

**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**

**BRIEF OF APPELLANT
(Oral Argument Requested)**

Of Counsel:

Michael V. Cory, Jr. (MSB No. [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 22nd day of August, 2008.

DANKS, MILLER, HAMER & CORY


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

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES	i
TABLE OF CONTENTS	ii, iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE ISSUES	1
STATEMENT OF THE CASE	1
A. Nature of the Case	1
B. Procedural History	2
C. Statement of the Facts	2
SUMMARY OF THE ARGUMENT	14
ARGUMENT	17
A. Applicable law and standard of review	17
B. The trial court erred in finding that the March 14, 2007, MRI was reviewed by Dr. Rutowski	18
C. The trial court erred in finding that based on the March 29, 2007, MRI, Dr. Rutowski was of the opinion that Ms. Weatherford suffered from mild stenosis or a bulging disk in her cervical spine as a result of the January 9, 1998, accident	19
D. The trial court erred in finding that Dr. Rutkowski recommended that Ms. Weatherford have surgery	20

involves a long and convoluted medical history.

B. PROCEDURAL HISTORY

The Complaint in this case was filed on February 1, 1999, in the Circuit Court of Washington County, Mississippi. The plaintiffs were Tammy Weatherford ("Ms. Weatherford") and Richard Williams. The defendants were Mary A. Martin, a minor and her father, Fred Martin. The defendants timely answered the complaint on March 1, 1999. In the defendants' answer, the defendants' admitted that the defendant, Mary Martin, was negligent at the time of the accident.

The case was tried before the trial judge on May 17, 2007. On September 20, 2007, the trial court filed its FINDINGS OF FACT AND CONCLUSIONS OF LAW, awarding the plaintiff Tammy Weatherford total damages in the amount of \$396,608.86.¹ This award consisted of medical expenses of \$28,058.86, and damages for past and future pain and suffering in the amount of \$368,550.00. [RE 1-8; CP 162-169]. The trial court also entered its FINAL JUDGMENT on September 20, 2007. [RE 9; CP 170].

The Defendant filed DEFENDANT'S MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW, TO REOPEN THE PROOF, FOR A REMITTITURE, OR FOR A NEW TRIAL on October 1, 2007. [RE 10-14; CP 172-176]. The trial court entered its ORDER denying the Defendant's motion on October 18, 2007. [RE 15-16; CP 183-184]. The Defendant filed its Notice of Appeal on November 7, 2007, in which the Defendant only appealed the judgment and award in favor of Ms. Weatherford. [RE 17; CP 188].

C. STATEMENT OF THE FACTS

¹The trial court also awarded plaintiff Richard Williams the total sum of \$27,500.00. However, this award has not been appealed.

1. At the time of the trial in this matter, the plaintiff, Tammy Weatherford was a 37 year old female. [RE 18; T 6]. Her educational background consisted of finishing the 11th grade and obtaining her GED in November 2006. [RE 19; T 7].

2. At the time of the accident at issue in this case, Ms. Weatherford was employed at Bing's Discount Foods as a front-end supervisor. [RE 25; T 19]. Her job responsibilities included watching "after the front-end cashiers and baggers and tell them when to go on breaks and to go home for the evening or whatever, approve checks, voids, things like that." She also would help with bagging when "there wasn't someone else to bag." [RE 25; T 19].

3. With respect to Ms. Weatherford's claimed neck and right shoulder pain, which are the lynch pin of the damages award in this case, she testified at trial that:

A. throughout my her treatment, I had neck pain that "was always present." [RE 25; T 19].

B. "I still have most of my problems out of my neck and shoulder." [RE 27; T 29].

C. my neck and shoulder problems have continued "[d]aily" since the accident . . . [i]t gets better and worse . . . and sometimes its worse depending on my activity level and what I do during the day and sometimes the weather." [RE 27; T 29].

D. the neck "pain was always present . . . [o]n a daily basis, it's there at one point or another." [RE 45; T 87].

E. with regard to my arm and shoulder, this pain "started from my neck, went across to my shoulder; and from my shoulder, went down to my elbow and into my finger - fingers. It was more of a tingling and a burning or a - - it's kind of hard to explain, but a tingling and a burning and a hurting all at the same time." [RE 34; T 48].

F. I "wasn't able to lift as much as I used to be able to lift, and I was so numb so I wasn't able to grasp things and hold them as much as I could." [RE 35; T 49].

G. "I never said that I couldn't use it, use my neck and my arm . . . I still use it even though it hurts." [RE 46; T 89].

4. The accident which supposedly caused this neck and shoulder pain occurred on January 9, 1998. According to Ms. Weatherford's trial testimony, she was an unrestrained passenger in a Ford Escort being driven by her then boyfriend, Richard Williams ("Mr. Williams"). [RE 20; T 8]. Immediately prior to the accident, Mr. Williams had stopped his car to make a left turn. While stopped, they were rear ended by a car that was being driven by the Mary Martin. When asked to describe the impact, Ms. Weatherford testified that she had "never been hit that hard." [RE 21; T 9]. The Photographs of Mr. William's Ford Escort taken after the accident show a moderate impact. [RE 49-50; R 1-2].

5. Ms. Weatherford testified that as a result of the impact, she hit her head on the headrest, and that because she was unrestrained, her foot flew up against the windshield while she was trying to hold herself down. [RE 22; T 10].

6. Following the accident, an ambulance arrived at the scene. However, Ms. Weatherford declined to go to the hospital in the ambulance because she felt "okay" and was walking around. She also testified that "I didn't have any, you know, you know, physical things that I would see wrong with me." [RE 23; T 13]. However, later that same day, Ms. Weatherford went with her mother to the emergency room at Delta Regional Medical Center in Greenville, Mississippi.

7. At Delta Regional, Ms. Weatherford complained of tingling in her head where her head had hit the headrest, and stiffness in her neck and back. [RE 24; T 15]. According to the Emergency Department Report, she was noted to be an obese 27 year old female in no acute distress. [RE 65; R 163]. After a full examination, Ms. Weatherford was diagnosed with a left scalp hematoma, multiple sprains and strains. [RE 65-66; R 163-64]. She was excused from work for two days, and was discharged home "in good condition." [RE 64; R 162].

8. On January 13, 1998, Ms. Weatherford went to Dr. Joe Pulliam at Family Medical Clinic. On this visit, Ms. Weatherford reported that “at times she has increasing spasm in her cervical spine and has occasional numbness and tingling in her fingers.” However, the neurological examination on this visit was “**normal,**” and “**no deficits whatsoever noted.**” [RE 61; R 122].

9. On February 2, 1998, Ms. Weatherford again went to Dr. Pulliam. The clinic note from this visit reflects that the “exam is without change.” Ms. Weatherford reported that her “**spasm in her neck has decreased significantly,**” and that she is “**mainly having low back pain with occasional radiculopathy.**” Ms. Weatherford had “full range of motion,” and again “no deficits noted.” There were no complaints on this visit of shoulder pain or arm pain. [RE 62; R 123].

10. On March 17, 1998, Ms. Weatherford went to see Dr. Pulliam. During this visit the exam revealed “full range of motion.” She was “still with chronic intermittent low back pain.” **There were no complaints of neck pain, right shoulder pain or right arm pain** on this visit, which was a little over two months after the accident. [RE 62; R 123].

11. On April 13, 1998, Ms. Weatherford went to Dr. Steuer at The Delta Pain Center. Dr. Steuer was a “pain specialist” who treated patients on a settlement assignment or lien basis. [RE 51-54, 55-59, 135; R 70-73, 76-80, 649]. His practice started in California and he ultimately moved to Greenville. [RE 131; R 609]. His medical licences in California and Mississippi were “**revoked** with automatic stay pending a successful probationary term of two years” sometime in 2000. (emphasis added). [RE 132; R 618].

12. At the time of this visit with Dr. Steuer, Ms. Weatherford’s pain complaint was now of “neck pain radiating down to the lower back.” There were no lower or upper extremity symptoms noted. She also described “progressively decreasing frequency of bifrontal and suprahelical

headache . . . often associated with nausea and photophobia, alleviated with dark room environment, **and typically triggered with menses.**" She also stated that she "sleeps poorly" and was doing "minimal exercise." Dr. Steuer's impressions were "cervical and thoracic whiplash injury; myofascial syndrome, mixed headache disorder." [RE 84-87; R 271-74].

13. On May 11, 1998, Ms. Weatherford was seen by Dr. Steuer. On this visit Ms. Weatherford told Dr. Steuer that she does not "have constant pain but it seems to get worse as the day grows." He also noted that the neck pain she was complaining of on this day "radiates into right shoulder blade and deltoid areas." [RE 88; R 279].

14. On May 19, 1998, Ms. Weatherford was again seen by Dr. Steuer. On this visit she reported a 60% improvement to lower back. She told Dr. Steuer that she had "rode her bike yesterday and was able to her lift laundry today." She denied any headaches, "but does complain of slight tension across the back of shoulder blade." There are no complaints of neck pain. [RE 89; R 281].

15. On June 1, 1998, Ms. Weatherford was again seen by Dr. Steuer. On this visit she reported a complaint of "headache" and low back pain "that has progressively gotten worse over past week." [RE 89; R 281]. On this visit, Dr. Steuer gave Ms. Weatherford a two day work excuse "**due to menses.**" [RE 90; R282]. **There are no complaints of neck, right shoulder, or right arm pain.**

16. On June 15, 1998, Ms. Weatherford was again seen by Dr. Steuer. On this visit she reported that her "back pain is 50% improved and she denied any headaches." [RE 91; R 287]. There are no complaints of neck, right shoulder or right arm pain.

17. On June 29, 1998, Ms. Weatherford went to physical therapy. At the time of this visit, she advised that "she has been able to carry out her job with only minimal pain now" and reported

that her present pain level was at "3/10." [RE 80; R 224]. The therapist also noted that the patient "was previously at a minimum spasm level and is now at a minimal/absent level."

18. On July 21, 1998, Ms. Weatherford was again seen by Dr. Steuer. During this visit, Dr. Steuer noted that she "has gotten much improvement in her low back pain through P.T." Her low back pain "is improved to 60% now, **but she does experience increased headaches and low back pain around her menses.**"² [RE 91; R 287]. There are no complaints of neck pain, right shoulder pain, or right arm pain.

19. On October 8, 1998, Ms. Weatherford went to physical therapy where she reported "that her back and shoulder feels much better and that **she is working where she is able to bend over and reach for objects and she is able to do this without pain as well.**" [RE 81; R 255].

20. On October 15, 1998, Ms. Weatherford went to physical therapy where she reported that "**she is pain free most of the time while at work as long as she continues her exercises.**" [RE 82; R 257]. She subsequently was discharged from physical therapy on November 3, 1998, apparently because her "maximum potential for rehab had been met." [RE 83; R 264]. She continued to occasionally see Dr. Steuer through July 1999.

21. On September 23, 2000, Ms. Weatherford was seen at the emergency room at The Kings Daughters Hospital in Greenville. At this time, she was still employed at Bings Super Value. [RE 92; R 311]. She reported complaints of back pain and right shoulder pain. [RE 93; R 316]. Ms. Weatherford was instructed to follow up with Dr. Jenkins, a Rheumatologist, which she apparently declined to do. [RE 25; T 19]. It appears there was a period of more than a year prior to this visit

²Dr. Rutkowski, one of the Ms. Weatherford's treating physicians, also testified that increased weight is a factor with regard to a person's propensity for low back pain. [RE 139-140; R 746-7].

during which time Ms. Weatherford apparently sought no medical treatment.

22. On November 5, 2000, Ms. Weatherford was seen at the emergency room at Delta Regional Medical Center with a complaint of being **hit in the jaw with a fist**. She was diagnosed with a contusion to her left jaw. [RE 68-69; R 171-72]. According to Ms. Weatherford, she was trying to break up a fight between "friends." [RE 41; T 68]. She went to the hospital to make sure she did not have "a broken jaw" because "I had never been hit like that before." [RE 42; T 69]. She also had "bruises to arms from being held." [RE 44; T 79]. There are no complaints of any neck pain, back pain, right shoulder pain, or right arm pain.

23. On June 21, 2001, Ms. Weatherford was seen at the Greenville Clinic with complaints of "itchy watery eyes off and on for several months." She asked that her "thyroid and sugar be tested" and reported that "she has had a lot of fatigue." Her neck was noted to be "supple." **There are no complaints of neck pain, back pain, right shoulder pain, or right arm pain.** Ms. Weatherford was diagnosed with allergic conjunctivitis and fatigue. Weight loss and exercise were recommended. [RE 63; R 128].

24. On October 31, 2001, Ms. Weatherford was seen in the emergency room at The King's Daughters Hospital. [RE 94; R 321]. She had been involved in an automobile accident while riding with her then boyfriend, Frank Honeycutt. Mr. Honeycutt attempted to run from a policeman who was trying to pull him over and ended up running the car off into a ditch. [RE 38-40, 95-96; T 65-67; R 322-323]. As a result of this accident, Ms. Weatherford suffered contusions to her chest, bruising to her left hip, left side of chest, right shoulder and abrasions to her side. In comparison, she had no similar significant contusions, bruising or the like as a result of the January 1998 accident. She also testified that she went to the hospital to make sure that she "didn't break a rib or

something.” [RE 40; T 67]. There were no complaints of back pain, right shoulder pain, or right arm pain. As a result of this accident, Ms. Weatherford was ultimately off work for a week from October 31, 2001 to November 7, 2001. [RE 97-98; R 340-41]. In contrast, she was only excused from work for two days following the January 1998 accident.

25. There was another extended period of more than a year where Ms. Weatherford apparently sought no medical treatment which included the entire 2002 calendar year.

26. On August 13, 2003, Ms. Weatherford was seen at the Greenville clinic with “numerous complaints.” According to the history taken, Ms Weatherford “was in a wreck in 1998 and she still relates it to some neck, mid-back pain, and low back pain.” No mention is made of the accident in October 2001. The record from this visit also states that:

- she complained of “weakness in her arms at times;”
- gave a history of “reflux disease, and trouble off and on with heartburn;”
- on examination, her neck was noted to be “supple;”
- on examination she had “good strength in lower extremities;”
- on examination she had “good strength in her upper extremities;”
- “grip is +2 and equal bilaterally;”
- “she has a smooth even gait;”
- “her balance does not seem to be disturbed although she reported some disturbance in her gait and balance;” and,
- her “heel and toe walking is normal.” [RE 63; R 128].

27. On August 27, 2003, an MRI was taken of Ms. Weatherford’s cervical spine. According to this imaging study: the “C2-3, C3-4 levels exhibit no disc herniation or spinal stenosis;” “C4-5

suggest some spondylotic change” which may be related to “motion artifact;” C5-6 “exhibits considerable motion artifact on the axial images making evaluation difficult” but there “may be some mild spinal stenosis present at this level;” C6-7 “exhibits some slight disc bulging.” [RE 70; R 187].

Because of the patient movement during the MRI, the radiologist specifically stated in his conclusion that this imaging was a “suboptimal evaluation . . . secondary to motion artifact.”

This radiologist also suggested that a “cervical myelogram with CT scanning may be of value to ascertain whether significant disease is present.”³ The MRIs of the thoracic and lumbar spine showed no evidence of disc herniation or spinal stenosis. [RE 71-72, 127-128; R 188-189, 525-526].

28. On October 7, 2003, Ms. Weatherford was seen by a neurosurgeon by the name of Dr. William Capel. Her chief complaint on this visit was neck pain and right arm pain. She gave a history to Dr. Capel of “neck pain, right arm pain, since” the 1998 accident. She was noted to have asthma and high blood pressure. On physical examination, Dr. Capel noted that she had “full range of motion of the neck without neurologic systems.” According to Ms. Weatherford, Dr. Capel told her that it was “unlikely” that she would need any surgery as long as she did her exercises. He also noted that the August 27, 2003 MRI had “very limited resolution.” [RE 127-138, 28; R 535- 536, T 33].

29. Sometime between March 2004 and May 2004, Ms. Weatherford stopped working at Bings and lost her health insurance because the doctor “had me scheduled to be off for - - it was almost a month which had to do with my blood pressure and different things.” [RE 30-31; T 37-8].

³Ms. Weatherford testified at trial that she did not get the myelogram done because “I had talked with my manager at Bing’s because he had had that procedure done, and he said that it was painful, and that it really did not help his situation.” [RE 29; T 34].

Ms. Weatherford specifically testified that during this time period 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 31; T 38].

30. On August 15, 2004, Ms. Weatherford was seen at the Emergency Room at The King’s Daughters Hospital. She presented with a complaint of moderate right arm pain which she said had started two (2) days previously. [RE 99-102; R 345-348]. Ms. Weatherford testified that she had a shooting right arm and shoulder pain after “cleaning that day at the house.” [RE 32-33; T 40-41].

31. On September 28, 2004, Ms. Weatherford was seen at the Greenville Rural Health Clinic. At this time, her weight was reported to be 231 pounds. She needed a refill of blood pressure medications and complained of headache and back pain. On this visit, she reported that her pain was an “8” on a scale of “0-10”. She was referred to another physician for sleep apnea. She also was noted to have hypertension, degenerative disc disease, chronic headache, fatigue/obesity, right scapula pain. There are no complaints of neck pain, or right arm pain. [RE 103-104; R 385-386].

32. Also on September 28, 2004, Ms. Weatherford was seen by Dr. John Hey for her sleep disorder problems. Ms. Weatherford gave a ten year history of snoring, apneic symptoms, moving about in bed a lot, and moderate excessive daytime sleepiness. She also reported: daytime fatigue; going to bed at 10 o’clock and gets up at about 10 o’clock; morning headaches; and, depression and anxiety symptoms. She has gastroesophageal reflux disease and heartburn. Her height was noted to be 5' 2" and her weight was recorded to be 235 pounds. Dr. Hey diagnosed her with morbid obesity, high blood pressure and probable obstructive sleep apneas and/or snoring.⁴ [RE 105-106;

⁴On October 5, 2004, Nocturnal Polysomnogram confirmed that Ms. Weatherford had obstructive sleep apnea. [RE 107-108; R 404-05].

R 390-391].

33. On March 10, 2005, Ms. Weatherford was seen at Kings Daughters Hospital for depression with an admitting diagnosis of depressed TSH and underwent thyroid testing. [RE 109; R 442].

34. On March 17, 2005, an MRI of her Cervical spine showed “mild to moderately significant midline disease at C4-5 through C6-7.” [RE 73; R 196]. However, the report notes that the “[a]xial studies are limited as to clarity and resolution due to the low strength magnet and also the size of this individual.” The radiologist also noted that “**better resolution . . . would be very helpful.**” The lumbar and thoracic MRI had no “positive findings” and “no abnormalities” respectively. [RE 74-75; R 197-198].

35. On March 18, 2005, Ms. Weatherford was seen at the Greenville Rural Health Clinic with abdominal epigastric pain. [RE 111-112; R 452-453]. There were no complaints of neck pain, back pain, right shoulder pain, or right arm pain. Examination of the neck and back were normal.

36. On March 21, 2005, Ms. Weatherford was seen at King’s Daughters Hospital for epigastric pain. [RE 110; R 448].

37. On October 31, 2005, Ms. Weatherford was seen at the Delta Regional Health Clinic to get a refill on her cholesteral medication. No other complaints were noted. [RE 113; R 471].

38. On November 14, 2005, Ms. Weatherford filled out a form for Delta Regional Health Clinic where she indicated that she had a history of allergies, arthritis, asthma, heart disease, high blood pressure, migraine headaches, obesity, sinus or hay fever problems, and ulcer. [RE 114; R 475].

39. On May 2, 2006, Ms. Weatherford was seen at the Delta Regional Health Clinic.

According to this medical record, she came in for a follow up on her back pain. Her back pain was noted to be a "2" on a scale of 0-10. There were no complaints of neck pain. A neck examination was performed which was noted to be normal. The examination of her extremities was normal with full range of motion. There were no neurological complaints noted. The only other complaint noted was of abdominal pain from eating high fat foods. On this visit, Ms. Weatherford was diagnosed with hypertension, abdominal pain, back pain, gastroesophageal reflux disease and allergic rhinitis.⁵ [RE 115-116; R 483-484].

40. On July 11, 2006, Ms. Weatherford was seen at Delta Regional Health Clinic for a follow up visit and to refill her medications. She also complained of "back pains." However, her pain level was noted to be "0" on a scale of "0-10." There were no complaints of neck or shoulder pain. The neck examination was normal. She had full range of motion of her extremities. No other complaints were noted except for a "moderately tender L-spine." She was diagnosed with low back pain, hypertension, HDL (cholesterol), joint pain, sleep apnea, chronic gastritis, and hypokalemia (low potassium). [RE 119-120; R 502-503].

41. On January 23, 2007, Ms. Weatherford was seen at Delta Regional Health Clinic to obtain a refill of her medications. Her pain was recorded to be "0" on a scale of "0-10." Neck examination was noted to be normal and she had full range of motion in her extremities. [RE 121-122; R 512-513].

42. On February 1, 2007, a "Disability Report Form" was filled out by Debbie Verble, a

⁵On May 3, 2006, Ms. Weatherford had a heart study which showed possible left atrial enlargement. [RE 118; R 495]. On May 5, 2006 – Ms. Weatherford had a Gallbladder Ultrasound which was negative to check for Gallstones. [RE 117; R 489].

Nurse Practitioner, who had been treating Ms. Weatherford. According to this form, Ms. Weatherford was making a disability claim due to “degenerative disc disease, bulging disc, sleep apnea, obesity, and high blood pressure.” The Nurse Practitioner was of the opinion that Ms. Weatherford had chronic hypertension, chronic degenerative disc disease, chronic cholesterol problems, chronic obesity, and chronic gastritis. [RE 123-126; R 517-520].

43. On March 14, 2007, an MRI of the Cervical spine showed that “the cervical spine is relatively straight with just a mild reversal of the curve, hypophotic at about C3-5.” The MRI report also notes that the “nerve roots, cord, and neural foramina were negative at all levels” and that no “facet disease” could be appreciated. **Most importantly, the radiologist reviewing the film concluded that there were “no significant findings.”** [RE 48, 76; T 102; R 201]. Thoracic and Lumbar spine MRIs done on this same day also were negative. [RE 77-79; R 203-205].

44. On March 29, 2007, Ms. Weatherford went to see Dr. Lenard J. Rukowski with subjective complaints of “7/10 neck pain and discomfort going down the right shoulder and to the third and fourth fingers with numbness and tingling . . . since an accident in January of 1998 when it started.” Muscle testing of the biceps, triceps, brachioradialis, deltoid, grips, interossei, quadriceps, hamstrings, gastrocnemius, soleus, and extensor hallucis is 5/5, symmetrical and normal. Exam normal except for decreased range of motion of the neck to the right side. [RE 60; R 112].

SUMMARY OF THE ARGUMENT

The trial court’s award of more than three hundred thousand dollars (\$300,000.00) to Ms. Weatherford was based on numerous factual findings that are not supported by substantial, credible and reliable evidence. The trial court concluded that Ms. Weatherford’s complaints of pain were proximately caused by the accident on January 9, 1998, based in part on its finding that a March 14,

2007 MRI was actually “reviewed by Dr. Rutkowski, a board certified neurologist” who testified by deposition in this case. [RE 66-67; R 164-165]. However, Dr. Rutkowski actually testified that he “didn’t see” the MRI taken on March 14, 2007. [RE 149; R 760]. This March 14, 2007, MRI is particularly important in this case because the actual MRI reviewed by Dr. Rutkowski, was of poor quality due to “motion artifact.” [RE 138, 147-150; R 745, 758-761]. Most importantly, the March 14, 2007, MRI actually showed that there was no injury to the plaintiff’s spine. [RE 48, 76; T 102; R 201].

The trial court also erroneously found that based on this March 14, 2007 MRI, Dr. Rutkowski was of the opinion that Ms. Weatherford suffered from “mild stenosis or bulging disk in her cervical spine” as a result of the January 9, 1998, accident. [RE 66-67; R 164-165]. This finding was in error both because Dr. Rutkowski was not privy to the March 14, 2007, MRI, and because Dr. Rutkowski **did not** testify that Ms. Weatherford suffered from mild stenosis or a bulging disc as a result of the January 9, 1998, accident. He specifically testified that “it is unlikely that it would be a cause of spinal stenosis.” [RE 152; R 765]. Also, and even without the benefit of the March 14, 2007 MRI, which did not show a bulging disc, much less a slight bulging disc, Dr. Rutkowski did not testify that the January 9, 1998, automobile accident caused a bulging disc. [RE 71-72; R 188-189].

The trial court also erroneously found that Dr. Rutkowski recommended that Ms. Weatherford have surgery. [RE 67; R 165]. Dr. Rutowski actually testified that “[s]urgery is an option in her case based on symptomatology . . . [b]ut in the context of the motor vehicle accident, I’m having a hard time putting that all together.” [RE 143; R 751]. So even without the benefit of the March 14, 2007, MRI, which showed no stenosis or abnormalities, he did not testify that he had recommended, or was recommending, surgery. Moreover, given the March 14, 2007, MRI results,

which do not even show a mild disc bulge or mild stenosis, there is no injury or condition to even operate on.

The trial court erroneously found that “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]. However, the fact that the March 14, 2007, MRI was negative combined with the testimony of Dr. Rutowski completely contradicts the finding of a “significant injury to her neck, right shoulder, right arm, and back.”

The trial court erroneously found that the lifestyle adjustments claimed by Ms. Weatherford were “a result of her pain” from the January 9, 1998, accident. [RE 66-67; R 164-165]. However, the medical records in their entirety show that any decrease in Ms. Weatherford’s quality of life was not the January 1998 accident, but instead were the various other health problems that Ms. Weatherford had and which were completely ignored by the trial court. The testimony of Dr. Rutkowski combined with the MRI done on March 14, 2007, which indicated that there were “no significant findings,” does not support the trial court’s finding that Ms. Weatherford’s alleged lifestyle adjustments were proximately caused by the automobile accident on January 9, 2008 .

Finally, over the objection of counsel for the defendant, the trial court admitted into evidence certain life expectancy tables not produced or identified prior to trial. The Defendant was prejudiced as a result because she was denied the opportunity to retain an expert witness to rebut the specific life expectancy assumptions based on Tammy Weatherford’s numerous documented medical conditions.

Based on erroneous findings, the trial court awarded a total of Three Hundred Seven

Thousand Eight Hundred Dollars (\$368,550.00) for past and future pain and suffering. However, the record shows that at most, the Plaintiff sustained some muscle strains and pains as a result of the January 1998 automobile accident. Therefore, the trial courts damages award must be remitted or reversed and remanded for a new trial on damages since the record shows that there was simply no substantial, credible and reliable evidence which supports the trial Court's pain and suffering award.

ARGUMENT

A. APPLICABLE LAW AND STANDARD OF REVIEW

As this Court is aware, "a circuit court judge sitting as the trier of fact is given the same deference with regard to his fact finding as a chancellor, and his findings are safe on appeal when they are supported by substantial, credible, and reliable evidence." *Mississippi Dept. of Public Safety v. Durn*, 861 So. 2d 990, ¶8 (Miss. 2003).

With regard to remittiturs, Mississippi Code Ann. § 11-1-55 provides for remittitur where the Court finds that the "damages are excessive . . . for the reason that the jury or trier of fact was influenced by bias, prejudice, or passion, or that the damages awarded were contrary to the overwhelming weight of credible evidence." (emphasis added). As the Mississippi Supreme Court has previously explained, "[i]n determining whether the circuit judge's award of damages was excessive, our standard of review is whether substantial evidence supports the award." *Jackson Public School Dist. v. Smith*, 875 So.2d 1100, ¶19 (Miss. 2004). The Court also has held that "a circuit judge, sitting as a trier of fact, is accorded great deference but his finding is treated the same as a jury verdict when he or she ignores the weight of the evidence." *Mississippi Dept. of Public Safety v. Durn*, 861 So.2d 990, ¶30 (Miss. 2003).

With regard to the questions concerning the admission or exclusion of evidence, the

F. THE TRIAL COURT ERRED IN FINDING THAT THE LIFESTYLE ADJUSTMENTS CLAIMED BY MS. WEATHERFORD WERE THE RESULT OF PAIN FROM THE JANUARY 9, 1998, ACCIDENT

The trial court found that the lifestyle adjustments claimed by Ms. Weatherford were “a result of her “pain” from the January 9, 1998, accident. [RE 66-67; R 164-165]. However, a review of the medical records shows that any decrease in Ms. Weatherford’s quality of life was not caused by the January 1998 accident, but rather was caused by Ms. Weatherford’s various other health and personal problems. 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]. The accident clearly was not the cause of conditions such as sleep apnea, obesity and high blood pressure. We also know that 2007 MRI was normal which means there is no bulging disc (mild or otherwise), there is no stenosis (mild or otherwise), and that there is no degenerative disc disease. For these reasons alone, the January 1998 accident could not be the cause of Ms. Weatherford’s claimed lifestyle changes.

Furthermore, Ms. Weatherford testified at trial that she stopped working at Bings and lost her health insurance between March and May 2004 (which was more than 6 years after the accident at issue in this case), because her doctor “had me scheduled to be off for - - it was almost a month which had to do with 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]. Therefore, according to Ms. Weatherford’s own testimony at trial,

requested on his behalf as well. [RE 1-8, 10-14; CP 162-169, 172-176].

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

Over the objection of counsel for the defendant, the trial court admitted into evidence certain life expectancy tables that were not produced or identified by Plaintiffs' Counsel prior to trial. [RE 36-37; T 54-55]. The Defendant sustained actual prejudice as a result of the admission of these life expectancy tables because the trial court apparently 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 Defendant had no notice of the Plaintiffs' intent to introduce these tables at trial, the Defendant was denied the opportunity to retain an expert witness to show, based on Tammy Weatherford's numerous documented medical conditions, that her actual life expectancy was significantly shorter than what was reflected in the life expectancy tables themselves. *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).

For these reasons as well this case should be reversed for a new trial on damages.

I. THE TRIAL COURT ERRED IN FAILING TO EITHER AMEND ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW; OR ORDER A REMITTITUR; OR GRANT A NEW TRIAL

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.


CONCLUSION

The Appellant in this case has unquestionably demonstrated that the trial Court's damages

award to Ms. Weatherford was based on erroneous findings and conclusions. At most, the Plaintiff sustained some muscle strains and pains as a result of the January 1998 automobile accident. Therefore, since the record itself shows that the trial court's award in this case was not supported by the substantial, credible and reliable evidence, a remittitur, or in the alternative, a new trial on damages is required.

RESPECTFULLY SUBMITTED, this the 22 day of August, 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 22nd day of August, 2008.



Michael V. Cory, Jr.
Eric T. Hamer