SHARON WOULLARD	*	IN THE
Plaintiff	*	CIRCUIT COURT
vs.	*	FOR
ASPEN PARK HOMEOWNERS ASSOCIATION, INC.	*	ANNE ARUNDEL COUNTY
	*	Case No. 02-C-03-094557 NG
Defendant		

* *

REQUEST FOR REMITTITUR OR, IN THE ALTERNATIVE, MOTION FOR NEW TRIAL

Defendant, Aspen Park Homeowners' Association, Inc. ("Aspen Park"), by its attorney, Matthew P. Woods, hereby requests a *remittitur* of the jury's excessive award or, in the alternative, requests a new trial pursuant to Maryland Rule 2-533 and for reason states:

BACKGROUND AND INTRODUCTION

Trial in this matter began on April 12, 2005. On the following day, April 13, 2005, a jury returned a verdict in favor of Plaintiff in the amount of $370,811.70. Specifically, the jury awarded Plaintiff $6,554.72 in past medical expenses, $17,256.98 in past loss of earnings, and $347,000 in non-economic damages.

A *remittitur* of the jury's award, or in the alternative a new trial, is required given that the jury's award was excessive, substantially beyond any reasonable amount of compensation, and well beyond damages proven by Plaintiff. Secondly, a new trial is necessary in light of the trial court's improper assumption of the risk instruction given to the jury, whereby it was inferred that Plaintiff in the instant case had no alternative means of egress besides the sidewalk in question.

I. EXCESSIVE DAMAGES

A. STANDARD OF REVIEW FOR THE GRANTING OF REMITTITUR OR NEW TRIAL BASED ON THE EXCESSIVENESS OF A JURY'S VERDICT

The court has expansive authority to set aside a verdict as contrary to the weight of

the evidence. MODERN MARYLAND CIVIL PROCEDURE, §10.3(c), at p.10-11, citing *Snyder v. Cearfoss*, 186 Md. 360 (1946). "Motions directed to this power are often based upon the inadequacy or excessiveness of a verdict." MODERN MARYLAND CIVIL PROCEDURE, at p.10-11.

Upon finding a particular verdict excessive, a trial judge may grant a new trial unless the plaintiff agrees to accept a lesser sum fixed by the court, *i.e.*, a *remittitur*. *Banegura v. Taylor*, 312 Md. 609 (1988), citing *Conklin v. Schillinger*, 255 Md. 50 (1969). In determining whether a verdict is so excessive as to grant a new trial, the standard applied has been stated as whether the verdict is "grossly excessive," "shocks the conscience of the court," is "inordinate," "outrageously excessive," or merely "excessive." *Banegura*, 312 Md. at 624. As stated in *Conklin*, *supra*, all of these standards "mean substantially the same thing." *Conklin*, 255 Md. at 69.

The granting or refusal of a *remittitur* is within the discretion of the trial court. *Id.* A trial court should consider a claim of excessiveness of the verdict on its own merits. *Id.* at 625. If the court finds the verdict so excessive that relief should be granted, it should "enter the *remittitur* without regard to whether the plaintiff is likely to accept it or whether a new trial will result." *Id.*

The issue of the basis for granting a new trial on the question of damages was more recently addressed in *Butkiewicz v. State*, 127 Md.App. 412 (1999), where is was held that

> the Court has discretion to grant [a] motion for new trial, just as it had discretion to deny it. Under the circumstances attended here, the resolution of [a] motion depended upon 'the judge's evaluation of the character if the testimony and of the trial,' and its determination of 'the core question of whether justice has been done…'

(Citing *Buck v. Cam's Broadloom Rugs*, 328 Md. 51, 57 (1992)).

B. THE PROVEN INJURIES IN THIS CASE DO NOT SUPPORT THE EXCESSIVE NON-ECONOMIC DAMAGES AWARDED BY THE JURY.

When determining what is excessive, grossly excessive or shocking to its conscience, the Court must perform a fact based review of the evidence heard by the trial court. Those cases that have reviewed verdicts to gauge the appropriateness of an award have looked specifically at the

injury suffered by the plaintiff and have asked what would constitute a reasonable correlating non-economic award. While no bright-line rule has been articulated, a review of the Maryland statutory maximum for pain and suffering awards, combined with a proportionality review based on non-economic damages compared to proven medical expenses, is an appropriate gauge of whether the jury's award in the instant case necessitates a *remittitur* or new trial.

1. Legislative cap on non-economic damages

Pursuant to ANNOTATED CODE OF MARYLAND, COURTS AND JUDICIAL PROCEEDINGS ARTICLE, § 11-108, the Maryland legislature determined that as of October 1, 1994, no award of non-economic damages could exceed $500,000. This non-economic cap is applied to all claims for injuries, no matter how substantial, including those for wrongful death, substantial permanent injury, paralysis, loss of sight, hearing, etc. The legislature allowed for a $15,000 increase of that cap per year. At the time of Plaintiff's alleged injury on February 21, 2003, the applicable non-economic cap mandated by statute was $635,000.

The public policy incorporated into law by the non-economic damages cap affords this court an appropriate frame of reference from which to consider whether the damages in question are excessive. In the instant case, the jury awarded Plaintiff over 50% of the maximum that the legislature permitted for a non-economic award in 2003, even for the most severe injury claim, including wrongful death. The jury made this award on the basis of Plaintiff's claims of significant injury to her wrist.

2. Case law review of damage verdicts

Conklin v. Schillinger, *supra*, is an example of an opinion in which the Court reviewed a trial court's determination that a verdict was excessive and "founded upon passion." *Conklin* involved a motor vehicle accident in which the plaintiff incurred approximately $2,000 in medical bills and another $600 in lost wages. The jury awarded $100,000 for pain and suffering. This was a case where there was substantial evidence of injury,

outlined by the Court in its opinion at pages 55 and 56, which in sum stated that the plaintiff had been thrown through the windshield of her motor vehicle and suffered multiple cuts and lacerations, most significantly across her left cheek and upper left forehead of bone depth extending to her temple. The record also reflected sprains to her muscles and ligaments of the cervical spine, a fracture to the second, third, fourth and fifth lumbar vertebrae, and a broken left arm from which she complained of pain at trial. The plaintiff had also presented evidence of a left ring finger fracture resulting in a disability preventing her from typing properly and a five to ten percent partial impairment of her left hand. The record also showed an injury to the left knee and testimony that the Plaintiff had a permanent disability to her left leg of 20%.

Despite the significance and documentation of her injuries, the trial court found that the $100,000 verdict for pain and suffering was "so excessive as to shock the conscience of the Court." The Court of Appeals upheld this determination having found no abuse of discretion. *Id.* at 70. The Court made its determination with an apparent consideration of the amount of compensatory damages compared to the pain and suffering award. *Id.* The Court also noted that despite her painful injuries, "fortunately most of her injuries responded to treatment and did not result in extensive permanent injury." *Id.* The Court also found it significant that the plaintiff had only spent one week in the hospital and had missed just one month of work. *Id.*

A more recent review of a jury's determination on damages is found in *Southern Management v. Mariner*, 144 Md.App. 188 (2002), where the Court upheld a judgment as not excessive under the facts. The damages arose from a fire that trapped the plaintiff in her home, forcing her jump from a third story window to escape the fire. As a result of disfiguring burns, broken bones and elements of fear associated with the fire, the jury awarded $24,565 for past medical expenses, $21,000 for future medical expenses, $10,500 for lost earnings and $410,000 for non-economic damages. This pain and suffering verdict may have been considered high but was certainly in proportion (1 to 7) to the other proven damages.

3. (Dis)Proportionality between compensatory and non-economic damages

The jury in the instant case awarded Plaintiff $6,554.72 for past medical expenses and $347,000 for non-economic damages. The disparity between these two numbers is tremendous. The jury's verdict of non-economic damages is 53 times the amount of medical expenses it awarded.

While no direct correlation may exist between the amount of medical bills and what would be adequate non-economic damages, this relationship should be taken into consideration for purposes of determining whether such an award is excessive. In the present case, Plaintiff has demonstrated $6,554.72 of out-of-pocket expenses as a result of her injury and was compensated that amount by the jury. The jury also compensated Plaintiff $17,256.98 for lost wages incurred during time off from work.

An award of non-economic damages 53 times this amount of past medical expenses is grossly excessive. This is particularly evident where the award for a wrist injury amounts to more than half of the statutory cap envisioned by the legislature for such injuries as paralysis, loss of vision and wrongful death. Specifically, Plaintiff's wrist injury has not caused her to miss a single day of rather physically demanding work since her return in 2003. Also, in her last visit to Dr. Apostolo on June 10, 2003, the doctor noted that Plaintiff had "dramatically turned the corner" and that motion in her wrist was only "slightly stiffened," that her wrist rotation was "full and symmetric," digital motion was full and that there was no intrinsic tightness. In short, the nature of Plaintiff's injury is not one where there was the type of pain or disfigurement that would otherwise call for a verdict of such disproportionate non-economic damages.

II. IMPROPER ASSUMPTION OF THE RISK JURY INSTRUCTION

A new trial is also warranted because the trial court gave the jury an improper instruction concerning the doctrine of assumption of the risk. Initially, the trial court instructed the jury properly from the pattern instruction pertaining to assumption of the risk. The trial court then

narrowed its general assumption of the risk instruction erroneously by quoting from *Roundtree v. Lerner Dev. Co.*, 52 Md.App. 281 (1982), saying that "a tenant does not assume the risk of the landlord's negligence in maintaining a common passageway when it is the only exit to the street." That instruction, however, was inappropriate given that the facts in the instant case were inapposite to those presented in *Roundtree*. Further, if a more complete portion of *Roundtree* had been utilized by the court, the jury likely would have found that Plaintiff had assumed the risk of her injuries in this instance.

In *Roundtree*, when the plaintiff left her apartment on a morning of inclement weather,

> [s]he walked along the sidewalk, where there was caked snow. When she reached the steps, she got back onto the sidewalk to go across a small drainage culvert and up the steps. She *had to use the steps* because there was a steep bank next to the steps on both sides which was impassable.

(Emphasis added) *Id.* Thus the plaintiff had been walking on a snow-caked grassy area next to the sidewalk for some time before coming to her steps. Because the only way to pass was to use the steps when she came to the drainage culvert, only then was the plaintiff forced to use the ice-covered steps. The Court noted that because "[t]here was evidence that there was no alternative route of egress from the [plaintiff's] apartment," the section quoted above as this court's eventual assumption of the risk instruction was applicable. *Id.* at 285.

The Court continued, however, stating that

> [i]f there had been evidence in this case that there was a reasonable and safe alternative route of egress open to the [plaintiff] and that she deliberately chose the shorter but more dangerous route, that might well establish *as a matter of law* that she was guilty of having assumed the risk.

(Emphasis added) *Id.* at 286. The Court noted a caveat to the portion quoted by this court as its jury instruction, quoting that "[w]here there is a reasonably safe alternative open, the plaintiff's choice of the dangerous way is a free one, and may amount to contributory negligence and assumption of risk." *Id.*

Unlike in *Roundtree*, Plaintiff in the instant case *was* presented with a reasonably safe

alternative. Plaintiff had the opportunity, just as the plaintiff originally did in *Roundtree*, to walk along or beside the sidewalk given that it obviously presented a safer means of egress than did the icy walkway. Plaintiff testified that she was aware that the sidewalk was icy, but that the only precaution she took was to wear heavy boots and walk carefully. Plaintiff neglected to recognize the reasonably safe alternative presented by the snow covered grass area next to the sidewalk, as the plaintiff had done in *Roundtree* before being forced back onto the sidewalk.

Also unlike *Roundtree*, Plaintiff in the instant case was not faced with a reason why she could not use the reasonably safe alternative means of egress and was not "forced" into a single means of exit. In *Roundtree*, the plaintiff had to utilize the icy steps when the snow covered grass area she had been walking came to a drainage culvert where she could not reasonably have continued. Only then did she walk on the only means of egress left to her. In the instant case, despite having a choice of a safer alternative to access her car, i.e., the snow covered grass area, Plaintiff chose the more dangerous of the two and was subsequently injured. Plaintiff was not "forced" into using the icy sidewalk for any reason. Plaintiff's choice to ignore the safer alternative was a free one and amounted to assumption of risk.

The second instruction given to the jury concerning assumption of the risk, which deviated from the standard pattern jury instruction, was erroneous given the particular facts of this case. The language used in the instruction, derived from *Roundtree*, was inapplicable to these facts and likely confused or misled the jury. The instruction implied that Plaintiff had but one means of egress to and from her vehicle, which was untrue given the reasonably safe alternative offered by the snow covered grass area next to the sidewalk. Further, other portions from *Roundtree* actually illustrate that the instruction given was improper under these circumstances, as the Court there noted that where a reasonably safe alternative is available and not utilized, a plaintiff may have assumed the risk of her injuries. Given this error and the resulting prejudice and/or confusion it likely imparted on the jury, a new trial should be granted.

WHEREFORE, Defendant Aspen Park presents the foregoing Request for Remittitur or, in the alternative, Motion for New Trial based on all the reasons stated herein and requests that the court grant either a *remittitur* or new trial.

Respectfully Submitted,

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Towson, Maryland 21204-5025
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POINTS AND AUTHORITIES

* Maryland Rule 2-533.

* ANNOTATED CODE OF MARYLAND, COURTS AND JUDICIAL PROCEEDINGS ARTICLE, § 11-108.
* MODERN MARYLAND CIVIL PROCEDURE, §10.3.

* *Banegura v. Taylor*, 312 Md. 609 (1988).
* *Buck v. Cam's Broadloom Rugs*, 328 Md. 51 (1992).
* *Butkiewicz v. State*, 127 Md.App. 412 (1999).
* *Conklin v. Schillinger*, 255 Md. 50 (1969).
* *Roundtree v. Lerner Dev. Co.*, 52 Md.App. 281 (1982).
* *Snyder v. Cearfoss*, 186 Md. 360 (1946).
* *Southern Management v. Mariner*, 144 Md.App. 188 (2002).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, That on this 25 day of April, 2005, a copy of the attached Request for Remittitur or, in the alternative, Motion for New Trial and proposed Order was mailed, postage prepaid, to **Laura G. Zois, Esquire,** Empire Towers, Suite 615, 7301 Ritchie Highway, Glen Burnie, MD 21061, Attorney for Plaintiff.

Matthew P. Woods

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* *

ORDER

Upon consideration of the Request for Remittitur or, in the alternative, Motion for New Trial, filed by Defendant Aspen Park Homeowners' Association, Inc., and any responses thereto, it is this _____ day of ____________________, 2005, by the Circuit Court for Anne Arundel County,

ORDERED, That Defendant's Motion is hereby GRANTED; and, That

_________ The jury's award shall be reduced to $________________________.

_________ A new trial will be scheduled concerning the underlying matter.

____
JUDGE, Circuit Court for
Anne Arundel County

Copies to:

Matthew P. Woods, Esq.
Laura G. Zois, Esq.