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Lowe's Drops Appeal After \$1.5M Faulty-Roof Settlement

By **Matthew Santoni**

Law360 (February 5, 2024, 7:26 PM EST) -- Lowe's Home Centers and a Philadelphia woman will drop their appeals after reaching a \$1.5 million settlement over claims that the company improperly denied warranty repairs after an affiliated contractor allegedly botched a \$9,500 roof installation, court records showed.

In addition to \$114,500 in compensatory damages, plaintiff Laira Lucas will keep more than \$1.4 million of the \$2 million in punitive damages that a Philadelphia jury had awarded her in 2022; Lowe's will withdraw its appeal of the punitive damages verdict to the Superior Court; and Lucas will withdraw her cross-appeal for additional damages, according to a Feb. 1 joint application to discontinue the cross-appeals.

"Both sides felt they had some basis for success in the appeal... but my client wanted to mitigate her risk and get the case over with," Bruce J. Chasan, representing Lucas, said Monday. "Considering it was a \$9,500 roof job, it was a remarkable result."

Lowe's appellate counsel declined to comment.

The settlement and discontinuance of the appeals closes a case that had been running since 2019, stemming from a 2016 roof installation at Lucas' home.

According to the trial court's opinion in the underlying lawsuit, Lucas had purchased a new roof with a one-year warranty through Lowe's, which was assigned to and installed by LDK Construction LLC in November 2016. Within six months of completing the job, LDK was called back and did some minor repairs, then did so again in September 2017 and April 2018 as Lucas kept reporting leaks.

Lowe's hired a third-party adjuster to assess the roof and any damage in August 2018, but despite a report that allegedly recommended redoing a larger portion of the roof and blamed the leak for damage to Lucas' home, Lowe's allegedly denied the warranty claim as unfounded and sat on the assessment, the court's opinion said.

Chasan said the adjuster wrote a 75-page report, with 120 photographs, confirming the damage to the roof and the inside of the house, but Lucas had to "invade" her retirement account to fund temporary repairs and mold remediation when the claim was denied.

After Lucas sued, a jury awarded Lucas \$2 million, which the trial judge said was supported by evidence

that the home improvement retailer's conduct was "outrageous." The parties settled on \$100,000 in compensatory damages, plus delay damages and post-judgment interest, but filed cross-appeals on the punitive damages side of the case.

Chasan said that after both sides filed their briefs to the Superior Court, they entered mediation late in 2023 and eventually reached the settlement, which was signed Jan. 24. The parties notified the Superior Court that they were discontinuing the case Feb. 1.

Lowe's did not admit to liability with the settlement, the agreement said.

Lucas is represented by Bruce J. Chasan.

Lowe's Companies Inc. and Lowe's Home Centers LLC are represented by Thomas G. Wilkinson Jr. and Matthew L. Bleich of Cozen O'Connor.

The case is Lucas v. Lowe's Companies Inc. et al., case number 190100018 in the Court of Common Pleas for Philadelphia, Pennsylvania, and case numbers 322 EDA 2023 and 324 EDA 2023 in the Superior Court of Pennsylvania.

--Editing by Patrick Reagan.

LAIRA LUCAS,

Plaintiff,

v.

LOWE'S COMPANIES, INC.; LOWE'S
HOME CENTERS, LLC; LDK
CONSTRUCTION, LLC; and MANTAS
ALONDERIS,

Defendants.

COURT OF COMMON PLEAS
PHILADELPHIA COUNTY

JANUARY TERM, 2019

NO. 0018

GENERAL RELEASE

For and in consideration of the payment of \$1,425,000.00 (the "Settlement Payment"), in full and complete settlement of the within dispute, the undersigned Plaintiff, Laura Lucas, for herself, her successors, and assigns ("Releasor"), does hereby fully release and forever discharge Lowe's Companies, Inc. and Lowe's Home Centers, LLC, and their successors, predecessors, parents, subsidiaries, affiliates, divisions, insurers, officers, directors, shareholders, attorneys, heirs, agents, servants, workmen (excluding LDK Construction, LLC), and employees (collectively, "Releasees") of and from all claims both existing and contemplated, manners of actions, causes of action, suits, debts, dues, accounts, bonds, covenants, contracts, agreements, judgments, or any claims whatsoever that have been made or could possibly be made in law or equity as of the date of the execution of this General Release, including, without limitation, any claims whatsoever that have been made or could possibly be made in law or equity arising from or related to the events giving rise to the claims set forth against Releasees in the above-captioned action.

It is further agreed that this General Release is executed pursuant to the Post Mediation Agreement executed by Releasor Laura Lucas, her counsel and counsel for the Lowe's Defendants

on December 19, 2023, and that the Post Mediation Agreement is deemed incorporated herein by reference and remains fully effective, and the obligations imposed therein are not being replaced or altered by this General Release. Consistent with that Post Mediation Agreement, Plaintiff's counsel shall execute and deliver the referenced complete assignment of any judgment, claims and causes of action she may possess against Co-Defendant LDK Construction, LLC (in the form attached hereto), as well as the documents necessary to terminate the above-captioned action with prejudice and the pending cross-appeals in the Superior Court upon her attorney's receipt of the above-referenced payment.

It is further understood and agreed that this General Release evidences a full and final settlement and compromise of disputed claims, and that payment of the consideration mentioned above is not to be considered an admission of liability of any kind, and that Releasees deny any liability whatsoever and have amicably resolved the matter to avoid the further expenditure of time, expense and resources on continued litigation.

Releasor understands and agrees that any tax liens or tax liabilities related to the payment of this settlement, if any, shall be satisfied by her, and the Releasor agrees to defend, indemnify and hold harmless the Releasees from any and all claims, demands, obligations, liabilities, expenses, valid liens, and assignments, including, but not limited to, costs and attorney's fees or judgments which might arise from any unpaid or unsatisfied tax liabilities related to the payment of this settlement.

Releasor understands and agrees that she shall be solely responsible for paying any and all attorney's fees, other bills and invoices from or related to the events giving rise to the claims set forth against Releasees in the above-captioned action.

Releasor further warrants that she has read this document and has consulted with counsel

of her selection concerning the mediation and the settlement and accepts it.

It is understood and agreed that this General Release shall not be subject to any claim of fraud, duress, deception, or mistake of fact, and that it expresses full, final and complete settlement of a liability claimed and denied. Regardless of the adequacy or inadequacy of the amount paid, this General Release is expressly intended to cover all claims and damages related to the events giving rise to the claims set forth against Releasees in the above-captioned action, whether known or unknown, and to foreclose any and all contemplated litigation between and among the parties to the above-captioned action.

Plaintiff agrees and covenants that she will not at any time make, publish or communicate to any person or entity or in any public forum (including by way of any social media), nor will she authorize her counsel (or other agent or representative) to make, any defamatory or disparaging remarks, comments or statements concerning Releasees' products or services, customers, suppliers, agents, representatives, attorneys, officers or employees or associated third parties, or make any maliciously false statements about any of the foregoing persons or entities. This non-disparagement provision does not prohibit Plaintiff or her counsel from making any true and accurate statement or report about the case, except that the mediation and settlement-related communications are confidential and shall not be publicly disclosed or published in any manner.

This Release may not be amended orally, nor shall any purported oral amendment (even if accompanied by partial or complete performance in accordance therewith) be of any legal force or effect or constitute an amendment of this Release, but rather this Release may be amended only by an agreement in writing signed by the Parties.

It is hereby acknowledged that this Agreement is governed by the laws of the Commonwealth of Pennsylvania.

THE UNDERSIGNED HAS READ THE FOREGOING RELEASE AND FULLY UNDERSTANDS IT. THE UNDERSIGNED WARRANTS AND REPRESENTS THAT SHE HAS THE FULL AUTHORITY TO EXECUTE THIS RELEASE, AND THIS RELEASE HAS BEEN VALIDLY AUTHORIZED AND CONSTITUTES A LEGALLY BINDING AND ENFORCEABLE OBLIGATION.

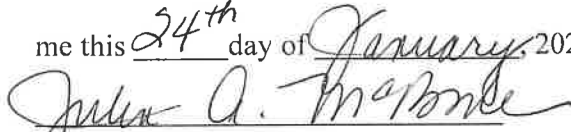
IN WITNESS WHEREOF, I have hereunto set my hand and seal this 24th day of

January, 2024.

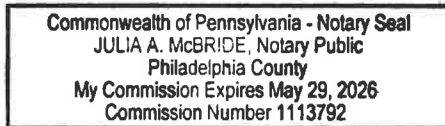

LAIRA LUCAS

Sworn to and Subscribed before

me this 24th day of January, 2024


Notary Public

(SEAL)



**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
COURT OF COMMON PLEAS
TRIAL DIVISION, CIVIL SECTION**

LAIRA LUCAS, Plaintiff, v LOWE'S COMPANIES, INC.; LOWE'S HOME CENTERS, LLC; LDK CONSTRUCTION, LLC; and MANTAS ALONDERIS Defendants.	 JANUARY TERM, 2019 NO. 00018 322 EDA 2023
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MEMORANDUM OPINION

On January 7, 2019, Plaintiff commenced this action against Lowe's Companies, Inc.; Lowe's Home Centers, LLC (hereinafter referred to as "LHC" and collectively referred to as the "Lowes Defendants" or "Appellants" interchangeably); LDK Construction, LLC; and Mantas Alonderis.

I. PROCEDURAL HISTORY/FACTS

On October 1, 2020, the Lowes Defendants filed a motion for summary judgment. In their motion, the movants argued that the plaintiff "failed to uncover any facts which demonstrate that Lowe's committed an outrageous act with an evil motive." Lowes Defendants' Memorandum of Law in support of their Motion for Summary Judgment, Sect. B. In its motion, there is no reference to Rest. Torts (2d) § 323 or its applicability. Prior to trial, Appellants filed seven (7) motions in limine; none raised the issue of Rest. Torts (2d) § 323.

Trial began on July 11, 2022 and was tried to verdict. The following testimony and evidence were presented at trial.

OPFLD-Lucas Vs Lowe'S Companies, Inc. Etal



On October 18, 2016, Plaintiff entered into a Services Solutions Installed Sales Contract (Contract No. 0920881) with LHC for the “installation of new SBS MOP granular rubberior (sic) roofing system” for a contract total of \$9,597.27. Among other things, the contract provided Plaintiff with “1 year free service warranty on [LHC] installation.” Exh. PX6; N.T. 220:4-9 (07/14/2022).

On October 20, 2016, LHC assigned performance of Contract No. 0920881 to LDK. Specifically, LDK was to install the roofing system on behalf of Lowe's LLC. N.T. 23:21-25:2; 72: 8-24 (07/12/2022). LDK performed the contracted services over several days, ending on November 2, 2016. N.T. 26: 7-28:24 (07/12/2022). November 2, 2016, Plaintiff executed a Certificate of Completion providing that the installation was completed “as set-forth in our sales contract with [HLC].” LDK agreed that “within one year from the date of the certification of completion ... [LDK] shall forthwith replace or correct such defective work ... free from all expense to Lowe's in a manner satisfactory to the owner. If [LDK] shall fail to replace or correct any defective work ... after reasonable notice, [LHC] may, at its option, cause such defective work ... to be replaced or corrected, and all costs of expenses incurred in connection therewith shall be borne by [LDK]”. Exh. PX7; N.T. 29:7-13; 30:8-23; 133: 18-255 (07/12/2022).

On May 15, 2017, Plaintiff notified [LHC] that she was experiencing a water leak in the same rear corner as before the roof was replaced. Exh. PX40; N.T. 226:13-19 (07/14/2022). LDK was subsequently notified, via email, and directed to contact plaintiff within “1 business day (24 hours) to schedule.” Exh. PX16; N.T. 33:5-20 (07/12/2022); 225:7-226:12 (07/14/2022).

On May 20, 2017, LDK visited plaintiff's home to make the required repairs. Exh. PX17; N.T. 34:8-36:9 (07/12/2022). Two days later, on May 22, 2017, LDK represented to both the plaintiff and LHC that the cause of the leak was debris clogging the drain. N.T. 34:17-21; 35:3-

20 (07/12/2022); 226:17-228:1 (07/14/2022). On May 22, 2017, based upon LDK's representations, the work order was closed. Exh. PX40.

On August 22, 2017, Plaintiff again notified LHC that her roof was leaking again. LHC requested pictures of the "roof crack". Exh. PX70; N.T. 229-21-230:21 (07/14/2022). On August 28, 2017, Plaintiff provided LHC pictures of a crack on her roof. Exh. PX73, PX74; N.T. 230:9-17; 231:9-233:11 (07/14/2022).

On August 30, 2017, a second work order was issued by LHC to LDK providing that the "Customer complains that roof is leaking and has interior damage please assess and repair[.]" Exh. PX17; N.T. 36:24-39:14 (07/12/2022). On September 5, 2017, LDK returned to the plaintiff's residence to make the required repairs. N.T. 38:12-14 (07/12/2022). In contrast to the pictures provided to LHC, on September 5, 2017, LDK represented to both the plaintiff and LHC that the cause of the leak was debris clogging the drain. N.T. 38:15-39:3 (07/12/2022); 234:6-18 (07/14/2022). LDK cleaned the drain and again applied roofing cement. N.T. 235:1-24 (07/14/2022).

On October 18, 2017, Plaintiff informed LHC that she wanted to file a claim for damages resulting from the leak. Exh. PX40; N.T. 235:-236:1 (07/14/2022). There is no evidence of a follow up by LHC to plaintiff for five (5) months regarding the claim process.

On April 30, 2018, Plaintiff notified LHC that her roof was leaking again. Exh. PX40. The same day, a work order was again issued to LDK to assess and repair the roof. Exh. PX18. On May 4, 2018, LDK made its third visit to assess and repair the roof. N.T. 39:15-41:1 (07/12/2022); 20:12-17 (07/15/2022). Again, LDK reported that the drain was clogged, and that water was overflowing the top of the roof. N.T. 41:2-8 (07/12/2022). On this occasion, sealant was applied to the drain box and some joints. LDK reported that it did not observe any cracks in

the roof. N.T. 42:8-25 (07/12/2022). LDK represented to both plaintiff and LHC that the roof issues may be a result of the neighbor's roof and clogged drainpipe and that there was no evidence of damage due to water leaking from the roof. Exh. PX40. 1; N.T. 52:14-53:4; 55:6-56:18 (07/12/2022). Plaintiff sent pictures of the interior damage caused by the leaking roof to LHC prior to the LDK inspection. N.T. 24:7-9 (07/15/2022).

Plaintiff agreed to “forego” the filing of a claim with Lowe's LLC pending resolution with plaintiff's homeowner's insurance; no claim was filed at the time. Exh. PX40. Sometime prior to July 9, 2018, Plaintiff filed a claim with her homeowner's insurance. Tr: 22:5-9 (07/15/2022). Plaintiff's insurer determined that the cause of the leaks was due to an insufficient roof pitch and that the roof needed to be resurfaced. Exh. PX40; N.T. 25:18-20 (07/15/2022). LHC was notified of the insurer's findings. N.T. 25-26 (07/15/2022).

On July 31, 2018, Christina Bunton, a representative of Lowe's LLC, was assigned “Incident 1-25720559866). Exh. PX40; N.T. 28:12-15 (07/15/2022). Plaintiff requested someone other than LDK to perform an assessment. N.T. 34:15-22 (07/15/2022).

Sometime prior to August 1, 2018, Plaintiff retained Paul Henkel of Russell Roofing to perform an inspection. N.T. 28:16-24 (07/15/2022). On August 1, 2018, Mr. Henkel concluded that the installation was not completed in accordance with the manufacturer's specifications. Exh. PX82; N.T. 101:16-25; 103:13-104:11; 107:21-108:15 (07/12/2022); 28:20-29:6 (07/15/2022). On August 7, 2018, Plaintiff was informed by Lowe's LLC that an independent, roof inspector would perform an assessment. Exh. PX40. On August 15, 2018, Lowe's LLC contacted Eagle Inspections to conduct an assessment on its behalf. Exh. PX40; N.T. 87:13-90:17 (07/11/2022); 12:6-9 07/13/2022).

On August 15, 2018, Plaintiff filed a complaint with Lowe's Companies, Inc. (“Lowe's

Inc.”). N.T. 41:24-42:3 (07/15/2022). Lowe’s Inc. concluded that Plaintiff’s complaint “were not actually Claims” but grievances. N.T. 37: 15-40:19 (07/15/2022). On August 20, 2018, Plaintiff was informed that Brenda Penley from Lowe's Inc. would be the contact person for Plaintiff’s “grievance.” N.T. 35:22-36:25; 40:21-41:1 (07/15/2022). On August 24, 2018, Ms. Penley notified the plaintiff that a claim, No. 30180844905-0001, was filed and a Senior Claims Examiner, Stephen Darling, assigned. Exh. PX90.

On August 28, 2018, Frontier Adjusting Services (“FAS”) was contacted to conduct an inspection of plaintiff's roof, on behalf of Lowe's Inc. On September 5, 2018, FAS submitted its report finding that the precise source of the water intrusion is unknown but, “It is conceivable that water could be overflowing the roof at the rear and entering through these openings, but I would more likely suspect that some openings have formed in the roofing material in the ponding area.” FAS recommended “re-doing the rear 12' x 20' and the scupper.” FAS did find that the plaintiff sustained a loss, “Roof installed in 2016 has been leaking along the rear wall of the property, causing interior leakage damage in the rear bedroom, and main basement. rooms.” Exh. PX95. Despite the report's findings, on September 6, 2018, Lowe's Inc. denied Plaintiff's warranty claim as unproven and refused to disclose the contents of the FAS report. Exh. PX95A.

On September 12, 2018, Eagle Inspections LLC (“EA”) conducted an inspection of plaintiff's roof on behalf of LHC. Exhs. PX115, PX120. There is no evidence that the plaintiff was aware that LHC and Lowe’s Inc. were not one and the same. On September 14, 2018, Plaintiff sent an email to Mr. Darling asking when the hole in her roof would be repaired and referenced the Eagle Inspection Report. Exh. PX116. On September 17, 2018, Mr. Darling wrote to the plaintiff, “There is no hole reported on your roof.” Exh. PX117. On September 24, 2018, despite the findings in the FAS report and not reviewing the findings in the EA report,

Lowe's Inc. closed the claim file. Exh. PX100.

On July 18, 2022, Appellants reference Rest. Torts (2d) § 323 only as to the issue of reliance; no argument as to its applicability was presented. N.T. 36: 20-25; 37: 1-14 (07/18/2022). Additionally, the court declined to give Standard Jury Instruction, 13.70, Negligent Undertaking to Render Services to Protect Others. N.T. 61: 6-23; 62: 1-6 (07/18/2022). There was no objection to Standard Jury Instruction, 8.00, Punitive Damages—General Instructions. N.T. 57: 9-18 (07/18/2022).

On July 19, 2022, this court provided the jury, in relevant part, the following instruction on punitive damages.

You *may* award punitive damages against Lowe's Companies, Inc. if ...you find the actions of Stephen Darling were outrageous and occurred during and within the scope of his employment as an employee of Lowe's Companies, Inc. and were not committed to satisfy Mr. Darling's personal ill will or malice, but instead were committed with the intent to further Lowe's Companies, Inc.'s interest.

If you find the conduct of Stephen Darling was outrageous, you *may* award punitive damages as well as any compensatory damages in order to punish the defendant for his conduct and to deter the defendant and others from committing similar acts.

A person's conduct is outrageous when it is malicious, wanton, willful or oppressive or shows reckless indifference to the interest of others.

N.T. 95: 21-25; 96: 14-14 (07/19/2022)(emphasis added). The verdict sheet was read into the record. “The [verdict sheet] that has been now provided the jury is a document created by the Court, reviewed by both plaintiff and defense without objection.” N.T. 104: 18-21 (07/19/2022).

On July 19, 2022, the jury returned a verdict in favor of the plaintiff. More specifically, the jury found the following:

- LHC breached a warranty and contract with the plaintiff;
- Lowe's Inc. was negligent in the handling and denying of plaintiff's claim;
- Appellants were the factual cause of the plaintiff's harm; and
- Lowe's Inc.'s conduct was outrageous.

The jury awarded plaintiff \$100,000.00 in compensatory damages and \$2 million in punitive

damages as against Lowe's Inc..

Plaintiff filed a motion for delay damages on July 22, 2022. On December 28, 2022, Plaintiff withdrew her motion and filed a post-trial motion to add post-judgment interest.

On July 28, 2022, Appellants filed post-trial motion. In their motion, Appellants argued for a judgment notwithstanding the verdict claiming that the “verdict was unsupported by sufficient evidence and was contrary to the law.” Appellants also motioned for a new trial on all issues. As to their request for remittur, Appellants argued that the punitive damages were *per se* unconstitutional and contrary to the weight of the evidence. Appellants’ motion was not granted. One December 28, 2022, more than 150 days from the date of the post-trial filing, plaintiff filed a praecipe for entry of judgment on the verdict in the amount of \$2.1 million.

Appellants filed an appeal on January 26, 2023; plaintiff filed a cross appeal a day later. On January 27, 2023, this court issued an order directing the Appellants and plaintiff to file “a concise statement of errors” within 21 days of entry of the order.

Plaintiff filed her Statement on February 16, 2023. Plaintiff complained that the court failed to add statutory post-judgment interest on the punitive damages portion of the award.¹ No order was issued on the motion prior to the filing of this appeal.

On February 17, 2023, despite the directions of the court Appellants filed a 15-page Statement. The court is impeded in its ability to provide its legal analysis of pertinent issues. Some things identified prove not to be an issue. In its best effort, the court offers its reasoning on the following items.

1. The court erred in not granting judgment notwithstanding the verdict.
2. The court erred in not granting a remittur.
3. The court erred in charging the jury on punitive damages.
4. “It was also error to instruct the jury that an award of punitive damages was mandatory.”

¹ The issue of interest for compensatory damages was resolved by and between the parties.

5. The “expert” testimony of Paul Henkel should have been excluded.

II. DISCUSSION

1. APPELLANTS FAILED TO COMPLY WITH THE RULES OF APPELLATE PROCEDURE

A. Concise Statement

The Rules of Appellate Procedure list the requirements of a “concise” statement. See Pa.

R.A.P. § 1925(b)(4). Of relevance here are the following:

- (1) “The Statement shall set forth only those errors that the Plaintiff intends to assert.” Pa. R.A.P. 1925(b)(4)(i).
- (2) “The Statement shall concisely identify each error that the Plaintiff intends to assert with sufficient detail to identify the issue to be raised for the judge.” Pa. R.A.P. § 1925(b)(4)(ii).
- (3) “The Statement should not be redundant or provide lengthy explanations as to any error.” Pa. R.A.P. § 1925(b)(4)(iv).

A review of its filings demonstrate that the Appellants are familiar with the requirements of Pa.

R.A.P. § 1925(b). Nevertheless, Appellants’ Statement fails to comply with the requirements of the above referenced provisions. “Issues ... not raised in accordance with the provisions of this paragraph [Pa. R.A.P. § 1925](b)(4) are waived.” Pa. R.A.P. § 1925(b)(4)(vii). Accordingly, the appellate court should find that they are waived her

B. Impediment to the judicial processes

“In order to preserve an issue for appellate review it must be raised by the Plaintiff in a Rule 1925(b) statement filed at the lower court's direction.” In re Est. of Daubert, 2000 Pa.

Super. 219, ¶ 3, 757 A.2d 962, 963 (2000). “When an Appellant fails adequately to identify in a *concise manner* the issues sought to be pursued on appeal, the trial court is impeded in its preparation of a legal analysis which is pertinent to those issues.” Jones v. Jones, 2005 Pa. Super. 213, ¶ 9, 878 A.2d 86, 89 (2005) (citations and quotation marks omitted)(emphasis added).

Appellants’ Statement has worked to impede the court in its preparation of an opinion to address

errors complained of on appeal.

While this court finds to Appellants' Statement to be a flagrant disregard of the Rules and should be dismissed, in accordance with Pa. R.A.P. § 1925(b)(4)(vii) the following reasoning is offered should the appellate court not waive Plaintiffs' issues in an abundance of caution.

2. THE COURT ERRED IN NOT GRANTING JUDGMENT NOTWITHSTANDING THE VERDICT

[A motion for] JNOV is an extreme remedy, as the trial court cannot lightly ignore the findings of a duly selected jury. A motion for JNOV challenges the sufficiency of the evidence presented at trial. As such, JNOV is only proper where, when viewing the evidence in the light most favorable to the verdict winner, the facts are so clear that reasonable minds could not disagree that the verdict was improper. JNOV ... may not be employed to invade the province of the jury.... Thus, where the jury has been presented with conflicting evidence, a motion for JNOV should be denied.

Koller Concrete, Inc. v. Tube City IMS, LLC, 2015 PA Super 92, 115 A.3d 312, 321 (2015)

(citations and quotation marks omitted).

Appellants argue for the court to make a determination of matters within the sole province of the jury. See para. 2. The jury is charged with the evaluation of evidence and credibility of the witness presented. See Waronsky v. Ameriprise Fin., Inc., 245 A.3d 1062 (Pa. Super. Ct. 2020). As to the issue of punitive damages, the jury found the actions of the Lowes Inc. to be "outrageous, showing maliciousness, wantonness, willfulness, oppressiveness or a reckless indifference to the interest of others." N.T. 116: 18-25 (07/19/2022). There was evidence that supported the findings of the jury.

3. THE COURT ERRED IN NOT GRANTING A REMITTUR

Appellants asks this court to find that ratio of punitive damages to compensatory damages to be per se excessive in violation of Appellants' substantive due process. Pennsylvania Courts have not adopted a per se test on the issue of punitive damages. "Like any

substantive-due-process inquiry then, the issue is whether the jury's award of punitive damages is reasonable under the facts. A punitive-to-compensatory-damages ratio that is unconstitutionally excessive in one case may not even raise constitutional suspicion in the next.” Bert Co. v. Turk, 2021 PA Super 87, 257 A.3d 93, 122 (2021), reargument denied (July 14, 2021), appeal granted, 275 A.3d 958 (Pa. 2022). Here, the court found the award, based upon the facts of this case, not to shock the conscience.

4. THE COURT ERRED IN CHARGING THE JURY ON PUNITIVE DAMAGES

Appellants present, for the first time, a particular argument on the issue of punitive damages. Specifically, Appellants argue that the Restatement (Second) of Torts 323 is only applicable where physical harm is involved.

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

- (a) his failure to exercise such care increases the risk of such harm, or
- (b) the harm is suffered because of the other's reliance upon the undertaking.

Restatement (Second) of Torts § 323 (1965). This issue was not raised at trial nor in post-trial activity and is, therefore, waived.

5. IT WAS ALSO ERROR TO INSTRUCT THE JURY THAT AN AWARD OF PUNITIVE DAMAGES WAS MANDATORY

Presumably, Appellants are arguing that the court instructed the jury that punitive damages were mandatory. Appellants failed to cite to the record wherein mandatory language regarding punitive damages was given to the jury. Based on the jury instructions provided, wherein the court uses the permissive term, “may,” the court finds this error to be without merit and will not be addressed in this opinion.

6. THE "EXPERT" TESTIMONY OF PAUL HENKEL SHOULD HAVE BEEN EXCLUDED.

Appellants filed a Motion in Limine to exclude the Paul Henkel as an expert witness (Ctrl No. 22064596). Henkel was listed by plaintiff as a witness. Expert interrogatories were exchanged. N.T. 12: 1-22 (07/11/2022). Accordingly, the court denied Appellants' motion. "The Court's reasoning here is that to the extent that there is a question of the sufficiency of the expert opinion's author, that is the subject of cross." N.T. 13: 13-17 (07/11/2022).

III. CONCLUSION

For all the reasons set forth herein, the appeal should be dismissed or the rulings of the court should be affirmed.

5/30/2023
DATE

BY THE COURT:

Allen, J.
ALLEN, J.