

**IN THE COURT OF APPEALS
STATE OF GEORGIA**

Marquiz Barker,

Defendant-Appellant,

v.

Owauniss Grier,

Plaintiff-Appellee.

Appeal No. A26A0229

On Appeal from the
State Court of DeKalb County
Case No. 22A03274

Brief of Plaintiff-Appellee

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I. INTRODUCTION

After a two-day jury trial with no meaningful objections, the jury awarded \$450,000 in past and future pain and suffering damages to Plaintiff Owauniss Grier. Ms. Grier was 37 years old at the time of trial and had suffered permanent, objective, and disfiguring injuries to her left knee, left thumb, and lower back due to a vehicular collision caused by Defendant Barker. By trial, those injuries had plagued Ms. Grier with pain for three years, and they will more likely than not afflict her for the rest of her life. The injuries and suffering were not meaningfully disputed, and Defendant half-heartedly disputed liability despite having paid a citation for causing the crash, which operated as an admission.

Now, on appeal, Defendant complains that (1) the trial court did not apply procedural rules about arguing damages **that did not exist when the case was tried**, (2) Plaintiff's arguments about holding Defendant accountable for his negligence were improper (even though he did not object to them at trial), and (3) the jury awarded too much in damages to Plaintiff for her pain and suffering.

All of Defendant's arguments are meritless. First, it would have been erroneous for the trial court to re-do the jury trial just to apply the

new procedural rules about argument enacted seven months **post-trial**. When new procedural rules are enacted that apply to pending cases, that does **not** invalidate past proceedings held under the previous procedures. *Landgraf v. USI Film Prods.*, 968 F.2d 427, 432-33 (5th Cir. 1992), *affirmed* 511 U.S. 244 (1994); *see also Humphrey v. Williams*, 295 Ga. 536, 539 n.2 (2014) (deciding an appeal based on the evidence law in effect **at the time of trial**, regardless of subsequently enacted evidence code). And, in any event, the new procedural rules were not violated, certainly not in any way that prejudiced Defendant.

Second, Defendant's failure to object to **any** of the allegedly problematic arguments (regarding damages and responsibility) waives the issue. These arguments were also permissible under Georgia law.

Finally, the evidence overwhelmingly supported the award of pain and suffering damages, which is measured only by the enlightened conscience of a fair and impartial jury. This Court should affirm.

II. STATEMENT OF THE CASE

This case arises from a terrifying, near-death collision where Defendant's negligent operation of his vehicle at interstate speeds in the rain resulted in him colliding into Plaintiff's vehicle and sending her

spinning across the interstate into another car. She suffered serious, permanent injuries to her left knee, lower back, and left thumb, and will struggle with pain and suffering for the foreseeable future.

A. Defendant causes the wreck but fights liability despite his admissions.

On the afternoon of December 11, 2021, Plaintiff Owauniss Grier was traveling in her vehicle eastbound on Interstate 20 to pick up her kids from school when the collision occurred. V4, 5-6. There had been moderate rain off and on that day. *Id.* Shortly before the collision, she was in the far-left normal lane, just to the right of the HOV lane. *Id.*

Ms. Grier was looking at the road ahead of her when she suddenly got hit and spun around. *Id.* She screamed and was scared. After her car spun around, she landed and came to a stop in the second lane from the shoulder. *Id.* at 7. People rushed to help her because the driver side of her car had been smashed from the front all the way to the back. *Id.* The people who responded were able to get her out of the car, and Ms. Grier was upset and frightened. While getting her bearings, she learned that her car had struck another car while spinning across the interstate, but that person was more concerned about whether Ms. Grier was okay. *Id.*

She was in shock. *Id.* She had been going about 55 to 60 mph when Defendant crashed into her and spun her across the interstate. *Id.*

After the collision, the responding police officer investigated and found that Defendant Barker was at fault because he lost control of his vehicle and struck Ms. Grier, starting her spinning. V4, 86. In fact, Defendant Barker had been illegally traveling in the HOV lane when he hydroplaned on the wet roads and caused the crash. *Id.* at 87. As a result of that investigation, the officer cited Defendant Barker for following too closely (based on his statement that someone was in front of him in the HOV lane) and illegally driving in the HOV lane. *Id.* at 94.¹ And Defendant Barker paid those citations. V4, 117. Despite that admission of fault, he still quibbled with responsibility at trial. V4, 125 (“Q. Was

¹ Although Mr. Barker’s claim that there was someone in front of him that caused him to stop does not save him from fault—he still followed too closely in the rain if true—the evidence also suggests that his claim **is not true**. V4, 8 (Plaintiff testifying that there was no one in the HOV lane in front of Defendant Barker), 96 (“Q. In the course of your investigation did you see any evidence that suggested that there was a vehicle that braked suddenly in front of Mr. Barker? A. No, sir.”).

this wreck your fault? A. No and yes.”).² Unsurprisingly, in light of the testimony and Defendant’s admissions, the jury found him at fault.

B. Ms. Grier is badly injured and sustains permanent injuries and pain and suffering from the collision.

During the crash, Ms. Grier was trying to hold onto the steering wheel; she injured her arm while bracing the wheel as well as her knee from hitting the interior of the car. In her words, she “was spinning and ... I was just hitting stuff everywhere.” V4, 9. Her life was “flashing before [her] eyes” and she was just “praying that [she made] it out of this horrible thing.” V4, 11. Immediately after the crash, her left knee was swollen; within 24 hours, her “whole body just felt like [she] got hit by a truck. [Her] whole body was sore from that point on.” V4, 10. She also injured the middle part of her back, and her neck was hurt from the seatbelt tightening up during the spin. *Id.*

In addition to hurting her arm, left knee, neck, and back, she also jammed her left thumb badly on the steering wheel while spinning. *Id.*

² *Agic v. MARTA*, 334 Ga. App. 679, 681 (2015) (“We have consistently held that where a party pays a fine on a citation and fails to appear in court on a citation, the party’s failure to appear is deemed an admission of guilt, and this admission may subsequently be used in a civil action for damages as an admission against interest to establish negligence.”).

Her left thumb was bent crooked in the incident, will not straighten now, and will remain that way permanently. V4, 10-11.

After the wreck, EMS arrived at the scene. V4, 17. Ms. Grier declined transportation to the hospital because she needed to pick up her kids, and told EMS that she would get checked out later. *Id.* at 17-18. When she got home, she tried to rest and take ibuprofen but awoke in the middle of the night with her whole body hurting and aching. V4, 20. The pain was so bad that she woke up her oldest son to let him know she needed to go to the hospital, and she had her father take her to Piedmont Atlanta. *Id.* When she got there, she was told that there was a three and a half hour wait, and after waiting a while amidst people coughing all around her, she decided to go home and try to rest and take pain remedies. *Id.* at 21.³

Ms. Grier tried to power through the holiday season (because almost everything was closed because of COVID-19, and she is generally not a fan of seeing doctors), but the pain persisted, so she went to see a medical provider on the 2nd or 3rd of January, 2022. V4, 22. The pain

³ The collision happened on December 11, 2021, when COVID-19 was still a concern and a burden on the healthcare system. V4, 22.

kept her from working, and she is a single parent, so she decided she had to see a doctor. *Id.* She was treated for her left knee, neck, and back pain; she rated her pain as an eight out of ten at the time. V4, 24-25. The provider gave her a back brace and a TENS unit, and scheduled an MRI. *Id.* at 25. She ultimately learned that she has a bulging disc in her back from the collision that will always cause her pain. *Id.* at 25, 28-29.

At trial, over a thousand days after the collision, Ms. Grier still needed the back brace to help with pain from activities. *Id.* at 26. She was 34 years old when the collision occurred and 37 at the time of trial. *Id.* at 27. After discovering the disc bulge, Ms. Grier attempted conservative treatment, including therapy, and ultimately underwent nineteen (19) injections to treat her pain. *Id.* at 30, 32. The injections were painful but provided temporary relief from the pain she was experiencing from the disc bulge. *Id.* at 32-33. Her knee pain also continued; her doctors explained that there was nothing they could do for that other than surgery, but she could manage the pain with a knee brace and pain pills, similar to how she was managing the back pain with a brace and a TENS unit. *Id.* at 34-35.

After four months of treatment, it was clear to Ms. Grier that she was going to be in pain, and managing flare-ups of that pain, for the foreseeable future. *Id.* at 35. And to be clear, these were all **new** injuries. Ms. Grier had never injured her knee, lower back, or left thumb before the collision. *Id.* at 36. She was a healthy 34-year-old woman at that time, but the collision changed that forever. Ms. Grier cannot perform well at work, go to the gym, sit, or walk with her kids. *Id.* at 41. She endures embarrassment because she must drag her leg with an injured knee, and she can no longer do things she likes to do, such as shopping with her kids at the mall or wearing high heels when she goes out. *Id.* The collision has profoundly affected her life:

I don't even want to go out because who wants to be walking around like that and I am young. It stripped me from everything that I like to do. It stripped me from my whole life. My whole life has changed from that.

V2, 41-42. Ms. Grier's injuries from the collision have interfered with her sleep, required her to depend on her kids, *id.*, and sunk her into depression that required therapy. *Id.* at 42-43. She was still dealing with pain, some days worse than others, at the time of trial. *Id.*

Because Plaintiff testified to all her injuries, medical treatment, and pain and suffering **without** objection from Defendant, there was no

need to call any medical provider, so Plaintiff streamlined her case for the Court. V4, 80.

C. Defendant failed to object to the arguments his brief contends were improper, failing to preserve them for appeal.

Although Defendant now complains of certain arguments about responsibility made by Plaintiff during closing, notably absent from Defendant's brief is any citation to where those claims of error were *preserved*. See NT Br. at 5 (listing the allegedly offending arguments, but **not** citing any objections); *cf.* Ga. Ct. App. 25(a)(5) (“[A]t a minimum the appellant’s brief must include ... [a] statement of the case that ... identifies how each enumerated error was preserved for review, with appropriate citations to the record.”).

There is a reason for that lack of citations: Defendant did not object to **any** of Plaintiff’s arguments about responsibility and has thus failed to preserve any claim of error related to such argument. See V4, 132-42 (first close; no objections to responsibility arguments),⁴ 154-60 (final

⁴ Defendant only objected to a reference to the police report and a reference to Defendant not proving there was a car in front of him (V4, 136-38); Defendant does not assign any error to the trial court’s ruling on either of those objections.

close; no objections whatsoever). That disposes of Defendant's argument entirely. *Williams v. Harvey*, 311 Ga. 439, 449 (2021) ("The issue of whether appellate review is available in civil cases to review a claim of allegedly improper argument in the absence of a contemporaneous objection is now squarely before us. We hold that **there is no reason to review unpreserved claims of error in closing argument in civil cases.**") (emphasis added).

Additionally, Plaintiff's closing argument was **not** asking for an award of damages based on Defendant's obstinance – it was asking for an award for compensatory damages based on Plaintiff's past pain and suffering. Defendant cites one line of the transcript, shorn of context, for that argument (NT Br. at 5 (citing V4, 159)), but after the \$500-a-day-for-1,006-days ask, Plaintiff's counsel immediately explained (omitted by Defendant in his quotation) that he was referring to **compensatory damages for pain and suffering**:

Those are the past **damages**. From the date of the collision until today has been 1006 days. \$503,000 is what that amounts [to]. ... I am asking, I am empowering you to **get back what was wrongly taken from her** and what will continue to be taken from her for the rest of her life. ... Plus any future damages that you all can agree on that you think is **appropriate to compensate her**.

V4, 159:15-25 (emphasis added).

It was clear to the trial court and to the jury (and to Defendant, **who did not object**) that Plaintiff was referring to the 1,006-day period because that was the number of days she had been experiencing pain and suffering for which she was seeking compensatory damages. As Plaintiff's counsel had previously explained with explicit reference to the 1,006-day period,

[t]he last element is damages.... What are the injuries that you are going to be empowered to award Owauniss [Grier]? You're supposed to give her what has been **taken away from her**, not just give her something for free. **She suffered past injuries from the date of the collision until today right now. 1006 days**, those are her **past injuries** that she has had to go to the doctor. That she has had pain. That she has not been able to do activities of daily life, braid hair.... **Past injuries are from the second that she was hurt on December 11th, 2021 until today.**

V4, 139:12-24 (emphasis added); *see also* V3, 149:14-16 (“For one thousand and five days today my client has been experiencing pain and suffering with the injuries that she sustained in this wreck.”). Defendant's claim that the damages request was based on the failure to take responsibility (rather than past pain and suffering) is belied by the record and, conclusively, by Defendant's failure to contemporaneously object. *Williams*, 311 Ga. at 449.

D. The trial court correctly denied Defendant’s motion for new trial.

After closing arguments, the trial court charged the jury without objection. V4, 160-172. The charge included the Georgia patterns on pain and suffering, again, without objection.⁵ The jury returned its verdict on September 12, 2024, in the total amount of \$450,000 for all claimed damages (including past and future general damages). V4, 179 (verdict read in open court); V2, 388 (verdict). The trial court entered judgment on the verdict on September 17, 2024. V2, 392 (judgment).

Defendant moved for a new trial on October 16, 2024. V2, 394-401. Plaintiff opposed the motion on November 14, 2024. V2, 402-14.

⁵ V4, 165-66 (“Pain and suffering is a legal item of damages. The measure is the enlightened conscience of fair and impartial jurors. Questions of whether, how much and how long the plaintiff has suffered or will suffer are for you to decide.... In evaluating the plaintiff’s pain and suffering you may consider the following factors, if proven: Interference with normal living, interference with enjoyment of life, loss of capacity to labor and earn money, impairment of bodily health and vigor, 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.

If you find that the plaintiff’s pain and suffering will continue into the future you should award damages for such future pain and suffering as you believe the plaintiff will endure. In making such award your standard should be your enlightened consciences as impartial jurors.”).

Defendant then supplemented his motion with quotes from the transcript on November 22, 2024. V2, 436-47.

Seven months after the trial, on May 14, 2025, Defendant filed a “notice of new authority” and supplement to his motion for new trial, adding arguments from recently enacted amendments to O.C.G.A. § 9-10-184. V2, 546-50. Plaintiff opposed those new arguments in a supplemental brief on May 27, 2025. V2, 551-639.

The trial court held a hearing on the motion for new trial on May 19, 2025, but Defendant has failed to obtain and include a copy of that transcript for the record on appeal. Because Defendant assigns error to the trial court’s exercise of discretion at the hearing on his motion for new trial, this is a fatal error requiring this Court to affirm the judgment of the trial court. *Barnwell v. TPCII, LLC*, 295 Ga. 153, 154 (2014).⁶

⁶ “The appellant has the burden of showing error below, and when the appeal draws in question the transcript of the evidence and proceedings, it shall be the duty of the appellant to have the transcript prepared at the appellant’s expense. Where the appellant fails to provide a transcript from which this court may determine the existence of the alleged error, this court has nothing to review. [W]here the transcript is necessary for review and appellant omits it from the record on appeal, the appellate court must assume the judgment below was correct and affirm.” *Id.* (emphasis added; quotations and citations omitted).

The trial court denied the motion for new trial, after the hearing, on June 5, 2025. V2, 645-47. Defendant filed his notice of appeal on July 3, 2025, V2, 1-6, and this appeal follows.

III. ARGUMENT

There is no basis to disturb the jury's verdict or the trial court's judgment. Defendant's arguments are waived, wrong on the merits, and fall far short of meeting the standard of review, and he has failed to provide this Court with the necessary transcript of the post-trial hearing.

This Court should affirm.

A. The Standard of Review

When a jury returns a verdict, an appellate court must affirm it if “there is any evidence to support it, and the evidence is to be construed in a light most favorable to the prevailing party with every presumption and inference in favor of sustaining the verdict.” *Green v. Key Custom Homes, Inc.*, 302 Ga. App. 800, 802 (2010). This Court

review[s] a denial of a motion for a new trial according to this same standard. Therefore, a jury verdict, after approval by the trial court, and the judgment thereon will not be disturbed on appeal if supported by any evidence, in the absence of any material error of law.

Yash Sols., LLC v. N.Y. Glob. Consultants Corp., 352 Ga. App. 127, 132 (2019). Further, the “existence of prejudice or bias cannot rest upon suspicion. That the verdict was the result of prejudice and bias must be shown.” *Brown v. Serv. Coach Lines*, 71 Ga. App. 437, 441 (1944).

“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.” *Redwing Carriers, Inc. v. Knight*, 143 Ga. App. 668, 677 (1977) (quotations omitted). And to be clear, “direct proof of prejudice or bias” requires proof of “**actual** bias on part of the **jury**.” *Cent. of G. R. Co. v. Nash*, 150 Ga. App. 68, 71 (1979) (emphases added). The “**only** guideline for awarding damages for pain and suffering is the **enlightened conscience of an impartial jury**. If the award is not so flagrant as to ‘shock the conscience,’ it will **not** be disturbed on appeal.” *Stover v. Atchley*, 189 Ga. App. 56, 57 (1988) (emphasis added).

Moreover, “[a]bsent compelling evidence, [this Court] will defer to the ruling of the trial court on a motion for new trial based on inadequate or excessive damages. The trial court’s decision on a motion for a new trial will be upheld on appeal unless it was an abuse of discretion.” *Green*, 302 Ga. App. at 803 (quoting *Marzullo v. Jim Ellis Motors*, 253 Ga. App. 706, 707 (2002)). Finally, “[c]ounsel is permitted wide latitude in closing argument, and defining the bounds of such argument is within the trial court’s discretion.” *White v. McGouirk*, 370 Ga. App. 318, 322 (2024). And absent a contemporaneous objection to a particular argument, a claim of error is **unreviewable** by an appellate court. *Williams*, 311 Ga. at 449.

Simply put, the standard of review is dispositive of this appeal.

B. The trial court correctly denied Defendant’s request for an unjust and wasteful retrial on new and waived arguments.

Defendant’s lead argument is that the trial court erred by not applying a law that did not exist until **seven months after** the trial of this case. That argument is meritless because the new law does not purport to apply to trials **that have already occurred**, nor could it.

1. *That a new rule of evidence or procedure applies to pending cases does not justify—let alone require—retrying a case that was properly tried under old rules.*

Although Defendant is correct that the amendments to O.C.G.A. § 9-10-184 are effective as of April 21, 2025, and apply to “pending cases” even if they accrued before the effective date, that fact does not give Defendant the result he seeks. The enactment of new procedural and evidentiary rules does not **invalidate past proceedings** in pending cases that were properly conducted under the previous procedural and evidentiary rules.

The Supreme Court of the United States has explained this concept in detail:

Of course, the mere fact that a new rule is procedural does **not** mean that it applies to **every** pending case. A new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime, and **the promulgation of a new rule of evidence would not require an appellate remand for a new trial**. Our orders approving amendments to federal procedural rules reflect the commonsense notion that **the applicability of such provisions ordinarily depends on the posture of the particular case**.

Landgraf, 511 U.S. at 275 n.29 (emphasis added). Thus, for example, “the promulgation of a new jury trial rule would ordinarily **not** warrant retrial of cases that had previously been tried to a judge. *Id.* Thus,

customary practice would **not** support remand for a jury trial in this case.” *Id.* at 281 n.34.

The reason for that commonsense rule is obvious:

We are not persuaded that [the legislature] intended to upset cases which were properly tried under the law at the time of trial. To require [the defendant] to retry this case because of a statutory change enacted after the trial was completed would be **an injustice and a waste of judicial resources**. We apply procedural rules to pending cases, but **we do not invalidate procedures followed before the new rule was adopted**.

Landgraf, 968 F.2d at 432-33 (emphasis added). And Georgia law is consistent with that commonsense concept. *See, e.g., Humphrey*, 295 Ga. at 539 n.2 (deciding an appeal based on the evidence law in effect at the time of trial, regardless of subsequently enacted evidence code).

In sum, that a new rule on argument procedures was enacted seven months after trial does **not** mean that Defendant gets an unjustified second bite at the apple. To the contrary, even when a new amendment to a procedural or evidentiary rule applies to “pending cases,” post-trial motions and appeals concerning a trial that happened before the change must still be decided based on the law in effect **at the time of trial**. *Landgraf*, 511 U.S. at 275 n.29; *Humphrey*, 295 Ga. at 539 n.2.

Defendant's lead authority is inapposite. In *Airasian v. Shaak*, 289 Ga. App. 540, 540 (2008), this Court held that it was not error to apply a new evidentiary rule that took effect **before** the trial of the case. The Court said nothing about redoing a trial that was conducted under the then-governing rule, and binding authority forecloses that argument. *Landgraf*, 511 U.S. at 275 n.29; *Humphrey*, 295 Ga. at 539 n.2.

Further, Defendant relies on language from *Bowers v. Keller*, 185 Ga. 435, 438 (1938), and *Fulton County v. Spratlin*, 210 Ga. 447, 447 (1954), stating that an appellate court may dispose of a case under a new law changed by statute, but those cases involved a change to the **substantive law** that affected the merits of the cause of action, **not** a change to an **evidentiary or procedural rule**. Although an appellate court may review the merits of a claim under the current substantive law (if retroactive application is constitutional⁷), there is no requirement to re-do proceedings that were properly conducted under previously

⁷ *Valdosta v. Singleton*, 197 Ga. 194, 208 (1944) (approving such retroactive application of substantive law only “where such application of the new law will impair no vested right under the prior law”); *see also Deal v. Coleman*, 294 Ga. 170, 177 (2013) (it is unconstitutional to impair vested rights; discussing vested rights).

effective evidence rules or procedures. *Landgraf*, 511 U.S. at 275 n.29; *Humphrey*, 295 Ga. at 539 n.2.

The textual difference, so to speak, is that when the legislature says a substantive change applies to a “pending case,” any court that considers substantive issues (the merits) must apply that change (if constitutional). Conversely, that a new procedural or evidentiary rule applies to a “pending case” has been interpreted to mean the new rule applies to a **new proceeding** in the case after the effective date of the rule; it does “not invalidate procedures followed before the new rule was adopted.” *Landgraf*, 968 F.2d at 432-33; *see Humphrey*, 295 Ga. at 539 n.2.

The only case Defendant cites regarding retroactive application of a “change” to a rule of evidence is *Griffin v. Bankston*, 302 Ga. App. 647, 649 (2009), but that case is also inapposite. *Griffin* did **not** involve a new *legislative enactment* of an evidence rule; it involved application of new *judicial precedent* about what an old rule had always meant. *Id.* (“But in the recent case of *Condra* ... the **Supreme Court of Georgia overruled this line of precedent** and held that evidence of a physician’s personal practices was admissible on cross-examination as substantive evidence

and to impeach the expert's opinion as to the applicable standard of care.") (emphasis added).

Defendant's reliance on *Griffin* reflects a fundamental misunderstanding of the separation of powers; *judicial interpretation* of a rule of evidence is an exercise of the judicial power to say what the law means (**and has always meant since it was enacted**), but *a legislative enactment* creates **a new rule** that did not previously exist. In other words, a judicial interpretation of the meaning of a rule that existed when the proceedings occurred is applied to determine whether the proceedings complied with that rule. That is fundamentally different from a legislative enactment that creates a new rule, which applies only to new proceedings in pending cases (not to invalidate past proceedings properly conducted under old evidentiary and procedural rules). *Landgraf*, 968 F.2d at 432-33; *see Humphrey*, 295 Ga. at 539 n.2.⁸

Finally, it would be an unconstitutional impairment of vested rights to retroactively disturb a **judgment** because of a new evidentiary rule.⁹

⁸ A different rule would be unworkable; if Defendant was right, virtually every case on the Court's docket would have to be remanded for retrial.

⁹ *Fowler Props. v. Dowland*, 282 Ga. 76, 77 (2007) (holding that retroactive application of a law that impairs vested rights is

As our Supreme Court has cautioned, the interpretive canon of constitutional avoidance counsels toward a reasonable interpretation of a law that avoids unnecessary constitutional issues. *See Rep. Nat’l Comm. v. Eternal Vigilance Action, Inc.*, 321 Ga. 771, 804 (2025).

In sum, the new amendment provides no basis for retrial. That new procedural and evidentiary rules apply to pending cases does “**not invalidate procedures followed before the new rule was adopted,**” *Landgraf*, 968 F.2d at 433 (emphasis added), and does “**not** require an appellate remand for a new trial.” *Landgraf*, 511 U.S. at 275 n.29 (emphasis added) (affirming the 5th Circuit’s decision).

2. Defendant made no objection to Plaintiff’s closing argument based on unfairness or surprise, which waives the claim of error; Plaintiff’s argument did not violate the new rule, and any violation would have been harmless.

Even if the new version of O.C.G.A. § 9-10-184 applied, Defendant made no objection to any argument Plaintiff made. Now, Defendant claims there was some fundamental unfairness with Plaintiff not asking for a certain amount of non-economic damages until Plaintiff’s second

unconstitutional); *Eig v. Savage*, 177 Ga. App. 514, 516 (1986) (“**[U]ntil a judgment is rendered** there is no vested right in a claim for damages for a tort.”).

close, and with Plaintiff asking for such damages on a *per diem* basis (*i.e.*, a certain amount per day). But Defendant did not even vaguely make any objection to those arguments at trial, which totally waives the issue. *Williams*, 311 Ga. at 449. This is **not** a case in which a defendant contemporaneously complained that argument tactics were unfair, and then a law was passed saying so. Here, Defendant's argument is just opportunistic hindsight.

Further, there was nothing wrong with Plaintiff's closing argument under the new version of the statute. The old version of O.C.G.A. § 9-10-184 still required that any argument concerning the "worth or monetary value of pain and suffering" "shall conform to the evidence or reasonable deduction from the evidence in the case." O.C.G.A. § 9-10-184 (2024). If anything, the new statute **broadens** the range of permissible arguments. Now, counsel are explicitly allowed to make any argument concerning the worth and monetary value of noneconomic damages so long as it is "rationally related to the evidence of noneconomic damages," and can also make references to objects or values that have **any** "rational connection to the facts proved by the evidence." O.C.G.A. § 9-10-184(c)(1) (2024). Previously, only "reasonable deduction" from the evidence in the case was

allowed, but now **any** rational connection to the evidence (deduction, induction, contrast, analogy, inference, common sense, common knowledge, etc.) is permissible.

An argument that \$500 per day for pain and suffering, multiplied by the number of days of pain and suffering, is plainly rational and is related to the evidence of 1,006 days of pain and suffering. Notably, nothing in the new statute changed Georgia substantive law, which is still that “[g]eneral damages are those which the law presumes to flow from any tortious act; **they may be recovered without proof of any amount.**” O.C.G.A. § 51-12-2.¹⁰ Nothing in Plaintiff’s argument about how pain and suffering should be valued violates the new version of § 9-10-184. *See Hardwick v. Price*, 114 Ga. App. 817, 820 (1966) (“[I]t is not improper for counsel to argue to the jury the per diem, monthly or yearly value of the plaintiff’s pain and suffering provided such argument is within the bounds of reasonable deduction from the evidence in the case”; arguing a per diem value “is merely drawing an inference from the evidence given at the trial”). If a per diem is a “reasonable deduction from

¹⁰ Plaintiff included this citation in the Pretrial Order without any objection by Defendant, which is a waiver of the issue. V2, 291-92.

the evidence,” it is definitionally “rationally connect[ed] to the facts proved by the evidence.”

Finally, that leaves the argument that Plaintiff should not have argued value only in the second closing, but that would be a harmless error because Defendant can show no prejudice. This is not a case in which there was disputed value or disputed medical treatment. Defendant had a full and fair opportunity to argue what should have been awarded, and made that argument. V2, 153 (“[Counsel] said that I may ask you to order a specific amount of dollars. **I hadn’t planned to but I guess I will. That amount is zero dollars.**”).

In short, the amendments to § 9-10-185 do not apply retroactively to a trial that already happened and resulted in a final judgment, but even if they did, they were not violated, and any violation was harmless. *HA&W Fin. Advisors, LLC v. Johnson*, 336 Ga. App. 647, 654 (2016) (“An appellant must show harm as well as error to prevail on appeal.”).

C. The trial court correctly found that the verdict was not excessive, punitive, or the product of bias.

Defendant falls far short of meeting his burden under the standard of review of showing that the verdict was excessive, punitive, or the product of bias.

1. The trial court's ruling and jury's verdict are entitled to double deference.

At risk of some repetition, this issue is subject to double deference. The evidence must be viewed in the light most favorable to the verdict, *Green*, 302 Ga. App. 802, and, absent compelling evidence, this Court will defer to the trial court and review its decision in denying the motion for new trial for abuse of discretion. *Id.* at 803.

2. All of Defendant's arguments are waived by his failure to contemporaneously object.

Every argument Defendant makes in this section has been dispositively waived. Under “[t]he contemporaneous objection rule, which has been a cornerstone of Georgia trial practice for over 150 years,” the plethora of objections made for the first time in Defendant’s brief **have been waived, and must be disregarded**, because the law does not allow a party to “sit back and make no objection in the hope of either a successful verdict or, in the event of a loss, persuading the trial court or the appellate court to reverse much later in a motion for new trial or on appeal.” *Williams*, 311 Ga. at 442, 447-48.

Defendant **made no objection to any of the comments** that he now claims were unfairly prejudicial. Georgia law prohibits this kind of

sandbagging. *White*, 370 Ga. App. at 322-23 (a contemporaneous objection is required because it allows the court to take corrective action where appropriate); *Williams*, 311 Ga. at 447-48 (a curative instruction negates any prejudice).

In sum, Defendant made his strategic trial decisions, and post-trial regret is no basis to disturb the jury's verdict. In any event, the waived objections that Defendant now relies upon are **invalid**, as the arguments were permissible and the evidence ignored by Defendant—but **not** by the jury—fully supports the award of pain and suffering damages.

3. All of Plaintiff's challenged arguments are permissible under binding Georgia authority that Defendant ignores.

Defendant's contention that Plaintiff improperly asked the jury to punish Defendant by arguing that he should be held responsible is contrary to Georgia law. Again, Plaintiff's argument that damages should be awarded for the past 1,006 days was not to punish Defendant for his refusal to accept responsibility, but to compensate Plaintiff for the pain and suffering she had endured during those 1,006 days. V3, 149:14-16; V4, 139:12-24.

Further, Georgia law expressly recognizes that arguments about responsibility are **permissible** arguments on liability and compensatory

damages. *See, e.g., Norfolk S. Ry. v. Jones*, 219 Ga. App. 602, 607-08 (1995) (characterizing statements such as “they’ve [Defendants] got to hear it from you” and “these people haven’t learned a lesson” as “an accurate characterization of the jury’s role in resolving a prime issue of liability”); *Stuckey v. N. Propane Gas Co.*, 874 F.2d 1563, 1575 (11th Cir. 1989) (finding no error where plaintiff’s counsel “made it clear that a ‘message should be sent’” because “he also made it clear that an award of only compensatory damages would suffice to send that message”); *see also White*, 370 Ga. App. at 322-34 (holding that multiple arguments about taking responsibility, the jury representing the community, and safety rules were **not** improper).

The Court in *White* explicitly approved of the reasoning of another case in which the Court found that the plaintiffs were

[c]onstricted by their request for only compensatory damages, [and that] their admonition that defendants had engaged in wrongdoing and should be treated as they treated [the plaintiffs] fell within allowable argument. **Such merely reflects the natural consequence of awarding compensatory damages, which is that defendants are motivated to change their conduct to avoid future awards of compensatory damages.**

White, 370 Ga. App. at 324 (quoting *F. D. Wilson Trucking Co. v. Ferneyhough*, 269 Ga. App. 736, 737 (2004)).

Notably, Defendant relies exclusively on non-Georgia case law for its argument on this point. NT Br. at 17-21. That is no doubt because binding Georgia case law allows all these types of arguments about the jury sending a message to a tortfeasor that he will be held responsible to compensate for harm that his negligence causes to people. If Defendant thought any of these arguments crossed the line into punishment-type arguments, he was obligated to object **at trial** to preserve the claim of error, but he failed to do so. *Williams*, 311 Ga. at 449.

4. The verdict is amply explained by substantial evidence of Plaintiff's injuries and pain & suffering.

Plaintiff sought compensation for three years of past pain and suffering to her left knee, her disfigured left thumb, and her lower back with objective proof of a disc bulge. *See, supra*, Section II, B. As Plaintiff explained at trial, those injuries have profoundly and permanently affected her life, were plaguing her at trial, and likely will for the rest of her life. *Id.* The evidence covered every factor of the pattern charge for pain and suffering damages, which are compensable under Georgia law:

In evaluating the plaintiff's pain and suffering you may consider the following factors, if proven: Interference with normal living, interference with enjoyment of life, loss of capacity to labor and earn money, impairment of bodily health and vigor, 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.

V4, 165-66. The significant evidence of three years of pain and suffering, and the fact that it would continue indefinitely, more than adequately explained the damages award as purely compensatory.

D. The verdict is overwhelmingly supported by evidence; Defendant fundamentally misunderstands Georgia law on *general* damages and confuses it with *special* damages.

Finally, Defendant attacked the damages award as inadequately supported by the evidence, but his argument reflects a grave misunderstanding of Georgia damages law. There is no requirement in Georgia that a pain and suffering award be “supported by evidence of actual expenses.” NT Br. at 23. In fact, the law is quite to the contrary. Instead, “[g]eneral damages are those which the law presumes to flow from any tortious act; **they may be recovered without proof of any amount.**” O.C.G.A. § 51-12-2 (emphasis added).

An “excessiveness” challenge to an award of pain and suffering damages is **highly** disfavored. *AT Sys. Southeast, Inc. v. Carnes*, 272 Ga. App. 671, 671 (2005). Courts reviewing a jury’s verdict “should be hesitant to second-guess verdicts **where the damage award is based in any significant part on pain and suffering.**” *Id.* (emphasis added).

The jury's conscience is the **only** measure of pain and suffering damages. *See id.* at 672; *Western & A. Railroad v. Abbott*, 74 Ga. 851, 856 (1885); *Beam v. Kingsley*, 255 Ga. App. 715, 716 (2002) (when the “trial court approved the verdict ... a presumption of correctness arises that will not be disturbed absent compelling evidence”).¹¹

Under Georgia's enlightened conscience of the jury standard, however, “[t]here exists no rule or yardstick against which damages for pain and suffering are to be measured.” *Carnes*, 272 Ga. App. at 672 (emphasis added). This Court has rejected the argument made by Defendant before:

Chrysler argues that the trial court erred in failing to remit the damages awards sufficiently to bring them in line with prior awards in Georgia. But **no two cases are exactly alike, so it may not be relevant to merely compare cases.**

Chrysler Grp. v. Walden, 339 Ga. App. 733, 750 (2016) (emphasis added).

¹¹ Defendant cites a few times to the “reasonable certainty” standard, but that is a standard that applies to **special** damages, not **general** damages for pain and suffering. *See Dossie v. Sherwood*, 308 Ga. App. 185, 187 & n.6 (2011) (distinguishing between diminished capacity to labor, which is a pain and suffering concept left to the enlightened conscience of the jury, and lost earning capacity, which is an element of special damages that must be proved with reasonable certainty).

Defendant's argument, if accepted, would diminish the discretion, authority, and independence of juries (granted by Georgia law) by allowing the verdicts reached by juries who served years or decades ago to constrain the exercise of the "enlightened conscience" of later juries in stare decisis-like fashion. That different juries reach different conclusions in cases bearing some degree of similarity is unsurprising; each jury consists of different individuals evaluating different evidence and assessing the credibility of different witnesses who they have an opportunity to personally observe. Additionally, the extent, severity, and duration of pain and suffering experienced by different plaintiffs will vary greatly even if they are involved in similar incidents.

Finally, a lack of substantial medical expenses is not a valid ground for questioning a jury's pain and suffering determination. *See, e.g., King v. Ga. Dep't of Corr.*, 347 Ga. App. 606, 609-10 (2018) (testimony detailing ongoing pain and "how the injury has adversely affected [the plaintiff's] family life" was sufficient; "[t]he law infers bodily pain and suffering from personal injury, and loss of time from the disabling effect thereof"). Very large pain and suffering awards are routinely affirmed, and virtually never disturbed, even where there are relatively minimal (if any) medical

bills. *See, e.g., Beam*, 255 Ga. App. at 716 (affirming \$2,584,000 pain and suffering award for two minutes of pain before death, with only \$1,693.86 in special damages (and no medical bills)); *Carnes*, 272 Ga. App. at 672 (affirming \$1,250,000 award despite only about \$75,000 in special damages and testimony that pain would not be permanent); *Walden*, 339 Ga. App. at 750 (approving \$10,000,000 award for pain and suffering with no medical bills).

Simply put, Defendant falls far short of proving that the verdict was excessive, let alone so flagrantly excessive that it shocks the conscience and must be discarded. Defendant's motion seeking a new trial or remittitur was properly denied.

IV. CONCLUSION

The verdict and judgment should be affirmed.

This submission does not exceed the word count limit imposed by Rule 24.

Respectfully submitted this 10th day of November, 2025.

/s/ Max Thelen

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CERTIFICATE OF SERVICE

I certify that there is a prior agreement with Appellant's counsel to allow documents in a PDF format sent via email to suffice for service, and that I have this day served a copy of this **Brief of Plaintiff-Appellee** by such means to the following counsel of record:

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