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IN THE CIRCUIT COURT FOR DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE

KENNETH PRICE	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**Docket No. 22C-1371**
	)	
ACER LANDSCAPE SERVICES, LLC,	)	
	)	
Defendant.	)	

DEFENDANT ACER LANDSCAPE SERVICES, LLC'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR NEW TRIAL OR REMITTITUR

Comes now Defendant, Acer Landscape Services, LLC, and incorporates this Memorandum of Law in Support of its Motion for New Trial or Remittitur of the jury verdict.

I. PROCEDURAL POSTURE

This case was tried before a jury on January 29th – 31st, 2024, in Davidson County, Tennessee, upon which the jury entered a verdict as follows:

Physical Pain and Mental Suffering – Past:	$39,000.00
Los of Enjoyment of Life – Past:	$39.000.00
Medical Expenses – Past:	$25,105.02
Physical Pain and Mental Suffering – Future:	$25,000.00
Loss of Enjoyment of Life – Future:	$25,000.00
Medical Expenses – Future:	$200,000.00
Permanent Injury:	$25,000.00
Loss of Earning Capacity:	$325,000.00
TOTAL:	$703,105.02

The Final Order of Judgment was entered on February 6, 2024.

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II. LAW AND ARGUMENT

A motion for new trial must be filed "so that the trial judge might be given an opportunity to consider or to reconsider alleged errors committed during the course of the trial or other matters affecting the jury or the verdict ..." *McCormic v. Smith*, 659 S.W.2d 804, 806 (Tenn. 1983). When considering a motion for a new trial, Tennessee trial courts must independently weigh the evidence and determine whether the evidence preponderates in favor of or against the verdict. *See Woods v. Herman Walldorf & Co.*, 26 S.W.3d 868, 873 (Tenn. Ct. App. 1999) (citations omitted). Therefore, the trial judge acts as the "thirteenth juror" when deciding whether the evidence supports a jury verdict. *See Loeffler v. Kjellgren*, 884 S.W.2d 463, 468-69 (Tenn. Ct. App. 1994). The trial court should grant a motion for a new trial if, after carefully weighing the evidence, the court determines that the jury's verdict is not supported by the evidence. *See Heath v. Memphis Radiological Prof'l Corp.*, 79 S.W.3d 550, 553-54 (Tenn. Ct. App. 2001) (when ruling on "a motion for a new trial, the trial court must be independently satisfied with the verdict of the jury").

"While trial courts enjoy wide discretion to grant or deny Tenn. R. Civ. P. 59 motions, […] they cannot refuse to exercise that discretion." *Shofner v. Shofner*, 181 S.W.3d 703, 713-14 (Tenn. Ct. App. 2004) (citing *Ali v. Fisher*, 145 S.W.3d 557, 564-65 (Tenn. 2004)). "When a trial court, acting in its role as the thirteenth juror, fails to properly evaluate whether a verdict is contrary to the weight of the evidence, the only viable remedy is …a new trial." *Payne v. CSX Transp., Inc.*, 467 S.W.3d 413, 451-52 (Tenn. 2015) (citing *Meals ex rel. Meals v. Ford Motor Co.*, 417 S.W.3d 414, 420 (Tenn. 2013)).

Tennessee trial judges are "charged with ensuring a fair trial, [and] serve[] as an important check on a jury's discretion to award damages." *Meals*, 417 S.W.3d at 420. A request for remittitur is implicit in a motion for a new trial and vice versa, as remittitur is a valid alternative to a new

trial. *See Foster v. Amcon Int'l, Inc.*, 621 S.W.2d 142, 143–44, 147 (Tenn. 1981). "Generally, if the trial judge is not satisfied with the jury's verdict, the judge must set aside the verdict and order a new trial." *Meals*, 417 S.W.3d at 420 (citing *Jones v. Idles*, 114 S.W.3d 911, 914–15 (Tenn. 2003)).

A. LOSS OF EARNING CAPACITY

A new trial should be ordered as Defendant contends that a jury award for "loss of earning capacity," is not supported by the evidence, was awarded in error as it was not alleged as a damage in the Amended Complaint, and should not have been added as a line-item on the verdict form that had been previously agreed upon by counsel.

1. Any Award for "Loss of Earning Capacity" Preponderates Against the Evidence.

The jury's verdict award of $325,000.00 for "loss of earning capacity," preponderates against the weight of the evidence. In fact, any award at all for "loss of earning capacity" is not supported by the evidence as it was not proven at trial, let alone to a degree of reasonable certainty. To succeed in a negligence action, Plaintiff must show: "a duty of care owed by the defendant to the plaintiff; (2) conduct falling below the applicable standard of care amounting to breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate, or legal, cause." *Green v. Roberts*, S.W.3d 172, 176-77 (Tenn. Ct. App. 2012).

Assuming a plaintiff has established the foundation case for liability against a tortfeasor, the elements of proof necessary to establish the claim for loss of earning capacity as an element of damage are as follows: (1) Proof of the existence of some earning capacity, either actual or potential, prior to the injury; (2) Proof that this earning capacity has been lost or diminished; (3) Proof that the cause of the lost or diminished earning capacity is proximately caused by the injury; and (4) Proof of the dollar amount of the loss. *Oglesby v. Riggins,* No. W2010-01470-COA-R3-

CV, 2011 Tenn. App. LEXIS 131, at *1 (Ct. App. Mar. 17, 2011). 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. *Id.*

Earning capacity refers not to actual earnings, but rather to the earnings that a person is capable of making. *See Southern Coach Lines v. Wilson*, 214 S.W.2d 55, 56 (Tenn. Ct. App. 1948) (explaining that earning capacity refers to the loss of the power to earn). To recover these damages, the injured person must first prove with reasonable certainty that the injury has or will impair his earning capacity**.** *Borne v. Celadon Trucking Servs., Inc.*, 532 S.W.3d 274, 310 (Tenn. 2017), (*citing Shoney's v. Overstreet,* 4 S.W.3d at 703). Then, the injured party must introduce evidence concerning the extent of the impairment of his earning capacity. *Id.*

"Loss or impairment of future earning capacity is an element of damage 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." *Hyde v. S. Cent. Tenn. Dev. Dist.,* No. M2015-02466-COA-R3-CV, 2017 Tenn. App. LEXIS 478, at *1 (Ct. App. July 14, 2017).

As evidenced by the record of this case and the Trial Transcript, it is clear that there is no material evidence in the record to support a claim for loss of earning capacity. The Plaintiff failed to prove the existence of Plaintiff's prior earning capacity, proof that Plaintiff's earning capacity was lost or diminished, or proof of the dollar amount of the loss. The jury's shocking award of $325,000.00 has no rational basis and cannot be tied to any evidence presented at trial.

During the trial, that was scant evidence, if any, to support a claim for loss of earning capacity and this does not meet the requirement of proving damages to a degree of reasonable certainty. For example, there was no testimony about the hours Mr. Price worked before this accident, the hours he worked after this accident, how much he was paid for a job, how many jobs he used to perform a week, how much he made before this accident, how much he has been making since the accident, how his wages have been affected, how many jobs he works now, any other influences on his work (age, travel, competition, etc.) or how his wages will be affected in the future. Additionally, Plaintiff's doctor, Dr. Blythe's testimony does not support an award of loss of earning capacity as he opined generally on Plaintiff's limitations but provided no permanent work restrictions. There was no opinion about whether future surgery would affect any limitations or restrictions.

Plaintiff testified generally about how his injuries have affected him, including at work. He testified:

Q: What parts of your job are impacted?

A: All.

Q: Give the jury some examples of things you do that are problems today that weren't there before?

A: Well, the last job I did was – let's see when it was? Last Thursday was the last I worked. The customer bought new window blinds; it was four of them. They are basic, simple. It took me a total of two hours to hang four window blinds. Normally to hang a blind, you know, you screw up your two brackets. Ten minutes most for me to hang the window blind. I do a lot of them, so I'm good at it. I'm quick. I charge a lot, so I'm quick. And it took me two hours to hang four window blinds because I just—I couldn't—with the screw gun. It just – I had to take a break. I couldn't even get a screw in before my arm just gave out. And I have to shake the blood back in. Just simple basic stuff. Replacing bathroom sink faucet is very difficult."

(Transcript Vol. I, p. 74: 21 – p. 75: 15). While he testified that he is slower now, there was no testimony that he works such a volume that working slower would affect his ability to earn.

When asked about the potential future surgery, he speculated, "I'm going to lose my business just healing, recovering from the surgery. I mean, customers love me, but they aren't going to wait six months for me to fix a faucet. To patch a hole in the drywall. You know, to hang a picture. They—you know, I'm going to lose 20 years of business." (Transcript Vol. I, p.76: 7-14). This was complete speculation and is not supported by the testimony of three customers who came and testified regarding Plaintiff's work ability. It is clear that all customs still in fact hire Plaintiff to perform work. For example, Cindy Gold testified that Mr. Price is still performing work at her house. (Trial Transcript Vol. I, p. 96: 1-2). She said that "so he is still able to climb to the top of the ladder, but he's not—I can tell he's in pain when he reaches up to change them and he's shaky." (Trial Transcript Vol. I, p. 96: 8-10). Again, this only proves that he still has customers and performs work.

Graham Bryant, another client of Plaintiff's testified on Plaintiff's behalf. Again, this testimony was that Plaintiff may be slower in performing his job, however, there was no testimony that Mr. Bryant stopped hiring Plaintiff to perform work for him. There was no testimony about what he paid Plaintiff for services either before or after the accident.

Q: Now those times you were seeing him struggling, did you ever have to send him home?

A: Yeah. It was more of a – kind of we will defer it to later – and defer a job. Or you could just tell he was in so much pain, I didn't want him to have to push through – push through hat and we would just defer it for another time.

(Trial Transcript Vol. I, p. 58:1-7).

Q: What, if anything, did you notice about Mr. Price's quality of work after the collision?

A: I think over all it was more – it was more of a struggle. I think the stamina wasn't there to do – to do things. He was very meticulous and would be a little less meticulous and wouldn't be able to finish timely, like I said.

(Trial Transcript Vol. I, p. 56:25 – 57:1-6). Michael Malone, another one of Mr. Price's customers about the day of the accident:

Q: Did he do any work for you that day?

A: Tried. But he was having a hard time lifting his arm and he just kept rubbing his neck. And he's like—and, you know, I know Kenny, he's done work for me before, so I was like, man, take – go and come back fresh in a couple days.

(Trial Transcript Vol. I, p. 63:5-10). The testimony of the three clients showed that Plaintiff may work a little slower than beforehand; but that is not enough to justify a claim for loss of earning capacity where there was no evidence about his inability to perform work, effect on his earnings, or how much he was ever paid for a job. In fact, all witnesses continue to hire Plaintiff to perform jobs.

In *Hyde v. S. Cent. Tenn. Dev. Dist.*, No. M2015-02466-COA-R3-CV, 2017 Tenn. App. LEXIS 478, at *14 (Ct. App. July 14, 2017), the plaintiff filed suit for personal injuries, and was ultimately awarded damages in a bench trial. *See,* id. In part, she was awarded damages of $169,041.60 for "Lost Future Earnings." *Id.* at *9. At the bench trial, the plaintiff provided testimony that she was employed as a hairdresser making $19.35 an hour and that she was working less hours than she was before the wreck. *See,* id. at *12. The plaintiff's doctor also provided testimony that the plaintiff had restrictions on lifting, standing, sitting, and bending her neck – as she works as a hairstylist. *See, id.* The Court of Appeals found that "the evidence shows that Ms. Hyde has lost some income since the accident and suffers some continued discomfort as a result of the injuries sustained. The court, however, did not making a finding relative to the extent of any

impairment of Ms. Hyde's future earning capacity, a finding required by *Overstreet*[1]*;* rather, the calculation was based on a calculation of lost earnings." *Id.* The Court of Appeals vacated the award of damages and remanded the case for the court to reconsider the award of loss of future earning capacity." *Id.* at *14.

Despite evidence of lost wages, restrictions from the doctor and her claimed effect on her work, the Court in *Hyde v. S. Cent.* still felt there wasn't enough for a loss of earning capacity claim. The evidence in the existing case did not even rise to the level of evidence presented in *Hyde v. S. Cent.,* as Plaintiff presented no evidence of past wages, clear restrictions on his work from a doctor (or how long they would last), present value calculations, reduced hours, etc. There was no evidence presented to support the jury's award. As such, the jury's award for $325,000 for "future loss of earning capacity," was purely based on speculation and is not supported by the evidence at trial. No amount of damages can be awarded for "loss of future earnings" without it being based solely on speculation, which violates the required standard of proof.

2. The Plaintiff Cannot Recover for Loss of Earning Capacity When It Was Not Plead in the Amended Complaint or Intended to Be a Damage Sought

It is an error to allow the Plaintiff to receive damages which were not a part of the lawsuit, and which were not completed by either party as doing so constitutes a prejudicial surprise to the Defendant, who was unable to prepare for this claim due to lack of proper notice.

A pleading is supposed to put the defendants on notice of the damages claimed to be suffered. *See,* Evans v. Nashville Banner Pub. Co., 1988 Tenn. App. LEXIS 638, at *6 (Ct. App. Oct. 12, 1988). A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain: (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief the

[1] *Overstreet v. Shoney's, Inc.,* 4 S.W.3d 694, 715 (Tenn. Ct. App. 1999)

pleader seeks. Relief in the alternative or of several different types may be demanded. Tenn. R. Civ. P. 8.01.

In the law of pleading, the most important classification of damages is the division into general damages and special damages. *Wilson v. Cook Mfg. Co*., 56 Tenn. App. 129, 131, 405 S.W.2d 584, 585 (1966). General damages are such as naturally and necessarily result from the wrong or injury complained of, while special damages are such as naturally but not necessarily result from the wrong or injury complained of. *Id.* Therefore, before evidence of special damages is admissible it is necessary that such damages should be alleged in the pleadings. *Id.*

The specific history of this case requires additional consideration. While loss of earning capacity is normally a "general damage," the claim was purposely removed from the Complaint when the Amended Complaint was filed, thereby signaling to Defendant that this damage claim was no longer being pursued.

As background, Plaintiff filed the Complaint on January 8, 2022, in Davidson County, Tennessee. Paragraph 19 of the Complaint stated that "Plaintiff Kenneth Price has lost and will continue to lose income as a direct and proximate result of the collision." (Complaint, ¶ 19). At Mr. Price's deposition on November 11, 2022, Counsel for Plaintiff stated, "I just want to let you know, we're going to be dropping the lost wages claim. So that won't be going forward." (Price dep., Page 6 lines 12-14). The Plaintiff filed an Amended Complaint on March 29, 2023. The Amended Complaint did <u>not</u> claim lost income or future loss of income/earning capacity. (See, Amended Complaint). Defendant reasonably relied on the Amended Complaint (which did not claim lost wages or loss of future earning capacity) and the statements by counsel that no claim was being pursued, while litigating this action. Based on this reliance, Defendant did not conduct any written discovery to obtain information about purported wages or loss of earning capacity.

Based on this reliance, Defendant did not interview any witnesses, or request any employment-related documents. Defendant went to trial on the premise that no wage claims of any kind were a part of the lawsuit and prepared accordingly. Of further importance, Defendants filed a Motion in Limine to "Exclude Testimony Relative to Any Alleged Lost Wages or Lost Earning Capacity." This Motion was "granted by agreement of the parties." See, Pre-Trial Order; Defendant's Motion in Limine to Exclude Testimony Relative to Any Alleged Lost Wages or Lost Earning Capacity."

Therefore, allowing an award for "loss of earning capacity," takes away the attorneys discretion in which damages are being sought, takes away their agreement on pre-trial motions, and would be contrary to the policy requiring a defendant to be put on notice of the damages claimed against it. Allowing otherwise would thwart a party's ability to properly prepare for its case. For example, had Defendant been put on notice that "loss of earning capacity" was going to be a damage awarded at trial (despite its removal from the Complaint) it would have conducted discovery surrounding that claim. However, since it was not a claim, Plaintiff likely would have objected to relevance. Wherefore, an awarded for loss of earning capacity cannot be awarded and Defendant should be granted a new trial or remittitur of the entire award.

3. It Was Plain Error to Add Line-Item to Be Added to the Agreed Verdict Form During Jury Deliberation

Allowing a line item to be added to the Verdict Form in the midst of deliberations allowed the jury to award damages that were not part of the lawsuit, that were purposely excluded via a Motion in Limine, and that were not supported by the evidence at trial. This resulted in substantial prejudice to the Defendant, wherein an award of $325,000.00 was given for this specific category of which it had no notice. The line-item was added despite objection by Defendant's counsel. This line-item was added despite the fact that the Parties agreed to Defendant's Motion in Limine to exclude *any* evidence of lost wages or loss of future earnings during the trial. Objections to

improper procedure must be voiced contemporaneously to give the trial judge the opportunity to correct the error on the spot. *State v. Walls*, 537 S.W.3d 892, 894 (Tenn. 2017).

Following the close of proof, the Court read the jury instructions to the jury. After closing arguments, the jury went to deliberate. Later that afternoon, the Court called the attorneys back into the courtroom with a question from the jury. It stated, "Our verdict form does not include a section for loss of earning ability. Are we to consider this factor? If so, then which damage category? And also, can we have information about Mr. Price's prior earnings?" (Trial Transcript, Vol. II, p. 127: 6-12). It is important to note that the attorneys for Mr. Price worked on an agreed Verdict Form, a Verdict form that specifically did not include a line item for lost wages or loss of earning capacity as this was not a part of the lawsuit.

During jury instructions, T.P.I. 14.01, "Compensatory Damages," was read to the jury. However, only a part of the instruction on "loss of earning capacity" was read to the jury. For ease of reference, T.P.I. 14.01 as it pertains to "loss of earning capacity," states as follows:

> **Loss of Earning Capacity.** Loss of earning capacity is the value of earning capacity that has been lost in the past [and the present cash value of lost earning capacity that is likely to be lost in the future] as a result of the injury in question.
>
> It is not the loss of time or actual earnings that make up this item of damages, but the loss of the ability to earn. There may be a loss of earning capacity even though there has been no loss of earnings [and even though the plaintiff made more money after the accident than before.] The loss of the ability to earn money may include, but is not limited to, actual loss of income.
>
> In deciding what, if any, award should be made for loss of the ability to earn, you should consider any evidence of the plaintiff's earning capacity, including, among other things, the plaintiff's health, age, character, occupation, past earnings, intelligence, skill, experience and record of employment.

Only the third paragraph was read to the jury, and under the heading of "Medical Expenses." While counsel agrees that this was in the jury instructions, counsel in good faith believes that this was included in error by the Parties, who worked on the jury instructions

following the second day of trial - while in the courtroom and intended to remove any instructions related to wages (past or future). Even though this part of the instruction was included, T.P.I. Civil 15.11, "All Instructions Not Necessarily Applicable," was also read to the jury, which would sufficiently allow the jury to re consider the portion of the loss of earning instruction and could have been relayed to the jury after their question. Additionally, it could have been explained that this was not being sought pursuant to the complaint and motions in limine.

After the instructions were read to the jury, counsel for Defendant did not object to the partial instruction related to "loss of future earnings," because Defendant knew that this was not a consideration of damages and was not included on the agreed - verdict form. Further, Defendant's failure to object to the instruction does not prevent Defendant from challenging the Verdict Form. See*, Overstreet v. Shoney's, Inc.,* 4 S.W.3d 694, 715 (Tenn. Ct. App. 1999)(*determining that Shoney's failure to raise an issue with the trial court's damage instruction…and a complete instruction patterned after T.P.I. 4.01 did not prevent Shoney's from challenging the verdict form*).

Defendant's counsel responded in objection to the addition of this line item on the verdict form. It's important to note that it appears even Counsel for Plaintiff agreed to the lack of evidence on this damage category. Counsel for Plaintiff stated: "Your Honor, if you mind, just briefly that loss of earning capacity requires testimony regarding what that earning capacity is based on 'I was a handyman making X and now I can't because of this injury.' There was no testimony regarding that. So, what this put the jury into is pure speculation. What does a handyman make? I doubt they know, they just have to speculate, there was not testimony regarding what a handyman makes. "So it's—they can't- they have nothing to put any type of basis for future—" (Trial Transcript Vol. II, p.131:17-25, 132:1-5).

Despite that above, The Court allowed a lien item to be added to the Verdict Form for future loss of earning capacity and the jury awarded $325,000.00 for this damage category, which was plain error and caused substantial prejudice to the Defendant and created a sense of unease for attorneys everywhere.

Wherefore, Defendnat's move for a new trial.

B. FUTURE MEDICAL TREATMENT

1. The award of damages for "Future Medical Expenses" is not supported by the evidence.

Tennessee case law makes it clear that future medical expenses may not be awarded when based on speculation or conjecture and that they must be proven with "reasonable certainty." See, *Overstreet v. Shoney's Inc.,* 4 S.W.3d 694, 703(Tenn. Ct. App. 1999)("However, damages for future medical expenses may not be awarded when the damages are based on speculation or conjecture.") Additionally, as cited by the Court in *Singh v. Larry Fowler Trucking, Inc.* "to remove awards for future medical expenses from the realm of speculation, persons seeking future medical expenses must present evidence (1) that additional medical treatment is reasonably certain to be required in the future and that (2) will enable to trier of fact to reasonably estimate the cost of expect treatment. 390 S.W.3d 280 (Tenn. Ct. App. 2012). "In personal injury cases, damage awards for prospective medical expenses may be awarded when the effects of the injury will require the injured person to additional medical treatment." *Henley v. Amacher,* 2002 Tenn. App. LEXIS 72 at 45.

When asked how much the claimed surgeries would cost, Dr. Blythe testified, "well over $100,000 would be my guess." Probably close to $150,000 just for the hospital. (Dep. Blythe, P. 23, line 16-18). Plaintiff provided no other testimony to allow the trier of fact to reasonably

estimate the cost of future treatment, and Dr. Blythe's "guess" allowed improper speculation on the jury's part in reaching an award for future medical damages.

The court in *Kilpatrick v. Bryant* gives clarification on causation, stating, "Causation is a matter of probability, not possibility. "[P]roof of causation equating to a 'possibility,' a 'might have,' 'may have,' 'could have' is not sufficient, as a matter of law, to establish the required nexus between the plaintiff's injury and the defendant's tortious conduct by a preponderance of the evidence…." *Kilpatrick v. Bryant*, 868 S.W.2d 594, 602 (Tenn. 1993). Dr. Blythe's statements and opinions equate to possibilities and are not adequate to meet the preponderance of the evidence standard.

Dr. Blythe testified that "surgery is really the only recommendation at this stage on the pathology in the neck…" (Dep. Blythe, p. 20:22). Dr. Blythe did not make clear whether this "pathology" is relative to the motor vehicle accident, degenerative conditions, or both, but he did testify: "So, basically, the discs are collapsed. They are diseased. They have to be addressed.". (Dep. Blythe, p. 23: 4-8). Given the severity of the pre-existing conditions as opined by both experts in this case, and when compared to the minor impact (as evidenced on the video and photos), it is clear that an award of $200,000 for future medical expenses is not supported by the evidence in this case.

Wherefore, Defendant moves for a new trial.

III. REMITTITUR OF DAMAGES

Defendant urges this Court to remit the verdict within the range of reasonableness, or alternatively, to grant its contemporaneous request for a new trial. The award of $325,000 for "loss of future earning capacity," should be reduced in its entirety as it is excessive and was not based on any credible proof at trial. Additionally, the award for $200,000 for future medical expenses is excessive and not based on credible proof at trial, as it fails to meet the requirement or proving

damages with reasonably certainty and is not supported by the evidence shown in the video and photos.

As Tennessee courts have long held, "a trial court may suggest a *remittitur* in any case involving unliquidated damages where the amount of the verdict is excessive." *Murphy Truck Lines v. Brown,* 313 S.W.2d 440, 442 (Tenn. 1958). T.C.A § 20-10-102 provides, in relevant part, in all jury trials had in civil actions, after the verdict has been rendered and on a motion for a new trial, when the trial judge is of the opinion that the verdict in favor of a party should be reduced and a remittitur is suggested by the trial judge on that account, with the proviso that in case the party in whose favor the verdict has been rendered refuses to make the remittitur, a new trial will be awarded, the party in whose favor such verdict has been rendered may make such remittitur under protest, and appeal from the action of the trial judge to the court of appeals." T.C.A. § 20-10-102(a).

Pursuant to Tennessee law, "it is not necessary for the court to find that a verdict is so excessive as to indicate passion, prejudice, corruption, partiality, or unaccountable caprice on the part of the jury, since the court only considers whether or not the verdict should be reduced." *Streetman v. Richardson*, 37 Tenn. App. 524, 266 S.W.2d 838 (Tenn. Ct. App. 1953). Tennessee trial judges must make their own assessments of witnesses' credibility, find the evidence preponderates in favor of a lower amount of damages, then may suggest remittitur instead of granting a new trial. *Borne v. Celadon Trucking Servs., Inc.*, 532 S.W.3d 274, 310 (Tenn. 2017). The Tennessee Supreme Court advised "[t]he trial court may [also] consider the amount awarded in similar cases in determining whether a verdict is excessive." *Id.* Even if the amount of a verdict is determined to be within the range of reasonableness, the "trial judge may suggest an adjustment in a jury verdict." Borne, 532 S.W.3d at 310.

However, if the trial court finds that the jury's verdict is excessive, it has the "statutory prerogative" to "adjust damage awards to accomplish justice between the parties and to avoid the time and expense of a new trial. *Johnson v. Beverly Nunis & Farmer's Ins. Exch.,* 383 S.W.3d 122, 134 (Tenn. Ct. App. 2012)(*citing, Long v. Mattingly,* 797 S.W.2d, 889, 896 (Tenn. Ct. Ap. Mar. 17, 2011)).

This Court has observed that "[r]eporting a verdict in this matter [with an itemized verdict form] . . . actually facilitates the trial court's ability to perform its role as the thirteenth juror, as well as the appellate court's ability to review the verdict for consistency and conformance with the evidence. *Johnson v. Beverly Nunis & Farmer's Ins. Exch*., 383 S.W.3d 122, 134 (Tenn. Ct. App. 2012)(*citing Overstreet v. Shoney's, Inc*., 4 S.W.3d 694, 714 (Tenn. Ct. App. 1999)).

A. Loss of Earning Capacity

A claim for loss of earn incapacity was not proven by Plaintiff, therefore a remittitur of the $325,000.00 award is warranted to conform the verdict with the evidence. An award of $325,000 based on pure speculation is not warranted. Damages must be proven with reasonable certainty. See, *Borne v. Celadon Trucking Servs., Inc.*, 532 S.W.3d 274, 310 (Tenn. 2017), (*citing Shoney's v. Overstreet,* 4 S.W.3d at 703). Thus, where there is an itemized verdict form, remittitur should be suggested as to particular itemized verdict amounts, because the jury has assigned "a separate monetary loss for each type of damages requested" and the proof as to each type of damages must be considered separately. *Id; Riley v. Orr*, No. M2009-01215-COA-R3-CV, 2010 Tenn. App. LEXIS 386, 2010 WL 2350475, at *7-10 (Tenn. Ct. App. June 11, 2010).

In support of its request for remittitur, Defendant incorporates in arguments from the above, "Motion for New Trial," and urges this Court to remit the entire award for "loss of earning capacity."

B. Future Medical Treatment

A claim for future medical treatment was not proven with reasonable certainty by Plaintiff, therefore a remittitur of the $200,000.00 award is warranted to conform the verdict with the evidence. This includes consideration of the expert's testimony, impact from collision and other common-sense evidence presented in this matter. In determining "whether a verdict is within the range of reasonableness, the trial judge must consider the credible proof at trial regarding the nature and extent of the injuries, pain and suffering, economic losses including past and future medical bills, lost wages and loss of earning capacity, age, and life expectancy." *Meals ex rel. Meals v. Ford Motor Co.*, 417 S.W.3d 414, 421 (Tenn. 2013).

Defendant incorporates its arguments from its Motion for New Trial, as stated above. Defendant requests that this Court act in its role as the "Thirteenth Juror," to award an amount of damages that is reasonable in consideration of all the evidence.

C. Other Damages

Defendant also requests a remittitur of the additional line-item damages that do no align with the weight of evidence presented in this case. Specifically, a remittitur of the $39,000 award of "physical pain and mental suffering – past," $39,0000 for "loss of enjoyment of life – past," $25,000 for "physical pain and mental suffering – future," $25,000 for "loss of enjoyment of life – future" and $25,0000 for "permanent injury."

"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. 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. The trial court may consider the amount awarded in similar cases in determining whether a verdict

is excessive. 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 Tennessee Court of Appeals." M*eals ex rel. Meals v. Ford Motor Co.*, 417 S.W.3d 414, 417 (Tenn. 2013) Tenn. Code Ann. § 20-10-102(a) (2009).

The Tennessee Supreme Court advised "[t]he trial court may [also] consider the amount awarded in similar cases in determining whether a verdict is excessive." *Borne v. Celadon Trucking Servs., Inc.*, 532 S.W.3d 274, 310 (Tenn. 2017). Even if the amount of a verdict is determined to be within the range of reasonableness, the "trial judge may suggest an adjustment in a jury verdict." *Id.*

The amounts awarded for the above-stated line-items damages are excessive in comparison to awards in similar cases and are not within the range of reasonableness given the evidence presented at trial. As such, Defendant requests a remittitur of the awards.

CONCLUSION

The excessive amount of the verdict alone warrants a new trial, and the verdict is contrary to the evidence, thereby requiring judgment in their favor notwithstanding the verdict in the alternative. For the foregoing reasons, Defendant respectfully requests that this Court grant a new trial, and any other relief this Court deems proper.

Respectfully submitted,

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EFILED 03/01/24 02:22 PM CASE NO. 22C1371 Joseph P. Day, Clerk

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of March, 2024, a true and exact copy of the foregoing document was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system. All others have been served via U.S. Mail as indicated.

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