

VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

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CLERK, CIRCUIT COURT
FAIRFAX VA

KAREN SANTORUM)
Plaintiff,)
v.)
DAVID B. DOLBERG, D.C.)
and)
KINGS PARK FAMILY CHIROPRACTIC)
CENTERS, P.C.,)
Defendants.)

At Law No.: 175800

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO SET ASIDE VERDICT/MOTION FOR REMITTITUR

COMES NOW, Plaintiff, by and through counsel, Richard Holzheimer, Esquire, and Miles & Stockbridge, P.C. and Heather S. Heidelbaugh, Esquire and Burns, White & Hickton and hereby submits the within Brief in Opposition to Defendants' Motion to Set Aside Verdict/Motion for Remittitur.

DEFENDANTS' MOTION TO SET ASIDE VERDICT/MOTION FOR REMITTITUR SHOULD BE DENIED FORTHWITH SINCE THE JURY VERDICT OF \$350,000 IS RATIONALLY RELATED TO THE EVIDENCE OF DAMAGES PUT FORTH BY THE PLAINTIFF AT TRIAL IN THIS MATTER.

The above chiropractic malpractice case went to trial on December 6, 1999. After the jury calmly listened to the evidence for four full days, the jury began its deliberations. The jury deliberated for over six hours and rendered a verdict for the Plaintiff in the amount of \$350,000.00. The Defendants are unhappy with the verdict awarded and have filed a Motion to Set Aside the Verdict / Motion for Remittitur. However, there is no basis upon which to grant the same.

Circumstances which compel setting aside a jury verdict include a damage award that is so excessive that it shocks the conscience of the court, creating the impression that the jury was influenced by passion, corruption, or prejudice; that the jury has misconceived or misunderstood the facts or the law; or, the award is so out of

proportion to the injuries suffered as to suggest that it is not the product of a fair and impartial decision.

Poulston v. Rock, 251 Va. 254, 258, 467 S.E.2d 479, 482 (1996). Herein, the Defendants have only complained that the verdict was so excessive that it shocks the conscience of the court, creating the impression that the jury was influenced by “sympathy, or the jury being inflamed, and/or some other extraneous factor.” See, Memorandum in Support of Motion, p. 5.

It is within the province of the jury to measure the quantum of damages in a particular case. *Simmons v. Boyd*, 199 Va. 806, 102 S.E.2d 292 (1958); *Williams Paving Co., Inc. v. Kreidl*, 200 Va. 196, 104 S.E.2d 758 (1958); *Phillips v. Campbell*, 200 Va. 136, 104 S.E.2d 756 (1958); *Lilley v. Simmons*, 200 Va. 791, 108 S.E.2d 254 (1959). However, there is no bright line test for measuring damages in a personal injury case. *Virginia Elec. and Power Co. v. Dungee*, 520 S.E.2d 164 (Va. 1999).

A precise standard for measuring damages for injury and suffering has not been found. The opinion of a jury, acting on credible evidence and under proper instructions, usually furnishes a reasonable standard, and should not be supplanted by a different opinion [of the court] without a clear showing that it has been formed by improper factors.

Modaber v. Kelley, 232 Va. 60, 384 S.E.2d 233 (1986)(emphasis added); *Translift Equip., Ltd. v. Cunningham*, 234 Va. 84, 360 S.E.2d 183 (1987). “[A] just compensation may vary widely in different cases, even where the physical injury is the same....” *Phillips, supra*. Thus, each case must be reviewed based upon its particular facts. *Simmons, supra*. Typical factors considered by courts in determining whether to deny a motion to set aside a verdict/motion for remittitur include the following: **the age of the plaintiff; the nature and extent and duration of the injury sustained; the effect of the injury on the normal activities of the plaintiff; the nature and extent of the pain, suffering, humiliation and embarrassment; past and future medical**

expenses; costs of special treatment and the jury instructions. *See, Modaber, supra; Simmons, supra; Williams, supra; Phillips, supra; Lilley, supra.*

At the trial in this case, the Plaintiff presented abundant evidence of past and future pain and suffering to support the \$350,000.00 verdict. Mrs. Santorum is a 39 year old woman, a nurse and attorney by training, a wife and mother of three children at the time of the injury. (She presently has five children.) Prior to the malpractice and injury, she was very active in her husband's campaigns and enjoyed vigorous exercising. She also enjoyed all of the responsibilities of motherhood, including cleaning the home and caring for her infant and toddler children.

On November 15 and 16, 1996, Mrs. Santorum testified that Dr. Dolberg performed a violent manipulation upon her. Within hours after the first manipulation on November 15, 1996, she began to experience excruciating burning pain radiating into her leg, severe muscle spasms in her back, decreased sensation and diminished strength in her left leg and foot. *See, Trial testimony of Dr. Marion, pp. 32-33, 57-58.* On November 23, 1996, Mrs. Santorum testified that she presented herself to North Hills Passavant Hospital emergency department. *Id.*, pp. 26-31, 57-58. After an exam and radiologic studies confirming a herniated disc at L5-S1, Dr. Donald W. Marion, M.D., a neurosurgeon, recommended an emergency diskectomy and foraminotomy at L5-S1. *Id.*, p. 44.

Following the surgery, Mrs. Santorum had a post-operative recovery period of at least one-month. *Id.*, p. 45, 56. Following the immediate post-operative period, she continued to experience recurring back pain, numbness in both feet and her left leg and exacerbations of pain if she sits. *Id.* She also developed scar tissue as a result of the surgery which causes her additional pain. *Id.*, p. 65. Dr. Marion then testified that the prognosis for her numbness would

probably be permanent and would therefore cause her pain for the rest of her life. *Id.*, p. 66-67.

Dr. Marion also testified that Mrs. Santorum would have back and leg pain for the rest of her life.

Id., p. 67.

Dr. Marion testified that in the future Mrs. Santorum will benefit from an organized program of physical therapy for her back and legs throughout her life. She will also require over-the-counter and prescription drugs for pain for the rest of her life. *Id.*, p. 68-69. In addition, Mrs. Santorum is now at risk for future similar surgeries because people who have had one ruptured disk are at greater risk for other ruptured disks. *Id.*, p. 68.¹

Mrs. Santorum testified that in addition to the physical pain and suffering, she has experienced severe mental suffering. Both Mr. and Mrs. Santorum testified that the physical pain restricts her activities with her family life in that she cannot care for her children as she used to and now requires help. As any mother is aware, this is emotionally devastating. The physical pain also restricts her exercise activities and as a result she has gained weight. Mr. and Mrs. Santorum testified she is very conscious of her weight gain and therefore has curtailed many activities. She is also left with an incision scar on her back, which is embarrassing to her. Thus, her injuries are permanent and painful (physically and mentally) and will severely limited her pursuits and activities for the rest of her 41.5 years of life².

¹ The surgery and all related expenses in this case cost \$18,083.53. The current rate of inflation is 2.6%. If Mrs. Santorum was required to have one additional surgery five years from now, using the current rate of inflation, the surgery would cost \$20,434.39. If she required additional surgeries, the cost obviously would increase.

² It was uncontested that Mrs. Santorum has a life expectancy of 41.5 years, and the jury was charged to consider the same in determining damages.

After the trial, the jury was properly charged to fully and fairly compensate Plaintiff only for those damages she sufficiently proved by the greater weight of the evidence that she sustained as a result of the Defendants' negligence, considering the following items:

- (1) any bodily injuries she sustained and their effect on Plaintiff's health according to their degree and probable duration;
- (2) any physical pain and mental anguish Plaintiff suffered in the past and any that she may be reasonably expected to suffer in the future;
- (3) any disfigurement or deformity and any associated humiliation or embarrassment;
- (4) any inconvenience caused in the past and any that probably will be caused in the future; and
- (5) any medical expenses incurred in the past and any that may be reasonably expected to occur in the future.

The jury deliberated for over six hours and considered her past pain and suffering, past medical bills, her future pain and suffering and medical bills, the permanency of her injury, her scar, her embarrassment, her humiliation and the effect on her normal activities and based on the same rendered a verdict in the amount of \$350,000.00.

In sum, it is reasonable to assume the jury concluded that Mrs. Santorum now has five children to raise with permanent back and leg pain, as well as permanent numbness. Thus, contrary to Defendants' assertions, the verdict was based on evidence fairly and competently adduced according to the facts of the case. Nothing in the record suggests, nor do the Defendants point to any evidence, that the jury was motivated by sympathy, prejudice or corruption.

Defendants do not point to any "clear" evidence of record to allow this court to set aside or remit the verdict so as to avoid reversal on appeal. Under these circumstances, Plaintiff submits that the amount of the verdict does not shock the conscience or create an impression that the jury acted from improper motives. Consequently, there is no evidence to support setting aside the verdict or to grant a remittitur.

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