IN THE

COURT OF SPECIAL APPEALS

September Term, 2006

No. 02167

HOUSING AUTHORITY OF BALTIMORE CITY,

Appellant

v.

MARY ROY, ET AL.,

Appellees.

BRIEF OF APPELLANT

ON APPEAL FROM THE CIRCUIT COURT FOR BALTIMORE CITY
(HONORABLE JOHN N. PREVAS)

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STATEMENT OF THE CASE

On January 21, 2005, Johnnie Pratt ("Pratt"), Mary Roy ("Roy"), and Louise Bills ("Bills") (collectively "Plaintiffs"), filed suit in the Circuit Court for Baltimore City, Maryland against the Housing Authority of Baltimore City ("HABC"). In their Complaint, Plaintiffs claimed injury as a result of exposure to mold, fungi and other toxic substances in the premises. (E.26-27).

On January 5, 2006, HABC moved for summary judgment and requested a hearing. On January 23, 2006, Plaintiffs filed an opposition to HABC's motion. On March 27, 2006, the Circuit Court held a hearing and ultimately denied HABC's motion.

On June 12, 2006, HABC filed a motion in limine and requested a hearing. Between July 5, 2006 and July 14, 2006 Judge Cannon held an evidentiary hearing. On July 14, 2006, the Circuit Court entered an order limiting the areas of testimony to be offered by Plaintiffs' experts Dr. Joyner and Dr. Simon and excluding outright several reports and lab results regarding mold testing at the premises. On July 31, 2006 and August 15, 2006, Plaintiffs filed a motion for reconsideration to which HABC responded on August 18, 2006. On September 11, 2006, Judge Cannon held a hearing and issued an order denying in part and granting in part Plaintiffs' motion for reconsideration. (E.154).

Between September 12 and September 27, 2006, the above-captioned case was tried by jury, with the Honorable John N. Prevas presiding. At the close of Plaintiffs' case, HABC moved for judgment. (E.666). HABC argued that Plaintiffs failed to prove their injuries and damages were either caused by or aggravated by exposure to mold and/or a damp indoor environment. HABC further argued that Plaintiffs had failed to present proof that the premises were unfit for habitation or that HABC had breached its leases with Plaintiffs. HABC's motion was denied. Id.

At the close of all the evidence, HABC renewed its motion for judgment and restated its arguments. (E.777). The motion was denied. (E.778). After the jury was sent to deliberate, but before it was given the exhibits, Plaintiffs' counsel reopened their case to move

in exhibits which had been held *sub curia*. (E.788-794). The Court sustained HABC's objections to the admissibility of some of the exhibits. (E.794-795). HABC requested a curative jury instruction regarding the inadmissibility of the laboratory reports by 1) Homesteaders Home Inspections and Mets Laboratories and 2) Dr. Simon and Pure Earth Environmental Lab, Inc. (E.795). That requested instruction was denied. (E.795).[1] The case was then submitted to the jury. The jury found HABC was negligent and in breach of its leases. Judgment was entered October 12, 2006.

On October 5, 2006, HABC filed a Motion to Correct Judgment. On October 13, 2006, HABC filed a Motion for Judgment Notwithstanding Verdict and Motion for New Trial and/or Remittitur and requested a hearing. On October 31, 2006, Plaintiffs filed an opposition to HABC's motion. On November 9, 2006, HABC filed replies in further support. On November 22, 2006, the Circuit Court denied HABC's motions. On November 28, 2006, HABC noted this appeal.

QUESTIONS PRESENTED

1. Whether the trial court committed reversible error when it refused to instruct the jury regarding the inadmissibility of Homesteader's sampling results and half of the sampling results from Pure Earth and Dr. Simon?

2. Whether the trial court erred when it failed to grant HABC's motions for judgment based upon Plaintiffs' failure to establish the proximate causation of their injuries?

3. Whether the trial court erred when it admitted inadmissible and prejudicial opinion testimony and exhibits?

4. Whether the trial court erred when it failed to grant HABC's Motion for Remittitur or in the Alternative Motion for New Trial based on the shocking and excessive non-economic damage awards?

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[1]On May 25, 2007, Defendant HABC filed a Consent Motion to Correct and Supplement the Record to reflect that HABC re-raised its Motion for Judgment following the admission or exclusion of several of these proposed exhibits.

STATEMENT OF FACTS

In this case, Plaintiffs claim injury and damages as a result of their residential exposure to mold in an apartment building owned and operated by HABC. (E.18).

I. Facts Regarding Exposure

Although there was evidence of violations in 2003 issued by the Baltimore City Health Department, no person or entity found the building unfit for habitability. Moreover, after re-inspection, the Health Department abated the violations in August 2003 and then finally in January 2004. (E.522-523, 1173-1175, 1206-1207). The Baltimore City Health Department issued no further violations.

In 2003, Advanced Mold Remediation in conjunction with EMSL Analytical Inc, (hereinafter referred to collectively only as "AMR") performed three sets of mold sampling and laboratory analysis. (E.1181-1205). Judge Cannon held all three reports, one for each of the Plaintiffs' apartments, were untrustworthy and inadmissible. (E.283, 285-290). The Court found "the numbers untrustworthy." (E.290). Among the many reasons upon which it relied, the Court explained that "not having the other" air sample to compare with the documented air sample, rendered the AMR air sample of Pratt's apartment, containing a 7754 spore count of stachybotrys, as well as the spore counts for other types of fungi, untrustworthy. (E.290). On Plaintiffs' Motion for Reconsideration, Judge Cannon reconsidered and allowed one line from one of the three AMR reports to be admitted. (E.402-406). The Court held that the Plaintiffs' experts could mention the spore count for stachybotrys taken by AMR in the air sample of Pratt's apartment. (E.402-406). At no point did Judge Cannon find that the AMR air sample, which counted stachybotrys as well as other fungi, was trustworthy, instead the Court merely found that the spore count for stachybotrys was not "that untrustworthy" and permitted the extraction of the number from a still-untrustworthy report. (E.404). Significantly, the Court refused to reconsider her decision finding that the other results in that specific AMR report as well as the other two AMR

reports were untrustworthy and inadmissible.[2] (E. 406).

At trial, the Court excluded all of the mold tests performed by Homesteaders Home Inspections and analyzed by Mets Laboratories (hereinafter referred to collectively as "Homesteaders") and approximately half of the samples taken by Plaintiffs' expert Dr. Robert Simon and analyzed by Pure Earth. (E.793-795).

There was no other mold testing performed or presented to the jury.

II. Plaintiffs' Damages

A. Plaintiffs' Claimed Injuries

At trial, the Plaintiffs complained of rhinitis symptoms (runny nose and eyes, itchy eyes and nose). Only one Plaintiff, Bills, complained that her pre-existing asthma worsened while simultaneously admitting that her asthma improved upon her move to the premises. (E.547, 573-574, 578-579, 587-588, 595-596, 602). None of the Plaintiffs described any sensations of pain. The Plaintiffs presented no evidence of any physical impairment or disfigurement, no proof of permanency and only minimal proof of any complaint at all. (E.553, 559-560, 578-579, 580-581, 595-596, 726-727, 729) Plaintiffs' care from Dr. Joyner, their medical doctor and forensic expert at trial, was neither significant nor regular. (E.634-635). Dr. Joyner saw Pratt three times: September 23, 2005; two years later on September 23, 2005; and then a month later on October 24, 2005. (E.635). Dr. Joyner saw Bills only two times:

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[2] The Pratt AMR report on which this suspect stachybotrys number is found, along with the other two AMR reports (together, the three reports detailing the conditions of the three Plaintiffs' apartments), were found inadmissible by Judge Cannon at the close of the Motion in Limine hearing in July (E.290). Judge Cannon affirmed their inadmissibility at the September re-hearing, save for the allowance of the alarmingly high suspect stachybotrys number. Judge Cannon determined these reports were inadmissible because they were not signed (E.286); because of the breach in protocol from the delay in transmitting the samples to the lab for analysis (E.286, 289); because they each suffered from infirmities ranging from not having an author (E.287), not having a signature indicating authenticity (E.287), to listing the wrong apartment unit (E.286); because they evinced clearly erroneous reporting results (E.287); because they neglected to report certain testing results (E.287); and because they failed to adhere to standard testing procedures, i.e. indoor/outdoor testing. (E.290).

September 26, 2003; and then two years later on August 12, 2005. Id. Dr. Joyner saw Roy four times: November 3, 2003; November 24, 2003; two years later August 12, 2005; and then December 2, 2005. Id.

When Pratt saw Dr. Joyner in September 2003, he made no complaints of watery eyes or an itchy nose. (E.649-650). Pratt testified that his symptoms stopped completely after he moved out of the premises in March 2005. (E.553). Defense expert Dr. Mardiney testified that he reviewed the Plaintiffs' medical records and found that Pratt failed to complain at all about his alleged symptoms to his treating healthcare providers at the VA during the same 2003-2005 time period. (E.724-727, 765-766, 1224-1226). Similarly, Pratt's VA records provided no indicia of any nasal irritation. (E.766). Furthermore, Pratt admitted his alleged symptoms did not interfere with his activities. (E.559-560).

Regarding her symptoms, Roy admitted that she did not have a runny nose or sniffles all the time. (E.587). She also said that "it might have been sniffles and it didn't last for long. . . . It might have been a cold, from a cold or something." (E.774). She further admitted that she could not remember how her sniffles and runny nose affected her. (E.587, 774). She testified that her activities had changed but also explained that it was because she was in a wheelchair and less mobile, not because of the premises. (E.581). In fourteen visits to her regular treating doctor between 2003-2005, Roy never complained about the upper respiratory complaints about which Dr. Joyner opined. (E.658).

In like fashion, Plaintiff Bills made no mention of an itchy nose to Dr. Joyner in 2003. (E.653). Bills made no mention of any rhinitis complaints when she saw her attorney-referred doctor, Dr. Joyner, in August 2005, a full two years after her last visit to Dr. Joyner. (E.631, 635, 731). In records from Bills' regular treating doctors, from whom she sought treatment approximately thirty-one times between 1998 and 2005, there was only one note regarding a runny nose. (E.604). The record clearly connected it to tear duct surgery performed in January 2004. There was also one note regarding a cold in October 2004. (E.731-732). Similarly, Bills medical records did not reveal an increase in her pre-existing asthma. (E.733-

734, 739, 1208-1219). Bills, Dr. Joyner, and Dr. Mardiney further testified that Bills only complained about her asthma to her doctor three times in thirty-one visits; never went for emergency treatment from her doctors; and never went to the hospital between 2003 and 2005. (E.604, 657-658, 774). While Dr. Joyner did note a complaint about asthma in August 2005, Bills' medical records revealed that the complaint coincided with her voluntary discontinuation of her medicine. (E.630, 631, 772). In a September 2005 medical note, a month after Bills' visit to Dr. Joyner, Bills' regular treating doctor reported no asthma-related symptoms. (E.771). 1210-1219). Predictably, Dr. Joyner never saw Bills again after that August 2005 visit. (E.635).

There was no objective evidence that Plaintiffs' respective rhinitis (runny and itchy noses and eyes) worsened during the period of exposure, nor was there any evidence that Bills' pre-existing asthma worsened. (E.632, 653-654, 731, 1227-1231). Instead, Dr. Joyner relied upon Plaintiffs' complaints to her as proof that their symptoms were real. (E.626, 627, 629, 630, 648). Dr. Joyner even admitted that her diagnosis was based on subjective complaints, that is, complaints described by the Plaintiffs. (E.627).

The only evidence that Plaintiffs' alleged symptoms were caused by inhalation of mold and/or exposure to a damp indoor environment was through the testimony of Plaintiffs' expert, Dr. Joyner. (E.623-624). Within her area of expertise, Dr. Joyner testified that Plaintiffs had no allergies to mold. (E.626, 629, 636-638, 1220-1223). She also testified that Plaintiffs did not have an immunological response to mold and/or a damp indoor environment. E.626, 629, 631, 636-637, 1220-1223). At no point in her testimony, did Dr. Joyner ever point to any scientific authority to support her opinion that exposure by Plaintiffs to mold in the building caused their injuries. (E.639-640, 641, 642). Nonetheless, Dr. Joyner opined that Roy's sniffling, sneezing and rhinitis were an adverse health effect as a result of exposure to mold and dampness. (E.629-630). Dr. Joyner further opined, beyond her area of expertise, that Plaintiffs each suffered an "irritant effect" from their exposure to mold and its byproducts: Volatile Organic Compounds ("VOCs") and mycotoxins. (E.643-644).

Significantly, Dr. Joyner admitted she did not know what VOCs or mycotoxins were present. (E.643-644, 646). She admitted that such VOCs are not just created by molds, but are created by many things. (E.643). She also admitted mycotoxins can come from many things. (E.644-645). There was undisputed evidence that it is possible to test to determine what VOCs and mycotoxins were present, but that no such tests were performed. (E.643, 646, 679). Nor did Dr. Joyner know what proteases were present because no studies had been done. (E.646). Ultimately, there was no evidence of what mycotoxins, VOCs or proteases were ever present.

Even though Dr. Joyner admitted current science recognizes a difference between a causal relationship and an association, Dr. Joyner failed to point to any scientific authority to support her opinion that Plaintiffs' claimed injuries were caused by exposure. (E.639-642).

> Q. How many studies concerning causation are you aware of?
> A. I'm not aware of any studies on causation, sir, at this time.

(E.640) Her inability to point to any resource supporting her opinion on causation of injury as a result of exposure to mold notwithstanding, and despite her knowledge that exposures to other things, such as exposure to tobacco smoke, cockroaches, or dust mites, can cause similar injury, Dr. Joyner reached and gave the jury a definitive opinion on the cause of Plaintiffs' injuries. (E.640).

Importantly, in reaching those opinions, Dr. Joyner did not even follow her own methodology and rule out other possible causes of their injuries.

> Q. And part of what you do in coming to your diagnosis is to rule out possible causes; is that correct?
> A. Yes.
> Q. Okay. But you didn't rule out those causes?
> A. Didn't rule out the other causes.

(E.656). See also (E.631). (Regarding Bills' asthma, Dr. Joyner even admitted that without removing Bills from her house, Dr. Joyner could not determine the effect of the premises on her condition).

Despite evidence that smoking and exposure to second-hand smoke causes the same symptoms about which all of the Plaintiffs complained, Dr. Joyner admitted she did not rule out the effect of smoke on the Plaintiffs, even though she knew that Pratt and Bills had smoked for most of their adult lives and that Roy had lived with and/or been around smokers most of hers. (E.625, 640, 641, 647-648, 729, 730, 735).

Although Dr. Joyner admitted that Pratt and Roy had other, non mold-related, allergies, and despite evidence that allergies can cause the same symptoms, Dr. Joyner made no effort to distinguish the adverse effects due to those other allergies. (E.626, 629, 636-638, 722-723).

In Pratt's case, Dr. Joyner's testing revealed that Pratt was allergic "to English plantain, which is a fall weed, lamb's quarters which is also a weed mostly found in the late summer/fall, Timothy and orchard grass, which is a spring pollen, Bermuda grass . . . , and then dust mite which is a year round allergen. He did not react to -- to mold on their testing." (E.722). Dr. Mardiney explained that those weeds and grasses were seasonal allergens present in Spring, Summer, and Fall. (E.723). Significantly, Dr. Joyner only saw Pratt in September and October, and during those months the seasonal allergens to which he tested positive were prevalent in the air. (E.635, 723).

For Roy, Dr. Joyner's allergy testing revealed a positive reaction to Timothy grass, dust mites and cockroach. (E.1223). Dr. Mardiney explained that dust mites are a perennial and ubiquitous allergen. (E.723). Dr. Joyner agreed. (E.641, 662-663). Dr. Joyner also explained that cock roaches are common in apartment buildings. (E.641). Dr. Joyner did not rule out the effect of dust mites and/or cock roaches even though current science has not ruled out the respective effect each has on causing the same type of respiratory complaints. (E.640-641).

Dr. Joyner also failed to rule out the effect of medications used by Roy and Bills and which are known to cause the same symptoms about which they complained. Dr. Joyner did not rule out the effect of Roy's use of Atenolol, a beta blocker known to cause rhinitis. (E.653, 1232-1235). Nor did Dr. Joyner determine the effect of Bill's use of Dristan also known to cause rhinitis medicamentosa. (E.730-731, 1237-1231).

Dr. Joyner admitted that she reached her opinions on causation over two years before she received and reviewed Plaintiffs' extensive medical histories. (E.646-647). Finally, Dr. Joyner never asked Plaintiffs whether they were exposed to other sources of mold or mycotoxins outside of HABC's control. (E.655-657, 681).

B. Plaintiffs' Claimed Damages

Plaintiffs offered no proof of the fair market value of their belongings. No receipts, photographs, appraisals or any evidence whatsoever was offered of the items' used value prior to when they suffered damage. (E.556, 578,586-587, 599-601). Roy could not even identify her allegedly damaged property by item or quantity. (E.587). Plaintiffs failed to identify any efforts to mitigate their damages. (E.557, 566, 1601). Instead, Plaintiffs testified that they either threw their damaged property out or, in the case of Bills, gave some of her damaged clothing to her neighbors because it did not fit her anymore. (E.600-601).

The Court erred by allowing Roy to testify as to damages, which she failed to disclose in response to HABC's discovery requests. (E.582-583, 585-587). Roy was allowed to testify, over HABC's objection, to property damage to items contained in her basement storage bin, which she had never disclosed in discovery despite requests to do so. (E.578). (App. A 1-6).

III. Opinion Testimony

The Court repeatedly allowed witnesses to testify beyond their knowledge, including allowing lay witnesses to testify that mold is unhealthy and experts to offer opinions beyond their area of expertise. The Court allowed Dan McDowell ("McDowell"), with only a high school degree, to state mold was unhealthy and repeatedly allowed reference to and admitted as an exhibit McDowell's cover letter to a bid proposal he sent to HABC stating "mold and mildew... was making for an unhealthy and unsafe atmosphere." (E.410-417, 449, 450, 1176). The Court further allowed repeated attention to McDowell's opinion when it allowed multiple witnesses to be questioned regarding their agreement with McDowell's comments as contained in that letter, including former housing manager Coral Ross and former

maintenance superintendent Japp Haynes. (E.525, 533).

The Court allowed HABC's employees, including an assistant housing manager Doug Smith and an environmental engineer Zakauddin Mahmood, with no medical science training, to opine as to the accuracy of an EPA publication commenting on the health effects associated with mold.[3] (E.433, 434, 436-437, 439-440, 797-873). The Court also allowed Joe Connor, who had no science or medical training, to discuss the health effects of mold. (E.442-447).

The Court also allowed even the medical experts to answer questions beyond their expertise. Plaintiffs questioned Dr. Mardiney, a medical doctor board certified in asthma and clinical immunology, regarding the quantity of mold present. (E.760). The Court also permitted Dr. Joyner, a medical doctor board certified in asthma and clinical immunology and by her own admission not a toxicologist, not an industrial hygienist, not an epidemiologist, and not an expert in the area of assessing the condition of a building, to testify that the building was in a deplorable condition. (E.613, 623, 634). The Court also allowed Dr. Joyner to testify that based on various documents she was given she understood mold was present in the common areas and in some of the apartments in the building. (E.616-623). Among the information upon which she relied were the three sets of mold testing performed by AMR/EMSL, the reports of Homesteaders summarizing its testing, and Dr. Simon's reports summarizing the tests analyzed by Pure Earth. Of that information, all of the tests, with the exception of half of Dr. Simon/ Pure Earth's data ,were held untrustworthy and inadmissible. (E.283-290, 304, 320-327,331-406, 792-795).

ARGUMENT

For the reasons set forth below, the trial court erred as a matter of law when it denied HABC's multiple motions for judgment and again when it denied HABC's Motion for Judgment Notwithstanding Verdict and HABC's Motion for New Trial or in the Alternative

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[3] That EPA publication was admitted into evidence over objection as part of Plaintiff Ex. 9. (E.797-873). A blow up of one page of that EPA publication was admitted over objection as Plaintiffs' Ex. 9A. (E.832).

for Remittitur .

I. Standard of Review

A. Motion for Judgment

When considering a motion for judgment, "the court shall consider all evidence and inferences in the light most favorable to the party against whom the motion is made." Md. Rule 2-519.

> The Court of Appeals of Maryland in Baulsir v. Sugar, 266 Md. 390, 394-95, 293 A.2d 253, 255 (1972), has stated the sufficiency of evidence standards which warrant the granting or denial of a directed verdict:
> 'We have held that in reviewing the action of the trial court in granting a directed verdict for a defendant at the conclusion of a plaintiff's case, we will, in testing the sufficiency of the evidence, resolve all evidentiary conflicts in favor of the plaintiff and assume the truth of all of the evidence and inferences that may naturally and legitimately be deduced therefrom in favor of the plaintiff's right to recover. Durante v. Braun, 263 Md. 685, 689, 284 A.2d 241 (1971); Home Insurance Company v. Metropolitan Fuels Company, 252 Md. 407, 411, 250 A.2d 535 (1969). We have also said that a plaintiff has not met his burden of proof if he presents merely a scintilla of evidence where the jury must resort to surmise and conjecture to declare his right to recover. Plitt v. Greenberg, 242 Md. 359, 367, 219 A.2d 237 (1966); Fowler v. Smith, 240 Md. 240, 246, 213 A.2d 549 (1965). A hypothesis resting on surmise and conjecture is not enough to warrant a submission of the case to the jury. Dorsey v. General Elevator Co., 241 Md. 99, 105, 215 A.2d 757 (1966); Moulden v. Greenbelt Consumer Services, Inc., 239 Md. 229, 232, 210 A.2d 724 (1965).'

Keene v. Arlan's Dept. Store of Balt., 35 Md. App. 250, 253-4, 370 A.2d 124, 127 (1977).

B. Judgment Notwithstanding The Verdict

Maryland Rule 2-532 provides that a party may move for judgment notwithstanding the verdict ("JNOV") if filed within ten days after entry of judgment on the verdict. The court must grant a motion for judgment or for JNOV when the evidence at the close of the case, viewed in the light most favorable to the nonmoving party, does not legally support the nonmoving party's claim. Dennard v. Green, 335 Md. 305, 323, 643 A.2d 422, 431 (1994); Mallard v. Earl, 106 Md. App. 449, 456, 665 A.2d 287, 290 (1995). The court "must assume

the truth of all credible evidence and all inferences of fact reasonably deducible from it tending to sustain the decision of the trial court in favor of the nonmoving party." Mallard, 106 Md. App. at 456-57, 665 A.2d at 290. The Mallard court, citing the Court of Appeals in Myers v. Bright, 327 Md. 395, 609 A.2d 1182 (1992), explained:

> "[I]f there be any evidence, however slight, legally sufficient as tending to prove negligence, ... the weight and value of such evidence will be left to the jury." "Legally sufficient" means "that a party who has the burden of proving another party guilty of negligence, cannot sustain this burden by offering a mere scintilla of evidence, amounting to no more than surmise, possibility, or conjecture that such other party has been guilty of negligence, but such evidence must be of legal probative force and evidential value." ["Without that prima facie showing, the issue of negligence should not be submitted to the trier of fact."]

Mallard, 106 Md. App. at 456 , 665 A.2d at 290-91 quoting Myers, 327 Md. at 399, 609 A.2d at 1183-84.

> If, however, the evidence, taken as a whole, does not rise above speculation, hypothesis, and conjecture, then the trial court should not allow the jury to consider the issue, and the denial of a motion for judgment or JNOV would be error.

Mallard, 106 Md. App. at 456 , 665 A.2d at 290-91.

C. New Trial and Remittitur

Maryland Rule 2-533 provides that a party may move for a new trial if filed within ten days after entry of judgment. The court has broad discretion to grant a new trial where the verdict is against the great weight of the evidence. See Buck v. Cam's Broadloom Rugs, Inc., 328 Md. 51, 612 A.2d 1294 (1992); I.O.A. Leasing Corp. v. Merle Thomas Corp., 260 Md. 243, 272 A.2d 1 (1971). Similarly, the court has discretion to grant a new trial where the verdict is contrary to the law or the court erred in failing to grant a directed verdict at the close of plaintiff's case and/or at the close of all proofs.

In Wilson v. Crane, 385 Md. 185, 867 A.2d 1077 (2005), the Court stated:

> There is an abuse of discretion "where no reasonable person would take the view adopted by the [trial] court[ ]" ... or when the court acts "without reference

> to any guiding principles." An abuse of discretion may also be found where the ruling under consideration is "clearly against the logic and effect of facts and inferences before the court[ ]" ... or when the ruling is "violative of fact and logic."
>
> Questions within the discretion of the trial court are "much better decided by the trial judges than by appellate courts, and the decisions of such judges should only be disturbed where it is apparent that some serious error or abuse of discretion or autocratic action has occurred." In sum, to be reversed "[t]he decision under consideration has to be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable."

Wilson v. Crane, 385 Md. 185, 198-99, 867 A.2d 1077, 1084 (2005), quoting In re Adoption/Guardianship No. 3598, 347 Md. 295, 312-13, 701 A.2d 110, 118-19 (1997) (citations omitted).

II. Trial Court Committed Reversible Error When it Refused to Instruct the Jury Regarding the Inadmissibility of the Homesteader Sampling Results and Half of the Sampling Results from Dr. Simon and Pure Earth

After belatedly hearing arguments regarding the admissibility of all of Homesteaders' reports and half of Pure Earth's[4] laboratory results – after the jury had already been sent to deliberate – the Court ultimately agreed with HABC that the data was not trustworthy or reliable and should be excluded. Defense counsel specifically requested a curative instruction regarding references to the Homesteaders' sampling results and half of the Pure Earth/ Dr. Simon Results in accord with its earlier Maryland Rules 5-403 and 5-703(b) instruction given for the inadmissible AMR lab results. The Court denied Defendant's request, however, stating that its prior instruction adequately covered the subject. The Court had earlier instructed:

> The rule of evidence, after a great deal of struggling over the years, the rules committee has permitted evidence to be admitted for the limited purpose of helping you evaluate the opinion or conclusion of the expert, but not to rely on

[4] Pure Earth was the laboratory to which Dr. Simon submitted his sampling for analysis.

> the evidence itself as proof. And I realize it's a difficult kind of thing to do, but you've got to look at, in this particular case, the facts of the data from the AMR and the MSL reports only for the purpose of evaluating the validity of the probative value of both Dr. Joyce and Dr. Simon's opinion or inference. The fact that the test revealed a specific number of scores is not evidence in this case and is not to be considered for any other purpose. In other words, that means you may consider it for the purpose of determining if Dr. Joyce and/or Dr. Simon has a valid basis for forming the opinion or the inference testified to, but not for any other purpose.

(E.780). (Emphasis added). The Court's previous instruction, which specifically identified the inadmissible data by name, did not include any reference to the Homesteaders' and or Dr. Simon/Pure Earth's data which was determined inadmissible after the jury was sent to deliberate. The Court's failure to advise the jury that the data was inadmissible and failure to instruct the jury regarding how it should consider, or not consider, the inadmissible evidence and Plaintiff's experts' reliance on that evidence demands reversal.

In Boone v. American Mfrs. Mut. Ins. Co., 150 Md.App. 201, 819 A.2d 1099 (2003), the Court reversed the trial court based upon its failure to give a proper instruction. It explained:

> In *Robertson,* 112 Md.App. at 385, 685 A.2d 805, a criminal case, we explained: The main purpose of a jury instruction is to aid the jury in clearly understanding the case and considering the testimony; to provide guidance for the jury's deliberations by directing their attention to the legal principles that apply to and govern the facts in the case; and to ensure that the jury is informed of the law so that it can arrive at a fair and just verdict. Accurate jury instructions are also essential for safeguarding a defendant's right to a fair trial. The court's instructions should fairly and adequately protect an accused's rights by covering the controlling issues of the case.

Boone v. American Mfrs. Mut. Ins. Co., 150 Md.App. at 226, 819 A.2d at 1113. Finding that the requested jury instruction was not covered, and finding that

> [a]s a result of the court's failure to make clear to the jury how it was to proceed, the jury may have believed it was awarding appellants $15,864.48 as a supplement to whatever amount appellants had already recovered from Sites." [The Court] vacate[d] the judgment and remand[ed] for further proceedings.

Boone v. American Mfrs. Mut. Ins. Co., 150 Md.App. at 233, 819 A.2d at 1117.

Here too, the requested jury instruction was not fairly covered by instructions actually given. A proposed instruction that is "a correct exposition of the law," that is "applicable in light of the evidence before the jury," and is not "fairly covered by the instructions actually given," Holman v. Kelly Catering, Inc., 334 Md. 480, 495-96, 639 A.2d 701, 709 (1994) (quoting Wegad v. Howard Street Jewelers, 326 Md. 409, 414, 605 A.2d 123, 126 (1992)), must be given. The curative instruction given by the Court pertained to the AMR/EMSL data by name. At no point did the Court ever instruct the jury that all of the Homesteaders data was inadmissible. At no point did the Court ever instruct the jury that half of Dr. Simon/ Pure Earth's data was also inadmissible. The jury heard extensive testimony and argument about the two sets of data repeatedly referred to during the trial as the Homesteaders reports and as the sampling performed by Dr. Simon and analyzed by Pure Earth, but the jury was never told to disregard those reports and the information contained in them for their substantive value. Clearly, hearing that evidence with no direction limiting its use prejudiced HABC.

If the jury had been instructed to not consider the excluded Homesteaders' and Dr. Simon/Pure Earth's data, the jury would have had no evidence of any testing confirming the presence of mold anywhere in the basement, as well as anywhere in Roy's apartment at any time. (E.258-261, 680-682, 780, 789-791, 1235). By excluding that data, there was no evidence showing any of the Plaintiffs' property damage stored in the basement was contaminated by any mold. The excluded Homesteaders data also should have removed from the jury's consideration, any testing confirming the presence of mold in Bills' apartment and in the second floor common room at any point in time before 2005. (E. 681, 695, 708, 780, 789-791). Yet the jury was never told that data was not admissible and not to consider it for its own sake.

The existence or non-existence of evidence showing there was mold present in the premises and in the Plaintiffs' respective apartments was a central question in this case. Significant testimony and argument were made to the jury about the significance of, and

subsequently determined inadmissible, data without any instruction on the issue. The Court allowed the jury to believe there were tests proving the existence of mold, when in fact those tests were untrustworthy. The jury was allowed to accept the truth of the testimony regarding those tests as facts. The failure to give the requested curative instruction was prejudicial error, warranting a reversal.

III. The Trial Court Erred as a Matter of Law When it Denied HABC's Motions Because Plaintiffs Failed to Establish the Proximate Causation of Their Injuries

Plaintiffs' reliance on Dr. Joyner is insufficient because Dr. Joyner cannot identify any scientific authority to support her theory of causation. In addition, Dr. Joyner failed to apply a reliable methodology to diagnose the cause of Plaintiffs' complaints.

The cause of all three Plaintiffs' rhinitis and the worsening of Bills' asthma are complicated medical questions demanding expert testimony. In Maryland, expert testimony is "required when the subject of the inference is so particularly related to some science or profession that it is beyond the ken of the average layman." Virgil v. "Kash 'N' Karry" Service Corp., 61 Md.App. 23, 31, 484 A.2d 652 (1984), cert. denied, 302 Md. 681, 490 A.2d 719 (1985). "When a complicated issue of medical causation arises, expert testimony is almost always required." Giant Food, Inc. v. Booker, 152 Md. App. 166, 178, 831 A.2d 481, 488 (2003) (internal citations omitted).

> Occupational diseases, infections, and other harm to internal tissue or organs, however, present a more esoteric question. A determination of causation in the latter category of cases by a jury of laypersons is less possible without the aid of medical evidence. It is particularly so, as here, when there has been a significant passage of time between the exposure and the onset of the disease and where there is lacking an obvious cause and effect relationship that is within the common knowledge of laymen. . . . . A medical diagnosis of asthma, and its antecedent cause, requires expert testimony.

Giant Food, Inc., 152 Md. App. at 180, 831 A.2d at 489 (emphasis added). As proof of causation, Plaintiffs relied exclusively on Dr. Joyner who, although an expert in the field of allergy and immunology, lacked sufficient knowledge about the effects caused by mold and/or

a damp indoor environment.

Despite specific questioning, Dr. Joyner could not identify any scientific literature to show a causal relationship between Plaintiffs' complaints and the alleged exposure. (E.642). While Dr. Joyner testified that the scientific community has recognized an association between various symptoms and mold and/or a damp indoor environment, both the scientific community and Dr. Joyner recognize that association is different from causation. (E.639-40, 642, 734-36). Furthermore, Dr. Joyner's opinions were not sufficient to establish proximate causation because by her own admission she failed to perform a differential diagnosis to rule out other probable causes of the complained of symptoms. (E.656). Dr. Mardiney explained that it is the standard of practice to perform a differential diagnosis when the cause of injury is not known. (E. 723-24). Dr. Mardiney having reviewed the medical histories of each Plaintiff as well as examined them in relation to their complaints, opined as to possible causes of each of their complaints.(E. 724-256, 728-29, 1224-34). Notwithstanding the other possible causes, Dr. Joyner admitted she failed to rule out those causes. Dr. Mardiney confirmed that she failed to do a differential diagnosis. (E.724-25). Lacking sufficient scientific knowledge and failing to follow a reliable methodology, Dr. Joyner's testimony is not sufficient to establish proximate causation of Plaintiffs' injuries.

Dr. Joyner cannot base her opinion on the fact that she is an expert in the field of allergy and immunology.

> [S]imply because a witness has been tendered and qualified as an expert in a particular occupation or profession, it does not follow that the expert may render an unbridled opinion, which does not otherwise comport with Md. Rule 5-702. "[N]o matter how highly qualified the expert may be in his field, his opinion has no probative force unless a sufficient factual basis to support a rational conclusion is shown." *State Dep't of Health v. Walker,* 238 Md. 512, 520, 209 A.2d 555 (1965) (citations omitted) (quoted in *Beatty v. Trailmaster Prod., Inc.,* 330 Md. 726, 741, 625 A.2d 1005 (1993)). An expert's opinion testimony must be based on a adequate factual basis so that it does not amount to " conjecture, speculation, or incompetent evidence." *Uhlik v. Kopec,* 20 Md.App. 216, 223-24, 314 A.2d 732 (1974), *cert. denied,* 271 Md. 739 (1974).

> Furthermore, the testimony must also reflect the use of reliable principles and methodology in support of the expert's conclusions. *Wood, supra,* 134 Md.App. at 523, 760 A.2d 315.

Giant Food, Inc., 152 Md. App. at 182-3, 831 A.2d at 490 (emphasis added). The premises of fact must disclose that the expert is sufficiently familiar with the subject matter under investigation to evaluate his opinion about the realm of conjecture and speculation, for no matter how highly qualified the expert may be in his field, his opinion has no probative force unless a sufficient factual basis to support a rational conclusion is shown. *State, Use of Stickley v. Critzer,* 230 Md. 286, 186 A.2d 586, and cases cited therein; *Hammaker v. Schleigh,* 157 Md. 652, 147 A. 790. The opinion of an expert, therefore, must be based on facts, proved or assumed, sufficient to form a basis for an opinion, and cannot be invoked to supply the substantial facts necessary to support such conclusion. The facts upon which an expert bases his opinion must permit reasonably accurate conclusions as distinguished from mere conjecture or guess. *Marshall v. Sellers,* 188 Md. 508, 53 A.2d 5.

Giant Food, Inc., 152 Md. App. at 189, 831 A.2d at 494 (emphasis added). The Court of Special Appeals went on to conclude that the expert's "testimony was not the product of the application of reliable principles and methods." Giant Food, Inc., 152 Md. App. at 189, 831 A.2d at 494.

Just like the expert in Giant Food Inc., Dr. Joyner's testimony was neither based on scientific literature, nor on reliable principles. Like that expert's ignorance of other chemical exposures, Dr. Joyner also did not know to what else Plaintiffs had been exposed. Dr. Joyner did not rule out the effect of their allergies, their past and present medical conditions involving the same symptomology, their exposure to tobacco smoke, nor the effect their other medications had on causing or aggravating their complaints. (E. 655-657, 681). Nor did Dr. Joyner know what, if any, VOCs, mycotoxins or proteases were in the building, despite her opinion that they had an irritant effect on Plaintiffs. (E.643-646).

Dr. Joyner failed to follow her own methodology. She did not conduct a differential diagnosis to rule out other probable causes, despite acknowledging that it is a part of the process of how she reaches her opinions. Dr. Joyner's methodology was unreliable in that she did not follow the acknowledged standard of care to rule out other causes. While she did review the medical histories of the Plaintiffs, it was not until 2006, over two years after she

first rendered opinions regarding the Plaintiffs' health. And then, she did not go to any effort to rule out probable causes consistent with their medical histories.

Not only did Dr. Joyner fail to rule out other probable causes, leaving the jury to speculate as to causation, but she never explained how the injuries allegedly occurred, stating only that inhalation of the mold and its byproducts in the damp indoor environment had an irritant effect. (E.643-44). See Myers v. Celotex Corp., 88 Md. App. 442, 458, 460, 594 A.2d 1248 (1991) (held trial court erred by striking medical doctor's opinion on the cause of cancer because the expert explained the mechanism or process by which the asbestos caused the cancer based upon his own personal observations and professional experience. The Court further noted that the conclusion that asbestos may cause cancer is neither novel, nor controversial); Owens Corning v. Bauman, 125 Md. App. 454, 501-02, 726 A.2d 745, 768-69 (1999)(court properly allowed doctor to opine on when tumor started based upon his knowledge and explanation of how tumors grow for other cancers).

Dr. Joyner never explained how inhalation caused the alleged irritant effects. Plaintiffs introduced no scientific literature explaining "how" inhalation causes irritant effects, nor did Plaintiffs introduce any literature or studies that established a causal link between exposure to mold and the type of injuries claimed by these Plaintiffs. Significantly, Dr. Joyner admitted she did not even know what VOCs, mycotoxins or proteases were even present in the premises to support her theory that they caused irritation. (E. 643-646). Although testing could have been performed to determine what was present, no testing was done. (E. 643, 646, 679).

Dr. Joyner cannot fall back on her methodology of performing a differential diagnosis to rule out other probable causes because she did not actually do a differential diagnosis. Lacking scientific literature on causation, failing to apply a differential diagnosis to rule out probable causes of the symptoms, and providing no explanation of how inhalation caused the alleged irritation symptoms, Plaintiffs failed their burden of proof. See Giant Food, Inc. v. Booker, 152 Md. App. 166, 831 A.2d 481; Wood v. Toyota Motor Corp, 134 Md App 512,

523-24, 760 A.2d 315, 321-22 (2000) cert. denied 362 Md 163, 763 A.2d 735 (2000) (trial court did not abuse discretion by disqualifying expert, stating "Mr. Leshner's theory provided no rational explanation for why the size or location of the vent holes [in the air bag] had anything to do with the injuries that appellant sustained;" Beatty v. Trailmaster, 330 Md. 726, 740, 625 A.2d 1005 (1993)(affirming summary judgment against a products liability plaintiff who proffered the testimony of an expert who could offer no "scientific evidence... [or] sound data to buttress his opinion").

In sum, Dr. Joyner failed to identify a factual basis for her opinions on causation, instead Dr. Joyner relied on the premise that she is an expert and therefore knows. Courts have repeatedly held that "I say so" is not a basis for admissibility. See Giant Food, Inc. v. Booker, 152 Md. App. at 188, 831 A.2d 493 ("We think that Redjaee's testimony amounts to a "because I think so," or "because I say so," situation. Maryland law makes clear that an expert can not assert an admissible opinion without an adequate factual basis or reliable methodology. *Wood, supra,* 134 Md. App. at 521-27, 760 A.2d 315; *Beatty, supra,* 330 Md. at 741, 625 A.2d 1005"). Dr. Joyner's unsupported opinions erroneously allowed the jury to find injury based upon conjecture and speculation. The Maryland Courts have consistently held that an expert witness must base his or her opinion on "reasonable probability or reasonable certainty" and not on "mere possibilities." See Farley v. Allstate Ins. Co., 355 Md. 34, 51, 733 A.2d 1014, 1023 (1999) (affirming trial court's conclusion that expert testimony about future medical expense was too speculative to be admitted); Ager v. Baltimore Transit Co., 213 Md. 414, 421, 132 A.2d 469, 473 (1957)(stating that the Maryland cases are "all consistent in rejecting the proposition that the jury may form a judgment or conclusion on the basis of [expert] testimony which admits of mere possibilities"). Mere possibilities are all that Dr. Joyner had to offer. Accordingly, Plaintiffs failed to prove the alleged exposures proximately caused their injuries.

IV. The Trial Court Admitted Inadmissible and Prejudicial Opinion Testimony and Evidence

A. The Trial Court Erred by Allowing Witnesses to give Inadmissible and Prejudicial Opinions

HABC was prejudiced by lay witnesses offering improper opinions as to the health effects of exposure to mold because their conclusory statements were inflammatory and misled the jury. Maryland Rule 5-701 provides:

> If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

Here, none of the lay witnesses had specialized training or sensory perceptions such that they had personal knowledge of the health effects of mold.

Dan McDowell was permitted to testify as to the potential health effects of mold despite having no first-hand knowledge or any training to support his lay opinions. HABC staff were further asked questions about their agreement with McDowell's letter summarizing his opinion that the building was unhealthy. Other HABC staff were asked questions regarding their knowledge and agreement with an EPA publication commenting on the health effects associated with mold.

When the witnesses were questioned about the health effects of certain conditions generally it became a question of opinion properly answerable only by someone with first-hand knowledge learned from a sensory perception or from scientific expertise. See Wilhelm v. State Traffic Safety Comm'n, 230 Md. 91, 103-04, 185 A.2d 715, 721 (1962); Maryland Rule 5-701. Plaintiffs never elicited information to show that the witnesses's opinions were based on their own perceptions. Moreover, McDowell, Coral Ross, Japp Haynes, Douglas Smith, Zakauddin Mahmood and Joe Connor all lacked medical training. Hearing from uneducated lay witnesses about purported health effects caused by mold was misleading because it allowed the jury to conclude there is in fact a health effect when there

is no science to support such an opinion.

Over and over again, the jury was allowed in error to hear from untrained fact witnesses and from Plaintiff's own medical expert, Dr. Joyner, that exposure to mold was unhealthy and caused injury. Critically absent was any definitive proof that the hypothesis that "mold is unhealthy and can cause injury" was true. The repetition of allowing the unproven hypothesis by witness after witness prejudiced HABC. The jury, equally untrained in the health effects of mold, was persuaded by sympathy, not science.

Similarly, the Court improperly allowed Plaintiffs to move into evidence a copy of an EPA publication commenting on health effects associated with mold. (E. 797-877). The EPA publication was like a learned treatise. The actual document itself should not have been received into evidence. Maryland Rule 5-803(18). Moreover, the exhibit lacked any authority for its conclusions that mold caused health effects. It did not even have a bibliography for the appendix related to health concerns. Even Plaintiffs' expert Dr. Joyner admitted that EPA is not a source for medical knowledge. (E. 664). The admission of an EPA document is prejudicial because as a government publication it imposed a certain aura of authenticity despite the document's lack of references or authorities to support its conclusions.

B. The Court Erred in Allowing Mention of the AMR Sampling Results

Judge Cannon found the entire AMR reports and underlying laboratory data from EMSL to be inadmissible because it was not trustworthy. In granting in part Plaintiffs' Motion for Reconsideration, Judge Cannon then allowed only a portion of those reports, specifically reference to the air sampling data concerning the finding of Stachybotrys to be mentioned as a basis for the experts' opinions. Judge Cannon never found that specific data to be trustworthy, even though she had previously held that the entire set of three reports were not trustworthy in their entirety.

While the rules of evidence allow mention of inadmissible evidence before the jury and provide for a curative instruction, the rules of evidence only allow mention of the data when it is inadmissible if it is trustworthy. Maryland Rule 5-703 ("If determined to be trustworthy,

necessary to illuminate testimony, and unprivileged, facts or data reasonably relied upon by an expert pursuant to section (a) may, in the discretion of the court, be disclosed to the jury even if those facts and data are not admissible in evidence. . . ."(emphasis added)). In this case it was never found to be trustworthy. Judge Cannon merely concluded that the results were a possibility, but she maintained that the reports and laboratory data in their entirety were not trustworthy. If she had made a specific finding that despite all of the errors, inconsistencies and breaches of protocol that particular sampling data was trustworthy, it would be a different issue. However, failing to make that finding, the inadmissible and untrustworthy data should not have been mentioned.

The discussion of that data was prejudicial and misleading because the stachybotrys spore count was so high that it allowed the jury to believe exposure was at a level for which there was no admissible evidence. The curative instruction was insufficient to correct the error – the jury should have never heard of the untrustworthy and inadmissible data. Moreover, the Court refused to give the instruction each time the data was discussed. 1540-1547. The error was only made more egregious when the Court held that the Homesteaders' results and half of the Pure Earth's results were inadmissible but refused to give a limiting instruction to the jury.

C Dr. Joyner's Reliance on Plaintiffs' Statements Improperly Took the Issue of Credibility Away From the Jury

Here, Dr. Joyner improperly usurped the role of the jury in concluding that Plaintiffs were injured, when in fact there was no objective evidence of the injuries. Dr. Joyner admitted she relied on Plaintiffs' subjective complaints as they described them to her. (E.627-628, 648, 661). By opining that their conditions existed and/or had worsened, Dr. Joyner accepted as true Plaintiffs' description of their complaints. Dr. Joyner's implicit acceptance of the truth of Plaintiffs' descriptions improperly vouched for the credibility of the Plaintiffs.

In Bohnert v. State, the Court made clear that:

no matter how highly qualified the expert may be in his field, his opinion has

> no probative force unless a sufficient factual basis to support a rational conclusion is shown. The opinion of an expert, therefore, must be based on facts, proved or assumed, sufficient to form a basis for an opinion, and cannot be invoked to supply the substantial facts necessary to support such conclusion. The facts upon which an expert bases his opinion must permit reasonably accurate conclusions as distinguished from mere conjecture or guess.

Bohnert v, State, 312 Md. 266, 274- 75, 276-79, 539 A.2d 657, 661, 662-63 (1988) quoting State Health Dep't v. Walker, 238 Md. 512, 520, 209 A.2d 555, 559-60 (1965) (citations omitted)). In Bohnert, the Court held that a social worker's expert opinion

> ... was not based on facts sufficient to form a basis for her opinion. There were no facts to show that [the complainant]'s allegations were true so that a reasonably accurate conclusion that the child had been sexually abused could be made. The conclusion that she had in fact been abused was no more than mere conjecture or guess. The short of it is that the very groundwork for [the expert]'s opinion was inadequately supported.

Bohnert, 312 Md. at 276-79, 539 A.2d at 662-63.

Applying Bohnert, in Bentley v. Carroll, M.D., 355 Md. 312, 734 A.2d 697 (1999), the Court held that the trial court did not err or abuse its discretion when it:

> precluded Dr. Abramson's proposed testimony that, in his opinion, the cause of Appellant's symptoms between 1978 and 1980, as reported to and treated by Appellees during her first seven visits to their offices, was sexual abuse. The judge reasoned that such testimony would improperly vouch for the credibility of Appellant's anticipated testimony, disputed by the defense, that she was sexually abused prior to 1981, or prior to the ages of five or six.

Bentley v. Carroll, M.D., 355 Md. at 335-38, 734 A.2d at 710-11 (involving a medical malpractice action for failure to prevent child sexual abuse). Similarly in Hutton v. State, 339 Md. 480, 503, 663 A.2d 1289, 1300 (1995), the Court held impermissible doctor's testimony as to the nature of the stressor leading to Post Traumatic Stress Disorder because it accepted as true the victim's statement that abuse occurred.

While it is acceptable for a doctor to rely upon a patient's description of their complaints in evaluating a patient, if that doctor's findings rest entirely on the patient's self-

described complaints, then the doctor is doing nothing more than vouching for the credibility of the patient. A doctor cannot come to an opinion as to the truth of that hearsay and convey that to the jury. In Beahm v. Shortall, MD., 279 Md. 321, 368 A.2d 1005 (1977) the doctor was allowed to rely on a patient's description of symptoms in making an opinion. However, unlike in Beahm, where there was other admissible evidence of injury, here there was no proof of their injuries except what Plaintiffs described to Dr. Joyner.

Lacking any evidence of injury, other than the comments of the Plaintiffs, Dr. Joyner's opinion that Plaintiffs had the injuries they described served only to vouch for their credibility. Dr. Joyner's opinions clearly exceeded the hearsay exception carved out for medical providers and falls within the area of vouching for a witness excluded by Maryland case law. The admission of that improper opinion testimony was prejudicial to HABC.

V. The Court Abused its Discretion When it Failed to Remit the Shocking and Excessive Non-Economic Damages Awards

In this case, the Plaintiffs identified symptoms of rhinitis (runny nose and eyes, itchy eyes and nose) and in the case of only one Plaintiff, Bills, the worsening of her pre-existing asthma. Plaintiffs described no feelings of pain. The Plaintiffs presented no evidence of any physical impairment or disfigurement, no proof of permanency and only minimal proof of complaints at all.

As set forth in the chart below, Plaintiffs identified the following medical expenses and the jury awarded the following awards:

Plaintiff	Identified Past Medical Expense	Identified Future Medical Expense	Jury Awarded Past Medical Damages[5]	Jury Awarded Non-Economic Damages
Johnnie Pratt	$1,200.00	$0	$1,000.00	$175,000.00
Mary Roy	$1,210.00	$0	$1,210.00	$100,000.00
Louise Bills	$1,295.00	$0	$1,295.00	$100,000.00

Having awarded only a minimal award for past medical expenses to the Plaintiffs, the jury awarded a disproportionately high award for non-economic damages to each of the Plaintiffs. Their non-economic damage award is not consistent with the instructions the jury was provided, is contrary to the law in Maryland, and is in essence an award of punitive damages in a case where they were neither sought, nor available as a matter of law.

Pratt received non-economic damages one hundred and seventy five (175) times his actual personal injury damages. Roy received non-economic damages eighty-three (83) times her actual personal injury damages. Bills received non-economic damages seventy-seven (77) times her actual personal injury damages. The non-economic damages awarded were grossly excessive in view of the evidence in this case and an amount that would be inappropriate in any context. No reasonable person would believe otherwise. The trial court abused its discretion when it failed remit the verdict or order a new trial. See Wilson v. Crane, 385 Md. 185, 867 A.2d 1077 (2005).

In Hebron Volunteer Fire Dept., Inc. v. Whitelock, 166 Md. App. 619, 890 A.2d 889 (2006), the plaintiff was injured while exiting a Ferris wheel ride. In that case, the plaintiff presented evidence of: injuries to his face, leg, arm, wrist and hand; two surgeries, including

[5] The jury also awarded property damages, as follows: Pratt- $1,000.00; Roy - $1,000.00, and Bills- $2,239.00. Significantly, Roy's award compensated her for damages which she failed to identify in discovery despite a specific interrogatory from HABC on the issue. (App. A 1-6).

the removal of three bones; five months of physical therapy; that he required assistance getting dressed, tying his shoes, bathing; and suffered pain, trouble sleeping, and interference with his hobbies. The jury awarded $15,000 for his past medical expenses and $525,000 in non-economic damages. The trial court granted defendant's motion for new trial and/or remittitur, reducing the non-economic damage award to $300,000. The trial court stated:

> I recognize that [plaintiff] had incurred an injury. There was injury that was incurred without fault on his part. It is an injury that has resulted in a permanent disability. And yet, considering all of the evidence, including the medical evidence, the medical records, the doctor's transcript, or deposition rather, it was shocking to the Court, and my initial reaction was that it was excessive..... I have... extended the fullest consideration possible to the amount returned by the jury.... And I believe I've done that, and I nevertheless am, I conclude that the non-monetary damage award was excessive under the facts of this case.

Hebron Volunteer Fire Dept., Inc., 166 Md. App. at 629-30, 890 A.2d at 905 (emphasis added). The Court of Special Appeals affirmed the trial court's decision to remit the judgment.

> Moreover, the determination of an appropriate amount is neither the product of a precise formula, nor a detailed checklist of considerations. Rather, the trial court, in making its determination, must make a fair and reasonable assessment of the evidence it has seen and heard during the trial and determine the highest amount that a reasonable jury would award to fairly compensate a plaintiff for his or her loss based on that evidence. In a personal injury claim involving non-economic damages, the court, like the jury, must consider: (1) the extent and duration of the injuries sustained; (2) their effect on the overall physical and mental health and well-being of the plaintiff; and (3) the physical pain and mental anguish suffered in the past and which may reasonably be experienced in the future. *See* MPJI-Cv 10:2. But, because of the deference to be accorded to the jury's verdict, the trial court does not make an independent determination of what it would have awarded had it been the fact finder. Instead, it only determines the amount at which it finds the award no longer excessive.

Hebron Volunteer Fire Dept., Inc., 166 Md. App. at 642-43, 890 A.2d at 912-13. In Hebron Volunteer Fire Dept., Inc. the Court reduced the non-economic damages to twenty (20) times

his economic damages. Here, this jury's award of between 77 and 175 times the past medical expenses is shocking, grossly excessive and inordinate, particularly considering the disproportionately severe non-economic harm at issue in Hebron Volunteer Fire Dept., Inc. Remittitur, or in the alternative a new trial, is necessary.

In Greenstein v. Meister, 279 Md. 275, 291, 368 A.2d 451, 461 (1977), the Court affirmed the trial court's refusal to remit the judgment where the adminstratrix "recovered $2209 for actual expenses, but that $150,000 was awarded by the jury as compensation for pain and suffering." In that case, the estate of the deceased brought a medical malpractice action against the hospital for post-operative complications subsequent to an elective back surgery. The day after the surgery, a doctor first noted the patient was suffering pain. Over the following two days, multiple requests were made by the patient's wife for medical assistance. Nevertheless, the patient grew more and more jaundiced. On March 12, his wife:

> found her husband 'very, very yellow, (a) deep color yellow' with one eye 'back in the side of his head and the other one . . . going up and down.' By then he was unable to speak. Mr. Jackson also detected a worsening of Mr. Meister's condition on the 12th when he observed the patient to be as 'yellow as a banana.'

Greenstein, 279 Md. at 280, 368 A.2d at 455. Thereafter, hospital staff responded:

> Various remedial measures were taken by the hospital staff after 12:30 p. m. when the patient was 'in shock.' Among the steps initiated was the insertion of a tube to empty the stomach of fluids and gas. This procedure apparently alleviated the shock condition. Still later, he became even more jaundiced and experienced gross hemolysis-a breakdown of the red blood cells. The family physician then had him transferred to the intensive care unit where the patient was seen by a hematologist. He, too, concluded that the most likely explanation for Mr. Meister's condition was 'transfusion incompatibility.' Early that evening, Doctor Aronson, on being informed by a telephone call from Doctor Greenstein that the patient was 'doing very badly,' went immediately to the hospital and, on seeing the patient, recognized that 'it was a hopeless situation.' Mr. Meister died at 10:30 p. m. on the 12th.

Greenstein, 279 Md. at 281, 368 A.2d at 455. In Greenstein, the Court let stand an award of non-economic damages sixty-eight (68) times the actual expenses, but the facts of the

Greenstein case stand in stark contrast to those in this case.

In Conklin v. Shillinger, 255 Md. 50, 257 A.2d 187 (1969), the Court of Appeals affirmed the trial court's decision to order a new trial based upon an excessive $100,000 verdict. In that case, the Plaintiff produced evidence of broken bones, hospitalization, and some permanency. Conklin, 255 Md. 55-7, 257 A.2d at 190-91:

> Our review of the record in the present case does not indicate to us that the trial court abused its discretion. In granting the new trial because of the excessiveness of the verdict, the trial court was of the opinion that the size of the $100,000 verdict was 'founded upon passion' and was 'so excessive as to shock the conscience of the Court.' Even though Mrs. Conklin was painfully injured as a result of the accident, fortunately most of her injuries responded to treatment and did not result in extensive permanent injury. She was in the hospital for one week and was out of work for only one month. Her claim for special damages for lost wages was $599.38. All other damages, including claims for loss of consortium and for injuries to the husband resulted in three jury verdicts amounting to $10,000 in the aggregate, and this amount apparently has been paid. After leaving the hospital on or about February 1, 1966, she was treated on an out-patient basis at the Bethesda Naval Hospital, receiving six treatments beginning February 17, 1966, and extending into March 1966. After being referred to Dr. Van Herpe, Mrs. Conklin incurred a bill of $335 to him for 16 dates of treatment and prior to that referral, she had incurred medical expenses of $1,618.74. Under these facts and circumstances, we cannot find that the trial court abused its discretion in granting a new trial because the verdict was excessive.

Conklin, 255 Md. 69-70, 257 A.2d at 197 (emphasis added).

The pain and suffering claimed by Plaintiffs in this case, namely runny eyes and nose and itchy eyes and nose, as well as worsening of asthma for Bills, is clearly minor in comparison to the pain and suffering of the injured parties in Hebron, Greenstein. and Conklin. In this case, none of the Plaintiffs presented any evidence of permanency, physical impairment, hospitalization, surgery, and only minimal complaints of suffering. Roy even admitted her rhinitis was like a cold and went away.

The award of substantial non-economic damages in this case is simply not supported by the evidence. The award cannot be sustained and should be stricken or reduced

significantly. As the United States Court of Appeals for the Second Circuit acknowledged in Consorti v. Armstrong World Industries, 72 F.3d 1003, 1009 (2nd Cir. 1995)[6], a reasonable person would not give up his or her life or good health for an award of damages in any amount. However, the Court of Appeals went on to note:

> "[M]oney awards do not make one whole; they do not alleviate pain . . .. If each jury is given unbridled authority to set the level of damages, awards will vary widely and unpredictably . . .. The unpredictability of jury awards is pernicious not only because it is unfair. . .. Widely varying jury verdicts make it difficult for risk bearers to structure their behavior to efficiently manage risk . . .. When courts fail to exercise the responsibility to curb excessive verdicts, the effects are uncertainty and an upward spiral. One excessive verdict, permitted to stand, becomes precedent for another still larger one . . .. [I]n the circumstance represented by asbestos litigation, where it appears virtually certain that the resources of major defendants will eventually be completely consumed by the liabilities, allowing excessive awards to stand . . . will leave insufficient resources for the . . . plaintiffs whose cases are heard later. For all these reasons, . . . courts . . . must accept the responsibility of controlling the limits of jury awards.

Id. 72 F.3d at 1009-10 (emphasis added).

The outrageousness of the awards sets an inappropriate precedent. Allowing such grossly excessive awards for pain and suffering fuels future litigation and makes future verdicts unpredictable and, as a result, future settlements more difficult. See Consorti v. Armstrong World Industries, 72 F.3d 1003, 1009 (2nd Cir. 1995). Clearly, the trial court abused its discretion when it refused to remit the damages awarded in this case or order a new trial given the minimal evidence to support the awards.

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[6]On July 1, 1996, the Supreme Court granted certiorari in Consorti v. Armstrong World Industries, vacated the judgment and remanded the case to the United States Court of Appeals for the Second Circuit for further consideration in light of Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 116 S.Ct. 2211 (1996). However, the action taken by the Supreme Court does not rob the quoted portion of Consorti of its pertinence.

CONCLUSION

For the reasons and based upon the authorities set forth herein, Appellant Housing Authority of Baltimore City requests the Court reverse the lower court's judgment and enter judgment in favor of the Housing Authority of Baltimore City or, in the alternative, order a new trial.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of May, 2007, two copies of Appellant's Brief and the Record Extract were hand delivered: Scott E. Nevin, Esquire, The Law Offices of Peter T. Nicholl, 36 S. Charles Street, Suite 1700, Baltimore, Maryland 21201, attorneys for Appellee.

Carrie Blackburn Riley

Attorney for Appellant
Housing Authority of Baltimore City

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APPENDIX A

Inadvertent Omissions to Extract pursuant to Maryland Rule 8-501(j)

1. Mary Roy's Answers to Interrogatory of HABC

APPENDIX B

RULE 2-519. MOTION FOR JUDGMENT

(a) Generally. A party may move for judgment on any or all of the issues in any action at the close of the evidence offered by an opposing party, and in a jury trial at the close of all the evidence. The moving party shall state with particularity all reasons why the motion should be granted. No objection to the motion for judgment shall be necessary. A party does not waive the right to make the motion by introducing evidence during the presentation of an opposing party's case.

(b) Disposition. When a defendant moves for judgment at the close of the evidence offered by the plaintiff in an action tried by the court, the court may proceed, as the trier of fact, to determine the facts and to render judgment against the plaintiff or may decline to render judgment until the close of all the evidence. When a motion for judgment is made under any other circumstances, the court shall consider all evidence and inferences in the light most favorable to the party against whom the motion is made.

(c) Effect of Denial. A party who moves for judgment at the close of the evidence offered by an opposing party may offer evidence in the event the motion is not granted, without having reserved the right to do so and to the same extent as if the motion had not been made. In so doing, the party withdraws the motion.

(d) Reservation of Decision in Jury Cases. In a jury trial, if a motion for judgment is made at the close of all the evidence, the court may submit the case to the jury and reserve its decision on the motion until after the verdict or discharge of the jury. For the purpose of appeal, the reservation constitutes a denial of the motion unless a judgment notwithstanding the verdict has been entered.

RULE 2-532. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.

(a) When Permitted. In a jury trial, a party may move for judgment notwithstanding the verdict only if that party made a motion for judgment at the close of all the evidence and only on the grounds advanced in support of the earlier motion.

(b) Time for Filing. The motion shall be filed within ten days after entry of judgment on the verdict or, if no verdict is returned, within ten days after the discharge of the jury. If the court reserves ruling on a motion for judgment made at the close of all the evidence,

that motion becomes a motion for judgment notwithstanding the verdict if the verdict is against the moving party or if no verdict is returned.

(c) Joinder With Motion for New Trial. A motion for judgment notwithstanding the verdict may be joined with a motion for a new trial.

(d) Effect of Failure to Make Motion. Failure to move for a judgment notwithstanding the verdict under this Rule does not affect a party's right upon appeal to assign as error the denial of that party's motion for judgment.

(e) Disposition. If a verdict has been returned, the court may deny the motion, or it may grant the motion, set aside any judgment entered on the verdict, and direct the entry of a new judgment. If a verdict has not been returned, the court may grant the motion and direct the entry of judgment or order a new trial. If a party's motion for judgment notwithstanding the verdict is granted, the court at the same time shall decide whether to grant that party's motion for new trial, if any, should the judgment thereafter be reversed on appeal.

(f) Effect of Reversal on Appeal.

(1) *When Judgment Notwithstanding the Verdict Granted.* If a motion for judgment notwithstanding the verdict is granted and the appellate court reverses, it may (A) enter judgment on the original verdict, (B) remand the case for a new trial in accordance with a conditional order of the trial court, or (C) itself order a new trial. If the trial court has conditionally denied a motion for new trial, the appellee may assert error in that denial and, if the judgment notwithstanding the verdict is reversed, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) *When Judgment Notwithstanding the Verdict Denied.* If a motion for judgment notwithstanding the verdict has been denied and the appellate court reverses, it may (A) enter judgment as if the motion had been granted or (B) itself order a new trial. If the motion for judgment notwithstanding the verdict has been denied, the prevailing party may, as appellee, assert grounds entitling that party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion. If the appellate court reverses the judgment, nothing in this Rule precludes it from determining that the appellee is entitled to a new trial or from directing the trial court to determine whether a new trial should be granted.

RULE 2-533. MOTION FOR NEW TRIAL.

(a) Time for Filing. Any party may file a motion for new trial within ten days after entry of judgment. A party whose verdict has been set aside on a motion for judgment notwithstanding the verdict or a party whose judgment has been amended on a motion to amend the judgment may file a motion for new trial within ten days after entry of the judgment notwithstanding the verdict or the amended judgment.

(b) Grounds. All grounds advanced in support of the motion shall be filed in writing within the time prescribed for the filing of the motion, and no other grounds shall thereafter be assigned without leave of court.

(c) Disposition. The court may set aside all or part of any judgment entered and grant a new trial to all or any of the parties and on all of the issues, or some of the issues if the issues are fairly severable. If a partial new trial is granted, the judge may direct the entry of judgment as to the remaining parties or issues or stay the entry of judgment until after the new trial. When a motion for new trial is joined with a motion for judgment notwithstanding the verdict and the motion for judgment notwithstanding the verdict is granted, the court at the same time shall decide whether to grant that party's motion for new trial if the judgment is thereafter reversed on appeal.

(d) Costs. If a trial or appellate court has ordered the payment of costs as a part of its action in granting a new trial, the trial court may order all further proceedings stayed until the costs have been paid.

RULE 5-403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

RULE 5-701 OPINION TESTIMONY BY LAY WITNESSES.

If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's

testimony or the determination of a fact in issue.

RULE 5-702 TESTIMONY BY EXPERTS.

Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education, (2) the appropriateness of the expert testimony on the particular subject, and (3) whether a sufficient factual basis exists to support the expert testimony.

RULE 5-703 BASES OF OPINION TESTIMONY OF EXPERTS.

a) In General. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

(b) Disclosure to Jury. If determined to be trustworthy, necessary to illuminate testimony, and unprivileged, facts or data reasonably relied upon by an expert pursuant to section (a) may, in the discretion of the court, be disclosed to the jury even if those facts and data are not admissible in evidence. Upon request, the court shall instruct the jury to use those facts and data only for the purpose of evaluating the validity and probative value of the expert's opinion or inference.

(c) Right to Challenge Expert. This Rule does not limit the right of an opposing party to cross-examine an expert witness or to test the basis of the expert's opinion or inference.

RULE 5-803 HEARSAY EXCEPTIONS. UNAVAILABILITY OF DECLARANT NOT REQUIRED.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(a) Statement by Party-Opponent. A statement that is offered against a party and is:

(1) The party's own statement, in either an individual or representative capacity;

(2) A statement of which the party has manifested an adoption or belief in its truth;

(3) A statement by a person authorized by the party to make a statement concerning the subject;

(4) A statement by the party's agent or employee made during the agency or employment relationship concerning a matter within the scope of the agency or employment; or

(5) A statement by a coconspirator of the party during the course and in furtherance of the conspiracy.

(b) Other Exceptions.

(1) *Present Sense Impression.* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) *Excited Utterance.* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) *Then Existing Mental, Emotional, or Physical Condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), offered to prove the declarant's then existing condition or the declarant's future action, but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) *Statements for Purposes of Medical Diagnosis or Treatment.* Statements made for purposes of medical treatment or medical diagnosis in contemplation of treatment and describing medical history, or past or present symptoms, pain, or sensation, or the inception or general character of the cause or external sources thereof insofar as reasonably pertinent to treatment or diagnosis in contemplation of treatment.

(5) *Recorded Recollection.* See Rule 5-802.1(e) for recorded recollection.

(6) *Records of Regularly Conducted Business Activity.* A memorandum, report, record, or data compilation of acts, events, conditions, opinions, or diagnoses if (A) it was made at or near the time of the act, event, or condition, or the rendition of the diagnosis, (B) it was made by a person with knowledge or from information transmitted by a person with knowledge, (C) it was made and kept in the course of a regularly conducted business activity, and (D) the regular practice of that business was to make and keep the memorandum, report, record, or data compilation. A record of this kind may be excluded if the source of information or the method or circumstances of the preparation of the record

indicate that the information in the record lacks trustworthiness. In this paragraph, "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

(7) *Absence of Entry in Records Kept in Accordance with Subsection (b)(6).* Unless the circumstances indicate a lack of trustworthiness, evidence that a diligent search disclosed that a matter is not included in the memoranda, reports, records, or data compilations kept in accordance with subsection (b)(6), when offered to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind about which a memorandum, report, record, or data compilation was regularly made and preserved.

(8) *Public Records and Reports.*

1. (A) Except as otherwise provided in this paragraph, a memorandum, report, record, statement, or data compilation made by a public agency setting forth

(i) the activities of the agency;

(ii) matters observed pursuant to a duty imposed by law, as to which matters there was a duty to report; or

(iii) in civil actions and when offered against the State in criminal actions, factual findings resulting from an investigation made pursuant to authority granted by law.

(B) A record offered pursuant to paragraph (A) may be excluded if the source of information or the method or circumstance of the preparation of the record indicate that the record or the information in the record lacks trustworthiness.

(C) A record of matters observed by a law enforcement person is not admissible under this paragraph when offered against an accused in a criminal action.

(D) This paragraph does not supersede specific statutory provisions regarding the admissibility of particular public records.

(9) *Records of Vital Statistics.* Except as otherwise provided by statute, records or data compilations of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(10) *Absence of Public Record or Entry.* Unless the circumstances indicate a lack of trustworthiness, evidence in the form of testimony or a certification in accordance with

Rule 5-902 that a diligent search has failed to disclose a record, report, statement, or data compilation made by a public agency, or an entry therein, when offered to prove the absence of such a record or entry or the nonoccurrence or nonexistence of a matter about which a record was regularly made and preserved by the public agency.

(11) *Records of Religious Organizations.* Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) *Marriage, Baptismal, and Similar Certificates.* Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(13) *Family Records.* Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones or the like.

(14) *Records of Documents Affecting an Interest in Property.* The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and a statute authorizes the recording of documents of that kind in that office.

(15) *Statements in Documents Affecting an Interest in Property.* A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document or the circumstances otherwise indicate lack of trustworthiness.

(16) *Statements in Ancient Documents.* Statements in a document in existence twenty years or more, the authenticity of which is established, unless the circumstances indicate lack of trustworthines

(17) *Market Reports and Published Compilations.* Market quotations, tabulations, lists, directories, and other published compilations, generally used and reasonably relied upon by the public or by persons in particular occupations.

(18) *Learned Treatises.* To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements

contained in a published treatise, periodical, or pamphlet on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.

(19) *Reputation Concerning Personal or Family History.* Reputation, prior to the controversy before the court, among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, or other similar fact of personal or family history.

(20) *Reputation Concerning Boundaries or General History.*

(A) Reputation in a community, prior to the controversy before the court, as to boundaries of, interests in, or customs affecting lands in the community.

(B) Reputation as to events of general history important to the community, state, or nation where the historical events occurred.

(21) *Reputation as to Character.* Reputation of a person's character among associates or in the community.

(22) [Vacant]. There is no subsection 22.

(23) *Judgment as to Personal, Family, or General History, or Boundaries.* Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the matter would be provable by evidence of reputation under subsections (19) or (20).

(24) *Other Exceptions*. Under exceptional circumstances, the following are not excluded by the hearsay rule: A statement not specifically covered by any of the hearsay exceptions listed in this Rule or in Rule 5-804, but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. A statement may not be admitted under this exception unless the proponent of it makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the intention to offer the statement and the particulars of it, including the name and address of the declarant.