COURT OF APPEALS
DECISION
DATED AND FILED

September 28, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 99-3176

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

FAYE LYNN BOLAND AND VERNON E. BOLAND,

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

V.

WAL-MART STORES, INC.,

DEFENDANT-APPELLANT-CROSS-RESPONDENT,

ABC INSURANCE COMPANY,

DEFENDANT.

APPEAL and CROSS-APPEAL from a judgment and an order of the circuit court for La Crosse County: DENNIS G. MONTABON, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

¶1 EICH, J. Wal-Mart Stores, Inc., appeals from a judgment, entered on a jury verdict, awarding Faye Boland substantial damages for a back injury she claimed she incurred when several stacked cartons fell on her while she was walking down an aisle in a Wal-Mart store.[1] Boland cross-appeals from the trial court's remittitur order reducing the size of the damage award.

¶2 The case was tried twice. In the first trial, the jury, while finding that Boland sustained damages of approximately $100,000, also determined that her injuries were not caused by any negligence on Wal-Mart's part. On motions after verdict, the court, concluding that the jury's negative answer to the cause question was contrary to the great weight and clear preponderance of the evidence, ordered a new trial on both causation and damages "in the interests of justice." At the close of the evidence at the second trial, the court granted partial summary judgment to Boland, ruling that, as a matter of law, Wal-Mart's negligence was a cause of injury to Boland, leaving it to the jury to ascertain the nature and extent of her injuries. This time the jury awarded Boland nearly $800,000 in damages, which, on Wal-Mart's motion for remittitur, was reduced by the court to $621,937 (representing a reduction of $175,000 to the award for pain and suffering).

¶3 Wal-Mart argues on appeal that: (1) the circuit court erred in ordering a new trial in the first instance because Boland had presented "no cognizable evidence of causation"; (2) alternatively, damages should not have been retried and the first jury's $100,000 damage award should be reinstated; (3) the court erred at the second trial in granting partial summary judgment on causation; and (4) we should order "substantial" additional remittitur. On her

[1] The judgment also awarded loss-of-consortium damages to Boland's husband.

cross-appeal, Boland argues that the court should not have reduced the second jury's award for pain and suffering. We affirm the judgment in its entirety.

I. New Trial (Cause)

Scope of Review

¶4 Wal-Mart begins by equating the circuit court's new-trial order to one changing the jury's answer to the cause question, arguing that that determination is reviewable under the "any credible evidence" standard applicable to such orders.[2] And it argues that there was "extensive medical testimony" indicating that the Wal-Mart incident was not a cause of Boland's back problems, and no real evidence to the contrary. Boland argues to the contrary—that there was ample evidence of cause before the jury.

¶5 We disagree with Wal-Mart's contention that the "any credible evidence" standard is applicable to our review of the court's new-trial order. The circuit court did not change the jury's answer to the cause question from "no" to "yes." Instead, finding that the answer was "contrary to the great weight and clear preponderance of ... evidence," the court stated that it was granting a new trial "in the interests of justice."

¶6 Under WIS. STAT. § 805.15(1) (1997-98),[3] a new trial may be granted "because of errors in the trial, or because the verdict is contrary to law or

[2] Appellate review of a successful motion to change an answer on a verdict considers whether there is "any credible evidence [that] ... fairly admits an inference which supports a jury's finding." ***Bastman v. Stettin Mut. Ins. Co.***, 92 Wis. 2d 542, 548, 285 N.W. 2d 626 (1979).

[3] All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

to the weight of evidence, or because of excessive or inadequate damages, or because of newly-discovered evidence, or in the interest of justice." Interpreting that statute, we have held that a new trial in the interest of justice may be granted "when the jury findings are contrary to the great weight and clear preponderance of the evidence, even though the findings are supported by credible evidence." ***Sievert v. American Family Mut. Ins. Co.***, 180 Wis. 2d 426, 431, 509 N.W.2d 75 (Ct. App. 1993), *aff'd,* 190 Wis. 2d 623, 528 N.W. 2d 413 (1995). We also said in ***Sievert*** that whether to grant a new trial is discretionary with the circuit court, and our review of such an order is not de novo, as Wal-Mart urges. It is highly deferential:

> [The appellate court] owes great deference to a … decision granting a new trial. This is because the order is itself discretionary, and the trial court is in the best position to observe and evaluate the evidence. Thus a decision to grant a new trial in the interest of justice will not be disturbed unless the court clearly abused its discretion.
>
> Our role is not to seek to sustain the jury's verdict but to look for reasons to sustain the trial court. No abuse of discretion [will be] found where the trial court sets forth a reasonable basis for its determination that one or more material answers in the verdict is against the great weight and clear preponderance of the evidence. There is an abuse of discretion if the trial court grounds its decision upon a mistaken view of the evidence or an erroneous view of the law.

Id., 180 Wis. 2d at 431, 509 N.W. 2d. We will therefore affirm if the circuit court did not erroneously exercise its discretion in ordering the new trial.

Evidence of Cause

¶7 While Boland was shopping at a Wal-Mart store, several boxes of "Pop Ices" fell off a forklift, some of them striking her in the back. Each box weighed approximately nine pounds. Boland stated that she felt "jolts" in her back

at the time and sought medical treatment for back and leg pain. At some point, she was diagnosed as having a herniated disc and, despite two subsequent surgeries, she continues to complain of pain in her back and several other problems and disabilities.

¶8 The evidence on the existence of a causal relationship between the incident in the store and Boland's herniated disc (and subsequent problems) consisted primarily of the depositions of two physicians—Dr. Mark Stevens, who testified on Boland's behalf, and Dr. Richard Galbraith, who testified for Wal-Mart.

¶9 Stevens, a neurologist to whom Boland had been referred, testified that, according to the history provided to him by the referring physician, she felt severe pain, "especially in the left hip and down the back of her leg … [a]rising from the lumbar area," immediately after being struck by the cartons. Sometime later, tests indicated that she had a "bulging" or "herniated" disc. Her pain was not significantly alleviated by treatment and she elected to have disc surgery, which Stevens performed. She continued to experience pain and discomfort, and Stevens performed a second operation a few months later. According to Stevens, the second surgery didn't end Boland's discomfort and she eventually "fell into what we call the chronic category." Stevens was asked whether he had an opinion, "based upon a reasonable medical certainty," whether the Wal-Mart incident "was a competent producing cause of the injuries" he had diagnosed and for which he treated Boland. He responded: "I believe that the incident described by the patient … is consistent with the injuries, the MRI findings [of a herniated disc] and the subsequent pain problems that the patient has had." He was then asked whether he had formed an opinion, "based on your experience and reasonable medical certainty" as to whether Boland's continuing complaints of "chronic pain and

discomfort" were "consistent with having been caused by the back injury you treated?" Stevens replied: "Yes … It is not unheard of that patients after disc herniation and even successful surgery continue to have back pain as well as neurological deficit after the surgery." Stevens also testified that the medical bills incurred by Boland were "necessary as a result of the injury she sustained in the Wal-Mart store." On cross-examination, Stevens acknowledged that herniated discs don't always result from trauma, but can be caused by a combination of other factors, such as age, "work influences" and weight.

¶10 Galbraith, a physician specializing in the field of neurology, testified for Wal-Mart. He had met with Boland for several hours, conducted a neurological examination, and spent an additional twelve to fourteen hours examining her medical records. After discussing Boland's history and the tests he performed, Galbraith was asked whether he had an opinion, "to a reasonable degree of medical probability," whether Boland's herniated disc "was caused by the incident at Wal-Mart," as that incident had been described to him. Galbraith replied: "I don't believe this incident that she described … would have caused that herniated disc to occur at that level at that time." Explaining his answer, he stated:

> Well, first of all, [the boxes] didn't hit her in the lower part of her back, they hit in the upper lumbar and lower thoracic area. But … she was standing straight, she wasn't bent over or flexed…. She was standing straight up. So at best they could have just [g]lanced off of her back. And even though it hurt her a little bit, it was just clinically hard to determine how would a box coming down on her, not hitting her directly, would do that…. Secondly ... she had an immediate onset … of numbness in her thigh … [only] down to her knee. It didn't go below the knee. In this distribution of where the herniated disc was, she should have had it below the knee and down into her foot and big toe…. I quizzed her [on] this many times, [and] she said she didn't have any pain. ... [I]f you have an acute

> herniated disc, I want you to know that you don't have just numbness. You have pain in your back and down your butt and down your leg and on the side of your leg and over the top of your foot and numbness in your big toe…. So to conclude, I don't think that herniated disc was a causation for her – from her injury, was a causation for that disc. It just didn't fit clinically.

On cross-examination, Galbraith was asked whether he could "exclude the possibility" that the Wal-Mart incident "caused the condition that led to Mrs. Boland's back surgery," to which he responded:

> The answer is no. You can't say 100 percent in anything in medicine … but what I'm saying is that it did not fit technically, diagnostically, if you will, with what she had that resulted in surgery. … [T]hat doesn't mean that it could not. I just can't explain it on the basis of a practical, common sense approach, neurologically. But nobody says never in medicine. I don't anyway. So I can't tell you 100 percent no that it wasn't related to that.

¶11 Galbraith, too, acknowledged that, while most herniated discs result from trauma, that is not always the case—they can also be caused by such things as being "markedly overweight" and perhaps "bending the wrong way." In that regard, there was evidence before the jury indicating that Boland, who weighed 291 pounds at the time of the incident, was "morbidly obese" and had a job (she was a nurse) which regularly involved heavy lifting as well as associated bending, twisting and stooping.

¶12 Finally, Boland's personal physician, Dr. Kenneth Olson, who examined and treated Boland after her first surgery, was asked whether, in his opinion to a reasonable degree of medical certainty, the pain she was experiencing after that surgery, was "related" to "the injury she suffered that resulted in [the] surgery …." He responded: "It is very difficult sometimes to differentiate the two … [but] they could be related." Olson, when asked "[w]ould you say it is

probable?" replied: "No … I could say that it could be." On cross-examination, Wal-Mart's counsel asked: "[H]ow can you … testify, to a real degree of medical certainty, that it is related?" Olson responded:

> Because they weren't there before, I guess. I mean, she hadn't had any back problems before, and then you have the surgery, and then she has these back spasms after surgery and after the injury. You have to … assume that it is related somehow to that injury or the surgery. It didn't just come out of the blue.

Discussion

¶13 As indicated, the jury in the first trial answered "no" to the question asking whether Wal-Mart's negligence was a cause of Boland's injuries. In post-verdict motions, Boland asked, among other things, that the court either change the causation answer to "yes," or, in the alternative, order a new trial both in the interest of justice and on grounds that the answer was "contrary to the overwhelming evidence." The court declined to grant the motion to change the answer to the cause question. Instead, it ordered a new trial, stating:

> I'm convinced that there has been a miscarriage of justice in this matter and that a new trial in the interests of justice is in order in that the jury's findings are in my opinion contrary to the great weight and clear preponderance of the evidence, even if they may be supported by Dr. Galbraith's testimony. It's clear to me that the only credible evidence shows that this plaintiff was physically all right up to the time of this accident, and I think [sic] might what have happened here and I think that was probably Dr. Galbraith's opinion that he didn't believe this accident by the boxes falling could cause the ruptured disc. However, it is also clear in my opinion that something happened at the time of this accident that caused the disc, whether it was caused by the impact I think is debatable, but that doesn't make any difference. Her reaction or whatever, if she jerked or had a prior weak disc or whatever, I'm convinced that this accident precipitated her problems, and I think this can't be settled by simply changing that answer because in

> my opinion they couldn't come up with that answer unless they believed basically that the plaintiff's story was a fabrication, and that's not supported in my opinion, by the credible evidence.

¶14 WISCONSIN STAT. 805.15(2) requires every order granting a new trial to "specify the grounds therefor"; and states that "[n]o order granting a new trial shall be valid or effective unless the reasons that prompted the court to make such order are set forth on the record, or in the order or in a written decision." Wal-Mart argues that the court's stated reasons in this case are inadequate under the statute.

¶15 The "written reasons" requirement of WIS. STAT. § 805.15(2) is consistent with the general requirement that a circuit court's discretionary determinations must be supported by demonstrable reasoning on the record.[4] But, while reasons must be stated—and they must be something more than "a statement of an ultimate conclusion," ***Loomans v. Milwaukee Mut. Ins. Co.***, 38 Wis. 2d 656, 661, 158 N.W. 2d 318 (1968)—they need not be minutely detailed or all-encompassing. Thus, while a simple statement that the jury "either didn't

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[4] In ***Burkes v. Hales***, 165 Wis.2d 585, 590-91, 478 N.W.2d 37 (Ct. App. 1991), we discussed at some length the scope of our review of a trial court's discretionary determination:

> A court exercises discretion when it considers the facts of record and reasons its way to a rational, legally sound conclusion. It is "a process of reasoning" in which the facts and applicable law are considered in arriving at "a conclusion based on logic and founded on proper legal standards." Thus, to determine whether the trial court properly exercised its discretion in a particular matter, we look first to the court's on-the-record explanation of the reasons underlying its decision. And where the record shows that the court looked to and considered the facts of the case and reasoned its way to a conclusion that is (a) one a reasonable judge could reach and (b) consistent with applicable law, we will affirm the decision even if it is one with which we ourselves would not agree.

understand or didn't listen to the … instruction" and "may or may not have been sidetracked" was considered to be insufficient, ***Burch v. American Family Mut. Ins. Co.***, 198 Wis. 2d 465, 477-78, 543 N.W.2d 277 (1996), a circuit court's statement that: "(1) … there was no evidence to justify the apportionment of the causal negligence, and (2) … the jury granted no damages although the testimony of personal injuries was uncontroverted" was held to comply with the statute. ***Loomans***, 38 Wis. 2d at 661-62.[5]

¶16 We are satisfied that the circuit court's explanation in this case was adequate to meet the statement-of-reasons requirement of WIS. STAT. § 805.15(2).

II. New Trial (Damages)

¶17 Wal-Mart also argues that, even if the court did not err in ordering a new trial on grounds that the jury's answer to the cause question was contrary to the great weight and clear preponderance of the evidence, it should not have ordered a new trial on damages. This, too, is within the court's discretion, and, as we have discussed above, we will not reverse absent an erroneous exercise of that discretion.[6]

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[5] *See also* ***Vogel v. Grant-Lafayette Elec. Coop.***, 195 Wis.2d 198, 218, 536 N.W.2d 140 (Ct. App. 1995), *rev'd on other grounds*, 201 Wis.2d 416, 548 N.W. 2d 829 (1996), where we held that the following explanation of the circuit court's *denial* of a new-trial motion was adequate to comply with WIS. STAT. § 805.15(2):

> I believe that the jury fairly assessed the testimony [it] heard…. I don't think credibility was as important as counsel seems to think. I think ... the jury found all experts to be credible, and it was simply a question of assessing the amount of negligence that they found to each party here. They did so based on the testimony they heard, and their finding will not be upset.

[6] *See* our discussion under "Scope of Review" *supra*, pp. 3-4.

¶18 As indicated above, the first jury awarded Boland approximately $100,000 in damages. In postverdict motions, she asked the court to change the answers to all of the damage questions to reflect higher figures or, in the alternative, for a new trial (a) because the damage answers were "perverse[ly]" low, (b) because the answers were against the great weight of the evidence, and (c) in the interest of justice. With respect to damages, the circuit court had this to say:

> The plaintiff's complaint of inadequate damages, I think that's somewhat affected by the jury's answer to the cause question; however, there is … credible evidence on the other side of the issue as to in my opinion mitigation of damages. I think … the weight issue was gone into a lot and whether the prejudice resulted from that, the fact that she's … obesely overweight, I think that's part of it and that's part of what would have perhaps aided her if she'd lost weight, but I think it's necessary to have a new trial on all the issues in that that ruling had to affect their judgment also as to damages, particularly as to the personal injuries or pain and suffering. The other damages there may well be reasons in the record and – but I think a new jury ought to take a look at the whole case.

¶19 Wal-Mart maintains that ample evidence supported the jury's answers to the damage questions and that, where the jury "has conclusively spoken on the amount of damages … [the plaintiff] is not entitled to another roll of the dice seeking a greater damage award." ***Block v. Gomez***, 201 Wis. 2d 795, 811, 549 N.W. 2d 783 (Ct. App. 1996). By not upholding the first damage award, Wal-Mart says, the court has "effectively denied [it] a forum."

¶20 We recognized in ***Badger Bearing, Inc. v. Drives & Bearings, Inc.***, 111 Wis. 2d 659, 673, 331 N.W.2d 847 (Ct. App. 1983), that, in our review of an order granting a new trial under WIS. STAT. § 805.15, we must keep in mind that

> [t]he trial court is in the best position to determine which issues should be retried, and the question on appeal is whether the trial court [erroneously exercised] its

> discretion. Where the court is ordering a new trial on some issues and it appears that error may have affected other issues, the ... court may order that a full retrial should be had. [And while the] court may grant a partial new trial when the error is confined to one issue which is "entirely separable" from the others … [even though] an error affects one issue only, a new trial on all issues should be granted where this will best subserve the ends of justice.

¶21 The circuit court's determination in this case that the causation and damage questions were so interrelated that the jury's answer to one might affect its answer to the other was not, in our view, an erroneous exercise of discretion. At the first trial, Boland's attorney argued to the jury that the incident at the store caused her herniated disc and all of the subsequent medical and surgical procedures, pain, suffering and medical expenses. Counsel for Wal-Mart, while conceding that Boland may have suffered some pain and discomfort as a result of the incident, maintained that that was the limit of their responsibility—that, based on their expert testimony, Boland's disc problems (and their aftermath) were not caused by any negligence on their part with respect to the stacking of the cartons in the store aisle. Beyond that, our discussion below concerning the manner in which counsel and the court framed the issues to be heard by the jury (and those to be answered by the court) at the second trial emphasizes the interrelation of the two issues.[7]

¶22 We have already discussed the deferential nature of our review of discretionary rulings by the circuit court—determinations which, as we have often

[7] Counsel maintained (and elaborated on) these positions in their arguments to the jury at the second trial. As we discuss in more detail below, Boland's attorney continued to maintain that, according to her experts, the store incident had caused all of her medical and related problems, and counsel for Wal-Mart insisted that because, according to its witnesses, Boland's disc problems were unrelated to the incident, the only injuries Wal-Mart was legally responsible for consisted of the pain of being struck by the boxes, a couple of visits to a physician and perhaps a visit or two to a physical therapist.

said, are "so essential to the trial court's functioning [that] we generally look for reasons to sustain [them]." ***Burkes v. Hales***, 165 Wis. 2d 585, 591, 478 N.W.2d 37 (Ct. App. 1991). Applying those rules here, we are satisfied that the court was acting within the bounds of its discretion when it ordered damages, as well as liability, to be retried.[8]

III. Partial Summary Judgment

¶23 At the close of the evidence at the second trial, the parties stipulated that Wal-Mart had been negligent with respect to the falling packages, and Boland moved for partial summary judgment with respect to cause. Counsel for Wal-Mart, agreeing that the court could answer the negligence question in the

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[8] Wal-Mart raises an additional argument in its reply brief, claiming that, under ***Fouse v. Persons***, 80 Wis. 2d 390, 400-01, 259 N.W. 2d 92 (1977), a new trial may only be ordered on the "mistaken issue," and may not extend to any other issues, unless the "entire verdict is affected by 'perversity.'" We reject the argument.

First, as we have said on many occasions, we do not consider arguments raised for the first time in a reply brief, *see* ***Northwest Wholesale Lumber, Inc. v. Anderson***, 191 Wis.2d 278, 294 n.11, 528 N.W.2d 502 (Ct. App. 1994), because doing so "thwart[s] the purpose of a brief-in-chief, which is to raise the issues on appeal, and the purpose of a reply brief, which is to reply to arguments made in a respondent's brief." ***Verex Assur. Inc. v. AABREC, Inc.***, 148 Wis.2d 730, 734 n.1, 436 N.W.2d 876 (Ct. App. 1989).

Second, the referenced pages in ***Fouse*** do not support Wal-Mart's broad-brush statement. What ***Fouse*** said was that "[a] partial new trial is to be favored when the … reason for the new trial is *confined to one issue which is entirely separable from the others and it is perfectly clear that there is no danger of complication*." ***Id***., 80 Wis. 2d at 400-01 (emphasis added). ***Fouse*** goes on to state that in the opposite situation—"where perversity is found"—the court "has broader leeway" and "may well set aside the entire verdict." ***Id***.

Here, of course, the trial court did not find the jury's answer to the cause question to be "perverse"—only that it was against the great weight of the evidence. In addition, the court did not find that the reason for ordering the new trial was "confined to one … entirely separable" issue, and/or that "it [was] perfectly clear that there [was] no danger of complication." Rather, as we discuss, it ruled that because the jury's answer to the damage question may have been affected by its cause answer, it was necessary that damages be retried as well. In other words, the reasons for the new trial encompassed both liability and damage issues.

affirmative, expressed his concern that a similar answer to the cause question might compel the jury to conclude that the court had ruled that the incident at the store had caused Boland's herniated disc (which, as indicated, it hotly disputed), rather than just causing some minor, temporary injury, and thus feel compelled to answer the damage question accordingly. Boland's attorney responded that he was not attempting to preclude Wal-Mart from "argu[ing] anything that they want with regard to damages, including the causal relationship of the herniated disc." He stated that all the court's answers to the two questions would impart to the jury is that "one, [Wal-Mart] has conceded negligence and, number two, [the court has] found that that negligence was a cause of an injury to the plaintiff and it's up to [the jury] to decide the significance and what that injury consists of."

¶24 The court granted Boland's motion, stating that it would answer the cause question in the affirmative, ruling that Wal-Mart's negligence "was a cause of [injury] to … Boland" and leave it to the jury to determine the nature and extent of those injuries in its answers to the damage questions. The court advised Wal-Mart's counsel that he would be free to argue to the jury that Boland's herniated disc was not caused by the incident in the store, and that her claim for that incident should be "limited to the pain of having boxes hit her, and … a doctor's visit or two."

¶25 Wal-Mart's counsel did just that. In his closing argument he told the jury (without objection by Boland or the court) that, while the court had answered the cause question in the affirmative, that answer related only to the pain she suffered at the time of the incident, and her initial visits to the doctor, and he argued strenuously that that was the extent of the injuries (and Boland's damages)

caused by the falling cartons.[9] He then discussed Dr. Galbraith's testimony at length, emphasizing Galbraith's opinion that the incident in the store did not cause Boland's herniated disc.

¶26 The court then instructed the jury and, with respect to the negligence and cause questions, stated:

> The parties stipulated and agree that Wal-Mart Stores, Inc. was negligent therefore [sic] Question No. 1 has been answered "yes." I have determined that such negligence was a cause of injury to Faye Lynn Boland on July 10, 1966. It is for the jury to determine the nature and extent of such injury in determining damages. [10]

¶27 Generally, a court may not direct a verdict "unless the court is satisfied that, considering all credible evidence in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such a party." ***Weiss v. United Fire & Casualty Co.***, 197 Wis. 2d 365, 388, 541 N.W.2d 753 (1995). A court is "clearly wrong," said the ***Weiss*** court, when it takes an issue from the jury that is supported by "any credible

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[9] Wal-Mart's counsel stated to the jury:

> The court has answered the cause question. Boxes fell on her back. She hurt. She expressed her pain and went to the doctor. That's an injury. That qualifies as an injury, but you still have evidence before you try and decide if the disc problem that then led to surgery, that then led to a second surgery, and segued into the rehabilitation management, that unfortunately turned into the [medication] addiction, and eventually led to the Mayo pain clinic, you still have to figure out based on the evidence that's been presented to you … was that disc problem caused by this incident[?] … Dr. Stevens probably the most prominent on the plaintiff's side of the case, has no problem with linking the incident and the disc problem …. Dr. Galbraith disagreed.

[10] The specific damage questions inquired what sums of money would compensate Boland "for such injuries as may have been sustained by [her] in the accident."

evidence" to the contrary—even though that evidence "be contradicted and the contradictory evidence be stronger and more convincing." ***Id***. at 389-90.

¶28 In applying those rules to this case, however, we must keep the matter in context. We have set forth at some length the colloquy between the court and counsel regarding its decision to answer the cause question, and we have discussed the manner in which the point was argued to the jury. And we are satisfied that, considering the court's ruling and its instruction to the jury, it did *not* rule that Wal-Mart's conceded negligence with respect to the cartons falling on Boland caused her herniated disc, the subsequent surgeries and all of the resulting problems. The court's instruction did no more than tell the jurors that, as a matter of law, the incident in the store caused *some* injury to Boland, and it was up to them to determine, in their answers to the damage questions, the actual nature and extent of that injury—whether, as Wal-Mart's counsel argued, it was limited to some temporary pain and discomfort, perhaps requiring a doctor's visit or two, or whether, as Boland's attorney propounded, it also encompassed the herniated disc and all of her subsequent problems.

¶29 We see no error in the court's ruling. Indeed, as Wal-Mart's counsel conceded at trial, there was no dispute that the packages falling on Boland caused her some injury—and the court's ruling went no further than that.

IV. Damages

¶30 Wal-Mart, arguing that the jury's damage award—even as reduced by the circuit court—was excessive, asks us to order a "substantial remittitur." It points to the first jury's $100,000 award in this case, and to other jury awards of far less than $800,000 "in the context of herniated-disc injuries," as evidence of the excessiveness of the second verdict in this case. Aside from renewing its

assertions that, according to its expert, the "glancing-blow" nature of the incident and Boland's initial complaints of pain are inconsistent with the existence of a herniated disc, Wal-Mart claims Boland's failure to mitigate her damages warrants remittitur in a sum greater than that ordered by the trial court (which, as we discuss below, remitted the jury's $375,000 pain-and-suffering award to $200,000 based largely on her failure to mitigate).

¶31 Generally, where the circuit court has sustained a verdict over a claim of excessiveness, we look to see whether there is any credible evidence "that under any reasonable view supports the verdict and removes the issue from the realm of conjecture." ***Coryell v. Conn***, 88 Wis. 2d 310, 315, 276 N.W.2d 723 (1979). In other words, to reverse in such a situation, we "must be able to say that there is such a complete failure of proof that the verdict must be based on speculation," ***id.***, and while we are to consider the evidence most favorably to the plaintiff, given the trial court's own analysis of the evidence in response to Wal-Mart's new-trial/remittitur motion, we need not review the entire record as a first impression and ascertain whether, in our judgment, the verdict is excessive. *See* ***Kobelinski v. Milwaukee & Suburban Transport Corp.***, 56 Wis. 2d 504, 525, 202 N.W.2d 415 (1972). Rather, we need only review the record "to the extent necessary to determine whether the trial court [erroneously exercised] its discretion." ***Id***. In this case, the circuit court approved all elements of the jury's damage award (except the award for pain and suffering which, as indicated, it reduced). We consider the verdict in this case, in its entirety, to be subject to the rules just discussed for review of verdicts that have been approved by the trial court, and we consider each element of damages in turn.

¶32 The jury awarded Boland $60,000 for past medical expenses. Wal-Mart's counsel conceded at the hearing on its post-verdict motions that the amount was appropriate.

¶33 The jury awarded Boland $100,000 for future medical expenses. Wal-Mart argues that there was insufficient evidence to support the award, claiming that the supporting witnesses' testimony (Dr. Stevens and Dr. Schwartz) was inadequate because Stevens "did not testify that any particular medical treatments were necessary and probable for Ms. Boland, offer any information as to the frequency of any particular measures, nor did he specify the costs of any future medical needs," and Schwartz "admittedly never reviewed Ms. Boland's medical records, but only considered selected information forwarded to him." Wal-Mart also points to testimony that Boland's physical therapy could be less expensive than predicted by the witnesses. In its decision on the post-verdict motions, the circuit court stated that, while it may have awarded less for future medical expenses, it believed there was ample evidence in the record to support the jury's award.

¶34 Dr. Stevens, testifying for Boland, stated that, in his opinion (to a reasonable degree of medical certainty), Boland's condition was chronic, requiring "continued follow-up and management for a lifetime," and that, again in his opinion to a reasonable degree of medical certainty (and in his own experience), the cost of her future treatment would be "in the area of $100,000 over a lifetime." Stevens also testified that, in his opinion, Boland's future treatment "will certainly involve doctors … physical therapy …, certainly may involve occasional use of medications, certainly may even involve some formal treatment by a pain management clinic." Dr. Schwartz's testimony was to a similar effect—that, in his opinion, it would be "reasonable for [Boland] to accrue at least $100,000 in

medical costs over the course of her life." We see no erroneous exercise of discretion in the circuit court's confirmation of the jury's award of $100,000 for future medical expenses.

¶35 Wal-Mart does not comment specifically on any of the other damage assessments made by the jury—past wage loss of $56,937 and future earning loss of $200,000; nor does it specify why it believes the award of $200,000 (after remittitur) for pain and suffering is excessive. Wal-Mart concentrates instead on comparing the aggregate verdict to other "herniated disc" verdicts. The trial court, considering the other elements of the verdict, determined that (with the exception of pain and suffering which, again, it reduced) they all were supported by the evidence. Our own review leads us to conclude that the court could reasonably so rule, and we see no misuse of discretion in that regard.[11]

V. The Cross-Appeal

¶36 Among Wal-Mart's motions after the second trial was one challenging the jury's award of damages as excessive, claiming that they were

[11] As to past wage loss, Boland points out that Wal-Mart's counsel, at the hearing on the post-verdict motions, stated: "As to past wage loss, $56,000 was awarded. That was what was sought, and for purposes of that, that's sensible in a remittitur setting."

The jury also awarded Boland $200,000 for future loss of earning capacity. Boland's expert witness, Ross Lynch, testified at length as to the manner in which her injuries and her skills would affect her ability to engage in other work, concluding that her employability had been "dramatically affected." Lynch computed Boland's annual loss (wages and fringe benefits) at $22,558 and stated that she had a working-life expectancy of at least another sixteen years. Lynch's testimony alone would thus support an award in excess of $300,000, and we see no misuse of discretion in the court's acceptance of the jury's $200,000 award for loss of future earning capacity.

Finally, as we conclude below, we are equally satisfied that the circuit court's decision reducing Boland's pain and suffering damages to $200,000 was reasonable.

"vastly out-of-line with awards in comparable Wisconsin cases." Alternatively, Wal-Mart asked for an unspecified remittitur.

¶37 The court granted Wal-Mart's motion in part—reducing the jury's $375,000 award for past and future pain, suffering and disability to $200,000, stating:

> [A]s to the past and future pain, suffering, and disability, as to that amount, I do find that's excessive and that it resulted from disregard of the evidence and the applicable law as to mitigation. I think the evidence is extremely clear in this case that her pain and suffering in all probability at least would have been ameliorated if she'd made greater efforts to reduce [her] weight and greater efforts to participate in continuing ... physical therapy. There was [evidence] that she couldn't – she couldn't do this and do that, but I think the evidence from all the doctors was to the contrary, that she in some way inhibited her own recovery. Therefore, the court is reducing the $375,000 to $200,000 which the court finds is a reasonable sum.

¶38 In determining whether a verdict award is excessive, the circuit court must view the evidence bearing on damages in the light most favorable to the plaintiff. ***Wester v. Bruggink***, 190 Wis. 2d 308, 326, 527 N.W.2d 373 (Ct. App. 1994). The court is not required to view pieces of evidence which in isolation might support the verdict, but must view the evidence as a whole. *See* ***id***. And because the circuit court has the advantage over an appellate court in that it has had the opportunity to observe the witnesses and the injured person, we will reverse its determination that the damages are excessive only if we find a misuse of discretion. *See* ***id***. And we will not do so if we can perceive a reasonable basis for the court's determination. *See* ***id***. at 327.

¶39 Boland criticizes the circuit court's determination that, in its view, the jury disregarded evidence that she had failed to take reasonable care to

mitigate her damages—particularly with respect to her failure to undertake a workable weight-loss regimen and to engage in recommended physical therapy. She points to testimony from some of the medical and therapy witnesses that, at various times, she was "cooperative" with respect to her therapy and other treatment recommendations, and that she "did the best she could given her situation." As Wal-Mart points out, however, there was considerable evidence that Boland persistently failed to follow her physicians' and therapists' advice with respect to her activities, her medications, her physical therapy and the continuing recommendations that she lose weight.[12]

¶40 We are satisfied that there was a reasonable basis for the circuit court's remittitur. In ***Wester***, we upheld a remittitur of $20,000 on a $75,000 pain-and-suffering verdict on the following basis:

> The trial court gave these reasons for its decision: that Bruggink had a preexisting injury which would have given her pain without the accident, that her quality of life was not substantially impaired and that the surgery was likely to give her significant relief from the injury. Under our deferential standard of review, we cannot conclude that these bases are unreasonable; the trial court with a view of Bruggink herself was in a better position to assess the extent to which [her] injuries were proved under the evidence. Therefore, we affirm the trial court on the cross-appeal.

Id., 190 Wis. 2d at 327. The circuit court's reasons for the remittitur in this case are the equivalent of those offered in ***Wester***, warranting affirmance here as well.

By the Court.—Judgment and order affirmed.

[12] Boland, described by one or more of the medical witnesses as "morbidly obese" weighed 290 pounds on or about the time the packages fell on her, and, despite the nearly universal opinion of the physicians and therapists that she undertake a concentrated weight-loss program, gained sixty pounds after the incident.

Not recommended for publication in the official reports.