Authors' Note: *This article is intended to help plaintiff lawyers learn how to use medical technology tools to prove permanent injuries suffered by motor vehicle collision injury clients, and to list common defenses to anticipate and prepare for in the handling of injury cases.*

Whiplash Injured Truck Driver
Receives $1,000,000 Federal Court Jury Verdict

It was a cold and clear day on January 18, 2006, when an FFE Transportation big truck side-swiped an owner-operator truck driver on Interstate 30 near Hope, Arkansas, causing whiplash neck injuries. The injured truck driver (referred to as the "Plaintiff") was forced to employ the Chaney Law Firm to protect his rights after FFE Transportation refused to accept responsibility for the harms caused by the fault of its driver. The trucking company denied liability for five years, then eventually admitted liability in a pretrial disclosure a few weeks before the federal court jury trial that was held February 15 – 18, 2011 in Hot Springs, Arkansas. The jury returned a unanimous jury verdict in the amount of $1,000,000.00 on February 18, 2011.

The Plaintiff incurred $18,100.00 in medical bills by the time of trial. Plaintiff's family doctor from Murfreesboro testified by video deposition, and was supportive of the chiropractic care, and the orthopedic surgeon and neurosurgeon referral chain of care, provided to the Plaintiff. He said the Plaintiff needed a future cervical fusion surgery at a cost of $50,000 – $110,000, and future shoulder surgery at a cost of $20,000 – $50,000, depending on complications. The treating chiropractic physician testified live at trial, and explained his own clinical findings and treatment, the digitized mensuration report of his plain x-rays, the digital video fluoroscopy (DMX) report, and the thin-slice proton density MRI radiology report. During the month before the trial, the treating neurosurgeon qualified the Plaintiff as an "elective" surgical candidate for cervical fusion surgery following a myelogram imaging study and an unsuccessful cervical epidural steroid injection. Surgery was neither performed nor was scheduled at the time of trial.

The Plaintiff missed several weeks of work in 2006 after the collision, and never again missed any work. In 2009 he changed to a less physically demanding truck driving job with $23,000 loss of annual income, which translated to $440,000 total loss of past and future income over the course of his expected work life according to an economic expert witness.

There were several friends and family members who did a credible job in describing the "before and after" collision injury changes in their loved one.

The defense called the Plaintiff "a liar" and accused him of falsifying the U.S. Department of Transportation (DOT) physical examination form on three occasions after the wreck by not marking on the form that he had physical health problems. When the defense attacked the family doctor who had performed and signed the DOT exam on three occasions after the wreck (and three occasions before the wreck), the doctor replied: "A man has got to work and feed his family." The doctor's file showed that he had written two prescription pad excuses for "Patient to be excused from wearing a seat belt due to a left shoulder injury."

The defense attempted to appeal to the media acquired cynicism and skepticism of any "tort reform" members of the jury by raising typical motor vehicle collision defenses, including the following:

- implied unethical collusion between the Plaintiff, the Plaintiff's attorneys and the Plaintiff's doctors (which was strongly refuted by all concerned);

- the treating chiropractic physician caused the demonstrated disc injuries during treatment of the Plaintiff (which was easily refuted by the chiropractor explaining treatment methods and the standard of care focused on patient safety);

- the treating chiropractic physician had a "direct lien interest" in the case for the unpaid balance of his bill as shown by a document in the chiropractor's patient file, with the inference being that the doctor would say anything to help get the balance of his bill paid (which was directly addressed by the treating physician);

- suspicion about chiropractic treatment (the chiropractor's extensive education and post-graduate training as a musculoskeletal physician specialist were emphasized during direct examination testimony);

- the 38 year old truck driver had pre-existing degenerative anatomical changes in his neck on the date of the collision (which was true and which was embraced to explain his increased vulnerability to the collision trauma that caused his new cervical ligament and disc injuries, as well as aggravating his pre-existing condition that is fully compensable as a matter of law);

- long gaps in treatment by physicians (Plaintiff dealt with his chronic pain for years by consuming large quantities of ibuprofen, home therapies and limiting his physical activities);

- inconsistent statements about the degree of pain and the Plaintiff's failure to report pain on many occasions in the medical records (including 22 consecutive visits without complaining of any left shoulder pain over many months, after which surgery was eventually recommended for the left shoulder injuries);

- negative findings on some imaging studies (a common defense strategy of citing static, neutral-position x-ray and MRI images that are read as "normal," but which are inappropriate for assessing disorders of normal spinal function (biomechanical impairment). Torn spinal ligament injuries require end-range-of-motion x-rays and/or digital video fluoroscopy (DMX) to be performed, along with the more refined thin-slice proton density MRI being required to visualize torn and scarred spinal ligament tissues);

- malingering by not continuing to work as an owner-operator truck driver that was more profitable than Plaintiff's subsequent job as a company truck driver (which was a career change necessitated due to the need for less physically demanding work);

- a defense medical examiner doctor saying there were no significant physical injuries caused by the collision;

- a subsequent motor vehicle collision (which Plaintiff described as a "no injury accident" for which he made a precautionary trip to the hospital emergency room to be checked out); and

- this was a mere "soft tissue" injury that the plaintiff should have fully recovered from in six to eight weeks (which is true for many minor strain/sprain cervical injuries, but not true for the "worst of the worst" torn spinal ligament injury victims such as the Plaintiff. The hallmarks of torn spinal ligament and disc injuries are that they are permanent (due to healing with scar tissue), painful (due to spinal ligaments and discs being innervated with nerve nocioceptors), and progressive (will worsen over time according to the mass of medical literature). These kinds of permanent injuries require future treatment on a permanent and regular basis over the patient's lifetime according to the evidence based treatment guidelines. Future treatment helps support the relative level of wellness achieved by the initial treatment, provide improved spinal function for physical activities, reduce chronic pain, and minimize advanced spinal degeneration that can otherwise occur at six times the normal rate (as established by the medical literature.) These permanent spinal injuries cause biomechanical impairment, which medical doctors call "facet syndrome" and "spinal instability," osteopathic physicians call "osteopathic lesion," and chiropractic physicians call "subluxation complex."

In this case the treating physicians were able to establish an accurate diagnosis of the extent and permanency of the torn spinal ligament injuries, which caused ligament laxity, spinal instability and chronic pain, by using the following medical technology tools:

- digital video fluoroscopy (a/k/a Digital Motion X-ray "DMX"). For more information please see our firm's case of *Graftenreed v. Seabaugh*, 100 Ark. App. 364, 268 S.W.3d 905 (2007), which is the first appellate court case in the United States to approve the use of digital video fluoroscopy as admissible evidence to prove injury claims over a defense *Daubert* scientific challenge;

- digitized x-ray reports (also known as Computer Aided Radiographic Mensuration Analysis or "CRMA") for regular x-rays (and which can also be performed upon various static images saved from the video fluoroscopic study). This testing correlated the objective measurements of x-ray abnormalities to a 25% whole person permanent impairment rating based on an angular motion segment integrity change at C5-C6, following the procedures required by the American Medical Association's *Guidelines for the Evaluation of Permanent Impairment* (4^{th} and 5^{th} editions); and

- thin-slice proton density MRI (which takes 2mm thin slices at sufficiently fine resolution to show small and thin torn spinal ligaments, along with scar tissue caused by traumatic injuries) establishing Grade 3 tears (two-thirds to fully torn) in key spinal ligaments and membranes that connect the skull base to the upper cervical spine.

The federal trial judge with 19 years of experience did a wonderful job in helping the jurors realize their jury service was one of the most important things they will ever do as U.S.

Citizens. The patriotic jury service atmosphere created by the trial judge provided a positive experience for all concerned.

The jury took their job seriously. We were pleased that our permanently injured Client was fairly compensated by the jury. When we returned to our office after the trial, our litigation legal assistant still had tears in her eyes from being touched by our Client's and his wife's sincerity by going out of their way on their way home to stop by our office (40 miles from courthouse), to thank her and our other staff members for their hard work leading to a good jury verdict. It is gratifying when the civil justice system works as it should to take care of deserving injury victims.

It can be difficult to overcome the smokescreen defenses commonly used by the powerful interests with unlimited financial resources in defending injury claims, but it is possible as shown by this case. We hope this verdict encourages our plaintiff lawyer friends, and especially the younger generation, to not be discouraged and give up, but to keep fighting the good fight and swinging for the fence in taking cases to trial when forced to do so by the defense refusing to make a reasonable settlement offer.

This case illustrates that a trial by jury is the only institution created by mankind to protect ordinary people from the powerful interests intent on avoiding responsibility for harm. There is a certain poetic justice when the defense's hardball tactics of "delay, deny, defend" backfire by forcing an injury victim to take a case to trial, and a jury fairly compensates the victim for all of the harms and losses caused by the wrongdoer. We should all work tirelessly to protect an individual's constitutionally guaranteed right to a jury trial, and continue to oppose so-called "tort reform" that erodes this most important right!

Respectfully submitted,

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Authors' note to plaintiff lawyers: the fact is that the auto insurance industry has been engaged in "economic warfare" for many years against injury victims as observed by the Arkansas Supreme Court in *Allstate v. Dodson*, 2011 Ark. 19 (January 27, 2011); and also explained by the United States Supreme Court and the Utah Supreme Court in the *State Farm v. Campbell* trilogy of cases: 2001 UT 89, 538 U.S. 408 and 2004 UT 34; along with many other publications. In addition to preparing for the above listed defenses used by some defense lawyers, be prepared to address other such defenses depending on the facts of your motor vehicle collision cases, as follows:

- no report of injury by plaintiff to the investigating police officer;
- the plaintiff did not leave the collision scene by ambulance;
- the plaintiff did not receive treatment at a hospital emergency room;
- delay in onset of plaintiff's symptoms;
- delay in treatment of plaintiff;
- plaintiff's employment of lawyer within a short time following injury;
- referral of plaintiff to a treating physician by plaintiff's lawyer;
- referral of plaintiff to plaintiff's lawyer by a treating physician;
- low speed collision with no or minor property damage to plaintiff's vehicle (any "common sense" or "no crash – no cash" defense arguments correlating property damage and injury have been refuted by the credible scientific literature. *See* Arthur C. Croft and Steven M. Foreman, *Correlating crash severity with injury risk, injury severity and long-term symptoms in low velocity motor vehicle collisions*, Med.Sci.Monit. 316-321 (2005); *Davis v. Maute*, 770 A.2d 36 (Del. 2001); and many other publications.
- absence of injuries to other occupants of vehicles in the same collision;
- previous injuries to the same body part;
- subsequent injuries to the same body part;
- lack of complaints about collision injury symptoms within physician treatment records for unrelated medical problems;
- plaintiff not following treatment recommendations by physician;
- plaintiff continuing to treat with physician after becoming pain free;
- plaintiff continuing with activities of daily living, employment and recreation, (albeit with pain and less vigor; *see Graftenreed v. Seabaugh*, 100 Ark. App. 364, 369; 268 S.W.3d 905, 912 (2007) stating that "a permanent injury is one that deprives the plaintiff of her right to live her life in comfort and ease without added inconvenience or diminution of physical vigor");
- inferring that the individual defendant cannot afford to pay any judgment to be awarded by the jury and other efforts to improperly invoke the jury's sympathy for the individual defendant (whose insurance carrier is using as a pawn to hide behind because the insurance carrier cannot be sued directly in most states);
- telling the jury to "let's hurry up and get this little frivolous soft tissue case over with, and stop wasting everyone's time so we can all go home to our families as soon as possible;" and
- the defense lawyer personally attacking plaintiff's lawyer by vilifying, questioning motives, and playing to disdainful stereotypes of plaintiff lawyers and plaintiffs. Study *Lioce v. Cohen*, 174 P.3d 970 (2008), to protect your injury clients from the defense using unethical character assassination tactics. You owe it to your client to know when the defense is cheating, and how to insist that insurance defense counsel follow the mandatory ethical rules.

Stay focused on the simple truth: that none of these so-called "defenses" are relevant as to whether your injury client was truly injured by the collision. Good skill!

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