IN THE SUPREME COURT OF MISSISSIPPI
NO. 2007-CA-01990

MARY MARTIN **APPELLANT**

V.

TAMMY WEATHERFORD AND
RICHARD WILLIAMS **APPELLEES**

APPEAL FROM THE CIRCUIT COURT
OF WASHINGTON COUNTY

REPLY BRIEF OF APPELLANT
(Oral Argument Requested)

Of Counsel:

Michael V. Cory, Jr. (MSB N[redacted]
Eric T. Hamer, (MSB No[redacted]
DANKS, MILLER, HAMER & CORY
Post Office Box 1759
Jackson, Mississippi 39215-1759
Telephone: (601) 957-3101
Facsimile: (601) 957-3160

ATTORNEYS FOR APPELLANT

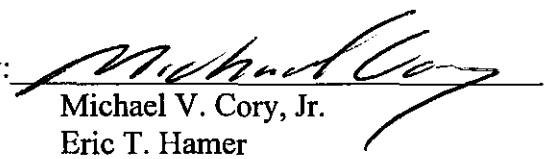
CERTIFICATE OF INTERESTED PERSONS

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 this Court may evaluate possible disqualifications or recusal:

1. Mary Martin (Appellant);
2. Michael V. Cory, Jr., Eric T. Hamer, and Danks, Miller, Hamer & Cory (Counsel for Mary Martin);
3. Tammy Weatherford (Appellee);
4. Richard Williams (Appellee);
5. W. Noel Harris and Harris Law Firm (Counsel for Tammy Weatherford and Richard Williams; and
6. Honorable Ashley Hines (the "Circuit Court) (Washington County Circuit Court Judge).

RESPECTFULLY SUBMITTED, this the 17th day of December, 2008.

DANKS, MILLER, HAMER & CORY

By: 

Michael V. Cory, Jr.
Eric T. Hamer
Attorneys for Mary Martin

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REPLY BRIEF

As money damages for the January 9, 1998, automobile accident at issue in this case, the trial court awarded Tammy Weatherford, $28,058.86 for past medical bills, and an incredible $368,550.00 for past and future pain and suffering. In the Brief filed on behalf of Ms. Weatherford, her lawyer attempts to minimize the objective medical evidence; argues that the issues raised are merely attacks on Ms. Weatherford's credibility; and suggests that this appeal can be resolved in her favor by simply drawing certain purportedly reasonable inferences from the evidence. However, this appeal involves much more substantial issues of error. While determining the actual injuries and damages that were caused by the 1998 car accident is somewhat tedious because of the voluminous medical records, a careful and thorough review of these records reveals that the trial court based its sizable pain and suffering award on multiple factual findings that were directly contrary to the substantial and credible evidence. For the reasons set forth below, and previously set forth in the Appellant's Brief, this Court must remand with an appropriate remittitur, or alternatively, remand for a new trial on damages.

I. THE TRIAL COURT BASED ITS PAIN AND SUFFERING AWARD ON FACTUAL FINDINGS THAT WERE CLEARLY ERRONEOUS

As set out in detail in the Appellant's Brief, the trial court based its award for pain and suffering on the following findings which were directly contrary to the actual evidence presented at trial:

> (1) the March 14, 2007, MRI was "reviewed by Dr. Rutkowski, a board certified neurologist" [RE 66-67; R 164-165];
>
> (2) Dr. Rutkowski was of the opinion that the January 1998 accident caused Ms. Weatherford to have "mild stenosis or bulging disk in her cervical spine" [RE 66-67; R 164-165];

(3) Dr. Rutkowski recommended that Ms. Weatherford have surgery as a result of the 1998 accident; [RE 67; R 165];

(4) "as a result of the January 9, 1998 accident, Ms. Weatherford sustained significant injury to her neck, right shoulder, right arm, and back and has suffered almost continuous pain in her neck, shoulder and arm." [RE 67; R 165]; and,

(5) the significant lifestyle adjustments claimed by Ms. Weatherford were a result of her pain from the January 9, 1998, accident [RE 66-67; R 164-165].

With regard to the trial court's erroneous finding in paragraph (1) that Dr. Rutkowski actually reviewed the March 14, 2007, MRI, and in paragraph (2) that the January 1998 accident actually caused Ms. Weatherford to have "mild stenosis or bulging disk in her cervical spine," Ms. Weatherford simply attempts to minimize the significance of these erroneous findings by suggesting that:

1. Dr. Rutkowski testified that the March 14, 2007, MRI "would not have affected his opinions as he does not rely upon MRI reports" [Appellee's Brief; pp. 14, 25];

2. the "actual reports from the 2005 and 2007 MRIs are not materially different" [Appellee's Brief; pp. 14, 25];

3. Dr. Rutkowski would not have considered the MRI report had it been available [Appellee's Brief; p. 15].

Contrary to these attempts to minimize the significance of the March 14, 2007, MRI, a review of the record actually shows that:

1. Dr. Rutkowski never saw the actual report or film from the March 14, 2007, MRI [RE 149; R 760];

2. there is no testimony that the March 14, 2007, MRI report would not have affected the medical opinions given by Dr. Rutkowski during his deposition;

3. Ms. Weatherford, for whatever reason, chose not to bring either the 2007 MRI report, or the MRI film with her when she saw Dr. Rutkowski;

4. when the March 14, 2007, MRI came up during Dr. Rutkowski's deposition which was

taken on May 3, 2007, Ms. Weatherford's lawyer chose not to show the report to Dr. Rutkowski, or to opposing counsel, but instead represented that "[i]t says essentially the same thing" as the 2003 and 2005 MRIs [RE 149-150; R 760-61];

5. the March 14, 2007, MRI, does not in fact say "essentially the same thing" as the 2003 and 2005 MRIs;

6. the March 14, 2007, MRI, was in fact "materially different" from the MRI actually reviewed by Dr. Rutkowski in that the 2007 MRI showed that there were actually no "significant findings," and that there was actually no stenosis or bulging disk (whether caused by the 1998 accident or something else) [RE 48, 76; T 102; R 201];

7. because of "motion artifact," the MRI that Dr. Rutkowski actually reviewed was difficult to interpret [RE 138, 147-150; R 745, 758-761];

8. Dr. Rutkowski did not testify that Ms. Weatherford had mild stenosis or a bulging disc as a result of the January 9, 1998, accident;

9. Dr. Rutkowski actually testified that "it is unlikely that it [the 1998 accident] would be a cause of spinal stenosis." [RE 152; R 765];

After looking at the pertinent medical records, and the actual testimony of Dr. Rutkowski, the only conclusion that reasonably can be reached is that since the trial court's award for pain and suffering was based on these erroneous findings, it is not supported by, and is in fact contrary to, the substantial, credible and reliable evidence presented at trial.

With regard to the trial court's specific finding in paragraph (3) that Dr. Rutkowski recommended that Ms. Weatherford have surgery, Ms. Weatherford's counsel concedes that this particular finding was in error as Dr. Rutkowski did not testify that the 1998 accident caused a need for surgery. [Appellee's Brief; p. 13]. Nevertheless, Ms. Weatherford suggests that this erroneous finding by the trial court is harmless since the trial court did not award any money for future medical expenses. However, there are several problems with this suggestion. First, the fact that the trial court did not award any money for a future surgery does not render the trial court's erroneous finding

inconsequential. In reviewing the trial court's Findings Of Fact And Conclusions Of Law, there can be no question that its finding that Ms. Weatherford needed a future surgery was a significant and important finding to the trial court. Given this specific finding by the trial court, it cannot now be reasonably suggested that the trial court did not include some money for the pain, suffering, and difficult recovery that would naturally follow a future neck surgery.

Also, Ms. Weatherford did not put on any evidence of future medical bills at trial. Given the fact that the trial court awarded to the penny what Ms. Weatherford's counsel requested as damages, and given the fact that the trial court specifically found that Ms. Weatherford would require a future surgery, it is fair to conclude that the only reason the trial court did not award any money for future surgery was because there was no proof at trial of the costs of any future surgery.[1] This fact however does not diminish the impact of the trial court's erroneous finding.

The fact remains that neither Dr. Rutkowski, nor any other qualified physician, testified to a reasonable degree of medical probability that Ms. Weatherford needed future surgery because of the January 1998 accident. There is also no dispute that the March 14, 2007, MRI (the only clear MRI), shows no disc bulge or stenosis. Therefore, there is simply no spinal injury or other operable condition to even perform surgery on. For these reasons, to the extent that the trial court's award for pain and suffering was based in part on this erroneous finding, it is not supported by the substantial, credible and reliable evidence presented at trial.

With regard to the trial court's finding in paragraph (4) that "as a result of the January 9, 1998 accident, Ms. Weatherford sustained significant injury to her neck, right shoulder, right arm, and

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[1]The record was supplemented by order of this Court with the Propose Findings Of Fact And Conclusions Of Law submitted to the trial court by Ms. Weatherford.

back and has suffered almost continuous pain in her neck, shoulder and arm," Ms. Weatherford's counsel suggests that although she claims that she had pain on a daily basis, the reason the medical records indicate otherwise is that she did not always complain of pain that was present, and moreover, that wherever it is noted in the medical records that she complained of "neck pain," she really meant that she was having neck pain, back pain, arm pain, numbness and tingling. Ms. Weatherford's counsel also suggests that the Court can infer a more significant injury than a whiplash muscle strain as a result of the the 1998 car accident based on the testimony of Dr. Steuer and Dr. Rutkowski. However, a review of the record shows that this is simply not the case.

The undisputed fact is that the March 14, 2007, MRI was negative. It is also undisputed that this was the only clear MRI taken. The March 14, 2007, MRI, as well as the testimony of Dr. Rutowski, both completely contradict the trial court's finding of a "significant injury to her neck, right shoulder, right arm, and back." As outlined in detail in the Appellant's Statement of Facts, the substantial and credible evidence shows that Ms. Weatherford suffered no more than a whiplash injury which caused her neck and back muscles to be strained. Moreover, Ms. Weatherford's own clear and precise deposition testimony given by her on June 29, 2000, directly refutes her self-serving trial testimony that she had endured daily neck pain since the date of the accident:

> Question: **Does your neck give you any problems now?**
>
> Answer: **Sometimes.**
>
> Question: **How often?**
>
> Answer: **Not as much. I'd say once a week.** [RE 47; T 90].

Also, and as set forth in the Appellant's Statement Of Facts, the medical records and testimony show numerous inconsistent complaints, multiple non-accident related causes for the complaints, and long

lapses in treatment. Therefore, to the extent that the trial court based its pain and suffering award on its finding that as a result of the 1998 accident Ms. Weatherford had, or still has, a "significant injury to her neck, right shoulder, right arm, and back and has suffered almost continuous pain in her neck, shoulder and arm," it is not supported by the substantial, credible and reliable evidence presented at trial.

With regard to the trial court's finding in paragraph (5) that the significant lifestyle adjustments claimed by Ms. Weatherford were a result of her "pain" from the January 9, 1998, accident, Ms. Weatherford's lawyer suggests that because there is no evidence in the record connecting many of Ms. Weatherford's unrelated medical and personal problems to the 1998 accident, the trial court did not compensate her for those problems. However, this misses the most important point with respect to this finding. The trial court did not acknowledge, much less address, the impact of these unrelated problems. A review of the evidence shows that most, if not all, of the significant lifestyle adjustments Ms. Weatherford underwent between the time of the 1998 accident and the time of the trial were the result of Ms. Weatherford's numerous other health and personal problems not related to the 1998 accident.

As set forth in the Appellant's Statement Of Facts, these problems included sleep apnea (going back to 1994 which caused her to have moderate excessive daytime sleepiness and daytime fatigue); gastroesophageal reflux disease; obesity; depression; gastritis; high cholesterol; asthma; hypertension; minimal exercise; and, morning headaches. Ms. Weatherford also applied for disability due to "degenerative disc disease, bulging disc, sleep apnea, obesity, and high blood pressure." [RE 123-126; R 517-520]. Ms. Weatherford also testified at trial that she stopped working sometime between March and May 2004 (which was more than 6 years after the accident

at issue in this case) primarily because of "my blood pressure and different things . . ." and that her neck and back problems "wasn't a major issue . . . [t]he main thing was my high blood pressure at that time and my father's situation." [RE 30-31; T 37-38].

The 1998 accident was not the cause of any of the above medical or personal problems that directly impacted Ms. Weatherford's lifestyle far more than any claimed injury from the 1998 accident. There also was no testimony from any medical expert at trial either that Ms. Weatherford actually had any continuing limitations in 2007 that were related to the 1998 car accident, or that her initial muscle strains had not resolved. This fact combined with the fact that Ms. Weatherford was working productively more than six years after the accident, and quit working for reasons unrelated to the accident, directly undermines and contradicts the trial court's damages award.

There are multiple findings by the trial court, and upon which the trial court specifically based its pain and suffering award, that were clearly erroneous and not supported by substantial credible evidence. Each one of the erroneous findings by itself is more than sufficient to warrant a remittitur, or in the alternative, a new trial on damages.

II. THE TRIAL COURT'S AWARD OF $368,550.00 FOR PAST AND FUTURE PAIN AND SUFFERING IS NOT SUPPORTED BY SUBSTANTIAL CREDIBLE AND RELIABLE EVIDENCE

The Mississippi Supreme Court has recognized that there are situations where this Court must lessen the deference given to a circuit judge in a bench trial. The deference to be given the trial court should be lower in situations such as where the court adopts verbatim the proposed findings of fact submitted by one side or another, or where the record suggests that the findings are not the "product of the trial court's adjudicatory process". *University of Miss. Med. Center v. Peacock*, 972 So.2d 619, 628 (Miss. 2007). In the *Peacock* case, the verdict of the trial court was reversed because

the appellant demonstrated that their were multiple erroneous findings made by the trial court. *Id.* at 629. Following the reasoning in *Peacock*, the deference given to the trial court's findings in the instant case must be appropriately lessened in light of the clearly erroneous findings made by the trial court, and in light of the fact that the trial court awarded to the penny the amount of money requested by both plaintiffs for pain and suffering

As this Court is well aware, the normal standard of review in cases such as this is for the Court to look at the entire record before it and determine whether the trial judge's factual determinations were supported by substantial evidence. *Omnibank v. United Southern Bank*, 607 So.2d 76 (Miss. 1992); *Ezell v. Williams*, 724 So.2d 396, 397 (Miss.1998); *Yarbrough v. Camphor*, 645 So.2d 867, 869 (Miss.1994). In normal circumstances, the trial judge's findings of fact following a bench trial are subject to the same deference as a chancellor's findings of fact, and will not be disturbed on appeal as long as those findings are supported by substantial evidence unless manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. *Mayor and Bd. of Alderman v. Homebuilders Ass'n of Miss., Inc.*, 932 So.2d 44, 486 (Miss.2006).

There are no set standards for determining whether a remittitur is appropriate as any such decision is to be made on as "case-by-case" basis." *Entergy Miss., Inc. v. Bolden*, 854 So.2d 1051, 1058 (Miss. 2003). In making such a decision, the amount of physical injury, mental and physical pain, present and future, temporary and permanent disability, medical expenses, loss of wages and wage-earning capacity, sex, age and health of the injured plaintiff, are all variables to be considered in determining the amount of damages to be awarded. *Woods v. Nichols*, 416 So.2d 659, 671 (Miss.1982). Finally, "[a] remittitur is appropriate if there is insufficient proof to support the award of damages." *Entergy*, 854 So.2d at 1058.

The trial court's award in this case of $368,550.00 for past and future pain and suffering shocks the conscious when reviewed in the light of the actual evidence in the record. The award was based on multiple erroneous conclusions by the trial court. The trial court awarded to the penny the amount of damages sought by both Plaintiffs. As a matter of law, this Court is compelled to find that the trial court's damages award was not based on a fair, thorough, and objective review and analysis of the evidence and testimony presented at trial. But that is not all. The vast majority of the bills presented in this case were either diagnostic in nature or for physical therapy which consisted primarily of ultrasound, hot packs, and electrical stimulation. [R 000046-000107]. The medical evidence and testimony that was given to a reasonable degree of medical probability showed that the injuries suffered by Ms. Weatherford as a result of the 1998 accident were only whiplash type muscle strains. There was no hospitalization, no past surgery, no future surgery, no broken bones, no disability, no impairment rating, no missed work, and no loss of wage earning capacity. The record also shows that Ms. Weatherford had numerous other medical and personal problems that affected her and were totally unrelated to the automobile accident in 1998.

In response to these facts, Ms. Weatherford suggests that the "testimony regarding Tammy's injuries and damages was not contradicted by any evidence presented by" the Appellant. (Appellee's brief, p. 24). Ms. Weatherford also contends that the Appellant is created a "straw man" because she failed to "put on evidence to directly contradict Tammy Weatherford's testimony or that of her treating physicians and experts." (Appellee's brief, p. 35-6). However, each of these arguments is patently wrong. Rather than set up a "straw man", the Appellant has relied on Ms. Weatherford's own words (which include the various histories that she gave to her medical providers), as well as the medical records themselves, the deposition testimony of Dr. Rutkowski (that was taken by the

Appellant) and the deposition testimony of Dr. Stueur (who primarily diagnosed muscle stains), all of which directly refute the argument proffered by Ms. Weatherford's lawyer.

The Mississippi Supreme Court in the *Entergy Miss., Inc. v. Bolden* case cited above found that an award of $532,000.00 which only included $41,286.00 in specials should be remitted to $232,000.00. *Bolden,* 854 So.2d at 1058. The plaintiff in the *Bolden* case sustained injuries to her left side of her body which included her knee, shoulder and ankle. She had surgery on her left knee and a subsequent surgery on her ankle. She also missed work for a period of time resulting in lost wages in the amount of $9,600.00. As a result of her injuries she was assigned a 15% impairment to the left knee as well as a 10% impairment to the left ankle. Another relevant case where the Mississippi Supreme Court found that a remittitur was appropriate is the case of *Rawson v. Midsouth Rail Corporations*, 738 So.2d 280 (Miss. 1999). In the Rawson case, the Court affirmed a remittitur from $187,000 to $75,000 where $167,000 of the verdict was attributable to pain suffering. At trial, the plaintiff in *Rawson* complained of some type of pain every day since the accident. *Id.* at 285. However, there were no broken bones, no hospitalizations, no surgery, and as with the instant case, the plaintiff ultimately stopped working due to completely unrelated problems. *Id.* at 286. Following the standards set out in the *Bolden* and *Rawson* cases, the only conclusion that can be reached is that a significant remittitur is required in the instant case.

III. THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE LIFE EXPECTANCY TABLES NOT PRODUCED PRIOR TO TRIAL

Ms. Weatherford contends that the trial court's erroneous admission of life expectancy tables over the objection of counsel for the defendant, was harmless error since the trial court could have taken judicial notice of the tables. However, no request was made for the trial court to take judicial

notice of the tables; the trial court did not in fact take judicial notice of these tables; and, there was no opportunity to be heard on the issue as required by Rule 201(e) of the Mississippi Rules of Evidence. Furthermore, there is no evidence to support the conclusion that these tables contain the kind of facts contemplated by Rule 201(b) of the Mississippi Rules of Evidence. Nevertheless, since judicial notice was neither asked for nor taken by the trial court, it is self evident that attempting to argue "judicial notice" does not cure the error.

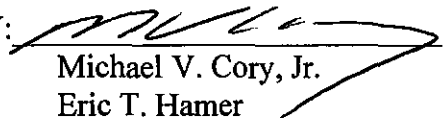
The Appellant sustained actual prejudice as a result of the admission of these life expectancy tables because the trial court used the assumptions contained in the life expectancy tables in calculating a per diem based award of damages for future pain and suffering. Since these tables were not produced prior to the trial, and since the Appellant had no notice of Ms. Weatherford's intent to introduce these tables at trial, the Appellant sustained actual prejudice by being denied the opportunity to present evidence through expert testimony showing that Ms. Weatherford's actual life expectancy was shorter than what was reflected in the life expectancy tables themselves based on her ongoing unrelated medical problems. *Terrain Ent., Inc. v. Mockbee*, 654 So.2d 1122, 1133 (Miss. 1995)(stating that error occurs when a party is prejudiced by another party's failure to seasonably supplement discovery responses with trial exhibits).

IV. CONCLUSION

Whether this case is reviewed under the normal standard of review, or a lessened standard of review, a remittitur, or a new trial on damages is required. For all of the reasons set forth herein this Court must either reverse with an appropriate remittitur, or alternatively, remand for a new jury trial on the question of damages.

RESPECTFULLY SUBMITTED, this the 17th day of December, 2008.

MARY MARTIN

BY: 
Michael V. Cory, Jr.
Eric T. Hamer

OF COUNSEL:

Michael V. Cory, Jr. (MSB#[redacted]
Eric T. Hamer (MSB#[redacted]
DANKS, MILLER, HAMER & CORY
Post Office Box 1759
Jackson, Mississippi 39215-1759
Telephone: (601) 957-3101
Facsimile: (601) 957-3160

CERTIFICATE OF SERVICE

I, Michael V. Cory, Jr., attorney for Mary Martin, do hereby certify that I have this day mailed, via United States Postal Service mail, postage pre-paid, a true and correct copy of the above and foregoing document to the following counsel of record:

William Noel Harris, Esq.
Harris Law Firm
225 S. Washington Ave.
Post Office Box 266
Greenville, MS 38702-0266
Counsel for Tammy Weatherford and Richard Williams

Hon. Ashley Hines
Washington County Circuit Court
Post Office Box 1315
Greenville, Mississippi 38702-1315
Washington County Circuit Court Judge

This the 17th day of December, 2008.

Michael V. Cory, Jr.
Eric T. Hamer