Date 11/17/04

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COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CIVIL ACTION
No. 2002-1159

MARCIA RHODES, HAROLD RHODES, Individually
and HAROLD RHODES on behalf of his minor child and next friend
REBECCA RHODES,
Plaintiffs,

vs.

CARLO ZALEWSKI, DRIVER LOGISTICS, and
BUILDING MATERIALS CORPORATION OF AMERICA
d/b/a GAF MATERIALS CORPORATION,
Defendants.

MEMORANDUM OF DECISION and ORDER
[On Defendants' Post Trial Motions]

This matter comes before the Court on the following post trial motions filed by the defendants. Defendants, Carlo Zalewski and Driver Logistics, filed an emergency motion to file their motion for a new trial and/or remittitur late. Building Materials Corporation of America filed a motion for a new trial and/or remittitur.

After hearing and review of the submissions, the motions are denied.

DISCUSSION

Mass. Rule Civ. P. 59(b) states "a motion for a new trial shall be served not later than ten days after the entry of the judgment." (Emphasis supplied). The defendants Carlo Zalewski and Driver Logistics Services, Inc. do not argue that they complied with the requirement of Rule 59(b) for service within ten days. They argue the motion to file

late should be allowed because it is in the nature of a motion to join the co-defendant's motion which was filed timely. I do not find the argument compelling; the liability is joint and several. I do not find compliance with the mandatory language of Rule 59(b). See Lopes v. City of Peabody, 426 Mass. 1001 (1997). Thus the motion to file late is denied.

Building Materials Corporation of America argues the failure of the court to order production of plaintiff, Marcia Rhodes', psychiatric records was error. It also claims the verdict was excessive and against the weight of the evidence both as to the plaintiff, Marcia Rhodes, and the loss of consortium claims of Harold Rhodes and his daughter, Rebecca Rhodes. Finally it argues a juror should have been dismissed from the trial.

A pre-trial conference was held on April 1, 2004 at which time a trial date was set for September 7, 2004 with a "First Out" status. Such designation is generally requested by counsel on cases involving either complex issues or multiple parties. Clearly, it presupposes that counsel are or will be ready for trial.

On June 8, 2004 Building Materials Corporation of America filed a motion to compel the mental health records of the plaintiff, Marcia Rhodes. After hearing, the Court, Chernoff, J., denied the motion. The denial was entered on the docket on June 16th. Almost two months later and approximately two weeks before the scheduled trial date there was a "joint emergency motion" filed by the defendants for an in camera review of Marcia Rhodes' mental health records. There was no basis for the motion to be filed as "an emergency". Failure to act in a timely manner does not rise to the level of "an emergency" and the use of such designation is an abuse. Notwithstanding the untimeliness the motion was heard and denied on August 23th.

Prior to the June 2004 hearing, counsel for the plaintiff attempted to resolve the issue by offering to produce Marcia Rhodes' mental health records pertaining to her bi-polar disorder and ADHD for a period of five years before the accident. The request was rejected which precipitated the argument before Chernoff, J.

The court rejects Building Materials Corporation of America's claim that it was prejudiced by not having access to the mental health records. The plaintiff presented only garden variety mental health issues which the jury would expect from a person rendered a paraplegic. During her examination Mrs. Rhodes testified she had a bi-polar disorder and ADHD both before and after the accident. I incorporate by reference and adopt the arguments set forth by the plaintiffs in response to the motion for a new trial or alternatively for a remittitur.

On the eve of trial the defendants admitted liability; challenging only the damages. The record presented to the jury was specific as to the hard costs incurred by the Rhodes family as a result of Marcia Rhodes being rendered a paraplegic from the accident. The jury heard evidence of the costs expended up to the time of trial and necessary future costs to complete renovates to the house to make it handicap accessible. The figures were substantial. Additionally, the jury heard the costs of the life care plan. The defendants presented their own expert on the costs and necessity of such life-long needs. It was within the province of the jury to assess the credibility of the witnesses and to adopt or reject the costs figures and to determine what would be fair and reasonable compensation not only for the hard costs but also for the physical and mental pain and suffering which were warranted. The verdict was neither excessive nor against the weight of the evidence.

The discharge of a juror is a very serious matter. No juror may be discharged if he or she remains indifferent and impartial. After examining the juror at side bar outside the presence of the remaining jurors I deemed her to be impartial.

ORDER

The motion of Carlo Zalewski and Driver Logistics to file late their motion for a new trial and/or remittitur is **DENIED**. The motion of Building Materials Corporation of America d/b/a GAF Materials Corporation is **DENIED**.

Elizabeth Bowen Donovan
Justice of the Superior Court

Date: November 15, 2004

A TRUE COPY
Attest: Mary E. Kenney
Deputy Assistant Clerk
11/17/04