IN THE SUPREME COURT OF GEORGIA

SHAWN G. EVANS, Individually and as Guardian of JANICE K. EVANS,	)	
Plaintiff,	)	**CASE NO. S18C1189**
vs.	)	
ROCKDALE HOSPITAL, LLC d/b/a ROCKDALE MEDICAL CENTER,	)	
Defendant.	)	

BRIEF OF APPELLEE

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I. PRELIMINARY STATEMENT

Georgia law is clear that compensatory damages should be compensatory. In every case, the evidence authorizes a range of awards that may fairly be viewed as compensation for the injury suffered. And where it is clear that a jury has added amounts beyond that range, or has failed to award an amount that is reasonably commensurate with the injury for which the defendant is liable, then the jury has not properly applied the legal measure of damages, and a new trial is required. In such cases, the award is said to "shock the conscience," and reviewing courts often infer that the jury — since it evidently did not follow its charge — must have acted from some mistake or improper motive.

Of course, a reviewing court cannot always tell why a jury did what it did. The legal standard for general damages is indeterminate, and the law entrusts jurors with great discretion, though not unlimited discretion, in applying it. The range of acceptable awards therefore is wide, and the case law admonishes the appellate courts not to enter the jury box or assume the place of the trial judge as the "thirteenth juror." The "shock the conscience" test historically has been used to protect against awards whose inadequacy or excessiveness is apparent from the face of the record and which suggest arbitrariness, prejudice, or bias.

As the Court of Appeals correctly held, the jury's verdict in this case fails this test. The jury found Defendant Rockdale Hospital, LLC ("Rockdale"), liable

for Jan Evans's catastrophic brain injury, and awarded Ms. Evans one-hundred percent of her past medical expenses. It apportioned fifty-one percent of the fault to Rockdale, and forty-nine percent to Ms. Evans. These findings are explainable as applications of law to the evidence; but the special verdict form clearly reveals other findings that cannot be so explained. It was undisputed at trial that Ms. Evans has suffered a completely debilitating brain injury and will need around-the-clock care for the rest of her life. Yet the jury awarded **no** future medical costs, **no** lost wages, and — most shockingly — **no** compensation whatsoever for past or future pain and suffering. And as to Mr. Evans's claim for loss of consortium, the jury awarded only the estimated cost of renovating the couple's home to accommodate Ms. Evans's disability. That amount was set forth in Ms. Evans's life care plan and is not an item of consortium damages as a matter of law.

Even Defendants do not seriously attempt to explain these irrational findings as the application of law to the evidence at trial. Instead, they first attempt to argue that the jury's refusal to award anything for pain and suffering should be affirmed because there is some evidence to support its award of past medical expenses. Besides being a complete *non sequitur*, this specious argument does nothing to resolve the self-contradiction in the jury's verdict. Second, Defendants contend that the jury "simply compromised and chose to award a reduced amount rather than give the Evans[es] nothing at all." NT Br., p. 27. This argument not only

ignores the express findings contained in the special verdict; it also disregards the apportionment statute, O.C.G.A. § 51-12-33. Under that statute, the jury is not permitted to "award a reduced amount." Rather, the jury is required to find the amount of total damages and to allocate express percentages of fault, and any reduction of the total damages is to be performed by the trial judge. If Defendants are correct that the jury simply "chose" to reduce its award without saying so on the verdict form, then a new trial is all the more necessary. This Court should vacate the jury's arbitrary and inadequate verdict and (as further shown in the companion appeal) should order a new trial on damages only.

II. STATEMENT OF RELEVANT FACTS

Viewed in the light most favorable to the jury's verdict against Rockdale, the evidence at trial showed the following.

A. Proof of Rockdale's liability.[1]

On the morning of January 16, 2012, Jan Evans called her husband Shawn at work and told him that "she was sick to her stomach. She had been throwing up, and she had a headache." T.V 715:18-19. Thinking that she had food poisoning, he came home and took her to the Rockdale Medical Center emergency room. *Id.*,

[1] The trial concerned claims not only against Rockdale, but also against an emergency-department physician, Taumaurus Sutton, M.D., and Dr. Sutton's employer, Emerginet, LLC. The jury found these Defendants not liable, and that finding was not appealed. Accordingly, the liability portion of this Statement of Relevant Facts focuses on the facts relating to Rockdale.

715:20-716:24. Jan and Shawn saw the triage nurse, Mr. Harold Hildreth, and told him about Jan's nausea, vomiting, and headache. *Id.*, 717:11-25. Shawn testified at trial that there was no doubt in his mind Jan told Hildreth about her headache. *Id.*, 723:21-724:6. Hildreth also took Jan's blood pressure, which was extremely high at 213 over 105. T.IV 298:7-16. A blood pressure this high is within the American Heart Association's guidelines for hypertensive crisis. T.IV 299:13-18. But Hildreth testified that, based on his education and experience, Jan's elevated blood pressure could have been due to nervousness at being in the ER. *Id.*, 299:23-300:5. He did not recall asking, and the triage records did not reflect that he asked, any questions about Jan's blood pressure or her headache. *Id.*, 300:12-301:13. Indeed, Shawn did not recall Hildreth asking Jan any questions at all. T.V, 721:12-13. Shawn did recall Hildreth noting that Jan's blood pressure was high. *Id.* 721:16-19.

After Jan was admitted, she again reported a headache with a pain level of 8 out of 10, and was treated with morphine. *Id.*, 725:3-8; T.IV 369:17-370:3. Her systolic blood pressure remained above 200, which is extremely high, throughout her entire stay. T.IV 369:5-16. Another Rockdale nurse, Trina Williams, took Jan's blood pressure at 8:55 that evening and found that her systolic blood pressure was 218 — even higher than when Jan was admitted. *Id.*, 373:8-13. But the records do not indicate that Ms. Williams asked Jan any questions about her blood pressure. *Id.*, 373:14-23. A third nurse, Linda Donaghy, took over Jan's care around 11:55

and had the benefit of all the previously charted information about Jan's extreme hypertension, headache, nausea, and vomiting. T.5 491:24-493:4. In fact, Donaghy herself took Jan's blood pressure and found it to be an astonishing 228 over 87 — again, **higher** than when she came into the emergency department. *Id.*, 493:22-494:5. Donaghy understood that this combination of symptoms is consistent with a brain bleed. *Id.*, 493:14-17. She did not consider the possibility of a brain bleed, although she admitted that she had a duty under the standard of care to assess the patient for that condition at that point. *Id.*, 494:6-494:22. The medical records also do not reflect that Donaghy informed Dr. Sutton that Jan's blood pressure had increased to such a dangerous level, although she agreed on cross that it would have been important to do so. *Id.*, 497:9-18.

Jan was discharged around 12:30 a.m., still registering a systolic blood pressure above 200. *Id.*, 503:21-24 (time of discharge); *id.*, 506:11-13 (blood pressure). Her diagnosis was high blood pressure, nausea, and vomiting, with no specific cause identified. *Id.*, 5-4:25-505:3. The entire time Jan and Shawn were in the Rockdale ER, they believed Jan was suffering from food poisoning, and no one at Rockdale ever told them otherwise. T.V 725:12-17. The next day, Shawn filled Jan's prescription for Phenergan (an anti-nausea medication). *Id.* 730:3-7. He also called a local primary-care practice and made Jan a doctor's appointment for the following Monday, which was the first available appointment. *Id.*, 732:2-19.

During the week, Jan took her nausea medication (with limited effect) and continued to experience headaches. *Id.*, 737:5-17. The following Saturday, January 21, Jan encouraged Shawn to attend a previously planned dinner with some friends from church, although she did not feel well enough to join him. *Id.*, 740:11-741:11. During dinner, though, she began sending him text messages indicating that she had fallen and was unable to get up. *Id.*, 741:22-744:2. Shawn settled his check and went home to see about her. *Id.*, 744:3-19. He believed she was exhausted from food poisoning and nausea. *Id.*, 744:20-745:4. When he got home, she was asleep, and he let her stay asleep, thinking this would be good for her. *Id.*, 745:19-746:3. But the next morning at breakfast, he noticed her moving her mouth unnaturally while eating. *Id.*, 746:25-747:16. She tried to get up from the couch to go to the bathroom, but could not get up. *Id.*, 747:22-748:3.

Shawn called 911, *id.*, 748:4-5, and Rockdale County EMS transported Jan back to Rockdale Medical Center's emergency department. *Id.*, 750:18-753:10. A CT scan revealed blood on her brain. *Id.*, 755:4-8. She was transferred to Emory, and Shawn followed behind the ambulance in his car. *Id.*, 755:9-23. Shawn never heard his wife talk again. *Id.*, 756:3-14.

B. The proof of damages was essentially undisputed.

From the very outset of the trial, defense counsel expressly acknowledged the "catastrophic" and "devastating" nature of Jan's injuries. *See* T-III 13:1 (Ms.

McGrotty, referring to Jan as "catastrophically injured"); T-III 198:6-7 (Mr. Weathington: "One thing we can all agree on this case, is that Ms. Evans suffered a catastrophic injury."); T-III 202:17-22 (Mr. Weathington: "I can tell you the focus in my case for two weeks will not be the damages. But it will be manifest, and it is manifest that Ms. Evans is injured, and concurrently, Mr. Evans has suffered. So nobody is — nobody is going to argue about that."); T-III 237:2-7 (Mr. Huff: "certainly, the rupture of these brain aneurysms, it's a catastrophic event. And no one, Mr. Weathington and I, no one with the hospital or Dr. Sutton or Emerginet are trying in any way to minimize the loss to Ms. Evans or to Mr. Evans. It's — it's a tragedy. It's devastating.").

The evidence of damages unequivocally supported this assessment. The jury heard evidence that Jan's brain injury caused past and future medical costs, past and future lost wages, and pain and suffering, as well as loss of consortium.

1. Past and future medical costs.

Jan's total past medical costs were $1,196,288.97. T.V 762:24-763:3; Pl. Exh. 17. The jury also heard expert testimony regarding Jan's likely future medical costs, including the testimony of a brain-injury rehabilitation physician, Dr. Payal M. Fadia, M.D.; a life care planner and registered rehabilitation nurse, Cathy Gragg-Smith, R.N.; and an economist, Dr. Francis Rushing, Ph.D. *See* T.VII 1245-1284 (Dr. Fadia); 1284-1315 (Ms. Gragg-Smith); 1345 (Dr. Rushing). Nurse

Gragg-Smith presented a life-care plan that itemized what, to a reasonable degree of medical certainty, Jan will need for her future care. T.VII 1284-1314 (testimony of Nurse Gragg-Smith); Pl. Exh. 12a (list of items, admitted without objection at T.VII 1300:1-7); T.VII 1300:12-24 (foundational testimony). Dr. Fadia testified that she signed off on the life-care plan as well, and that she believed the modalities itemized in the plan were appropriate. *Id.*, 1273:10-1280:19. Defendants' cross-examination of Dr. Fadia did not address that topic at all. *Id.*, 1280:21-1284:3. The cross-examination of Nurse Gragg-Smith regarding the items in the plan was limited to whether a certified nursing assistant would suffice as a caregiver, rather than a nurse. *Id.*, 1306:18-1309:18; *see also id.*, 1313:21-1314:17 (re-cross by Mr. Huff, which did not address any of the items on the life care plan). Defendants did not present any alternative plan for Jan's future care.

2. Past and future lost wages.

The jury heard extensive evidence of Jan's work history with U.S. Airways. Jan was working for U.S. Airways when she and Shawn met, T.V 690:18-25, and she continued to do so after she married Shawn and moved to Georgia in June, 2001. *Id.*, 697:5-13. Jan was furloughed along with other U.S. Airways employees after the tragic events of September 11, 2001; but after the furlough period she took the first available position, commuting to Charlotte, NC to do so. *Id.*, 697:20-698:14. After about a year, a part-time position opened up in Atlanta, and Jan

accepted it so she could be closer to home. *Id.*, 698:22-699:13. At the time of the incident, she was working five six-hour shifts per week. *Id.*, 702:2-9. Jan's supervisor, Regina Hofele, testified that Jan was "an excellent employee . . . one that you didn't have to worry about being supervised." T.VII, 1056:8-9; *see also* T.V 700:9-702:9 (testimony of Shawn Evans regarding Jan's work). On the Sunday that Jan went to Rockdale Medical Center for the first time, she called Ms. Hofele to report sick for work with nausea and a severe headache. *Id.*, 1057:10-18. Jan never came back to work. *Id.*, 1059:6-7. Defendants did not contend at trial that Jan will ever be capable of working again, nor did they dispute that she would have continued to work if she had not suffered her injury.

3. Pain and suffering and loss of consortium.

The jury also heard evidence about Jan's life: her independence, creativity, humor, and energy; her devotion to her Catholic faith; and, above all, the love she found late in life and the happy marriage she shared with Shawn. T.V 689:17-696:25; 777:22-778:18. But perhaps the most compelling evidence of their bond came from the period after Jan's injury. For three-and-a-half years from Jan's release from the rehabilitation center through the date of trial, Shawn personally cared for Jan in their home. *Id.*, 778:19-779:6. The jury met Jan during a brief courtroom visit and saw a day-in-the-life video that showed the daily tasks that Shawn performed for her. *Id.*, 776:55-777:4; Pl. Exh. 18. He prepared her

medications; bathed her; changed her diaper; and transferred her from her wheelchair to her bed and back. *Id.*, 768:5-15. But Shawn is more than a nurse to Jan, despite her disability. The evidence was that he regularly takes her out to dinner in the community and includes her in conversations "like she's going to get up out of the chair and answer him." T.VII 1238:13-14. A friend of the family testified that, "it's just like he loves her as much as he did on the day that he married her." *Id.*, 1238:2-4.

4. Defendants did not challenge damages in closing.

In closing, defense counsel did not try to argue that any specific items of damages had been caused by anything other than Ms. Evans's brain bleed. Dr. Sutton's lawyer, Ms. McGrotty, commenced her argument by stating: "There is no doubt that a subarachnoid hemorrhage and a bleed into the tissue of your brain as a result of a ruptured aneurysm is one of the most devastating things that can happen to anyone. . . . And, frankly, I wouldn't wish on my worst enemy the situation that Jan Evans finds herself in, and that Mr. Evans finds himself in." T-IX 1912:11-14, 19-21. She then spent the next nineteen pages of the trial transcript arguing about liability issues, and concluded by stating: "I'm not going to talk to you about damages. There is no doubt that Ms. Evans is neurologically devastated. There is no doubt about it." T.IX 1931:19-21. Likewise, Rockdale's counsel, Mr. Huff, focused solely on the issues of liability and comparative fault, and did not dispute

that Ms. Evans's brain bleed caused her significant damages. T-IX 1950:12-21; *see* Slip Op., p. 6 ("Rockdale did not contest that Mrs. Evans was catastrophically injured and did not address the issue of damages during closing argument.").

5. The jury's special verdict made clear and discrete findings on liability, apportionment, and damages.

The jury found Rockdale 51% liable for the damage caused by Jan's untreated ruptured brain aneurysm, and found Jan herself 49% liable for that damage. R.2 47-48 (¶ 3). The jury awarded Jan the full amount of her past medical expenses, but it wrote in **zero** for future medical expenses; **zero** for past and future lost wages; and **zero** for past and future pain and suffering. *Id.*, 47 (¶¶ 1(b)-1(f)). As to Shawn's loss of consortium claim, the jury awarded only the cost of renovating his house – an item that was set forth only in Jan's life care plan and which legally is not an item of consortium damages at all. *Id.* (¶ 2). The trial court entered judgment on the verdict on March 10, 2016, noting that the award of damages to Jan was only "for past medical expenses . . .." R.2 60-61.

6. The trial court incorrectly denied Plaintiff's request for a new trial on damages only and upheld the verdict in full.

Plaintiff timely filed his Motion for Additur or for a New Trial on Damages Only on April 11, 2016. R.2 62-71. In a two-page Order dated August 24, 2016, the trial court summarily denied Plaintiff's Motion. R.II 124-25. Plaintiff filed a timely Notice of Appeal on September 14, 2016. R.II 1.

7. The Court of Appeals reversed the jury's award of damages and remanded for a new trial on all issues.

The Court of Appeals began its analysis by quoting the applicable statutory language from O.C.G.A. § 51-12-12(a) and (b):

> (a) The question of damages is ordinarily one for the jury; and the court should not interfere with the jury's verdict unless the damages awarded by the jury are clearly so inadequate or so excessive as to be inconsistent with the preponderance of the evidence in the case.
>
> (b) If the jury's award of damages is clearly so inadequate or so excessive as to any party as to be inconsistent with the preponderance of the evidence, the trial court may order a new trial as to damages only, as to any or all parties, or may condition the grant of such a new trial upon any party's refusal to accept an amount determined by the trial court.

345 Ga. App. at 514-15. The Court of Appeals then quoted, at length, this Court's statements regarding appellate deference to trial courts in *Moody v. Dykes*, 269 Ga. 217, 221(1998) — the leading case relied upon by Defendants — but noted that, "[n]evertheless, our Supreme Court has held that appellate courts are empowered to set aside a jury's damages award under OCGA § 51-12-12 . . . and an award that is so inadequate or excessive 'as to shock the conscience' is subject to reversal on appeal." 345 Ga. App. at 515.

This "shock the conscience" test is the one that the Court of Appeals applied to reverse the jury's award of damages. *See* 345 Ga. App. at 518 ("Given this record, the jury's award of zero damages for Mrs. Evans's past pain and suffering, the same time period for which it awarded Mrs. Evans her past medical

expenses, was so clearly inadequate under a preponderance of the evidence as to shock the conscience and necessitate a new trial."); *id.* at 521 ("Because the jury's award of zero damages for Mrs. Evans's past pain and suffering was so clearly inadequate under a preponderance of the evidence as to shock the conscience, a new trial is necessary, and the trial court abused its discretion in concluding otherwise.").

In applying that standard, the Court of Appeals focused particularly on the jury's award of zero for past pain and suffering. *Id.* That award shocked the Court of Appeals' judicial conscience for at least two reasons. First, and most obviously, its sheer amount is inconsistent with the preponderance of the evidence, and indeed the undisputed evidence, of Ms. Evans's catastrophic injuries, rendering an award of zero "so clearly inadequate under a preponderance of the evidence as to shock the conscience and necessitate a new trial." 345 Ga. App. at 518. And second, the Court of Appeals also appears to have been troubled by the fact that the jury found Rockdale liable and awarded Ms. Evans the full amount of her medical expenses for the **same period** during which it denied any recovery for pain and suffering. *Id.* These bills are not just economic damages; they represent actual, invasive medical procedures that Ms. Evans underwent (as the jury found) because of Rockdale's negligence. *See id.* (noting that "the undisputed evidence from Mr. Evans, other witnesses, and Mrs. Evans's medical records introduced without objection

reflected that [Ms. Evans] underwent multiple surgical procedures and spent months in the hospital and a rehabilitation facility").

The Court of Appeals distinguished some of its earlier cases, which had affirmed arguably irrational jury verdicts by declining to speculate as to the reason for a diminished award. It noted that Georgia's old comparative-negligence regime had been superseded by the apportionment statute, and that, "[a]ccordingly . . . the jury in the present case was tasked with calculating the total damages owed to Mrs. Evans, including damages for past pain and suffering, as a distinct first step, separate and apart from any subsequent reduction in the total damages based on the percentage of Mrs. Evans's comparative fault . . .." *Id*. at 516. But the Court of Appeals went on to hold that this Court's pre-apportionment decisions required a new trial on all issues, not on damages only. *Id.* at 521-22. That portion of the decision below is the subject of the companion appeal, Case No. S18G1189.

This Court granted the Writ of Certiorari on January 7, 2019.

III. QUESTION PRESENTED

What is the standard by which an appellate court reviews a claim that a trial court erred in considering a claim under O.C.G.A. § 51-12-12, and did the Court of Appeals properly apply that standard?

IV. ARGUMENT AND CITATION TO AUTHORITY

Rockdale's contention that the Court of Appeals applied an incorrect legal standard is baseless. The holding of the Court of Appeals was that the jury's award of zero for pain and suffering to a catastrophically injured plaintiff was so clearly inadequate as to "shock the conscience" and necessitate a new trial. 345 Ga. App. 511, 516-21. That is the standard of appellate review that this Court has approved, and both Georgia appellate courts have applied, in multiple decisions before and after the 1987 enactment of O.C.G.A. § 51-12-12. Applying that standard, the Court of Appeals correctly found the jury's award clearly inadequate. Rockdale's arguments to the contrary only serve to underscore the arbitrariness of the verdict and the need for a new trial on damages.

A. This Court's precedents establish that an appellate court may grant a new trial under O.C.G.A. 51-12-12 where the jury's award is so excessive or inadequate as to shock the conscience.

This Court has long held that "the jury's verdict may be reviewed by the trial court, and again on appeal, to ensure that it was not the product of bias rather than fact and law." *Kesterson v. Jarrett*, 291 Ga. 380, 388 (2012). And this Court has held — in cases that Defendants do not even cite — that an appellate court should review the excessiveness or inadequacy of a verdict under the same "shock the conscience" standard applied by the intermediate court in this case. *See Hosp. Auth. of Gwinnett County v. Jones*, 259 Ga. 759 (1989) ("The appellate court will

not disturb the award absent an award so excessive or inadequate as to shock the judicial conscience.") (internal quotation marks omitted); *Smith v. Milikin*, 247 Ga. 369, 372 (1981) (to the same effect).

The above authorities span the period before and after the 1987 Tort Reform Act, which enacted the current version of O.C.G.A. ¶ 51-12-12. The most natural inference, then, is that the rewording of the statute did not change the applicable legal standard. But if the 1987 Tort Reform Act changed the standard at all, it can only have made it **easier** for an appellate court to determine that a jury's verdict was impermissibly excessive or inadequate. To hold otherwise would be to hold that a verdict could pass the new test, and be affirmed on appeal, **even if it failed the old test** — *i.e.*, even if it was so excessive or inadequate as to shock the judicial conscience and create an inference of gross mistake or bias. It cannot reasonably be supposed that the Tort Reform Act was intended to reform tort law by allowing shockingly excessive or inadequate verdicts to survive on appeal. *See Jones,* 259 Ga. 759, 764 ("The statutory scheme [including appellate review under O.C.G.A. § 51-12-12] is designed to protect defendants against excessive verdicts."). Instead, it is more likely that the 1987 Tort Reform Act was meant to modernize the language of the legal standard, without reducing the thoroughness or effectiveness of appellate review.

Prior to the 1987 Act, Georgia's legal standard often was expressed in language such as that used in decisions under the Federal Employers Liability Act:

> This standard of review [under the FELA] is consistent with that which obtains under Georgia law, which has been stated as follows: "Before the verdict will be set aside on the ground that it is excessive, where there is no direct proof of prejudice or bias, the amount thereof, when considered in connection with all the facts, must shock the moral sense, appear '[exorbitant],' 'flagrantly outrageous,' and 'extravagant.' 'It must be monstrous indeed and such as all mankind must be ready to exclaim against at first blush.' 'It must carry its death warrant upon its face.' (Cits.)".

Csx Transp. v. Darling, 189 Ga. App. 719, 721 (1988), *quoting Seaboard System R. v. Taylor*, 176 Ga. App. 847, 849 (1985). The 1987 Act replaced this vague and subjective language with a clearer, more modern, and more objective standard:

> (b) If the jury's award of damages is clearly so inadequate or so excessive as to any party as to be inconsistent with the preponderance of the evidence, the trial court may order a new trial as to damages only, as to any or all parties, or may condition the grant of such a new trial upon any party's refusal to accept an amount determined by the trial court.

O.C.G.A. § 51-12-12(b). This standard requires the Court to compare the jury's award with the proof at trial and to determine whether the award is "clearly . . . inconsistent with the preponderance of the evidence." *Id.* If it is, then the statute authorizes one of two remedies: the court may simply order a new trial on damages only, or it may order "such a new trial" — i.e., a new trial on damages only — unless a party accepts a modified amount. *Id.*

Like the current language of O.C.G.A. § 51-12-12, the code and case law prior to 1987 also described the applicable legal standard in terms of a comparison

between the award and the proof of damages at trial. *See Lang v. Hopkins*, 10 Ga. 37, 46 (1851) ("Had proof been introduced in the trial that three thousand dollars was an ample allowance for the widow and daughter in that part of the country, considering their condition in life and the size of the estate, then a verdict given for double that amount, would have carried on its face the evidence that it was founded in bias or prejudice."); *Anglin v. Columbus*, 128 Ga. 469, 472 (1907) (holding that the denial of a new trial was error because "the amount fixed by the jury was so small and disproportionate to the pain and suffering endured from the injury as to justify the inference of gross mistake or undue bias"); *Slaughter v. Atlanta Coca-Cola Bottling Co*., 48 Ga. App. 327, 327-28 (1934) ("If the plaintiff was entitled to recover anything (and the jury has so found), she was entitled to recover damages commensurate with the injury sustained by her. The amount of $1 fixed by the jury could not be considered as sufficient compensation for whatever pain and suffering the plaintiff may have endured."). Such language belies Defendants'

In arguing for their "any evidence" standard, Defendants rely heavily on cases involving the denial of new trial motions based on the general grounds, where the excessiveness or inadequacy of damages was not at issue. *See* NT Br., p. 14 (citing various cases that did not arise under O.C.G.A. § 51-12-12). It is not surprising if such language has been repeated in cases where an appellant argues both that the verdict was excessive and that a new trial should have been granted

on the general grounds. But that does not mean that the "any evidence" standard controls appellate review under O.C.G.A. § 51-12-12. That would be contrary to the express holdings of this Court's decisions in *Jones* and *Milikin*.

Indeed, it is not even clear how an "any evidence" standard could be useful in this context. For example, where a jury awards an excessive amount of general damages, or an excessive amount of punitive damages, there is generally some evidence to support such an award; otherwise the issue could not properly be submitted to the jury in the first place. The problem in such a case is not that there is no evidence of damages; rather, the problem is that the amount of the award suggests the jury did not faithfully apply the law to the evidence. *See*, *e.g.*, *Lang*, 10 Ga. at 45 (describing the evaluation of excessiveness of verdicts in "suits for personal injuries, where, although there is no fixed criterion for assessing the damages, yet the Court must conclude, from the exorbitancy of them, that the Jury acted from passion, partiality or corruption"). In any event, Defendants fail to cite any decision of this Court that has followed their "any evidence" standard in the specific context of appellate review under O.C.G.A. § 51-12-12, as opposed to appellate review of the denial of a motion for new trial on the general grounds. Nor do they make any argument that the "any evidence" standard should replace the "shock the conscience" standard of *Jones* and *Milikin*. These controlling decisions have a long pedigree and should not be disturbed.

While ignoring the precedents of *Jones* and *Milikin*, Defendants lean heavily on this Court's decision in *Moody v. Dykes*, 269 Ga. 217, 221(1998). According to Defendants, *Moody* stands for the proposition that the trial court, and the trial court alone, may grant a new trial under O.C.G.A. § 51-12-12, because the application of that statute supposedly involves weighing the evidence. Defendants disregard, however, the fact that *Moody* itself acknowledges the power of appellate courts to grant a new trial for a clearly excessive or inadequate verdict. *Moody*, 269 Ga. at 222 ("Of course, the appellate court may set aside a jury verdict under O.C.G.A. § 51-12-12 (a), but the threshold is extremely high.").

Tellingly — and also disregarded by Defendants — the precedent cited in *Moody* as setting forth the "threshold" for such appellate review was nothing other than *Jones*, which establishes the "shock the conscience" standard applied here by the Court of Appeals. Defendants' argument that *Moody* somehow establishes a different standard therefore makes no sense. At any rate, there is no inconsistency between *Moody*'s holding that O.C.G.A. § 51-12-12 gives some discretion to the trial court, and the holding of the Court of Appeals in this case, that such discretion is abused where judgment is entered on a verdict that shocks the conscience. *See Evans*, 345 Ga. App. at 521 ("Because the jury's award of zero damages for Mrs. Evans's past pain and suffering was so clearly inadequate under a preponderance of the evidence as to shock the conscience, a new trial is necessary, and the trial

court abused its discretion in concluding otherwise."). This Court need not choose between *Moody* and *Jones*, because they do not set forth different standards.

B. The Court of Appeals correctly applied the legal standard.

It is well established that "[d]amages are given as compensation for injury; generally, such compensation is the measure of damages where an injury is of a character capable of being estimated in money." O.C.G.A. § 51-12-4. Thus, a jury that finds a defendant liable for a plaintiff's injury cannot arbitrarily refuse to compensate the plaintiff for the damages that undisputedly flow from that injury. As this Court held in the 1907 case of *Anglin v. City of Columbus*:

> If the jury did not believe that the [defendant] was negligent, they should have returned a verdict in favor of the defendant; but if, on the other hand, they believed from the evidence that the [defendant] was negligent, and that its negligence resulted in the [plaintiff's] injury . . ., they should have found a verdict for the plaintiff for such an amount as would be fairly compensatory for the injury sustained.

Anglin, 128 Ga. 469, 473; *see also Slaughter v. Atlanta Coca-Cola Bottling Co*., 48 Ga. App. 327-28 (1934) (failure to grant new trial was an abuse of discretion where "[t]he amount of $1 fixed by the jury could not be considered as sufficient compensation for whatever pain and suffering the plaintiff may have endured").

For this reason, Georgia's appellate courts have not hesitated to grant new trials when juries find liability but award grossly inadequate damages. *Carter v. Reese*, 150 Ga. App. 494, 495-496 (1979) (verdict of $100 grossly inadequate for serious injuries); *Brewer v. Gittings*, 102 Ga. App. 367, 369 (1960) (where jury

found defendant liable for serious injuries to child and awarded medical costs to the father, award of $10 to the child for pain and suffering was grossly inadequate); *Travers v. Macon R. & L. Co*., 19 Ga. App. 15 (1916) (where the evidence showed $107 in medical bills, and at least some amount in lost time and services and pain and suffering, an award of $1 was held so grossly inadequate as to mandate a new trial); *Potter v. Swindle*, 77 Ga. 419, 424 (1887) (Bleckley, J.) (describing an award of $25 as "grossly inadequate" where the jury had held sheriff liable for detaining the plaintiff without a warrant for several days).

The decision of the Court of Appeals in *McLendon v. Floyd*, 59 Ga. App. 506 (1939), is particularly instructive:

> in an action to recover damages for personal injuries, where the evidence, although in sharp conflict, authorized the finding of the jury establishing the liability of the defendant, and the undisputed evidence showed actual damages to the plaintiff resulting from the injuries sustained, in the loss of her wages as a nurse for four months, amounting to $400, and in doctor's and hospital bills and medical expenses amounting to $300, and also severe pain and suffering, a verdict in favor of the plaintiff for $300 was grossly inadequate and contrary to law and the evidence, and the refusal to grant the plaintiff a new trial was error.

Id., 59 Ga. App. at 506-507. As here, the jury in *McLendon* found the defendant liable but awarded the plaintiff only the amount of her resulting medical expenses, with nothing for the lost wages or pain and suffering that arose from the same injuries. *Id.* Although the trial court approved the verdict and denied a new trial, the Court of Appeals reversed, stating that when a verdict is grossly excessive or

inadequate, the trial court should not allow it to stand "no matter how many new trials it may be obliged to grant." *Id.* at 507.

The main difference between *McClendon* and this case, of course, is that this case involved the use of a special verdict form. R.2 47-48. But that fact only makes the necessity of a new trial here even clearer than it was in *McClendon*, because the verdict clearly shows on its face that recovery for items of undisputed damages was withheld, even after liability had been found. *Id.* As in *McClendon*, this fact renders the verdict grossly inadequate as a matter of law, requiring a new trial.

Likewise, the mere fact that Defendants asserted comparative fault cannot explain this verdict, because that issue, too, was **resolved** by the jury. In this post-apportionment case, there is no question as to how much comparative fault the jury imposed on Jan Evans. The jury expressly quantified her percentage of liability as neither more nor less than 49%. R.2 48. This is the most that the jury could reduce Jan's recovery for comparative fault without reaching a defense verdict, which it obviously did not do. Comparative fault therefore is not and cannot legally be the justification for imposing additional reductions on Jan's recovery by arbitrarily denying individual categories of damages such as future medical bills, lost wages, or pain and suffering. The fact that the amount of the jury's comparative-negligence finding is expressly set forth in the verdict form means that, for purposes of the remaining issues, that issue may be set on one side.

Defendants' argument that comparative fault may have had an effect has no place here, when the jury has stated in a special verdict exactly what effect it had. This is particularly true because the jury imposed the **maximum** comparative-fault reduction legally allowed. Any further reduction would have resulted in a defense verdict, which, as Defendants admit, is not what the jury returned.

The fact that the jury awarded 100% of Plaintiff's past medical costs, and also awarded damages for loss of consortium, demonstrates that it resolved the questions of breach and causation in favor of Plaintiff and against Rockdale. *See Clark v. Wright*, 137 Ga. App. 720, 722 (1976) ("When the jury found for the wife, it, in effect, determined that the defendant had caused her injury."). Having done so, it was required to award at least something — not zero — for each type of damages that Jan undisputedly suffered. Its failure to do so requires a new trial.

In particular, the jury could not rationally fail to award damages for pain and suffering on this record, where Jan undisputedly has lost the use of practically every faculty of mind and body. As the Court of Appeals has held, quoting this Court:

> "Every person is entitled to retain and enjoy each and every power of body and mind with which he or she has been endowed, and no one, *without being answerable in damages*, can wrongfully deprive another by a physical injury of any such power or faculty, or materially impair the same." (Emphasis supplied.) The uncontradicted evidence in this case shows that plaintiff was injured and that she suffered; and the question of liability having been adjudicated against defendant, the jury was not authorized to return a verdict [awarding no damages for pain and suffering].

Cochran v. Lynch, 126 Ga. App. 866, 868 (1972) (emphasis added), quoting *Atlanta S. R. Co. v. Jacobs*, 88 Ga. 647, 652 (1891); *see also Clark*, 137 Ga. App. at 722 ("The law infers bodily pain and suffering from personal injury."). The same is true of Ms. Evans's damages for past and future lost income, as well as her uncontradicted proof of likely future medical expenses, which according to the life care plan and the testimony of Dr. Rushing totaled more than $3 million. Defendants made no effort to rebut this showing, and the jury was not entitled to simply disregard the uncontradicted evidence. *See id.* ("Positive and direct testimony of an unimpeached witness cannot be arbitrarily disbelieved by a jury.").

Defendants' heavy reliance on *Columbus Regional Healthcare System v. Henderson*, 282 Ga. 598, 599-600 (2007), is misplaced. In that case, a jury found a hospital liable for medical malpractice upon an infant but awarded no damages to the parents on their claim for wrongful death. *Id.* This Court held that the verdict did not reflect an inadequate award, but rather a plaintiff's verdict as to medical malpractice and a verdict of zero damages (the equivalent of a defense verdict) as to the separate claim for wrongful death. *Id.* Such a verdict might be inconsistent, but this Court held that an award of zero damages for wrongful death could not be regarded as an "inadequate" award within the meaning of the additur statute – rather, it was no award at all. *Id*. In contrast, the jury in the present case did not return a defense verdict or its equivalent on any claim. Plaintiff here asserted two

separate claims — medical negligence and loss of consortium — but the jury found liability and at least some damages on **both claims**. This precludes any speculation that the jury "really" meant to enter a defense verdict.

Though an award was made on each claim, however, the amounts awarded were grossly inadequate, such that the trial court abused its discretion in denying a new trial. As this Court is aware, Georgia juries routinely are instructed to consider the following factors in awarding general damages for injury:

> [i]nterference with normal living, interference with enjoyment of life, loss of capacity to labor and earn money, impairment of bodily health and vigor, the fear of extent of injury, shock of impact, actual pain and suffering, past and future, mental anguish, past and future, [and the extent to which the plaintiff] must limit activities.

Food Lion v. Williams, 219 Ga. App. 352, 355 (1995). In essentially all of these categories, Jan Evans undisputedly has suffered an unimaginable loss. She will never know normal living again; her loss of enjoyment is near-complete; she has no capacity to labor and earn money; her bodily health and vigor is severely compromised; to the extent that she remains conscious of her condition, she must fear further decline and suffer significant mental anguish; and the phrase "limit activities" is hardly adequate to describe her limitations. A rational and properly intentioned jury could not fairly consider this list of factors and find that Jan Evans had zero pain and suffering. The award is inadequate as a matter of law.

Likewise, the jury's award of $67,555 for loss of consortium not only

grossly under-compensates Shawn for his marital loss; more than that, it shows that the jury disregarded the law. Defendant argued below that this award is reasonable because it represents the cost of renovating the Evanses' house, as set forth in the life care plan. But the damages set forth in the life care plan are not consortium damages at all. *See W.J. Bremer Co. v. Graham,* 169 Ga. App. 115, 116 (1983) (defining consortium as the spouses' mutual rights to "society, companionship, love, affection, aid, services, cooperation, sexual relations, and comfort"). Mr. Evans has certainly suffered a significant loss of "society, companionship, love, affection, aid, services, cooperation, sexual relations, and comfort," but the need to renovate his house does not flow from that loss of consortium; rather, the need to renovate the house flows from Jan's physical and mental impairments. That is why it was enumerated in the life care plan, which belongs to Jan, not Shawn. A jury that understood and performed its lawful function would not have awarded an item from Jan's life care plan to Shawn as compensation for his loss of his wife's "society, companionship, love, affection, aid, services, cooperation, sexual relations, and comfort." Such an award clearly implies that the jury was mistaken about the job it was required to perform.

C. Rockdale's arguments only confirm the need for a new trial.

At pages 25-26 of its brief, Rockdale makes a number of arguments as to why the jury's verdict would have been affirmed if the Court of Appeals had

applied an "any evidence" standard. Most of Rockdale's arguments, however, have nothing to do with the evidence, and all of them are baseless.

First, Rockdale attempts to fight against the plain meaning of the verdict form, speculating that the jury may have intended its award as essentially a general verdict encompassing all types of damages, but may have decided to ignore the trial court's instructions by simply writing that general amount in the first line of the verdict form. Rockdale makes no effort to explain why the award equals exactly the total amount of Ms. Evans's past medical costs **and** is written in the line for past medical costs. It is plainly absurd to construe this award as anything other than what it purports to be — an award of past medical costs.

Second, Rockdale speculates that the jury may have found the Evanses' damages evidence not to be credible. But the jury accepted that evidence when it awarded Ms. Evans the full amount of her past medical costs, down to the penny. If Rockdale's negligence caused Ms. Evans to undergo those medical procedures, then it caused the accompanying pain and suffering, as well as the wages that Ms. Evans lost while she was hospitalized. Rockdale makes no effort to justify this basic inconsistency, because it cannot be justified.

Third, Rockdale makes the confused argument that the jury may have thought that pain and suffering damages were "not appropriate," because Ms. Evans now receives excellent care. Besides being profoundly insulting to the

bereaved but faithful Mr. Evans, who personally provides much (though not all) of that care, this argument ignores the fact that this care undisputedly will need to continue for the rest of Ms. Evans's life, and will cost a great deal of money, which the jury did not award. Moreover, even the best care could not completely remove all past and future pain and suffering, or change the fact that Ms. Evans ceased being able to work on the day of her injury. This argument fails.

Fourth, Rockdale attempts to argue that the jury may have found that Ms. Evans's ruptured aneurysm resulted inevitably from her uncontrolled high blood pressure. Rockdale's one-sentence, conclusory argument fails to explain how such a finding supposedly could justify an award of 100% of Ms. Evans's past medical costs with zero for lost wages and pain and suffering. No explanation can be given, because this argument really goes to causation or comparative fault, not the amount of total damages. If the jury had "concluded that Ms. Evans' pain and suffering was not causally related to Rockdale's alleged negligence," as Defendants attempt to argue, NT Br., p. 26, then the jury would have rendered a defense verdict, which it did not do.

Finally, Defendants argue that the verdict should be construed as a compromise in which the jury secretly believed Defendants were not liable at all, but also did not want Ms. Evans to go away empty-handed. This Court rejected essentially the same argument more than a century ago in *Anglin v. Columbus*:

> It was insisted by counsel for the defendant in error that the verdict for this insignificant sum should be interpreted as a finding in favor of the city upon its contention that the city was not negligent, and that the pittance allowed by the jury was a matter of mere gratuity. We can not construe the verdict in that way. A verdict for the plaintiff could not have been lawfully had against the defendant upon any theory except that of the negligence of the defendant, described in the pleadings; and when the jury expressly found against the defendant, the verdict must be construed according to its recitals. The jury must be taken at its word, when by the effect of its verdict it finds that the city was negligent.

Anglin, 128 Ga. 469, 472. Here, as in *Anglin*, this Court should reject Defendants' misguided effort to construe the verdict to mean something other than what it says. Speculation cannot take the place of plain meaning. In trying to run away from the verdict, Defendants only further prove that they cannot defend it.

CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Appeals' holding that the award of damages in this case was clearly inadequate under O.C.G.A. § 51-12-12. As further shown in the companion appeal, the case should be remanded for a new trial on damages only.

Respectfully submitted, this 4th day of March, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing **BRIEF OF APPELLEE** upon Defendant's counsel of record by U.S. Mail at the following address:

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