UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WILLIAM P. KRIPPLEBAUER and ANGELA KRIPPLEBAUER, his wife,	CIVIL ACTION NO. 3:02-CV-1499
Plaintiffs,	
v.	(JUDGE CONABOY)
CELOTEX CORP.,	
Defendant and Third-Party Plaintiff,	
v.	
ZIEGLER CHEMICAL & MINERAL CORP.,	
Third-Party Defendant.	

MEMORANDUM AND ORDER

We consider in this Memorandum Plaintiff William P. Kripplebauer's Motion for New Trial, (Doc. 164), filed pursuant to Rule 59(a) of the Federal Rules of Civil Procedure.[1] The matter

[1] Two other motions are currently pending in this case: Motion of Third Party Defendant Ziegler Chemical & Mineral Corp. for Entry of Judgment in its Favor and Against Third Party Plaintiff Celotex Corporation, (Doc. 161), in which Ziegler argues that it is not responsible for Celotex's expenses and attorneys' fees; and Cross-Motion of Third-Party Plaintiff Celotex Corporation for Judgment Against Third-Party Defendant Ziegler Chemical & Mineral Corp. in which Celotex seeks to have Ziegler pay Celotex all of its expenses and reasonable attorneys' fees in defending the claims brought by William P. Kripplebauer and Angela Kripplebauer in the above-captioned case, (Doc. 166). Because these motions will be moot if Plaintiff's Motion for New Trial is granted, we must dispose of the Motion for New Trial before addressing the remaining pending motions.

has been fully briefed and is ripe for disposition.

I. Background

Although the parties differed on precisely how the accident which formed the basis of this action occurred and at trial presented evidence in support of their respective positions, many basic facts were not in dispute. Plaintiff William Kripplebauer (Plaintiff) is an independent contractor who transported a load of hot asphalt in his tanker-truck from supplier Ziegler to purchaser Celotex. The receiving facilities at the Celotex plant included a pump mechanism located in an enclosed brick structure and a hose which connected to Plaintiff's vehicle. On November 3, 1999, the day of the accident, there was a problem with the flow of the asphalt. Plaintiff disconnected the hose: according to Plaintiff he did so at the request of Celotex's employee; Celotex maintains that their employees warned him not to do so. Once the hose was disconnected, a surge of hot asphalt burned Plaintiff.

Plaintiffs originally filed their Complaint in the Schuykill County Court of Common Pleas against Defendant Celotex. (Doc. 1, Ex. D.) Defendant Celotex (Celotex) removed the case to this Court on August 26, 2002. (Doc. 1.)

With permission of the Court, Celotex filed a Third-Party Complaint against Ziegler on November 4, 2002, (Doc. 15). The Third-Party Complaint alleged that Defendant Celotex contracted with Ziegler to purchase asphalt resin which Plaintiff delivered.

Under the terms and conditions of the contract, Celotex averred that Ziegler agreed to indemnify Celotex for the claims asserted in Plaintiff's Complaint. The relevant provision (which is located on the back of the purchase order) provided:

> SELLER SHALL INDEMNIFY, DEFEND, AND HOLD HARMLESS BUYER FROM ANY AND ALL CLAIMS, LIABILITIES, DAMAGES, AND EXPENSES (INCLUDING REASONABLE ATTORNEYS FEES) ON ACCOUNT OF THE DEATH OR INJURY TO ANY PERSON OR DAMAGE TO ANY PROPERTY ARISING FROM OR IN CONNECTIONS WITH ANY GOODS OR SERVICES SUPPLIED, EXCEPT TO THE EXTENT CAUSED BY BUYER'S SOLE NEGLIGENCE OR INTENTIONAL MISCONDUCT THIS INDEMNITY SHALL APPLY WITHOUT REGARD TO CONTRACT, BREACH OF WARRANTY, NEGLIGENCE, STRICT LIABILITY OR OTHER TORT. THIS INDEMNITY SHALL SURVIVE DELIVERY AND ACCEPTANCE OF GOODS OR SERVICES.

(Doc. 15, Ex. A ¶ 8.)

Celotex maintained that its conduct was reasonable, prudent and cautious under the circumstances and did not proximately cause Plaintiff's injuries. Celotex further averred that Plaintiff's injuries were not caused by Celotex's sole negligence or intentional misconduct. Therefore, the above contract provision obligates Ziegler to indemnify, defend and hold harmless Celotex.

On December 23, 2002, Celotex moved for entry of default against Ziegler. (Doc. 17.) Judgment was entered on January 13, 2003, reserving the issue of damages until resolution of the case. (Doc. 22.)

On January 12, 2004, Ziegler moved to vacate the default judgment entered on January 13, 2003. (Doc. 39.) The Court heard

oral argument on February 26, 2004, and granted the Motion by Order of February 27, 2004, (Doc. 59).

The case came to trial before this Court on May 24, 2004. During the trial, the jury received contradictory evidence about how the accident happened both from expert and lay witnesses. The parties also produced contradictory evidence about the conduct of Defendant Celotex's employees who were present at the scene and Plaintiff's conduct, including whether he was wearing safety equipment.

On June 1, 2004, the Court met with counsel to discuss points for charge and jury interrogatories. The interrogatories were agreed upon and were distributed to the jury following closing arguments and jury instructions. The jury returned a verdict with the interrogatories in favor of Defendants. On the Special Interrogatories form, (Doc. 142), Question One asked: "Do you find that Plaintiff William Kripplebauer has proved by the fair weight and preponderance of the evidence that Defendant Celotex was negligent?" The jury answered "yes." Question Two asked: "Do you find that Plaintiff William Kripplebauer has proved by the fair weight and preponderance of the evidence that the negligence of Defendant Celotex was a substantial factor in bringing about Plaintiff William Kripplebauer's harm?" The jury answered "no." Following Question Two, the Interrogatories form instructed the jury: "If you answer 'no,' you should answer no further questions

and return with that report to the Court." (Doc. 142 at 1.) Because the jury answered "no" to Question Two, it answered no further questions.

Plaintiff filed this motion on June 16, 2004, (Doc. 164), and submitted his supporting brief on July 16, 2004, (Doc. 170). Defendant Ziegler filed its opposition brief on August 3, 2004, (Doc. 173), and Defendant Celotex filed its opposition brief on August 5, 2004, (Doc. 174). Plaintiff filed a Reply Brief on August 17, 2004, (Doc. 175).

In the pending motion Plaintiff argues that the verdict in favor of Celotex was, in light of the jury's answers to Special Interrogatories One and Two, against the weight of the evidence so that Plaintiff should be granted a new trial. (Doc. 170.) Defendants maintain that the jury's verdict should be upheld and a new trial is not warranted.[2] (Docs. 173, 174.)

II. Discussion

A. Rule 59(a) Standard

Rule 59 of the Federal Rules of Civil Procedure in pertinent part provides that "[a] new trial may be granted . . . (1) in an action in which there has been a trial by jury, for any of the

[2] Defendant Ziegler did not file an opposition brief but filed a response, (Doc. 173), which consists of ten numbered paragraphs corresponding to and answering the ten paragraphs in Plaintiff's motion, (Doc. 164). For this reason, the "Discussion" portion of this Memorandum will refer only to Defendant Celotex's opposition brief, (Doc. 174).

reasons for which new trials have heretofore been granted in actions at law in the courts of the United States . . . ." Fed. R. Civ. P. 59(a).

Here Plaintiff asserts that the jury's verdict was against the weight of the evidence. (See Doc. 170 at 9.) Motions brought on grounds that the verdict was against the weight of evidence are proper. Lind v. Shenley Industries, Inc., 278 F.2d 79, 89-90 (3d Cir.)(en banc), cert. denied, 364 U.S. 835 (1960); Farra v. Stanley-Bostitch, Inc., 838 F. Supp. 1021 (E.D. Pa. 1993).

In deciding the pending motion, we are guided by legal authority which instructs us that a motion for a new trial based on the assertion that the jury's verdict was against the weight of evidence is to be granted only when the record shows that the jury's verdict resulted in a miscarriage of justice or where the verdict, on the record, cries out to be overturned or shocks the court's conscience. Williamson v. Consolidated Rail Corp., 926 F.2d 1344, 1353 (3d Cir. 1991). The purpose of this rule is to ensure that the trial court does not supplant the jury verdict with its own interpretation of facts and determination of witness credibility. See Olefins Trading, Inc. v. Han Yang Chemical Corp., 9 F.3d 282, 289-90 (3d Cir. 1993). While the authority to grant a new trial is left almost entirely to the exercise of discretion of the trial court, the discretion must not be abused. Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 36 (1980)(per

curiam). The trial court must exercise its discretion recognizing that granting a new trial based on the weight of the evidence is "to some extent . . . an action [which] denigrates the jury system." Lind v. Schenley Indus., Inc., 278 F.2d 79, 90 (3d Cir. 1960). Therefore, a trial court should view the power to overturn a jury verdict on "weight of the evidence" grounds as severely circumscribed. Henry v. Hess Oil Virgin Islands Corp., 163 F.R.D. 237, 242 (D.C.V.I. 1995).

The court's decision must be based on the sufficiency of the evidence submitted to the jury. A new trial is not warranted merely because one feels or could speculate that a jury could have reached a different result. See Gebhardt v. Wilson Freight Forwarding Co., 348 F.2d 129, 133 (3d Cir. 1965). The question is not whether the evidence "preponderated" in favor of one party or another. Hourston v. Harvlan, Inc., 457 F.2d 1105, 1107 (3d Cir. 1972). Rather, "[i]f the evidence in the record, viewed from the standpoint of the successful party, is sufficient to support the jury verdict, a new trial is not warranted." Id. (citations omitted). This Court reiterated these principles in Van Scoy v. Powermatic, 810 F. Supp. 131, 134 (M.D. Pa. 1992), where we stated:

> It is not the Court's duty . . . on a motion for new trial, to second-guess or to countervail a jury's reasonable determination, even in the instance where a Court disagrees with the jury's findings. Indeed, unless there is a significant miscarriage of justice, the Court must consider the evidence on such a motion in a

> light most favorable to the verdict winner.
>
> . . .
>
> . . . One must ever be alert to the fact . . . that in considering such a motion the evaluation of witness credibility and of disputed testimony are matters clearly and solely within the province of the jury and in the absence of clear error, that province should not be invaded by the Court.

Van Scoy, 810 F. Supp. at 134.

B. Sufficiency of the Evidence

Applying these principles to the case before us, we find that a new trial is not warranted based on the ground that the jury's verdict is against the weight of evidence. Sufficient evidence was presented to the jury to support a verdict that Plaintiff had failed to prove that Defendant Celotex's negligence was a substantial factor in bringing about Plaintiff's harm.

Plaintiff argues that "the evidence at trial disclosed that Celotex failed in meeting the duty of care it owed Kripplebauer in at least five respects." (Doc. 170 at 4.) He identifies the following five negligence theories:

> First, Kripplebauer demonstrated that Celotex failed to maintain its asphalt piping system in a safe condition so as to prevent slugging of asphalt in Celotex's lines during the asphalt unloading process. . . .
>
> Second, Kripplebauer introduced evidence that Celotex failed to adequately train its employees so as to avoid utilizing unsafe procedures, namely the use of steam to clear Celotex's slugged asphalt transfer piping system while said piping was connected to the outtake pipe of asphalt tanker trucks. . . .
>
> Third, the record disclosed that Celotex failed to have adequate safety procedures in

> place to minimize the risk of injury to Celotex employees and others during the asphalt unloading process. . . .
>
> Fourth, the testimony of Celotex employees confirmed that they utilized the extremely hazardous method of injecting steam in the asphalt transfer system piping as a means of clearing slugged lines. . . .
>
> Fifth, the record indicates that Celotex employees did not warn Kripplebauer concerning any use of steam to clear the slugged asphalt transfer system piping. . . .

(Doc. 170 at 4-6.) Plaintiff further argues that the jury, by affirmatively answering Question One on the Special Interrogatories form, indicated that it believed at least one or more of Plaintiff's negligence theories. (Id. at 6.) Based on the fact that the jury found Celotex negligent and Plaintiff's assumption that "under the facts of the case and as a matter of law" each of Plaintiff's negligence theories standing alone "constituted a substantial factor in bringing about the harm Kripplebauer suffered," Plaintiff finds the jury's answer to Question Two - the finding that Celotex's negligence was not a substantial factor - "incomprehensible." (Id. at 6-7.) In summary, Plaintiff's argument hinges on his belief that Celotex's negligence was a substantial factor in bringing about his harm as a matter of law.

Plaintiff cites Section 433 of the Restatement Second of Torts (1965) in support of his argument. Section 433 provides in pertinent part:

> The following considerations are in themselves or in combination with one another important in determining whether the actor's

> conduct is a substantial harm to another:
> (a) the number of other factors which contribute in producing the harm and the extent of the effect which they have in producing it;
> (b) whether the actor's conduct has created a force or series of forces which are in continuous and active operation up to the time of the harm, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible;
> (c) lapse of time.

Restatement Second of Torts § 433.

Based on his assertion that the jury did not find Plaintiff contributorily negligent and there was no evidence of third–party negligence, Plaintiff further argues that the jury necessarily ruled out "other factors" referenced in subparagraph (a) above. (Doc. 170 at 7.) Plaintiff finds subsections (b) and (c) satisfied, citing as support the assumptions that Plaintiff was not contributorily negligent, there was no "appreciable interruption in the series of forces set in motion by Celotex" and all of the witnesses to the incident testified that it occurred "within a period measured by seconds." (Id.)

Defendant Celotex argues that the jury was presented with contradictory testimony throughout the trial and the verdict was a determination of credibility. (Doc. 174 at 6.) Defendant Celotex also states that "Plaintiff's Motion for New Trial is premised on two false assumptions: (1) that we must presume that the conduct of Celotex caused plaintiff's injuries; and (2) that the jury affirmatively concluded that plaintiff was not negligent." (Doc.

174 at 2.) Defendant Celotex also points out that Plaintiff had the burden to prove both the negligence and causation elements of his case and that the jury verdict obviously indicated that he did not prove the causation element. (Id. at 2-3.) Defendant Celotex sees the following as the logical explanation of the jury's verdict:

> The jury heard evidence that allowed it to conclude that Celotex may have acted negligently in various ways unconnected to the accident, such as allowing puddles of asphalt on the ground, not giving Mr. Kripplebauer an instruction manual, or allowing Mr. Kripplebauer to be at the rear of the trailer during the off-loading process. None of this conduct, however, actually caused Mr. Kripplebauer's injuries. The obvious inference from the verdict is that the jury concluded that this conduct was "negligent," but that it did not cause Mr. Kripplebauer's injuries.

(Doc. 174 at 2.)

Defendant Celotex also asserts that, based on the fact that the jury did not reach the contributory negligence question, Plaintiff "has no basis to claim that the verdict was a factual finding that Mr. Kripplebauer was not responsible for his own injuries. Rather, the most logical inference from the verdict is the opposite . . . . Since Celotex's conduct was not the cause of the injuries, by inference, Mr. Kripplebauer's conduct must have caused them." (Id. at 3.)

Plaintiff's basic assertion upon which this motion is grounded - that Celotex's negligence was a substantial factor in bringing

about his harm *as a matter of law* - is without foundation in law or fact. Plaintiff misconstrues the jury's findings and misapplies the law of negligence, specifically the causation element of a negligence cause of action. Our review of Plaintiff's general argument and specifically asserted theories in the context of the testimony and other evidence presented at trial indicates that Plaintiff falsely assumes at least three things: (1) that the jury necessarily found that the evidence supported or did not contradict at least one of his theories - in other words, that these were exclusively the theories upon which the jury could have based its finding of negligence; (2) that each theory standing alone was a substantial factor in bringing about the Plaintiff's injuries as a matter of law; and (3) that the jury found that Plaintiff was not negligent.

On the issue of Plaintiff's own negligence, the jury did not conclude that Plaintiff was not negligent. The jury never reached the question of whether Plaintiff was contributorily negligent because it was instructed to answer no further questions if it found that Defendant Celotex's negligence did not cause the Plaintiff's harm. No other question about Plaintiff's own negligence was posed to the jury. Given this context, no inference can be made that the jury found that Plaintiff was not negligent. Therefore, Plaintiff's conclusion that given the jury's finding that Celotex was negligent and Plaintiff was not, Celotex's

negligence was the only factor causing Plaintiff's harm and necessarily a substantial factor in causing the harm is without merit. (See Doc. 170 at 9.) The effect of Plaintiff's misapprehension can be seen in our review of his asserted theories of negligence.

Regarding the exclusivity of Plaintiff's theories and his substantial factor argument, we conclude that the facts and circumstances of this case do not require a finding that at least one of Plaintiff's five identified negligence theories was accepted by the jury and was a substantial factor in bringing about Plaintiff's harm as a matter of law.

First, the fact that the evidence showed that a slug existed in the line does not equate with the conclusion that Plaintiff "demonstrated that Celotex failed to maintain its system in a safe condition as to slugging." (Doc. 170 at 4.) The evidence cited by Plaintiff in support of this theory shows only that a slug existed when Plaintiff was offloading the asphalt at the Celotex plant and that slugging had occurred in Celotex's lines prior to the incident at issue here. This evidence does not equate with the proposition that the mere existence of slugging is a violation of the duty of care an offloading facility owes to the driver of an asphalt tanker truck. Thus, the jury could have rejected this theory of negligence. Morevover, even if the jury accepted the theory, it could have believed that it was not a substantial factor in

bringing about Plaintiff's injuries if it believed the testimony by Celotex employees Bobbi Jo Delbaugh and Christine Whitesel that Plaintiff was told not to disconnect the hose and did so anyway. In other words, the jury could have believed that Defendant Celotex breached a duty of care when it maintained its facility in a manner which allowed the existence of the slug. However, it could also have concluded that the mere existence of the slug, the breach of duty, was not a substantial factor in causing the harm because Plaintiff would not have been injured if he did not disconnect the hose after being instructed not to do so.

Second, Plaintiff's introduction of evidence that Celotex "failed to adequately train its employees so as to avoid utilizing unsafe procedures, namely the use of steam to clear Celotex's slugged asphalt transfer piping system while said piping was connected to the outtake pipe of asphalt tanker trucks," (Doc. 170 at 4), was directly contradicted by evidence that steam was not used to clear Celotex's lines in the form of testimony from both of the Celotex employees on the scene at the time of the incident - Bobbi Jo Delbaugh and Christine Whitesel. While the jury may have believed that Celotex was negligent regarding the training and safety issues related to the steam process, Celotex's employees' lack of training or the general safety of such a procedure would not be a substantial factor in bringing about Plaintiff's harm if the jury believed that steam was not used to clear the lines on the

day in question.

In support of Plaintiff's third theory of negligence - "that Celotex failed to have adequate safety procedures in place to minimize the risk of injury to Celotex employees and others during the asphalt unloading process," (Doc. 170 at 5) - he cites evidence that Celotex had no formal written procedures pertaining to the unloading of ashpalt tanker trucks. First, the fact that Celotex had no written procedures does not necessarily lead to the conclusion that it did not have adequate safety procedures in place. Therefore, the jury could have rejected this theory of negligence. However, even if the jury considered Celotex negligent for failing to have safety procedures reduced to writing, it could have concluded for any number of reasons that this negligent conduct was not a substantial factor in bringing about Plaintiff's harm. This is another instance where the jury could have considered Plaintiff's own actions in deciding that the negligence was not a substantial factor if it believed, for example, that the lack of written instructions in this situation would have been harmless if Plaintiff had heeded Defendant Celotex's employees' instructions.

Fourth, because "the testimony of Celotex employees confirmed that they utilized the extremely hazardous method of injecting steam in the asphalt transfer system piping as a means of clearing slugged lines," (Doc. 170 at 6), on one occasion does not mean that

it was used during the incident in question. Therefore, even if the jury believed that it was negligent conduct for Celotex to *ever* use steam to clear slugged lines, this negligent conduct would not be a substantial factor in bringing about Plaintiff's harm if the jury did not believe that steam was used to clear the lines when Plaintiff was offloading asphalt on the day in question.

Plaintiff's fifth asserted theory of negligence - that "the record indicates that Celotex employees did not warn Kripplebauer concerning any use of steam to clear the slugged asphalt transfer system piping," (Doc. 170 at 6) - assumes that steam was used. The jury's rejection of the steam theory would logically also have it reject the duty to warn as a basis of negligence.

Defendant Celotex's additional theories upon which the jury could have found it negligent - the pooling of asphalt, the use of wooden ramps to raise the tanker, the use of unmanned propane torches, allowing Plaintiff to use the torches, and the lack of a fire extinguisher in the pump house, (Doc. 174 at 13-14) - are also plausible. The jury's acceptance of any one of these theories would also be consistent with a finding that any one or a combination did not cause Plaintiff's harm.

We will not further review these additional theories because, even if we were to accept Plaintiff's premise that the jury must have believed one of its theories to affirmatively answer Question One, as our analysis of the five asserted theories demonstrates, it

was not inconsistent for the jury to have concluded that the negligent conduct was not a substantial factor in causing Plaintiff's harm.

As Defendant Celotex has averred, credibility played a central role in this trial and there was sufficient evidence to lead the jury to conclude that Defendant Celotex's negligence was not the cause of Plaintiff's injuries. (See Doc. 174 at 6-14.) Plaintiff's credibility was seriously challenged by Defendant Celotex when it showed that the Plaintiff had made contradictory statements about how the accident happened. Defendant Celotex also provided the jury with evidence (contrary to Plaintiff's) that cast serious doubt on whether Plaintiff was wearing safety equipment at the time of the accident because neither Plaintiff's hard hat nor safety glasses contained any sign of the asphalt which sprayed all over Plaintiff's head and body. Thus, the issue of credibility - basically a jury function - played a significant role in the jury's deliberation.

Plaintiff does not argue that contradictory evidence was not believable or seek to demonstrate that it was quantitatively insufficient - rather he cites evidence in support of his asserted theories and concludes that each is a "substantial factor" standing on its own. However, contrary to Plaintiff's assertions, there was ample evidence that the Plaintiff's own actions in detaching the hose - against the advice of Celotex employees - was the sole cause

of the accident and Plaintiff's injuries, and not any of the conduct of Celotex or its employees. As we said in Van Scoy, Plaintiff "seems to argue that the jury should have believed his testimony." Van Scoy, 810 F. Supp. at 135. However, this is not the standard employed to decide a Rule 59 motion. Van Scoy was another case in which the plaintiff's arguments included that the answers to jury interrogatories were "inconsistent in law and fact." Id. at 134-35. We made the following observations about the plaintiff's motion for a new trial:

> Reference to the Plaintiff's brief and Plaintiff's counsel's argument throughout the trial . . . immediately reveals that Plaintiff disagrees with [the jury's] findings and sought to have the jury make other findings. . . .
>
> The Plaintiff makes the common error of arguing on the basis of facts he wishes the jury would have accepted.

Van Scoy, 810 F. Supp. 134.

The same can be said of Plaintiff here and our conclusion in the face of Plaintiff's factual and legal arguments. Given the contradictory evidence presented to the jury at trial and the divergent conclusions able to be drawn from the evidence, this is not one of the rare cases in which a new trial is warranted. Here the jury could have found Defendant Celotex negligent on a number of grounds - not just those asserted by Plaintiff. Further, as demonstrated in our review of Plaintiff's asserted theories, Plaintiff's substantial factor analysis is flawed - it is just not

factually or legally correct to assert that "any one of the various forms of Celotex's negligence asserted by Kripplebauer would, as a matter of law, have constituted a substantial factor in causing the harm he suffered." (Doc. 175 at 4.) Rather, under several of the asserted theories, the jury could have found that Defendant Celotex breached a duty of care without finding that the breach of duty was a substantial factor in causing Plaintiff's injuries. (See supra pp. 12-15.) Therefore, the jury's verdict is not logically inconsistent or contrary to the evidence and must be allowed to stand.

III. Conclusion

For the reasons set forth above, Plaintiff's Motion for New Trial, (Doc. 164), is denied. An appropriate Order follows.

_____
RICHARD P. CONABOY
United States District Judge

DATED: _____

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WILLIAM P. KRIPPLEBAUER and ANGELA KRIPPLEBAUER, his wife,	:	CIVIL ACTION NO. 3:02-CV-1499
Plaintiffs,	:	
v.	:	(JUDGE CONABOY)
CELOTEX CORP.,	:	
Defendant and Third-Party Plaintiff,	:	
v.	:	
ZIEGLER CHEMICAL & MINERAL CORP.,	:	
Third-Party Defendant.	:	

ORDER

AND NOW, THIS _____ DAY OF OCTOBER 2004, FOR THE REASONS SET FORTH IN THE ACCOMPANYING MEMORANDUM, IT IS HEREBY ORDERED THAT:

1. Plaintiff's Motion for New Trial, (Doc. 164), is DENIED;

2. The Clerk of Court is directed to mark the docket.

_____
RICHARD P. CONABOY
United States District Judge