Circuit' Court for Howard County
Case No. C-13-CV-20-000453

UNREPORTED

IN THE APPELLATE COURT

OF MARYLAND

No. 783

September Term, 2022

DORIS SCOTT

v.

UNIVERSAL PROTECTION
SERVICE, LLC.

Berger,
Leahy,
Wilner, Alan M. (Senior Judge),
Specially Assigned,

JJ.

Opinion by Wilner, J.

Filed: October 20, 2023

Before us are cross-appeals from an action for damages suffered by appellant/cross-appellee Doris Scott (hereafter "appellant") when, on September 7, 2019, she tripped and fell over a protrusion of a "track and grate" while entering the Columbia Mall in Howard County.

In summary, appellant said that the entrance to the mall that she used had two sets of doors, that she pressed the button to open the handicap door in the first set of doors and walked through and that, as she was about to press the button to open the second set of doors, she fell due to a defective track and grate. The alleged problem was a floor mat that was misplaced, causing a half-inch protrusion or gap in the floor area over which she, then 89-years old, tripped and fell, breaking her femur. An exhibit at E-201 shows the half-inch elevation difference.

In an amended complaint filed on February 15, 2021, appellant sued four entities that she claimed bore responsibility for that protrusion and for the injuries she suffered as a result of her fall. They were (1) The Mall in Columbia, LLC (The Mall); (2) Brookfield Properties Retail, Inc. (Brookfield), (3) Global Management Solutions, Inc. (Global); and (4) Universal Protection Service, LLC, doing business as Allied Universal (Allied). The first three defendants were alleged to be The Mall's owner, manager, and janitorial contractor, respectively. Allied was alleged to be responsible for security at the premises.

Allied responded on January 14, 2022 with a conditional crossclaim against the other three defendants, asserting that, if Allied were to be found liable, the other

defendants would be liable to Allied for any damages awarded against it because their acts or omissions were the independent active, primary, superseding, and/or intervening causes of appellant's damages. Allied demanded indemnification and contribution from those defendants.

On January 20, 2022, appellant entered into a joint tortfeasor settlement agreement with The Mall, Global and Brookfield. Global, for itself, and Brookfield and The Mall together, agreed to pay $190,000, for a total of $380,000, in return for which appellant released those companies and their "related persons and entities," which, as to those companies, but not as to Allied, was defined to mean all past or present parent companies, divisions, subsidiaries, affiliates, related corporations, stockholders, directors, officers, agents, [and] employees.[1] As a result of that settlement, Allied remained the only defendant. The next day, January 21, 2022, The Mall, Brookfield, and Global moved to dismiss all claims against them with prejudice.

Allied responded the same day with a motion to strike the stipulation of dismissal on the ground that **it** had not stipulated to the dismissal of **its** claims for contribution and identification. That produced an amended partial stipulation that appellant was not dismissing her claim against Allied. A week later Allied filed a motion for summary

[1] In the settlement agreement, Brookfield was identified as Brookfield Properties Retail Holdings LLC FKA Brookfield Property REIT, Inc., FKA General Growth Properties, Inc., General Growth Management, Inc. Brookfield Properties Retail, Inc., FKA and General Growth Services, Inc. FKA is a common abbreviation for "formerly known as."

judgment on the grounds that (1) it was not a landowner or agent of a landowner and had no obligation to comply with the Americans with Disabilities Act (ADA) or the National Fire Protection Association Code (referred to by Allied as NFPA) and (2) there was no evidence of any breach by Allied that proximately caused appellant's injuries.

Appellant opposed that motion and filed one of her own on the ground that Allied was under a contractual obligation to The Mall to report safety hazards which, with actual knowledge of the hazardous condition, it failed to do.

The court held a hearing on several open issues on March 31, 2022, at the conclusion of which it orally granted Allied's motion with respect to Count 8 of the complaint (premises liability), holding that there was no evidence that Allied was the possessor of the property but denied the motion with respect to Count 7 (negligence) on the ground that it presented a question of fact that should go to a jury.

A month later, on April 28, Allied dismissed, without prejudice, its crossclaim against The Mall, Brookfield, and Global. On May 17, 2022, with trial looming, Allied moved to preclude appellant from offering testimony and opinions from Dr. Jeffrey Gaber, a medical witness for appellant, regarding any connection between her fall and her use of a wheelchair, any opinion concerning medical maximum improvement, and any connection between her fall and her life expectancy. The court denied that motion on May 24. In the meanwhile, on May 16, Allied filed motions to preclude appellant from seeking evidence to establish a duty of care owed by Allied other than a duty to warn The

Mall of known safety hazards and to preclude her from seeking evidence of Allied's internal policies and procedures. The court granted the first motion in part and denied the second one.

A jury trial commenced between appellant and Allied on May 24, 2022. Allied's motions for judgment at the end of appellant's case and at the end of Allied's case were denied, and, after deliberation, the jury returned a verdict for appellant for $750,000 in non-economic damages. The last matter, which produced the main issue now before us, was what deductions should be applied to that verdict in light of the settlements with The Mall, Brookfield, and Global. Appellant contended that there were three tortfeasors and that Allied should be responsible for one-third of the verdict, or $250,000. She asked as well that the judgment be entered *nunc pro tunc* as of the date of the verdict.

After considering post-trial briefs, the court, on June 28, 2022, accepted Allied's view that there were four joint tortfeasors rather than three and entered judgment for $187,500. It declined, however, to predate the judgment to the date of the verdict. Allied moved for judgment notwithstanding the verdict on the ground that there was insufficient evidence that Allied's conduct was the proximate cause of appellant's injuries. That motion was denied.

The battle continues now in this Court with cross-appeals. Appellant complains (1) that the trial court disregarded the parties' release in reducing the jury's verdict based on the existence of four joint tortfeasors rather than three; (2) it improperly denied her a

month of post judgment interest by failing to enter judgment as of the date of the verdict; and (3) the court erred in entering summary judgment on her product liability claim.

Allied presents five complaints: (1) the court erred in denying judgment in Allied's favor; (2) it erred in permitting Allied's internal policies to be used as evidence to establish a duty to appellant; (3) it erred in permitting testimony by Dr. Jeffrey Gaber; (4) it erred in giving a modified causation instruction; and (5) it erred in denying its motion for JNOV.

Appellant's Issues

Number of Tortfeasors

Whether there are three or four joint tortfeasors for purposes of calculating Allied's s liability depends on whether The Mall and Brookfield are to be regarded as one tortfeasor or two for purposes of establishing Allied's share (assuming Allied's liability for a share).

As noted, in the settlement agreement those two entities jointly agreed to pay the single sum of $190,000, although it is not clear how much either of those companies contributed to that amount. In one paragraph of the Release Agreement, they agreed that "each RELEASEE is to be considered a joint tort-feasor with any other tort-feasor liable to any RELEASOR." In the next paragraph of the Release, however, appellant (the

releasor) agreed that Brookfield and The Mall "shall be considered one tort-feasor for purposes of any pro rata reduction."

Appellant points us to *Owens-Illinois v. Cook*, 386 Md. 468, 496 (2005), in which the Court confirmed that Maryland follows the objective law of contract interpretation, and, under that test, the court must determine from the language of the agreement what a reasonable person in the position of the parties would have meant, not necessarily what the actual parties intended it to mean. *See also Spangler v. McQuitty*, 449 Md. 33, 72-73 (2016). Under that kind of objective test, it seems clear from the language the parties used that they intended for The Mall to be a separate joint tortfeasor for purposes of contributing to the recompense of appellant, but not for purposes of reducing Allied's contribution. That is what the parties very clearly said, and we presume that is what they meant.

Appellant believes that it is permissible to treat two joint tortfeasors as one party for contribution purposes when, as she claims is the case here, they are in a principal/agent relationship, with one party's liability being derivative of the other's liability. In support of that claim, she notes that the two companies were represented by the same attorney, they filed pleadings and motions jointly, had one corporate designee for trial, and they issued one settlement draft. She relies for that proposition on *Hashmi v. Bennet*, 188 Md. App. 434 (2009) and *Scapa Dryer Fabrics v. Saville,* 418 Md. 496 (2011). We find those cases to be distinguishable on their facts.

As Allied points out, The Mall and Brookfield were not sued in any capacity as principal and agent. Quite the opposite. There are two aspects to that issue. First, the counts of the Complaint against The Mall (Counts I and II) both alleged that The Mall "retained **exclusive** ownership, possession, control and/or supervision of and over the Premises." That same language was alleged against Brookfield (Count IV). Putting aside the inconsistency of alleging that two different companies with no internal connection with one another were each in exclusive control of the premises, there is no averment that one was the agent of the other. The Releasees took the position that both were independent joint tortfeasors vis-à-vis each other but counted only as one for purposes of contribution by any third joint tortfeasor.

There was a solid basis for the Settlement Agreement to declare Brookfield a joint tortfeasor – it had a contractual duty to report the problem so that it could be addressed by The Mall and Brookfield and failed to do so – but no basis for the inconsistent statement that its joint tortfeasor status didn't count for the purpose of determining how many joint tortfeasors there were. Their duties were different – Brookfield's to inform The Mall of the problem and the Mall's to resolve it.

The fact that two defendants – one an owner of the property and the other an independent contractor – which were sued separately with no averment of any agency relationship between them, chose to cooperate in their defense does not necessarily put

them into an agency relationship or destroy their independent status but may simply have been a way to reduce the cost of the defense for both of them.

We find no error in the court's rejection of appellant's approach and determining Allied's share be based on there being four joint tortfeasors.

Date of Judgment

The normal procedure regarding the entry of judgments is found in Rule 2-601, section (a) of which, captioned in part "Prompt Entry," provides, in relevant part, that, upon a verdict of a jury allowing recovery of a specified amount of money, "the clerk shall **forthwith** prepare, sign, and enter the judgment unless the court orders otherwise" (Emphasis supplied).

As noted, the jury's verdict in this case, in the amount of $750,000, was returned on May 27, 2022. The issue remained, however, of how much of that verdict should be entered as a judgment in light of the settlement with the other three joint tortfeasors. That was not resolved until June 20, 2022. It was only then that a proper judgment could be entered.[2] But that, of itself, does not preclude a court from making the judgment

[2] Appellant argues that judgment could (and should) have been entered on the verdict immediately, subject to reduction once an appropriate credit was determined. That approach is not required, however, and it does have some drawbacks, of having in place a judgment that all parties know will have to be reduced in some undetermined amount. It is at least permissible, if not better, to leave the verdict intact and deal with the necessary reductions before entering judgment, but then enter the judgment *nunc pro tunc* to the date the verdict was returned.

effective *nunc pro tunc* to the date the verdict was returned for purposes of commencing the running of post-judgment interest. *See Mona v. Mona Electric*, 176 Md. App. 650, 730-31 (2007) and *Aronson v. Fetridge*, 181 Md. App. 650, 683-687 (2008).

Apart from resolving a post-judgment motion filed by Allied, which was denied, the one-month delay in this case was for the legally required determination of an appropriate reduction in the verdict due to the existence of other joint tortfeasors, and we see no reason why appellant should be denied post-judgment interest because of that necessary delay. The only way to achieve that result – a fair and permissive result – is to date the judgment *nunc pro tunc* from the date of the verdict.

Summary Judgment on Product Liability Claim

This issue arises from the summary judgment granted to Allied with respect to Count 8 of appellant's amended complaint alleging that Allied (and the other defendants as well) retained exclusive control over the premises and owed a duty to appellant to maintain the property in such condition that the public would not be subject to risks from dangerous and defective conditions, and that it failed in that duty. Appellant concedes in her brief that this was a conditional claim raised only in the event that a new trial is ordered." Otherwise, she acknowledges, the Court need not reach this issue. As we are not ordering a new trial, we need not, and do not, reach that issue.

Allied's Issues

Denial of Judgment in Allied's Favor

On January 28, 2022, Allied filed a Motion for Summary Judgment on the grounds that (1) Allied was not a landowner and had no obligation to comply with the ADA or the NFPA, and (2) there was no evidence of any breach by Allied that proximately caused appellant's injuries. That motion was denied. Following the return of the jury's verdict, Allied filed a motion for judgment notwithstanding the verdict (JNOV), which also was denied. Allied claims both of those rulings were erroneous.

Motion for Summary Judgment

Appellant had employed S.E.A. Ltd. to investigate and provide an opinion as to whether the entrance area where the incident occurred was in conformance with applicable codes. The investigation was conducted by a senior civil engineer, Duane Ferguson. His conclusions were that (1) the exposed one-half inch edge "was not beveled from ¼ inch to ½ inch as required by the ADA and NFPA 101," (2) "[t]hus, the recessed area inside the vestibule did not conform to the ADA and NFPA 101 requirements," and (3) "[t]he exposed edge caused Ms. Scott to trip and fall."

Allied did not contest those conclusions but argued that, as a mere security contractor and not an owner of the property, it had no duty to comply with either of those statutes. Its only function, it says, was to perform patrols and report known safety

hazards. In making that argument, however, Allied tacitly dismisses the import of its duty to report known safety hazards. The evidence indicated that the half-inch gap over which appellant tripped had been there for some period of time and, though not recognized by appellant, was visible and should have been reported by Allied. We find no error in the denial of Allied's motion for summary judgment and its motion for JNOV.

Testimony of Jeffrey Gaber

Dr. Gaber performed an independent medical evaluation on appellant on December 15, 2020. He concluded, at that time, that she suffered from a "severely altered gait, the need for a walker, and the marked weakness in the left quadriceps [which were] all a direct consequence of the September 7, 2019 injury" but made no mention of a shortened life expectancy or need for a wheelchair. Appellant reported that he "may testify" and that his testimony "may include his opinion of the plaintiff's physical condition as a result of the injuries sustained in the incident relevant to this case and/or subsequent injuries or conditions and/or the causal connection between the alleged injuries and the subject incident." Appellant reserved the right to supplement that response after further discovery.

On May 2, 2022 – a year and a half later – Dr. Gaber, in a *de bene esse* deposition, did supplement his response. In that deposition he said that appellant's situation had declined to the point that she was "pretty much bound to a wheelchair" and that "she is not expected to get any better." He added that, being 91 years old, she "is already beyond

what someone would predict to be her average life span" and that "[b]eing immobile is a major risk factor for longevity."

The trial was set to begin on May 24. On May 17, Allied moved *in limine* to preclude Dr. Gaber's testimony on the ground that discovery had been closed five months earlier and the doctor had not offered those opinions in earlier statements, but those objections were overruled.

Allied recognizes that whether to preclude the testimony as a discovery sanction was a discretionary call. *See Klein v. Weiss*, 284 Md. 36, 56 (1978); also *Hill v. Wilson*, 134 Md. App. 472, 489 (2000) ("When the question is whether there is a material variance between what the witness testified to at deposition and what the witness will testify to at trial, the trial judge's finding of fact will be affirmed on appeal unless the reviewing court is persuaded that the trial judge's finding is clearly erroneous)." He argues, however, that the failure to disclose those opinions earlier was substantially prejudicial in that they had, or could have had, a significant impact on damages and yet severely limited Allied's opportunity to investigate and challenge them.

In the circumstances of this case, we find no error. A year and a half had elapsed since Dr. Gaber's earlier examination and prognosis. Appellant was then 91 and had become confined to her wheelchair, which Dr. Gaber attributed to her injury and the ravages of time. It should come as no surprise that the life expectancy of a 91-year-old person who had suffered a significant injury – a broken femur – and was confined to a

wheelchair would not be measured in decades. During his *de bene esse* deposition, Dr. Gaber was asked to comment on the views of Allied's medical expert, Dr. Halikman. Reading from Dr. Halikman's Report, he said that he agreed with Dr. Halikman's conclusion that:

> "She [appellant] was independent in ambulation before the fall. She has the need for assistance in activities of daily living now. He points out that she is 91 and has gotten a little older and he says normal deterioration and function would be expected."

Allied had three weeks before trial to react to Dr. Gaber's deposition. It had its own expert, Dr. Halikman, who could testify; it had the option of seeking a postponement. We find no error.

Modified Jury Instruction

Over objection, the court instructed the jury, as part of a negligence instruction, that several negligent acts may work together to cause an injury and that each person or entity whose negligence is a substantial factor in causing an injury is responsible. Allied complains that that instruction was erroneous because there was no evidence that Allied's actions were the proximate cause of Scott's injuries. We have already dealt with that. Allied was responsible for reporting any unsafe conditions, and it failed to do so, which contributed to a dangerous condition remaining unresolved.

CONCLUSION

We find no basis for a reversal of the judgment entered by the trial court or for a new trial. We shall, however, remand the case for the court to enter the judgment *nunc pro tunc* as of the date of the verdict so that post judgment interest may commence as of that date.

CASE REMANDED TO CIRCUIT COURT FOR HOWARD COUNTY WITH INSTRUCTION TO ENTER THE JUDGMENT *NUNC PRO TUNC* AS OF MAY 27, 2022. JUDGMENT OTHERWISE AFFIRMED. COSTS TO BE PAID BY APPELLEE.