IN THE STATE COURT OF DEKALB COUNTY
STATE OF GEORGIA

LAQUAN TREMELL TAYLOR,	}	
	}	
PLAINTIFF,	}	
	}	
V.	}	**CIVIL ACTION**
	}	**FILE NO. 15A: 57407E3**
THE KROGER CO.,	}	
	}	
DEFENDANT.	}	

ORDER

On March 27, 2020, this case came before the Court via telephone conference for oral argument upon Defendant Kroger's Amended Motion for Judgment Notwithstanding the Verdict or, A Motion for a New Trial, or, Alternatively, a Motion for Remittitur (Amended Motion) which was filed on January 21, 2020. The parties were represented by counsel and following argument, Defendant's motion was taken under advisement.

PROCEDURAL HISTORY

Final Judgment was entered in this case on May 1, 2019. On May 15, 2029, Defendant Kroger filed a Motion for Judgment Notwithstanding the Verdict (JNOV) or New Trial or Alternatively for Remittitur. Plaintiff filed his Opposition to Defendant's motion on June 12, 2019. The official court transcript of this trial was filed on November 20, 2019.

By Order of January 6, 2020, the Court granted the parties Consent Motion extending time for Defendant to file an Amended Motion for Judgment Notwithstanding the Verdict, Motion for New Trial, or, in the Alternative, for Remittitur until January 21, 2020. Thereafter, Plaintiff filed his Opposition to the Amended Motion on March 6, 2020. Defendant filed a Brief in Support on

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March 26, 2020.

The hearing on Defendant's Amended Motion occurred via teleconference March 27, 2020, during the Judicial Emergency. On April 6, 2020, Plaintiff filed a Supplemental brief on Future Medical Expenses. Defendant also filed a Supplemental Brief on April 8, 2020. Plaintiff filed a Response to Defendant's Untimely Supplemental brief on April 10, 2020. Defendant filed a Brief in Further Support on April 19, 2020.

In its Amended Motion, brought pursuant to O.C.G.A. § 5-5-40(b), Defendant Kroger sets forth the grounds of its motion as follows:

A. Kroger is Entitled to Judgment Notwithstanding the Verdict

1. Because Taylor's prior crime evidence was not substantially similar to this incident it is not probative, and Taylor has not overcome the usual rule that intervening criminal conduct is the sole proximate cause of his injury

2. Taylor's theory of causation is impermissibly speculative

3. The award of future medical expenses is unsupported by any evidence

4. The lost wages award is unsupported by any evidence

B. In the Alternative, Kroger is Entitled to a New Trial

1. The Court erred by denying Kroger's motion in limine to exclude prior crime and motions in limine nos. 1, 4, 12, and 16, and Kroger was prejudiced by the admission of this evidence at trial

2. Taylor's other improper closing arguments tainted the jury verdict. The Court addresses each of Defendant's arguments in turn.

STANDARDS OF REVIEW

> [T]he standard imposed upon a trial judge in granting a motion for judgment n.o.v. is different from the standard imposed upon the trial judge in granting a motion for new trial. See *Beasley v. Paul*, 223 Ga. App. 706, 707 (1) (478 SE2d 899) (1996). Specifically, "[a] trial judge cannot grant motions for [judgment] n.o.v. on any issue if '<u>any evidence</u>' exists to support that issue. By contrast, a trial judge can grant a motion for new trial if the verdict is <u>contrary to the evidence [under OCGA § 5-5-20] or</u>

> strongly against the weight of the evidence [under OCGA § 5-5-21]." (Punctuation omitted.) Id.

Moore v. Stewart, 315 Ga. App. 388, 390-91, 727 S.E.2d 159, 162 (2012) (emphasis added).

FORESEEABILITY

With respect to the JNOV motion, Plaintiff did not rely exclusively on similar crime evidence to prove foreseeability. This case is unusual in that Kroger's own analysis showed that this location was unusually dangerous, and that criminal victimization of customers could be anticipated in the absence of a parking lot patrol. Furthermore, evidence was also introduced that Kroger had specific information of the dangerousness of one of the perpetrators and his association with their location.

With respect to the Motion for New Trial and the issue of whether the prior crime evidence submitted by Plaintiff was sufficiently similar to the incident in question, this issue was exhaustively argued pre-trial. The Court, therefore, sees no reason to further address this issue. Defendant's Motions are denied as to that ground.

CAUSATION

Defendant strenuously contends Plaintiff has not overcome the usual rule that intervening criminal conduct is the sole proximate cause of his injury.

Fundamentally, Defendant argues that Plaintiff did not, and cannot, establish that the presence of an armed guard in the Kroger parking lot would have deterred the conduct which harmed Plaintiff. This is not the salient inquiry.

Instead, the question is whether there was a reasonable basis for the jury to use their collective human experience to decide whether it was more likely than not that an armed guard would have prevented the crime which harmed Plaintiff irretrievably.

Unlike the cases relied upon by Defendant, this case involves neither a disease mechanism nor a physical barrier such as a window or door lock. It is not a subject on which scientific or engineering analysis could be used to establish the probable course of events with and without an intervention. Instead, this situation involves human actors with independent will and motivation and who cannot be relied upon to give reliable information as to their motivations or intentions, and thus, as always, the jury answers questions of human motivations and intentions based upon their collective human experience to decide what is more likely than not. As to the Motion for New Trial, the Court does not find the jury's conclusion to be against the weight of the evidence.

OTHER IMPROPER CLOSING ARGUMENTS TAINTED THE JURY VERDICT

In advance of trial the Court ruled in limine on the Defendant's "send a message" argument. The Court directed

> [s]o as to send a message, I agree that specifically send a message is inappropriate in a civil case. But, again, I'm unwilling to -- I mean, that's as far as I'm going. I'm not going into every implication of every argument that might be analogized to send a message. I think that that has to be objected to specifically.

April 8, 2019, Motions Trans., p. 107 (emphasis added).

Plaintiff has ably addressed all of Defendant's contentions as to the argument in this case. In this case, Defendant Kroger did not raise specific objections at trial to Plaintiff's various closing arguments which are at most analogous to "send a message" arguments. ***Nor did the Defendant obtain an advance ruling relevant to the current post-hoc claims of prejudice.*** Thus, it was Defendant's failure to object at trial to any specific argument by Plaintiff, as required by the Court's ruling on the Motion in Limine, which precludes Defendant's post-trial objections, which were waived.

In oral argument, the parties prominently discussed the most recent relevant ruling on improper argument. *Harvey v. Williams*, 841 S.E.2d 386, 2020 Ga. App. LEXIS 207 (March 16, 2020), (*cert.* filed). Close analysis of this case shows that it supports Plaintiff's position. In *Harvey*, unlike the case *sub judice*, the trial court had ***granted*** two motions in limine and the Court of Appeals analyzed both. The analysis of the second is doubly fatal to Defendant's contentions.

The granted motion related to prohibiting a "golden rule" argument. The Court first noted that it had jurisdiction to consider the issue in the absence of an objection because the trial court had ***granted*** the motion. The opinion then concluded: "The argument in this case comes dangerously close to invoking the 'golden rule,' but because it is ambiguous, we are reluctant to assume that counsel intended its most damaging meaning." *Harvey,* 2020 Ga. App. at *12.

The other motion in limine, for which relief was granted was a general one as to statements or arguments "offered predominantly to overly inflame the emotions of the jury or to illicit[sic] excessive or undue sympathy, hostility, or prejudice for or against either party." *Harvey,* 2020 Ga. App. at *12. The argument was that if the jury did not award enough money to pay for home care for Plaintiff's expected life expectancy, "you're signing his death warrant." *Harvey,* 2020 Ga. App. at *7. This is an argument which leaps off the page as inflammatory and is in no way akin to the excepted arguments in the case *sub judice*.[1] The Court of Appeals concluded it was undoubtedly intended to inflame the jury.

As to Defendant's Motion in Limine 12 regarding apportionment of Plaintiff's potential award, this issue was discussed extensively at the Motions Hearing in advance of trial on April 8, 2019, pp. 108-123. The Court denied this Motion in Limine.

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[1] Apparently, the arguments herein were not recognized as improper by Defendant's able trial counsel at the time or thereafter prior to the jury's verdict.

At the jury charge conference, Tr. Trans. Vol. 6, pp. 1458-90, Defendant Kroger acquiesced to pattern charge 66.810. *Suggested Pattern Jury Instructions, Volume I: Civil Cases,* Council of Superior Court Judges. Specifically, stating that "Kroger is fine, obviously, with the pattern apportionment charge. But we don't feel the first and second paragraphs are necessary given the position of the case." Jury Charge Conference, Vol. 6, p. 1458.

Fundamentally the Court adopted the view of the pattern charge ruling, but specifically that both the first and second paragraphs of that charge would not be given. Thus, Defendant waived any objection to the pattern charge. And, as the jury was entitled to be informed of the pattern charge, which was proper, Plaintiff's counsel was entitled to make an argument based upon a proper charge.

FUTURE LOST WAGES

The argument that Defendant is entitled to JNOV as to lost future wages is frivolous. As to the Motion for New Trial, the evidence showed that Plaintiff earned approximately $150,000, annually while working in Kuwait post Navy-Reserve, including in his first IT job. April 10, 2019, Trial (Tr.) Trans., Vol. 2, pp. 441-42. He remained in Kuwait for three years. *Id.* at p. 444.

At the time of the shooting in 2015, Plaintiff's salary in an entry level IT position with United Food was about $38,000, per year. Tr. Trans., Vol. 2, p. 458. Plaintiff testified that he regarded this entry level position as a "springboard" to higher paying IT positions. Tr. Trans., Vol. 2, p. 459. The average of these different incomes is $94,000.

Based upon life expectancy tables Plaintiff, who was 32 years old at the time of trial, would likely have worked another 38 years, that is, until the age of 70. Using these figures, Plaintiff's

future wages would be $3,572,000.[2] It is true that a jury is to apply a 5% discount rate per annum, however, considering inflation,[3] and the recognized tendency to earn more over the course of a career, there was sufficient evidence for the jury to determine that these factors would balance out the 5% discount rate. The verdict is supported by the evidence, and the Defendant's Motion is denied on the issue of future lost wages.

FUTURE MEDICAL EXPENSES

At trial Plaintiff offered extensive evidence in support of future medical expenses. The contention that a JNOV is appropriate is again frivolous.

The same cannot be said as to the Motion for New Trial insofar as it relates to the future medical expenses award. The Plaintiff offered testimony of a Life Care Plan in the approximate amount of $1.2 million. The Plaintiff also offered testimony that the plan was "conservative" and did not cover various likely expenditures.

The Plaintiff has correctly pointed out that case law supports the idea that past medical expenses can provide supporting evidence for future. Yet, in the absence of more specific evidence or argument at trial or in this motion, only the VA and Shepherd's bills seem illustrative of likely future medical expenses.

In terms of the potential complications listed in the Life Care Plan, they are all reasonably likely, but in terms of the past expenses found in the evidence, those sums are relatively small as compared to the spinal cord surgeries and treatments. These bills do not seem to provide methods of estimating expenses associated with diabetes or pulmonary complications and only very limited evidence of expenses associated with cardiovascular disease and complications. Such

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[2] $94,000.00 x 38 = $3,572,000.00

[3] The Court recognizes that inflation rate has varied wildly over the last fifty years.

evidence better supports expenses associated with his irreparably weakened abdominal wall, skin problems, and orthopedic and muscular corrections. Many of these expenses would involve repetitive treatments.

As to largest items, associated with his spine and spinal cord, the Court concludes that an estimate that the amount of expenses shown in the VA and Shepherd's bills would be matched over the course of his lifetime would not be against the weight of the evidence, but to go past that point would be against the weight of the evidence. And, as to those items that would be more repetitive, adding more than a few hundred thousand dollars to the total anticipated expenses would be against the weight of the evidence. O.C.G.A. § 5-5-21. However,

> O.C.G.A. § 51-12-12 does not empower the trial judge to increase an award, <u>but empowers the trial judge to seek the parties to accept an additur or remittitur upon the threat of a new trial</u> and allows the judge to order a new trial on the issue of damages only; refusal by either party to accept leaves the judge with the power only to grant or to deny a new trial and to decide what issues will be retried. Cits. Therefore, the criteria under either a motion for additur or new trial rest upon the sound exercise of discretion in granting or denying either or both such motions, as the case law applicable to the denial of a new trial would govern both motions.

Ara Health Servs. v. Stitt, 250 Ga. App. 420, 425, 551 S.E.2d 793, 797-98 (2001) (emphasis added). Accordingly, as the Court concludes that future medical expenses in excess of $3.5 million are against the weight of the evidence, Defendant Kroger is entitled to a Remittitur on the Final Judgment.

<u>MOTION FOR NEW TRIAL AS TO PAIN AND SUFFERING</u>

Following a lengthy trial, the jury found damages in the amount of $60,000,000, for the 32-year old Plaintiff for non-economic damages including pain and suffering, mental suffering, physical injury, inconvenience, and physical impairment in the past and into the future.

Based upon a superficial analysis of spinal cord injury cases in Georgia, Defendant argues that the damages must be considered a clearly excessive award for a "spinal cord injury case." In considering this Motion, the Court must view the evidence in the light most favorable to the verdict.

One must begin with the original incident. Plaintiff was ambushed out of the blue while carrying out routine daily activities. It was senseless – he had complied with the demands of the criminals without resistance. Thinking he was past the danger point he was shot in the back and then repeatedly shot again as he fled for his life and lay helpless on the ground, before being left for dead. In essence, he went through the experience of being the victim of a senseless murder, except somehow, due to expert medical intervention, he unexpectedly survived.

Initially, Plaintiff was hospitalized at Grady Hospital in Atlanta, Georgia, with multiple, severe injuries. Plaintiff lost a kidney and his aorta ruptured. Tr. Trans., Vol 2, p. 472. He suffered bed sores, skin grafts and compartment syndrome. He endured grueling surgeries, medical procedures and recuperation for many months, including suffering through his intestines remaining outside his body for about a year. Plaintiff's Trial Exhibits (Tr. Ex.) 4-6. Tr. Ex. 7b, Exoskeleton video. His marriage ended.

Plaintiff was transferred to Shepherd's Spinal Center in Atlanta to undertake punishing rehabilitation, then to the Tampa Veteran's Administration for further therapy as both an inpatient and then continuing as an outpatient at least through March 2019.

Prior to being shot, Plaintiff had been a healthy, fit, handsome, vibrant and outgoing young man in the prime of life. Tr. Ex. 3a-n. Following his shooting, the expert testimony established that Plaintiff's spinal cord injury, although incomplete, which allows him to walk short distances with great difficulty using crutches and braces and drive with hand-controls, is life-long. Tr. Trans., Vol. 4, pp. 1091-96. Tr. Ex. 7a, Day in the Life Video. That the severance is incomplete

can be viewed as a blessing or a curse; Plaintiff experiences nearly unremitting pain and would expect to for the rest of his life. Tr. Trans., Vol. 4, pp. 1094-95.

Cathy Gragg Smith, R.N., who authored Plaintiff's Life Care Plan with input from Dr. Bilsky, explained that it is a conservative plan which did not provide for all Plaintiff's possible medical care or needs. Tr. Trans. Vol. 4, pp. 1090, 1097. Tr. Exhibits Vol. II, Plaintiff's Ex. 48. Plaintiff will always require medical care and treatment which the Life Care Plan recognizes as potential, but undetermined, complications. Tr. Exhibits Vol. II, Plaintiff's Ex. 48 (Life Care Plan). Ms. Smith further explained that the aging process will be different for Plaintiff. By age 53, if not sooner, Plaintiff is likely to require the use of a motorized wheelchair because of the constant wear and tear on his joints and muscles. He faces the likely prospect of multiple repetitive future surgeries and a bleak old age.[4]

Additionally, Plaintiff no longer has normal sexual functioning. He can only sustain an erection with the aid of injected medicine. And, it is unclear whether Plaintiff can father children in the future, Tr. Trans., Vol. 4, p. 1092, an expensive determination and subsequent process to conceive not included in Plaintiff's Life Care Plan.

There is no basis to infer that "comparable" cases cited by Defendant are indeed comparable.[5] The injuries here are more extensive, by far, than solely a spinal cord injury. This evidence and more, was sufficient for the jury to determine that Plaintiff's life had been irreversibly altered in every way and had been marred by great pain and suffering and would continue to be one of hardship, suffering and endurance. The Court certainly has not been

[4] *See, e.g.*, Tr. Trans., Vol. 4, pp. 1079, 1082.

[5] The author has been involved in "spinal-cord injury" cases as both a lawyer and a judge. But none of them are remotely comparable to the case at bar. The most typical spinal cord injury case results from negligence or, more colloquially, an accident.

provided with information suggesting that the other cases cited are comparable. The Court finds it has no basis to substitute its judgment for that of a fair and impartial cross-section of the community.

Under the circumstances of this case, the jury's determination of damages of $60,000,000.00, cannot be said to be excessive warranting a new trial.[6] The Defendant's Motion for New Trial is denied as to damages for pain and suffering.

ACCORDINGLY, IT IS HEREBY ORDERED AND ADJUDGED that Defendant Kroger's Motions JNOV, filed May 15, 2019, and January 21, 2020, are DENIED.

Defendant's Motions for New Trial or Remittitur, filed May 15, 2019, and January 21, 2020, are GRANTED, as to a REMITTITUR of $8,218,505.80, for a Final Judgment in the total amount of $61,441,494.20.

Plaintiff has **ten (10) days from the entry of this Order**, within which to accept this Remittitur in writing which will then be made the Final Judgment of the Court. Otherwise, the Court shall grant a New Trial.

SO ORDERED, this 17 day of June, 2020.

WAYNE M. PURDOM, JUDGE
STATE COURT OF DEKALB COUNTY

Copy to: All parties

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[6] *Meals ex rel. Meals v. Ford Motor Co.*, 417 S.W. 3d 414, 2013 Tenn. LEXIS 702 (2013) (verdict of $43.8M, including $39.5M in non-economic damages reinstated).

See generally, Bravo v. United States, 532 F.3d 1154 (11th Cir. 2008) (discussing excessiveness in non-economic awards). *R.J. Reynolds Tobacco Co. v. Schleider* 273 So. 3d 63, 2018 Fla. App. LEXIS 18608 (ten years later rejecting excessiveness and upholding $15M in non-economic damages to wife, $6M to daughter). *Munn v. Hotchkiss Sch.*, 326 Conn. 540, 165 A.3d 1167 (upholding $31.5M in non-economic damages).

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