COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.	SUPERIOR COURT DEPARTMENT OF THE TRIAL COURT Civil Action No. 02-01159A
MARCIA RHODES, HAROLD RHODES, INDIVIDUALLY, and HAROLD RHODES, ON BEHALF OF HIS MINOR CHILD AND NEXT FRIEND, REBECCA RHODES, Plaintiffs, v. CARLO ZALEWSKI, DRIVER LOGISTICS, PENSKE TRUCK LEASING CORP., and BUILDING MATERIALS CORP. OF AMERICA d/b/a GAF MATERIALS CORP., Defendants,	**PLAINTIFFS' OPPOSITION TO MOTION OF DEFENDANT BUILDING MATERIALS CORP. OF AMERICA d/b/a GAF MATERIALS CORP. FOR NEW TRIAL OR ALTERNATIVELY FOR REMITTITUR**

As the Court is aware, this case involved the catastrophic injuries suffered by Marcia Rhodes on January 9, 2002 when a fully-loaded tractor-trailer smashed into the back of her stopped car and paralyzed her. In the week leading up to trial, the defendants, Carlo Zalewski, Driver Logistics and Building Materials Corp. of America d/b/a GAF Materials Corp. ("GAF"), each admitted to liability. The jury, after hearing the evidence, returned with a fair and reasonable verdict which should be allowed to stand as there are no legitimate grounds for ordering a new trial or remittitur.

I. Defendant's Motion Should be Denied Because the Court Correctly Precluded Discovery of Marcia Rhodes' Mental Health Records and Defendant Cannot Show It Was Prejudiced by That Decision.

As the cornerstone of its Motion, GAF complains of rulings by this Court to protect Mrs. Rhodes from an inspection of her private mental health records in what would have been a fishing expedition by GAF. Mrs. Rhodes is paralyzed from the waist down, and will be for the

rest of her life. As a result, she is suffering, as would anyone, from grief, frustration, and depression related to her physical condition. Any reasonable jury could evaluate Mrs. Rhodes' mental anguish and emotional distress over the catastrophic effects of her injuries based on its own common sense and experience. As such, Mrs. Rhodes only sought, and only received, damages for "garden-variety emotional distress;" she did not need, and therefore did not call as a witness, her psychiatrist or psychologist to explain her emotional suffering to the jury. See, e.g., Sorenson v. H&R Block, Inc., 197 F.R.D. 199, 204 (D. Mass. 2000) (allegations of mental anguish, humiliation and severe emotional distress "do not denote the type of psychic or psychological injury which would trigger a waiver" of the psychotherapist-patient privilege).[1]

GAF's argument is based on two pieces of evidence produced in the course of discovery: 1) Mrs. Rhodes' response to an Interrogatory asking her to describe her damages, in which she stated that the paralysis "exacerbated" her ADHD; and 2) the life-care plan's reference to Mrs. Rhodes' "impaired coping abilities" related to her ADHD and bi-polar disorder. As Mrs. Rhodes did not provide any testimony at trial that her paralysis exacerbated her pre-existing conditions, GAF cannot establish that it was prejudiced by not having access to years of therapy records pre-dating the January 9, 2002 accident. It is also difficult for GAF to establish prejudice based on the statements in the life care plan as 1) only the cost tables, not the text, of the life care plan were marked as exhibits at trial and 2) GAF never bothered to depose Adele Pollard, R.N., after it was served with Mrs. Rhodes' responses to expert interrogatories on February 5, 2004.

[1] Because the parties already argued the issues raised by GAF and the Court ruled on them on two separate occasions, the arguments need not be repeated in detail here. However, for the Court's convenience, a copy of *Plaintiffs' Opposition to GAF's Motion to Compel* is attached hereto as Exhibit A and a copy of *Plaintiff's Opposition to Joint Emergency Motion of Building Materials Corp. of America d/b/a GAF Materials Corp., Carlo Zalewksi and Driver Logistics, Inc. for In Camera Review of Plaintiff Marcia Rhodes' Mental and Emotional Health Records and to Compel Deposition Testimony Relating to Plaintiff Marcia Rhodes' Mental and Emotional Health* is attached as Exhibit B.

If GAF had deposed Ms. Pollard, it would learned all of what Ms. Pollard testified to at trial – she is an RN who has worked with patients with catastrophic injuries for almost 30 years, and that she has both a bachelor's and master's degree in psychology which she pursued after noticing the psychological recovery and adjustment that her patients went through following a catastrophic injury. GAF could have asked Ms. Pollard to explain how and why her life care plan took Mrs. Rhodes' impaired coping abilities into consideration. GAF could have also pursued such a line of inquiry in cross-examining Ms. Pollard at trial – but it chose not to do so.

Instead, GAF has focused on a very small component of the October 2003 life care plan prepared by Ms. Pollard. That plan, however, was updated after Ms. Pollard interviewed Mrs. Rhodes and reviewed additional medical records in July, 2004. As a result, Mrs. Rhodes served Supplemental Answers to Expert Interrogatories in August, 2004, which are attached hereto as Exhibit C. The cost tables from the August 2004 life care plan were introduced at trial, without objection. The cost tables do not include any charges for the psychiatrist that Mrs. Rhodes began to see after the accident, Dr. Kelly Clark. In addition, all out-of-pocket costs for mental health providers and medicines were removed from Plaintiffs' claim. It is worth noting that it is Plaintiffs' claim as presented at trial, not prior (and mostly obsolete) discovery, which should form the basis for a claim of prejudice. To the extent that GAF is relying on a purported $3,600 cost for psychiatric treatment in the future as the basis for a new trial, such a claim is unfounded. In no event should the cost of psychiatric treatment following a catastrophic physical injury serve as the basis for GAF to traipse through years of Mrs. Rhodes' therapy records pre-dating the accident.

While GAF protests that the Court prevented it from reviewing Mrs. Rhodes' therapy records for her pre-existing conditions, it fails to note that it flatly refused Mrs. Rhodes' offer to

turn over therapy records discussing ADHD and her bi-polar condition in exchange for GAF's agreement that Mrs. Rhodes could preserve the right to introduce evidence concerning how the conditions have been impacted by the accident. See *Affidavit of M. Frederick Pritzker*, attached hereto as Exhibit D.[2] Having chosen to not review the records offered, GAF cannot now claim it was prejudiced by not having access to them.

Even more damaging to GAF's cause is the fact that it failed to respond to Judge Chernoff's ruling on its Motion to Compel the therapy records. Judge Chernoff denied GAF's motion, but noted that he "may well" review the records in camera. GAF never asked him to do so. In fact, GAF did nothing in response to the Court's June 16, 2004 ruling, or to Mrs. Rhodes' production of a single page summary of her condition from her therapy records, which was produced on June 24, 2004 in accordance with the ruling. Instead, GAF waited until two weeks before trial to file an "emergency" motion asking the Court, through a different judge, to review the therapy records in camera and compel Mrs. Rhodes to provide deposition testimony about her privileged communications.[3] The denial of such a motion was amply within the Court's discretion.

Despite the fact that Mrs. Rhodes' prior conditions were not emphasized, and that testimony on her pre-existing conditions took approximately five minutes of direct testimony out of the hours that she testified, GAF now contends that the mental health records were relevant to certain issues including:

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[2] It is important to note that GAF's current Motion focuses on Mrs. Rhodes' Bipolar Disorder and ADHD, aside from some vague references to the loss of consortium claims.

[3] GAF goes to great lengths to describe the five step process for in camera reviews set forth in Comm. v. Bishop, 416 Mass. 169 (1993), and refined in Comm. v Fuller, 423 Mass. 216 (1996). The Bishop/Fuller protocol, however, is applicable in criminal cases. "The Bishop/Fuller protocol cannot simply be substituted for the statutory test adopted for use in civil cases… There is a difference between the constitutionally based claim of a criminal defendant for access to privileged material … and the claim of a party in a civil case." Donovan v. Prussman, 12 Mass. L. Rep. 65 (2000). Unlike a criminal defendant, who can access privileged material upon a showing of need, GAF had the burden of establishing that "the interests of justice" required disclosure of Mrs. Rhodes' therapy records.

> [M]itigation of damages – whether she was a compliant patient and the effect of her medications . . . on her recovery; the state of the marriage/consortium, particularly where Mr. and Mrs. Rhodes testified that they discussed divorce but claimed it was an idle threat, and testimony that Harold had slept out of the master bedroom for the last eight or ten years of the marriage allegedly because of his snoring, and plaintiff [sic] testimony as to marijuana purportedly for medicinal use which was a source of contention in the marriage; the daughter's consortium claim, given the testimony that Rebecca went into therapy because she was isolated and could not make friends and Mrs. Rhodes attended her therapy sessions.

GAF's Motion at p. 8 n.3. These arguments only serve to underscore the fact that GAF wanted to conduct a fishing expedition in Mrs. Rhodes's therapy records to dig up dirt to throw at the consortium claims. How else to explain GAF's theory that therapy records for attention deficit hyperactivity disorder, which Mrs. Rhodes described as a feeling of "jumping out of her skin" could reveal the "real" reason why Mr. and Mrs. Rhodes had separate bedrooms before the accident? If GAF wanted to expose the "real" reason, it should have asked those questions of Mr. and Mrs. Rhodes during their depositions – or during cross examination at trial. In fact, GAF argued that Mrs. Rhodes' marijuana use was relevant to Mr. Rhodes' consortium claim when it opposed Mrs. Rhodes' Motion in Limine to preclude any evidence of marijuana use. Yet, GAF did not purse this theory when it had the opportunity to cross-examine Harold Rhodes.

The loss of consortium claims cannot serve as the basis for destroying the privileged and confidential nature of Mrs. Rhodes' communications with mental health care providers – they are not her claims and they do not put any psychiatric injury suffered by Mrs. Rhodes at issue in the case. Mrs. Rhodes' relationships with her husband and daughter before the accident were the "status quo" against which her husband and daughter's losses were measured, even if those relationships were shaped or impacted by ADHD or her bi-polar condition. Both Harold and Rebecca Rhodes testified about their relationships with Marcia Rhodes before, and after, the

accident, and GAF had ample opportunity to challenge the veracity of these witnesses' testimony. In enacting the statutory privilege governing therapy records, the Legislature intended to prohibit precisely what GAF hoped to accomplish – use of privileged communications as ammunition against Mrs. Rhodes herself, or even worse, against her family.

GAF never sought to discover any of the information on the topics it now claims are relevant from any non-privileged, discoverable source. For example, GAF could have made inquiry on these topics when it deposed the Plaintiffs and the medical doctors, or GAF could have deposed family members and friends. GAF also had an opportunity to cross examine the Plaintiffs and Mrs. Rhodes' doctors at trial as to whether or not she was a compliant patient and the effects of certain medications. The fact remains that GAF did not take advantage of the opportunities provided by the adversarial process, and it should not now be rewarded with a new trial based on its decision to limit cross-examination.

There is another basis upon which to deny GAF's motion – to the extent that GAF would have used any information from Mrs. Rhodes' therapy records to argue that it didn't cause the profound depression she experienced as the result of being paralyzed, or that she somehow "failed to mitigate" damages because she had "impaired coping abilities," these arguments are clearly improper, and contrary to the Court's instructions to the jury. The jury was instructed that GAF had to take Ms. Rhodes as it found her on the day of the accident. She was a middle-aged woman who was not in peak physical condition, and who suffered from ADHD and bi-polar disorder. To the extent that Mrs. Rhodes was overweight, with limited emotional coping abilities on the day of the accident, GAF must bear responsibility for the additional challenges Mrs. Rhodes faced in recovering from and adapting to her new, paralyzed self. Mrs. Rhodes didn't fail to mitigate her damages. She did the best she could given the condition she was in at the

time of the accident, and GAF is liable for the amount the jury determined was fair and reasonable compensation for such injuries.

II. The Jury Award Was Not Excessive and Remittitur is Unwarranted.

GAF's request for remittitur should be denied because the jury's award in this case does not so "shock[] the sense of justice as to compel the conclusion that the jury was influenced by partiality, prejudice, mistake or corruption." Labonte v. Hutchins & Wheeler, 424 Mass. 813, 825 (1997). The award of $7,412,000 to Marcia Rhodes encompasses both special damages and pain and suffering. Mrs. Rhodes' special damages (including out-of-pocket expenses, future costs under her lifecare plan, and loss of household services) totaled $3.2 million. This means that her pain and suffering award was approximately 1.3 times her special damages. Even if the value of the two loss of consortium claims are taken in account, the total verdict to all three plaintiffs was only 2.3 times Mrs. Rhodes' special damages. This award hardly shocks the conscience, especially in light of Mrs. Rhodes "significant and life-altering personal injury." GAF Motion, p. 17. In fact, in one of the cases cited by GAF—presumably because GAF deems it to be an appropriate award—a similar ratio was applied. Cooper, et al. v. Waste Mgmt., Inc., Suffolk Superior Court Civil Action No. 2000-05309 (2000) ($4.5 million award totaling 2.1 times $2.1 million special damages). See also Bourne v. Haverhill Golf & Country Club, 58 Mass. App. Ct. 306; review denied, 440 Mass. 1102 (2003) (affirming punitive damage awards ranging from 1.37 – 3.96 of plaintiffs' compensatory damages).

GAF admitted liability in this case and did not object to the introduction of $3.2 million of special damages. This admission, coupled with the evidence presented regarding the severity of the crash, the significant number of physical complications suffered by Mrs. Rhodes after the accident, the three months Mrs. Rhodes spent in the hospital, followed by being bedridden for 11

months, and the fact that she will have to live with this injury and complications for the rest of her life, does not support the argument that the verdict so "shock[s] the sense of justice as to compel the conclusion that the jury was influenced by partiality, prejudice, mistake or corruption." Labonte, 424 Mass. at 825.

As for the loss of consortium claims, apart from noting that these awards are higher than those in another case, GAF cites no evidence supporting the claim that the awards were so shocking that remittitur is warranted. Given the compelling testimony of Harold Rhodes as he described the myriad ways he provides care to his wife, including attending to her most intimate and basic functions, and the testimony and demeanor of Rebecca Rhodes, the only shocking thing about the consortium awards is that they were not higher.

III. The Court Rightly Decided to Not Excuse Juror No. 3, Who Affirmed That She Could Be Impartial.

After Mrs. Rhodes' testimony, Juror No. 3 disclosed to the Court that she had not realized that Bipolar Disorder was a part of the case, and she thought she should inform the Court that her brother took medication for a condition. When asked if she could put aside her feelings about Bipolar Disorder and ADHD and be fair to all parties, Juror No. 3 responded affirmatively. The Court correctly decided to not excuse her. This was a proper exercise of discretion by the Court, and does not constitute grounds for a new trial or remittitur. E.g., Commonwealth v. Sleeper, 435 Mass. 581, 587-88 (2002) (proper exercise of discretion in relying upon juror's assertion of impartiality where juror was friends with potential witness); Commonwealth v. Waters, 27 Mass. App. Ct. 64, 70-71 (1989) (judge is allowed broad discretion and committed no error in refusing to strike juror who stated he and his friends had been repeated victims of violence, but thought he could be impartial); see also, e.g., United States v. Owens, 167 F.3d 739, 756 (1st Cir. 1999) (in finding no error in refusing to excuse juror who initially expressed doubt about ability to be

impartial, but stated she would try to be impartial, court stated "[t]here are few aspects of a jury trial where we would be less inclined to disturb a trial judge's exercise of discretion, absent clear abuse, than in ruling on challenges for cause in the empaneling of a jury").

Jurors are expected to rely upon their own good sense, background, and experience in weighing the evidence presented and in determining what would be a fair and reasonable figure to compensate plaintiffs for their injuries. See Cuddy v. L&M Equipment Co., 352 Mass. 458, 464 at n. 4 (1967) (affirming common sense jury instruction). Implicit in this is that the jury will have varied experiences and bring them into the courtroom and jury room when deciding cases. Juror No. 3 informed the Court of some of her experience, and affirmed that it would not affect her judgment and that she would remain impartial. As such, there was no abuse of discretion and GAF's Motion should be denied. E.g., Sleeper, 435 Mass. at 587-88; Waters, 27 Mass. App. Ct. at 71.

IV. Conclusion

GAF's Motion should be denied because Mrs. Rhodes' therapy records are privileged, and she did not seek compensation for either her ADHD or bi-polar condition. As GAF chose to forego certain opportunities to examine and present evidence it deemed helpful, it cannot now be heard to complain. GAF should not be allowed to now seek a new trial because it is unhappy with the results it obtained from its tactical decisions. In addition, the Court properly exercised discretion to not excuse Juror No. 3. Accordingly, the Motion for a New Trial should be denied. GAF's alternative request for remittitur should also be denied. As to Mrs. Rhodes' claims, GAF cannot say that the award of special damages and the award of pain and suffering damages equal to 1.3 times the special damages shocked the conscience. Having failed to conduct meaningful discovery on these claims, the plaintiffs' testimony may well have come as a surprise to GAF, but

that is far from establishing that the verdicts shocks the conscience. Thus, the request for remittitur should be denied.

WHEREFORE, Plaintiffs request that this Court deny the Motion of Defendant Building Materials Corp. of America d/b/a GAF Materials Corp. for New Trial or Alternatively for Remittitur.

Respectfully submitted,

MARCIA RHODES, HAROLD RHODES, INDIVIDUALLY, HAROLD RHODES, ON BEHALF OF HIS MINOR CHILD AND NEXT FRIEND, REBECCA RHODES,

By her attorneys,

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