IN THE STATE COURT OF FULTON COUNTY
STATE OF GEORGIA

Bankruptcy Estate of Carol Thurman and John Thurman, by and Through Kyle Cooper, Bankruptcy Trustee Plaintiff, v. United Services Automobile Association a/k/a USAA Defendant.	)	Civil Action File No. 2009EV007882F

FINAL ORDER

I. Procedural History

The above-styled action was tried to a jury of 12 persons on November 2 and 3, 2011. There were no challenges to the jury empanelled. Prior to trial, the parties submitted to the Court an agreed upon Consolidated Pre-Trial Order. The parties worked well together resolving all technical and procedural issues without the intervention of the court, including the resolution of the motions in limine filed by both parties and all objections to the depositions which were presented at trial.

During the trial, Plaintiff presented the testimony of five witnesses, all of which provided testimony supportive of Plaintiff's claims related to causation. Four of the five witnesses testified directly to the damages sustained by Plaintiff, including her substantial pain and suffering before and after surgery. These witnesses included Mrs. Thurman, Mr. Thurman, Rochelle Brown, a licensed massage therapist, and Dr. Hal Silcox, a board certified orthopedic surgeon and former professor of surgery at Emory University.

In addition, Plaintiff offered 15 trial exhibits, all of which were admitted without objection. These exhibits all pertained to causation or Plaintiff's claim for damages, including 2 medical illustrations, 2 x-rays, exemplars of the hardware inserted during Plaintiff's spinal surgery, medical bills, medical records, 2 photographs showing significant damage to Plaintiff's vehicle, the 1949 Ultimate Mortality Table and the informed consent form describing the risks of Plaintiff's spinal surgery.

Defendant USAA presented the testimony of Mr. Brown, the driver of the vehicle which struck Ms. Thurman and photographs of his vehicle. Defendant did not offer the testimony of any medical expert as to the cause of Plaintiff's herniated disk and did not call any of Plaintiff's subsequent medical providers. Rather, Defendant chose to rely upon cross-examination of Plaintiff's witnesses.

During the course of the trial, counsel for neither party maintained an objection to any questions asked or to any evidence offered.[1] Accordingly, both parties were able to place before the jury all evidence which they deemed relevant to their determination of the case. The trial lasted two days, with the presentation of the evidence commencing in the afternoon of the first day and ending by the early afternoon of the second day. After being charged by the Court, the jury deliberated for one and one-half hours before reaching a verdict. Given that negligence was uncontested, the jury had to consider only causation and damages. The jury returned a verdict for $1,370,031 for the damages suffered by Mrs. Thurman and $25,000 for Mr. Thurman's loss of consortium. The amount awarded was consistent with the amount requested by Plaintiff's counsel during

[1] Defendant may have initially objected to the verdict form, but, to the extent any objection was made, it was withdrawn upon the Court providing further direction to the jury regarding the form. Due to the absence of a trial transcript, the Court cannot recall if a formal objection was made or, if upon defense counsel expressing general concern regarding the form, the Court provided further direction to the jury.

his closing argument. The court entered a judgment on the verdict for $1,300,000, plus costs.[2]

Prior to the entry of the judgment on the verdict, Defendant USAA filed a Motion for New Trial or, in the alternative, for a Remittitur. After the entry of the judgment, Defendant USAA filed a Renewed Motion for New Trial or, in the alternative, for a Remittitur.

II. Evidence

Defendant USAA failed to order a trial transcript for the Court's consideration and did not provide the Court with references to any of the four depositions which were read into evidence during trial.[3] While the Court has the authority to dismiss or deny Defendant's Motion based upon the failure to order the trial transcript, the Court has decided to exercise its discretion to consider Defendant's motion without the transcript. See, *Miller v. Parks*, 124 Ga. App. 4, 183 S.E.2d 88 (1971) and *Evans v. State*, 230 Ga. App. 728, 497 S.E.2d 248 (1998). The trial transcript certainly would have been helpful to the Court's consideration of Defendant's motion, but given the clear nature of the evidence in the case, and the Court's recollection of the case whish was also refreshed by counsel, the Court is able to rule without consideration of the transcript.[4]

There were two issues for the jury to consider in this matter – causation and damages. Plaintiff presented substantial evidence on both of these issues. With respect to causation, a variety of evidence can be pertinent in establishing this element of

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[2] The amount of the verdict was reduced due to the limited amount of uninsured motorist coverage available.

[3] At trial, Plaintiff presented the video depositions of Stephen Brown, Michelle Brown, and Dr. Hal Silcox. The deposition of Stephen Brown presented by Plaintiff was a deposition taken by Plaintiff for the preservation of evidence. Defendant also presented the discovery deposition of Stephen Brown during trial.

[4] Plaintiff also provided the Court with citations to the various depositions which were introduced at trial.

Plaintiff's claim. In this matter, Plaintiff presented evidence that 1.) the level of impact was significant; 2.) A short time after the accident (3 days), Plaintiff developed symptoms in the area of her body in which the herniated disk was later identified; 3.) Plaintiff had constant neck pain from the time of the onset of neck pain until the herniated disk was diagnosed; 4.) Plaintiff treated regularly with a variety of medical providers from the time of the accident through the date of her diagnosis of a herniated disk; and, 5.) Expert testimony that the herniated disk was caused by the accident and that the herniated disk necessitated the fusion surgery which Plaintiff underwent. Plaintiff was not required to offer evidence in each of these areas in order for the jury to conclude that the accident caused the herniated disk, but the Court found the level of evidence on causation, especially the testimony of Dr. Hal Silcox, to have been substantial.

With respect to the level of the collision's impact, Plaintiff offered evidence that it was significant. This included a photograph of the outside of Plaintiff's vehicle (Trial Exhibit 2), a photograph of the shattered glass driver's side window (Trial Exhibit 3), testimony that the vehicle had to be towed (Testimony of Carol Thurman), testimony that the damage to Plaintiff's vehicle was over $12,000 (Testimony of Carol Thurman) and testimony that the impact was so severe it resulted in hysterical crying by Mrs. Thurman immediately after impact (Testimony of Carol Thurman). None of this evidence was ever contested by Defendant.

Defendant offered evidence with respect to the severity of the impact through the testimony of Mr. Brown and photographs of Mr. Brown's vehicle. However, the only thing Mr. Brown could state was that he was traveling approximately 40 to 50 miles per hour prior to the collision (Brown Depo., p. 31). He was not able to estimate his speed at

the time of impact to Mrs. Thurman's vehicle. The photographs offered by Defendant of the damage to Mr. Brown's steel bumper had a limited bearing on the impact on Plaintiff since she was sitting in her vehicle which was crushed and not Mr. Brown's pickup truck.

In regard to when the neck pain developed, Plaintiff offered and admitted into evidence the medical record from Mrs. Thurman's family practice doctor that her complaints of neck pain started within 3-4 days after the accident (Trial Exhibit 4). In addition, Mrs. Thurman testified that her neck pain started about 3 days after the accident. Further, Mrs. Thurman's massage therapist testified that she had such severe neck pain nine days after the accident that she could not turn her head due to the neck pain and Ms. Brown could barely touch her. (R. Brown depo., p. 14, ll 5-12 to 15, ll 5-13). Ms. Brown testified utilizing her notes she made on the same day she saw Mrs. Thurman, thereby providing further credibility to her testimony. (M. Brown depo., p. 18, ll 23-25 to p. 19, ll 1-5). Further, Mrs. Thurman testified that she believes she scheduled the appointment with Rochelle Brown approximately five days ahead of time, which means she would have scheduled the appointment approximately four days after the accident.

Defendant did offer a copy of the billing statement from the club at which the massage therapy was provided in an effort to dispute certain aspects of Ms. Brown's testimony as to when massage therapy was performed. However, Ms. Brown testified that she also provided massage therapy to Mrs. Thurman at her home, and Plaintiff offered testimony of Mr. Thurman that the couple belonged to the club for a greater period of time than reflected on the billing statements. (M. Brown depo, p. 30, ll 16-25).

In regard to the continuation of and treatment for her neck pain, Plaintiff introduced substantial evidence that her neck pain continued and she received treatment for it until she was diagnosed with the ruptured disk. From August through December, 2007, she saw her internist who prescribed muscle relaxers and massage therapy. Plaintiff then treated regularly with her massage therapist. When Plaintiff did not get relief from this treatment, she contacted the office of an orthopedic surgeon in December, but could not get in to see him until January, 2008. The orthopedic surgeon, Dr. Hal Silcox, prescribed a new muscle relaxer and home exercises that he equated to physical therapy. (Silcox depo., p. 11, ll 14-25 to p. 13, ll 1-10). When these did not resolve her pain symptoms, Plaintiff then treated over the next 18 months with 3 different chiropractors for neck pain. (Trial Exh. 5, medical bills from treatment).

When Mrs. Thurman's neck pain did not resolve, Plaintiff returned to Dr. Silcox who prescribed an MRI. The MRI revealed the cervical herniated disk, and Dr. Silcox then prescribed an epidural injection. (Silcox depo., p. 13, ll 11-15 to p. 16, ll 1-10). Plaintiff had a negative reaction to the epidural injection, and Dr. Silcox recommended surgery. (Silcox depo, p. 25, ll 8-25 to p. 28, ll 1-5). He then performed a cervical diskectomy and fusion on Plaintiff. Defendant did not contest that Plaintiff received the above-described treatment from an internist, a massage therapist, three chiropractors and an orthopedic surgeon from the time of the accident until her herniated disk was diagnosed and surgery was performed.

Plaintiff offered the testimony of Dr. Hal Silcox that the subject car accident caused Plaintiff's herniated disk and necessitated the spinal surgery he performed on Plaintiff. (Silcox depo., p. 20 ll 25 to p. 28, ll 1-5). Dr. Silcox testified extensively and

offered his opinion as to causation to a reasonable degree of medical certainty. (Silcox depo., p. 43, ll 8-10). Further, his testimony was supported by a medical illustration of the herniated disk which included a copy of Plaintiff's MRI and a medical illustration of the surgery. (Trial Exhibits 7 and 10). Dr. Hal Silcox is board certified in orthopedic surgery, former chief of orthopedic surgery for the Atlanta Veterans Administration Hospital and a former Professor of Orthopedic surgery at Emory University. (Silcox depo., pp. 6-7).

Defendant USAA offered no medical evidence challenging Plaintiff's theory of causation or supporting Defendant's alternative theories of causation that Mrs. Thurman's running, her work or a shelf hitting her jaw caused her herniated disk. At trial, Mrs. Thurman testified she did not recall the shelf incident. Defendant did not call the chiropractor who created the note as a witness, did not introduce the medical record regarding the incident at trial and did not introduce the testimony of any medical expert to support defendant's theory of causation.

There was also substantial evidence regarding damages offered by Plaintiff, including the following:

1.) that Mrs. Thurman's neck pain started shortly after the accident and became debilitating over the two years after the accident (Testimony of Carol and John Thurman);

2.) that Mrs. Thurman received extensive treatment for her neck pain prior to the herniated disk being diagnosed, including treatment with an internist, massage therapist, orthopedic surgeon and three chiropractors (testimony of Carol and John Thurman; Deposition of Dr. Silcox; Deposition of Rochelle Brown; and medical bills indicating treatment which occurred, trial exhibit 5);

3.) that Mrs. Thurman suffered a herniated disk due to the accident (Silcox depo., p. 13, ll 11-15 to p. 16, ll 1-10 and medical illustration and MRI, trial exhibit 7);

4.) that Mrs. Thurman underwent an epidural injection to which she had a severe reaction (Testimony of Carol Thurman; Dr. Hal Silcox, depo., p. 25, ll 8-25 and Medical illustration showing injection, trial exhibit 7);

5.) that Mrs. Thurman underwent an extremely serious spinal surgery which required the placement of a plate, screws and cornerstone cage packed with bone morphic protein (Testimony of Dr. Hal Silcox, depo., p. 31, ll 3-25 to p. 39, ll 1-9; medical illustration of surgery, trial exhibit 10; exemplars of hardware inserted into her spine, trial exhibit 11; and, post-surgical x-rays, trial exhibits 12 and 13);

6.) that as a result of her surgery, Mrs. Thurman suffered a 25% permanent partial impairment rating of her whole body (Silcox depo., p. 42, ll 9-24);

7.) that Mrs. Thurman developed a swallowing issue after the surgery which required further treatment, but which continues to exist despite the treatment (Carol Thurman testimony and Silcox depo., p. 39, ll 25 to p. 40, ll 1-24);

8.) that Mrs. Thurman's neck pain remains unresolved and that she has been told there is no surgical option available to end the neck pain (Carol Thurman's testimony);

9.) that due to the accident Mrs. Thurman has been and is required to live with neck pain for 28 years (1949 Ultimate mortality table, trial exhibit 6);

10.) that Mrs. Thurman incurred medical bills in the amount of $70,031.00 due to her injuries (trial exhibit 5);

11.) that Plaintiff is no longer able to engage in her lifetime passion of long distance running due to her continued symptoms (Carol Thurman Testimony); and,

12.) Carol and John Thurman suffered a loss of consortium which substantially impacted the party's marriage, including contributing to their separation (testimony of Carol and John Thurman).

Defendant USAA did not offer evidence pertaining to Plaintiff's damages, but sought to discredit the claim for damages by challenging the causal relationship of the accident to the cervical herniated disk suffered by Plaintiff. Further, Defendant's closing argument did not include a discussion of what the jury should consider awarding if it were to conclude the herniated disk was caused by the accident.

III. Motion for New Trial

Defendant USAA asserts three general statutory grounds in requesting that the Court grant its motion for new trial. Pursuant to O.C.G.A. §§ 5-5-20 and 5-5-21, Defendant asserts that the verdict is "contrary to the evidence and principles of justice and equity" and is "decidedly and strongly against the weight of the evidence," respectively. In addition, Defendant asks the Court to exercise its discretion pursuant to O.C.G.A. § 5-5-25, to overturn the jury's verdict.

"In passing upon a motion for new trial after verdict, the view of the evidence which is most favorable to upholding the verdict must be taken." *Kelly Ford, Inc. v. Paracsi*, 141 Ga. App. 626, 234 S.E.2d 170 (1977). "After the verdict of a jury has been returned the evidence is construed most favorably to the prevailing party as every presumption and inference is in favor of the verdict. See *Brown v. Nutter*, 125 Ga.App. 449, 450(1), 188 S.E.2d 133; *West Lumber Co. v. Schnuck*, 85 Ga.App. 385, 392(12), *Scott v. Imperial Hotel Co.*, 75 Ga.App. 91, 93, 42 S.E.2d 179; *Hill Aircraft etc. Corp. v. Flanders*, 143 Ga.App. 504, 505(2), 239 S.E.2d 155, supra. [A] trial court correctly

denie[s] the [party's] motion for new trial [when] it cannot be said that the verdict of the jury was contrary to the evidence and without evidence to support it." *Hill Aircraft & Leasing Corp. v. Tyler*, 161 Ga. App. 267, 291 S.E.2d 6 (1982).

Contrary to Defendant USAA's assertion, this Court finds that the verdict was supported by the evidence as well as the weight of the evidence. In regard to whether the cervical herniated disk suffered by Mrs. Thurman was caused by the subject collision, the only medical evidence offered on this issue was presented by Plaintiff. Plaintiff's medical expert, Dr. Silcox, testified that it was his opinion to a reasonable degree of medical certainty that the herniated disk was caused by the collision. (Silcox depo., p. 21, ll 5-25 to p. 22, ll 1-7).

Defendant asserted three alternative theories of causation. These included Mrs. Thurman's running, the general nature of her work and a shelf hitting her jaw. However, Defendant did not offer any medical evidence to support any of these theories. With respect to the cause of a medical condition, expert evidence is often required to establish the matter. See, *Cowart v. Widener*, 287 Ga. 622, 697 S.E.2d 779 (2010). This is certainly true when the medical question involves truly specialized medical knowledge. *Id.* [5] When confronted with the Defendant's contention that the herniated disk was somehow related to Mrs. Thurman's running, Dr. Silcox rejected Defendant's theory, providing a detailed explanation why the mechanics of running did not cause herniated disks. (Silcox depo., p. 22, ll 12-25 to p. 24, ll 1). Dr. Silcox is a well qualified and

[5] The Court recognizes that medical evidence is not required to prove causation in simple negligence actions. *Cowart v. Widener*, 287 Ga. 622, 697 S.E.2d 779 (2010). The line between areas in which expert medical testimony is required and not required is not always completely clear. However, when one party presents expert medical testimony and the other party does not present such testimony, the jury, the ultimate judge of the credibility of witnesses, is certainly authorized to accept the testimony of such an expert.

credible orthopedic surgeon and the jury was certainly authorized to accept his testimony that the herniated disk was caused by the subject collision.

In regard to Defendant's general assertion that Mrs. Thurman continued to work after the collision, to the Court's recollection, very few details about the specific nature of Mrs. Thurman's work were introduced at the time of trial. In any event, given Dr. Silcox's testimony that the collision caused the herniated disk and the failure of Defendant to offer medical evidence to support its theory that Mrs. Thurman's work someone how caused the herniated disk, it was certainly appropriate for the jury to reject this theory.

With respect to Defendant's theory that a shelf striking Mrs. Thurman's jaw caused her herniated disk, there was minimal, if any, evidence regarding the incident and certainly no medical evidence that it caused the herniated disk. During cross-examination, Defendant USAA's counsel questioned Mrs. Thurman regarding the incident based upon a single visit to a chiropractor. Mrs. Thurman testified she did not recall the incident, and the medical record was not offered into evidence. At the time of the visit to the chiropractor, Mrs. Thurman had already been suffering and treating for neck pain for almost eleven months. She had seen an internist, a massage therapist, an orthopedic surgeon and two chiropractors. Accordingly, she already had a well established history of neck pain in the area in which the herniated disk was later identified.

Given Dr. Silcox's testimony that the collision caused the herniated disk, the limited evidence regarding the shelf incident itself, the fact Mrs. Thurman had a well established history of neck pain at the time of the incident and the lack of any medical

evidence offered by Defendant USAA that the incident caused the herniated disk, the jury was certainly authorized to reject Defendant's alternative theory of causation.

In addition to Dr. Silcox's testimony, the jury had other evidence to support its finding of causation, including:

1.) the medical illustrations used by Dr. Silcox to explain the nature of the disk injury (Trial Exhibit No. 7);

2.) the evidence that the impact on the driver's side door where Plaintiff was sitting was substantial (i.e., photograph of the outside of the car, trial exhibit 2, photograph of the shattered glass, trial exhibit 3, evidence that there was $12,000 in property damage and evidence the impact was so severe Mrs. Thurman immediately started crying hysterically (testimony of Carol Thurman);

3.) the evidence showing the early onset of the neck pain (plaintiff's medical record showing neck pain started within 3 days of accident, Trial Exh. 4);

4.) the continuation of the neck pain for the two years after the accident (Testimony of Carol and John Thurman); and,

5.) that Plaintiff treated extensively for neck pain after the accident, having never treated previously for neck pain (After the accident, Plaintiff saw an internist, massage therapist, an orthopedist and three chiropractors for fifty visits, Trial exhibit 5, Plaintiff's medical bills).

Defendant USAA asserts two central arguments to support its request for a new trial based upon the amount of damages awarded: first, that the verdict was inappropriate given that Mrs. Thurman's medical special damages were $70,000 and she suffered no

lost wages; and second, that verdicts in other cases involving herniated disks were lower than the verdict in the current case.

With respect to Defendant USAA's contention that the pain and suffering award is contrary to the level of special damages, Georgia's appellate courts have solidly rejected such an approach to determining pain and suffering awards. The court in *Smith v. Crump,* 223 Ga. App. 52, 476 S.E.2d 817 (1997) provided perhaps one of the best explanations why there is "...no rule or yardstick against which damages for pain and suffering are to be measured..." *Id.* The court explained:

> Under Georgia law, pain and suffering in the past, present, and future are measured by the enlightened conscience of a fair and impartial jury. There exists no rule or yardstick against which damages for pain and suffering are to be measured, as suggested by [defendant], who would have such damages as some multiple of special damages for medical expenses and lost wages. The reason is simple: if such an objective yardstick is applied, then the young, the old, the sick, the disabled, the rich, the poor, the unemployed, and the underemployed would be treated differently than the fully employed when having such special damage cap [applied].

Crump, 223 Ga. App. at 57, 476 S.E.2d at 821.

Georgia appellate courts have consistently rejected the use of any specific measure, rule or yardstick applied to special damages to determine what is an appropriate award for pain and suffering. *Southern Cotton Oil Co. v. Skipper,* 125 Ga. 368, 54 S.E. 110 (1906); *Arnsdorff v. Fortner*, 276 Ga.App. 1, 622 S.E.2d 395 (2005); and *AT Systems Southeast, Inc. v. Carnes,* 272 Ga.App. 671, 613 S.E.2d 150 (2005). "With respect to actual damages for pain and suffering, these "are determined solely by the enlightened conscience of an impartial jury," *International Assn., etc., Local 387 v. Moore,* 149 Ga.App. 431, 432(1), 254 S.E.2d 438 (1979), and that is what the trial court must respect." *Salvador v. Coppinger*, 198 Ga. App. 386, 387, 401 S.E.2d 590, 592 (1991).

Defendant USAA did not offer the jury a formula to use in calculating damages or any rational or logical reason for its application. In this case, Plaintiff has suffered a substantial and life altering spinal injury that has left her permanently impaired according to the medical testimony at trial. The amount she incurred in medical expenses bears no rational relationship to what amount of pain and suffering damages Plaintiff should be entitled to recover.

In regard to the existence of smaller verdicts involving similar injuries, such verdicts do not inform the Court's decision about whether the verdict is contrary to the evidence or against the weight of the evidence. Every case is unique in that each individual who has been injured has their personal medical history, medical conditions and has undergone a course of treatment which is never exactly the same as individuals in other cases.

In this matter, Plaintiff offered the only evidence regarding damages. The evidence included the fact that Mrs. Thurman was involved in a serious collision on an interstate highway, suffered significant neck pain for two years prior to her herniated disk being diagnosed, was diagnosed with a herniated disk, underwent an epidural spinal injection that resulted in an adverse reaction, underwent major spinal surgery that included the placement of plates and screws, suffered and continues to suffer a swallowing complication due to the surgery, continues to suffer from neck pain after the surgery and has been assigned a 25% permanent impairment rating by her surgeon. Plaintiff also introduced a mortality table indicating that Mrs. Thurman is expected to endure pain and suffering for 28 years through the year 2035.

Defendant chose not to offer any evidence challenging the pain and suffering which Plaintiff claims she endured due to her herniated disk. Rather, Defendant based its position in this case on causation, contending that Mrs. Thurman's herniated disk was not caused by the accident and, therefore, her damages were limited. The jury having rejected Defendant's alternative theories of causation, the evidence and weight of the evidence certainly supported its award of $1,370,000 for Mrs. Thurman's injuries, which includes medical bills and past, present and future pain and suffering damages and $25,000 for Mr. Thurman's loss of consortium.

Defendant has also asked the Court to exercise its discretion to grant a new trial under O.C.G.A. § 5-5-25. Under this code section, the court is charged with the "exercise of sound legal discretion" in granting a motion for new trial, which must be based upon "the provisions of the common law and practice of the courts." O.C.G.A. § 5-5-25. The Court is always very reticent to overturn a jury's verdict in a case absent a strong basis for the court to exercise this authority. This is especially true after the Court has concluded the evidence and weight of the evidence supports the verdict. The only remaining basis on which the court would consider exercising its discretion would be if a party was unable to introduce evidence which should have properly been admitted or something occurred at the trial to make it unfair or inequitable to one of the parties.

The trial in this matter does not justify the Court exercising its discretion to overturn the jury's verdict. To the contrary, the trial proceeded very smoothly, with each party having been able to introduce all of the evidence which was offered. In fact, as indicated by the following, no issues or disputes requiring the Court's intervention arose during the proceeding:

- the parties resolved all pre-trial matters without the court's intervention;
- there were no objections during voir dire or as to the jury which was seated;
- there was not a single objection maintained as to any question asked during trial;
- there was not a single objection maintained as to any exhibit;
- there were no objections during opening statements;
- there were no objections during closing arguments;
- Defendant did not except to any jury charge;
- the jury spent one and one-half hours deliberating as to causation and damages (Liability was admitted) on one day's worth of evidence before reaching its verdict; and,
- there was no objection to the verdict at the time it was rendered.

Based upon the Court's conclusion that the trial was fair and equitable and the verdict was consistent with the evidence and the weight of the evidence, a new trial is not justified in this matter.

B. Motion for Remittitur

In arguing against the verdict, Defendant asserts that the amount was excessive and that the Court should issue a remittitur pursuant to O.C.G.A. § 51-12-12. This code section provides, in pertinent part, as follows:

> "(a) The question of damages is ordinarily one for the jury; and the court should not interfere with the jury's verdict unless the damages awarded by the jury are clearly … so excessive as to be inconsistent with the preponderance of the evidence in the case."

Regarding the size of the verdict, appellate courts have repeatedly held that the trial court may not simply substitute its judgment for that of the jury, and may only order a new trial or remittitur where a verdict is so large that it is "monstrous and shocking to all mankind." *Smith vs. Crump, Id.*, 223 Ga. App. 57. Carol Thurman's medical expenses were just over $70,000.00, an amount that was stipulated to by the parties. The remaining amount of the jury's verdict as to Mrs. Thurman fell under the general category of physical and emotional pain and suffering. "[T]he amount of damages returned by a jury in a verdict for pain and suffering due to alleged negligence is governed by no other standard than the enlightened conscience of impartial jurors. And the defendant has a heavy burden under O.C.G.A. § 51-12-12 (a) to establish that such a damage award is excessive . . . " *Patterson Bank v. Gunter*, 263 Ga. App. 424, 425 (2003). Courts should be hesitant to second guess juries "...where the damage award is based in any significant part on pain and suffering..." *Id.*

Defendant USAA has requested the Court to condition the grant of a new trial on Plaintiff's agreement to a reduction of the judgment to $300,000. Defendant failed to offer the Court any reason to reduce the verdict to this specific amount. Rather, Defendant asserts a general argument that a remittitur should be granted because the verdict was excessive. In support of this argument, Defendant again points to a sample of verdicts in other cases involving a herniated disk in which the verdict was below the verdict in this matter.

The question for the Court is not whether other juries may have awarded less money for this type of injury, but whether the verdict is "...**clearly** ... so excessive as to be inconsistent with the preponderance of the evidence in the case." O.C.G.A. § 51-12-

12(a). (Emphasis added). While the Court does not believe it is necessary to consider verdicts in other cases, to the extent the Court were to consider verdicts in such cases, it would be more pertinent to consider whether there were other verdicts equal to or greater than the verdict since the issue presented is whether the verdict is excessive.

Plaintiff submitted to the Court verdicts in seven other herniated disk cases tried in Georgia in which the verdicts ranged from $1,439,000 to $10,000,000. See, *Dixie A. Bric v. Kroger*, 1999 WL 33228761 ($10,000,000.00); *Smith v. Advanced Hunting Equipment*, 1990 WL 465350 ($7,000,000 to injured person and $1,500,000 for loss of consortium); *Williams v. Norfolk Southern Railroad*, 1996 WL 504345 ($2,765,735); *King v. Maxineau*, 2009 WL 5416501 *Maxineau v. King*, 304 Ga. App. 217, 695 S.E.2d 732 (2010) ($2,000,000); *Davis v. Central of Georgia Railroad*, 1994 Wl 1719785 ($1,800,000); *Reece v. Home Depot*, 2009 WL 5416487 ($1,500,000.00); and, *Gilortiz v. Cintas Corp.*, 2010 WL 4971767, ($1,439,000.00). Further, Plaintiff identified a search on Westlaw's "Combined Jury Verdicts and Settlements" database for "ruptured or herniated /s disk disc" cases with a verdict or settlement of over $1,000,000 which identifies over 1700 such cases. To the extent other verdicts are pertinent, as asserted by Defendant USAA, these cases indicate that the verdict in this case was not "monstrous and shocking to all mankind." *Smith vs. Crump, Id.*, 223 Ga. App. 57.

Aside from verdicts in other similar cases, there is an abundance of evidence to support the amounts awarded by the jury in this case. Mrs. Thurman suffered an extremely serious spinal injury – a ruptured disk in her neck. She endured significant pain and suffering over 2 ½ years until she underwent an epidural spinal injection and then a very significant spinal surgery, a cervical diskectomy and fusion. During this surgery, the

front of Plaintiff's neck was cut open, the disk between her 6th and 7th cervical vertebrae wass removed, a cornerstone cage with bone morphic protein was inserted into the disk space in her spinal column and a plate and 4 screws were then permanently attached to her vertebras.

After her surgery, Mrs. Thurman developed a swallowing complication and her neck pain returned. Despite efforts to medically treat these conditions, there is no surgical option and, therefore, her swallowing problem and neck pain are permanent. Mrs. Thurman has been given a 25% permanent impairment rating of the whole body. She is no longer able to run, her lifetime passion, and she has and will have to live with her permanent impairment for 28 years, until the year 2035. Given the level of Mrs. Thurman's injury, it was also appropriate for the jury to conclude that Mr. Thurman suffered a loss of consortium. During its closing argument, Defendant did not dispute that Mrs. Thurman suffered a herniated disk, did not dispute that she needed surgery and did not dispute the pain and suffering she has and will endure as a result of her disk injury.

Given the evidence concerning Mrs. Thurman's injury and damages, it cannot be said that the verdict was "clearly so excessive as to be inconsistent with the preponderance of the evidence presented..." O.C.G.A. § 51-12-12 (a) and (b). To the contrary, the only evidence presented at trial strongly supports the damages awarded by the jury.

Accordingly, Defendant USAA's Renewed Motion for New Trial, or in the alternative, for a Remittitur is DENIED. With respect to Defendant USAA's original Motion for New Trial or, in the alternative, for a Remittitur, filed prior to the entry of the

judgment, it is DENIED as void. *Dae v. Patterson*, 295 Ga. App. 818, 673 S.E.2d 306 (2009).

So ORDERED this 13th day of February, 2012.

Susan B. Forsling

Susan B. Forsling
Judge, State Court of Fulton County

Copies to counsel of record via
LexisNexis File & Serve