IN THE COURT OF APPEALS OF TENNESSEE
AT JACKSON
April 23, 2014 Session

DONRIEL A. BORNE v. CELADON TRUCKING SERVICES, INC.

Direct Appeal from the Circuit Court for Shelby County
No. CT-003273-10 Robert S. Weiss, Judge

No. W2013-01949-COA-R3-CV - Filed July 31, 2014

Plaintiff was injured in an accident involving three tractor-trailer trucks. Plaintiff, who was driving a tractor-trailer, sued the other truck drivers and the trucking company owners of the vehicles. However, prior to trial, Plaintiff entered into an agreement with one of the trucking companies whereby Plaintiff and the agreeing defendant agreed to cooperate regarding the litigation and to work together to expose the defenses asserted by the non-agreeing defendant. The jury returned an itemized verdict of $3,705,000 for the Plaintiff against the non-agreeing defendant. The trial court denied the non-agreeing defendant's motion for a new trial, but it suggested a remittitur of $1,605,000, for a total award of $2,100,000. Plaintiff accepted the remittitur under protest and the non-agreeing defendant appealed to this Court. For the following reasons, we affirm in part and we reverse in part. Specifically, we affirm the physical pain and mental anguish and permanent injury awards as reduced by the trial court; we reverse the trial court's suggested remittitur of the loss of earning capacity award and we instead reinstate the jury verdict of $1,455,000; and we further reduce the loss of enjoyment of life award to $50,000. Thus, we approve a total award to Plaintiff of $2,105,000.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Circuit Court Affirmed in Part, Reversed in Part

ALAN E. HIGHERS, P.J., W.S., delivered the opinion of the Court, in which DAVID R. FARMER, J., joined and J. STEVEN STAFFORD, J., dissented separately.

Dwight E. Tarwater, Ryan M. Connor, Knoxville, Tennessee; Jim Summers, Kevin W. Washburn, Memphis, Tennessee, for the appellant, Celadon Trucking Services, Inc.

R. Sadler Bailey, Thomas R. Greer, Memphis, Tennessee, for the appellee, Donriel A. Borne

OPINION

I. FACTS & PROCEDURAL HISTORY

On July 1, 2009, three tractor-trailer trucks were involved in an accident on Interstate 55 in Memphis, Tennessee. The first tractor-trailer, driven by Donriel A. Borne ("Plaintiff"), was stopped in a construction zone when it was rear-ended by a tractor-trailer owned by Celadon Trucking Services, Inc. ("Celadon") and driven by Harold Foster. The Celadon truck was then apparently rear-ended by a tractor-trailer owned by Chickasaw Container Services, Inc. "(Chickasaw") and driven by Steve Dondeville.

On June 30, 2010, Plaintiff,[1] who allegedly suffered back and neck injuries in the accident, filed a personal injury lawsuit in the Shelby County Circuit Court against Celadon and Chickasaw alleging the negligence of the employee tractor-trailer drivers Foster and Dondeville,[2] seeking $5,000,000.00 in compensatory damages. Celadon and Chickasaw filed answers denying liability.

The matter was set for trial on May 20, 2013. On May 17, 2013, Plaintiff and Chickasaw entered into a letter agreement ("Agreement") drafted by Plaintiff's counsel and executed by both parties' counsel, as follows:

> I am writing to set forth my understanding of the facts and to confirm our agreement regarding this case.
>
> As I understand, Chickasaw has tried to persuade Celadon to admit that Chickasaw is not at fault in this case. Celadon has refused to make such an admission. Celadon intends to pursue the frivolous blaming Chickasaw for the injuries suffered by Mr. Borne.
>
> My client, by and through the efforts of his attorneys, has come to the conclusion that Chickasaw is not at fault in this matter. I am troubled that Chickasaw is a defendant in this case. As you know, we only named Chickasaw as a defendant in this case because it was obvious to us that Cel[a]don was going to attempt to blame Chickasaw. My investigation reflects

[1]Plaintiff's passenger, Talmadge G. Mevers, and his passenger's wife, Kathy M. Mevers, were also named as plaintiffs. The Mevers voluntarily non-suited their claims prior to trial.

[2]Plaintiff also named the individual drivers as defendants. The drivers were voluntarily dismissed from the suit prior to trial.

> that Chickasaw is not a responsible party for the injuries suffered by Mr. Borne. We have agreed to fully cooperate with each other with regard to this litigation. It is agreed that Borne has no basis to blame Chickasaw in this matter, and Borne will take no actions in litigation adverse to the interests of Chickasaw. Mr. Borne acknowledges that Chickasaw is not at fault and will communicate that to the jury. It is further agreed that Chickasaw has no factual basis to deny the injuries suffered by Mr. Borne and that those injuries are attributable to the negligence of Cel[a]don. Chickasaw agrees to take no action in this litigation which is any way contrary to the interests of Mr. Borne. In fact, Mr. Borne and Chickasaw agreed to work in concert to expose the defenses being asserted by Cel[a]don in this litigation.
>
> It is anticipated that the jury will come to the conclusion that Chickasaw is not at fault. However, in the event that Cel[a]don is successful in persuading the jury that a judgment should be entered against Chickasaw, and in favor of Borne, it is hereby the agreement between Borne and Chickasaw that Borne will accept payment from Chickasaw of one-half of the amount of any judgment entered against Chickasaw in favor of Mr. Borne. . . .

The Agreement was immediately disclosed to Celadon including that Plaintiff and Chickasaw would work in concert to select the jury.

The case was tried over six days in May of 2013. At the commencement of trial, Celadon's counsel brought the Agreement to the trial court's attention and counsel asked that the agreement "be available to use to impeach witnesses" and that it "be admissible as evidence[.]" For reasons discussed hereinafter, the Agreement was scarcely mentioned at trial, it was not admitted into evidence, and the jury was not instructed regarding it.

At the close of Plaintiff's proof, Chickasaw moved for a directed verdict, but given Celadon's assertion of comparative fault against Chickasaw, the motion was taken under advisement. On the second-to-last day of trial, Celadon struck its comparative fault allegation against Chickasaw, and Chickasaw was dismissed on a directed verdict. The jury returned a verdict in favor of Plaintiff for $3,705,000. Specifically, the jury awarded $1,455,000 for loss of earning capacity, $750,000 for physical pain and mental suffering, $750,000 for permanent injury, and $750,000 for loss of enjoyment of life.

Celadon filed a Motion for New Trial or, in the Alternative, for Remittitur. Following a hearing, the circuit court entered an Order denying Celadon's motion for new trial, but granting a remittitur based upon its finding that the jury's award was "excessive." The trial court reduced the total verdict by $1,605,000 to $2,100,000 as follows:

Loss of Earning Capacity reduced from $1,455,000 to $1,100,000
Physical Pain and Mental Anguish reduced from $750,000 to $500,000
Permanent Injury reduced from $750,000 to $100,000
Loss of Enjoyment of Life reduced from $750,000 to $400,000

Plaintiff accepted the remittitur under protest.[3] Celadon timely appealed to this Court.

II. ISSUES PRESENTED

Appellant presents the following issues for review, as restated:

1. Whether the agreement between Plaintiff and Chickasaw violates public policy;

2. Whether the trial court erred in its treatment of the agreement by failing to (1) strike the jury panel; (2) enter the agreement into evidence; and (3) issue an appropriate jury instruction;

3. Whether the trial court erred in failing to instruct the jury on superseding cause;

4. Whether the trial court sufficiently remitted the jury verdict.

Additionally, Appellee presents the following issues:

1. Whether Appellant waived its right to object to the agreement; and

2. Whether the trial court erred in reducing the jury verdict.

For the following reasons, we affirm in part and we reverse in part. Specifically, we affirm the physical pain and mental anguish and permanent injury awards as reduced by the trial court; we reverse the trial court's suggested remittitur of the loss of earning capacity award and we instead reinstate the jury verdict of $1,455,000; and we further reduce the loss of enjoyment of life award to $50,000. Thus, we approve a total award to Plaintiff of $2,105,000.

[3] "When the trial judge suggests a remittitur, the plaintiff has three options: accept the remittitur, refuse the remittitur and opt for a new trial, or accept the remittitur under protest and seek relief from the Court of Appeals." ***Meals ex rel. Meals v. Ford Motor Co.***, 417 S.W.3d 414, 421-22 (Tenn. 2013) (citing Tenn. Code Ann. § 20-10-102(a)).

III. DISCUSSION

A. Public Policy

On appeal, Celadon first argues that the Agreement between Plaintiff and Chickasaw violates public policy necessitating vacation of the jury verdict. Specifically, Celadon contends that the Agreement misled the jury by obfuscating the parties' true allegiances, that the Agreement misallocated peremptory challenges in violation of Tennessee Code Annotated section 22-3-104,[4] that it disregarded the link between fault and liability, and that it compromised the integrity of the legal profession and the justice system.

Plaintiff rejects Celadon's contention that the Agreement violates public policy. Plaintiff points out that the Agreement was fully disclosed to Celadon and to the trial court, that the jury was not prohibited from knowing about the Agreement, and that Chickasaw was not required to assist Plaintiff in increasing his damages. According to Plaintiff, the Agreement does not inhibit settlement because Chickasaw retains no authority over future settlement terms between Plaintiff and Celadon. Plaintiff further argues that Celadon has not identified any harm resulting from the peremptory challenge allocation and that Chickasaw's dismissal obviated any comparative fault concerns.

At the outset, however, Plaintiff argues that we should not reach the public policy issue because Celadon failed to raise it at any time in the trial court. In response to Plaintiff's waiver argument, Celadon claims that it preserved its public policy objections by raising the issue in its memorandum of law incorporated into its motion for new trial (together, "motion for new trial"). Specifically, it points to the following statements in its nearly fifty-page motion for new trial: that the Agreement "perpetrate[d] a fraud on this Court and the jury[,]"

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[4]Tennessee Code Annotated section 22-3-104 provides in part:

> (a) Either party to a civil action may challenge four (4) jurors without assigning any cause.
> (b) In the event there is more than one (1) party plaintiff or more than one (1) party defendant in a civil action, four (4) additional challenges shall be allowed to such side or sides of the case; and the trial court shall, in its discretion, divide the aggregate number of challenges between the parties on the same side, which shall not exceed eight (8) challenges to the side, regardless of the number of parties. Even when two (2) or more cases are consolidated for trial purposes, the total challenges shall be eight (8), as provided in this subsection (b).

Here, fourteen jurors were seated. Plaintiff was given six peremptory challenges and Celadon and Chickasaw received four challenges each. Twelve total challenges were made.

and that "Mary Carter Agreements[5] are prohibited in multiple jurisdictions[.]"[6] Celadon also points to its discussion in its Motion for New Trial of the *In re: Waverly Accident of Feb. 22-24, 1978* case in which a secretive agreement in which a plaintiff agreed to not enforce judgment against a co-defendant was found to be not in "good faith."[7] 502 F.Supp. 1, 5

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[5] So-called "Mary Carter" agreements, named after the type of agreement found in *Booth v. Mary Carter Paint Co.*, [202 So. 2d 8 (Fla. Dist. Ct. App. 2d Dist. 1967) *abrogated by Dosdourian v. Carsten*, 624 So.2d 241 (Fla. Aug. 26, 1993)] . . . have been considered by some courts to be violative of public policy, though a significant number of courts either approve their use generally or permit them under certain circumstances. Under this type of agreement, one or more, but fewer than all, tort defendants will agree with the tort plaintiff to pay the plaintiff a specified maximum sum of money (often the limits of any policy of insurance), with the amount to be reduced or eliminated by any collectible judgment the plaintiff obtains against the remaining, non-agreeing defendant. In addition, the agreement will permit or require the agreeing defendants to continue to participate in the lawsuit (which of course they have an incentive to do, since it is their financial interest that the plaintiff obtain as large a judgment against the non-agreeing defendant as possible), and will often provide that, since the parties have already agreed to the maximum recovery against the agreeing defendants, the plaintiff will not execute on any judgment obtained against them. Finally, such agreements will often provide that they do not constitute admissions of liability by the agreeing defendants or releases by the plaintiff (to avoid the possibility that the release of one joint tortfeasor might release any other, *i.e.*, the non-agreeing defendant), and covenants by both parties that they will not disclose the terms or existence of the agreement unless required to do so by a court. While secrecy is not essential to the "Mary Carter" agreement, such an agreement obviously "works better" from the perspective of the parties to it if it remains secret, and this aspect of the typical agreement has been enough to lead some courts to hold them invalid, or, at a minimum, to require that they be disclosed to the court, the non-agreeing defendant and ultimately, the jury.

7 Williston on Contracts § 15:2 (4th ed.).

[6]Celadon fails to cite its sentence in toto, however: "Mary Carter Agreements are prohibited in multiple jurisdictions *and, in those which they are not prohibited, are viewed with suspicion*." (emphasis added). Additionally, in its appellate briefs, Celadon acknowledges that "the Agreement is not a traditional Mary Carter agreement."

[7]In *Waverly*, the plaintiff agreed that she would not enforce any judgment obtained against the co-defendant. 502 F.Supp. at *3. In return, the co-defendant agreed to pay plaintiff $33,333.33 and it gave the plaintiff a conditional guaranty that she would receive an additional $66,666.67. ***Id.*** To make the guaranty (continued...)

(D.C. Tenn. 1979).

"In all civil cases tried to a jury, any ground not cited in the motion for new trial has been waived for the purposes of appeal." ***Waters v. Coker*** 229 S.W.3d 682,689 (Tenn. 2007) (citing *Boyd v. Hicks*, 774 S.W.2d 662, 625 (Tenn. Ct. App. 1989)). "The issues presented in a motion for new trial must be specified with reasonable certainty so as to enable appellate courts to ascertain whether the issue was first presented for correction in the trial court; otherwise, the matter cannot be considered on appeal." ***Id.*** (citing *State v. Gauldin*, 737 S.W.2d 795, 798 (Tenn. Crim. App. 1987)). The requirement of filing a motion for new trial is governed by Rule of Appellate Procedure 3(e), which provides in part:

> [I]n all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived.

"When an appellate court reviews a motion for new trial under Rule 3(e), it should view the motion in the light most favorable to the appellant, and it should resolve any doubt as to whether the issue and its ground were specifically stated in favor of preserving the issue." ***Fahey v. Eldridge***, 46 S.W.3d 138, 143 (Tenn. 2001). "Any other method of review would result in needlessly favoring 'technicality in form' over substance, a practice specifically discouraged by the comments to [Rule of Appellate Procedure 1]." ***Id.*** "Thus, while courts cannot find error where none has actually been alleged, no matter how liberal a construction is given to the motion, . . . courts may not deem a motion for a new trial insufficient to preserve errors for appeal merely because it fails to enumerate specific issues." ***Id.*** (internal citation omitted).

Bearing these principles in mind, we find that Celadon sufficiently raised the public policy issue in its Motion for New Trial. However, our inquiry does not end there. "It is well settled under Tennessee law that a party is not allowed to raise an issue on motion for new trial that was not presented to the court at the trial of the case." ***Sandalwood Properties,***

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[7](...continued)
operative, the plaintiff was required to pursue her claims against all possible defendants, including the co-defendant, and she was allowed to settle with the other defendants only in accordance with certain restrictions established by the co-defendant; a settlement of less than $33,333.33 required the co-defendant's consent. ***Id.*** If Plaintiff followed the requirements, the co-defendant would pay the plaintiff an additional $66,666.67, less any amounts received by the other defendants. ***Id.***

LLC v. Roberts, No. E2006-01163-COA-R3-CV, 2006 WL 3431939, at *7 (Tenn. Ct. App. Nov. 29, 2006) *perm. app. denied* (Tenn. Apr. 23, 2007) (citing *Serv-U Mart, Inc. v. Sullivan County*, 527 S.W.2d 121, 124 (Tenn. 1975)); *see State v. McLemore*, No. M2010-01189-CCA-R3-CD, 2012 WL 695325, at *11 (Tenn. Crim. App. Feb. 6, 2012) *perm. app. denied* (Tenn. May 16, 2012) (issue of bifurcation waived where defendant first raised issue in motion for new trial); *State v. Flamini*, No. E2008-00418-CCA-R3-CD, 2009 WL 1456316, at*4 (Tenn. Crim. App. May 26, 2009) (issue of constitutional due process violation waived where defendant first raised issue in motion for new trial); *State v. Wiggins*, No. W2007-01734-CCA-R3-CD, 2009 WL 1362323, at *13-14 (Tenn. Crim. App. May 15, 2009) *perm. app. denied* (Tenn. Dec. 21, 2009) (issue of judicial bias waived where issue first raised in motion for new trial); *State v. Barnes*, No. M2001-00631-CCA-R3-CD, 2002 WL 1358717, at *9 (Tenn. Crim. App. June 24, 2002) *perm. app. denied* (Tenn. Dec. 2, 2002) (issue of propriety of jury charge waived where issue first raised in motion for new trial); *State v. Robinson*, 971 S.W.2d 30, 42-43 (Tenn. Crim. App. 1997) (issue regarding judge's chastisement of defense counsel waived where defense counsel failed to interpose a contemporaneous objection or make a motion for mistrial and first-raised issue in motion for new trial); *State v. Bolden*, No. 02C01-9601-CC-00023, 1997 WL 113886, at *8-9 (Tenn. Crim. App. Mar. 14, 1997); *State v. Williams*, C.C.A. No. 01CO1-9505-CR-00146, 1996 WL 654332, at *2-3 (Tenn. Crim. App. Nov. 12, 1996) (issue of whether jurors who slept through a material part of the trial testimony could render a fair verdict was not timely when first-raised in motion for new trial); *State v. Porter*, No. 01C01-9410-CC-00353, 1996 WL 4319, at *4 (Tenn. Crim. App. Jan. 5, 1996) (issue of whether defendant was denied a fair trial because the jury did not represent a fair cross-section of the community waived where defendant failed to object contemporaneously to the jury selection process and issue was first raised in motion for new trial); *Norris v. Nationwide Mut. Fire Ins. Co.*, 728 S.W.2d 335, 338 (Tenn. Ct. App. 1986) (issue of right to a twelve person jury waived where defendant proceeded to trial without indicating dissatisfaction with six-person jury and first raised issue in motion for new trial). Because Celadon failed to argue that the Agreement was *per se* invalid on public policy grounds prior to, or even during trial, the issue was not preserved when raised in Celadon's Motion for New Trial.[8]

Celadon asks this Court, even if it waived its public policy objection to the Agreement, to exercise our discretion to consider the issue. Tennessee Rule of Appellate

[8]We note that Plaintiff argues on appeal that Celadon did not raise a public policy argument before trial, during trial, or even in its motion for new trial. In response, Celadon, who has a duty to direct this Court to where the issue was raised, has directed this Court only to its Motion for New Trial and accompanying memorandum. ***See generally Zang v. Leonard***, 643 S.W.2d 657, 665 (Tenn. Ct. App. 1982) ("Where appellant insists there was no evidence on a certain issue, it is the duty of appellee to cite in the record where such evidence may be found.").

Procedure 13(b) vests this Court with discretionary authority to consider issues not properly presented for review when "compelling reasons," *Baugh v. Novak*, 340 S.W.3d 372, 378 n.4 (Tenn. 2011), exist such as: "(1) to prevent needless litigation, (2) to prevent injury to the interests of the public, and (3) to prevent prejudice to the judicial process." **Tenn. R. App. P. 13(b)**. We decline to exercise our discretion to consider the public policy argument espoused by Celadon because we find addressing the issue now could result in an injustice to Plaintiff and to the judicial process. Celadon was fully aware of the Agreement and its parameters prior to trial, yet it did not challenge the *per se* validity of the Agreement on policy grounds until a sizeable verdict was rendered against it following a six-day jury trial. It would be fundamentally unfair to allow Celadon to "witness [alleged] misconduct, fail to object, and complain only upon a disagreeable verdict." ***See Moss v. Sankey***, 54 S.W.3d 296, 299 (Tenn. Ct. App. 2001) (citations omitted). The interests of justice are not served by allowing a party to "set[] a trap" for appeal. ***See Middle Tenn. R. Co. v. McMillan***, 134 Tenn. 490, 184 S.W.20, 24 (Tenn. 1916). We find the public policy issue is waived.

B. Treatment of the Agreement

As an alternative to its public policy argument, Celadon argues that the trial court erred in failing to take certain corrective measures to alleviate the allegedly prejudicial effect of the Agreement. We address these measures in turn.

1. Failure to Strike Jury Panel

First, Celadon argues that the trial court erred in failing to strike the jury after Plaintiff's attorney made allegedly prejudicial remarks during voir dire. Specifically, Celadon cites the following voir dire exchanges:

> [Plaintiff's counsel]: Okay. Well, let me ask you[, prospective juror Allen,] more specifically [whether knowing Chickasaw's counsel would make you favor Chickasaw]. We're not going to argue that [Chickasaw] is responsible in any way. Okay? That's not going to be our position in the case. So knowing that, does that - -
>
> Prospective Juror Allen: Well what will be your position in the case?
>
> [Plaintiff's counsel]: That's great.
>
> Prospective Juror Allen: Because I guess that's what I thought your position would have been.

[Plaintiff's counsel]: You have two trucking companies that have been sued. It's our position that Celadon is responsible for all of the harm. What you have here - - we're not supposed to get too much into the facts, but so you can understand it, it's a rear-end collision on the interstate. Our client is stopped. The Celadon truck represented by these lawyers hits our client first, and then [Chickasaw] rolls into the back of the truck and bumps it.

Okay. Now that you know the facts and - - you said you go to church with [Chickasaw's counsel]?

Prospective Juror Allen: I think so. I don't know if he's at my church anymore, but he was at Independent.

[Plaintiff's counsel]: All right. Let me - - maybe I'll just let the lawyers for Celadon ask you questions about [Chickasaw's counsel].

Prospective Juror Allen: Okay. So ask your question again now that you gave me that information.

[Plaintiff's counsel]: Well, I want to know maybe you might be a good juror for me.

Prospective Juror Allen: I don't know.

[Plaintiff's counsel]: Okay. Because I'm not going to say anything negative about [Chickasaw]. I'm going to say a lot of negative things about Celadon.

. . . .

[Plaintiff's counsel]: Okay. All right. Now, I was talking to Ms. Allen about this earlier. We're not saying that one of the defendants caused harm. And I've got to talk to you about this because it's going to be an issue in the case.

When we filed this lawsuit for [Plaintiff], we sued two trucking companies, the first and the second truck that rear ended him. Okay? In Tennessee, you've got to file your lawsuit in one year. We sued two trucking companies.

As the case progressed, we got pictures - - exchanged pictures with the defendants which we didn't have. We took depositions. We talked to the

truck drivers. And as the case went on, we became convinced that the third truck didn't cause any harm to [Plaintiff]. Everybody with me?

All right. Now, we tried - - when you file a lawsuit in Tennessee and you sue somebody, they have a right to blame whoever they want to. So if A sues B, B can blame C. Does everybody understand that?

So in this case, we sued the defendants, the two trucking companies, and Celadon blamed the third truck. They said the third truck was at fault. But after going through discovery, we decide[d] the third truck didn't cause any harm and we tried to let them out of the lawsuit. Celadon wouldn't agree. That's why they're a defendant in the case.

[Celadon's counsel]: Your Honor, can we approach the bench?

Whereupon, an exchange occurred at the bench out of the hearing of the jury. Celadon's counsel objected to the discussion of "settlement." The trial court overruled the objection, but it stated that Plaintiff could not "get[] into the content of the agreement[.]" Plaintiff's counsel then continued:

[Plaintiff's counsel]: Sorry about that. We have to do that from time to time, but what I was asking you about was, I was kind of giving you some background that you're going to hear in the case. Two defendants were sued and now we're only saying that one defendant's at fault. Okay?

We entered into an agreement, "we" being the plaintiff, entered into an agreement with Chickasaw, the third truck, I guess, to work in concert with each other. We don't think they're at fault. They're not getting out of the case. There's an agreement. You may hear some testimony on that. I'm not sure. But I need to know how y'all feel about that okay?

And I know it's a difficult - - maybe a difficult concept for y'all to understand, but you have a case here where the plaintiff filed a lawsuit against two companies and now there's an agreement between the plaintiff and one of the companies. What do y'all think? Do you think that's - -

Prospective Juror Allen: Well, I think when you say one truck, two truck, three truck, that's a little confusing. And then I think my next question is, it's like it seems like I'm hearing the case and we haven't even started yet, right? Like we're given - - you're giving us a lot of information and at the same time,

you're not giving us all of the information.

So like you're asking questions and you're wanting our opinions and our answers to them, but we're not hearing the entire - - so, I mean, it doesn't really seem - - I don't know. I mean, maybe I'm the only one that thinks that.

. . . .

[Plaintiff's counsel]: . . . .

But what do you think - - and all I can tell you is that there's a deal, there's an agreement between the plaintiffs and one of the defendants. And I just want to know in your gut, how does that sit with you? . . .

Prospective Juror Van Hooks:[9] I'm kind of like [prospective juror Allen], but if it's already a deal, I don't know where it's coming from. I haven't seen the diagram. I mean, you're asking me to make a decision on something based on an ideal picture in my head that I don't have, that's not complete.

[Plaintiff's counsel]: Okay. So basically, what you have is we both agree, the plaintiffs - - Chickasaw, which is the third truck, we both agree that that truck didn't cause any harm. We have an agreement to that effect. What do you think about that?

Prospective Juror Fiorino: Okay.

[Plaintiff's counsel]: Will that negatively impact your view of me or [Plaintiff]?

Prospective Juror Ciaramitaro: I don't think trial lawyers are snakes in the grass. What you did is what you did. That's the way the legal system works, you know. If it comes out that you did something different, that's fine, but I've got to assume that you're being straight up with us from the beginning. I'm not going to start out thinking, oh, they done some kind of deal [sic].

[Plaintiff's counsel]: I appreciate it. That's why I'm telling y'all about it. . . . Will y'all trust me, the lawyers for [Plaintiff] to make that kind of - -

[9]We note that, prior to jury deliberations, Mr. Van Hooks was identified as an alternate juror and released from the jury.

> Prospective Juror Regester: If the law permits it, the law permits it. That's - - that's clearcut.

The following day, after the jury was sworn, Celadon moved to strike the jury panel "based upon the use of the Mary Carter Agreement and the collusion between [Chickasaw's counsel] and the plaintiff's counsel in striking the jurors[.]"[10]

Celadon argues that Plaintiff's counsel was allowed to "argue[] the merits of the Agreement with the jury panel during voir dire" and that his statements affected the outcome of the trial. Celadon contends that Plaintiff's counsel "was able to not only present a lawyer's view of the evidence, but was able to do so with enhanced credibility due to the support of a co-defendant and its counsel, who the jury admittedly expected to disagree with Plaintiff."

"The ultimate goal of voir dire is to determine whether the jurors are competent, unbiased, and impartial." ***Danmole v. Wright***, 933 S.W.2d 484, 487 (Tenn. Ct. App. 1996). "The scope and extent of voir dire rests within the discretion of the trial court." ***Id.*** (citing *State v. Harris*, 839 S.W.2d 54, 65 (Tenn. 1992)).

The trial transcript indicates that, at the commencement of trial, Celadon asked that it be allowed to use the Agreement to impeach witnesses, that the jury be allowed to view the Agreement, and that the Agreement be admitted into evidence. In response to Celadon's stated intention to utilize the Agreement at trial, Plaintiff's counsel mentioned the Agreement to determine whether its existence would cause potential jurors to exhibit bias against Plaintiff. We find the trial court did not abuse its discretion in limiting discussion of the Agreement's contents, while allowing questions regarding its existence. In any event, we note that the trial court properly instructed the jury that statements of counsel are not evidence, and "[t]he jury is presumed to follow its instructions." ***State v. Young***, 196 S.W.3d 85, 111 (Tenn. 2006) (citing *State v. Shaw*, 37 S.W.3d 900, 904 (Tenn. 2001)). Celadon has cited no evidence to indicate that the jury disregarded the trial court's instructions or that any

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[10]In its appellate brief, Celadon takes issue with the concerted efforts of Plaintiff and Chickasaw to exercise peremptory challenges. However, in its reply brief, Celadon clarifies that, on appeal, the peremptory challenge argument serves only as a basis for the larger public policy argument, which we have found to be waived. In any event, we find that Celadon failed to timely object to the cooperative use of peremptory challenges. Celadon admittedly knew at least at the commencement of trial that Chickasaw planned to use its peremptory challenges in favor of Plaintiff, yet when the trial court asked counsel whether it had "questions, comments or concerns" regarding the allocation of challenges, Celadon's counsel responded only with a question regarding the timing of opening statements. ***See*** **Tenn. R. App. P. 36(a)** ("Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably necessary to prevent or nullify the harmful effect of an error.").

disregard affected the outcome of the trial.

2. Failure to Enter Agreement as Exhibit

Celadon next argues that the trial court erred in failing to enter the Agreement as an exhibit. Plaintiff, however, contends that the Agreement was properly excluded because Celadon "failed to introduce or even mention the Agreement during the proof at trial" and Celadon "abandon[ed] . . . the Agreement during trial[.]"

At the commencement of trial, prior to jury selection, Celadon attempted to admit the Agreement as an exhibit to "clearly illustrate for the jury who the parties really are[.]" Plaintiff stipulated to the Agreement as an exhibit, but Chickasaw asked "for a few minutes" to consider whether or not to agree to the stipulation.

The following day, Celadon filed a motion seeking to admit the Agreement as an exhibit. That same day, after the jury was sworn but before opening statements, Plaintiff again stated, "we think [the Agreement] should be made an exhibit." Chickasaw objected to the Agreement being made an exhibit, but it stated, "I think [Celadon] can read it out loud, they can read it word for word, they can ask witnesses about it." The trial court stated, "[S]ince there is an agreement that [the Agreement] can be referred to and put into evidence, I'm going to reserve my ruling as far as whether the document itself will be made an exhibit."

During the proof phase of the trial, none of the parties mentioned the Agreement; Celadon did not read the Agreement into evidence and it did not question any witnesses regarding it. After the close of proof, during a discussion regarding jury instructions, Celadon renewed its argument that the Agreement should be admitted as an exhibit. Despite his prior stipulation,[11] Plaintiff objected, pointing out that the document was not mentioned at trial and contending that, because the proof had closed, he could no longer cross-examine witnesses regarding the Agreement. Following the discussion, the trial court did not rule on the Agreement's admissibility; obviously, the Agreement was not made a trial exhibit.

On appeal, Celadon argues that the Agreement was admissible under Tennessee Rule of Evidence 408 as a settlement agreement and that its admission as an exhibit was necessary to give the jury "the entire picture" of the "level of collusion that Plaintiff and Chickasaw coordinated." In response, Plaintiff argues that Celadon waived the Agreement's admission

[11]During the discussion, Plaintiff's counsel contended that he was not "reneging" on his prior stipulation. He stated that his stipulation was "If you want to use it during trial for impeachment or to make it an exhibit during the trial, we will not object." Celadon does not argue, on appeal, that the prior stipulation was controlling.

as an exhibit by failing to sustain an express ruling regarding its admissibility and by failing to present any proof regarding the Agreement during trial.

We decline to hold that Celadon's failure to secure an express ruling regarding its motion to include the Agreement as an exhibit operates as a waiver of the issue. Celadon did not fall silent after it filed its motion; it renewed its request to admit the Agreement following the close of proof. ***See generally Ellison v. Alley***, 902 S.W.2d 415, 418 (Tenn. Ct. App. 1995) ("A trial court will not be placed in error for failing or refusing to rule on a motion unless the record clearly reflects that it was asked to do so and thereafter, without just cause, refused to act.") (citing *Cary v. Arrowsmith*, 777 S.W.2d 8, 20 (Tenn. Ct. App. 1989)). However, we nonetheless find that the trial court's implicit denial of Celadon's motion to include the Agreement as a trial exhibit was not in error. ***See generally Hartline v. Hartline***, No. E2012-02593-COA-R3-CV, 2014 WL 103801, at *8 (Tenn. Ct. App. Jan. 13, 2004) (finding the trial court had implicitly denied a party's motion *in limine* to exclude testimony and reviewing the denial under the abuse of discretion standard).

"Generally, the admissibility of evidence is within the sound discretion of the trial court." ***Mercer v. Vanderbilt Univ., Inc.***, 134 S.W.3d 121, 131 (Tenn. 2004) (citing *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 442 (Tenn. 1992)). "The trial court's decision to admit or exclude evidence will be overturned on appeal only where there is an abuse of discretion." ***Id.*** (citing *Mercer*, 134 S.W.3d at 131). "A trial court abuses its discretion 'only when it 'applie[s] an incorrect legal standard or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.'" ***Id.*** (quoting *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999)).

Tennessee Rule of Evidence 616 provides that "[a] party may offer evidence by cross-examination, extrinsic evidence, or both, that a witness is biased in favor of or prejudiced against a party or another witness." **Tenn. R. Evid. 616**. "Our Supreme Court ruled that 'partiality for one party . . . or hostility to the other' is 'always competent' on the issue of credibility." ***State v. Gentry***, No. 03C01-9905-CR-00215, 1999 WL 1104492, at *4 (Tenn. Crim. App. Dec. 7, 1999) (quoting *Creeping Bear v. State*, 113 Tenn. 322, 87 S.W. 653 (1905)). Additionally, Rule 408 permits evidence of a compromise where the evidence is presented to show, among other things, bias or prejudice of a witness. **Tenn. R. Evid. 408**. Moreover, Celadon correctly points out that many states which allow agreements of this type *allow* the agreement to be admitted as an exhibit for the jury's consideration. ***See, e.g., Firestone Tire & Rubber Co. v. Little***, 276 Ark. 511, 514, 639 S.W.2d 726, 728 (Ark. 1982) (holding that a "Mary Carter" agreement is "not only discoverable but also may be admitted into evidence"); ***General Motors Corp. v. Lahocki***, 286 Md. 714, 730, 410 A.2d 1039, 1047 (Md. 1980) (holding that the jury should have been informed of the parties' alliances "either by the presentation of the agreement itself . . . or by a statement as to the terms of the

settlement"); ***Grillo v. Burke's Paint Co., Inc.***, 275 Or. 421, 426-27, 551 P.2d 449, 453 (Or. 1976) (stating that "the majority of jurisdictions which have considered [the validity of these types of agreements] do not condemn the agreement as invalid per se but instead require that the agreements be subject to pretrial discovery procedure and be admissible into evidence on request of any non-settling defendant[,]" but indicating that the non-settling defendant "made no effort to discover the existence or the terms of the agreement despite the fact that it had been repeatedly informed by [defendant] that it intended to settle with plaintiff.").

As stated above, prior to the presentation of proof, the parties agreed that witnesses could be questioned regarding the Agreement and that the Agreement could be referred to and read into evidence. However, the Agreement was not mentioned, whatsoever, during the proof phase of trial. Had Celadon raised the Agreement during the proof phase of trial–which it undisputedly was allowed to do–we might be inclined to find error in its exclusion as an exhibit. However, agreements of this type are not *ipso facto* admitted, *see* ***General Motors Corp.***, 410 A.2d at 1046 (noting that "in some circumstances it might be wise not to admit into evidence a full, unedited agreement because the parties might insert a number of self-serving declarations into the contract."), and it would be fundamentally unfair to allow Celadon to remain silent as to the Agreement during trial and then to admit the Agreement as an exhibit *after* the close of proof, essentially foreclosing Plaintiff's ability to rebut any suggested prejudice or bias. ***See State v. Gentry***, 1999 WL 1104492, at *4 ("The witness must always be allowed to deny or explain an allegation of bias.") (citing *State v. Lewis*, 803 S.W.2d 260 (Tenn. Crim. App. 1990)). *See generally City of Tuscon v. Gallagher*, 108 Ariz. 140, 493 P.2d 1197, 65 A.L.R. 597 (1972) (upholding an agreement where the terms were disclosed to the court and the non-agreeing-defendant failed to reveal the terms of the agreement to the jury by cross-examination of the agreeing defendant). Under these circumstances, we find no error in the exclusion of the Agreement as an exhibit.

3. Failure to Instruct Jury on Agreement

Finally, Celadon argues that the trial court erred in refusing to issue a proper jury instruction regarding the Agreement, specifically Tennessee Pattern Jury Instruction - Civil No. 2.26.[12] Like Celadon's arguments heretofore raised, Plaintiff contends that the issue is waived because Celadon failed to request an appropriate jury instruction and because it failed

[12]T.P.I. - Civil 2.26 Evidence of Settlement instructs:

> You may consider evidence that a witness who was also involved in this incident *[collision]* has compromised and settled the witness' claim only for the purpose of deciding whether or not that witness has any interest or bias in this case. You may not consider any settlement as an admission of liability for any loss or damage.

to raise the issue in its motion for new trial. Alternatively, Plaintiff argues that the evidence did not support a jury instruction pertaining to the Agreement.

As stated above, in his appellate brief, Plaintiff argues that Celadon did not raise the issue of an instruction regarding the Agreement in its motion for new trial. In its reply brief, Celadon does not address the waiver issue. After reviewing Celadon's motion for new trial and memorandum of law incorporated therein, we have found no indication that Celadon raised the trial court's denial of its requested instruction regarding the Agreement in its motion for new trial.[13] Accordingly, we find the issue is waived on appeal. ***See* Tenn. R. App. 3(e)** ("[I]n all cases tried by a jury, no issue presented for review shall be predicated upon error in . . . jury instructions granted or refused . . . unless the same was specifically stated in a motion for new trial; otherwise such issues will be treated as waived.").

C. Superseding Cause

Celadon contends that throughout the trial it defended on the ground of superseding cause–namely, Plaintiff's post-accident work activities and a subsequent motor vehicle accident–and it argues on appeal that the trial court erred in denying its requested jury instruction regarding superseding cause, Tennessee Pattern Instruction - Civil No. 234.[14] At trial, Plaintiff objected to the instruction, arguing that under *Kirkpatrick v. Bryan*, 868 S.W.2d 594 (Tenn. 1993), Celadon was required to present evidence that Plaintiff's injuries were "probably" as opposed to "possibly" caused by something that happened after the wreck. On appeal, Celadon contends that the trial court erred in applying *Kilpatrick* which, according to Celadon, sets forth a causation standard meant to guide juries during deliberations, not judges during the crafting of jury instructions.

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[13]We note that Celadon *did* argue in its motion for new trial, that the trial court erred in excluding its requested jury instruction on superseding cause.

[14]Tennessee Pattern Jury Instruction - Civil 3.24, regarding superseding cause, instructs:

> A cause of injury is not a legal cause when there is a superseding cause. For a cause to be a superseding cause, all of the following elements must be present:
>
> 1 The harmful effects of the superseding cause must have occurred after the original negligence;
> 2 The superseding cause must not have been brought about by the original negligence;
> 3. The superseding cause must actively work to bring about a result which would not have followed from the original negligence; and
> 4 The superseding cause must not have been reasonably foreseeable by the original negligent party.

In response, Plaintiff argues that the trial court correctly refused to issue a jury instruction on superseding cause because there was no "substantial evidence" of a superseding cause of his injuries. Additionally, Plaintiff contends that Celadon's position at trial was that Plaintiff was not really injured and that he could work if he chose to do so–a theory which does not support an instruction on superseding cause. Alternatively, Plaintiff argues that the trial court's instruction on cause in fact and legal cause was sufficient to instruct the jury and that failure to give an instruction on superseding cause was not reversible error because, according to Plaintiff, Celadon offered no proof at trial that a superseding cause brought about a result which would not have followed from the original negligence.

Insofar as the trial court relied upon the preponderance of the evidence standard in determining whether to instruct the jury on superseding cause, such reliance was in error. The proof necessary to support a jury instruction and our review of the issue was stated in *White v. Premier Medical Group*, 254 S.W.3d 411 (Tenn. Ct. App. 2007), as follows:

> It is proper for a court to charge the law upon an issue of fact within the scope of the pleadings upon which there is evidence, which even though slight, is 'sufficient to sustain a verdict.' *Reynolds v. Ozark Motor Lines, Inc.*, 887 S.W.2d 822, 823 (Tenn. 1994); *Norman v. Fisher Marine, Inc.*, 672 S.W.2d 414, 421 (Tenn. Ct. App. 1984); *Ringer v. Godfrey*, 50 Tenn. App. 559, 362 S.W.2d 825, 827 (1962); *Monday v. Millsaps*, 37 Tenn. App. 371, 264 S.W.2d 6 (1953); *Hurt v. Coyne Cylinder Co.*, 956 F.2d 1319, 1326 (6th Cir. 1992)). For the evidence to be "sufficient to sustain a verdict," there must be evidence which is "material" to the issue. *Turner v. Jordan*, 957 S.W.2d 815, 824 (Tenn. 1997); *Crabtree Masonry Co. v. C & R Contr., Inc.*, 575 S.W.2d 4, 5 (Tenn. 1978); *City of Chattanooga v. Rogers*, 201 Tenn. 403, 299 S.W.2d 660 (1956); *D.M. Rose & Co. v. Snyder*, 185 Tenn. 499, 206 S.W.2d 897 (1947).
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> The Tennessee Supreme Court has described "material evidence" as "evidence material to the question in controversy, which must necessarily enter into the consideration of the controversy and by itself, or in connection with the other evidence, be determinative of the case." *Knoxville Traction Co. v. Brown*, 115 Tenn. 323, 89 S.W. 319, 321 (1905)). Black's Law Dictionary defines "material evidence" as "evidence having some logical connection with the [facts of consequence] or the issues." **Black's Law Dictionary** [(9th ed. 2009)].[15] This Court has described "material evidence" to be "such relevant

[15]The seventh edition cited by the *White* Court similarly defined "material evidence" as "evidence (continued...)

> evidence as a reasonable mind might accept as adequate to support a rational conclusion and such as to furnish a reasonably sound basis for the action under consideration." *Sexton v. Anderson County*, 587 S.W.2d 663, 666 (Tenn. Ct. App. 1979); *Mullins v. City of Knoxville*, 665 S.W.2d 393, 396 (Tenn. Ct. App. 1983) (noting that "beliefs opinions, and fears of neighborhood residents do not constitute material evidence").
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> . . . .
>
> [W]ithout judging the credibility of witnesses or weighing the evidence, we must determine whether there is any material evidence sufficient to sustain the defense of superseding cause. To make this determination, we must identify the superseding cause contended by [d]efendants and determine whether there is any material evidence in the record that pertains to each element of this defense.

White, 254 S.W.3d at 416-17 (footnote omitted); *see also* Meals, 417 S.W.3d at 423 ("'It matters not a whit where the preponderance of the evidence lies under a material evidence review.'") (quoting *Hohenberg Bros. Co. v. Mo. Pac. R.R. Co.*, 586 S.W.2d 117, 119-20 (Tenn. Ct. App. 1979); *Ball v. Ward*, 1990 WL 205220, at *2 (Tenn. Ct. App. Dec. 18, 1990) ("The test for material evidence must not be confused with the test weighing the preponderance of the evidence."). *Compare Godbee v. Dimick*, 213 S.W.3d 865, 888 (Tenn. Ct. App. 2006) ("We must determine whether any *substantial evidence* supported an instruction to the jury on independent intervening (superseding) force.").

If we determine that material evidence supported a superseding cause instruction, we must then determine whether the trial court's decision to disallow the instruction constitutes a reversible error in this case. "[W]e should not set aside a jury's verdict because of an erroneous instruction unless it affirmatively appears that the erroneous instruction actually misled the jury." ***Grandstaff v. Hawks***, 36 S.W.3d 482, 497 (Tenn. Ct. App. 2000) (citing *Carney v. Coca-Cola Bottling Works*, 856 S.W.2d 147, 150 (Tenn. Ct. App. 1993); *Helms v. Weaver*, 770 S.W.2d 552, 553 (Tenn. Ct. App. 1989)); *see also id at* n.28 ("This court has repeatedly found erroneous or omitted instructions to be harmless when we have concluded that the error did not or could not have played a material role in the jury's decision-making process.") (citations omitted).

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[15](...continued)
having some logical connection with the consequential facts or the issues." ***White***, 254 S.W.3d at 417 (quoting Black's Law Dictionary 459 (7th ed. 2000)).

"It is well-established that a plaintiff seeking to prove negligence must demonstrate: 1) a duty of care owed by the defendant to the plaintiff; 2) conduct falling below the applicable standard of care that amounts to a breach of that duty; 3) injury or loss; 4) cause in fact; and 5) proximate, or legal, cause." ***Howell ex rel. Williams v. Turner***, No. M2008-01588-COA-R3-CV, 2009 WL 1422982, at *3 (citing *McClung v. Delta Square Ltd.*, 937 S.W.2d 891, 894 (Tenn. 1996)). "Legal cause concerns a policy decision to deny liability where conduct might otherwise be actionable, and Tennessee courts establish the boundary of legal causation considering logic, common sense, justice, policy, precedent and other ideas of what justice demands and of what is administratively possible and convenient." ***Id.*** (citing *Patterson-Khoury v. Wilson World Hotel-Cherry Road, Inc.*, 139 S.W.3d 281, 285 (Tenn. Ct. App. 2003); *Rains v. Bend of the River*, 124 S.W.3d 580, 592 (Tenn. Ct. App. 2003)). "To prove legal causation, we consider the following three factors: (1) the tortfeasor's conduct must have been a substantial factor in bringing about the harm being complained of, (2) there is no rule or policy that should relieve the wrongdoer from liability because of the manner in which the negligence has resulted in the harm; and (3) the harm giving rise to the action could have reasonably been foreseen or anticipated by a person of ordinary intelligence and prudence." ***Id.*** (citing *McClenahan v. Cooley*, 806 S.W.2d 676, 775 (Tenn. 1991)). "One rule or policy that we have held relieves a wrongdoer from liability is the doctrine of independent intervening cause, which breaks the chain of legal causation between the original actor's conduct and the eventual injury." ***Id.*** at *4 (citations and footnote omitted).

> The element of the superseding cause defense are as follows:
> (1) the harmful effects of the superseding cause must have occurred after the original negligence;
> (2) the superseding cause must not have been brought about by the original negligence;
> (3) the superseding cause must actively work to bring about a result which would not have followed from the original negligence; and
> (4) the superseding cause must not have been reasonably foreseen by the original negligent party.

Grandstaff, 36 S.W.3d at 497 (citing *Godbee*, 213 S.W.3d at 882). "If all four elements are met, then the intervening cause is said to be a superseding cause which breaks the chain of proximate causation." ***Howell ex rel. Williams v. Turner***, No. M2008-01588-COA-R3-CV, 2009 WL 1422982, at *4 (Tenn. Ct. App.W.S. May 21, 2009). "Because the superseding cause, therefore, "supplants" a defendant's conduct as the legal cause of the plaintiff's injuries, it relieves the defendant from liability to the plaintiff." ***Id.*** (citing *Potter v. Ford Motor Co.*, 213 S.W.2d 264, 273 (Tenn. Ct. App. 2006)). We must review the record to determine whether material evidence was presented as to each element. ***Grandstaff***, 36 S.W.3d at 497.

As stated above, Celadon relies upon two alleged superseding causes of Plaintiff's injuries: his continuing to work for six months following the July 2009 accident at issue and a subsequent April 2011 motor vehicle accident. We address these events in turn.

1. Post-Accident Work

According to Plaintiff, at the time of the accident, he was "so in shock" that he "didn't really have any pain[.]" He did not visit the hospital and he was able, that afternoon, to drive the tractor-trailer involved in the accident home to Louisiana at the direction of his boss. The morning after the accident, he "was kind of a little sore" and approximately four days after the accident, Plaintiff developed progressively worsening neck and back pain for which he was treated conservatively by a family physician. Apparently Plaintiff received a "little heat treatment" which he acknowledged "helped a little while." Despite his alleged persistent pain, Plaintiff continued to work after the accident because, apparently for financial reasons, he "had to[.]" For six months after the accident, Plaintiff worked five days per week at "full duty" requiring him to load and unload chemicals into his tanker truck, get on the ground to unhook a twenty-pound hose, and use a mallet to loosen valves.

With regard to the second element, Celadon argues that "it is beyond dispute that Plaintiff's . . . post-Accident work activities were not brought about by the Accident. . . . Moreover, Plaintiff's post-Accident work activities were in no way connected to the Accident."

To establish the third element–the superseding cause must actively work to bring about a result which would not have followed from the original negligence–Celadon points to the specific trial testimony which we will address now. On cross-examination, Plaintiff's expert, neurosurgeon Dr. Donald Dietze, testified that he did not know the types of work Plaintiff performed following the accident. However, he stated that "full duty," which Plaintiff testified he worked for six months following the accident, typically entails "jumping in and out of the truck" and "lifting, pushing, pulling . . . 50 to 100 pounds[.]" Dr. Dietze agreed that "jumping out of an 18-wheeler . . . can put a fairly substantial load on one's spinal cord" and that "lifting heavy weights and loading and unloading trucks can similarly put a load on someone's spine[.]" Similarly, Plaintiff's expert radiologist Dr. Lawrence W. Glorioso, III, agreed in his deposition that "the sort of trauma that can be part of everyday trucking, such as hitting potholes and boun[c]ing up and down the roads for miles and miles, and putting that load on your back . . . could create trauma[.]"

Plaintiff's physical therapist, Courtney Roberts, testified that following the accident, she "assume[d]" Plaintiff's job required loading and unloading chemicals into his tanker, getting on the ground to unhook hoses, and using a mallet to loosen valves. Based upon her

experience as a physical therapist, she agreed that "those activities have some sort of load or impact on the back[.]" She also testified that Plaintiff complained of "increased difficulty walking" during the six-month period.

As stated above, Plaintiff, testified that "heat treatment" therapy "helped a little while[,]" but that he experienced pain and discomfort as he continued to work following the accident. Celadon's expert, neurosurgeon Dr. Robert L. Applebaum, confirmed in his video deposition that Plaintiff had reported to him that his "symptoms gradually increased over the [] six months" following the accident.

Celadon's biochemical engineer expert, Douglas R. Morr, testified regarding the forces upon Plaintiff's spine. He stated that "getting in and out of the cab . . . . bending over and doing things through that job whether it be unhooking things and hooking up things, just bending over . . . that is going to cause substantially more forces in the lumbar spine than the one-time event that we had in our accident[.]"

Regarding foreseeability, Celadon argues, without citing any evidence presented at trial, that "Celadon had no way of predicting that Plaintiff would return to full duty work for six months following the Accident, engaging in such strenuous activities as loading cargo, using a mallet to loosen valves, and wrangling a 20 pond hose. . . . Accordingly, the superseding cause[] at issue [was] not foreseeable to Celadon."

In its appellate brief, Celadon contends that material evidence was presented as to each of the four elements of superseding cause with regard to Plaintiff's work during the six-month period following the July 2009 accident. We disagree. While we question whether Celadon presented material evidence that Plaintiff's post-accident work "br[ought] about a result which would not have followed from the [accident,]" at a minimum, we find that Celadon has not presented material evidence to indicate that Plaintiff's continued work in the same capacity, performing the same pre-accident functions was not reasonably foreseeable to Celadon. ***See generally Howell ex rel. Williams v. Turner***, 2009 WL 1422982, at *5 ("'[T]he foreseeability requirement is not so strict as to require the tortfeasor to foresee the exact manner in which the injury takes place, provided it is determined that the tortfeasor could foresee, or through the exercise of reasonable diligence should have foreseen, the general manner in which the injury or loss occurred.'") (quoting *McClenahan v. Cooley*, 806 S.W.2d 767, 775 (Tenn. 1991)). Accordingly, we find the elements of superseding cause were not met as to Plaintiff's post-accident work to support a jury instruction in that regard.

2. 2011 Accident

We now consider whether the trial court erred in failing to instruct the jury on superseding cause as to Plaintiff's subsequent April 2011 accident.

At trial, Plaintiff testified that he was involved in an accident in April 2011 which he described as follows:

> I was at a red light. I seen [sic] a friend of mine that I used to work with. The lady in front of me, we both stopped. I had a distance between me and her. She - - I was talking to the guy. In the corner of my eyes, I could see her start to roll. I didn't accelerate. I left my foot off of the brakes, like anybody else would do, because I seen [sic] the vehicle started to roll. When I turned around and caught a full view of her vehicle, she had stopped. It was too late for me to actually stop. I bumped her. By her van, the way it's made, there's a whole window inside that van. My truck ran [into] the back of her - - her door and it shattered the glass.
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> We called the police. She had got a ticket [sic]. She got a citation . . . because she failed to have her kid in a car seat. This is the reason why she stopped. The light was green. When the police came there, he asked us what happened. As anybody else, somebody - - I take responsible [sic] for my actions. I told the officer, "Yeah, I hit her." I was careless, I took fault, and I took the blame for it.

Plaintiff described the accident as a "fender-bender[.]" He explained that the other vehicle suffered a dent and its back window was shattered and that his truck[16] "had a dent" which he did not repair.

To support its argument that material evidence was presented at trial regarding injuries stemming from the April 2011 accident, Celadon points to the testimony of neurosurgeon Dr. Dietze. Dr. Dietze testified that Plaintiff's MRIs indicated a worsening of Plaintiff's condition between 2010 and 2012. He opined that the changes were not the result of aging or wear and tear, and instead he explained that he would "not expect any other potential causes other than more trauma, development of a connective tissue disease that's sort of like rheumatoid arthritis or Sjogren's disease, something that would - - a disease itself would

[16]It appears that, in the April 2011 accident, Plaintiff was not driving the tractor-trailer truck involved in the July 2009 accident. However, it is unclear whether, in the 2011 accident, Plaintiff was driving a different tractor-trailer truck or a pick-up truck.

accelerate the quote, unquote degenerative changes[.]" When asked whether the 2011 accident could account for the changes, Dr. Dietze responded, "If it's significant enough." Celadon also points to Dr. Dietze's notes from Plaintiff's May 4, 2011 office visit indicating that Plaintiff had complained of increased pain since his last office visit[17] as well as "[right] knee pain for approximately [two weeks]."

In arguing that the trial court correctly rejected a superseding cause instruction, as alluded to above, Plaintiff primarily contends that Celadon's trial theory was that Plaintiff was not injured–a theory that does not support a superseding cause instruction. The record supports Plaintiff's assertion that Celadon primarily attempted to downplay or even deny the nature and extent of Plaintiff's alleged injuries. For example, Celadon's expert, Dr. Applebaum, stated his final opinion as to Plaintiff's condition as follows:

> It was my opinion [Plaintiff] did not have disease or damage involving the spinal cord and nerve roots and was not in need of any further neurological testing or treatment. And I felt he could return to any occupation for which he was otherwise qualified from a neurological point of view.

Secondarily, Celadon argued that Plaintiff's condition was the result of a pre-existing degenerative condition. For example, Celadon introduced the videotaped deposition of neurologist Dr. Najeeb M. Thomas who performed an independent medical evaluation of Plaintiff at the request of Plaintiff's employer's Worker's Compensation carrier. Dr. Thomas testified that Plaintiff sustained a permanent work-related injury on July 1, 2009. On re-direct examination, Celadon pressed Dr. Thomas on Plaintiff's degenerative problems and Dr. Thomas agreed that he "thought" such problems "more likely than not . . . ha[d] been aggravated and . . . worsened and . . . [had] become a debilitating injury because of a trauma that he [] sustained . . . [on] July 1, 2009[.]"

Alternatively, however, Celadon theorized that Plaintiff's injuries were, in fact, caused by Plaintiff's April 2011 accident, as evidenced by the above-cited testimony of Dr. Dietze. ***See* Tenn. R. Civ. P. 8.05(2)** ("A party may set forth two (2) or more statements of a claim or defense alternately or hypothetically."); *Jacobs v. Nashville Ear, Nose & Throat Clinic*, 338 S.W.3d 466, 477 (Tenn. Ct. App. 2010) (noting that the law allows alternative pleading and stating, therefore, that "it would seem strange to penalize a party because it produced testimony in support of alternative positions.").

In *Godbee v. Dimick*, 213 S.W.3d 865 (Tenn. Ct. App. 2006), this Court cited with

[17] As best we can tell, the office notes do not indicate when Plaintiff last-visited prior to May 4, 2011.

approval from a New Mexico case, in part:

> An instruction on independent intervening cause presupposes a defendant's negligence and causation in fact. Without some initial tortious act or omission by a defendant that precipitates the plaintiff's ultimate injury, subsequent causes and their injuries cannot "intervene." Without causation in fact, there is nothing for the subsequent cause to "interrupt" or "intervene" in, and no chain of causation to break. If the evidence demonstrates no more than a simple dispute over causation in fact (i.e., whether the defendant's negligence did or did not cause in fact the injuries suffered by the plaintiff), then the issue for the jury is causation alone, not independent intervening cause.
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> . . . .
>
> As previously discussed, the independent intervening cause instruction presupposes causation in fact and comes into play only if the evidence shows (1) negligence by a defendant that is a cause in fact, or "but for" cause, of the plaintiff's injury, . . . and (2) the intervention of an independent, unforeseeable event that "interrupts and turns aside" the normal progression of that causation in fact . . . . Without causation in fact, there can be no independent intervening cause.

213 S.W.3d at 886-88 (quoting *Chamberland v. Roswell Osteopathic Clinic, Inc.*, 130 N.M. 532, 27 P.3d 1019, 1023-34 (N.M. App. 2001) (internal citations omitted); *see also id.* at 888-89 (holding that the issue of whether patient's condition was the natural progression of a pre-existing degenerative disc disease or the result of the doctor's negligence was a question of cause-in-fact not warranting a jury instruction on superseding cause).

"'Intervening cause[18] appears to relate more to legal (proximate) causation than to

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[18]In *Howell*, this Court noted that the terms "superseding cause" and "intervening cause" are, at times, used interchangeably. 2009 WL 1422982, at *3 n.5. The terms have been explained as follows:

> Some intervening causes are superseding causes. What are superseding causes? They are intervening causes that break the causative chain. And how does that occur? An intervening cause breaks the causative chain when a defendant proves that: (1) the intervening act was not caused by defendant's negligence, and (2) the intervening act was not foreseen or reasonably foreseeable."

(continued...)

causation in fact because [intervening cause] does not come into play until after causation in fact has been established.'" ***Id.*** at 889 (quoting *Waste Mgmt., Inc. of Tenn. v. South Central Bell Telephone, Co.*, 15 S.W.3d 425, 432 (Tenn. Ct. App. 1997)). The theory relied upon by Celadon in purported support of a superseding cause instruction–that the 2011 accident, as opposed to the 2009 accident involving Celadon, actually caused Plaintiff's injuries–presents nothing more than a question of cause-in-fact. Celadon does not argue that the 2011 accident *broke* the chain of causation; it argues that the 2011 accident *began* the chain of causation. ***See generally*** **17 Tenn. Prac. Tennessee Law of Comparative Fault §6.6 (2013 ed.)** ("A cause that is truly a superseding cause, that is, one not caused by defendant's negligence and not foreseen or reasonably foreseen, will still break the causative chain and relieve a prior actor of the actor's negligence."). Accordingly, we find that an instruction on superseding cause was not warranted in this case and that the instructions on proximate cause and legal cause were sufficient. ***See Parish v. King***, 179 S.W.3d 524, 530 (Tenn. Ct. App. 2005) ("[T]rial courts should give substantially accurate instructions concerning the law applicable to the matters at issue. The instructions need not be perfect in every detail, as long as they are, as a whole, correct.") (citations omitted).

D. Damages

Finally, we will address the issue of damages. As stated above, the jury returned a verdict in favor of Plaintiff for $3,705,000. Specifically, the jury awarded $1,455,000 for loss of earning capacity, $750,000 for physical pain and mental suffering, $750,000 for permanent injury, and $750,000 for loss of enjoyment of life. However, the trial court suggested a remittitur, which is described in its order as follows:

> [W]hile this Court makes no specific determination that this jury acted with passion, prejudice or caprice, it is ruled that the award given following the trial of this matter was excessive and remittitur is appropriate. As such, this Court suggests a remittitur in the amount of $1,605,000 be taken from the initial jury verdict of $3,705,000 leaving a new verdict in the amount of $2,100,000. Specifically, the Court suggests the verdict shall be reduced as follows:
>
> Loss of Earning Capacity reduced from $1,455,000 to $1,100,000
> Physical Pain and Mental Anguish reduced from $750,000 to $500,000
> Permanent Injury reduced from $750,000 to $100,000
> Loss of Enjoyment of Life reduced from $750,000 to $400,000

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[18](...continued)
17 Tenn. Prac. Tennessee Law of Comparative Fault § 6:6 (2013 ed.).

On appeal, both parties challenge the damage award: Celadon argues that this Court should further reduce the award and Plaintiff argues that we should reinstate the original jury award.

"Tennessee caselaw emphasizes the primacy of the jury in determining the damages to be awarded to a claimant." ***Johnson v. Nunis***, 383 S.W.3d 122, 133-34 (Tenn. Ct. App. 2012) (citing *Foster v. Amcon Int'l*, 621 S.W.2d 142, 147 (Tenn. 1981); *Smith v. Shelton* 569 S.W.2d 421, 426-27 (Tenn. 1978); *Oglesby v. Riggins*, No. W2010-01470-COA-R3-CV, 2011 WL 915583, at *3 (Tenn. Ct. App. Mar. 17, 2011); *Long v. Mattingly*, 797 S.W.2d 889, 895 (Tenn. Ct. App. 1990)); *see also Porter v. Green*, 745 S.W.2d 874, 879 (Tenn. Ct. App. 1987) ("In personal injury cases the amount of compensation is primarily for the jury and, next to the jury, the most competent person to pass on the matter is the trial judge.") (citing *Foster*, 621 S.W.2d at 147). If, however, the trial court determines that the jury verdict is excessive, it has a "'statutory prerogative'" to "'adjust damage awards to accomplish justice between the parties and to avoid the time and expense of a new trial.'" ***Id.*** (quoting *Long*, 797 S.W.2d at 896).

> "When remittitur is the issue in a personal injury . . . case, the question is whether the amount of money awarded is excessive, which requires ascertainment of a figure that represents the point at which excessiveness begins." *Ellis*, 603 S.W.2d at 126). This will establish the upper limit of the range of reasonableness. An excessive verdict may be cured by remitting the sum by which the award exceeds that figure. *Id.* The trial court may consider the amount awarded in similar cases in determining whether a verdict is excessive.

Meals ex rel. Meals v. Ford Motor Co., 417 S.W.3d 414, 421 (Tenn. 2013).

"[T]here is no precise mathematical formula which the court can use to assure that judgments in negligence cases are uniform." ***Palanki***, 215 S.W.3d at 386 (citing *S. Ry. Co. v. Sloan*, 56 Tenn. App. 380, 407 S.W.2d 205, 211 (1965)).

> There is no exact yardstick, or measurement, which this court may use as a guide to determine the size of verdict which should be permitted to stand in cases of this kind. Each case must depend upon its own facts and the test to be applied by us is not what amount the members of the court would have awarded had they been on the jury, or what they, as an appellate court, think should have been awarded, but whether the verdict is patently excessive. The amount of damages awarded in similar cases is persuasive but not conclusive, and, in evaluating the award in other cases, we should note the date of the award, and take into consideration inflation and the reduced value of the

individual dollar.

Id. (quoting *S. Ry. Co.*, 407 S.W.2d at 211).

"The role of the appellate courts is to determine whether the trial court's adjustments were justified, giving due credit to the jury's decision regarding the credibility of the witnesses and due deference to the trial court's prerogatives as thirteenth juror." ***Long***, 797 S.W.2d at 896 (citing *Burlison v. Rose*, 701 S.W.2d 609, 611 (Tenn. 1985); *Bates v. Jackson*, 639 S.W.2d 925, 926-27 (Tenn. 1982); *Foster*, 621 S.W.2d at 145). On appeal from a remittitur, we employ a "three-step review":[19]

> First, we examine the reasons for the trial court's action since adjustments are proper only when the court disagrees with the amount of the verdict. Second, we examine the amount of the suggested adjustment since adjustments that "totally destroy" the jury's verdict are impermissible. Third, we review the proof of damages to determine whether the evidence preponderates against the trial court's adjustment.

Id. (citations omitted). Where the trial court has suggested a remittitur,

> [t]he [C]ourt of [A]ppeals shall review the action of the trial court suggesting a remittitur using the standard of review provided for in Tennessee Rule of Appellate Procedure 13(d)[20] applicable to decisions of the trial court sitting without a jury. If, in the opinion of the [C]ourt of [A]ppeals, the verdict of the jury should not have been reduced, but the judgment of the trial court is correct in other respects, the case shall be reversed to that extent, and judgment shall

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[19]"Previously, when a judge acted as the thirteenth juror and granted a remittitur, our first task on appeal was to determine a reasonable range of damages based on the proof provided at trial. Next, we had to decide whether the jury verdict and the court's remitted verdict fell within that range. Once determined, our role on appeal when the jury verdict and trial court's remitted verdict were within the range of reasonableness was to simply reinstate the jury's verdict." ***Bain v. Simpson***, No. M2001-00088-COA-R3-CV, 2002 WL 360320, at *3 (Tenn. Ct. Ap. Mar. 7, 2002) (citing *Smith v. Shelton*, 569 S.W.2d 421, 427 (Tenn. 1978)).

[20]Tennessee Rule of Appellate Procedure 13(d) provides:

> Unless otherwise required by statute, review of findings of fact by the trial court in civil actions shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. Findings of fact by a jury in civil actions shall be set aside only if there is no material evidence to support the verdict.

be rendered in the [C]ourt of [A]ppeals for the full amount originally awarded by the jury in the trial court.

Tenn. Code Ann. § 20-10-102(b). *Compare Meals*, 417 S.W.3d at 423 ("'[W]hen the trial judge has approved the verdict, the review in the Court of Appeals is subject to the rule that if there is *any* material evidence to support the award, it should not be disturbed.' . . . The Court of Appeals' authority to suggest a remittitur when the trial court has affirmed the verdict is far more circumscribed than that of the trial court.") (citations omitted) (emphasis in original). "If, after reviewing the record, we determine that the adjusted damage award is still excessive, we have the prerogative under Tenn. Code Ann. § 20-10-103(a) [] to reduce the damages further." ***Id.*** (citing *Ellis v. White Freightliner Corp.*, 603 S.W.2d 125, 129 (Tenn. 1980); *Porter v. Green*, 745 S.W.2d 874, 879 (Tenn. Ct. App. 1987)).

Again, on appeal, Celadon argues that the trial court failed to sufficiently remit the jury award. Specifically, it contends that the adjustment of non-economic damages (physical pain and mental anguish; permanent injury; and loss of enjoyment of life) from $2,250,000 to $1,000,000 was insufficient because, it claims, the only evidence supporting the jury's award of non-economic damages was (1) Plaintiff's lingering back pain and (2) his inability to participate in certain hobbies and household chores. Celadon suggests, based upon caselaw cited in its brief, that "non-economic damages in this case would be reasonable between $100,000 and $430,000."

Celadon also argues that this Court must further reduce the loss of earning capacity award because the jury disregarded evidence that Plaintiff is capable of obtaining gainful employment. According to Celadon, the jury awarded Plaintiff 100% of his lost wages as if he would never again be able to return to work rather than the difference between the wage he earned before the accident and what he is capable of earning after the accident.

In response, Plaintiff contends that the trial court erred in reducing the verdict at all and that the jury verdict should be reinstated. First, regarding the physical pain and mental anguish award, Plaintiff maintains that the evidence established that he will have a lifetime of pain and that he experienced mental suffering, including worry and shame. Second, he argues that the original $750,000 award for permanent injury was appropriate because the accident left him unable to participate in the activities he previously enjoyed or to perform household chores. Third, Plaintiff maintains that the $750,000 award for loss of enjoyment of life was not excessive because the accident left Plaintiff unable to enjoy the pleasures and amenities of daily activities common to most people, and if he chooses to participate in those activities, he suffers considerable pain. Finally, Plaintiff contends that the $1,455,000 jury award for loss of earning capacity should not have been reduced. Plaintiff acknowledges that the amount slightly exceeds the testimony at trial regarding an average truck driver income,

but he contends that the jury considered, among other things, his above-average work ethic and inflation. He maintains that, although testimony indicated that he could perform certain types of work, the evidence demonstrated that he would face extreme difficulty in securing such a position.

The first step of the three-step-review is clearly met in this case as the trial court denied Celadon's motion for a new trial and it suggested a remittitur. ***See Myers v. Myers***, No. E2004-021350COA-R3-CV, 2005 WL 1521952, at *3 (Tenn. Ct. App. June 27, 2005) ("The fact that the trial court denied the defendant's motion for a new trial and suggested a remittitur clearly indicates that the trial court agreed with the jury's verdict pertaining to liability.") (citing *Burlison v. Rose*, 701 S.W.2d 609, 611 (Tenn. 1985)). *Compare Rey v. Hestle*, 1992 WL 102231, at *3 (Tenn. Ct. App. May 15, 1992) (stating that a trial court's explanation of its remittitur "because the verdict [was] excessive" offered "no guidance" and left the Court "unable to apply the first prong of the [three-step review].").[21]

Pursuant to step two, we now consider whether the trial court's remittitur "destroyed" the jury's award. Our Supreme Court recently explained the concept of destruction of a jury verdict as follows:

> The trial court's authority to suggest a remittitur of a jury's verdict rather than grant a new trial when it disagrees solely with the award of damages is not absolute. A suggested remittitur should not be so substantial as to destroy the jury's verdict. *See Foster v. Amcon Int'l, Inc.*, 621 S.W.2d 142, 148 (Tenn. 1981). There is no set percentage that represents the destruction of the jury's verdict. *See id.* at 148 n.9 ("[W]e do not intend to establish a numerical standard for reviewing additurs and remittiturs."); *Webb v. Canada*, No. E2006-01701-COA-R3-CV, 2007 WL 1519536, at *4 (Tenn. Ct. App. May 25, 2007) ("While we decline to establish any particular percentage that would indicate a remittitur that has totally destroyed a jury verdict, we note that [large] remittiturs by percentage have been found acceptable by this Court and the Supreme Court of our state."). *Compare Webb*, 2007 WL 1519536, at *4 (citing cases in which remittiturs ranging from 40% to 59% were found not to

[21] We note, however, that under step one we are to "examine the reasons for the trial court's action[.]" ***Long***, 797 S.W.2d at 896. "Where the trial court does not give any explanation for its action, . . . 'we are left perplexed as to how this can be done[.]'" ***Adams v. Leamon***, No. E2012-01520-COA-R3-CV, 2013 WL 6198306, at *5 (Tenn. Ct. App. Nov. 25, 2013). "Trial courts can assist in this Court's review by providing specific reasons for the suggested remittitur and the evidence upon which the trial court relies." ***Id.*** (citing *Glover v. Chambers*, 1988 WL 5681 (Tenn. Ct. App. Jan. 29, 1988) *perm. app. denied* (Tenn. May 2, 1988)). The trial court did, however, somewhat aid our review by suggesting remittitur of particular itemized awards.

> destroy the jury's verdict), *with Guess v. Maury*, 726 S.W.2d 906, 913 (Tenn. Ct. App. 1987) (holding that 75% remittitur destroyed the verdict), *overruled on other grounds by Elliott* [*v. Cobb*, 320 S.W.3d 246] 252 [Tenn. 2010], *and Myers v. Myers*, No. E2004-02135-COA-R3-CV, 2005 WL 1521952, at *1 (Tenn. Ct. App. June 27, 2005) (holding that 70% remittitur destroyed the verdict.).

An adjustment which "destroys" the verdict is impermissible and must be modified or vacated. ***See Adams v. Leamon***, No. E2012-01520-COA-R3-CV, 2013WL 6198306, at *5 (Tenn. Ct. App. Nov. 25, 2013) (citing *Johnson*, 383 S.W.3d at 134; *Myers*, 2005 WL 1521952, at *3).

In this case, the trial court reduced the jury's verdict by 43%–from $3,705,000 to $2,100,000.[22] Bearing in mind that no numerical standard has been established by which remittiturs and additurs are reviewed, *see Foster*, 621 S.W.2d at 148 n.9, we find the remittitur in this case is in line with other remittiturs which have been found not to destroy the verdict.[23] *See, e.g. Jenkins v. Commodore Corp. S.*, 584 S.W.2d 773 (Tenn. 1979) (40% reduction did not destroy the verdict); *Johnson v. Nunis*, 383 S.W.3d 122, 135 (Tenn. Ct. App. 2012) (43% reduction did not destroy the verdict); *Palanki v. Vanderbilt University*, 125 S.W.3d 380 (Tenn. Ct. App. 2006) (59% reduction did not destroy the verdict); *Grandstaff*, 36 S.W.3d 482 (Tenn. Ct. App. 2000) (45% reduction did not destroy the verdict); *Steel v. Ft. Sanders Anesthesia Group, P.C.*, 897 S.W.2d 270 (Tenn. Ct. App. 1994) (40% reduction did not destroy the verdict); *Rey v. Hestle*, 1992 WL 102231, at *3 (Tenn. Ct. App. May 15, 1992) (60% reduction did not destroy the verdict). *Compare Foster*, 621 S.W.2d at 148 (additur thirty times that of the jury verdict destroyed the verdict); *Meals*, 417 S.W.3d at 423 (70.55% reduction destroyed the verdict); *Lashlee v. Harper's Chrysler*, No. M2007-00443-COA-R3-CV, 2008 WL 3983120, at *12 (Tenn. Ct. App. Aug. 27, 2008) (95% reduction destroyed the verdict).

Finally, we review the proof of damages to determine whether the evidence preponderates against the trial court's adjustment.

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[22] We find it appropriate to consider the percentage reduction of the overall award. ***See, e.g., Adams***, 2013 WL 6198306, at *5 (considering the percentage reduction of the overall award even though the delineated awards for pain and suffering and for loss of enjoyment of life were reduced by different percentages).

[23] The eastern section of this Court has previously noted that "cases in which a trial court's remittitur or additur was reversed because it totally destroyed the jury's verdict are few and far between." ***Webb***, 2007 WL 1519536, at *4.

1. Loss of Earning Capacity

Loss or impairment of future earning capacity is an element of damages in a personal injury action. Earning capacity refers not to actual earnings, but rather to the earnings that a person is capable of making.

The extent of an injured person's loss of earning capacity is generally arrived at by comparing what the person would have been capable of earning but for the injury with what the person is capable of earning after the injury. If the injury is permanent, this amount should be multiplied by the injured person's work life expectancy, and the result should be discounted to its present value.

The injured party has the burden of proving his or her impairment of earning capacity damages. In order to recover these damages, the injured person must first prove with reasonable certainty that the injury has or will impair his or her earning capacity. Then, the injured party must introduce evidence concerning the extent of the impairment of his or her earning capacity.

The proof concerning impairment of earning capacity is, to some extent, speculative and imprecise.

The courts have found competent and admissible any evidence which tends to prove the injured person's present earning capacity and the probability of its increase or decrease in the future. Thus, the courts have routinely admitted evidence concerning numerous factors, including the injured person's age, health, intelligence, capacity and ability to work, experience, training, record of employment, and future avenues of employment.

Impairment of earning capacity is not necessarily measured by an injured person's employment or salary at the time of the injury. It is not uncommon for an injured person to assert than an injury has caused him or her to abandon plans to change employment, to obtain additional education or training, or to otherwise advance a career. In the face of such an assertion, the trier of fact must distinguish between persons with only vague hopes of entering a new profession and those with the demonstrated ability and intent to do so. Often, making this distinction depends on the steps the person has actually taken to accomplish his or her educational or career goals.

Overstreet v. Shoney's, Inc., 4 S.W.3d 694, 703-05 (Tenn. Ct. App. 1999) (internal citations and footnote omitted).

The primary dispute in this case concerns Plaintiff's ability to return to work. At trial, vocational economic analyst, Anthony Gamboa, Jr., Ph.D., testified regarding a vocational economic assessment he conducted regarding Plaintiff. In performing the assessment, Dr. Gamboa reviewed, among other things, the medical report of Dr. Dietze, a functional capacity evaluation performed on Plaintiff, Plaintiff's prior earning history, and the average earnings for "heavy truck drivers" in Louisiana. Dr. Gamboa testified that Plaintiff had been cleared for some types of sedentary work; however he opined that Plaintiff–"a person who learns and does with his hands"–would face difficulty securing work. He stated,

> The evaluators are basically saying that this man is capable of sedentary work, but not all sedentary work. Because some sedentary jobs require a great deal of prolonged sitting, which is a problem for him. Similarly, light work requires prolonged periods of standing and walking. . . .
>
> His problem is, he can't sit for long periods of time. He can't stand for long periods of time, either. So that creates a very significant limitation, in terms of the amount or kind of work he can perform. He can perform some sedentary occupations that alternate sitting and standing and some light occupations that don't require prolonged standing. But there are very, very , very few of those occupations.

Even jobs which Plaintiff could physically handle, Plaintiff likely could not secure, as explained by Dr. Gamboa:

> for those jobs when they become open, there are lots of persons who have done that type of work in the past. Why would an employer hire someone, let's say, as a file clerk if they've never done the job of file clerk, when you can get someone who has maybe not only been a file clerk but has functioned as a receptionist and who has functioned maybe doing some typing, et cetera.
>
> So what I'm saying to you is, he's kind of like a fish out of water. This guy has functioned as a welder, he's functioned as a truck driver, he's a physical guy. That's what he has done for a living. A lot of those jobs are not physical and they're not anything like what he has done in the past. And for every one of those jobs that becomes open, you have multiple people applying for it, especially in this economy.

. . . .

> What I'm saying to you is, he's clearly not going to do any of the work that he's done in the past. No one says he is going to function as a welder or as an over-the-road tractor-trailer driver. No one is saying that. Everybody is saying he can't do that.
>
> So now the question is: What can he do? Well, he can do some light work, if it doesn't require a lot of standing. And most of those jobs do. And he can do some sedentary work, as long as he can sit and stand alternatively.
>
> All I'm saying is this: He's not subhuman because he's disabled; he's just going to have extreme difficulty getting a job. Do I think it's more likely than not that he will be employed? I don't. I think it's more likely than not that he will never work again. That's what I think. But what I think isn't really all that critical; it's what the jury thinks. And all I'm saying to you is: I've worked with lots of disabled people; and I'm telling you what the data says, only a third of them are employed. And there's nothing to cause me to conclude that for some reason he's going to be an exception to the rule and walk out of here next month and get a job. I don't think that's going to happen, but that's just me.

Dr. Gamboa further explained that Plaintiff's "significant[]" reading deficiency compounded his inability to secure a non-manual-labor position.

Given Plaintiff's restrictions, he stated that Plaintiff "would have the capacity to perform, maybe 2 percent of the job[s] in the labor market[,]" which he described as "real, real low." Notwithstanding his capacity to perform some jobs, however, Dr. Gamboa testified that "the issue for him is an issue of employability." He opined that Plaintiff's "probability of employment [is] so low, that he is really unemployable. . . . [T]his man is not going back to work."

Using the statistical average, Dr. Gamboa placed Plaintiff's pre-injury earning capacity at $38,281 per year. He then calculated Plaintiff's lifetime loss of earning capacity–who was 33 years old at the time–to be $1,334,647.[24]

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[24]He explained that he took the $38,000 figure and" increased it by the fringe benefit factor of approximately [27%]." He then "projected it out over a preinjury work life expectancy of 27.5 years." Although Plaintiff was 33 years old at the time of calculation, Dr. Gamboa calculated his work life (continued...)

On appeal, Celadon argues that Dr. Gamboa erroneously relied upon a June 2011 functional capacity evaluation because, according to Celadon, the evaluation was obsolete prior to trial. Celadon contends that the functional capacity evaluation indicated that Plaintiff could not return to work and that following the evaluation, with physical therapy, Plaintiff's condition improved such that he could perform sedentary, light-duty, or light-to-medium-duty work.

We find Celadon's arguments unavailing. Dr. Gamboa clearly did not base his assessment upon any medical determination that Plaintiff is physically unable to return to *any* job. Instead, he opined that Plaintiff's limited credentials essentially leave him unable to compete for the jobs which he can physically perform.

Given Dr. Gamboa's testimony, we reject Celadon's contention that the loss of earning capacity should be reduced beyond $1,100,000. In fact, having found no basis for straying from the lost earnings figure suggested by Dr. Gamboa, we find the evidence preponderates against the $355,000 reduction suggested by the trial court. Accordingly, we reverse the trial court's suggested remittitur of the loss of earning capacity award and we reinstate the jury's $1,455,000 award for loss of earning capacity.[25]

2. Non-Economic Damages

Along with economic damages, personal injury plaintiffs are entitled to recover compensatory damages for non-economic losses. ***See Meals***, 417 S.W.3d at 420 (citing *Ellis*, 320 S.W.3d at 247). "'Non-economic damages include pain and suffering, permanent impairment and/or disfigurement, and loss of enjoyment of life.'" ***Id.*** (quoting *Ellis*, 320 S.W.3d at 248 n.1); *see also Thompson v. National R.R. Passenger Corp.*, 621 F.2d 814, 824 (C.A. Tenn. 1980) ("Pain and suffering, permanent injury, and loss of enjoyment of life each represent separate losses which the victim incurs.").

"Assigning a compensable, monetary value to non-economic damages can be difficult." ***Id.*** (citing *Wolfe v. Vaughn*, 13 Beeler 678, 688, 152 S.W.2d 631, 635 (Tenn. 1941)); *see also Meals*, 417 S.W.3d at 425 ("Non-economic damages . . . are not easy to

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[24](...continued)
expectancy only to age 60 because he considered the probability of death and unemployment.

[25]Dr. Gamboa calculated Plaintiff's lost earnings, beginning at age 33, at $1,334,657. At the time of trial in 2013, Plaintiff was 34 years old. It appears that the jury appropriately included Plaintiff's wages lost between the accident and the time of Dr. Gamboa's calculation ($38,821 annual earning capacity x 27% fringe benefit x 2.5 years of lost work prior to calculation = $123,256.68. This figure is nearly identical to the difference between the jury award and Dr. Gamboa's calculation.

determine."). "The assessment of non-economic damages is not an exact science, nor is there a precise mathematical formula to apply in determining the amount of damages an injured party has incurred." ***Id.*** (citing *McCullough v. Johnson Freight Lines, Inc.*, 202 Tenn. 596, 606, 308 S.W.2d 387, 392 (1957); *S. Ry. Co. v. Sloan*, 56 Tenn. App. 380, 392, 407 S.W.2d 205, 211 (1965)). Accordingly, "a plaintiff is generally not required to prove the monetary value of non-economic damages." ***Id.*** (citing *Health Cost Controls v. Gifford*, 239 S.W.3d 728, 733 (Tenn. 2007)).

"A jury has wide latitude in assessing non-economic damages." ***Meals***, 417 S.W.3d at 425. "We trust jurors to use their personal experiences and sensibilities to value the intangible harms such as pain, suffering, and the inability to engage in normal activities." ***Id.*** "It is not our role to second-guess the jury and to substitute our judgment; but it is our role to protect against a verdict that is excessive." ***Id.*** (citing *Coffey v. Fayette Tubular Prods.*, 929 S.W.2d 326, 330-31 n.1 (Tenn. 1996); *Foster v. Amcon Intern., Inc.*, 621 S.W.2d 142, 143 n.2, 147 (Tenn. 1981)).

a. Physical Pain and Mental Anguish

"Damages for pain and suffering are awarded for the physical and mental suffering that accompany an injury." ***Id.*** (citing *Overstreet*, 4 S.W.3d at 715). Pain and suffering "includes the 'wide array of mental and emotional responses' that accompany the pain, characterized as suffering, such as anguish, distress, fear, humiliation, grief, shame, or worry." ***Overstreet***, 4 S.W.3d at 715 (quoting *McDougald v. Garber*, 132 Misc.2d 457, 504 N.Y.S.2d 383, 385 (N.Y. Sup.Ct. 1986)). "Damages for pain and suffering . . . are not easily quantified and do not lend themselves to easy valuation." ***Duran v. Hyundai Motor Am., Inc.***, 271 S.W.3d 178, 210 (Tenn. Ct. App. 2008) (citations omitted); *see also id.* at n.34 ("'[T]he determination of such nonpecuniary losses as pain and suffering damages involves an element not present in the determination of ordinary facts. The jury trial guarantee requires that the subjective element involved be that of the community and not of judges.'") (quoting Case Comment, *Pennsylvania Supreme Court Reduces Jury Verdict Without Granting Plaintiff Alternative of a New Trial*, 113 U. Pa. L.Rev. 137, 141 (1964)).

On appeal, Celadon argues that Plaintiff has suffered only mild pain and that the jury's pain and suffering award–even with the trial court's suggested remittitur from $750,000 to $500,000–is "clearly excessive" as compared to damage awards in other cases involving similar injuries. Specifically, Celadon correctly notes that Plaintiff did not experience pain at the time of the accident, that he continued to work for six months following the accident,

and that he has taken only non-narcotic pain medications since the accident.[26] Additionally, Celadon argues that Plaintiff was required, and failed, to present expert testimony regarding his mental anguish.[27]

In response, Plaintiff points out that he was only thirty years old at the time of the accident, he contends that the evidence established that he will endure a lifetime of pain, and he calculates his physical pain and mental anguish award at $49.00 per day based upon the jury's verdict.[28] Aside from physical pain, however, Plaintiff maintains that the jury took into account his mental anguish–specifically, worry, depression and shame.

As previously noted, at trial, Plaintiff testified that at the time of the accident, he was "so in shock" that he "didn't really have any pain[.]" He did not visit the hospital and he was able, that afternoon, to drive the tractor-trailer involved in the accident home to Louisiana. Approximately four days after the accident, however, Plaintiff developed progressively worsening neck and back pain for which he was treated conservatively by a family physician. Apparently Plaintiff received a "little heat treatment" which he acknowledged "helped a little while." Despite his alleged persistent pain, Plaintiff continued to work after the accident because, apparently for financial reasons, he "had to[.]"

In January 2010, Plaintiff was seen by a spine specialist, neurosurgeon Dr. Donald Dietze. According to Dr. Dietze, the evaluation "revealed that [Plaintiff] had both in his neck and his back some evidence of spasm, decreased range of motion, palpable pain in the back . . . ." and "some disc space narrowing at multiple levels in the lumbar spine[.]" Initially, Dr. Dietze believed that Plaintiff had suffered a musculoskeletal injury from the July 1, 2009 accident. However, when the purported muscle, tendon and ligament injuries

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[26]In its reply brief to this Court, Celadon argues that we cannot consider any mental anguish stemming from Plaintiff's inability to work because, Celadon claims, as a result of the loss of earning capacity award, Plaintiff "should no longer be burdened with this concern." While this may be true of *future* mental anguish, a loss of earning capacity award does nothing to relieve any anguish suffered by Plaintiff from the 2011 accident until the award is finalized and payment is received.

[27]Celadon has cited no authority requiring expert proof of mental anguish in a personal injury action; we have found none. ***See generally***, *Johnson*, 383 S.W.3d at 136-37 (noting that the plaintiff's non-economic damage award for past loss of ability to enjoy life was supported by lay testimony); *Estate of Amos v. Vanderbilt Univ.*, 62 S.W.3d 133, 136-37 (Tenn. 2001) (rejecting the defendant's argument that the requirements of "expert medical or scientific proof and serious or severe injury extend to all negligence claims resulting in emotional injury" and instead holding that such requirements "are a unique safeguard to ensure the reliability of 'stand-alone' negligent infliction of emotional distress claims.").

[28]Plaintiff arrived at this figure as follows: $750,000 ÷ 42 years of remaining life expectancy ÷ 365 days.

did not resolve themselves within two to three months, an MRI scan was performed. According to Dr. Dietze, the MRI revealed a "classic muscle, tendon, ligament injury" to Plaintiff's neck, but it indicated a disc herniation in Plaintiff's back, specifically the L4-5 disc. Dr. Dietze explained that Plaintiff's delayed pain following the accident is "pretty classic" "especially with a disc herniation" because "your adrenaline is so high that you don't realize truly what you feel."

Pursuant to Dr. Dietze's recommendation, Plaintiff received a series of two epidural spinal injections and facet injections. According to Dr. Dietze, however, Plaintiff received only a temporary benefit of "roughly about two to three weeks, but nothing sustained beyond that."

Dr. Dietze later recommended a lumbar facet neurotomy or rhizotomy where nerve endings are burned to relieve pain for "six months to even a couple of years." He also recommended an intradiscal electrothermal treatment which can shrink small disc herniations because Dr. Dietze still believed Plaintiff's disc was a component of his pain. However, Plaintiff did not receive these recommended treatments because they were not covered by worker's compensation.[29]

From October 2011 to April 2012, Plaintiff received physical therapy from Ms. Roberts over approximately forty-five visits. According to Ms. Roberts, Plaintiff was a good patient who exerted effort and he improved during the course of his therapy. When Plaintiff began treatment he reported "his best pain levels were at a six out of ten . . . and that his worst pain levels were eight to nines." He also complained of decreased range of motion in his neck, shoulder and hips, which Ms. Roberts agreed was consistent with lower back and neck pain. He had stated to Ms. Roberts that he had to stop working in the yard because of his increased pain level, he had difficulty standing, sitting and walking for longer durations, and he had difficulty lifting items due to neck and back pain.

Following physical therapy, Plaintiff reported his "best pain level" at "a two out of ten" and he was able to perform "housework and light yard work, laundry, taking out the trash, making the bed and other light chores around the house without increasing his pain." However, approximately three days per week his pain level was "five to six" which Plaintiff attributed to "sleeping wrong or the weather[.]" With physical therapy, Plaintiff's strength increased to "almost normal limits" and his range of motion in his neck, hips and shoulders improved. However, according to Plaintiff's wife, Tamara Williams, even with physical therapy, "It wasn't like the pain went away."

[29]Plaintiff's worker's compensation claim was filed in Louisiana where Plaintiff resides.

In March 2012, Dr. Dietze ordered a follow-up MRI. According to Dr. Dietze, the MRI showed "some progression changes of [Plaintiff's] back" such as "straightening of his spine and [] further collapse of the L4-5disc" which he opined was most logically explained as L4-5 disc injury resulting from the accident. Dr. Dietze opined that Plaintiff would "never . . . be pain free."

Dr. Lawrence W. Glorioso, III, the radiologist who performed the follow-up MRI, described seeing an "internal disruption of a disc because we've got a full thickness annular fibrosus tear" which "in and of itself is a pain generating source." Like Dr. Dietze, Dr. Glorioso also described seeing a straightening of Plaintiff's spine which he explained occurs because "someone with back pain" "hold[s] their back more erect than the average person would[.]"

At trial, Plaintiff testified regarding his mental anguish. He stated that he "would like to work just like everybody else" and that his worker's compensation recovery is inadequate to cover his bills, causing him to "worry about how this is going to get paid and how that is going to get paid" and leaving him depressed. Plaintiff's wife testified that Plaintiff is "used to working and making his own money" and that being unable to provide for his family, including his mother, has caused him to "worry[] about how he [i]s going to survive" and to "feel horrible" and "depressed." Plaintiff's wife further testified that Plaintiff becomes "upset" and "bother[ed]" when he is unable to help her or his mother with a task such as hooking up a boat or "moving stuff[.]"

As stated above, on appeal, Celadon argues that the instant award for physical pain and mental anguish is excessive as compared to other cases involving similar injuries. As recently stated by the Supreme Court:

> Our review of verdicts in similar cases must be approached with some caution. First, we recognize that by reviewing verdicts in published opinions, we are not reviewing the entire pool of damage awards. Cases resolved by settlement and/or mediation are not included in the pool of damage awards, and their absence can skew the results. Second, we must take care to only consider cases that are "similar"–presumably involving a similar plaintiff with similar injuries. Third, courts should take inflation and the reduced value of the dollar into account when considering these verdicts. Finally, courts should be mindful that when looking at other jury verdicts, each case must be judged on its own particular facts.

Meals, 417 S.W.3d at 425-26 (citations omitted). Bearing these precautions in mind, we now consider the cases cited to us by Celadon.

First, Celadon cites *Long v. Mattingly*, 797 S.W.2d 889 (Tenn. Ct. App. 1990). In *Long*, the fifty-seven year old plaintiff, who was rear-ended, left the accident scene believing she was uninjured; however, later that afternoon she developed a headache and the following day she experienced pain and swelling in her neck. 797 S.W.2d at 891. During the two years that followed the accident, the plaintiff "was treated by four different physicians for cervical and lumbar strain. The treatment included occipital nerve injections, physical therapy, and various medications." ***Id.*** at 891-92. Her treating physicians testified that her condition "'frequently follows a whiplash-type injury which is what she described.'" ***Id.*** at 892.

Plaintiff was not employed outside of the home and there was no proof that her condition prevented her from becoming employed. ***Id.*** at 896. Additionally, there was "little proof that she w[ould] require additional, significant medical treatment." ***Id.*** The evidence demonstrated that although "she ha[d] some residual pain and restriction of movement," she was able to "resume[] her normal activities" and she was restricted only from mowing the grass, getting dishes out of a cabinet, vacuuming, and lifting heavy boxes filled with antique bottles. ***Id.***

The jury awarded plaintiff $100,000 including $6,175 in medical expenses; the trial court reduced the award to $85,000.[30] ***Id.*** at 896. This Court found the evidence preponderated against the $85,000 award and we further reduced the award to $50,000. ***Id.***

Next, Celadon relies upon *Holt v. Compton Sales Co., Inc.*, 900 S.W.2d 291 (Tenn. Ct. App. 1995). In *Holt*, the forty-year-old plaintiff was involved in an automobile accident. ***Id.*** at 292. As a result, the plaintiff suffered headaches which resolved with time as well as a back injury, specifically "a significant lumbar sprain strain with nerve root impingement and a bulging disc at L4-5" which caused permanent pain and limitation of motion ***Id.*** The plaintiff was given a 10% to 22% impairment rating and his employment prospects were severely limited. Additionally, the plaintiff "developed stomach ulcer problems relating to the medications that he was taking as a result of the injury" and "[h]e also suffered from depression relating at least in part to the accident." ***Id.*** at 293. Prior to the accident, the plaintiff "enjoyed several recreational activities including camping, fishing, boating, auto racing and repair and yard and home maintenance." ***Id.*** at 292. However, after the accident, he could no longer engage in these activities. ***Id.*** at 293. He unsuccessfully attempted to return to his previous employment, but he was reduced to working as a "gofer" for nominal

[30]The Consumer Price Index indicates that $43,825 in 1990 ($50,000 - $6,175) has the same buying power as $78,112.78 in 2013.

wages. ***Id.*** A jury awarded the plaintiff $250,000[31] including $6,771.38 in medical and drug expenses, but the trial court suggested a remittitur to $200,000.[32] This Court affirmed the remittitur, but we declined to further reduce the award.

Finally, Celadon cites *Webb v. Canada*, No. E2006-01701-COA-R3-CV, 2007 WL 1519536 (Tenn. Ct. App. May 25, 2007). In *Webb*, the plaintiff was injured in a car wreck, sustaining a fracture of the second lumbar vertebra. ***Id.*** at *5. The plaintiff was temporarily placed in a back brace and he received physical therapy treatment. ***Id.*** He was allowed to return to work with limitations–although given his skills, his employer had no jobs available within his limitations–and he was assigned a 5% whole body impairment. ***Id.***

Before the accident, the *Webb* plaintiff was earning $16.99 per hour, but expert testimony indicated that, post-accident, the plaintiff was qualified only for jobs earning approximately $7.00 per hour. ***Id.*** An expert economist testified that if the sixty-one-year-old plaintiff never returned to work, his lost wages would total $210,624. ***Id.***

At trial, two and one-half years after the accident, the plaintiff testified that he still suffered from back pain "but [that] it [was] not as severe as it was right after the accident." ***Id.*** at *6. The plaintiff indicated that he had pain if he sat for long periods, but that "the pain eases if he is able to 'get up and walk around for a little bit.'" ***Id.*** He testified that prior to the accident he enjoyed playing softball and golf, but that he could no longer participate in those activities. ***Id.***

The jury awarded the plaintiff $723,426.27 in damages, including $12,812.27 in stipulated medical expenses. ***Id.*** The trial court suggested a remittitur of $125,000, for damages of $598,426.27.[33] ***Id.*** On appeal, the defendant argued that the trial court's remittitur was inadequate, but we disagreed. ***Id.*** We noted that the plaintiff's medical expenses and lost wages totaled more than $223,000,[34] that the plaintiff "[c]ontinued to suffer pain from his spinal injury and w[ould] probably do so for the rest of his life[,]" and that he

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[31]The *Holt* awards were not itemized between lost wages and non-economic damages.

[32]The Consumer Price Index indicates that $193,228.62 in1995 ($200,000 - $6,771.38) has the same buying power as $295,367.19 in 2013.

[33]The Consumer Price Index indicates that $374,990 in 2005 ($598,426.27 - $210,624 - $12,812.27) has the same buying power as $447,294 in 2013.

[34]Testimony was presented that the plaintiff could perform a minimum wage job; however, given his medical restrictions and his age, we stated "the odds of him being hired for such a position do not appear likely." *Webb*, 2007 WL 1519536, at *6 n.1.

"c[ould] no longer pursue the recreational activities that he once enjoyed." ***Id.***

We find the cases cited by Celadon somewhat distinguishable from the instant case. Notably, the plaintiffs in *Long* and *Webb* were significantly older–fifty-seven years old and sixty-one years old, respectively–as compared to our thirty-year-old Plaintiff at the time of the accident. Additionally, the injuries sustained in *Long* and *Webb* appear to be less severe than here. In *Long*, the plaintiff suffered whiplash, she was able to return to her normal activities, and there was no indication that she sustained any permanent injury or that she suffered any mental anguish. Likewise, in *Webb*, there was no indication that the plaintiff would permanently remain in pain.

Here, Plaintiff suffered a "classic muscle, tendon, ligament injury" to his neck, but more seriously, a permanent spinal disc herniation. He received multiple types of treatment, including heat treatment, epidural spinal injections and facet injections, and extensive physical therapy. Surgery was considered, but rejected, because of efficacy concerns and other temporary pain-relieving treatments were denied under Plaintiff's worker's compensation. Of the treatments Plaintiff received, nothing was able to correct his injury or to his eliminate his back pain. Following physical therapy, Plaintiff reported his "best pain level" at "a two out of ten[;]" however, approximately three days per week his pain level is "five to six" out of ten. Multiple witnesses–including Ms. Roberts and Drs. Dietze, Applebaum and Thomas–confirmed Plaintiff's credibility. A follow-up MRI nearly three years after the accident revealed "progressive changes" in Plaintiff's back including a "straightening of his spine and further collapse of the L4-5 disc [.]"

As explained more fully above, Plaintiff is unable to return to work–a fact that has led to both depression and anxiety. Additionally, his physical limitations have brought about a sense of shame to this once-independent young man.

Keeping in mind that this case must be judged on its own facts, and that an award of this type involves a particularly subjective element which the jury–and next the judge–is most competent to pass on, we cannot say that the trial court's remittitur of the pain and suffering and mental anguish award to $500,000 is against the preponderance of the evidence. ***See Duran***, 271 S.W.3d at 211-12 (affirming the trial court's remittitur of compensatory damages to the amount requested by the plaintiff, approximately $2,000,000, noting that "[t]he assessment of these subjective damages was for the jury to decide in the first instance and then for the trial judge[,]" and stating that "[w]hether we would have awarded [these damages] is not the point[.]").

b. Permanent Injury

"A permanent injury differs from pain and suffering in that it is an injury from which the plaintiff cannot completely recover." ***Overstreet***, 4 S.W.3d at 715 (citing *Jordan v. Bero*, 158 W.Va. 28, 210 S.E.2d 618, 630 (1974)). Permanent injury "prevents a person from living his or her life in comfort by adding inconvenience or loss of physical vigor." ***Id.*** (citing *Wheeler v. Bennett*, 312 Ark. 411, 849 S.W.2d 952, 955 (1933)). "Permanent injury may relate to earning capacity, pain, impairment of physical function or loss of the use of a body part, or to a mental or psychological impairment." ***Id.*** (citations omitted). "A permanent injury may be physical, emotional, or psychological." ***Champion v. CLC of Dyersburg, LLC***, 359 S.W.3d 161, 163 (Tenn. Ct. App. 2011) (citing *Overstreet*, 4 S.W.3d at 715).

Again, the jury awarded Plaintiff $750,000 for permanent injury, which the trial court reduced to $100,000. In support of the jury's award, Plaintiff cites the testimony of Dr. Dietze in which Dr. Dietze indicated that Plaintiff suffered a permanent loss to his spinal disc as a result of the July 2009 accident, with a permanent impairment rating of 10 percent. Celadon, however, argues that Dr. Dietze's testimony is unreliable because he failed to order a second functional capacity evaluation after Plaintiff completed physical therapy. Celadon also contends that the $100,000 award is excessive as compared to *Johnson v. Nunis*, 383 S.W.3d 122 (Tenn. Ct. App. 2012), in which the jury awarded the plaintiff, who was injured in an automobile accident, $10,000 for permanent injury. In *Johnson*, this court found remittitur inappropriate as to that award based upon testimony that the plaintiff would likely continue to have "flare-ups" of pain and discomfort, particularly neuralgia of the forearm.[35] ***Id.*** at 127.

Importantly, Celadon has pointed to no evidence indicating that Plaintiff has not sustained a permanent injury. Notwithstanding the absence of a second functional capacity evaluation following physical therapy, the jury apparently credited Dr. Dietze's live trial testimony, and the trial judge, who did not completely eradicate the award, likewise, apparently gave credence to his testimony. Although the trial court failed to make specific findings regarding its rationale for the remittitur, it appears that the trial court may have suggested a remittitur in order to avoid a double recovery. As noted above, an award for permanent injury includes damages for lost earning capacity and for pain; however, because Plaintiff has been compensated for these losses through other awards, we find the permanent injury award represents the permanent damage to Plaintiff's disc and the accompanying

[35] In *Johnson*, the trial court suggested an overall remittitur of the verdict rather than a remittitur of particular awards. Thus, it is unclear whether the trial court suggested a remittitur of the permanent injury award. 383 S.W.3d at 135.

inconvenience and loss of physical vigor. We cannot say that the evidence preponderates against a $100,000 award to a thirty-year-old plaintiff who suffered a permanent injury to his spinal disc.

c. Loss of Enjoyment of Life

Finally, we address the trial court's suggested remittitur of the $750,000 jury verdict for loss of enjoyment of life to $400,000. As with the other damage awards, Plaintiff argues that the trial court erred in suggesting a remittitur of this award, and Celadon argues that further reduction is warranted.

> Damages for loss of enjoyment of life compensate the injured person for the limitations placed on his or her ability to enjoy the pleasure and amenities of life. *See Thompson v. National R.R. Passenger Corp.*, 621 F.2d [814,] 824 [C.A. Tenn. 1980); *Martin v. Southern Ry.*, 225 Tenn. 77, 80-81, 463 S.W.2d 690, 691 (1971) (approving an award for the "intangible elements of damage such as pain, suffering, inconvenience, and deprivation of the normal enjoyments of life"); *Mariner v. Marsden*, 610 P.2d 6, 12 (Wyo. 1980). This type of damage relates to daily life activities that are common to most people. *See, e.g.*, *Nemmers v. United States*, 681 F.Supp. 567, 575 (C.D. Ill. 1988) (going on a first date, becoming a parent, reading, debating politics); *Dyer v. United States*, 551 F. Supp. 1266, 1281 (W.D. Mich. 1982) (sense of taste); *Sweeney v. Car/Puter Int'l Corp.*, 521 F.Supp. 276, 288 (D.S.C. 1981) (recreational or family activities). It can also compensate a victim for the loss of uncommon individual pursuits or talents. *See, e.g.*, *District of Columbia v. Woodbury*, 136 U.S. 45, 459, 10 S.Ct. 990, 34 L.Ed. 472 (1890) (contributing articles to professional journals); *McAlister v. Carl*, 233 Md.446, 197 A.2d 140, 145 (1964) (inability to continue in a particular career); *Kirk v. Washington State Univ.*, 746 P.2d [285,] 292-93 [Wash. 1987] (ballet). The policy underlying the award of loss of enjoyment damages is of making the victim whole in the only way a court can–with an equivalent in money for each loss suffered. *See Thompson v. National R.R. Passenger Corp.*, 621 F.2d at 824.

Overstreet, 4 S.W.3d at 715-16.

At trial, Plaintiff's wife testified that, prior to the accident, Plaintiff was an active person, participating in basketball, fishing, hunting, vacations, picnics, and family outings. She stated that he "did everything" around the house including mowing the lawn, cleaning

the house, washing clothes and dishes, and sometimes cooking. He also cared for his mother who lived alone.

She testified that after the accident, Plaintiff "had bad days where he actually couldn't do things" and "good days where he could do things[.]" However, she explained that, even on good days, when Plaintiff attempted to participate in his normal pre-accident activities, "[a]fterward he would be in a lot of pain." She testified, "We only went places where he didn't have to walk so far, or did things where it wouldn't aggravate him to the point to where two or three days later he would be in so much pain to where he couldn't get out [of] the bed." She acknowledged that following the accident, Plaintiff continued to hunt and fish "a little bit" in a modified way to avoid aggravating his injuries. He also mowed the yard "a few times" using a riding lawnmower, but he was forced to stop because he was in "so much pain[.]"

Similarly, Plaintiff testified that before the accident his hobbies included fishing, hunting, mowing the lawn, working on vehicles, and doing things "any man around a house would do[.]" However, he stated that after the accident he could no longer hunt normally; he had someone build him a "box stand" where he could hunt seated in a chair. He also testified that since the accident he has been unable to play basketball.

Dr. Dietze testified regarding Plaintiff's activity following the accident as reported to him by Plaintiff. He testified that Plaintiff is able to fish from the bank or even from his boat if someone helps him get it into the water, that he is able to take out the trash "as long as it [isn't] too heavy[,]" and that he was able to coach a football team by giving verbal instructions. He testified that Plaintiff had reported "faring well" over a holiday weekend despite partaking in activities such as "cooking, fishing and helping carry a cooler with shrimp inside."

On appeal, Celadon points to Plaintiff's ability to partake in some activities and it argues that the $400,000 award for loss of enjoyment of life is excessive, again in comparison to *Long*, *Holt*, and *Webb*. In *Holt*, the trial court reduced a $250,000 total, non-itemized, damage award to $200,000, including approximately $6,000 in medical expenses. In affirming the total remittitur, we noted that the plaintiff had sustained permanent pain and motion limitations, that he now had limited occupational opportunities, that he had suffered depression, and that he could "no longer engage in his recreational activity and home and yard maintenance." 900 S.W.2d at 293.

In *Long*, although the plaintiff "ha[d] some residual pain and restriction of movement," she was able to "resume[] her normal activities" and she was restricted only from mowing the grass, getting dishes out of a cabinet, vacuuming, and lifting heavy boxes

filled with antique bottles. 797 S.W.2d at 891. We reduced the trial court's total award from $85,000 to $50,000, including approximately $6,000 in medical expenses. ***Id.***

In *Webb*, we affirmed a remittitur of $125,000 for total damages of $598,426.27, including medical expenses and lost wages of more than $223,000. 2007 WL 1519536, at *5. We noted that the plaintiff would suffer pain throughout the remainder of his life and that he "c[ould] no longer pursue the recreational activities that he once enjoyed." ***Id.***

We find additional cases persuasive.[36] In *Huskey v. Rhea County*, No. E2012-02411-COA-R3-CV, 2013 WL 4807038, at *17 (Tenn. Ct. App. Sept. 10, 2013) *perm. app. denied* (Tenn. Jan. 14, 2014), in a non-jury case, the eastern section of this Court affirmed a $50,000 award for loss of enjoyment of life and permanent injuries due to the plaintiff's injured arm being shorter and more-limited-in-motion than the other, and due to her inability to fully care for her handicapped grandchild, drive more than one hour at a time, reach lower piano keys without pain, sew for an extended period, or open cans or jars.

Shortly thereafter, in *Adams v. Leamon*, No. E2012-01520-COA-R3-CV, 2013 WL 6198306, at *4 (Tenn. Ct. App. Nov. 25, 2013), the eastern section stated that the evidence did not preponderate against the trial court's determination that a $156,204.50 award for future loss of enjoyment of life was excessive, noting that the plaintiff "was able to work and perform most household tasks" and that "[h]is greatest limitation appeared to be that he could no longer fully enjoy his hobby of riding motorcycles." However, the eastern section ultimately vacated the trial court's suggested remittitur and remanded the case for a new trial after finding that the trial court's 71.5 percent damage reduction destroyed the verdict. ***Id.*** At *5.

In *Rippy v. Cintas Corp. Services, Inc.*, No. M2010-00034-COA-R3-CV, 2010 WL 3633469 (Tenn. Ct. App. 2010), the middle section, under the lesser "material evidence" standard, affirmed a $40,000 award for loss of enjoyment of life to a plaintiff who sustained neck and shoulder injuries in a rear-end accident. The Court noted the plaintiff's testimony that it was "difficult for her to engage in the household chores she formerly enjoyed, such as sweeping, weeding, mopping, gardening, and any other activity that requires the use of her upper body muscles." ***Id.*** at *6. Although the plaintiff could still engage in many activities, if she chose to do so, "the next day [wa]s 'rough.'" ***Id.***

In *Riley v. Orr*, No. M2009-01215-COA-R3-CV, 2010 WL 2350475 (Tenn. Ct. App. W.S. June 11, 2010), this Court, again under the lesser "material evidence" standard,

[36] The cases show what types of damages are awarded for loss of enjoyment of life - not $400,000 for the types of injuries sustained in the case.

approved a $50,000 award for loss of enjoyment of life. In *Riley*, the plaintiff, who was accidentally shot, had "to rest more often when lifting heavy furniture, c[ould not] play guitar nearly as long as he used to, and he [could not] sit as long without feeling antsy and experiencing leg cramps." ***Id.*** at *8. Additionally, he suffered from increased agitation and less patience, he was inhibited from picking up his young children, and he could not run well when playing with his children. ***Id.*** Compare *Overstreet*, 4 S.W.3d 694, 717 (affirming a $250,000[37] award for past and future loss of enjoyment of life, under the "material evidence" standard, to a plaintiff who lost vision in one eye and, therefore, avoided social situations and lost the ability to swim, wash her hair, lift heavy objects, drive, perform housework without assistance, and to participate in sports).

After reviewing the record in this case, and cases we have deemed similar, we find that even with the trial court's suggested remittitur, the award for loss of enjoyment of life remains excessive and is against the preponderance of the evidence. Accordingly, we exercise our statutory prerogative to reduce the award to $50,000.00.

IV. CONCLUSION

For the aforementioned reasons, we affirm in part and we reverse in part. Specifically, we affirm the physical pain and mental anguish and permanent injury awards as reduced by the trial court; we reverse the trial court's suggested remittitur of the loss of earning capacity award and we instead reinstate the jury verdict of $1,455,000; and we further reduce the loss of enjoyment of life award to $50,000. Thus, we approve a total award to Plaintiff of $2,105,000. Costs of this appeal are taxed to Appellant, Celadon Trucking Services, Inc., and its surety, for which execution may issue if necessary.

ALAN E. HIGHERS, P.J., W.S.

[37]The Consumer Price Index indicates that $250,000 in 1999 has the same buying power as $349,575.33in 2013.