COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss

SUPERIOR COURT
CIVIL ACTION NO. 02-01159A

MARCIA RHODES, HAROLD RHODES, INDIVIDUALLY, 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.

MEMORANDUM IN SUPPORT OF DEFENDANT BUILDING MATERIALS CORP. d/b/a GAF'S MOTION FOR NEW TRIAL OR ALTERNATIVELY FOR REMITTITUR

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff Marcia Rhodes asserted with respect to her damages claim that:

> …I currently require the assistance of two people to make any transfers …I perform a multiple-hour bowel program every morning (which lasts up to as long as four hours) …Finally, *since I suffer from ADHD and bipolar disorder, my mental condition has significantly worsened as a cause of this crash;* as a result, I have much difficulty sleeping. Last, *I live with the deep depression of the knowledge of the limitations placed on me as a result of the crash* which will continue throughout the course of my life.” (See Plaintiffs’ Second Supplemental Answer to Interrogatory No. 13 attached as Exhibit A)(emphasis supplied).

On February 5, 2004, the plaintiff served expert interrogatory answers, including the designation of Adele Pollard, R.N. and life care planner, which related the following:

> … *Mrs. Rhodes remains limited in her wheelchair safety and mobility due to resolving decubitus, resolving leg fractures, and her bipolar disorder and ADHD.*
>
> … Her Functional Independence Assessment Measure *(FIM/F*AM) was assessed during the onsite assessment. This standardized ordinal scale is the most widely accepted functional assessment measure used in rehabilitation. The FIM addresses disfunction (sic) in activites (sic) that commonly occur with progressive, reversible or fixed neurological, muscular, skeletal, and other disorders to assess the level of disability. *The FAM emphasizes cognitive and psycho-social aspects of the disability.* These items are applied in conjunction with the items of the FIM … Mrs. *Rhodes currently presents with an overall FIM/FAM score of* 4 = *Minimal Assistance (subject performs* 75% *of tasks). When comparing this to her*

> *previous overall FIM/FAM score of* 5 = *Supervision and/or Set-up, at discharge from Whittier Rehabilitation Hospital (August 2002), a decrease in her overall functional independence level has occurred.*
>
> Mental Health: Mrs. Rhodes is on numerous medications for her Bipolar disorder and ADHD. She takes Valium and Percocet. *Her impaired coping abilities and disability related adjustment issues warrant long term interventions to reduce negative effects on her overall health maintenance and to keep her family unit (support systems) intact.*
>
> … The following nursing diagnostic categories describe actual medical problems, potential risks and complications specific to Marsha Rhodes and are referenced in the Cost Tables attached hereto as <u>Exhibits A-C</u>.

Nurse Pollard's tables then set forth diagnosis number 20, "Impaired Social Interaction", which gave the following as defining characteristics and/or etiology: "Insufficient or excessive quality of social exchange. Self-concept disturbance, limited physical mobility, environmental barriers". The expert designation also related the following:

> Potential Complications & Associated Risks:
>
> … Mrs. Rhodes is twenty-four months post-injury and has already been diagnosed and treated for DVTs, osteoporosis, fractures, pressure ulcers, and depression.
>
> … *Her lack of further rehabilitation improvement and disability related depression is in part contributed by her limited spinal cord injury rehabilitation involvement, absence of community resources/supports, the bipolar disorder and ADHD* …
>
> … Her low community integration ... demonstrates she remains socially isolated from the community *and remains at high risk for increased depression and dependence on others* …The recommended multidisciplinary approach outlined in this LCP identifies the lifetime needs and resources for Marcia Rhodes to become productive, maintain an optimal level of health, social well being, and community reintegration. … (emphasis supplied).

"Exhibit A" to Pollard's designation included among the Annual Care costs items for Wellbutrin (sic), an antidepressant, Prozac, another antidepressant, Zyprexa, an anti-psychotic and muscular-skeletal pain medication, and monthly follow-up visits with the psychiatrist, Kelly J. Clark, M.D. (See Pollard expert designation with attachments appended as Exhibit B).

On May 17, 2004, GAF served a motion to compel production of the plaintiff's mental health records, arguing that circumstances triggering the exceptions to the privileges concerning such records under G.L. c. 233, § 2B, and G.L. c. 112, § 135B, existed. GAF asserted that in light of the plaintiff's contentions that her mental condition was worsened by the motor vehicle accident, it was reasonable and necessary to review her records to evaluate and defend such issues as to whether in fact her mental condition was worsened, alternatively whether her current mental

and emotional state were a continuation of pre-existing conditions, and whether her contentions as to her damages are refuted by her records. By order of June 11, 2004, the Court (Chernoff, J.) ruled:

> Defendant's motion to compel the production of all the plaintiff Rhodes' mental health records is denied. This Court orders that the defendant be allowed to discover a post-accident summary of mental health condition which alludes to her mental state prior to the accident if such exists. The Court may well require an in camera inspection of plaintiff's medical records. (See Order attached as Exhibit C).

On August 4, 2004, at her deposition, Ms. Rhodes testified that:

> … The depression I have now, I consider it to be two depressions. I separate them; *there is normal depression I have from Bipolar Disorder; then I have a profound depression that I have because of this accident* and because - you know, what's happened in my life. (Plaintiff's deposition at 181-82 attached as Exhibit D).

At her deposition, plaintiff's counsel instructed her to not answer questions relating to her treatment for bipolar disorder and ADHD, and for grief, frustration or depression caused by her physical condition. (See Plaintiff's Deposition at pp. 132-134 attached as Exhibit E).

On August 11, 2004, the case went to mediation but did not settle.

On August 18, 2004, the defendant moved for an *in camera* inspection of the plaintiff's mental health records, and for an order that upon resumption of the plaintiff's deposition she be required to answer questions regarding the history and care of her mental health condition. In their motion, the defendants noted that they "are willing to enter into a protective order that mental and emotional health records can only be used in this litigation and must be returned to Ms. Rhodes thereafter." On August 23, 2004, the Court denied the motion "for the reasons stated in the [plaintiff's] opposition."

On September 8 and 9, 2004, Marcia Rhodes gave direct testimony regarding her bi-polar disorder, ADHD, depression, purported medicinal use of marijuana and the effect these issues had on her and her family. She testified liberally on how her normal depression differs from her bipolar disorder depression. On September 14, 2004, plaintiff's counsel presented Adele Pollard who testified that Marcia Rhodes' recovery was hampered by her bi-polar disorder, ADHD and depression. GAF did not have any of the medical records it had requested in discovery and twice moved the Court to compel in order to cross-examine plaintiffs on these issues.[1]

ARGUMENTS

I. A NEW TRIAL ON DAMAGES IS REQUIRED BECAUSE THE COURT COIVIMITTED LEGAL ERROR AND/OR ABUSE OF DISCRETION IN DEPRIVING THE DEFENSE OF MENTAL HEALTH RECORDS TO WHICH IT WAS ENTITLED UNDER THE EXCEPTIONS TO THE PRIVILEGES AFFORDED UNDER G.L. C. 233, § 20B, AND G.L. C. 112, § 135B, THEREBY PRECLUDING A FAIR OPPORTUNITY TO DEFEND AT TRIAL ON KEY DAMAGES-RELATED ISSUES.

A. **The Court's refusal to perform an *in camera* inspection of the records was legal error and/or abuse of discretion which unduly prejudiced the defense of the case.**

Discovery orders are reversible error requiring a new trial upon a showing of prejudicial error resulting from an abuse of discretion. *Solimene v. B. Grauel & Co., K.G.,* 399 Mass. 790, 799 (1987).

> Proper exercise of judicial discretion requires more than avoiding "arbitrary determination, capricious disposition, or whimsical thinking." … It imports a willingness, upon proper request, to consider all of the lawfully available judicial options. "Where discretion to grant relief exists, a uniform policy of denying relief is error." … "It is one thing to consider [a] right [to exclude evidence] and exercise it either way, but having been given that right, analogous to discretion, it is the duty of the judge to exercise it, and it is error as a matter of law to refuse to exercise it." … (internal citations omitted). *Lonergan-Gillen v. Gillen,* 57 Mass. App. Ct. 746, 749 (2003).

When the trial court refused to grant GAF's motion for *in camera* review prior to any determination of the relevancy of the plaintiffs' records, explicit authority and instruction as to the five-step procedure which included *in camera* review to make that determination, had already been provided by the Supreme Judicial Court. *Commonwealth v. Bishop,* 416 Mass. 169, 181-183 (1993). As has been recognized by a number of courts, employment of the procedure in *Bishop,* which is designed to maximize a defendant's access to relevant information in psychological treatment records while simultaneously maintaining stringent safeguards to avoid unnecessary disclosure of their contents, is proper in civil cases where privilege is asserted as to psychotherapeutic and social worker records.[2]

The mandatory procedures imposed by *Bishop* are essential to a fair trial. *Bishop* instructs that to trigger the Court's obligation to undertake the *in camera* review the defense need only show "in good faith, at least some factual basis which indicates how the privileged records are likely to be relevant to an issue in the case and 'that the question for its contents is not merely a desperate grasping at a straw." *Bishop,* 416 Mass. at 180. Here, there was no straw-grasping by the defense. The showing of the relevance of the records was overpowering, so much so that it was even conceded in the plaintiff's opposition papers. By way of example, as noted above, the plaintiff asserted as an element of her recovery the right to compensation for bills incurred, and to be incurred, by reason of psychiatric care afforded by Dr. Kelly. It is flat-out impossible for a plaintiff to rationally assert, on the one hand, that she may recover for "fair and reasonable" psychiatric care, see G.L. c. 233, § 79G, and yet simultaneously maintain that she may block disclosure of the psychiatrist's records for purposes, *at a minimum,* of assessing the reasonableness and necessity of the care reflected in those records

Beyond the question of recoverability of the psychiatrist's bills, however, and of even graver import, is the Court's failure to appreciate the unavoidable relevance of the documents to causation and mitigation

as was conceded in the plaintiff's opposition materials. As a threshold manner, while the plaintiff did strategically drop her claim for reimbursement of the costs of the medications associated with her mental health care, and argued (successfully to the Court) that her dropping this portion of the claim would obviate the need for production of the records, she never dropped her claim for compensation for Dr. Kelly's bills and therefore, as noted, the records remained obviously discoverable at least with regard to that issue. Nonetheless, the Court adopted the reasoning offered by the plaintiff which was, as in relevant part, as follows:

> Mrs. Rhodes and her counsel are so adamant about protecting her right to privacy and her assertion [of] the statutory privilege attached to her communications with mental health providers in this case, where the intimate details of the physical details of her daily life will be exposed to a number of strangers, that she would forego well over $100,000 in future costs by removing the anti-depressant medications form the life-care plan, Mrs. Rhodes will not seek to recover the costs of Welbutrin, Prozac and Zyprexa medications at trial. As these damages will not be presented to the jury, the defendants have absolutely no legal or factual support for their Motion. (Plaintiff's Opposition to Joint Emergency Motion … for *In Camera* Review of … Mental Health Records … at 2) (emphasis in original).

The plaintiff's reasoning was sophistry, particularly in light of the explicitly personal details of her life she was willing to share at trial. That the plaintiff, for admitted pure strategic reasons, might be willing to drop some dollar element of her claim, does not eliminate the *admitted, logical, nexus* between the records of her claimed aggravation of her bipolar disorder and ADHD conditions. Nor does her dropping the claim for the bills for the psychiatric medications magically erase the relevance of those records for numerous purposes other than the simple dollar recovery of the costs of those medications, including but not limited to such issues as:

(1) did the *entirety* of Mrs. Rhodes' emotional distress arise out of her pre-existing bipolar disorder and/or ADHD;

(2) did *some part* of her emotional distress arise solely out of either or both of those conditions;

(3) since her expert admitted that her bipolar disorder and/or ADHD inhibited Mrs. Rhodes' ability to rehabilitate from her injury and maximize her ability to cope with it both in terms of her physical abilities and socialization, did she engage in conduct reflected in her mental health records, for example non-compliance with medication or other treatment modalities or use of marijuana, which a jury might have found was the proximate cause of her aggravation of the bipolar and ADHD conditions so that her compensable damages would have been found by the jury to be substantially less in light of her failure to mitigate; and

(4) the impact of her bipolar disorder and ADHD upon consortium relationships with her husband and daughter as aggravated by her use marijuana and/or other non-compliant behavior,

~~*independent* of any causal relationship with negligence of the~~ defendants.[3]

The Court's ruling totally shut off the defense's access to information which was critical to resolution of these issues, and instead permitted the plaintiff to engage in a "cut and paste" method of litigation where she was permitted to defeat the defense's ability to try obviously critical and relevant inferences before the jury by picking and choosing to drop selected portions of her claims, the dropping of which were immaterial to those key inferences in any event.[4]

As observed by the Supreme Judicial Court:

> A trial by jury comprehends a full and fair hearing on all relevant issues where all questions of fact presented by the evidence are decided by the jury in accordance with the principles of law given to them in the instructions by the Judge. *New England Novelty Co., Inc. v. Sandberg,* 315 Mass. 739, 750 (1994).

The Court has recognized that common law actions:

> … belong [ ] to the class of cases … where under the Constitution trial by jury must be held sacred and jealously guarded against every encroachment. The power in the Superior Courts is ample to make rules regulating practice and procedure, expediting the trial of causes and the general conduct of its business, and such rules are to be respected and enforced … (citations omitted) … But of course such rules cannot override the Constitution. The essence of that right is that controverted facts *shall be decided by the jury. Each party must have on proper demand at least one fair opportunity to present to the jury the evidence which raises a disputed issue of fact.* _Farnam, et al. v. Lennox Motor Car Co.,_ 229 Mass. 478, 481 (1918) (discussing Mass. Constitution, Part One, Article XV).

Here the Court's mishandling of the plaintiff's psychotherapeutic records deprived the defense of the "one fair opportunity to present to the jury the evidence which raises a disputed issue of fact", not only by precluding use of her records at trial, but by blindfolding the defense as to their contents. Thus, not only was the defense unfairly disabled, contrary to the "interests of justice", from pursuing affirmative evidence regarding key issues at trial, but was further prejudiced because, not armed with those records, it was not in any fair position to police the plaintiff's own testimony as to how the accident affected her (and her familial relationships) mentally and as to what the true cause of her inability to better rehabilitate herself physically and socially actually was.

Error as to a trial court's evidentiary ruling is reversible error so long as there is any plausible basis upon which to conclude that, had the ruling been otherwise, the jury's verdict might have been different. _*Dejesus v. Yogel*_, 404 Mass. 44, 49 (1989) (dealing with erroneous exclusion of evidence). *A fortiori,* when a trial court's erroneous discovery ruling precludes the defense from even engaging in review of relevant factual material which could have been followed with use of such material at trial and development of defenses and inferences which are either non-existent or substantially weaker without that information, reversible and prejudicial error exists.

B. By depriving the defense of the opportunity to develop and argue critical inferences on the issues of causation and mitigation in a damages trial, the Court's ruling was unduly prejudicial to the defense and therefore contrary to the interests of justice as declared by Massachusetts case law pertaining to waiver of privilege as to matters put "at issue" by plaintiffs.

The highly prejudicial nature of the one-sided availability of the information in the records in the particular circumstances of this case could not be more clear. For example, the Rhodes contested disclosure in that the records involved private areas that they did not want "strangers" to learn about, yet Mr. Rhodes testified about how he had to administer and place feminine hygiene products when his wife experienced her menstrual period, and how embarrassed they were regarding this. Also, the Rhodes testified about a solid pre-accident marriage with only "normal marriage issues" and normal intimate relations, yet slept in separate rooms for years allegedly because of Mr. Rhodes's snoring. Obviously, the jury could have included as part of their awards an adoption of the allegation that the Rhodes ceased intimate relations only after the accident. Thus the plaintiffs were permitted to introduce highly inflammatory testimony regarding their most private affairs, yet were permitted to keep highly relevant information from the defense on grounds of privacy. Ms. Rhodes also testified that she questioned her will to live and was in a state of hopelessness. Again, it was essential to a fair trial that the jury be provided with any information contained in the records regarding mental suffering on her part prior to the accident, particularly given her mental condition.

It is no adequate response to urge, as the plaintiff has urged previously, that her claim for emotional distress was a "garden variety" one, relying upon *Sabree v. United Brotherhood of Carpenters & Joiners of America Local No. 33*, 126 F.R.D. 422 (D. Mass. 1989). First, the statutes[5] do not speak in terms of "garden variety" claims, and under the plain statutory language the exception requiring disclosure is triggered *whenever* the patient introduces her emotional condition, whether in a purported "garden variety" context or not. In any event, there is nothing "garden variety" about the plaintiff's contention that the accident aggravated her formally diagnosed mental illnesses of bipolar disorder and ADHD. See, e.g., *Jacobs v. Cidermill Farms Co., Inc., et al.*, United States District Court Civil Action No. 99-40210-NMG, Order of September 19, 2001 (copy attached as Exhibit G) (ordering disclosure of psychotherapy records, observing "Plaintiff has not only placed her emotional and psychological condition at issue, she has also alleged that she has suffered a 'psychic injury', i.e. depression."); see generally *Dr. Marjorie McMillan v. Massachusetts Society For the Prevention of Cruelty to Animals*; *Dr. Gus Thornton; and Dr. Paul Gambardella*, Order on Plaintiff's Objections and Motion for Reconsideration of Magistrate's Order of November 2, 1995, and Magistrate's Order of April 28, 1993 (collectively attached as Exhibit H). See also *Sarko v. Penn-Del Direct01Y Company*, *170* F.R.D. 127, 129-130 (E.D. Pa. 1997) (disclosure mandated where plaintiff alleged to be suffering from clinical depression requiring medication). Thus, even assuming the label "garden variety" is of any efficacy in making determinations as to appropriate disclosure under these statutes (the

defendant asserts that it is not), *it cannot be logically asserted that the aggravation of formally diagnosed mental illness is a "garden variety" type of emotional distress which would be experienced upon a given event by a person not suffering from such illness beforehand. Moreover, it is likewise not a "garden variety" contention by the plaintiff that her ability to physically rehabilitate and socialize following her accident was diminished by her reason pre-existing mental conditions.*

The "interests of justice" are never served by withholding from any party the most important information available regarding the key issues of causation, aggravation, and mitigation in a damages trial. "Particularly in a civil case, a privileged party cannot fairly be permitted to disclose as much as he pleases and then to withhold the remainder to the detriment of the defendant." *Greater Newburyport Clam Shell Alliance v. PSCHN*, 838 F. 2d 13, 20 (1st Cir. 1988), citing 8 *Wigmore of Evidence,* § 2327 at 635 - 36 *(McNaughton* rev. ed. 1961). *Clam Shell Alliance* observed that:

> In a civil damages action, … fairness requires that the privilege holder surrender the privilege to the extent that it will weaken, in a meaningful way, the defendant's ability to defend. That is, the privilege ends at the point where the defendant can show that the plaintiff's civil claim, and the probable defenses thereto, are enmeshed in important evidence that would be unavailable to the defendant if the privilege prevails. The burden on the defendant is proportional to the importance of the privilege. The Court should develop the parameters of its discovery order by carefully weighing the interests involved, balancing the importance of the privilege asserted against the defending party's need for the information to construct its most effective case. *Id.* at 20.

The Supreme Judicial Court adopted the principles described in *Clam Shell Alliance* with respect to the attorney-client privilege in *Darius, et al. v. City of Boston*, 423 Mass. 784 (2001). The *Darius* court "accept[ed] the premise underlying the concept of 'at issue' waiver of the attorney-client privilege: there are circumstances in which a litigant may implicitly waive the privilege, at least in part by injecting certain types of claims or defenses into a case," *Darius,* 423 Mass. at 284. Finding such waiver is appropriate where it is shown that the privileged information sought to be discovered is not available from any other source." *Id.* at 284. The appropriateness of applying the "at issue" waiver principle developed for the attorney-client privilege has been noted by courts dealing with "at issue" waiver where psychotherapeutic records are involved, in light of the similarities of the privilege insofar as they are designed to foster open and trusting relationships. *Sarko*, 170 F.R.D. at 130; but see *Sabree, supra;* see generally *Jaffee v. Redmond*, 518 U.S. 1, 10, 18 (1996) (analogizing between attorney-client privilege and psychotherapy privilege as a matter of Federal common law but not reaching question of "at issue" waiver).

In the present case, it is self evident that the documents which were sought by the defense contain information not available from any other source which was of consummate importance on the issues discussed above. Nowhere else, other than in the plaintiff's own treatment records, could the defense expect to find as accurate a recording of

such matters as what the plaintiff's actual symptomatology from her various mental and emotional conditions was at the time she was experiencing it, how her bipolar and ADHD conditions following the accident compared with before the accident, and how those conditions influenced, if at all, her ability to rehabilitate and socialize following the accident. This is particularly so in a psychotherapeutic context, where by definition one could not expect the same relationship to exist between the plaintiff/patient and some third-party examiner of her, nor that a plaintiff would be as forthcoming with pertinent information as she would be with her own therapists. See *McMillan, supra,* Slip Opinion at 7-8.[6]

As Judge Learned Hand stated with regard to the Fifth Amendment privilege, "the privilege is to suppress the truth, but that does not mean that it is a privilege to garble it: … it should not furnish one side with what may be false evidence and to deprive the other of any means of detecting the imposition." *The United States v. St. Pierre*, 132 F. 2d 837, 840 (2d Cir. *1942), cert. dismissed as moot* 319 U.S. 41 (1943). This is consistent with the fundamental precept under Massachusetts law that a "person may not seek to obtain a benefit or to turn the legal process to his advantage while claiming the privilege as a way of escaping from obligations and conditions that are normal incidents to the claim he makes." *Colley v. Benson, Young & Downs Insurance Agency, Inc.*, 42 Mass. App. Ct. 527, 533 (1997). Decisions dealing with psychotherapeutic records have likewise acknowledged that fundamental fairness and the "interests of justice" demand disclosure where, as here, the records are relevant in key contested issues and a defendant cannot hope to create their equivalent through its own retention of experts. See *McMillan, supra.*

There was no valid reason why the Court could not have given the plaintiff every reasonable assurance that she was entitled to with respect to potential use of the documents, issuing appropriate orders to assure that the documents would remain confidential except as permitted at trial and sealed in the Court's file if necessary. The defense specifically apprised the Court of its assurance that the documents would be used only in the context of the litigation. Rather than taking up the defense's suggestion to perform *in camera* review and thereby accommodate the legitimate interests of both parties under the procedures outlined in *Bishop*, the Court simply shut down the truth - finding process by denying the defense's motion, thereby precluding it from investigating, evaluating, and asserting as appropriate key defenses and inferences at trial. This ruling offended not only the concepts of fundamental fairness and justice described in *Darius*, *Clam Shell Alliance*, *Colley* and *Jacobs*, *McMillan*, *and Sarko*, *supra,*[7] but also foreclosed the exercise of the defendant's fundamental and constitutional right to have a jury decide contested issues in a tort case.[8] See *Farnham*, 229 Mass. at 481; *Sandberg*, 315 Mass. at 750.

As observed by the Court in *McMillan,* it is axiomatic that Civil Procedure Rule 26 "is designed to encourage '*mutual* knowledge of all relevant facts.'" *McMillan*, Slip Opinion at 16-17, quoting Notes of Advisory Committee on Rule 26 [Federal Rules of Civil Procedure], 1983 amendment (quoting *Hickman v. Taylor*, 329 U.S. 495, 507 (1947)) (emphasis supplied), and that "[d]iscovery is as appropriate for proof of a plaintiff's damages as it is for proof for other facts essential to

[her] case.". *Id.* at 17 (citations omitted). Thus, where one party has access to the best information on an issue put in contest by that party, and seeks to hide behind a privilege to keep it from the other, such conduct defeats not only the mutuality of knowledge deemed essential under the rules of discovery, but is also "contrary *to the most basic sense of fairness and justice". Sarko,* 170 F.R.D. at 130 (emphasis supplied). Accordingly, the "interests of justice" referenced in the statutory exceptions to the Massachusetts psychotherapy and social worker records statutes demanded disclosure of those records in this case.

II. ALTERNATIVELY, THE DEFENDANT SHOULD BE GRANTED A REMITTITUR BECAUSE THE DAMAGES AWARDED BY THE JURY ARE EXCESSIVE IN LIGHT OF THE CIRCUMSTANCES UNDERLYING THE VERDICT.

Under the provisions of Rule 59(a) the Court is empowered to remit so much of the jury's verdict as the Court judges is excessive. In stating the standard to be applied considering remittitur, the Supreme Judicial Court has observed as follows:

> The only practical test to apply to [a] verdict is whether the award falls somewhere within the necessarily uncertain limits of just damages or whether the size of the verdict so shocks 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), quoting *Mather* v. *Griffin Hospital,* 207 Conn. 125, 139 (1988).

It is an error of law if "the damages awarded were greatly disproportionate to the injury proven or represented a miscarriage of justice." *Labonte,* 424 Mass. at 824, quoting *del Canto v. Ametek, Inc.,* 367 Mass. 776, 787 (1975).

Moreover, while comparative awards do not necessarily control a court's decision as to whether to remit an award in a given case, comparative awards in similar cases may be considered in evaluating the reasonableness of a jury verdict. *Labonte,* 424 Mass. at 826 n. 17 (court compared damage awards of lesser amounts in similar cases in buttressing its determination that the trial court's failure to remit an emotional distress award in a handicap discrimination case amounted to an error of law).

Under the above principles, the awards of $7,412,000 in favor of Marcia Rhodes, $1,500,000 in favor of Harold Rhodes, and $500,000 in favor of Rebecca Rhodes are excessive and should be remitted. The defendant does not suggest that Marcia Rhodes did not experience a significant and life-altering personal injury. However, in making the determination as to the appropriateness of a remittitur, under *Labonte* the Court must be mindful of the likely influence upon the amount of the verdict awards which resulted from the Court's failure to undertake the *in camera* inspection of the plaintiff's mental health records so as to permit use of them by the defense on the issues of extent of damages and mitigation, and also to question and rebut what turned out to be (in the absence of the defense's ability to use those records) unfettered testimony on the part of Ms. Rhodes that her damages were increased by reason of aggravation of her mental health conditions, and her inability to better rehabilitate herself following her injury. On this point, as

suggested by *Labonte*, comparison of damage awards in other cases is informative.

In 2002, a jury award of $2,570,000 was made for a twenty-five year old man who was rendered a paraplegic following the reckless service of alcohol to him at a dram shop in *Paquin, et al.* v. *MRW, Inc., d/b/a Hotel Barre*, Worcester Superior Court Civil Action No. 1991-02268. A loss of consortium award of $500,000 was made for his wife, and $280,000 for each of his two children. In 2000, a thirty-seven year old single mother also was rendered a paraplegic received an award of $4,500,000 (of which $2,100,000 was special damages) in *Cooper, et al. v. Waste Management Inc.*, Suffolk Superior Court Civil Action No. 2000-05309. In 1993, a seventeen year old who was rendered a paraplegic received a verdict of $2,000,000 in Middlesex Superior Court Civil Action No. 1990-2652, *Diane Marie and Joseph Williams* v. *Brian Doherty*. In 1990, a two year old child who was rendered a paraplegic received an award of $5,200,000 in compensatory damages in *White v. International Manufacturing Co.*, Suffolk Superior Court Civil Action No. 1985-75057.

The awards reflected in these other paraplegic cases do strongly indicate that the jury was influenced to a considerable extent by the plaintiff's testimony to the effect that her mental health conditions were aggravated by the accident, and that her ability to rehabilitate from her injury was adversely affected by her particular mental health conditions, so as to yield a verdict which, comparatively speaking, exceeded those which have been seen for other paraplegic cases where such mental health issues have not been injected into the jury's damages analysis. Accordingly, the circumstances are compelling that the Court's error with regard to preventing the defendant's use of her mental health records at trial resulted in a significant enhancement of the damages award.

Such is also the case with regard to Harold Rhodes' consortium verdict of $1,500,000 and Rebecca Rhodes' consortium verdict of $500,000, since a jury would in all likelihood have found that the greater the aggravation of Marcia Rhodes' mental health conditions, and the greater their aggravation impeded her ability to rehabilitate, the greater the resulting damages to her husband's and daughter's relationship with her were. This is particularly likely where there was evidence in the case regarding marital and familial difficulties experienced by the Rhodes prior to the accident.

III. THE COURT'S REFUSAL TO EXCUSE JUROR NO. 3 CONSTITUTES REVERSIBLE ERROR AND PREJUDICE AS A MATTER OF LAW AFTER SHE EXPRESSED CONCERN OVER BEING ABLE TO FAIRLY DECIDE THE CASE BECAUSE OF MARCIA RHODES' BIPOLAR DISORDER AND HER OWN FAMILY EXPERIENCE WITH THAT ISSUE.

After plaintiff's counsel brought out on direct of Marcia Rhodes that she had a bipolar disorder, Juror No. 3 on her own initiative asked to be excused. Relating that people in her own family have that condition, she sympathized with the plaintiff, and felt that it could be her family on trial with respect to these issues. In leading questioning, the Court obtained a concession from the juror at sidebar that she "thought" she could be impartial, and declined to excuse the juror over the objection of defense counsel.

The concern and affinity which the juror felt for the Rhodes family in light of the specific information she felt compelled to provide to

the Court constituted a clear extraneous influence upon her with regard to her ability to deliberate on the case. In such circumstances, a mere acknowledgement from the juror that she "thought" she could still be impartial was not sufficient to permit her to continue to sit. 9 *Moore's Federal Practice and Procedure,* § 47.43 [3] and authorities cited at n. 12 therein, including *Waldorf v. Shuta,* 3 F. 3d 705, 711-712 (3rd *Cu.* 1993). Rather, the juror should have been excused in light of this extraneous influence unless the plaintiff satisfied the affirmative burden of proof "to demonstrate that there is no reasonable likelihood that [GAF] was prejudiced" by reason of the potential influence of the extraneous matter upon the deliberative process which Juror No.3 would have to partake in with the other members of the jury. *Markee v. Biasetti,* 410 Mass. 785, 788-89 (1991). Usually that demonstration must be made with respect to the potential effect of the extraneous matter upon "a hypothetical average jury". *Id.* However, where, as here, there are specific circumstances which demonstrate that the jury cannot "fairly be modeled by a 'hypothetical average jury'", the non-objecting party is unable to sustain its burden as a matter of law. *Id.,* citing *Commnonwealth v. Fidler,* 377 Mass. 192,201 (1979).[9]

In light of the extraneous influence, in deliberation Juror No.3 may very well have rejected the defense's position that Mrs. Rhodes could have mitigated her damages more effectively and had a better quality of life despite the bipolar problems. This would have led to an increased verdict not only in terms of mental suffering, but also future healthcare costs, as greater independence on the part of Mrs. Rhodes would decrease the degree of home care attendant services required.

CONCLUSION

For the above reasons, defendant GAF respectfully moves that (1) it be granted a new trial on damages, or (2) in the alternative, that the Court order a remittitur of damages.

Dated: October 8, 2004

BUILDING MATERIALS CORP. OF AMERICA d/b/a GAFMATERIALS CORP.,

By Its Attorneys

CAMPBELL CAMPBELL EDWARDS & CONROY PROFESSIONAL CORPORATION

[1] Further relevant trial testimony of the plaintiffs is reference as appropriate below.

[2] See, e.g., *Kippenhan v. Chalk Services, Inc.*, 2 Mass. L. Rep. 121, 122 n. 1 1994 Mass. Super. LEXIS 644 (April 27, 1994); *Perrin v. S&A Enterprises, Inc.*, 9 Mass. L. Rep. 619, 620 n. 1 1999 Mass. Super. LEXIS 68 (February 16, 1999); *Boremi, et al. v. Lechmere, Inc.*, 1993 Mass. Super. LEXIS 76 (November 22, 1993); *McCue v. Kraines, et al.*, 1 Mass. L. Rep. 298, 299, 300 in 1 1993 Mass Super. LEXIS 288 (November 22, 1993).

[3] The enormous volume of information withheld from the defendants relevant to these key issues would include records of Dr. McNaulty (psychologist), Dr. Clark (psychologist), Dr. Apsel (psychiatrist), Dr. Eisenberg (family therapist), Dr. Merritt (daughter's psychiatrist), and Dr. Melrose (mother/daughter family therapist). Withheld information would also relate to Marcia Rhodes' taking of the following medications: Wellbutrin (sic), Valium, Restoral (sic), Prozac, as well as allegedly medicinal use of Marijuana. These records would obviously be relevant to Rhodes' psychological condition before and after the accident and how much impact the accident had on her bipolar disorder, ADHD, and depression which she affirmatively discussed in her case, particularly testifying as to a purported difference between her bipolar depression and other depression; mitigation of damages -- whether she was a compliant patient and the effect of her medications (or lack of taking them) 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 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 to therapy because she was isolated and could not make friends and Mrs. Rhodes attended her therapy sessions; and Mrs. Rhodes' expectation of improvement, given her husband's testimony that her doctors and therapists were adamant that he should not set goals for her. I t is undisputed that Drs. Clark and McNaulty, at a minimum, knew about the marijuana use (see Marcia Rhodes' deposition at 253-254 attached as Exhibit F).

[4] The error and prejudice inherent in the Court's refusal to grant *in camera* review of the documents is underscored by the subsequent procedures contemplated in *Bishop*. Had the Court recognized that the defense was not merely "grasping at a straw" then the Court would have been required to undertake specific procedural measures so that the defense would not be doubly prejudiced and would at least have the records available for review on appeal, since the *in camera* review contemplated in *Bishop* "denies the defendant the benefit of an advocate's eye in reviewing the privileged records to determine whether any communications contained in the records are relevant." *Bishop*, 416 Mass. at 168-169. Those subsequent measures should have included (1) making available to defense counsel at least those portions of the records which would have been found relevant by the Court, (2) a written decision setting forth the bases for withholding of any documents, (3) explicit identification of documents deemed irrelevant, which documents should be sealed and transmitted to any reviewing court, (4) subsequent disclosure to the defense of any documents which might have first been deemed immaterial but the relevancy becomes evident later, and (5) permission for use of any materials deemed relevant, subject to appropriate protective orders limiting their use for purposes of the instant litigation. *Bishop*, 416 Mass. 181-183. Indeed, *Bishop* recognizes that rather than simply deny the defense's request for review *in camera* and permission to use the documents subject to appropriate protective orders, the Court could have

postponed the decision, "thereby allowing the issue to mature". *Bishop,* 416 Mass. at 182. By raising the issue and presenting it to the Court shortly after the plaintiff's expert disclosures, which made plain that her emotional condition was put in issue (she was even seeking recovery for psychiatric care and medication for it), and then following up with a second request following deposition of the plaintiff after the Court's first ruling (Chernoff, J.) had indicated that the Court would consider *in camera* review in the future, the defense afforded the Court a well-developed record geared precisely to the objective of having the Court review the documents in question *in camera* and issue appropriate protective orders. Had the Court done so the trial would have proceeded where (1) the plaintiff would have assurance that there would be no abuse of the records or the information set forth therein, the use of which would be carefully monitored by the Court, and (2) the defense would not be cut off from introducing evidence and making arguments concerning key inferences which related to the issues of causation and mitigation, which issues are critical in a trial on damages in a tort case.

5 G.L. c. 233, § 20B, and G.L. c. 112, 135B, respectively, provide for qualified privileges concerning communications with psychotherapists and social workers. Both of these statutes provide for the following exceptions:

> the privilege granted hereunder shall not apply to any of the following communications: …(c) in any proceeding … in which the patient introduces his mental or his emotional condition as an element of his claim or his defense, and the judge or presiding officer finds that it is more important to the interests of justice that the communications be disclosed than that the relationship between the patient and psychotherapist by protected.

6 The *McMillan* Court observed: "The extent of plaintiff's mental and emotional distress and the causal connection between her distress and defendants' alleged discriminatory conduct is therefore directly at issue and highly relevant. Dr. Kales' treatment notes and the issues discussed during the course of plaintiff's three years of therapy with Dr. Kales constitute the only meaningful source for this information. Dr. Engel's treatment notes, which involve a single consultive (sic) session, fail to provide a viable alternative when compared to Dr. Kales' treatment notes, which involve a three year period of weekly meetings."

7 In addition to *Sabree's* holding being violative of fundamental fairness and the interests of justice as those terms have been long understood in Massachusetts, its holding that records relating to "garden variety" emotional distress claims should be withheld from disclosure because of a supposed "chill" factor which would dissuade tort victims from seeking psychotherapy must be rejected because its logic fails in at least five respects. First, even assuming such a "chill" factor exists, then it would be anomalous to permit withholding of records by those persons with less severe, "garden variety" emotional distress claims, yet require it of those who have or claim severe emotional distress and "psychic" injuries, neuroses, psychoses, etc., as persons with such more severe issues would be those most in need of the therapeutic relationship. Second, by definition, a "garden variety" emotional distress claim consists of that emotional harm which, because of physical injury, employment discrimination, or whatever other wrongful conduct the tortfeasor may have committed, the tort victim *is normally expected to suffer.* If compensation for such harm is justified on the theory that it is normally foreseeable in such circumstances, then it follows that there is no stigma associated with such damages which could ever justify the result that the alleged tortfeasor should be precluded from

a fair opportunity to examine the records and contest the claim before a jury. Third, while people who have sustained merely "garden variety" emotional distress claims can be expected, by definition, to experience some upset regarding what has happened to them, it does not follow at all that they are incapable of appreciating the fundamental notion that fairness requires that all relevant information pertaining to their claims be made available to those whom they sue. (Indeed, nothing in *Sabree* suggests that persons with even formally diagnosed mental illnesses are, by definition, incapable of understanding this basic fairness principle). Fourth, *Sabree's* underlying assumption that persons feeling in need of psychotherapy would shun it out of concern that on the off chance that they should have a tort committed upon them a fair minded judge reviewing his/her records *in camera* would issue any order regarding the limited use of the records which would be anything but fair in the circumstances is dubious. Fifth, whatever supposed stigma attached to garden variety emotional distress claims in 1989 when *Sabree* was decided, it is unfounded speculation to say that such "garden variety" claims today entail such a stigma that persons alleging such claims would refrain from discussing the circumstances underlying them with a therapist for fear of disclosure of the content of such discussions. Public awareness, and society's willingness to address mental health issues generally has (sic) increased. To simply hold by judicial *fiat* that, in this day and age, there is a "chill" factor which would dissuade persons claiming "garden variety" emotional distress from seeking mental health care assistance, in the absence of any empirical demonstration of this, as a justification to deprive a litigant of a fundamentally fair trial, would also run afoul of the principle that courts should govern their dispute resolution processes employing scientifically reliable data, not speculation. *Comm. v. Lanigan,* 419 Mass. 15, 20 (1994).

[8] All of the above grounds for new trial regarding damages sustained by plaintiff Marcia Rhodes also apply to the consortium claims of her husband, Harold Rhodes, and her daughter, Rebecca Rhodes, for loss of consortium as well, since a jury could reasonably have found that any evidence which might have influenced their assessment of whether and to what extent her emotional condition was caused or aggravated by the accident, and whether and to what extent behavior on her part for which GAF bore no responsibility impaired her ability to rehabilitate, was of key relevance in determining the extent of damage caused to the relationships of the family members attributable to GAF's negligence, as opposed to being caused by other factors.

[9] Moreover, even if the plaintiff did not have the affirmative burden of proof here, as a matter of law the clear extraneous influence upon the juror constitutes prejudice because the court cannot deny the jury might reasonably have reached a different result if they had not had the extraneous information before them." *Id.* at 78990 (concurring opinion of Wilkins, J., proposing prejudice test rather than majority's shift of burden of proof).