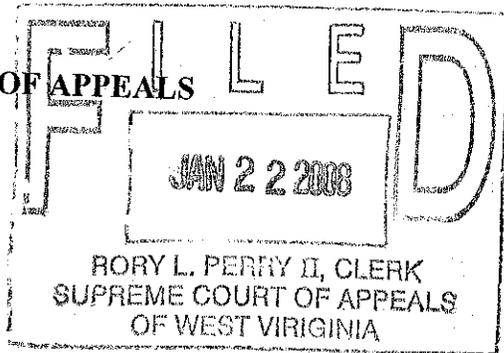


BEFORE THE SUPREME COURT OF APPEALS
OF WEST VIRGINIA



**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' REPLY TO
BRIEF OF APPELLEES**

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January 23, 2008

Appellants Belk Incorporated; Crown American Crossroads, LLC d/b/a Crossroads Mall; and Newport Trading Company (collectively "Appellants"), by the undersigned counsel, submit this reply brief in response to the Brief of Appellees. Appellees assert that the trial court did not abuse its discretion in granting Appellants' Motion to Set Aside the Verdict and Award a New Trial because the jury's verdict that Appellants were not liable for Ms. Neely's alleged injuries was against the clear weight of the evidence. Specifically, Appellees argue that the trial court did not abuse its discretion because (1) Appellants presented no evidence at trial disputing that the door malfunctioned and (2) Appellees presented a *prima facie* case of negligence by proving all elements of a negligence claim, including breach of duty (foreseeability). Appellees arguments fail for the following reasons.

With regard to Appellees' first point, Appellants dispute that the door malfunctioned as Ms. Neely testified. Frankie Lawson and Avis Bailey, former Belk employees, testified at trial that the door was "protruding just a little" or "askew" but that it did not fall from its frame, as Ms. Neely claims. (Trl. Tr. Day 3, pp. 184, 188, and 201). Likewise, Belk's store manager, Sandi Sluss, testified that Belk management checked the store grounds daily to ensure the safety of its employees and customers and no problems with the door had been reported on the day of the incident before Ms. Neely's complaint. (Trl. Tr. Day 3, p. 33-34). In contrast, as detailed in Appellants' brief, trial testimony showed that Ms. Neely gave several different people wildly varying accounts at different times regarding the incident. (Trl. Tr. Day 7, p. 26; *See also*, Trl. Tr. Day 5, p. 17). For example, Ms. Neely testified that the entrance door fell completely off its hinges and struck her knocking her to the ground. (Trl. Tr. Day 5, p. 17). 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). This inconsistent testimony, coupled with the surveillance DVD and the Social Security Disability application, could have been the evidence upon which the jury concluded that Ms. Neely was not a credible witness and that the door did not malfunction as she claimed. In fact, the trial court acknowledged that the jury may have determined that Ms. Neely was not a credible witness insofar as the trial court stated that the jury could have concluded that Ms. Neely exaggerated her damages claim. (See the trial court’s January 2, 2007 Memorandum, p. 3). Thus, the jury was well within its right to determine that none of the Appellants were liable for Ms. Neely’s alleged incident, that she did not suffer any damages, or even that there was no incident at all.

Appellees’ second point is that the jury’s verdict on liability was contrary to the clear weight of the evidence because Appellees presented a *prima facie* case of negligence. Appellees make no effort to address Appellants’ contention that Appellees failed to prove that they suffered any damages as a result of the incident at Belk. Damages are an essential element of a negligence claim and failure to prove damages negates the claim. Notwithstanding that evidentiary shortfall, Appellees contend that they proved their claim because Appellants’ alleged breach of duty was foreseeable. It was not. There was no evidence presented that the locking problem caused the door to malfunction in any way. Moreover, there was no evidence presented which would have placed Appellants on notice that the Belk door might become askew. (See Trl. Tr. Day 3, p. 33-34). No one reported any problem with the door on the day of the incident before Ms. Neely’s complaint. 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” (Trl. Tr. Day 3, p. 139). Appellees’ own expert testimony defeats the foreseeability element of a negligence claim. Succinctly, there is simply no evidence in the record that any of the Appellants had knowledge of or could have reasonably foreseen that the door would malfunction at the time Ms. Neely opened it, as she alleged.

Appellees rely upon Adkins v. Chevron, USA, Inc., 199 W.Va. 518, 485 S.E.2d 687 (1997), in arguing that the previous problems with the locking mechanism on the Belk door somehow placed Appellants on notice that a door may become askew. In Adkins, a fuel truck driver was injured when the driveway of Chevron’s fuel loading facility collapsed beneath the front left tire of his truck and the tire fell into a sink hole. Both the driver and Chevron’s facility manager had noticed a crack in the driveway approximately one month before the accident. Chevron poured gravel into and upon the crack, but did nothing else to otherwise repair the problem at that time. This Court held in Adkins that Chevron negligently caused Adkins’ injuries because Chevron had actual knowledge of the crack in the driveway, but only performed limited maintenance to repair it.

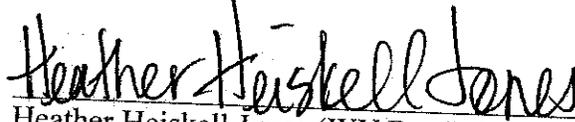
Appellees argue that the facts in Adkins are similar to those at issue in the instant matter and thus, Appellants could have reasonably foreseen the incident. This argument misleads the Court insofar as it suggests that evidence was presented at trial that there were problems with the door prior to the incident at Belk which would have allowed Appellants to reasonably foresee that the incident could occur. Appellees fail to disclose that the problems experienced with the Belk entrance door prior to the incident involved locking mechanisms only and, in fact, those problems were corrected several weeks prior to the incident and the door was in good working

order. (Trl. Tr. Day 3, p. 29-30, 35-36; *See also*, Trl. Tr. Day 7, p. 96, 101). Simply put, there was no evidence that problems with the lock caused or related to the door malfunctioning as Ms. Neely claimed. Thus, Adkins is distinguishable and inapplicable.

In summary, Appellants request that this Honorable Court find that the Circuit Court of Raleigh County abused its discretion by setting aside the verdict and awarding Appellees 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

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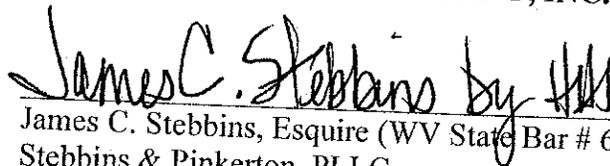
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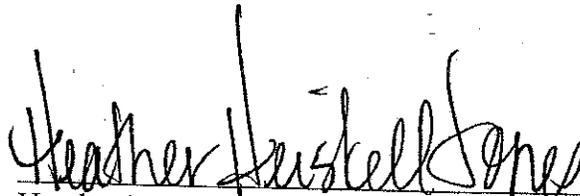
CERTIFICATE OF SERVICE

I, Heather Heiskell Jones, hereby certify that service of the foregoing "Appellants' Reply to Brief of Appellee" has been made upon the parties this 18th day of January, 2008, via United States Mail, postage prepaid, and addressed as follows:

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