

Tenth Judicial Circuit

of

ROBERT A. BURNSIDE, JR.
CIRCUIT JUDGE
RALEIGH COUNTY COURTHOUSE



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West Virginia

Raleigh County

MEMORANDUM

TO: John D. Wooton, Esq.
Heather Heiskell Jones, Esq.
James C. Stebbins, Esq.
Corey Palumbo, Esq.

FROM: Robert A. Burnside, Jr., Circuit Judge

DATE: January 2, 2007

RE: *Neely v. Belk, etc.*
Civil Action No: 03-C-593-B

On November 3, 2006, the jury returned a verdict for Defendants, upon which a final judgment order was entered on November 8, 2006. On November 13, 2006, Plaintiff timely filed a motion to set aside the verdict and to grant a new trial pursuant to Rule 59. That motion has now been fully briefed in accordance with the court's briefing schedule of November 14, 2006. Upon examination of the motion, response, reply, and upon consideration of the record of this matter, it is the court's opinion that the motion can be fairly and sufficiently considered without the necessity of oral argument.

The standard for the court's consideration of a Rule 59 motion for a new trial was stated in Syll. Pt. 3, *In re State Public Bldg. Asbestos Litigation*, 193 W.Va. 119, 454 S.E.2d 413 (1994):

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.* (Emphasis added)

It its discussion of the standards the trial court must apply in its consideration of a motion for a new trial, the Court adopted the language found in 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 for 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 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)

Applying this criteria to the present motion, this court has reviewed the evidence presented during the trial of this action. According to the evidence, as the Plaintiff opened a public door to enter the Belk department store at Crossroads Mall, the door somehow disengaged from its moorings and fell on her. Defendant Newport Trading had recently performed a repair or maintenance procedure on the door, although the evidence was not developed as to the exact nature of that procedure. It was not disputed at trial that that the door had fallen on the Plaintiff and no party offered any evidence to explain the cause of the fall.

It is the court's opinion that the Plaintiff presented a *prima facie case* against all defendants on the issues of duty, breach, proximate cause, and damages. Defendant Belk, as the proprietor of the department store, owed to Plaintiff a duty of due care to inspect and maintain the door, and to correct any conditions as to which it is reasonably foreseeable might cause injury to Plaintiff. Defendant Newport, as the entity hired by Belk to maintain and repair the door, is held to the knowledge that Belk's customers will use that door on a daily basis, and it owes a contractual duty to Belk, and a general duty directly to the anticipated customers, to perform the maintenance and repairs correctly. The evidence at trial was that Defendant Crossroads Mall, as the owner of the structure in which Belk is a commercial tenant, had not given up complete control of the premises to its tenant, and that it had participated to some degree in the inspections of the exterior doors.

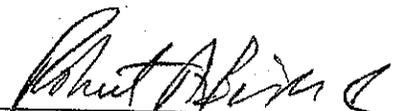
It cannot be said that a door cannot fall except as the result of negligence, nor does evidence of a falling door shift the burden of proof. It is the court's opinion, however, that evidence produced at trial that a public door to a retail establishment fell on a patron constituted a *prima facie* case of negligence that places upon the defendants the duty to come forward with evidence to overcome the impact of the *prima facie* case. The strength of the *prima facie* case, largely unchallenged by any Defendant, is such that the court must conclude that the jury's verdict on the issue of liability is contrary to the clear weight of the evidence.

The jury's finding on liability may be explained by reference to the Plaintiff's evidence of damages. Plaintiff claimed a substantial amount of damages for a life care plan, with questionable medical support, and her claim was seriously weakened by her own contradictory acts and statements. In addition, Defendants offered a surveillance video upon which a jury could conclude that she was exaggerating her symptoms when it was to her benefit to do so. 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.

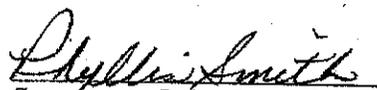
It is the court's opinion that it is substantially likely that the jury's finding on liability is the result of their conclusion that the Plaintiff had exaggerated her damages claim, and that it is not supported by the evidence pertinent to liability. That opinion supports that finding that the jury's verdict was grounded on motivations which, although understandable, do not support the verdict.

Accordingly, it is the Court's opinion that the Plaintiff's motion to set aside the verdict and to grant a new trial should be granted.

An order to this effect, information copy enclosed, was entered on the 2nd day of January, 2007.


ROBER A. BURNSIDE, JR.
CIRCUIT JUDGE

I hereby certify that the foregoing Memorandum was mailed to counsel of record listed above on the 2nd day of January, 2007.


Secretary to Judge Burnside

IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

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

Plaintiffs,

Vs.

Civil Action No: 03-C-593-B

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

Defendants.

ORDER

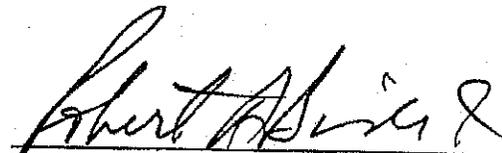
Granting Plaintiff's motion to set aside the verdict and award a new trial

In accordance with the Court's memorandum of January 2, 2007, incorporated herein by reference, it is

ORDERED that the Plaintiff's motion to set aside the verdict and grant a new trial should be and it is hereby granted.

The Clerk is directed to mail a copy of this order to counsel of record.

ENTER: January 2, 2007



**ROBERT A. BURNSIDE, JR.
CIRCUIT JUDGE**