2d 61.

Based upon these tenets, the trial court’s Order granting Plaintiffs’ Motion should be reviewed under the abuse of discretion standard. As will be shown, the clear weight of the evidence supports the jury’s verdict. Consequently, the trial court abused its discretion in issuing the Order and therefore its decision must be reversed and the verdict reinstated.

B. THE TRIAL COURT ABUSED ITS DISCRETION BY SETTING ASIDE THE JURY’S VERDICT BECAUSE THE CLEAR WEIGHT OF THE EVIDENCE SUPPORTED THE JURY’S VERDICT.

1. The clear weight of the evidence supported the conclusion that the Belk entrance door did not fall on Ms. Neely.

The circuit court found that “as the Plaintiff opened a public door to enter the Belk department store at Crossroads Mall, the door became somehow became disengaged from its moorings and fell on her.” (See Exhibit C at 2). The court further held that “[i]t was not disputed at trial that that [sic] the door had fallen on the Plaintiff and no party offered any evidence to explain the cause of the fall.” *Id.* The trial court’s findings in this regard are wrong and ignore the evidence on this important element of proof. First, at an *in camera* hearing prior to the jury selection on the first day of trial the following discussion was had:

Ms. Jones: Your Honor, can I back up one second? We dispute that the door fell and that's something that appeared in the pretrial order⁴ --

The Court: Oh.

Ms. Jones: -- and we tried to figure out where on earth that came from, went back and --

The Court: I thought you agreed that it fell?

Ms. Jones: No sir.

The Court: All right. Well then --

Ms. Jones: We do not agree that it fell. There will be conflicting evidence on that.

(Trl. Tr. Day 1, p. 14-15).

At trial, the jury did, in fact, hear sharply conflicting testimony as to whether the door fell on Ms. Neely as she claimed. Ms. Neely testified that as she opened the door "the door hit me on my knee and the right side of my body, on my arm, and the door fell all the way to the ground." (Trl. Tr. Day 5, p. 17). Ms. Neely's daughter, Haley Clark, also testified that the door fell completely to the ground. (Trl. Tr. Day 4, p. 214). As the trial progressed, however, the jury was presented with evidence which will be detailed below that highlighted Ms. Neely's inconsistent testimony regarding the alleged incident and indicated that Ms. Neely was being truthful about the alleged incident and her alleged injuries.

Plaintiffs called Avis Bailey and Frankie Lawson, former Belk employees who assisted Ms. Neely following the alleged incident and who were the first people to observe the door after the alleged incident. Contrary to Ms. Neely's and Ms. Clark's version of the events, Ms. Bailey testified that "the door did not fall." (Trl. Tr. Day 3, p. 177). Ms. Bailey stated that after Ms.

⁴ The lower court's Pretrial Order erroneously contained a stipulation that the Belk entrance door malfunctioned and fell on Ms. Neely. Defendants alerted the Court prior to trial that such a statement was inaccurate and accordingly, Defendants would not be so stipulating.

Neely left the store, she went out to look at the door and noted that the bottom right-hand corner of the door was askew, but the door was still in its frame and was still attached with a pin to the top of the frame. (*Id.* at 184). With the assistance of Ms. Lawson, Ms. Bailey lifted the door from the remaining pin and carried it into the entryway.⁵ (*Id.* at 186). Ms. Lawson also testified that the door was intact after the incident. (*Id.* at 201). When questioned by counsel for Plaintiffs, she stated that the door was in its frame, but was protruding “just a little” down at the bottom. *Id.* She stated further that “[T]he door was intact. The only – only problem was down at the bottom of the door was sticking out or protruding out.” *Id.* Ms. Lawson also testified that she and Ms. Bailey “lifted the door out and carried it over to the side.” *Id.* Ms. Bailey’s and Ms. Lawson’s testimony was that the door did not fall completely off its hinges and onto the ground, as Ms. Neely and her daughter contend.⁶ Unlike Betty Neely and Haley Clark, Ms. Bailey and Ms. Lawson – who were no longer employed by Belk - had no motive for financial gain and the jury was well within its right to believe they were telling the truth and that the door did not fall on Ms. Neely. Additionally, further evidence – which will be detailed below – was introduced at trial, the cumulative effect of which easily could have caused the jury to find Ms. Bailey’s and Ms. Lawson’s testimony to be more credible than that of Ms. Neely and Ms. Clark.

Plaintiffs also called David Dunlap, whose wife Andrea Dunlap was an Area Sales Manager for Belk at the time of the alleged incident, to testify regarding the Belk entrance door. Plaintiffs’ counsel elicited testimony from Mr. Dunlap that one day when he picked his wife up

⁵ Interestingly, Ms. Neely observed Ms. Bailey move the door after the alleged incident. Ms. Neely testified that Ms. Bailey “just kind of lifted up on it, scooted it over to the side of the door” and that Ms. Bailey “just slid it to the outside.” (Trl. Tr. Day 5, p. 19-20, 27).

⁶ In fact, Ms. Lawson testified that numerous customers had come through the door throughout the day and none had reported a problem. (Trl. Tr. Day 3, p. 206). When questioned at trial, Sandi Sluss, Belk’s store manager, independently confirmed that no customers had reported a problem with the door on the day of the alleged incident. (Trl. Tr. Day 3, p. 34). As will be discussed further below, this evidence proves that Defendants could not reasonably have foreseen that the door would malfunction when Ms. Neely opened it, thus defeating a necessary element of Plaintiffs’ negligence claim.

for lunch at Belk he saw a door completely off its hinges and leaning against the doorjamb in the foyer. (Trl. Tr. Day 2, p. 260). On cross-examination, however, Mr. Dunlap testified that he didn't know whether the door he saw off its hinges was the entrance door at issue in this case. (Trl. Tr. Day 2, p. 267). In fact, he could not verify the date on which he observed the door. When pressed for a date, he stated, "I have no clue. I just – I don't – I don't remember when it was. It was sometime – I was still roofing, so it was late summer or early fall." (*Id.* at 263). Notably, Mr. Dunlap did not testify that he saw the door off the hinges on October 7, 2002, the day of the alleged incident. David Dunlap's testimony does not constitute clear evidence that the door fell on Ms. Neely. As a matter of fact, Mr. Dunlap's testimony does not constitute any evidence that the door fell on Ms. Neely.

Patty Redden, Ms. Neely's best friend and neighbor, offered conflicting testimony about whether the door fell and struck Ms. Neely. At trial, Ms. Redden testified that Ms. Neely told her that the door struck Ms. Neely, but did not knock her to the ground and land on top of her. (Trl. Tr. Day 7, p. 26). She previously testified, however, that Ms. Neely told her that the door came off the hinges, struck Ms. Neely, *knocked her to the ground, and landed on top of her.* *Id.* When asked on cross-examination about the discrepancy in her testimony, she stated that, sometime after her deposition, but before the trial, Betty Neely told her that the latter was what really occurred. (*Id.* at 26-27). This testimony highlights the fact that Ms. Neely gave conflicting accounts of what happened at Belk on October 7, 2002.

The jury could have reasonably concluded that the clear weight of the evidence was that the door did not fall off its hinges and onto Ms. Neely. It was, therefore, an abuse of discretion for the lower court to find that it did. Two unbiased witnesses, Ms. Bailey and Ms. Lawson, who were no longer employees of Belk, testified that the door did not fall. Two witnesses, Ms. Neely

and Ms. Clark – who had a clear motivation to do so – testified that it fell completely to the ground. Notably, however, even Ms. Neely’s testimony on this point was sharply conflicting, and thus could have hurt her credibility with the jury. Mr. Dunlap and Ms. Redden admittedly don’t really know what happened. The trial judge stated in his Order that the jury’s verdict was “contrary to the clear weight of the evidence” adduced at trial and awarded Plaintiffs a new trial. (See Exhibit C). In doing so, the lower court adopted language from 3 Charles Alan Wright, *Federal Practice and Procedure* § 553 at 247 (2d ed. 1982):

[O]n a motion for a new trial – unlike a motion for a directed verdict or judgment notwithstanding the verdict – the judge may set aside the verdict even though there is substantial evidence to support it. He is not required to take that view of the evidence most favorable to the verdict-winner. The mere fact that the evidence is in conflict is not enough to set aside the verdict. Indeed the more sharply the evidence conflicts, the more reluctant the judge should be to substitute his judgment for that of the jury. *But on a motion for a new trial on the ground that the verdict is against the clear weight of the evidence, the judge is free to weigh the evidence for himself.* Indeed it has been said that the granting of a new trial on the ground that the verdict is against the weight of the evidence ‘involves an element of discretion which goes further than the mere sufficiency of the evidence. It embraces all the reasons which inhere in the integrity of the jury system itself.’ (Emphasis added by the trial court).⁷

Id. The trial court correctly states that a trial judge has the authority to review a jury’s decision and, if it is against the clear weight of the evidence, disregard it and award a new trial. However, the verdict was not against the clear weight of the evidence in the instant matter. In this case, the trial judge ignored the sharply conflicting evidence presented at trial that pitted two totally unbiased witnesses who testified that the door did not fall against two inherently biased

⁷ The trial court relied heavily on the cited section of Charles Wright’s treatise, *Federal Practice and Procedure*, to derive its authority to independently review the jury’s verdict in the face of sharply conflicting evidence. However, there is a significant body of law in West Virginia that will be discussed below which mandates that a trial judge should not disturb a jury’s verdict where a case has been fairly tried before a competent jury, as occurred in this instance.

witnesses who stated that it did. The trial judge's abuse of discretion in this regard is amplified by the fact that Ms. Neely herself gave conflicting accounts of the incident to Ms. Redden. As such, in incorrectly issuing the Order, the trial court emphasized the wrong portion of the passage quoted from Charles Wright. Given the evidence presented at trial, the trial court should not have set aside the jury's verdict and awarded Plaintiffs a new trial. Instead, the trial court should have focused on the cited language from the treatise which reads: "[T]he mere fact that the evidence is in conflict is not enough to set aside the verdict. Indeed the more sharply the evidence conflicts, the more reluctant the judge should be to substitute his judgment for that of the jury" and should have affirmed the jury's legitimately reached verdict. *Id.* In granting Plaintiffs' Motion, the trial court clearly abused its discretion and committed reversible error.

2. The clear weight of the evidence supported the conclusion that Ms. Neely did not suffer any damages as a result of the alleged incident.

a. The Surveillance Video sharply conflicted with Ms. Neely's testimony regarding her alleged damages.

Appellants hired a private investigator to trail Ms. Neely after she testified at her deposition on November 4, 2004 that she was unable to resume normal daily activities after the accident, was unable to drive like she used to, was unable to walk without a limp, and that she was afraid of stores and doors.⁸ (*See generally* Trl. Tr. Day 5, p. 158-165) The investigators, Michael Rigsby and Michael Kidd of Kidd Investigations, Inc., filmed Ms. Neely on two different days, nine months apart. The surveillance DVD shows that on November 4, 2004 – over two years after the alleged incident - Ms. Neely was able to drive, walk, shop, lift and carry items and place them in her car. (*See generally* Exhibit A and trial testimony of investigator

⁸ Interestingly, the first portion of the surveillance DVD (Exhibit A) was filmed on November 4, 2004 – the day of Ms. Neely's deposition. Following her testimony that she rarely drove and could not walk, she was filmed driving to a Cracker Barrel restaurant, walking inside without a limp, and returning to her vehicle carrying items that she purchased while inside.

Michael Rigsby – Trl. Tr. Day 7, p. 107-121). She appears on the DVD with no limp and with no assistance in performing these tasks. Id.

On August 9, 2005 - nine months later - the surveillance DVD shows Ms. Neely on her feet, walking normally for more than six and a half hours as she visited various restaurants and stores. (See generally Exhibit A and trial testimony of investigator Michael Kidd – Trl. Tr. Day 7, p. 121-147). Ms. Neely is shown first eating lunch at Burger King and walking normally inside the fast food restaurant. In fact, the video shows her standing on one leg – her right leg (the one that was allegedly injured at Belk) - while lifting her left leg to balance her purse and search for her car keys. Next, she is seen alone, walking normally to her car, getting in, and driving away. Thereafter, she arrives in the parking lot of her counselor, Nancy Sotak, whom she was seeing for anxiety and depression before the accident. Ms. Neely is seen getting out of her car and walking very slowly in a halted gait to her counselor's office. Her halted gait is even more pronounced as she exits the office and returns to her car. Id.

Ms. Neely then drives to the Department of Motor Vehicles (“DMV”), and walks with a halted gait into the DMV and reappears with a handicapped parking permit in hand. Over the next several hours, Ms. Neely is seen driving to a beauty salon and then to another shop, both of which she walks into and out of normally. As she exits one of the shops, it begins to rain and she walks more quickly to her vehicle. Finally, she is seen driving to the mall where she shops for several hours before she emerges with multiple bags, walks normally to her car and drives off. She is wearing flip flops the entire time. The end of the DVD shows a side-by-side of Ms. Neely walking normally (when she is dining and shopping) and with an exaggerated limp and halted gait (when she sees her counselor and goes to the DMV to obtain a handicapped parking permit). Id. Notably, on the *same day* Ms. Neely was videoed, August 9, 2005, she reported to her

counselor, Nancy Sotak, that she was having “increased symptoms, particularly withdrawal and increased pain” and that she “continued to struggle with lifestyle changes.” (See Nancy Sotak’s treatment notes (Aug. 9, 2005), attached hereto as Exhibit D).

Prior to viewing the surveillance DVD, the jury heard Betty Neely’s testimony. In an attempt to explain the video and various inconsistencies in her testimony, Ms. Neely repeatedly testified that she had “good days and bad days.” (See generally, Trl. Tr. Day 5, p. 156-164). She testified further that she had increased her medication on August 9, 2005 and that it took effect after she left her counselor’s office and the DMV. (See *Id.* at 104-107). She also attempted to explain her behavior and activities on that day by stating that Ms. Sotak “was really encouraging that day.” (*Id.* at 105).

Ms. Neely was then cross-examined with regard to her prior testimony at deposition regarding her condition and her fear of stores and doors. Her deposition was *taken the very same day* that the initial surveillance was conducted, on November 4, 2004, and when questioned about her testimony there she testified as follows:

Q: Okay. And I want to go over some things that you testified to in your deposition. Are you still afraid to go into stores?

A: Now, what it is, I’m afraid of – it’s where I’m afraid that my leg will go out on me and I am afraid of doors like to open up the doors and stuff.

Q: Okay. So in your deposition two years ago, I think it was Nov. 4, 2004, you testified that you were afraid to go into stores.

A: Uh huh, at that –

Q: Is that – is that accurate?

A: Well, at that time, you know, I was, but it’s like now I’m working with my counselor to try to help

me, but, no, there is still times when I am afraid to go in and sometimes if I go with my daughter, then, you know, she's trying to help me overcome it.

Q: So as of Nov. 4, 2004, that was true but you're saying that is improving at this point. Is that right?

A: Well, I wouldn't say it's improving. You know, like I said before, I have my good days and bad days. I really don't know how to –

Q: Well, I'll just –

A: to word it, you know.

Q: represent to you in your deposition you didn't really quantify it at all. You said, "I'm afraid to go into stores."

(Trl. Tr. Day 5, p. 158-160). Ms. Neely further testified that when she gave her deposition, she meant that she was afraid to open doors and go into stores *at that time*. (Trl. Tr. Day 5, p.159). She also stated that since she has good days and bad days, sometimes she is scared to go into stores and sometimes she is not. (*Id.* at 160). As of the date of the trial, however, she was still paranoid to open doors. (*Id.* at 161). Finally, Ms. Neely testified that she won't go anywhere by herself unless she has to and that she does not enjoy shopping like she used to. (*Id.* at 162, 165).⁹

Several of Plaintiffs' witnesses offered contradictory testimony about issues concerning the activities that Betty Neely could and could not do before and after the alleged incident. Ms. Neely's daughter, Haley Clark, testified that since the October 7, 2002 incident she had only seen Betty Neely walk without a limp five times or less. (Trl. Tr. Day 4, p. 218). She testified that each time was for fewer than fifteen feet. (*Id.* at 219). Betty Neely's best friend, Patty Redden, testified that she had never seen Betty Neely walk normally since the alleged incident. (Trl. Tr. Day 7, p. 27-28). Ms. Redden also testified that Betty Neely can only walk for a few steps

⁹ In addition to the surveillance video and the testimony related thereto, soon after, the jury heard evidence concerning Ms. Neely's social security disability application. That evidence will be discussed below.

without stopping to take a break. (Trl. Tr. Day 7, p. 28-29). Johnny Neely testified that he had never seen Betty Neely walk without an obvious and pronounced limp since the alleged incident. (Trl. Tr. Day 6, p. 181-182).

The surveillance video was shown on the next-to-last day of trial and it was powerful evidence that sharply conflicted with Ms. Neely's and numerous other Plaintiffs' witnesses' testimony at trial and at deposition regarding her physical condition and the limitations on her daily life activities. (See Exhibit A). After hearing Johnny Neely – her husband – and Patty Redden – her best friend – testify that Ms. Neely had not walked normally since the alleged incident, the jury was presented with incontrovertible visual evidence that directly conflicted with Plaintiffs' testimony regarding her condition. (Trl. Tr. Day 6, p. 181 and Trl. Tr. Day 7, p. 27-28). As the United States Supreme Court made clear in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), the jury was well within their rights to evaluate the surveillance video in conjunction with the testimony they heard at trial. The cumulative effect of this evidence was critically damaging to Plaintiffs' claim as it highlighted the inconsistencies in Plaintiffs' witnesses' testimony. In light of the surveillance DVD, the clear weight of the evidence supported the conclusion that the Plaintiffs were not being honest about their damages and that they might not have suffered any damages at all. Consequently, the trial judge abused his discretion in granting Plaintiffs' Motion and issuing the Order.

b. The Social Security Disability Application sharply conflicted with Ms. Neely's testimony regarding damages that were the alleged proximate cause of her injuries.

On the fourth day of trial, Plaintiffs called Haley Clark – Ms. Neely's daughter – to testify regarding the alleged incident and its impact upon Ms. Neely's lifestyle. Ms. Clark testified that prior to the alleged incident Ms. Neely had panic attacks as a result of a stressful

work environment at a telemarketing company. (Trl. Tr. Day 4, p. 200). She testified further, though, that the panic attacks did not have a substantial impact on her mother's daily activities:

Q: Can you explain to me, before October 2002, was there a period of time when Betty wasn't doing anything or when her -- when she had more limitations?

A: I don't recall a specific time. If there was, it would just have to be for a couple month period or something. I'm not saying definitely no, but I don't recall it, because there's nothing that just sticks out in my mind as an ongoing thing to where she was needing help before the accident, no not that I'm aware of.

Q: So if she was needing a lot of assistance prior to the accident, would you have remembered that?

A: Yes.

(Trl. Tr. Day 4, p. 200-201).

Although Ms. Clark later testified that Ms. Neely did not begin to experience serious problems physically and emotionally until after the alleged incident at Belk in October 2002, on March 2, 2002, *more than six months before the alleged incident*, Ms. Clark assisted Ms. Neely in filling out an application for Social Security Disability benefits related to her panic attacks. (Trl. Tr. Day 4, p. 200-201, 220). The application contained numerous representations. Specifically, Ms. Neely represented that she could not, among other things, walk, drive, swim, garden, or do household chores (with the exception of laundry) before the alleged incident at Belk. (See Exhibit B.) She also indicated that she could not care for her grandchildren as she had before and could not go shopping. Id. In fact, Ms. Neely represented to the federal government that she didn't perform any household tasks or chores (other than laundry) or recreational activities. Id. She represented that the panic attacks had rendered her totally disabled.

Evidence at trial, however, proved that Ms. Clark and Ms. Neely either were not being truthful at the time they filled out the application or were not being truthful at trial. As mentioned above, *more than six months before the alleged incident*, Ms. Neely represented to the federal government that she could not care for her grandchildren. *Id.* She made this representation with the intention of convincing the government that she was totally disabled as a result of her stressful work environment and thus entitled to social security disability benefits. However, at trial Ms. Clark directly contradicted Ms. Neely's representations on the application when she testified as follows with regard to Ms. Neely's interaction with her grandchildren before the alleged incident:

Q: How did your mother play with your children prior to the accident?

A: Oh, just whatever they wanted to do was what she would do, if it was play ball, chase, play on the swing set. It was just whatever they wanted to do, she done it right there with them.

(Trl. Tr. Day 4, p. 204). Ms. Neely also represented on her disability application that she could not shop as a result of her panic attacks. (*See Exhibit B*). However, Ms. Neely testified that, prior to the alleged incident, she and Ms. Clark shopped together at least three times a week.

(Trl. Tr. Day 5, p. 165). Ms. Clark reiterated that testimony. She testified that, prior to the alleged incident, she and Ms. Neely shopped together at least three times a week for periods of up to seven hours at a time. (Trl. Tr. Day 4, p. 215-216).¹⁰ In addition, the surveillance video showed that Ms. Neely did in fact shop, and she did so for extended periods of time. (*See Exhibit A*). Ms. Neely herself testified at trial and at deposition that she could walk, drive, swim,

¹⁰ The jury heard Ms. Neely and Ms. Clark testify on multiple occasions about the frequency with which they shopped prior to the alleged incident. Ms. Neely also testified that she and Ms. Clark "went to the mall a lot" before the alleged incident. (Trl. Tr. Day 5, p. 15). Ms. Clark added that, prior to the alleged incident, they "shopped together all the time." (Trl. Tr. Day 4, p. 215).

garden, shop, and play with her grandchildren before the alleged incident at Belk but that she could not do them after the alleged incident at Belk. (*See* Trl. Tr. Day 5, p. 15-16, 165-168). Her testimony was contrary to the representations she made in applying for social security disability benefits. This evidence proved that Ms. Neely was taking advantage of the system when she applied for social security disability benefits and was attempting to do so a second time by filing this lawsuit. Her testimony proved further that she was willing to say different things at different times depending on her audience. Given the sharply conflicting evidence regarding her alleged damages, the jury was within their rights to determine that Ms. Neely was not being truthful and, based on the cumulative effect of the evidence, to find that she had no damages as a result of the alleged incident at Belk.

In sum, based on Orr v. Crowder, 173 W.Va. 335, 315 S.E.2d 593 (1983) and its progeny, the trial court's decision to set aside the jury's verdict and award a new trial based upon its conclusion "that the jury's verdict on the issue of liability is contrary to the clear weight of the evidence" plainly constitutes reversible error. As mentioned above, Orr sets out four factors for consideration when evaluating whether a verdict is supported by the evidence. The first three factors include resolving evidentiary conflicts in favor of the prevailing party, giving the prevailing party the benefit of all favorable inferences which reasonably may be drawn from the facts, and assuming as true all facts which the prevailing parties' evidence tends to prove. There were three main pieces of evidence presented by Defendants at trial that when considered in a light most favorable to them – as mandated by Orr – necessitate a reversal of the lower court's ruling. First, Avis Bailey and Frankie Lawson testified that the entrance door *did not fall*. This testimony conflicts with that of Ms. Neely and Ms. Clark, who stated that it did. If the favorable testimony (that the door did not fall) is assumed as true, then based on Orr the jury is justified in

reaching its verdict that Defendants were not negligent. Second, the jury was presented with powerful evidence in the form of the surveillance DVD that proved that Ms. Neely was capable of performing activities – such as walking, driving and shopping – that she swore under oath she could not do. Third, Defendants presented evidence concerning Ms. Neely’s Social Security Disability application that cast doubt on the credibility of Ms. Neely and her witnesses.

The fourth prong of the Supreme Court’s four-part test requires a trial court to give Defendants the benefit of all favorable inferences that may have been gleaned by the jury from the evidence presented. The surveillance video and the social security disability application indicated that Ms. Neely was willing to exaggerate or fabricate her condition when it was favorable for her to do so. Accordingly, the jury was justified in inferring that she may likewise have exaggerated or fabricated her testimony as to whether the door fell and struck her. Regardless, the evidence with which the jury was presented provided a rock solid foundation upon which it could base a determination that none of the Defendants were liable for Ms. Neely’s alleged incident, that she did not suffer any damages, or that there was no incident at all. Consequently, the trial court abused its discretion in issuing the Order therefore its decision must be reversed and the verdict reinstated.

C. **THE TRIAL COURT ABUSED ITS DISCRETION BY FINDING THAT THE CLEAR WEIGHT OF THE EVIDENCE RENDERED DEFENDANTS LIABLE UNDER A NEGLIGENCE THEORY IN SPITE OF PLAINTIFFS’ FAILURE TO PROVE ESSENTIAL ELEMENTS OF THEIR CLAIM.**

In its Order granting Plaintiffs’ Motion, the trial court determined that Plaintiffs presented a *prima facie* case of negligence against all Defendants with regard to the elements of their claim. See Belk Incorporated, et. al. v. Betty K. Neely, et al., Civil Action No. 03-C-593 (Circuit Court of Raleigh County, West Virginia, January 2, 2007 Order at p. 2). The law is clear, however, that “the mere happening of an accident is legally insufficient to establish

liability.” McMillion v. Selman, 193 W.Va. 301, 456 S.E.2d 28, 30 (1995). The law is equally clear that “[b]efore one can recover under a tort theory of liability, he or she must prove each of the four elements of a tort: duty, breach, causation, and damages.” Carter v. Monsanto Company, 212 W.Va. 732, 575 S.E.2d 342 (2002). In determining that the Plaintiffs put on a *prima facie* case on all four elements, the trial court ignored the fact that the record at trial was replete with sharply conflicting evidence regarding the elements of breach of duty (including foreseeability) and damages. Assuming *arguendo* that Plaintiffs did establish a *prima facie* case of negligence – which they did not – Defendants rebutted it by presenting strong evidence that Ms. Neely was greatly exaggerating or even fabricating her condition. This evidence militates against the trial judge setting aside the jury’s verdict. In fact, if there is conflicting testimony on a material element of Plaintiffs’ claim, the trial judge “cannot substitute his conclusion for that of the jury” merely because he disagrees with their interpretation of the evidence. Arbogast v. Mid-Ohio Valley Medical Corp., 214 W.Va. 356, 362, 589 S.E.2d 498, 504 (2003). In fact, the weight of a jury’s verdict, when there is credible evidence upon which it can be based, is not overborne by the trial judge’s disapproval. *Id.*

1. There was sharply conflicting evidence as to whether Defendants breached any duty to Plaintiffs.

Applying the foregoing criteria to the trial court’s findings set forth in the Order, this Court should find that the lower court erroneously determined that Plaintiffs presented a *prima facie* case of negligence. First, the record shows that Plaintiffs failed to conclusively establish at trial that any of the Defendants breached a duty of care to Ms. Neely. The locking problem with the door prior to the alleged incident was detected by Belk and reported to Newport before the alleged incident and Newport had corrected it. (Trl. Tr. Day 3, p. 29-30). Moreover, the testimony at trial from Belk manager Sandi Sluss indicated that the door was working properly

on the day of the alleged incident and that numerous customers had entered the store without a problem (*Id.* at 33-34). In fact, Plaintiffs' *own expert*, Dr. Donald Lyons, testified that thousands of customers walk through the door in question every day and, notably, *the customer immediately preceding Betty Neely may have had no problem with the door.* (*Id.* at 139) (emphasis added).

The testimony adduced at trial plainly shows that Defendants could not have reasonably foreseen that the door would malfunction at the time Ms. Neely opened it. The law is clear that "[I]f a person cannot reasonably foresee any injury as a result of one's act, or if one's conduct was reasonable in light of what one could anticipate under existing circumstances, there is no negligence." Gillingham v. Stephenson, 209 W.Va. 741, 551 S.E.2d 663 (2001). The trial court was aware that foreseeability is an essential factor in a negligence claim and, in fact, instructed the jury on the issue immediately prior to their deliberation. The trial court instructed the jury as follows:

....[T]o determine whether the injury allegedly suffered by Ms. Neely was foreseeable, you must determine whether the ordinary corporations, in this case Belk and Crossroads Mall, knew or should have known that the injury allegedly suffered by Mrs. Neely was likely to result from the circumstances as you understand them. If you determine that Belk and the Crossroads Mall acted with reasonable care under the circumstances, you must find for Defendants Belk and Crossroads.

(Trl. Tr. Day 8, p. 148-149). There is simply no evidence in the record that any of the Defendants had knowledge of or could have reasonably foreseen that the door would malfunction at the time Ms. Neely opened it as she alleged. If the jury ultimately determined that no Defendant had knowledge of or could have foreseen the alleged malfunction, no Defendant could have breached a duty to Ms. Neely. Since there was no evidence that the Defendants could have foreseen the alleged incident, it is obvious that the clear weight of the

evidence supported the conclusion that the alleged incident was not foreseeable and that there was no breach of duty. As Defendants' breach of a duty is an essential element of Plaintiffs' negligence claim, Plaintiffs' claim failed as the jury correctly found. Consequently, the trial court's finding that Plaintiffs presented a *prima facie* case of negligence is patently incorrect and contrary to the clear weight of the evidence.

2. There was sharply conflicting evidence regarding Ms. Neely's claim for damages, which is a necessary element of Plaintiffs' negligence claim.

The lower court also stated in the Order that it was "substantially likely the jury's finding on liability is the result of their conclusion that the Plaintiff had exaggerated her damages claim . . ." (See Exhibit C at p. 3). The lower court went on to explain:

The Plaintiff's evidence of damages may have seemed to the jury to be overstated. If the jury reached those conclusions, 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.

Id. This conclusion reached by the lower court regarding damages is incorrect because it is based on the finding that Plaintiffs proved a *prima facie* case of negligence – which as discussed above, was wrong. But the lower court's logic here is flawed for another, more important, reason. In recognizing that a jury could have concluded that Ms. Neely was exaggerating her injuries and that Plaintiffs put on a "questionable case on damages," the court ignores the fact that a jury may have legitimately concluded that Ms. Neely suffered no damages as a result of the alleged incident. Id. Plaintiffs failed to prove that they suffered any damages – a required element of a negligence claim. If the jury believed that the Plaintiffs suffered no damages, then the finding of no negligence was entirely proper.

As discussed previously, the jury was presented with evidence in the form of a surveillance video and disability application that seriously weakened the credibility of several of Plaintiffs' witnesses. After seeing Ms. Neely walk without a limp – except when it benefited her to do so – for extended periods of time, it is very possible that the jury inferred that Ms. Neely was fabricating her injuries. It is very possible that the surveillance video and disability application led the jury to conclude that the whole alleged incident was fabricated. This conclusion would be entirely within the province of the jury. The whole reason that the Defendants compiled the surveillance footage was to directly contest Plaintiffs' damages claim. As the Walker and Orr cases prescribe, any legitimate inferences that the jury may have made when viewing the footage and arriving at their verdict must be assumed as true. If the Court concludes that the jury was justified in possibly concluding that Ms. Neely did not sustain any damages, then it must follow that Plaintiffs failed to prove the elements of their negligence claim against Defendants. Even in the face of the conflicting evidence on the elements of Plaintiffs' claim, however, the lower court substituted its judgment for that of the jury and found “that the jury’s verdict on the issue of liability is contrary to the clear weight of the evidence.” This action by the trial court constitutes reversible error.

D. THE TRIAL COURT ABUSED ITS DISCRETION BY USURPING THE PROVINCE OF THE JURY AND IMPERMISSIBLY SUBSTITUTING ITS JUDGMENT FOR THAT OF THE FINDERS OF FACT.

It has long been said that the jury is one of the most important institutions in the American legal system. In his concurring opinion in Gerver v. Benavides, 207 W.Va. 228, 530 S.E.2d 701 (2000), Justice Starcher stated that “[w]e have decided to give the ultimate say-so in our justice system to a diverse group of ordinary citizens We have decided that it is better to place our faith in the common-sense of ordinary citizens than in a trained class of professional

jurors.” The critical role of the jury in the context of deciding whether it is appropriate to set aside a verdict and grant a new trial has been fully discussed above. As mentioned, in Anderson v. Liberty Lobby, Inc., the United States Supreme Court explained that “[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge” Anderson, 477 U.S. 242 (1986). This court extended the holding in Anderson by stating that, where a civil action has been fairly tried before a competent jury, it is an abuse of a trial judge’s discretion to encroach upon the province of the jury and vacate the verdict and grant a new trial. Pauley v. Bays, 200 W.Va. 459, 490 S.E.2d 61.

As fully set forth herein, the record in this matter is replete with sharply conflicting evidence. Several witnesses offered conflicting testimony with regard to the entrance door. Ms. Neely was filmed for over six and a half hours on August 9, 2005 and was shown driving, shopping, and walking normally – all things she swore under oath she could not do as the result of the alleged incident at Belk. Additionally, the jury was shown an enlarged exhibit – which was admitted into evidence for their further consideration – depicting Ms. Neely’s disability application filed more than six months before the incident at Belk. On the application, Ms. Neely represented that she could not, among other things, walk, drive, swim, garden, or do household chores (with the exception of laundry) before the alleged incident at Belk. In contrast, however, Ms. Neely testified at trial and at deposition that she could do all of those things before the alleged incident at Belk and could not do them after the alleged incident at Belk. The jury bore the responsibility at trial to evaluate the evidence and arrive at a conclusion with regard to the credibility of the witnesses. Absent some form of prejudicial error, whatever determination the jury reached in doing so should have been beyond the grasp of the trial court’s purview. Moreover, the trial court recognized that the jury was the ultimate trier of fact. In fact, in

informing the jury that it held the fate of plaintiffs' claims in its hands, the trial judge instructed them:

You may give the testimony of each of these witnesses such weight, if any, that you think it deserves in light of all of the evidence. You should not permit a witness's opinion testimony to be substituted for your own reason, judgment, and common sense. In addition, you may reject the testimony of any opinion witness, in whole or in part, if you conclude that the reasons given in support of the opinion are unsound or if you, for other reasons, do not believe the witness. The determination of the facts of this case rests solely with you.

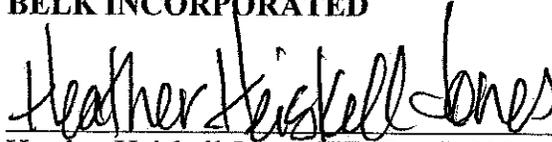
(Trl. Tr. Day 8, p. 145). In light of this instruction, it is especially apparent that the trial judge abused his discretion by substituting his opinion for that of the jury, and thus committed error by setting aside the jury's verdict.

VI. RELIEF PRAYED FOR

Appellants respectfully request that this Honorable Court find that the Circuit Court of Raleigh County abused its discretion by setting aside the verdict and awarding Respondents a new trial in the face of conflicting evidence as to Appellants' liability. Appellants further request that this Honorable Court reinstate the jury's verdict which was legitimately reached at the lower court.

RESPECTFULLY SUBMITTED

BELK INCORPORATED



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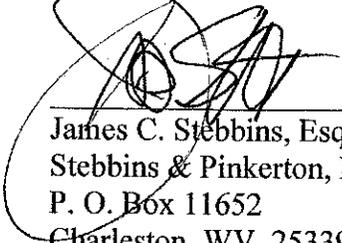
300 Kanawha Boulevard, East

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Charleston, WV 25321-0273

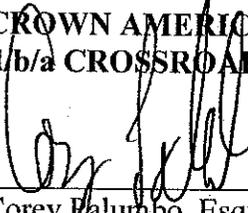
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NEWPORT TRADING COMPANY, INC.



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**CROWN AMERICAN CROSSROADS, LLC
d/b/a CROSSROADS MALL**



Corey Palumbo, Esquire (WV State Bar #7765)
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BEFORE THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA

BELK INCORPORATED, CROWN
AMERICAN CROSSROADS, LLC
d/b/a CROSSROADS MALL AND
NEWPORT TRADING COMPANY, INC.,

Appellants (Defendants below),

vs.

BETTY K. NEELY and
JOHNNY L. NEELY,

Appellees (Plaintiffs below).

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Docket No. 33597

CIVIL ACTION NO.03-C-593
Circuit Court of Raleigh County
Judge Robert A. Burnside, Jr.

CERTIFICATE OF SERVICE

I, Heather Heiskell Jones, hereby certify that service of the foregoing “Appellants’ Joint Appeal Brief” has been made upon the parties this 3rd day of December, 2007, via United States Mail, postage prepaid, and addressed as follows:

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