UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

DONALD CHAD SHELTON,	)	
	)	
Plaintiff,	)	Case No. 7:02CV00925
	)	
v.	)	**OPINION AND ORDER**
	)	
FRANKLIN DAVID BARRETO, ET AL.,	)	By: James P. Jones
	)	United States District Judge
	)	
Defendants.	)	

Matthew W. Broughton and H. David Gibson, Gentry Locke Rakes & Moore, Roanoke, Virginia, for Plaintiff; Eric S. Jensen, Jensen & Associates, P.C., Richmond, Virginia, for Defendants.

In this Virginia personal injury case in which the plaintiff suffered a permanent back injury as a result of a motor vehicle accident, the jury awarded compensatory damages of more than one million dollars. While the verdict was large, for the reasons set forth in this opinion I do not find it legally excessive and deny the motion for remittitur.

I

The plaintiff Donald Chad Shelton was injured in an accident in Roanoke, Virginia, on January 29, 2001, when the vehicle he was driving was struck in the rear

by a tractor-trailer truck owned by the defendant Continental Express, Inc. ("Continental"), and driven by its employee, Franklin David Barreto. Shelton filed suit for damages in state court against Barreto and Continental and the defendants removed the action to this court based on diversity of citizenship and amount in controversy.[1] At trial on March 18 and 19, 2003, the issues of liability and damages were bifurcated. The jury first found the defendants liable and then, after hearing evidence as to damages, returned a verdict for the plaintiff in the amount of $1,100,518.90, and judgment was entered for that amount.

The defendants filed a timely post-verdict motion for a new trial pursuant to Federal Rule of Civil Procedure 59 on the ground that the verdict was excessive. The motion has been briefed and argued and is ripe for decision.

The accident occurred on Orange Avenue in Roanoke. According to the plaintiff Shelton, while waiting at a stoplight in heavy traffic, his Toyota pickup truck had been suddenly rear-ended by the tractor-trailer truck driven by defendant Barreto. Shelton's head flew back and struck the frame of the rear window enough to dent it and pop it out into the bed of the pickup truck. His knee struck and broke the dashboard.

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[1] *See* 28 U.S.C.A. § 1441(a) (West 1994).

Shelton, a high school graduate who was twenty-seven years old and self-employed, refused an ambulance because he did not want to leave his truck at the scene, but a half an hour later he was taken to the emergency room by a friend, complaining of headache and back, neck, knee, and hip pain. He was released but continued to have pain and saw a chiropractor and a number of physicians over the next few months. About a year later he was seen by Dr. Henning, an orthopedist who testified at trial. Eventually, all of the symptoms resolved except his back pain, which Shelton described as follows:

> I have good days and I have bad days. And I have days that are good and might turn into a bad day. I mean, but I have pain every day. It's not always excruciating. Certain ways I sit, certain ways I move, bending things will be a pain. There's always a little pain there.

(Tr. 58.) In addition, his back "goes out" on occasion and he becomes immobile and the pain is intense. (Tr. 72.) Sometimes this occurs in public and is embarrassing to him. Shelton is athletic (he had a professional baseball tryout when he was younger) and his back prevents him from playing basketball or other sports in the manner he did before the accident. He is often unable to play with his young daughter (who was born a few months after the accident) the way he would like, because of his back.

Shelton started his business in 1994 and has no other employees. He did not work for two weeks following the accident on doctors' orders; since then he has

missed thirty-six full days and eleven half days of work because of back pain. His job is repairing automobile interiors and windshields, work that requires twisting and turning his body.

George Henning, Jr., M.D., a board-certified orthopedic surgeon, testified for Shelton at trial. Dr. Henning is the senior member of the largest orthopedic clinic in the Roanoke area and has practiced there for more than thirty years. It was his opinion that the accident caused a compression fracture of Shelton's thoracic spine—in Dr. Henning's words, "a fairly significant injury." (Tr. 10.) Dr. Henning believes that because of this injury, Shelton's spine will become progressively arthritic and cause him more pain and difficulty. He has advised Shelton not to lift more than the current requirement of his job, which is thirty to forty pounds on an occasional basis, and to keep "twisting and a lot of repetitive movement . . . to a minimum." (Tr. 18.) According to the doctor, after age fifty Shelton will be unable to perform the physical demands of his current job.

Shelton claimed lost past earnings because of his injury of $7700. Based on Dr. Henning's opinion and that of a vocational expert, an economist testified that the present value of Shelton's lost future earnings is $63,396. In addition, there was evidence that his medical expenses to date have been $9895.22 and he reasonably may expect additional such expenses for the rest of his life because of the accident,

the present value of which is $61,844. He also suffered damages to personal property—work supplies in the truck—of $598. Thus, his claimed special damages totaled $143,433.22.

The court instructed the jury as to the proper elements of the plaintiff's damages as follows:

> In determining the damages to which the plaintiff is entitled, you must consider any of the following which you believe by the greater weight of the evidence was caused by the negligence of the defendant.
>
> (1) any bodily injuries he sustained and their effect on his health according to their degree and probable duration;
>
> (2) any physical pain and mental anguish he suffered in the past and any that he may be reasonably expected to suffer in the future;
>
> (3) any disfigurement or deformity and any associated humiliation or embarrassment;
>
> (4) any inconvenience caused in the past and any that probably will be caused in the future;
>
> (5) any medical expenses incurred in the past and any that may be reasonably expected to occur in the future;
>
> (6) any earnings he lost because he was unable to work at his calling;
>
> (7) any loss of earnings and lessening of earning capacity, or either, that he may reasonably be expected to sustain in the future; [and]

(8) any property damage he sustained.

After deliberation, the jury returned a verdict of the amount of damages sustained by Shelton of $1,100,518.90, without interest.[2]

II

The grant or denial of a motion for new trial under Rule 59 is entrusted to the sound discretion of the court. *See Cline v. Wal-Mart Stores, Inc.*, 144 F.3d 294, 305 (4th Cir. 1998). If it concludes that the jury's award of damages is excessive, the court has the option of ordering a new trial nisi remittitur. *See id.*[3]

When considering a state law claim, this court "must apply state law standards to determine whether a verdict is excessive." *Steinke v. Beach Bungee, Inc.*, 105 F.3d 192, 197 (4th Cir. 1997). Virginia law is established that the "[c]ircumstances which compel setting aside a jury verdict include a damage award that is so excessive that it shocks the conscience of the court, creating the impression that the jury was influenced by passion, corruption or prejudice; that the jury has misconceived or

[2] The jury was instructed that at its discretion, it might award interest on any damages and fix the date on which interest was to run. *See* Va. Code Ann. § 8.01-382 (Michie 2000). However, the jury declined in its verdict form to award any interest.

[3] The plaintiff originally sued for $300,000, and amended his ad damnum prior to trial to $1,000,000. The fact that the verdict exceeded the ad damnum is not significant, since under federal procedure, the ad damnum does not cap the amount of the judgment in a contested case. *See Dotson v. Ford Motor Co.*, 218 F. Supp. 2d 815, 816 (W.D. Va. 2002).

misunderstood the facts or the law; or the award is so out of proportion to the injuries suffered as to suggest that it is not the product of a fair and impartial decision." *Poulston v. Rock*, 467 S.E.2d 479, 481 (Va. 1996). When a verdict is attacked as excessive, Virginia law places considerable reliance on the judgment of the trial judge, who has had the opportunity to consider the trial evidence in a manner "'which cannot be reproduced in the cold printed page.'" *Bassett Furniture Indus., Inc. v. McReynolds*, 224 S.E.2d 323, 333 (Va. 1976) (quoting *Am. Oil Co. v. Nicholas*, 157 S.E. 754, 758 (Va. 1931)). In evaluating the evidence as to damages, I must view it in the light most favorable to the plaintiff. *See Shepard v. Capitol Foundry of Va., Inc.*, 554 S.E.2d 72, 75 (Va. 2001).

The defendants contend, as they did at trial, that Shelton's expert testimony was inconsistent or flawed. In particular, they argue that the jury should have believed that Shelton's compression fracture is healed, "with no objective sign of injury beyond arthritis, a very common condition which effects [sic] every man." (Defs.' Mem. of Law 14.) However, I find that the plaintiff's evidence, while certainly subject to argument, was clearly within the jury's province to accept or reject.

The parties have cited cases in which they contend verdicts in comparable cases were, or were not, set aside as excessive. While these cases are helpful, it is

settled that "the amounts of respective verdicts for somewhat like physical injuries are by no means controlling," *Williams Paving Co. v. Kreidle*, 104 S.E.2d 758, 764 (Va. 1958), because "there is no exact method by which to measure and value in monetary terms the degree of pain and anguish of a suffering human being." *Va. Elec. & Power Co. v. Dungee*, 520 S.E.2d 164, 180 (Va. 1999).

I have carefully considered the evidence and I do not find the verdict excessive as measured by the applicable Virginia standards. Had I sat on the jury, I might not have awarded a verdict of that size, but that is not the test. *See Reel v. Ramirez*, 416 S.E.2d 226, 228 (Va. 1992) ("The setting aside of a verdict is not warranted if it 'merely appears to be large and more than the trial judge would have awarded had he been a member of the jury.'") (citation omitted). The jury was generous in this case but under the evidence its generosity was within legal bounds.[4]

III

For the reasons stated, it is **ORDERED** that the Rule 59 Motion for New Trial [Doc. No. 39] is **DENIED**.

[4] In their brief, the defendants also asserted that the jury foreperson had related to defense counsel after the verdict that the jury had considered elements of damages not included in the instructions of the court, but at oral argument counsel disclaimed any reliance on such information in support of his motion.

ENTER: August 19, 2003

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United States District Judge