District Court, Larimer County, State of Colorado 201 LaPorte Avenue, Suite 100 Fort Collins, CO 80521-2761 (970) 498-6100	
Plaintiff: HEATHER TERRY **v.** **Defendants: DONNIE TIPTON and CRST VAN EXPEDITED, INC.**	▲ COURT USE ONLY ▲
	Case Number: 2004CV843 Courtroom: 3B

ORDER DENYING MOTION FOR NEW TRIAL, JUDGMENT NOTWITHSTANDING THE VERDICT, OR ALTERNATIVELY, REMITTITUR

On March 19, 2009, Defendants filed a motion for a new trial, judgment notwithstanding the verdict, or alternatively, remittitur. For the reasons that follow, the Court denies the motion for a new trial, or alternatively, remittitur.

A. Future Medical Expenses

Defendants seek a new trial on five separate grounds. First, Defendants assert that the Court tendered an improper jury instruction (No. 16) concerning damages, creating an irregularity which prevented the Defendants from having a fair trial under C.R.C.P. 59(d)(1). In their motion, Defendants essentially renew the objection that was made in a motion for a directed verdict: "that Plaintiff failed to present any evidence of the amount of Plaintiff's claimed losses for future medical expenses and past wage loss." The jury awarded Plaintiff $107,500 in future medical expenses and zero damages for past wage loss.

Viewing the evidence in the light most favorable to the prevailing party, *Furnary v. Merritt*, 837 P.2d 192, 196 (Colo. App. 1991), the Court finds that Plaintiff introduced evidence that was adequate to permit a reasonable estimation of damages. *Dupont v. Preston*, 9 P.3d 1193, 1199 (Colo. App. 2000). For example, Dr. Michael Janssen testified that Plaintiff's implant will not last a lifetime and it is very likely that Plaintiff will need a fusion. Further, evidence was presented on past medical costs from which the jury could have extrapolated to reach their award.

B. Plaintiff's Counsel's Comments

Defendants next argue that a new trial is warranted based on the comments of Plaintiff's counsel. According to Defendants, Plaintiff's counsel made several prejudicial remarks in front of the jury, was argumentative in his questions, and had a loud voice during sidebars.

The Court rejects Defendants' contention that a new trial should be granted based on counsel's behavior. The Court gave the jury an instruction that remarks, arguments and objections by counsel are not evidence. Regarding sidebar discussions, the Court will not speculate that the jury was able to hear and understand Mr. Jurdem. Further, the Court reiterates that the jurors were instructed that counsel's remarks do not constitute evidence. Throughout the trial, the jurors behaved in a manner that manifested respect for the Court and its instructions.

C. Undisclosed Medical Records

Defendants' third argument is that Plaintiff neglected to produce medical records, thus violating the disclosure requirements of C.R.C.P. 26(a)(1). At trial, the Court allowed Dr. Trenton Scott to testify that Plaintiff had been in his office for massage therapy at or near July 15, 2005 and that he referred Plaintiff to pain management. Defendants argue this testimony severely undermined their defense that Plaintiff did not receive any medical treatment for low back pain between June 22, 2004 and August 30, 2005.

Plaintiff counters that Defendants not only had the October 18, 2005 deposition of Dr. Scott, the pain management referral appeared in trial exhibits 13 and 26.

The Court finds that even if Plaintiff committed a technical violation of C.R.C.P. 26(a)(1), Defendants were on notice regarding the massage therapy treatment and pain management referral through Dr. Scott's deposition. Therefore, the Court finds that ordinary prudence could have guarded against any irregularity in proceedings, accident or surprise at trial. C.R.C.P. 59(d)(1) and (3).

D. Testimony of Dr. Jeffrey Broker

Defendants next argue that the Court committed error by allowing Dr. Broker to provide the jury biomechanical opinions that were based entirely on his own reconstruction of the accident. Defendants point out that the Court did not qualify Dr. Broker as an expert in the field of automobile accident reconstruction.

The Court finds that Dr. Broker testified within his field of expertise and was qualified to render his opinions based on the standards set forth in Colorado Rules of Evidence 702 and *People v. Ramirez*, 155 P.3d 371, 378 (Colo. 2007).

E. Verdict Unsupported By Evidence

Finally, Defendants argue that the jury's verdict was wholly unsupported by the evidence. Generally, the Court cannot substitute its judgment for that of the jury regarding the amount of damages. "The amount of damages awarded by a jury may not be disturbed unless it is completely without support in the record." *Belfor USA Group, Inc. v. Rocky Mountain Caulking and Waterproofing, LLC*, 159 P.3d 672, 676 (Colo. App. 2006) (citing *Miller v. Rowtech, LLC*, 3 P.3d 492 (Colo. App. 2000)). The jury award must be upheld unless the award is "so excessive or inadequate as to shock the judicial conscience and raise an irresistible inference that passion, prejudice, corruption or other improper cause invaded the trial." *Higgs v. District Court*, 713 P.2d 840, 860-861 (Colo. 1985) (quoting *Barnes v. Smith*, 305 F.2d 226, 228 (10th Cir. 1962)).

Having reviewed the record, the Court cannot find that the jury's award shocks the conscience or is completely without support in the record. Therefore, the Court must defer to the findings of the jury.

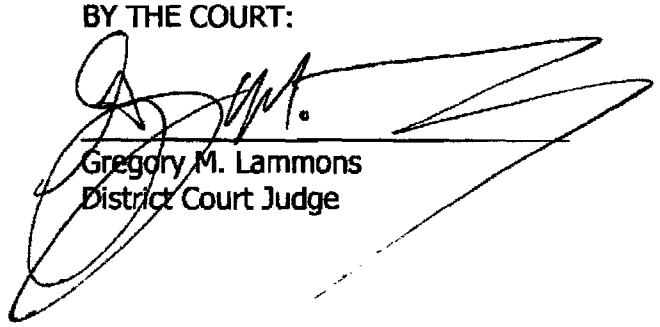
F. Remittitur

The Court also denies the request for remittitur. First, as explained in section A, the Court finds an evidentiary basis for the award of future medical expenses. Second, based on all the evidence, including Plaintiff's case-in-chief, the Court cannot find that the awards for non-economic damages and impairment disfigurement were so excessive as to shock the conscience.[1] Third, the Court rejects Defendants' assertion that the award of damages for future loss of income was highly speculative. Dr. Janssen said it was very likely that Plaintiff would need future surgery and noted that Plaintiff's work life and activities would be significantly reduced. Finally the Court does not find that the past medical expenses are excessive. The Colorado Supreme Court has adopted the view that the correct measure of damages for medical expenses is the necessary and reasonable value of the services provided. *Kendall v. Hargrave*, 349 P.2d 993, 994 (Colo. 1960); the amount paid for the services provides some evidence of their reasonable value, *Id.*, and therefore is not dispositive as to the proper amount of damages to be awarded by the jury.

[1] However, in a separate Order, the Court did reduce the non-economic damages to $366,250 based on a finding that there was no clear and convincing evidence for a justification to exceed the cap in C.R.S. § 13-21-102.5.

Dated this 16th of April, 2009.

BY THE COURT:



Gregory M. Lammons
District Court Judge

District Court, Larimer County, State of Colorado 201 LaPorte Avenue, Suite 100 Fort Collins, CO 80521-2761 (970) 498-6100	
Plaintiff: HEATHER TERRY **v.** **Defendants: DONNIE TIPTON and CRST VAN EXPEDITED, INC.**	▲ COURT USE ONLY ▲
	Case Number: 2004CV843 Courtroom: 3B

ORDER OF JUDGMENT

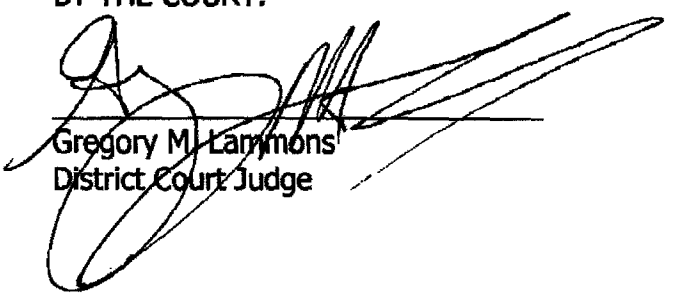
This matter was tried to a jury on March 2, 2009 through March 5, 2009. Defendants admitted liability before trial. The issue for the jury concerned the amount of damages to be awarded Plaintiff.

On March 5, 2009, the jury rendered a verdict for Plaintiff and against Defendants in the total amount of $1.7 million. The jury awarded Plaintiff $400,000 in non-economic damages, $42,500 for past medical and related treatment expenses, $107,500 for future medical and related treatment expenses, $400,000 for future loss of earnings, and $750,000 for physical impairment and disfigurement. On April 15, 2009, the Court reduced Plaintiff's damages for non-economic damages to $366,250 pursuant to C.R.S. § 13-21-102.5. Thus, the award was reduced to $1,666,250.

Pursuant to C.R.S. § 13-21-101, Plaintiff also is entitled to pre-judgment interest through the date of the verdict of $884,379.74. The Court therefore enters judgment in favor of Plaintiff and against Defendants in the amount of $2,550,629.40 as of the verdict date. Plaintiff also is entitled to interest at a rate of $619.15 per day through the date of the Order, continuing to accrue thereafter as provided by law.

Dated this 28th day of April, 2009.

BY THE COURT:



Gregory M. Lammons
District Court Judge