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No. 92324-8

SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 71726-0-I

LESLIE PENDERGRAST, an individual,
Respondent,

v.

ROBERT MATICHUK and JANE DOE MATICHUK, as individuals and in their marital capacity; BLAINE PROPERTIES, L.L.C., a Washington State limited liability company,
Petitioners.

RESPONSE OF LESLIE PENDERGRAST TO MATICHUK, ET AL.'S PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

Leslie Pendergrast ("Pendergrast") responds to Robert Matichuk and Jane Doe Matichuk's, and Blaine Properties, LLC's (collectively "Matichuk") Petition for Review ("Petition").

B. COURT OF APPEALS' DECISION

The Petition seeks review of the August 31, 2015, Published Opinion of the Court of Appeals, Division I, attached as Appendix A to the Petition ("Opinion").

C. ISSUES PRESENTED FOR REVIEW

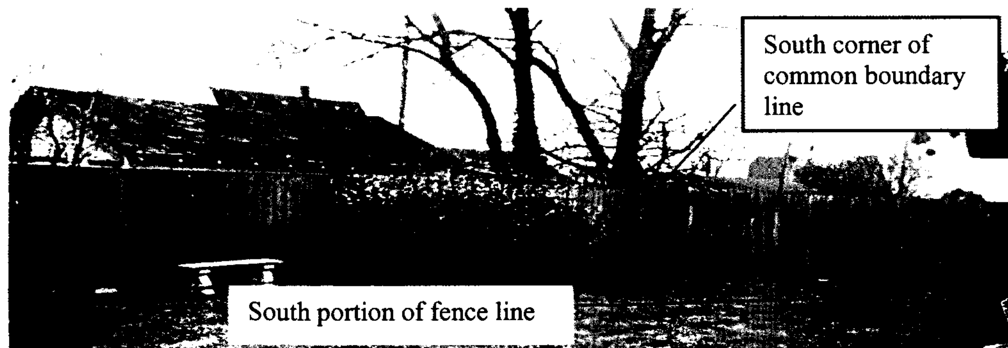
Pendergrast does not raise a cross-petition for review.

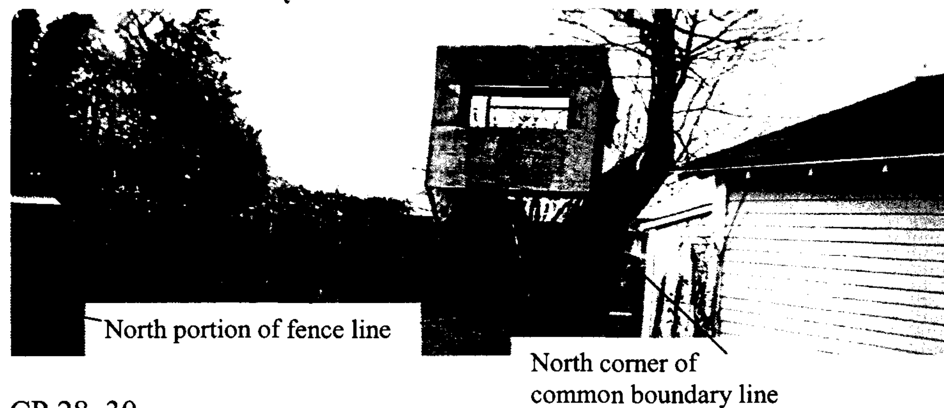
D. STATEMENT OF THE CASE

Matichuk have left out some critical facts relating to the application of the boundary by common grantor doctrine, and therefore, Pendergrast supplements the facts in the Petition with the following:

- At the time of both conveyances by the common grantors, Tali and Cyrus Conine ("Conine"), to Matichuk and Pendergrast, there was a six-foot solid wood fence that ran the length of the common boundary between the Pendergrast property and the vacant parcel sold to Matichuk. The fence line, as shown from the interior of the Pendergrast property, and as extending from the south corner of the common boundary line to the

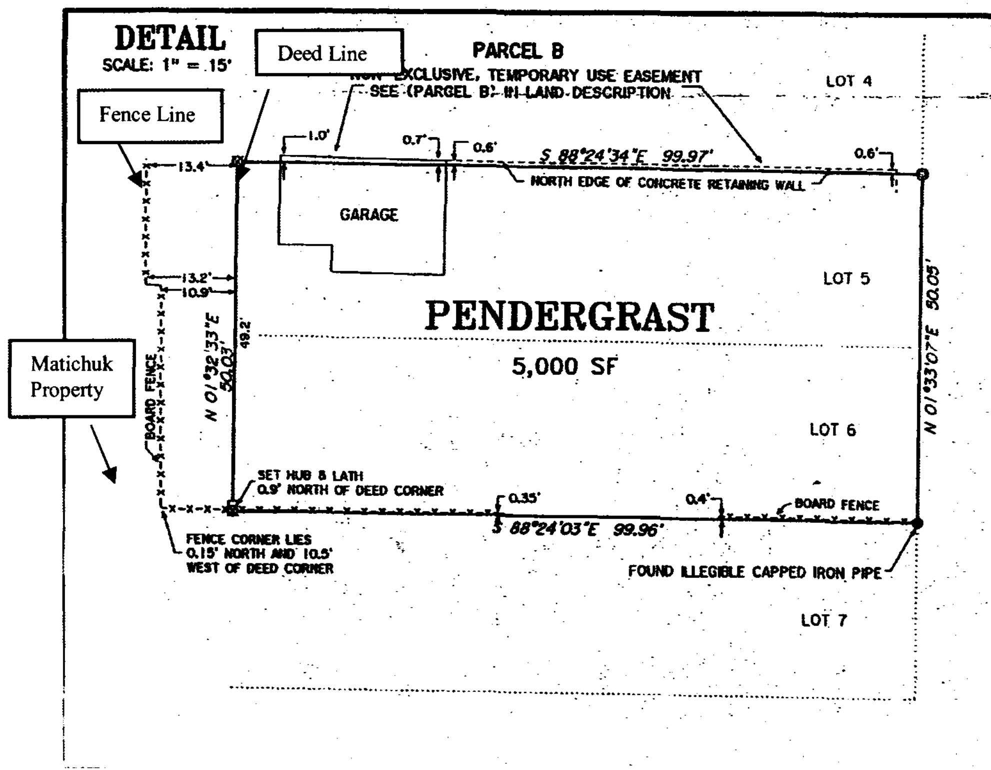
north corner of the common boundary line, looked as follows at the time Conine sold each lot:





CP 28, 30.

The precise location of the fence line at the time of both conveyances is shown on a survey obtained by Pendergrast, with the Matichuk vacant lot on the right (west) side of the fence marked in "x:"



CP 31.

- At the time he acquired the vacant lot on April 25, 2006, Petitioner Robert Matichuk ("R. Matichuk") walked off what he understood to be its legal description and noted the existence of the fence line between the vacant lot and the Pendergrast property and concluded as follows:

> I came to the conclusion – I came to the conclusion the fence was not on the property line. Actually, let me rephrase that, I came to the conclusion I didn't know where the fence was in relation to the property line.

CP 52. The fence appeared to him to be connected with the Pendergrast property. CP 53. He did no further investigation at that time or came to a different conclusion. Id. at 52.

- When she purchased, Pendergrast was provided with a listing statement that referenced her property as "Fenced-Partially." CP 32. She also received a Seller's Disclosure Statement which represented that there were no encroachments or boundary disputes. CP 33.

- Pendergrast at all times thought, and both parties treated, the fence line as the common boundary line between the Matichuk and Pendergrast properties. Pendergrast performed all yard work in the area within the six-foot high fence line. There was also a large tree and tree fort on her side of the fence, which was used exclusively by her family members. Pendergrast often saw R. Matichuk walking around his property when he did maintenance and remodeling work. He never came onto her side of the fence, or said anything about the fence line encroaching onto his vacant property. CP 26. He concedes that he never used any of the property on Pendergrast's side of the fence between the time he purchased on April 25, 2006, and moved the fence line in 2009. CP 54.

- After he purchased the Conine vacant lot, R. Matichuk began to process an application to construct condominiums on the vacant lot. Sometime in June 2008, R. Matichuk surveyed the vacant lot, and discovered that the fence line was over the deed line in his legal description. CP 53.

- R. Matichuk did nothing about this issue until he sent a letter to Pendergrast six months later, on January 29, 2009, advising that the fence was "6-8 feet" over his boundary line and that he was going to move the fence to the deed line. CP 38.

- Pendergrast retained attorney Philip A. Serka, who sent a letter to R. Matichuk on April 21, 2009, claiming Pendergrast's ownership up to the fence line based upon the common ownership by the previous owner and location of the fence as the agreed boundary. R. Matichuk was advised that he should not move the fence as threatened. CP 39. R. Matichuk nonetheless moved the fence line to the deed line and then cut down the large cherry tree that housed the tree house. CP 27. He came back later and reversed the panels on the fence, so that the cross beams were showing on Pendergrast's side. Id. Petitioner Robert Matichuk concedes that he knew that Pendergrast claimed ownership up to the fence line when he took these actions. CP 55-56.

In their Petition, Matichuk also fail to disclose one important procedural point. On January 14, 2013, Matichuk filed a Motion for Reconsideration of the Trial Court's Order Granting Plaintiff's Cross-Motion for Summary Judgment. CP 353-59. R. Matichuk restated his rejected arguments and argued that there was an issue of fact that should have prevented the granting of summary judgment to Pendergrast under the common grantor doctrine. This motion was heard by a different judge than originally granted Pendergrast summary judgment. The Trial Court denied the Motion for Reconsideration. CP 101-02. Thus, a total of five judges, two separate Trial Court judges and a panel of three Court of Appeals judges have confirmed the appropriateness of granting Pendergrast summary judgment on her quiet title claim under the common grantor doctrine.

E. ARGUMENT

Noticeably absent from Matichuk's Petition is any reference, recognition, or application of RAP 13.4(b)'s critical standards that must be shown to support their extraordinary request for Supreme Court review:

> (b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

None of these considerations have been established by Matichuk.

1. The Court of Appeals' Affirmation of the Trial Court's Granting Pendergrast Title of the Disputed Property by Way of Summary Judgment Under the Common Grantor Doctrine Does Not Conflict With Any Existing Law.

Much of Matichuk's argument on the common grantor doctrine is a complaint that the Court of Appeals erred in concluding that there was not an issue of fact that should have prevented the Trial Court from granting Pendergrast's Motion for Summary Judgment. This is not a justifiable basis to seek Supreme Court review. In fact, Matichuk do not disagree that the Court of Appeals referenced and properly applied the critical parameters for its review of a decision on summary judgment, nor a contention that these parameters are contrary to law. Matichuk have

therefore failed to identify any legitimate basis to trigger Supreme Court review.

Even if the Court of Appeals' substantive determination that there was no issue of fact was to be a basis to seek Supreme Court review, there is not one single disputed "fact" that Matichuk can identify in relationship to the circumstances of each party's acquisition, the existence of the fence, the fence's physical occupancy of the entire common boundary line, or the parties' recognition of the fence line for occupancy for over three years. There is simply not a single dispute between the parties as to these controlling facts.

Matichuk instead contend that the Court of Appeals improperly applied the undisputed facts to the boundary by common grantor doctrine, "as it changes established precedent concerning what actions of the parties are to be considered." Petition, p. 6. According to Matichuk, the Court of Appeals' Opinion concluded, inconsistently to precedent, that a "meeting of the minds" was no longer required. Id. On the contrary, the Court of Appeals specifically recognized the need for a "meeting of the minds" to meet the common grantor doctrine:

> Application of the common grantor doctrine presents two questions: (1) was there an agreed boundary established between the common grantor and original grantee, and

> (2) if so, would a visual examination of the property show subsequent purchasers that the deed line no longer functioned as the true boundary?

Opinion, pp. 8-9 (emphasis added) (citing Fralick v. Clark Co., 22 Wn.App. 156, 160, 589 P.2d 273 (1978)). There is no contention that this standard is inconsistent with existing law.

Matichuk do argue, however, without citation to a single authority, that this standard cannot be met by the type of evidence relied upon by the two Trial Court judges and Court of Appeals. They first argue that there could be no meeting of the minds because neither Matichuk nor Pendergrast physically met with the common grantor, Conine. This contention was explicitly rejected in Winans v. Ross, 35 Wn.App. 238, 241, 666 P.2d 908 (1983):

> The Rosses contend there was no proof the Corletts and Youngs agreed the fence would be the boundary, because the record shows they did not talk about the boundaries at the time of sale. We disagree. A formal, or specific, or separate contract as to the boundary line between the parties is not necessary.

(citing Thompson v. Bain, 28 Wn.2d 590, 183 P.2d 785 (1947)). Nor is there any other case that requires such a physical meeting. There is therefore no inconsistency with existing law on this point.

They then argue that the "court of appeals [sic] also significantly deviated from the boundary by common grantor doctrine by consideration of actions after closing to find a 'manifestation of ownership.'" Petition, pp. 9-10 (emphasis in original). The court in Winans v. Ross, supra, 35 Wn.App. at 241, also explicitly concluded to the contrary: "An agreement or meeting of the minds between the common grantor and original grantee may be shown by the parties' manifestations of ownership after the sale." (Emphasis added). Matichuk do not cite any authority that holds to the contrary. Again, there is no inconsistency with existing law on this point.

Matichuk then contend that their undisputed recognition of the fence line as the property line for three years merely created an "inference" of a meeting of the minds, which alone could not support summary judgment. Petition, p. 10. Not a single case is cited to support this proposition. As the Court of Appeals properly noted:

> Both parties' conduct, from before they purchased until Matichuk announced he intended to move the fence, showed an understanding that they owned adjacent parcels separated by the fence. And a visual examination of the property gave notice that the fence functioned as the true boundary. The realty listing agreement and seller disclosure form further support the conclusion that Conine intended to sell the parcels in relation to the fence.

Opinion, pp. 10-11. These are the facts, indeed the precise facts, relevant to prove application of the common grantor doctrine.

In fact, Matichuk's contention that the parties' recognition of the fence as the boundary line cannot prove the common grantor doctrine directly conflicts with the Supreme Court's ruling in Thompson v. Bain, supra, 28 Wn.2d 590. There, the appellant argued that "the fact that the appellants occupied up to the fence does not prove, nor is there any other proof of, an agreement between the common grantor and the appellants so establishing the boundary line." Id. at 592. This Court disagreed:

> The rule as heretofore set out contemplates that the boundary line should be established by the grantor and that the grantee takes the land in reliance thereon. A formal, or specific or separate contract as to the boundary line between the parties is not necessary.

Id. This Court also rejected another Matichuk suggestion that application of the common grantor doctrine violates the parol evidence rule. Id. at 593. In the end, based upon the same facts relied upon here, this Court concluded "that in this case the common grantor established an 'on the ground' boundary line between the tracts in question that is binding on the common grantees. Id.

Nor does Matichuk note the additional uncontested evidence relied upon by the Trial Court and Court of Appeals to find a meeting of the minds, such as the fact that at the time of purchase, R. Matichuk had notice and recognized a discrepancy between the deed line and the property he measured by pacing the fence, his recognition that the fence "appeared to relate to" the adjoining property, and Conine's retention of control over the area on the Pendergrast side of the fence for the five months she retained ownership after selling to Matichuk. Opinion, pp. 11-12. The facts relied upon by the Court of Appeals to uphold application of the common grantor doctrine, all of which were undisputed, is precisely the type of evidence relied upon by every other court that has applied the doctrine, and no inconsistency exists.

2. Trebling of Non-Economic Damages Under RCW 64.12.030 Is Consistent With Birchler v. Costello Land Co., Inc.

Matichuk next maintain that review should be granted as to the Court of Appeals' decision that non-economic damages awarded for a timber trespass under RCW 64.12.030 should be trebled. According to Matichuk, this ruling should be reviewed, so the Supreme Court can "confirm that RCW 64.12.030 does not provide trebling of non-economic harms." Petition, p. 12. Matichuk's request is premised exclusively upon

the contention that such "confirmation" flows from this Court's ruling in Birchler v. Castello Land Co., Inc., 133 Wn.2d 106, 111, 942 P.2d 968 (1997), and therefore the Court of Appeals' decision conflicts with the ruling. Matichuk's contention is incorrect, and in fact, the Court of Appeals' decision is based upon a detailed analysis and proper application of the ruling in Birchler v. Castello Land Co., Inc., supra.

RCW 64.12.030 provides as follows:

> Whenever any person shall cut down, girdle, or otherwise injure, or carry off any tree, including a Christmas tree as defined in RCW 76.48.020, timber, or shrub on the land of another person, or on the street or highway in front of any person's house, city or town lot, or cultivated grounds, or on the commons or public grounds of any city or town, or on the street or highway in front thereof, without lawful authority, in an action by the person, city, or town against the person committing the trespasses or any of them, any judgment for the plaintiff shall be for treble the amount of damages claimed or assessed.

(Emphasis added). In Birchler, the trial court ruled that emotional distress damages could be awarded on a timber trespass claim under RCW 64.12.030, and on appeal, Division One of the Court of Appeals agreed. However, in doing so, the Court of Appeals concluded that such were "segregated" and "distinct" components of damages, and not a component of the "statutory treble damages" award. On appeal, this Court first recognized that in deciding whether emotional distress damages were

recoverable under RCW 64.12.030, it was specifically not deciding whether such damages, if allowed, would be trebled because the issue had not been properly raised on appeal:

> Although counsel for the homeowners suggested in oral argument that the emotional distress damages award should have been trebled, we do not reach that issue as the homeowners did not seek cross-review on that issue in the Court of Appeals, RAP 2.4(a), nor did they raise the issue in their Answer to the Petition for Review. RAP 13.4(d).

Birchler v. Castello Land Co., Inc., supra, 133 Wn.2d at 110, n. 3. However, and importantly, this Court, in affirming the ability to recover emotional distress damages, made it clear that such damages were not "distinct" from the statutory damages that "shall be trebled" as noted by the Court of Appeals, but instead awardable as "damages" under the statute.

In reaching this conclusion, it is true that this Court noted that courts had historically interpreted the "damages" recoverable and subject to trebling under the statute narrowly:

> RCW 64.12.030 does not precisely articulate the damages that are subject to trebling, indicating only that punitive damages are available '[w]henever any person shall cut down, girdle or otherwise injure, or carry off any tree, timber or shrub...'Our cases have generally confined the treble damages remedy to injury to, or removal of,

> vegetation, although the measure of damages has varied by the type of vegetation affected.

Id. at 111 (emphasis added). It is this last sentence, which is nothing more than a recognition of prior opinions, that Matichuk reference to argue that this Court in Birchler inherently concluded that non-economic damages should not be trebled. Petition, p. 12. Matichuk fail to note, however, that after making this generalized observation, this Court then defined the issue as to whether "emotional distress damages are recoverable under RCW 64.12.030." Id. at 112. Nor does Matichuk recognize that in then evaluating this issue, this Court first concluded that "damages under RCW 64.12.030 are not confined exclusively to injury to or destruction of vegetation," and thus, it turned to the question of "whether emotional distress damages are recoverable under RCW 64.12.030 for a trespass." Id. at 115.

Finally, Matichuk fail to note that in concluding that such damages were recoverable, this Court rejected the limiting applications of earlier cases and upon which Matichuk now relies:

> Amicus argues that in the absence of explicit language in the statute allowing emotional distress damages, 'it would be improper to conclude that the legislature intended to allow a measure of damages for willful tree trespass that was not recoverable at common law at the time the Statute was enacted.' Br. of Amicus Curiae at 7. We

> disagree.... We believe the correct rule is that emotional distress damages are recoverable under RCW 64.12.030 for an intentional interference with property interests such as trees and vegetation.

Id. at 116. Because "non-economic" injury is a "damage" directly recoverable under the statute, this Court inherently concluded, contrary to Matichuk's assertion, that such damages must be trebled under the clear language of the statute. Thus, the Court of Appeals' decision, which is based upon the Birchler ruling, and the 18 years that have passed with no legislative response limiting the type of "damages" recoverable under the statute to exclude non-economic damages, is completely consistent with this Court's analysis.

3. The Court of Appeals Followed Proper Standards to Refuse to Reverse the Trial Court's Denial of Matichuk's Motion for a New Trial or to Reduce Damages Under CR 59.

Finally, Matichuk seek review of the Court of Appeals' refusal to reverse the Trial Court's denial of their motion for a new trial or to reduce the non-economic damages awarded to Pendergrast. No "conflict" with any statute or case law is referenced. Instead, Matichuk merely recite their rendition of the "evidence" and ask this Court to step in and reverse the Trial Court's ruling. The Supreme Court's jurisdiction is not triggered by such a perceived failure by the Court of Appeals.

Even if substantively reviewed, there is nothing incorrect about the Court of Appeals' decision. The Trial Court's denial of a motion to reduce a jury award is reviewed by the Court of Appeals "for abuse of discretion using the substantial evidence, shocks the conscience, and passion and prejudice standard articulated in precedent." Bunch v. King County Dept. of Youth Services, 155 Wn.2d 165, 176, 116 P.3d 381 (2005). Such deference is based upon the fact that the judge saw the witnesses and heard the evidence first hand. Thus, the Trial Court's denial of the motion actually strengthens the jury verdict:

> The appellate court does not engage in exactly the same review as the trial court because deference and weight are also given to the trial court's discretion in denying a new trial on a claim of excessive damages. The verdict is strengthened by denial of a new trial by the trial court. While either the trial court or an appellate court has the power to reduce an award or order a new trial based on excessive damages, 'appellate review is most narrow and restrained' and the appellate court 'rarely exercises this power.'

Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp., 122 Wn.2d 299, 330, 858 P.2d 1054 (1993). The Court of Appeals properly applied this standard, which is not disputed by Matichuk, and properly concluded that no abuse of discretion had occurred. Indeed, nowhere does

Matichuk allege or provide any basis to support that the Trial Court abused its discretion.

Finally, Matichuk suggests that this Court should adopt some specific "multiplier" that maximizes the amount of non-economic damages that can be awarded in comparison to actual damages, but then does not reference what this "multiplier" should be, nor how this Court could constitutionally simply place a "cap" on how much a party can recover in non-economic damages. No court has suggested that such cap exists, nor could or should one be adopted. Matichuk suggest that the Court of Appeals in Hill v. GTE Directories Sales Corp., 71 Wn.App. 132, 856 P.2d 746 (1993) recognized such a "cap," but this is incorrect.

The court in Hill reviewed a trial court's reduction of a jury verdict, thereby implicating a completely different standard of review. Matichuk also fail to recognize that the court's affirmation of the trial court's reduction was not limited to the size of the award, but also to the jury's failure to properly determine the economic damages: "In light of the meager evidence and the jury's award of excessive economic damages (as discussed earlier), we agree the $410,000 award clearly indicates passion or prejudice, or an attempt to award punitive damages." Id. at 140. This factor was noted by this Court in Bunch v. King County Dept.

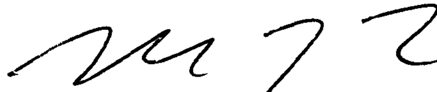
of Youth Services, supra, 155 Wn.2d at 181 as a specific distinction. The awarded economic damages to Pendergrast were precisely the same as the uncontested values provided by experts, which have not been challenged.

Moreover, nothing in Hill suggests that the proper or necessary evaluation of non-economic damages includes a mathematical comparison with the amount awarded for economic damages. Matichuk's proposal that this Court adopt such a cap would violate the rule that a "jury verdict cannot be overturned merely because of its size." Thompson v. Berta Enterprises, Inc., 72 Wn.App. 531, 543, 864 P.2d 983 (1994). Indeed, comparing the two categories of damages runs contrary to the fact that emotional distress damages may be recovered in the absence of any special damages. Fernandes v. Mockridge, 75 Wn.App. 207, 213, 877 P.2d 719 (1994), rev. denied, 126 Wn.2d 1005 (1995). For instance, the court in Johnson v. Marshall Field & Co., 78 Wn.2d 609, 617-18, 478 P.2d 735 (1970) reversed a reduction of a $20,000 general damages award where the jury found $0 in special damages. The focus is upon the amount of the award in comparison to the evidence, not some arbitrary comparison of the proportionality between economic and non-economic damages.

F. CONCLUSION

For the foregoing reasons, Matichuk do not present any basis to trigger Supreme Court review.

DATED this 27th day of October, 2015.



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