IN THE CIRCUIT COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

FRANCISCO TOVAR **PLAINTIFF**

VS. **CAUSE NO. 25CI1:19-cv-00071-WLK**

KRUEGER INTERNATIONAL, INCORPORATED;
AND JOHN DOES #1-10 **DEFENDANTS**

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR NEW TRIAL AND/OR REMITTITUR

COMES NOW Plaintiff Francisco Tovar, by counsel, and responds to Defendant Krueger International Incorporated's Motion for New Trial and/or Remittitur, and would show until this Honorable Court the following, to wit:

1.

PROCEDURAL HISTORY AND TRIAL SUMMARY

This case involves a motor vehicle collision that occurred on I-55 in Hinds County, Mississippi on or about February 9, 2016. The trial in this matter was held before a jury of (12) twelve citizens of Hinds County, Mississippi, commencing on Monday, November 28, 2022 and ending on Thursday, December 1, 2022. In relevant part, the Plaintiff claimed and ultimately proved that the Defendant's negligence injured the Plaintiff and, specifically, permanently aggravated the Plaintiff's pre-existing low back injury.

After considering the evidence and testimony presented by the Plaintiff and Defendant, the jury found unanimously that the Defendant, Krueger International Incorporated, was 100% liable for the injuries suffered by the Plaintiff and awarded the following compensatory damages:

Admitted past Medical Expenses:	$27,654.92
Additional past Medical Expenses, if any:	$61,000.00

Future Medical Expenses, if any:	$727,323.00
Past, Present and Future Pain and Suffering; Past, Present and Future Mental Anguish; Loss of Enjoyment of Life; Permanent Impairment; and, Disfigurement, if any:	$1,184,022.00
TOTAL:	**$2,000,000.00**

(Please see Executed Jury Verdict Form, attached as Exhibit 1).

In accordance with Mississippi law and the jury's verdict, on December 6, 2022, this Honorable Court entered a Final Judgment against the Defendant in the amount of **$2,000,000.00**, plus costs of Court and interest at the rate of eight (8%) percent annum. (Please see Final Judgment on Jury Verdict, attached as Exhibit 2)

Aggrieved, Defendant, now moves this Court for a new trial and/or remittitur. For the reasons set forth below, the Defendant's motion should be denied, except for past medical expenses, which should be lowered to total $61,000.00.

2.

PLAINTIFF'S CASE-IN-CHEIF

1. Master Sergeant Eric Henry

The Plaintiff called Master Sgt. Eric Henry as a witness. Officer Henry was the state trooper that responded to the February 9, 2016 crash. Officer Henry was not a retained expert and he testified to the following:

A. On February 9, 2016 he responded to a three vehicle crash on I-55 in Jackson, Mississippi.

B. It was a serious crash and four people reported having pain.

C. There were three impacts to the Plaintiff's vehicle: 1) Defendant's 18-wheeler hit the Plaintiff's Honda SUV on the right back corner; 2) the Honda SUV spun into the Infinity in front of it; 3) the back of the Honda SUV went into the median and flipped over.

D. The Defendant's driver told Officer Henry he was not paying attention because he was looking at the circus on the Frontage Road.

E. He determined that the Defendant's driver failed to yield and was following too closely.

F. He observed heavy damage to all three vehicles involved.

G. He found the Plaintiff's vehicle upside down in the median with damage on three sides.

H. He concluded, based on the physical evidence and 19 years of experience, everything indicated that the Defendant's driver was at fault for the collision.

I. All the impacts that occurred were hard impacts.

No objections were made to this testimony.

2. Rudy Lima

The Plaintiff called Rudy Lima as a fact witness. Mr. Lima is a translator for the Plaintiff and testified to the following:

A. He met Mr. Tovar a few years before the 2016 wreck and saw him at least once a month around town.

B. When he would see Mr. Tovar before the wreck he seemed normal and cheerful.

C. When he would see Mr. Tovar after the wreck it appeared like Mr. Tovar was in pain, he would not smile as much and was not as cheerful, and Mr. Tovar's daughter and wife were always with him.

D. The Plaintiff asked him to begin going to doctor visits with him to translate and make sure Mr. Tovar understood everything that was being said.

E. He first went with the Plaintiff to a doctor visit in April 2016 to receive shots in his lower back for the pain because at that time the Plaintiff was in a lot of pain.

F. In 2017 he went to several doctor visits with the Plaintiff in Jackson and Brookhaven and

noted that the Plaintiff was still in a lot of pain and looking for something to help.

G. He did not see the Plaintiff getting any better.

H. In 2018 he went to more doctor visits with the Plaintiff for his low back pain but he was not getting any better.

I. From 2019 to present he has accompanied the Plaintiff on several doctor visits at several different places but the Plaintiff was not getting any better.

J. Mr. Tovar still works and is able to do things but he suffers pain as a result.

K. His relationship with the Plaintiff is strictly professional and Mr. Lima does not help with household chores at the Tovar residence.

L. He has definitely noticed a difference in the Plaintiff since the car wreck because Mr. Tovar doesn't hang out as much and his demeanor is different.

3. Dr. Adam Lewis

Dr. Adam Lewis was called by the Plaintiff by video deposition as a fact/expert witness in neurosurgery. Dr. Lewis is a neurosurgeon at Jackson Neurology in Jackson, Mississippi and he is one of the Plaintiff's treating physicians. Dr. Lewis provided the following testimony:

A. On February 27, 2021 Dr. Lewis examined the Plaintiff at his Jackson Neurology clinic in Jackson, Mississippi.

B. The Plaintiff’s pain was a 7/10 and shooting down the leg to the heal with pain and numbness.

C. Dr. Lewis diagnosed him with an irritation of the nerve root L5-S1 and noted that he did have a previous lumbar fusion and removal of the hardware.

D. He stated that the symptoms have been ongoing since the February 2016 motor vehicle collision.

E. Prior to this visit the Plaintiff had already undergone physical therapy, chiropractic care, and epidural steroid injections - none of which seemed to eliminate the pain.

F. He conducted a physical examination which revealed inflammation in the Plaintiff's SI joint between the tailbone and the hip.

G. He stated that the Plaintiff's previous back surgery was a fusion of the L5-S1 level, but Plaintiff now has irritation of the nerves above at L4-5 and below in the SI joint - both of which are new complaints.

H. He stated that based off records available that the Plaintiff made an excellent recovery and was having minimal, if any, symptoms following the previous lumbar fusion at L5-S1 and subsequent hardware removal.

I. He believes that the February 9, 2016 collision caused a ***permanent*** aggravation of the Plaintiff's prior lumbar spine injuries.

J. He agrees with Dr. Minerva Nixon-Gaddis, Dr. Orhan Ilercil and Dr. John Adams that the February 2016 car wreck caused the permanent aggravation of the Plaintiff's low back issues.

K. He also agrees with Dr. Nixon-Gaddis, Dr. Ilercil and Dr. Adams' recommendation to the Plaintiff for a spinal cord stimulator trial as a result of his pain from the 2016 motor vehicle collision.

L. Spinal cord stimulator trials have a 97% success rate leading to the permanent stimulator implant.

M. He reviewed the Plaintiff's pre-wreck records and noted there was no radicular pain down to the foot prior to 2016.

N. Prior to the wreck Mr. Tovar had radiating pain down to the knee which is the L4 nerve

root; after the wreck his radiating pain was down to the heel which is the L5 nerve root.

O. Dr. Lewis stated that according to the records no doctor had recommended a spinal cord stimulator prior to the 2016 motor vehicle collision.

P. He stated that patients with a prior fusion can be made worse.

No objections were made to Dr. Lewis' qualifications. Further, the Defendant did not call a medical expert to contradict Dr. Lewis.

4. Merisca Tovar

The Plaintiff called Merisca Tovar as a fact witness. Merisca is the Plaintiff's daughter and currently lives with him. She provided the following testimony:

A. Before the wreck she liked to ride horses with her dad because it was something they enjoyed doing together – he can not ride now because it hurts his back.

B. He can not play volleyball like he use to.

C. He can still do most things, but he is not the same.

D. They took a vacation to Disney World, but he was unable to ride roller coasters with her because it hurts his back.

E. She misses out on experiences with her dad because he is always in pain, and it doesn't stop – he does not sleep because of the pain.

F. When they went to Disney World a friend drove the car.

G. They also went to the Smoky Mountains but did not climb or hike - they did walk up a walkway to look out over a peak.

H. He went sledding down a hill on a cookie sheet one time because she begged him to do it and his back hurt afterwards.

I. He is a good Dad and she misses doing things with him.

5. Ryan Michler

The Plaintiff called Krueger International's corporate representative, Ryan Michler, as an adverse witness. Mr. Michler testified to the following:

A. He agreed with Defense counsel's opening statements that the Defendant's driver had a prior speeding ticket and the company had a choice to fire him or keep him on the road.

B. The company chose to give him a warning and took away his bonus.

C. The Defendant's driver caused the wreck and destroyed the vehicles involved.

D. Most importantly, Mr. Michler admitted that the company is responsible for the property damage and that they take responsibility for the Plaintiff's injuries.

The Defense opened the door to the Defendant driver's prior bad acts with their opening statement and their corporate representative's testimony. This testimony came in without objection.

6. Francisco Tovar

The Plaintiff, Francisco Tovar, testified to the following:

A. Prior to the car wreck, he had back pain because of a lumbar fusion and hardware removal but it was minimal.

B. After the collision on February 9, 2016 his pain was different.

C. As a result of pain several doctors recommended a spinal cord stimulator trial.

D. He stated he has not gotten the spinal cord stimulator because he is 49 years old and has already had two back surgeries and is a little worried about having another.

E. He said he is eventually going to have to get the spinal cord stimulator because pain is not getting better.

F. He has pain every day and some days are better than others.

G. He can still do most things just not like he used to – now after activities pain comes on

hard.

H. He stated once his prior fusion hardware was removed it helped him a lot but he still had minimum pain.

I. His pain increases with activity and bending - he stated that he could bend down and he could get up quick but his back is going to hurt if he does so.

J. He stated that sometimes he will do an activity even though he knows it is going to hurt his back because he has to - like working but he does it carefully.

K. He said he slid down a hill in the snow one time and it hurt his back.

L. He stated he should not have done it but he did it for his daughter because she asked him to.

M. He said that he was laughing in the sledding video because it was fun at the time, but once he finished, it was no longer fun because his back hurt.

N. Before the wreck he was able to work but now he has to do light duty.

O. He stated because of his increased low back pain it has affected intimacy between him and his wife.

P. He was released for his work injury in January 2015 from the doctor with no restrictions.

Q. In the one year between being released by the doctor and the February 9, 2016 car wreck he received no injections and had no visits with a neurologist or orthopedic doctor.

R. He stated that the objects he is lifting in the photos of the surveillance video are not very heavy and he has to work because he must support his family.

7. Dr. Todd Cowen

Dr. Todd Cowen was called by the Plaintiff as a retained expert in the field of physical medicine and rehabilitation, pain medicine, and life care planning. Dr. Cowen provided the

following testimony:

A. The Plaintiff has a life expectancy of 34 more years.

B. The Plaintiff's future medical care will cost $701,577.11.

C. The future medical care costs will include a spinal cord stimulator trial, a permanent spinal cord stimulator implant, physical therapy, routine diagnostics, and medications.

D. He stated that the spinal cord stimulator batteries will need to be replaced every 5-7 years.

E. Dr. Cowen did not believe the Plaintiff's pain would go away without the spinal cord stimulator and even with the spinal cord stimulator it is likely that the Plaintiff will still have some pain.

F. In his experience he has found that spinal cord simulator trials have around 80% success rate leading to a permanent implantation.

G. He stated that the need for the spinal cord stimulator and all projected future care in his report were caused by the February 9, 2016 car wreck.

H. He said he reviewed photos of the Plaintiff at work and the video of him sliding down the hill and would recommend the Plaintiff to live life the best he can and not live in a shell.

I. He did not believe evidence of the Plaintiff traveling or going on vacation was proof that his quality of life had not been altered.

J. He agreed with Dr. Adams that the radiating pain down to the foot is a new aggravated nerve root.

K. He stated that there was no point in having the spinal cord stimulator trial if the patient was not planning to go forward with the permanent stimulator implant.

The Defendant did not object to his qualifications and did not designate an expert to rebut Dr.

Cowen.

8. Dr. Gerald Lee

Dr. Gerald Lee is a professor of economics and was called by the Plaintiff as a retained expert in the field of economics. He testified to the following:

A. Dr. Lee was specifically retained to calculate present value of future medical costs based on the report by Dr. Todd Cowan.

B. He stated that as time goes on the value of money changes.

C. He uses government stats to determine present value.

D. The present value of the Plaintiff's future medical costs is $727,323.00.

3.

DEFENDANT'S CASE IN CHIEF

Upon the Plaintiff resting his case, the Defendant also rested without calling any witnesses.

4.

ARGUMENT

New Trial

A motion for a new trial addresses the weight of the evidence and should be granted to prevent an unconscionable injustice. *Wall v. State*, 820 So.2d 758, 759 (Miss. 2002); *Bridges v. State*, 790 So.2d 230, 233 (Miss. 2001). In determining whether a jury verdict is against the overwhelming weight of the evidence, the Court must accept as true the evidence which supports the verdict. *Herrington v. Spell*, 692 So.2d 93 (Miss. 1997). The Court may grant a new trial only when justice so requires, when the verdict is against the overwhelming weight of the evidence, the jury is confused by faulty jury instructions, or the verdict is based on bias, passion, and

prejudice. *Hamilton v. Hammons*, 792 So.2d 956 (Miss. 2001).

There is no injustice in allowing the jury verdict stand in this case. The Plaintiff presented overwhelming evidence of both damages and causation, and there is no evidence the verdict was based on bias, passion, and prejudice. Moreover, generally, the Defendant had no experts nor any medical proof to dispute the Plaintiff's damages. In fact, the trial Court allowed some evidence of almost every issue complained by the Defendant versus completely barring all evidence — which is within the Court's discretion. As a result, the jury verdict for this case should stand for the following reasons:

I. The Trial Court Did Not Err in Preventing Defendant from Introducing Worker's Compensation Material

The Defendant argues that they should have been allowed to present the full Worker's Compensation file including pleadings and petitions to the jury. However, the Defendant was not totally barred from presenting the fact that the Plaintiff had a previous Worker's Compensation claim. Specifically, the Defendant introduced through Dr. Adam Lewis that the Plaintiff had filed a Worker's Compensation petition after the subject wreck. The Defendant further argues that the prior Worker's Compensation file is relevant because Mr. Tovar's injuries "were/are largely indistinguishable from that which he attributed to his work injury." Yet, testimony from both Dr. Lewis and Dr. Cowan showed that the Plaintiff had radiating pain down to the foot only after the car wreck. Both doctors testified that this radiculopathy was from a different nerve root than that which was injured before. The Defendant never rebutted this evidence.

The Defendant finally argues that they should have been allowed to use the Worker's Compensation file for impeachment purposes. Specifically, the Defendant alludes to contradicting testimony from the Plaintiff's testimony to the Commission versus his sworn testimony for this case. The Defense mentions several claimed contradictions. First, they point out that the Plaintiff

complained of pain throughout his Worker's Compensation file but at trial testified that he was without pain in 2013 once hardware was removed. This is not true. At trial, the Plaintiff testified that he had minimal pain after the hardware was removed, not that he was without pain. Second, they highlight how he testified, and the Administrative Law Judge found, that he "suffered a permanent and total loss of wage earning capacity because of the (work) injury, two surgeries, and continuing pain and restrictions." The Defense argues it was improper for the jury to award an indivisible $1,184,022 for "permanent impairment" without knowing the ruling in a Worker's Compensation file. Yet, again, the Defense provided no medical expert to rebut both Dr. Lewis and Dr. Cowen who both stated that the car wreck caused the Plaintiff a permanent aggravation and that a person with a prior existing injury can be made worse. Moreover, the Defendant never began to lay the groundwork for impeachment by establishing that any of the Plaintiff's testimony was false.

The Defendant was properly allowed to discuss all the Plaintiff's prior medical treatment related to the Worker's Compensation injury, including impairment ratings. The Defendant simply did not provide any expert testimony to contradict the Plaintiff's injuries' permanency and extent. The Trial Court properly withheld the full Worker's Compensation pleadings file as a collateral source and in accordance with Mississippi Rule of Evidence 403.

II. The Trial Court Did Not Err in Instructing The Jury on Pre-Existing Injuries

The Defendant argues that the Worker's Compensation file has no mention of the wreck and in the specific pleading Mr. Tovar relates back pain to his 2009 work injury. However, the records used in the Worker's Compensation determination stopped in January 2015, over one year before the petition or a determination was filed. In that January 2015 record the Plaintiff is released with no restrictions. Further, in the year plus gap between the January 2015 record and the February

2016 car wreck, the Plaintiff received no treatment for any low back pain. The Defendant's attempt to draw correlations between the Worker's Compensation petition and ruling by the Commission is not only faulty but misleading to the trier of fact. Regardless of the date of filing for the Worker's Compensation pleading or determination, it related to an injury in 2009 which the Plaintiff stopped treating over a year before the subject car wreck.

Moreover, the Defense claims the Plaintiff's medical professionals used to procure opinions had no knowledge of his Worker's Compensation case, settlement and assigned impairment. Again, this is not true. The Plaintiff was seen by Dr. Ilercil both before and after the 2016 car wreck. Dr. Ilercil actually treated the Plaintiff for his Worker's Compensation injury and the aggravation injury stemming from the 2016 motor vehicle collision. Further, Dr. Lewis and the Plaintiff's retained expert Dr. Cowen were both aware of the Plaintiff's prior two surgeries which formed the basis of the Worker's Compensation case. The Worker's Compensation case simply further substantiates Dr. Lewis and Dr. Cowen's opinion that the Plaintiff's worsened back pain and need for a spinal cord stimulator all stem from the 2016 car wreck. Not only was the Plaintiff released from medical care without restriction a year before the 2016 car wreck, while treating the Plaintiff for his work injury, Dr. John Davis noted on September 4, 2013 that Mr. Tovar's future treatment "certainly would not include such costly treatments as surgery, spinal cord stimulator, spinal epidural steroid injections, or prolonged physical therapy." (Please see New South Neuro Spine 9/4/13 record, attached as Exhibit 3).

The Defendant raises all of these issues to indicate that the Plaintiff had a continuing pre-existing condition and the jury was not properly instructed on the law. The Court's decision to use the Plaintiff's jury instruction for a pre-existing condition did not equate to a peremptory instruction but was simply stating well-established Mississippi law. On at least two separate

occasions the Mississippi Supreme Court has found that "one who injures another suffering from a pre-existing condition ***is*** liable for the entire damage when no apportionment can be made between the pre-existing condition and the damage caused by the Defendant—thus the Defendant must take his victim as he finds her." *Blake v. Clein*, 903 So. 2d 710, 730 (Miss. 2005), citing *Brake v. Speed*, 605 So.2d 28, 33 (Miss.1992); See also *Doe ex rel. Doe v. N. Panola Sch. Dist.*, 906 So. 2d 57, 61 (Miss. Ct. App. 2004).

Even in *Koger v. Adcock*, 25 So. 3d 1105, 1110 (Miss. Ct. App. 2010) (the case in which the Defendant bases their entire "may be liable" argument) the Court acknowledges and adopts the "is liable" ruling in *Blake* one sentence below where the Defense stops their citation. Nonetheless, nowhere in this language does the Court remove the jury's duty to assess apportionment. Apportionment must still be deliberated, but if the jury finds that no apportionment can be found, the Defendant is wholly liable. Again, the Defendant had no medical expert to testify whether damages were from a pre-existing condition or from the wreck. As a result, the jury was properly instructed on this matter.

The Defendant further argues that the jury was improperly instructed on the elements of negligence and specifically proximate cause. The Defendant admitted to causing the collision and admitted responsibility for nearly $28,000 in past medical expenses. There was no need for the jury to be instructed on duty and breach as both were already admitted by Defense counsel. The only elements of negligence relevant to this case were proximate cause and damages to which the jury was properly instructed. Jury Instruction No. 15 properly defined proximate cause while Jury Instruction No. 16 correctly instructs the jury that it is their "sworn duty to limit and confine any additional damages to those Plaintiff proved, by a preponderance of the evidence, were proximately caused by the February 9, 2016 accident…" [MEC 85]. Finally, the Plaintiff did not

claim lost wages, therefore, the Court properly excluded the jury instruction mentioning this claim. Most importantly, there were no damages awarded for lost wages. For these reasons, the jury was properly instructed, eliminating need for remedy or a new trial.

III. The Trial Court Did Not Err in Excluding Evidence of Third-Party Payments

The Defendant argues that the Plaintiff opened the door for the Defense to bring up the Plaintiff's contractual agreement with HMR by stating that he could not afford the recommended surgery. However, this error was solely invited by the Defendant. Under the invited-error doctrine, an appellant cannot complain on appeal of alleged errors which he invited or induced. *Busick v. St. John*, 856 So. 2d 304, 314 (Miss. 2003); *Caston v. State*, 823 So.2d 473, 502 (Miss.2002); See also HWCC-Tunica, Inc. v. Jenkins, 907 So.2d 941, 942 (Miss. 2005). The supreme court has explained that the purpose of this doctrine is to "bind trial counsel to strategic decisions inducing judicial rulings with the purpose of obtaining favorable judgments for their client[ ]" and to prevent trial counsel from "requesting [that] a judge act in a particular way to salt the record with error as an end in itself, thereby providing potential grounds for reversal of an adverse judgment." *Thomas v. State*, 249 So.3d 331 (¶56) (Miss. 2018) (quoting *State v. Hargrove*, 48 Kan.App.2d 522, 293 P.3d 787, 790 (2013)).

On direct examination the Plaintiff was asked why he had not received the spinal cord stimulator trial. He gave several reasons including his age and his past back surgeries. He made no mention of expense or the burden of cost that the surgery would place on him financially. The Plaintiff was then asked again on cross examination why he had not received a spinal cord stimulator trial. Again, he pointed to the fact that he was only 49 years old, had already undergone two previous back surgeries and was holding out as long as he could. Dissatisfied with his answer, the Defense asked him a third time why he has not received the spinal cord stimulator trial to which

he finally responded that he could not afford it. The Defendant explicitly elicited evidence on why the Plaintiff had not undergone the recommended procedure. As a result, the Defense cannot complain when they invite the error. *Busick* at 314.

Moreover, the Defendant insinuates the Plaintiff's ability to pay for the procedure because it is only $37,327.99. This does not take into the full cost of care that the Plaintiff would need. Dr. Cowen testified that future care for the Plaintiff would be over $700,000.00. Moreover, Dr. Cowen opined that there was no point in doing the spinal cord stimulator trial if the patient was not planning to proceed with the permanent stimulator implant. Although affordability was not the Plaintiff's primary reservation in proceeding with the procedure, it is a misrepresentation to suggest that $37,000.00 is not only affordable but is the only financial burden the Plaintiff is subject to as a result of the Defendant's negligence. For these reasons, the Court properly withheld mention of HMR and the Plaintiff's ability to pay for his needed medical care.

IV. The Trial Court Did Not Err in Refusing to Permit Photographs and Surveillance Videos

The Defendant argues that it was aggrieved since the Court allowed photographs by the Plaintiff depicting the motor vehicle crash but prevented the Defendant from showing surveillance footage of the Plaintiff at work and other videos of the Plaintiff on social media. An abuse of discretion standard applies on appeal to the admission or exclusion of evidence. *Jumper v. Olive Branch Fam. Med. Clinic*, 318 So. 3d 1143, 1149 (Miss. Ct. App. 2020), *cert. denied*, 318 So. 3d 482 (Miss. 2021); *Manhattan Nursing & Rehab. Ctr. LLC v. Pace*, 134 So. 3d 810, 816 (¶21) (Miss. Ct. App. 2014). Unless a substantial right is adversely affected, an error involving an admission or exclusion of evidence will not be reversed. *Id.*; *see also United Servs. Auto Ass'n v. Lisanby*, 47 So. 3d 1172, 1179 (¶25) (Miss. 2010).

The Plaintiff's photographs of the collision and crash scene are relevant towards damages.

The Defendant claimed that the Plaintiff was not hurt as bad as he portrayed or that all his injuries were pre-existing. Thus, the force of the impact and rollover of the vehicle are not only relevant but necessary to assess damages. Moreover, the Defense provides no case law supporting their argument to bar these photos as their admissibility is within the Court's discretion. The Defendant, however, was not entirely barred from showing photographs and describing the activities portrayed in the surveillance and social media videos that they sought to introduce. The simple mention of this evidence directly goes towards any argument the Defense intends to raise regarding their substantial rights being adversely affected. Nonetheless, the Defendant's evidence had two issues.

First, the photographs and footage were produced well after discovery ended. When requested to produce all newly acquired evidence, the Defense responded that impeachment evidence was not discoverable[1]. (Please see 11/22/22 Correspondence, attached as Exhibit 4). Thus, the purpose of these documents and videos were solely to impeach specific testimony that the Plaintiff may provide giving rise to the Defendant's second evidentiary problem. To be able to use the impeachment evidence, the Defendant is required to lay the foundation for impeachment - this was never done. The Defendant never asked the Plaintiff in his deposition about what he could or could not do. Thus, the basic foundation for impeachment was not laid. Then, the Defense attempted to introduce evidence to impeach even though the Plaintiff testified that he could work and that he did go on vacation. The false testimony that the Defense needed was never given. Moreover, when the Plaintiff admits that he can do things there is no additional evidence needed to provide the jury with "the truth." Simply, the Defense cannot point to any false testimony given

[1] The Defendant agreed to produce the newly acquired documents only after the Defense was presented with the ruling in *Williams v. Dixie Elec. Power Ass'n*, 514 So. 2d 332 (Miss. 1987). The Court in *Williams* found that although Dixie Electric had acquired surveillance footage a few days before trial for impeachment purposes, "it should have given Williams' attorneys notice of them and an opportunity to view them prior to trial. Since Dixie Electric failed to comply with discovery rules in a meaningful way, the trial judge should not have admitted the films into evidence. Rule 37(b)(2)(B) and (a) MRCP.1" *Id*. at 336-37.

by the Plaintiff that would make the videos they sought to introduce relevant. Therefore, the Court's evidentiary ruling did not unfairly prejudice the Defendant and certainly did not mislead the jury with a "false narrative." Therefore, the Defendant's Motion for New Trial should be denied.

Remittitur

The Mississippi Supreme Court has held that the determination of whether a jury verdict is excessive is determined on a case-by-case basis. *APAC Mississippi, Inc. v. Johnson*, 15 So.3d 465, 479 (Miss. Ct. App. 2009) (citing *Entergy Miss., Inc. v. Bolden*, 854 So.2d 1051, 1058 (Miss. 2003). Generally, a reviewing Court will not disturb a jury award unless the amount, in comparison to the actual damages, "shocks the conscience" of the Court. *Johnson*, 15 So.3d at 479. In other words, the question is whether the verdict is so excessive as to indicate that the "jury failed to respond to reason." *Id.* (citing *Walker v. Gann*, 955 So.2d 920, 931 (Miss. Ct. App. 2007).

The Plaintiff agrees to reduce total past medical expenses to $61,000.00. However, the Defendant argues that the jury award of $1,184,022.00 for pain and suffering is not only excessive but is not grounded in any evidence whatsoever. The Mississippi Supreme Court has previously looked to the Mississippi Court of Appeals case *Cade v. Walker*, 771 So.2d 403 (Miss.Ct.App.2000) when reviewing large multipliers for compensatory damages. "That court, in a 10–0 decision, held that it would not disturb a total jury award for compensatory damages which was fifty-one times the amount of the plaintiff's medical expenses. *Id* at 410. After reviewing the elements of the damages awarded, the court compared the award to other awards involving similar circumstances. *Id* at 408–9. Stating that the amount of damages is primarily a concern for the jury who is entitled to a large amount of leeway, the court deferred to the jury's judgment and affirmed

the award. *Id* at 410." *Gatewood v. Sampson*, 812 So. 2d 212, 223 (Miss. 2002).

The evidence was uncontradicted that Plaintiff had past, present and future pain and suffering, mental anguish, loss of enjoyment of life, and permanent impairment from the doctors, experts, medical records, and fact witnesses. The Plaintiff testified on both direct and cross examination that he was still able to do almost everything he could before. However, now, when he does physical activities, he does not have the stamina or efficiency and suffers increased pain. Dr. Adams and Dr. Cowen further supported the permanent nature of the Plaintiff's injuries by diagnosing him with a "permanent aggravation" of his lumbar spine because of the 2016 car wreck. The Defendant chose not to call any expert to refute the Plaintiff's testimony. The verdict simply reflects that the jury obviously believed the Plaintiff's experts and the evidence.

The Defendant further argues that the jury's award of $727,323.00 for future medical care is unfounded. It is undisputed that the four separate neurosurgeons who saw the Plaintiff recommended him for a spinal cord stimulator trial and related its necessity to February 9, 2016 car wreck. It is also undisputed that the Plaintiff's retained expert, Dr. Cowen, agreed with this recommendation. Moreover, it is undisputed that Dr. Lewis testified that he has seen a 97% success rate in the dorsal column stimulator trial while Dr. Cowen stated he has seen an 80% success rate. Therefore, there's undisputed testimony that the Plaintiff is recommended a spinal cord stimulator trial and that it is more likely than not going to lead to a permanent implantation. The jury simply and correctly followed the burden of proof and obviously found it was more likely than not that the Plaintiff would need a permanent implantation and awarded him compensation for the same.

The jury returned a verdict of $2,000,000.00 and there was ample evidence to support the amount of the verdict. Given the evidence and expert testimony, the verdict in no way rises to the level that "shocks the conscience" or reflects that the jury failed to respond to reason. For these

reasons, the Defendant's motion for remittitur should be denied, except for past medical expenses, which should be lowered to total $61,000.00.

RESPECTFULLY SUBMITTED, this the 28th day of December, 2022.

PLAINTIFF

By: /s/ William A. Graves
WILLIAM A. GRAVES

WILLIAM A. GRAVES, ESQ. (MSB# 105679)
MORGAN & MORGAN, PLLC
4450 Old Canton Road, Suite 200
Jackson, Mississippi 39211
Telephone: (601) 949-3388
Facsimile: (601) 949-3399
wgraves@forthepeople.com

CERTIFICATE OF SERVICE

I, William A. Graves, attorney of record for Plaintiff, Francisco Tovar, in the above-styled and referenced matter, do hereby certify that I have this day filed a true and correct copy of the above and foregoing ***Plaintiff's Response to Defendant's Motion for New Trial/Remittitur*** to all counsel of record.

THIS, the 28th day of December, 2022.

/s/ William A. Graves
WILLIAM A. GRAVES