IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-CA-01990

MARY MARTIN **DEFENDANT/APPELLANT**

v.

TAMMY WEATHERFORD AND
RICHARD WILLIAMS **PLAINTIFFS/APPELLEES**

APPEAL FROM THE CIRCUIT COURT
OF WASHINGTON COUNTY, MISSISSIPPI

CAUSE No. CI-99-0023

BRIEF OF APPELLEES TAMMY WEATHERFORD AND RICHARD WILLIAMS

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ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Mary A. Martin, Appellant
2. Hon. Michael V. Cory, Jr., Attorney for Appellant
3. Hon. Eric T. Hamer, Attorney for Appellant
4. Tammy Weatherford, Appellee
5. Richard Williams, Appellee
6. Hon. W. Noel Harris, Attorney for Appellee
7. Hon. Ashley Hines, Circuit Court Judge below

W. Noel Harris
Attorney for Appellee

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STATEMENT OF THE ISSUES

I. Whether the Trial Court committed reversible error in admitting life expectancy tables into evidence?

II. Whether the Trial Court's finding that Tammy Weatherford sustained $396,608.86 in damages as a result of the automobile collision which was admittedly caused by Mary Martin's negligence was manifestly erroneous?

III. Whether the Trial Court committed reversible error in denying Mary Martin's post judgment motion seeking amendment of the judgment, remittitur or a new trial?

STATEMENT OF THE CASE

On January 9, 1998, Mary Martin drove her car into the rear end of Tammy Weatherford's vehicle while it was stopped at an intersection. Tammy was in the passenger seat and Richard Williams was driving. On or about February 1, 1999, Weatherford and Williams sued Martin for compensation for the injuries they suffered when Martin rear ended them. Martin admitted liability and that Williams and Weatherford had sustained some damage as a result of Martin's negligence. The only issue remaining at the time of the bench trial in May of 2007 was the extent of the injuries caused by Martin's negligence and the determination of an appropriate monetary award to compensate Williams and Weatherford for the injuries they suffered. (CP 2, 162; T 2-3; RE 1; AE-RE 169)[1].

After a bench trial, the Trial Court found that Tammy sustained significant injury to her neck, right shoulder, right arm, and back and has suffered almost continuous pain in her neck,

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[1] Citations to the record are abbreviated as T (Trial Transcript), CP (Clerks Papers), R (other parts of the record below), RE (Appellant's Record Excerpts) and AE-RE (Appellee's Record Excerpts).

shoulder and arm as a result of the January 9, 1998 accident caused by Martin's negligence. Finding Weatherford's testimony to be credible, the trial court awarded her $28,058.86 for medical expenses and $368,550 for past and future pain and suffering. The Trial Court also award Williams $4,601.84 for medical expenses and $22,896.16 for past and future pain and suffering. The judgment in Williams' favor has not been appealed. (CP 166, 169; RE 5, 8)

Martin filed a post judgment motion in which she asked the Trial Court to reconsider its findings of fact and conclusions of law and grant a remittitur of Weatherford's pain and suffering award to $100,000.00, arguing that the judgment was contrary to the overwhelming weight of the credible evidence. The basis of this motion was Martin's arguments that the only credible evidence showed Weatherford repeatedly told her treating physicians that she was much better or failed to complain about certain aspects of pain on each and every visit to a medical provider. Martin argued Weatherford's pain claims were not supported by credible evidence because her complaints were subjective and there were no objective medical findings confirming any permanent injury from the accident. Aside from one general reference to the remittitur statute, Martin cited no legal authority in her motion for reconsideration. Although Martin argued in her post trial motion that the pain and suffering award should be reduced to present value, she did not brief that issue in her primary brief and thus has abandoned it for purposes of this appeal. (R. 172-174; RE 10-12) When the trial court denied the motion for reconsideration, Martin timely filed this appeal. (CP 183-184, 188; RE 15-17)

STATEMENT OF FACTS

Prior to January 9, 1998, Tammy had no significant unresolved medical problems[2]. She had had no muscular or nerve problems. About 8:00 am that morning, she was riding as a passenger in her own vehicle being driven by Williams on Raceway Road in Greenville. When Williams stopped to make a left turn, Martin's vehicle plowed into the rear of Tammy's vehicle. The hard impact knocked Tammy's vehicle into oncoming traffic. Tammy's head moved suddenly forward and back and struck the headrest on her side of the car. Williams bounced with his head hitting the roof of the car. He wound up laid out in his seat as the impact broke his seat back. Photographs were introduced showing the severity of the impact. (T. 7-11, 61; RE 19-22; AE-RE 1, 38)

When the ambulances arrived, Tammy declined their offer to take her to the hospital. She explained she did not see any immediate injuries and felt she could take herself to the emergency room later that day if she developed any symptoms needing attention. Around 9 am that morning, she did go to the emergency room when she became dizzy. She waited hours to be seen. When she was seen, she complained of headache, back and neck pain. (T 15; RE 24)

Eventually x-rays were taken, ice was put on her bruises and she was sent home with several prescriptions and instructions to followup with her regular doctor or the Family Medical

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[2]In April of 1991 she did have a precautionary emergency room visit after getting a black eye in an altercation with a boyfriend. It required no followup treatment. In 1994, she was in a motor vehicle accident where her car was hit on the drivers side when she was on the passenger side. She went to the emergency room as a precautionary measure and was treated for a small contusion on her forehead and released. The injury did not require any followup care or have any lasting effects. The lienholder on her car asked her to cooperate in an action against the other driver which resulted in a judgment paying off the lien, but she received nothing from the judgment. (T. 61-64; AE-RE 38-41)

Clinic. A couple of days later, she did go to see Dr. Pulliam at the Family Medical Clinic. When she first saw Dr. Pulliam , she was experiencing neck spasms radiating down her shoulders into her arms with a greater problem on the right side. This pain was always present. When new pains appeared or changes occurred, she would report them to the doctor on her next visit. The pain she described to Dr. Pulliam on later visits focused on the changes in pain or new areas she was concerned about. She did not complain of every pain she felt att every visit. In describing her pain, she often used the word "back" when she meant to include her neck, spine, and shoulders. Also, when the shoulder pain initially started she did not realize that it was connected to or came from her neck and so did not necessarily mention her neck when the pain spread to her shoulder and right arm. She later came to realize that the pain she referred to as neck or back pain that has been constantly present comes from her neck and radiates down the right side to her right shoulder and then through and under her shoulder down her right arm to the fingers of her right hand. It gets worse if she tries to increase activity or does too much and usually eases if she stops activity and rests. Both this upper body right side pain and her low back pain varied over time with one or the other being more prominent on different dates. (T. 16, 21-22; AE-RE 2-4)

When Tammy was still experiencing serious pain three months after being rear-ended, Dr. Pulliam referred her to a pain management specialist, Dr. Steuer, who specialized in treatment of patients with chronic or difficult to manage pain. (R. 660, T. 21-22; AE-RE 127, 2-4) Dr. Steuer is a board certified pain management specialist who specializes in the diagnosis of the causes of chronic pain and the treatment of chronic pain. (R. 608, 620; AE-RE 106-107) Dr. Steuer treated Tammy for her chronic pain, including that coming from her neck and radiating through her right shoulder down her right arm and in her low back, for approximately 15 months covering

the period from 3 months to 18 months after the Martin car rear-ended Tammy's car. (T. 21-25; R 271-306; AE-RE 3-7, 59-94)

Dr. Steuer's records demonstrate Tammy did not come to him seeking narcotic pain relievers or pain medication. She really didn't want to take pain medication. However, the pain she was experiencing was constant and so serious that she could not sleep. During the 15 months that Tammy was under Dr. Steuer's care, she went to physical therapy 37 times. She often received as many as four different treatments for pain including ultrasound, electrical stimulation, and moist heat and instruction in exercise. When the home exercises she was taught did not bring sufficient pain relief to carry her through between her appointments, a TENS unit[3] was prescribed for her to use during the day so that she could continue to function despite the constant serious pain she was enduring. In addition to these treatments, Dr. Steuer had to give her trigger point injections at least 5 times, including at least one occasion after her initial discharge from physical therapy.[4] He also prescribed several medications to address the pain itself and the also the muscle spasms and sleep problems caused by the pain. These medications included Relafen (a non-steroidal anti-inflammatory drug for pain), trazadone (an anti-depressant with pain relieving and sleep inducing properties to help her sleep), Baclofen (a muscle relaxing drug), and Ultram (a non-addictive narcotic pain medication). While Tammy obtained some temporary relief or reduction in pain from these treatments, there was no permanent relief. The

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[3]After several years, Tammy stopped using the TENS unit because parts wore out and needed replacement but the place where she bought supplies for it is no longer open. She has not yet obtained a prescription for a replacement unit. (T. 55-56; AE-RE 34-35)

[4]Tammy described the injections as being very painful in addition to the pain she was already feeling. (T. 24; AE-RE 6)

pain always returned later to the higher levels it was at before a particular treatment. (R. 271-306, 637-638, T. 23-29; AE-RE 5-11, 59-94, 113-114)

Dr. Steuer testified it was his expert opinion that there is a reasonable medical probability that a significant portion of Tammy's headaches as well as Tammy's myofascial pain syndrome (MPS) symptoms were casually related to the whiplash injury she sustained in the accident where the vehicle she was riding in was rear-ended. The initial diagnosis he made on her first visit 3 months after she was rear-ended was that she was suffering from mixed headache disorder, myofascial syndrome, and a cervical thoracic whiplash injury. He explained that both a particular type of headache and MPS pain in the neck, upper back, and shoulder areas are a common result of whiplash injury sustained when a person's body is a rest as in a stopped vehicle and is suddenly accelerated and decelerated forward and backward when the person's vehicle is struck from the rear while it is stopped. With the exception of a portion of her headaches which fit the migraine pattern, Tammy's headache, neck, shoulder, and back pain complaints all fit squarely within the pattern of injuries commonly sustained in a rear end car collision. (R. 641-645, 651, 660-664; AE-RE 115-119, 125, 127-131) Dr. Steuer also testified that once a patient has been experiencing back pain for more than a month or two, it is very unusual for it to resolve spontaneously. If it lasts more than a month, significant medical intervention is usually necessary to help the patient cope with the pain. (R. 638; AE-RE 114)

He explained that MPS is, more often than not, a secondary issue caused by a primary disorder or injury such as a cervical and/or thoracic facet or disc injury or disease or nerve root irritation which is often the result of a cervical whiplash injury. The diagnosis is usually made by a combination of history of onset and progression provided by the patient and a physical exam in

which the physician is able to feel actual tension and tightness in muscle coming from a painful trigger point. With trigger points, a pain specialist can usually find and feel the muscle tension or tightness or spasm providing objective verification of the patient's pain. Trigger points, such as those he found in his physical examination of Tammy approximately 3 months after being rear-ended by the Martin vehicle are objectively verifiable findings that cannot be faked or exaggerated by a patient. They are an objectively verifiable manifestation of disruption of the structures of the cervical and thoracic spine including the facet joints, discs, ligaments, tendons and muscles. Thus, these trigger points Dr. Steuer found in his physical examination 3 months after the wreck are objective evidence that the pain Tammy suffers is causally related to injuries to her cervical spine from a whiplash injury sustained in that rear end collision. (R. 624-628, 654, 663-664; AE-RE 108-112, 126, 130-131) It was also his opinion that the shoulder pain she developed several months later was related to the same cervical spinal problems causing her earlier pain. (R. 710-711; AE-RE 145-146)

Dr. Steuer testified that his opinions are consistent with both the general opinion of specialists in pain management and with studies reported in the medical literature showing a causal link between MPS and traumatic injuries such as cervical whiplash. (R. 647; AE-RE 121) The treatments he prescribed were conservative for the pain Tammy was experiencing and designed to find the most cost effective treatments for her pain before recommending more aggressive and costly therapies. (R. 665-666; AE-RE 132-133) He elected not to do MRIs or other expensive studies as long as she was responding to cost effective treatments.[5] (R 680; AE-

[5]Dr. Steuer also testified that the charges in the bills for his services to Tammy were reasonable and necessary. (R. 688; AE-RE 142)

RE 134) When she was still having problems more than nine months after being rear-ended and was not improving any further with the medications and physical therapy, Dr. Steuer stopped the physical therapy and trigger point injections and suggested that Tammy consider undergoing facet blocks. (R. 681; AE-RE 135) It was Dr. Steuer's opinion that without continuing medical treatment, Tammy's pain would continue and her condition would probably deteriorate. However, prior to his deposition, he had no information as to whether Tammy actually sought other medical treatment after his recommendation of facet blocks. (R. 681-682; AE-RE; 135-136)

After examining the records of Dr. Capel (R. 525-529; AE-RE 103-105), a neurosurgeon who evaluated Tammy in November of 2003, Dr. Steuer expressed the opinion that the symptoms complained of and Dr. Capel's findings and diagnosis were consistent with a progressive deterioration of the conditions he had treated Tammy for in 1998 and 1999. He testified that his own field of medicine included expertise in neurological pathology and that he often made diagnoses in the field of neurological pathology in the process of treating his chronic pain patients. (R. 683-686; AE-RE 137-140) After she ceased being treated by Dr. Steuer in 1999, Tammy did her best to cope with the continuing pain through the methods she had been taught in physical therapy. She also sought continuing treatment for the by now chronic constant pain from her primary care providers who were treating her overall health. In the spring of 2007, she was seeing Debbie Verbal in Greenville for her primary care. Verbal referred her to Dr. Lenard Rutkowski, a local neurosurgeon. On March 29, 2007, Dr. Rutkowski examined Tammy and discussed her history with her, and reviewed the available MRI films. At that time, she had neck pain at an intensity of 7 on a 10 point scale that radiated through her right shoulder to the

third and fourth fingers of her right hand which she related as having been present constantly but with varying intensity since the motor vehicle accident with Martin in January of 1998. When he examined her, he found that while she had no specific weakness, numbness or obvious specific neurological deficits, she had difficulty moving her neck with her range of motion being limited particularly on the right side. He did not order any tests because she came in with her MRI films which he testified that he reviewed. On those films, he said he could see a narrowing of the spinal canal between the C5 and C6 vertebrae, and also between C6 and C7 especially on the right side, of the type typically associated with bulging discs, ligamentous hypertrophy or spurring. He testified that if she had an MRI taken in 1998 shortly after the collision which could then be compared to 2003 and 2007 MRIs it would have made it easier to determine that the 2007 stenosis he diagnosed was caused by the 1998 accident; however, he could tell from just the 2003 MRI films that the problems he saw on those films were not new injuries. The 2003 films showed evidence of an injury much older than 2003. While it is possible to tell from an MRI whether an injury was old or new at the time of the MRI, it is not possible to date an injury to a specific year or number of years from looking at MRI films. (R. 740-745; RE 136-138; AE-RE 147-152) Dr. Rutkowski explained the limitations of what he could say about a causal link between the 1998 rear end collision and Tammy's 2007 diagnosis of stenosis when he was examined by defense counsel in his deposition:

> To be honest with you, in '98 to '03 to '07, it's going to be impossible to give a time relationship here. I can't tell you what has changed. All I can tell you is in '07 she did have abnormalities that were long-standing. They do not happen over a period of weeks or a couple of months. They happen over months in the years and multiple years.

(R. 745-746; RE 138-139) He went on to explain when asked if lifestyle and physical activity

were commonly factors in neck pain

A. The biggest factor in regards to degeneration of the disk and problems is your genetics, by far; overwhelms everything else. If you have a fracture, then I explain that. That takes genetics out; maybe a little predisposition. But for the most part, 80, 90 percent of the issues related to neck problems are related to your genetics.
Q. In this case, the symptoms she reported, are they consistent with the stenosis you saw on the MRI?
A. They can be, yes.
Q. There could be other causes as well, but they're not inconsistent.
A. Well, I would be far more definitive if she had neurological findings this many years down the way, and she did not. So are the symptoms that she had compatible with the findings on the MRI? They can be, yes.
Q. With the symptoms that she had and is complaining of and that she believes are related to the automobile accident in January of 1998, for those symptoms to have been related — or, to a reasonable degree of medical probability related to that accident, what would you expect to see in the first two to three weeks after the accident? Or would you expect to see complaints in a certain area?
A. I would expect symptomatology within two to three months if you're going to have anything significant to a specific incident.
Q. So if there were – would you expect to see a neck complaint showing up – you said two or three months. That seems like a long time to me. Would you expect to see them in two to three weeks?
A. You could. I'm not saying you don't. You can see them very early, and you can see them within two to three months.
Q. If it's a gradual progression of increased pain or problems, does that make it more likely that it's a combination – assuming for purposes of this question that she represents she was asymptomatic before the accident and then she has a problem immediately after the accident, is that a combination of genetics triggered by the accident?
A. Well, that goes back to the MRI scan and what would've shown in '98. If, for the most part, her scan was totally normal in '98, with those symptoms, then you pull, stretch muscles, nerves, and whatever, that can be an explanation. If she had a predisposition with some degeneration of the disk at those two levels, she's a little bit more predisposed, with the result of a motor vehicle accident developed symptomatology.
Q. What is her - as far as the complaints you saw her for in March of this year, what's her general prognosis?
A. Well, this is the story. The problem I have in regards to giving you a prognosis is this. We're dealing with '98 to '07. I don't find anything on the exam indicating nerve dysfunction. All the symptomatology here is subjective. There's no objective findings. The only objective finding on this evaluation is

basically the films – are the films and the abnormality on the films.
Q. Is it fair – medically you wouldn't characterize the abnormality you saw on the film as a significant abnormality?
A. No. I would say, given the circumstances at her particular age, it's a significant abnormality because this is somewhat premature in the whole scale of things relative to this particular diagnosis. We see this in 60, 70, and 80 year olds. So it's a little bit premature. Is it significant? It's significant if, for the most part – not considering this case, but just looking at the MRI it is significant depending on the symptomatology, what the findings are on examination, and how much this interferes with the patient's lifestyle. So in that sense it can be significant.

The problem I have in this case is that here we're nine years down the way. I can't see it as overly significant considering the fact that there's nothing on the exam that indicates there's nerve dysfunction. We look for, on this examination, nerve dysfunction. If somebody comes in with weakness, numbness that is documented on pinprick or some abnormality on the exam that shows us a particular nerve is not functioning properly, that sends a red flag up. Rather than go conservative with medication therapy, surgical aspects go up higher on the list because our job not only is to help pain and discomfort but to protect and keep away from nerve damage or dysfunction. So if somebody comes in with nerve dysfunction, weakness, the muscle shrinks on one side, that to us is a significant finding which brings surgery higher on the list to preserve that function or regain that function.
Q. Is it fair to say at this point you're not recommending surgery for her?
A. Surgery is an option in her case based on symptomatology. But in the context of the motor vehicle accident or whatever, I'm having a hard time putting it all together.
Q. Is it fair to say that the ability for anyone at this point to relate the stenosis that showed up on the MRI to the accident earlier it would be based entirely on the credibility and accuracy of her history?
A. That's a factor, what showed up on previous tests, and whatever. And, like I said, the big problem I have is that we're so many years down the way with these complaints I would have expected some numbness to show up on the exam, some weakness to show up on the exam, something showing up on the neurological examination that would tell me that there's a significant abnormality. ... Let me explain this. ... Something may be significant on films and not – may not be significant clinically. So I may have an MRI scan ten times worse than this, but I don't have symptoms. Other individuals may have a minuscule abnormality; can't get out of bed because of pain and discomfort. That's what gives doctors ulcers in the sense that there's not necessarily a correlation between severity of what shows up on the test and what shows up in the history or on examination. ...

I think the general concept among physicians in comparing age to what they see on MRI scans, it is a general statement that we can say that [spinal changes or degeneration] usually comes on in later age and that we very rarely see

> it in teens and twenties and thirties. ... It's a rare situation that we see it in very, very young people.

(R. 747-753; AE-RE 154-160)

Following this exchange, Dr. Rutkowski was questioned by Tammy's counsel concerning the MRI's he examined, Tammy's symptoms in 2007 and his diagnosis of the cause of her pain in 2007. Dr. Rutkowski explained that he did see spinal stenosis on the films he examined in 2007. Given the number of patients he sees, he did not have a recollection of exactly which films he examined. He had reports for both 2003 and 2005 MRI scans in his files indicating that he probably had those films. He found Tammy's report of the history of her symptoms and her limited range of motion in her neck to be credible. Together, her symptoms, her young age, and the abnormalities he could see on the films he had were sufficient to support the diagnosis of spinal stenosis that he made in 2007. The waxing and waning of symptoms and the degree of pain she felt over the years since the accident would not be unusual. It would be expected that changes in the weather or her activity levels would exacerbate her symptoms. (R. 756-757; AE-RE 161-162)

Dr. Rutkowski went on to testify that consistency in her history showing no symptoms prior to the accident, symptomatology developing two months after the collision and documentation of treatment for the neck and cervical spine issues beginning four months after the accident establishes a time line supporting an injury from the accident as a cause of her current symptoms. If her history showed, as it does, that prior to the 1998 accident she had no neck and shoulder problems on the right side, and that since the 1998 accident, the complaints have consistently involved radiating pain worse on the right side than on the left, he testified that

it would be more likely than not that the 1998 accident was a precipitating factor in her current ongoing pain and symptomatology. (R. 764, 767; AE-RE 163-164)

He explained that the problems he has in expressing opinions on connection to the 1998 accident is that at present he does not see evidence that surgery would likely be of benefit to her and that her prior physicians also did not see the need to go the surgery route. Thus, he cannot say that the 1998 accident caused a need for surgery that he believes may someday be required as a last resort in treating Tammy's pain. But he is not saying that her ongoing pain cannot be related to the 1998 accident. (R. 768; AE-RE 165) Moreover, as the success rates with neck surgery decrease as time goes on from the point of injury, the correlation between the 1998 accident and the likelihood that surgery will improve the situation diminishes. Thus, the likelihood that the 1998 accident will be the cause of future surgery decreases. However, at the same time, that same passage of 9 years from the date of the accident makes it more likely that her pain symptoms from the accident have become chronic and that the odds of reducing her constant pain in the foreseeable future are significantly reduced. (R. 768-769; AE-RE 165-166)

The bottom line on his opinion is:

> assuming that Ms. Weatherford had no prior history with neck problems, with arm pain, with the symptomatology that [he] noted in her records when [he] last saw her, or the only time that [he'd] seen her, but assuming that she had no history of this prior to January of 1998 and assuming that after the accident in January of '98 that she began experiencing, within a few days of the accident, some numbness and tingling in her fingers and hands, that she began experiencing after that some pain radiating from her neck into her shoulder on the right side and that this was within a matter of a few months following the accident and that this continued throughout her treatment, varying at times only as to decree [sic] or intensity but predominantly always on the right side .... that would indicate to [him] that, more likely than not, the trauma from the accident of January of '98 was the precipitating factor in the cause of the problems today. ... But the history and fact that it's continuous from that period of time until now and the fact that it's

> consistent does lead me to state that there's some correlation between the accident and her symptomatology.

(R. 770 -771; AE-RE 167-168) He can express this opinion on a more likely than not level but not to a level of absolute certainty. (R. 770; AE-RE 168)

In regard to the report of a 2007 MRI which Martin relies upon as discrediting the findings from the 2003 and 2005 MRI films Dr. Rutkowski admittedly saw, Dr. Rutkowski said he could not now remember exactly which MRI films he examined. He said "[w]hatever one I saw, I made a diagnosis of 5-6 and 6-7 problem." Its undisputed he had the reports from two 2003 and one 2005 MRI. He said he was not aware of a 2007 MRI report but that a 2007 report would not have affected his diagnosis or his opinions as he does not rely upon MRI reports. He has to see the actual films and make his own determination of what they do and do not show. Regardless of what a 2007 MRI report might have said, based on the earlier MRI films, the abnormality he diagnosed Tammy as having was several years old when he examined her in 2007. (R. 759-760; RE 148-149)

The actual reports from the 2005 and 2007 MRIs are not materially different in regard to what they say the MRIs actually showed. What differs is the summary impression of a radiologist reading the film at the time without the benefit of a full medical history since onset of the symptoms or an actual examination of the patient. The March 17, 2005 MRI report says:

> Over the segment of C3-6, there is a reversal of usual curve, a mild kyphosis present. On sagittal images right of midline, I see spurring at the C6-7 interspace. No intrinsic cord lesion. Craniovertebral junction was negative. No pathologic bone signal. AP diameter of the canal at all levels seems adequate.
> Axial studies are limited in clarity and resolution due to the low strength magnet and also the size of this individual. I can see midline broad based spur or disc signal at C4-5, C5-6 and C6-7. The AP diameter of the canal may be slight limited at C5-6 and C6-7. If this patient could tolerate the 1.5 magnet just for axial

> studies, this would be very helpful.
> At the levels of interest, the neural foramen did not appear to be compromised.
> IMPRESSION: MILD TO MODERATELY SIGNIFICANT MIDLINE DISEASE AT C4-5 THROUGH C6-7. THIS CONVEX SIGNAL EQUIVOCAL AS TO SPONDYLOSIS OR PROTRUDING DISC.

(R. 196; RE 73) The March 14, 2007 report states:

> The cervical spine is relatively straight with just a mild reversal of the curve, kyphotic at about C3-5. No pathological bone signal. Bony ridging is mainly noted at C5-6 and C6-7. Craniovertebral junction and cervical cord are normal. On axial studies, only a mild degree of eccentric ridging to the right can be appreciated at C6-7. The nerve roots, cord and neural foramina were negative at all levels. I cannot appreciate any facet disease.
> IMPRESSION: NO SIGNIFICANT FINDINGS.

(R. 201; RE 76) Both reports indicate the films show some loss or reversal of the normal neck curvature and some bony ridging or spurs at the C5-6 and C6-7 areas. While the radiologist's impression differs from 2005 to 2007, Dr. Rutkowski would not have considered that impression anyway. The actual description of the films in both 2005 and 2007 is consistent with Dr. Rutkowski's testimony.

Dr. Rutkowski explained that Tammy's weight was not relevant to the pain she was experiencing from the problems in her neck and cervical spine as weight is not even a factor increasing the propensity for neck pain as some believe it is for low back pain. (R. 746-747; RE 139-140) Dr. Steuer also expressed the opinion that Tammy's pain problems were not caused by her weight, particularly since she did not develop the problems at the time she put on the weight, but instead they developed shortly after a rear-end collision in a pattern that fits injuries occurring in rear-end collisions with whiplash injuries. (R. 686-687; AE-RE 140-141) He also explained it was unlikely that her pain was caused by pre-existing degenerative disease because degenerative disease in the absence of trauma is very unusual in patients of Tammy's age at the

time of the Martin wreck and his treatment. The overwhelming majority of patients who develop degenerative disease in the absence of trauma are in their 60's, 70's and 80's whereas Tammy was in her 20's when he first started treating her for the pain resulting from the rear-end collision. (R. 687-688; AE-RE 141-142)

Dr. Steuer also explained why the various imaging studies which report normal findings do not indicate the lack of injury or pain in Tammy's case. X-rays would show tumors or fractures, but they are extremely nonsensitive to the types of injuries that caused Tammy's pain and are not considered to be diagnostic tests for the types of injuries she has. (R. 704; AE-RE 144)

In regard to allegations of missed appointments, Dr. Steuer explained that each time he saw Tammy, he recommended an approximate time for the next appointment, but he did not actually make appointments on those dates. He explained that if there were conflicts with work or being out of town or other issues, the receptionist would have scheduled the appointment at a later date and it cannot be assumed from the next entry in his records being after the recommended date that Tammy had missed a scheduled appointment. (R. 702; AE-RE 143)

Tammy explained that while she was seeing Dr. Steuer, she was also trying to continue working. When she could, she scheduled her appointments with Dr. Steuer during her lunch break. But there were times when she could not adjust her work schedule and had to cancel appointments because of the demands of her work. Despite these conflicts she kept most of her appointments with Dr. Steuer and for physical therapy. (T. 26; AE-RE 8) Later she missed other appointments when she did not have the money to pay for them. (T. 39; AE-RE 20)

Tammy testified that the pain radiating from her neck to her right shoulder, arm and hand

has been present daily since it first developed shortly after Martin's car rear-ended her car. The intensity waxes and wanes, getting worse with activity, weather changes and other factors and often improving with rest and changes in her lifestyle. After she ceased seeing Dr. Steuer, she sought treatment for the continuing pain from her primary care medical providers who also managed her health conditions which she does not claim were caused by the Martin collision. On several occasions, these primary care providers requested MRIs in relation to her ongoing pain caused by the Martin collision. On two occasions, they referred her to other specialists (Dr. Capel and Dr. Rutkowski) for consultations on the constant pain in her neck, right shoulder and hand and low back. (T. 29-33, 35, 47; AE-RE 11-15, 17, 28)

Tammy testified that she elected not to have some of the more aggressive treatments and tests because after they were explained to her and she talked to others who had had the procedures, she felt the risks outweighed the potential benefits. She declined the myelogram Dr. Capel recommended after talking to the manager where she worked who had had the procedure and described it as being very painful and not really providing any useful information in his case. Dr. Capel had also explained to her the risks of paralysis from the procedure. Tammy elected instead to continue with the exercises she had been taught[6]. When the pain worsened from time to time, she took medication which had been prescribed, used over-the-counter anti-inflammatory medication, stopped doing the activities which aggravated the pain, etc. When the neck/right shoulder-arm-hand pain increased and did not respond to any of these approaches, she would either go to the hospital or seek help from a doctor treating her at that time who would accept

[6]Tammy only saw Dr. Capel one time because he moved to Oklahoma by the time she qualified for Medicaid and had a way to pay for further treatment. (T. 42-43; AE-RE 23-24)

Medicaid. (T. 34-35, 40-41; RE 32-33; AE-RE 16-17) These other medical providers continued most of the types of treatment Dr. Steuer had used to address her pain, including prescriptions for pain medication, anti-inflammatory medication and anti-depressant medication. She was also prescribed an additional course of physical therapy and continued to do her exercises at home. (T. 44; AE-RE 25)

In 2004, Tammy stopped working. She does not claim that her inability to work was caused by the 1998 Martin collision, but it did affect the treatment options available to her for the continuing neck and right shoulder, arm, and hand pain. She could not afford the COBRA rates to continue private health insurance and without health insurance she had substantial difficulty in paying for medical care. Eventually she qualified for Medicaid but some of her medical providers did not accept Medicaid. She did what she could on her own when she could not afford medical care and made do with providers who would accept Medicaid after she qualified for Medicaid. (T. 37-51; AE-RE 18-32)

Before she stopped working in 2004, there were also periods when Tammy did not have insurance or when treatment for the neck and right shoulder, arm and hand pain were considered to be noncovered pre-existing conditions. Because she had been warned that she had to keep her work hours up to continue to qualify for health insurance and she had received collection letters for the medical bills she had not been able to pay, she did her best to tough it out and did not seek medical treatment for these conditions when she had no way of paying for treatment and when treatment would have required her to take off time that would have put what medical insurance coverage she did have in jeopardy. During these periods, while there were times when the level of pain was low enough that she could function without additional medical attention, but she

continued to experience the pain which had been constant since the Martin wreck. She did what she could for herself with rest, exercise and over the counter medication and her TENS unit. Despite these efforts, there were still times when the pain got so out of control that she had to seek help in the hospital emergency room. (T. 59-60, 90, 108; R 313-318; RE 47; AE-RE 36-37, 44, 95-100)

Tammy does not generally complain about pain when she is able to cope with it sufficiently to continue to function. When she says her neck is not causing her "problems" at a particular time, she means the level of pain is such that she can tough it out and function without seeking additional medical treatment to what she has already had. She describes her pain as a problem when it rises above the level that she has come to expect as the "normal" or "everyday" level of pain or when it has gotten so out of control that she must get additional medical attention despite being unable to pay for it. (T. 90-91; AE-RE 42-43)

Tammy continues to try to cook and do limited cleaning at home being careful not to lift items over 10 pounds as instructed by her doctors and nurse practitioners. She is not able to mop, and must limit sweeping to when its absolutely necessary and there is no one else there to do it. She has difficulty washing dishes because of the neck pain. (T. 51-52, R. 134, 483; RE 115; AE-RE 32-33, 56)

In November of 2000, Tammy tried to break up a fight between friends at her house. During the process, she got hit in the jaw. She went to the emergency room as a precaution, but her only injuries were a bruise which she recovered completely from without further treatment. In October of 2001, Tammy was involved in another minor automobile accident. She was a passenger in her vehicle driven by her then boyfriend when it went off the road into a ditch

coming to rest with the drivers side tilted against the ditch. She was able to get herself out of the vehicle. She followed the advice of the police and went to the emergency room where she was checked out and found to have only a minor bruise and slight skin break on her check from the seatbelt she was wearing. She recovered completely from the bruises without any followup treatment. (T. 66-69; RE 39-40) She also testified that the continuing neck, and right shoulder, arm and hand pain did not change in connection with these incidents. Her neck and right shoulder, arm and hand pain remained the same after these incidents as it had been before them. (T. 109; AE-RE 45)

Richard Williams has lived with Tammy for most of the last 13 years. He has observed her on a day to day basis. He heard her testimony and agreed with all of it. He testified that "[s]he has a pretty hard time sometimes" and that he has to assist her most of the time with things she cannot do because of the pain. He does the mopping, sweeping and heavy housework. When she was still working, working was all she could do. She would be in tears by the time she got home from work. He testified that Tammy's condition has not really improved over the years since the accident. It does at times get worse, but her pain is always there. He testified that she tries "to deal with it as best she can" but that it can be overwhelming especially when it prevents Tammy from doing the things she used to do the way she liked to do them. (T. 132-133; AE-RE 46-47)

SUMMARY OF ARGUMENT

Liability was stipulated in this automobile collision personal injury case. The only issue to be decided by the Trial Court in the bench trial was the extent of the injuries caused by the collision and an appropriate amount of compensation for those injuries. The defendant, Martin,

has not contested the award made to Richard Williams. Only the parts of the judgment concerning Tammy Weatherford's injuries are at issue.

Martin and her counsel chose not to present any witnesses of their own. Instead, they relied upon cross examining Tammy's witnesses and attacking the credibility of their testimony. They gambled and lost with that trial strategy as the Trial Court found Tammy's witnesses to be credible. In an effort to overturn the Trial Court's judgment, they have misinterpreted, stretched and recasted the Trial Court's findings into something other than what the Trial Court actually found. In so doing, they erect straw men and then attack those straw men with arguments unsupported by either citations to case law or evidence that their factual assertions are not only true but necessarily preclude the Trial Court's factual findings and ultimate judgment.

These arguments fall outside the applicable standard of review and also lack merit on a purely logical basis often assuming propositions which are simply not supported by any evidence. Under the appropriate standard of review, the Trial Court's actual findings necessary to support its judgment are supported by substantial evidence in the record and inferences supported by that evidence. There is no reversible error in this case.

ARGUMENT

A. Standard of Review

The judgment of a trial judge sitting without a jury is given great deference by our appellate courts which view the record in the light most favorable to the trial court's judgment, accepting all evidence that would reasonably support the judgment, together with any reasonable inferences that could be drawn from the favorable view of the supporting evidence in the record. *City of Natchez v. Jackson,* 941 So. 2d 865, 876-877 (Miss. Ct. App. 2006); *Fred's Stores of*

Tenn., Inc. v. Brown ex rel. Brown, 829 So.2d 1261, 1263 (Miss. Ct. App. 2002). Under this deferential standard, an appellate court will not disturb the findings of a trial judge sitting without a jury unless such findings were manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. *Delta Reg'l Med. Ctr. v. Venton*, 964 So. 2d 500, 503, 505-506 (Miss 2007)

In reviewing challenges to the amount of damage awards, each case must be considered on its own facts taking into account that it is up to the fact-finder to determine the amount of damages to be awarded. An award will not be set aside unless it is "so unreasonable in amount as to strike mankind at first blush as being beyond all measure, unreasonable in amount and outrageous." *Natchez v. Jackson* quoting *Lewis v. Hiatt*, 683 So.2d 937, 941 (Miss. 1996).

B. Standard of Proof for Pain and Suffering Damages

Although a plaintiff must prove damages for pain and suffering by a preponderance of the evidence, she is not required to prove such damages by any particular form of evidence or any specific type of evidence a defendant argues should be present if the plaintiff sustained the claimed pain and suffering. Pain and suffering is routinely proven by the testimony of a plaintiff and/or the testimony of those around a plaintiff. Neither the absence of positive findings on tests like x-rays and MRI's nor gaps in complaints of pain in a plaintiff's medical records indicates a failure to prove pain and suffering by a preponderance of the evidence. See e.g., *Natchez v. Jackson*, supra, *Stevison v. Public Emples. Ret. Sys.*, 966 So. 2d 874 (Miss. Ct. App. 2007), *Public Employees' Retirement System v. Dearman*, 846 So. 2d 1014, 1019 (Miss. 2003), *Public Employees' Retirement System v. Waid,* 823 So. 2d 595, 597 (Miss. Ct. App. 2002)

Our courts have rejected arguments that plaintiffs be required to offer specific types of

proof or that plaintiffs be required to prove the amount of their claims for pain and suffering with specificity. *Amiker v. Brakefield*, 473 So. 2d 939, 939-940 (Miss. 1985). Instead, recognizing that some categories of damages, like pain and suffering, cannot be measured directly and necessarily include some element of speculation, our courts have held that the plaintiff's burden of proof is to "lay enough of a foundation in evidence to assist the trier of fact to make a fair and reasonable decision" on the amount of compensation to be awarded for these categories of damages. *Natchez v. Jackson* at ¶ 35; *Fred's Stores of Tenn.* at ¶ 10. To require a plaintiff to prove the amount of damages for pain and suffering caused by the defendant's fault to a level of reasonable certainty would raise the burden of proof beyond the required preponderance of the evidence. *Amiker v. Brakefield*, 473 So. 2d 939, 939-940 (Miss. 1985).

> In many cases, such as those in which the plaintiff seeks compensation for pain, suffering and mental anguish, such proof cannot be made with mathematical precision, and such is not required by law. Assessment is within the discretion of the [fact finder.] ... [A] plaintiff's recovery "is not limited only to such damages as may be measured with any certainty."

Amiker citing *Washburn v. Pearson*, 226 So. 2d 758 (Miss. 1969).

Ms. Weatherford's testimony and the evidence contained in her medical records and the deposition of two of her treating physicians clearly rise to the preponderance of evidence level required by *Amiker* and *Washburn* to support a finding that Tammy has suffered, continues to suffer, and will continue to suffer significant and serious levels of pain which have changed her lifestyle as a result of injuries she sustained when rear-ended by the Martin vehicle in 1998. Dr. Steuer could feel areas of muscle tension and spasm which objectively verified the pain was real. All her treating medical providers found her statements concerning her history and the pain she felt to be credible. Martin did not even present an expert of her own to testify contrary to the

opinions of Dr. Steuer that the Martin collision caused the pain he treated Weatherford for or that the pain resulting from that collision would likely worsen if she did not continue to receive the level of treatment he had been providing to her. Nor did they present an expert to testify contrary to Dr. Rutkowski's testimony that assuming facts which were supported by or were supportable inferences from the other evidence, there is a correlation between the 1998 Martin collision and the pain Tammy continues to suffer today.

C. The Judgment of the Trial Court Was Not Manifestly Erroneous in Light of the Evidence and Supportable Inferences in this Case

As the Trial Court found in paragraph 27, the testimony regarding Tammy's injuries and damages was not contradicted by any evidence presented by Martin. (CP 166; RE 5) Martin chose not to present any experts expressing opinions that Tammy's pain was not causally related to the Martin collision in 1998. Instead they chose only to attack the credibility of Tammy's testimony and that of her treating physicians through cross examination.

While they were able to draw out a considerable amount of testimony from Dr. Rutkowski about the objective evidence he would have expected to find, but did not find, in 2007 if the 1998 Martin collision had caused the *stenosis* he found on the images he examined for himself in 2007 or the type of evidence of nerve injury that long untreated significant stenosis can cause, they did not get him to express an opinion that there was no correlation between her constant and continuing *pain* and the 1998 Martin collision. While the lack of specific positive responses to certain neurological tests during his exam led him to question the likelihood that Tammy's pain would respond positively to surgery, he did not state that those same findings indicated that her pain was unlikely to have been caused by the 1998 Martin collision.

Furthermore, he testified that surgery was an option for future treatment despite the lack of findings of significant nerve damage in his examination of Tammy because of her history and symptoms. (R 747-753; AE-RE 154-160)

He then expressed the opinion that one patient may experience severe pain as a result of a seemingly minor injury to the cervical spine while another may experience no pain while the MRI shows substantial significant findings. He went on to give the opinion that given a history of no similar pain prior to 1998, and a consistent pattern of pain radiating from the neck through the shoulder and down the arm predominantly on the right side since the 1998 collision, the abnormalities he was able to see in the films he did examine which show old injuries when the first MRI films were taken 2003, and her inability to turn her neck through the full range of motion on the right when he examined her in 2007, there was a correlation between the *pain* she had and continued to suffer and the 1998 Martin collision. (R. 756-757, 764, 767; AE-RE 161-164)

That opinion regarding the causal relationship between her continuous and ongoing pain and the Martin collision was not contradicted by any other evidence and did not depend upon a review of 2007 MRI films or the impressions of the radiologist who wrote the 2007 MRI report. Moreover, Dr. Rutkowski testified the 2007 report relied upon by Martin would not have affected his opinions as he reads the films himself and does not rely upon radiologists' readings of the films much less the impressions they put in their reports. Furthermore, as shown by the quotations in the Fact Statement of this brief, while the 2007 MRI report contains an *impression* of the radiologist that the films contain no significant findings, the description of the films in the crucial C6-C7 area of the cervical spine in the 2005 and 2007 reports describe similar

characteristics of that part of the spine. Dr. Rutkowski explained the significance of Tammy's history in determining the causal connection between the 1998 Martin collision and her pain. That is information which was not available to the radiologist who wrote the impression statement that he did not see any significant abnormalities in the 2007 films. (R. 759-760; RE 148-149)

Regardless of whether the court's statement that Dr. Rutkowski actually reviewed the 2007 films on March 29, 2007 is correct, it does not affect the correctness of the court's findings as to the cause and extent of Tammy's pain and the compensation awarded for it. Paragraph 16 of the Trial Court's findings concludes that Dr. Rutkowski found that Tammy had a mild stenosis which is caused in 80-90% of the cases by genetics and recommended surgery at some point in the future. As the court did not award any amount for future medical expenses, the statement about Dr. Rutkowski recommending surgery in the future did not affect the amount of the damages awarded. The Trial Court did not say in paragraph 16 that Dr. Rutkowski's review of the 2007 MRI established that Tammy's stenosis was caused by the 1998 collision instead of genetics or was the source of her pain from 1998 to the present, either. Paragraph 16 simply recounts that Dr. Rutkowski diagnosed a mild stenosis at C5-6 and C6-7 which is true. Any error in date of the MRIs reviewed by Dr. Rutkowski made in paragraph 16 does not affect the outcome of the case and is harmless error which cannot justify reversal of the award. (CP 164-165; RE 3-4)

Gillis v Gillies (in Re Estate of Gillies) 830 So. 2d 640, paragraph 30 (Miss. 2002)

> Paragraph 30 reads:
> We agree. While the Chancellor's opinion and judgment were not written with the precision we would prefer, none of the factual misstatements

> appear to have affected the final resolution of this case. Further, Gillis has failed to cite any authority in support of his contention that these inaccuracies require reversal, other [**22] than citing the general manifest error standard of review. At most these inaccuracies amount to harmless error and do not rise to the manifest error requirement mandated for reversal.

Furthermore, while Dr. Rutkowski did testify that he did not have the 2007 MRI report, he also said he could not remember what films he actually had and reviewed. He was unequivocal that regardless of what any report said, which he would not rely upon anyway, he could and did make a diagnosis of stenosis based on what was visible in the films he reviewed even though there was some compromise in clarity in the films. He also testified that he requires patients to bring their current films, but not their MRI reports, with them to their appointments and that he reschedules appointments and will not see patients who do not bring their films with them. (R. 759-760; RE 148-149) At trial Tammy testified the 2007 MRI was done before her visit to Dr. Rutkowski because he wanted his own set. She also testified that she picked up her various MRI films so that she could take them to the doctor who wanted to review them. (T. 46; AE-RE 27) The medical records show that on at least one occasion, the orders were to print a set of the films at the time of the MRI and give the films to the patient to take to her doctor. (R. 529; AE-RE 105) They also show the 2007 MRI referred to in Tammy's testimony was done on March 14, 2007, but that the radiologist's preliminary draft report on it was not printed for several days and that only Debbie Verble was sent a copy of the report. (R. 201-202; RE 76; AE-RE 58) This evidence when considered with the 3/29/2007 written entry in Dr. Rutkowski's records that he personally reviewed MRI films brought by the patient that day and his inability to remember what films he actually reviewed, could support a reasonable inference that Dr. Rutkowski did have and did review the 2007 films but not the 2007 report when he saw Tammy

on 3/29/2007. (R. 112; RE 60)

Martin's other attacks on factual findings by the Trial Court are equally without merit. As is shown in the Statement of Facts in this brief, there is ample evidence provided through both Dr. Steuer and Tammy's testimony that being rear-ended by Martin's vehicle did cause a cervical whiplash injury which resulted in objectively verifiable muscle spasms and trigger points which verify the pain she describes was caused by the Martin collision. There is also ample evidence that the alleged discrepancies Martin points to between the medical records and Tammy's testimony are not really discrepancies at all. Rather they are evidence that the pain while constantly there varies in intensity depending upon factors such as activity levels and rest. The evidence supports the conclusion that Tammy is a stoic individual without a great deal of education or definitiveness in vocabulary who did her best to learn from her treatments and to apply them for herself at home whenever possible to control costs. She focused on the least risky treatments offered and did her best to cope with the pain without complaining repeatedly to her medical providers about pain that had not changed. She avoided medical expenses when possible and mitigated the damages from medical expenses by focusing her complaints to doctors on changes in the pain which she did not know what to do about based on prior treatments.

At most the alleged discrepancies pointed to by Martin are merely attacks on her credibility which is an issue to be resolved by the Trial Court. The Trial Court's finding that Tammy's testimony concerning her injuries and damages was credible is not a decision that could be described as manifestly erroneous or one applying an incorrect legal principle. Our Supreme Court has said it has found in its experience, plaintiffs who are stoic and do not complain overly much about their pain are found to be more credible by fact finders, so that

plaintiffs who give the impression of concealing their pain and/or finding a way to go on as best they can with life despite the pain tend to be believed and awarded more than those who complain loudly and often. *Holmes County Bank & Trust Co. v. Staple Cotton Cooperative Assoc.*, 495 So. 2d 447 (Miss. 1986) The findings favoring the plaintiff are the result of the fact finder's assessment of credibility and not an indicator that an improper legal standard has been applied or that the award is excessive or outrageous. *Id.*

Thus, contrary to Martin's arguments, the presence of periods of time when Tammy did not constantly complain to her medical providers of the pain which had become a constant and persistent presence in her life and instead focused on the changes (including both temporary improvements and periods when the pain worsened) at each visit does not require the drawing of an inference that she had recovered from the pain of the injuries caused by being rear-ended by the Martin vehicle. An equally supportable inference is that she is a sensible and stoic woman who has learned from her medical providers what techniques she can use on her own on an ongoing basis to try to cope with the constant pain and who has mitigated the ongoing cost of medical care, which she cannot afford, by not wasting time and money on constantly going over old ground with her medical providers.

While she may have reached the maximum improvement physical therapy could achieve in November of 1998, maximum improvement does not equal cure. One need only look to workers compensation cases to see that it is common for a patient to reach maximum medical improvement, beyond which a certain type of medical treatment is not justified, but still be suffering considerable pain that will exist for a lifetime. In this situation, the absence of the complaints which Martin relies upon actually support a larger award than if Tammy had

complained in the way that Martin claims should be documented in the medical records if she was really in that much pain. See *Holmes*, supra.

Martin's arguments that the Trial Court's findings are erroneous in regard to lifestyle changes being caused by pain from the 1998 collision are without merit for similar reasons. There is ample evidence in the record to support the connection between the 1998 collision, the pain Tammy suffers and the changes in lifestyle and activities she claims resulted from that pain. When referring Tammy to Dr. Steuer for pain management shortly after the 1998 collision, Dr. Pulliam imposed a weight limit on Tammy's activities because of the pain. (R. 123-124; AE-RE 48-49) Later, when she was being treated by the Greenville Clinic, the weight limitation was reduced to 10 pounds because of neck and back pain affecting her arm strength. (R. 128-134, 187-189; RE 70-72; AE-RE 50-56). Dr. Capel's notes document that increased activity increases the neck and right arm pain. (R. 525-526; RE 127-128) Other records indicate that standing on her feet with increased activity aggravates it. (R. 137; AE-RE 57) Kings Daughter's Hospital records also document that activities such as cleaning house aggravate the pain. (R. 345-348; RE 99-102) All of this evidence connects physical activity directly with increased pain in the areas Dr. Steuer tied directly to the 1998 collision.

All of this evidence predates the sleep study resulting in a diagnosis of sleep apnea in late December of 2004. (R. 364-365; AE-RE 101-102). There is no evidence in the record connecting daytime sleepiness, GERD, obesity, hypertension or the other unconnected health problems Martin points to with the pain for which she was compensated by the Trial Court's judgment. To the contrary, both her treating physicians testified there is no connection between her obesity and her cervical injuries and related pain. (R. 686 - 687; 746-747; RE 139-140; AE-

RE 140-141)

The lifestyle changes referred to by Tammy and the Trial Court do not include loss of the ability to work. Tammy's testimony focused on things she formally did outside of work around her home such as cooking, cleaning, sweeping, mopping and caring for her home. Richard also testified that these physical things are the types of things he must constantly do for her since the accident because she cannot do them for herself anymore. (T. 51-52, CP 165-166; R. 134, 483; RE 4-5, 115; AE-RE 32-33, 56)

One need look no further than legislation such as the Americans with Disabilities Act to see that people who have had to make significant physical lifestyle changes because of disabilities or pain or injuries are often still able to work at sedentary jobs that do not involve a lot of physical activity. It is not pain, but factors such as day-time sleepiness which prevent Tammy from performing those jobs and prevent her from working. Tammy has never claimed lost wages as being caused by the pain from the 1998 collision. There is simply no correlation between when and why Tammy stopped working and her claims for compensation for pain. There is no evidence indicating that the pain claimed to be caused by the 1998 collision is such that it would prevent her from engaging in sedentary work.

Similarly there is no evidence that only bulging discs, stenosis, or degenerative disc disease are necessary for the 1998 collision to produce lifestyle changing pain. This argument completely disregards the evidence that the injury Tammy sustained was a soft tissue whiplash type injury which caused the muscle spasm and myofascial pain syndrome pain which started in 1998 and continues to the present time predominantly on the right side. To the contrary, Dr. Steuer's testimony established that the pain caused by the myofascial pain syndrome and

whiplash is soft tissue type muscular injury which exists whether or not there are bulging discs, stenosis or degenerative disc disease which is part of why he did not order MRI's in 1998. There is simply no evidence to support Martin's claim that the lack of evidence of a bulging disc, stenosis, or degenerative disc disease on a 2007 MRI necessarily precludes a finding that the 1998 collision resulted in injuries that caused the claimed lifestyle changes. There is uncontradicted evidence to support the Trial Court's finding that pain from the 1998 injuries has caused Tammy to make changes in her lifestyle including routine domestic chores, lifting and carrying heavy objects, and pushing of pulling objects.

D. The Amount of the Award for Pain and Suffering Is Not Outrageous

The gist of Martin's argument is that the amount awarded for pain and suffering is outrageous in this case because there were only soft tissue injuries which did not even require surgery and would not require surgery in the future. In *Natchez v. Jackson*, in rejecting a similar argument and upholding a pain and suffering award more than 10 times the medical expenses, the court pointed out that the factors to be considered in making an award include present and future mental and physical pain, and age and health of the injured plaintiff. That court pointed to factors such as the plaintiff having to continue to live with sciatic nerve pain, and being unable to decorate for Christmas, attend family functions, help or travel with her husband's ministry as justifying a pain and suffering award exceeding 10 times the medical damages. We are not told in the opinion the exact age of the *Natchez v. Jackson* plaintiff, but reading the opinion leaves one with the definite impression that Ms. Weatherford is considerably younger than the *Natchez v. Jackson* plaintiff indicating that an award of considerably more than ten times medical damages would not be outrageous given the number of years a person of Ms. Weatherford's age

would be likely to have to live with the pain which medical care has been unable to cure.

In *Holmes County Bank & Trust Co. v. Staple Cotton Cooperative Asso.*, 495 So. 2d 447 (Miss. 1986), our Supreme Court reviewed some prior pain and suffering awards including that in *L.&N. R.R. Co. v. Hasty*, 360 So.2d 925 (Miss. 1978) in which a pain and suffering award of more than 11 ½ times the medical expenses totaling $125,000 was found not to be outrageous. *Holmes* then goes on to point out that it is appropriate when comparing an award to an earlier case to take into account inflation and increases in the cost of living since the date of the prior decision used for comparison purposes. *Holmes* pointed to the time lapse between its own decision in 1986 and the 1978 decision in *Hasty*, highlighting the already been considerable inflation so that the 1978 *Hasty* award needed to be increased by the increase in the cost of living before being compared to the judgment under review.

Using the Department of Labor's calculator based on the Consumer Price Index, found at http://www.bls.gov/data/inflation_calculator.htm, an award of $125,000 in 1978 dollars would be the equivalent of just under $400,000 in 2007 when the trial court entered this judgment or just over $400,000 in present day 2008 dollars. The same calculations show that the $200,000 part of the award for damages other than medical expenses approved in *Holmes* in 1986 for neck injuries to a 75 year old woman would be the equivalent of just over $375,000 in 2007 dollars and just barely under $400,000 in 2008 dollars. Given these adjustments as discussed in *Holmes*, when *Hasty* and *Holmes* are adjusted for inflation, they show that an award of $400,000 for pain and suffering would not be so large as to be considered outrageous today even with a plaintiff with a much shorter life expectancy, and thus a shorter period of expected future pain, than Tammy Weatherford. Thus, these decisions demonstrate that the award of $368,500 in this case for

damages other than medical expenses would not be so great as to shock the conscious or be considered outrageous even if it is considered to all be applicable to pain and suffering with no allocation for future medical treatment of the pain.

In *Delta Reg'l Med. Ctr. v. Venton*, 964 So. 2d 500 (2007), our Supreme Court pointed out that when challenging a damage award made by a trial judge in a bench trial, it is necessary for the appellant to demonstrate that the award by the trial judge was "actuated by passion, partiality, prejudice, or corruption" just as it is necessary to show that a jury award has been "actuated by passion, partiality, prejudice, or corruption" before it will be reduced. The *Venton* Court pointed out that the Appellant in that case failed to demonstrate any such passion, partiality, prejudice or corruption by the trial judge, saying:

> Testimony revealed that Venton experienced substantial pain and suffering from the time she entered the facility until her death. Comparing amounts deemed suitable in other negligence cases, an award of $ 1,000,000 is not outrageous. See Purdon v. Locke, 807 So. 2d 373 (Miss. 2001) (upholding award for $ 450,000 for medical negligence resulting in severe soreness and discomfort); Holmes County Bank & Trust Co. v. Staple Cotton Cooperative Ass'n., 495 So. 2d 447 (Miss. 1986)(reinstating jury verdict of $ 200,000 where seventy-five-year-old plaintiff incurred neck injuries). DRMC presented no evidence showing that the trial judge was influenced by passion, partiality, prejudice or corruption, therefore, this issue is without merit.

Id at ¶ 23. Similarly, in the present case, Martin has presented no evidence showing that the trial judge was influenced by passion, partiality, prejudice or corruption in this case. Accordingly, as in *Venton*, Martin's challenge to the amount of the award is meritless.

Since Martin has failed to demonstrate that the Trial Court's judgment on damages is unsupported by the record and is outrageous, she has similarly failed to demonstrate any abuse of discretion in denying the post trial motion for remittitur or new trial.

E. Admission of the Life Expectancy Tables Was Not Reversible Error.

During the course of Tammy's testimony, her attorney asked her if she had reviewed life expectancy tables to learn about her remaining life expectancy. After she said she had, her attorney offered the U.S. Department of Health and Human Services Life Tables as self authenticating government documents under M.R.E. 902. Martin's attorney objected arguing the tables were inadmissible because they were not produced during discovery. The Trial Court overruled the objection stating that the tables were widely available to anyone and known to attorneys. (T. 54; RE 36)

Our Supreme Court pointed out in *Churchill v. Pearl River Basin Dev. Dist.*, 757 So. 2d 940 (Miss. 1999) that the use of life expectancy in calculating damages for pain and suffering is proper and well established. It also pointed out that our judges can take judicial notice of the content of life expectancy tables. Since the court could take judicial notice of the life expectancy tables without the actual introduction of the tables into evidence, the effect of admitting them into evidence would be harmless even if the actual admission of the tables was erroneous for some reason. This issue is meritless as it does not effect the outcome of the case since the trial court could consider the life expectancy of the plaintiff whether or not the tables were actually introduced in evidence. See *Hankins v. Sanderson Farms, Inc.*, 226 So. 2d 723, 724-725 (Miss. 1969)

CONCLUSION

Martin admitted liability and the existence of some damage in this case. The only issue to be decided by the trial court was the amount of the damages caused by Martin's negligence. Martin and her counsel made a tactical decision not to put on evidence to directly contradict

Tammy Weatherford's testimony or that of her treating physicians and experts. Instead, they chose to concentrate on attacking the credibility of the evidence Tammy presented. Credibility decisions are left to the fact finder. Here the Trial Court made those credibility calls in Tammy's favor and against Martin. While Martin, and possibly even another Trial Court, might have made that call differently, it is not grounds for reversal or even remittitur. The award made was within the bounds of other awards made for pain and suffering sustained as a result of soft tissue injuries which by their nature do not show up on x-rays and MRI's. Such injuries are not any less painful and tortfeasors should not be able to avoid fully compensating such injuries because current medical equipment cannot record them on images or because the plaintiff stoically does her best to stick to conservative treatments and endure the pain with what medical attention she can afford avoiding expensive risky procedures without high probabilities of success.

RESPECTFULLY SUBMITTED, this the 31 day of October, 2008.

TAMMY WEATHERFORD

By: /s/ W. Noel Harris

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CERTIFICATE OF SERVICE

Pursuant to M.R.A.P. Rule 25(a), I hereby certify that I have mailed the original and three (3) true and correct copies of the above and foregoing Brief of Appellees via First Class U.S. Mail to:

Hon. Betty W. Sephton
Clerk, Supreme Court of Mississippi
P.O. Box 249
Jackson, Mississippi 39205-0249

I further certify that I have mailed a true and correct copy of the above and foregoing Brief of Appellees via First Class U.S. Mail to:

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Washington County Circuit Court Judge

I further certify that pursuant to M.R.A.P. 28(m), that I have also mailed an electronic copy of the above and foregoing on an electronic disk and state that this brief was written in Wordperfect format.

This the 31st day of October, 2008.

W. Noel Harris, MBN [redacted]