

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2011 CA 1202**

**BADA ASBAHI and HUDA ASBAHI**

**VERSUS**

**BEVERLY INDUSTRIES, L.L.C., GRAY INSURANCE  
COMPANY, and AUSTIN DUSKIN**



Judgment Rendered: **MAY 23 2012**

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On Appeal from the 21<sup>st</sup> Judicial District Court  
In and for the Parish of Livingston  
Docket No. 121,024, Division "F"

Honorable Elizabeth P. Wolfe, Judge Presiding

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**BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.**

*McDonald, J. concurs.*

## HUGHES, J.

This is an appeal from a judgment of the Twenty-First Judicial District Court rendered after a jury trial in favor of the plaintiffs, Dr. and Ms. Asbahi, and against the defendants, Austin Duskin, Beverly Industries, L.L.C. (Beverly), and Gray Insurance Company, for damages. For the reasons that follow, we affirm.

### FACTS AND PROCEDURAL HISTORY

This action arose out of a rear-end collision in Denham Springs, Louisiana. On May 5, 2008 Ms. Huda Asbahi and her son, Sammi Asbahi, were stopped at a red light when their vehicle was rear-ended by an 18-wheeler being operated by Austin Duskin.<sup>1</sup> The truck was owned by Mr. Duskin's employer, Beverly, and he was acting in the course and scope of his employment at the time of the accident. Therefore, Beverly is vicariously liable for the damage caused by its employee.<sup>2</sup>

As a result of the accident, Ms. Asbahi alleged that she sustained injury to her neck and back. On August 19, 2008 she filed suit against Mr. Duskin, Beverly, and their insurer, Gray Insurance Company. Her husband, Dr. Bada Asbahi, also joined in the action alleging a loss of consortium.<sup>3</sup> The defendants stipulated to fault in causing the accident, but contested both

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<sup>1</sup> The record reflects that Mr. Duskin's vehicle struck the Asbahi vehicle two separate times.

<sup>2</sup> At the outset of the trial, Beverly Industries stipulated to Mr. Duskin's fault in causing the accident and to its liability for any damages caused by him. Therefore, the only issues argued at the trial involved the causation and extent, if any, of the injury and damages.

<sup>3</sup> Louisiana Civil Code article 2315 provides, in relevant part, that:

- A. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.
- B. Damages may include loss of consortium, service, and society, and shall be recoverable by the same respective categories of persons who would have had a cause of action for wrongful death of an injured person.

The compensable elements of a claim for loss of consortium of a spouse include loss of love and affection, loss of companionship, loss of material services, loss of support, impairment of sexual relations, loss of aid and assistance, and loss of felicity. See Ferrell v. Fireman's Fund Insurance Co., 96-3028 (La. 7/1/97), 696 So.2d 569, 573 n.4.

the degree of the injury sustained by Ms. Asbahi, and the amount of the damages alleged to have resulted from that injury.

The case went to a jury trial on October 14 and 15, 2010. At the close of the evidence, the jury returned a verdict in favor of Dr. and Mrs. Asbahi. The jury awarded Ms. Asbahi \$521,837.00 in special damages and \$1,555,000.00 in general damages. Dr. Asbahi was awarded \$26,000.00 in damages for his loss of consortium.

The defendants filed a “Motion for New Trial, or, Alternatively, Remittitur” which was denied by the trial court. The defendants appeal, and urge generalized assignments of error, which may be summarized as follows:

1. The trial court erred in improperly handling objections during trial.
2. The trial court erred in allowing inadmissible evidence to be presented to the jury.
3. The trial court erred in excluding admissible evidence from the jury.
4. The trial court erred in its award of past medical expenses.
5. The trial court erred in its award of future medical expenses.
6. The trial court erred in the amount of general damages and loss of consortium damages awarded.

## **LAW AND ANALYSIS**

### **A. EVIDENTIARY ERRORS**

In assignments of error numbers 1, 2, and 3, the defendants allege evidentiary errors. An appellate court may not overturn a jury’s findings of fact absent manifest error, or unless a finding is clearly wrong. However, if upon review, we find that the trial court committed one or more evidentiary errors that interdict the fact-finding process, we are required to instead

conduct a *de novo* review. As such, because a finding of an evidentiary error may affect the standard of review we should apply, we will address the alleged evidentiary errors first in this appeal. **Wright v. Bennett**, 2004-1944, p.6 (La. App. 1 Cir. 9/28/05), 924 So.2d 178, 182. We note, however, that in regards to the defendants' allegations of error as to whether the trial court improperly admitted or excluded certain evidence, the trial court is granted broad discretion in these rulings and its determinations will not be disturbed on appeal absent a clear abuse of that discretion. **Wright**, 924 So. 2d at 183, *citing* **Turner v. Ostrowe**, 2001-1935 (La. App. 1 Cir. 9/27/02), 828 So.2d 1212, 1216, writ denied, 2002-2940 (La. 2/7/03), 836 So.2d 107.

Moreover, this circuit has previously noted that LSA-C.E. art. 103(A) provides, in part, that “[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected.” **Wright**, 924 So.2d at 183. “The proper inquiry for determining whether a party was prejudiced by a trial court’s alleged erroneous ruling on the admission or denial of evidence is whether the alleged error, when compared to the entire record, had a substantial effect on the outcome of the case. If the effect on the outcome of the case is not substantial, reversal is not warranted.” **Wright**, 924 So.2d at 183. As such, even if we determine that the trial court abused its discretion and improperly admitted or excluded certain evidence, we must then also find that the error, when compared to the entire record, had a substantial effect on the outcome of the case in order for the error to warrant a reversal of the verdict.

### **1. Trial Objections**

In their first assignment of error, defendants argue that they were unduly prejudiced by the method used by the trial court for the recording of the parties’ objections. However, defendants make no specific argument

wherein they claim any actual prejudice. Moreover, we note that upon review, we cannot say that the trial court erred in its method of recording objections. In a trial by jury, arguments or “speaking objections” by counsel are not properly made in the presence of the jury. LSA-C.E. art. 103(C)<sup>4</sup>; LSA-C.E. art. 104(C).<sup>5</sup> As such, it is commonly the practice that objections be made contemporaneously, but not argued by counsel on the record, until after the jury is retired. See Sher v. Lafayette Ins. Co., 07-2441 (La. 4/8/08), 988 So.2d 186, on rehearing in part, 07-2443 (La. 7/7/08). Additionally, while the defendants make numerous references to the record that seemingly would be to prejudicial errors committed by the trial court, a review indicates that defendants merely cite to each and every instance in the record wherein an objection was made by both counsel for plaintiffs *and* defendants. Included in these are many instances in which defendants cite objections to evidence upon which they prevailed, or to which plaintiffs’ objections were overruled. Aside from a waste of time, we discern no prejudice. We find no abuse of discretion by the trial court in the method used to record contemporaneous objections and to later record “speaking objections” after the retirement of the jury.

## 2. Evidentiary Rulings

In their second and third assignments of error, defendants allege error on the part of the trial court on various rulings as to the admissibility of evidence. Defendants first allege error in the trial court’s ruling that, under the collateral source rule, no evidence of contractual adjustments, write-offs,

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<sup>4</sup> Louisiana Code of Evidence article 103 is titled Rulings on evidence. Article 103(C) states that “[i]n jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or asking questions in the hearing of the jury.”

<sup>5</sup> Louisiana Code of Evidence article 104 is titled Preliminary questions. Section (C) of Article 104 states, in pertinent part, that “[h]earings on matters to be decided by the judge alone shall be conducted out of the hearing of the jury when the interests of justice require.”

or courtesy discounts be admitted. Defendants also object to the trial court's admission of a summary of Ms. Asbahi's past medical treatment costs, introduced by the plaintiffs pursuant to LSA-C.E. art. 1006, in lieu of the complete medical bills.

Under the collateral source rule, a tortfeasor may not benefit, and an injured plaintiff's tort recovery may not be reduced, because of monies received by the plaintiff from sources independent of the tortfeasor's procurement or contribution. **Bozeman v. State of La., and the Dep't of Transp. and Dev.**, 03-1016, p.9 (La. 7/2/04), 879 So.2d 692, 698; **Louisiana Dep't of Transp. and Dev. v. Kansas City S. Ry. Co.**, 02-2349 (La. 5/20/03), 846 So.2d 734, 739. This issue was thoroughly discussed in the Louisiana Supreme Court's **Bozeman** decision. After a detailed analysis of the history of the collateral source rule in America and the policies upon which the rule is based, the **Bozeman** court held that in instances where a plaintiff's patrimony has been diminished in some way in order to obtain the benefit of collateral source payments, a plaintiff is entitled to the full "benefit of the bargain" and may recover the full value of the medical services, including contractual adjustments or write-off amounts. **Bozeman v. State of La.**, 879 So.2d at 706.

From an evidentiary standpoint, the jurisprudence is clear that evidence of collateral source payments is neither admissible nor relevant to the litigation. In the instant case, defendants seek to introduce as evidence the amounts contractually adjusted (or written off) by the healthcare providers as a result of their contracts with Humana, the private medical insurance provider of the Asbahis. The premiums paid by Ms. Asbahi to obtain the benefit of private health insurance coverage fall squarely within the protections afforded by the **Bozeman** decision as an example of the

diminution of a plaintiff's patrimony for the benefit of collateral source payments. Ms. Asbahi is entitled to recover the full value of the medical services provided to her, including any adjustments thereto, and no evidence of the adjustments is admissible at trial. We find no abuse of discretion by the trial court in excluding evidence thereof.

As for the professional courtesy discounts<sup>6</sup> alleged to have been received by the Asbahis for services rendered to Ms. Asbahi, we note Justice Knoll's concurrence in the **Bozeman** decision:

The majority opinion is strictly limited to the amounts written off by the health care providers in accordance with the Medicaid program. Our holding today does not include a tort victim who is the beneficiary of largesse from a private benefactor, where there is no consideration provided for that benefit and the plaintiff's patrimony was not diminished; under these circumstances the collateral source rule is applicable and the tort victim is still entitled to recover damages otherwise recoverable from the wrongdoer. Simply stated, gratuitous collateral sources are not excluded from the collateral source rule under our holding. Our holding here is limited to the amounts written off by the health care provider, where no consideration was provided for that benefit, as contrasted with Medicare and private insurance, where consideration is provided for that benefit.

**Bozeman v. State of La.**, 879 So.2d at 706, (Knoll, J., concurring.)

We do not disagree with Justice Knoll that the prohibition of defendants from benefiting from such a gratuitous payment by a collateral source is consistent with the purpose of the rule: tort deterrence. Such benefits are for the advantage of the injured, and not for the one who caused the injury. However, a review of the summary totals, compared to the bills proffered by the defendants, evidences that the plaintiffs did not seek to

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<sup>6</sup> The testimony indicates that physicians, as a courtesy to their fellow physicians, sometimes extend a discount to each other. This is termed in this case as a "professional courtesy discount."

recover any amounts so discounted.<sup>7</sup> As such, we need not address this argument as there would be no impact on the amount awarded herein.

We now turn to a discussion of the medical summary admitted by the trial court pursuant to LSA-C.E. art. 1006, which states:

The contents of otherwise admissible voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

Defendants' objection to the trial court's admission of the summary is three-fold: (1) it was not listed on the pre-trial order; (2) it did not meet the requirement of Article 1006 as it was not based on "voluminous" information; and (3) it was not authenticated.

While the trial court acknowledged that the defendants may have prevailed in excluding the use of the summary due to the plaintiff's failure to list it as an exhibit on the pre-trial order, the trial court ultimately determined that because the defendants had the actual medical bills in their possession months prior to the trial, no prejudice to the defendants would occur by the use of the summary. Furthermore, a comparison of the medical bills proffered by the defendants and the summary provided to the jury reveals that defendants were actually benefitted rather than prejudiced.<sup>8</sup>

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<sup>7</sup> While defendants seemingly attempt to allege a conspiracy between the Asbahis and the healthcare providers in this case, the records indicate that only Dr. Isaza afforded such a discount. And while the defendants assign error to the trial court's exclusion of the admission of any adjustments under the collateral source rule, a review of the proffered bills compared to the summary shows that Dr. Isaza rendered services valued at \$1,040.00, and discounted the amount of \$605.24. In turn, the plaintiffs only sought recovery for the amount of \$380.00. Thus, plaintiffs did not request compensation for the gratuitously discounted amount.

<sup>8</sup> We note that some of the medical bills are actually higher than the amount listed in the summary. For instance, Dr. Isaza provided medical services to Ms. Asbahi in the amount of \$1,040.00. As noted earlier, the plaintiffs removed any amount discounted by Dr. Isaza and claimed only \$380.00 on the medical summary. Additionally, the bills of Imaging Center of Louisiana on the summary reflect that while the patient was responsible for \$851.15, the actual cost was \$2,700.00. The difference is the amount paid by Humana, which plaintiffs would have also been entitled to, and did not claim on the summary. We also note that the bill of Peak Physical Therapy reflects charges in the amount of \$417.00, and plaintiffs only requested reimbursement for the amount of \$209.71 on the summary.



While the summary may not meet the strict requirements of Article 1006, the actual bills proffered by defendants contain collateral source material, and once again the defendants seem to be objecting to evidence that was actually in their favor, given that the amounts listed on the summary were either equal to or less than the amounts supported by the actual bills that could have been claimed by plaintiffs. The summary was authenticated by Dr. Asbahi who testified under oath that he had received the bills summarized and had paid them. There is no suggestion that the summary contained false or misleading figures. The collateral source rule was properly applied. When the entire record is considered, we cannot say the ruling of the trial court allowing the introduction of plaintiffs' medical bill summary had a substantial effect on the outcome of the case. **Wright v. Bennett**, 924 So.2d at 183.

Defendants also object to the trial court's exclusion of testimony or evidence regarding Ms. Asbahi's prior breast augmentation and "spider vein" removal, ruled upon by the trial court pursuant to a motion in limine. After arguments of counsel, the trial court determined that the two procedures were irrelevant to the instant litigation as both had occurred years prior to the accident. As noted earlier, the trial court's ruling is afforded great deference and we find no abuse of discretion in the trial court's determination that these cosmetic procedures bear no relevance to the issues involved in the instant litigation.

In their reply brief to this court, defendants contend that while the procedures may be irrelevant as to those issues, Ms. Asbahi's failure to list her cosmetic surgeon in her discovery responses is relevant to the jury's determination of her credibility. However, the record reveals that while the trial court excluded any testimony regarding the nature of the prior

procedures, the court allowed the defendants to question her in front of the jury regarding the fact that she omitted the name of her plastic surgeon from her discovery responses. As such, the jury was free to draw whatever inferences it wished from that omission and the defendants were not prejudiced by the ruling.

The defendants next contend that the trial court erred in allowing Dr. Asbahi to testify as an expert: 1) regarding cervical dystonia, and 2) regarding the psychological condition of depression. A review of the record reveals the following testimony from Dr. Asbahi on the subject of cervical dystonia:

Q. Have you ever heard of Cervical Dystonia before this accident?

A. No, I haven't.

\* \* \* \*

Q. Doctor, in your capacity as a husband, but not in your capacity as a doctor, if you can separate the two, have you come to learn your own understanding of what Cervical Dystonia is?

A. I learned more about it recently.

Q. From what you know about it - - well, what is your layman husband's understanding of what your wife has? From your observations?

\* \* \* \*

Q. Have you educated yourself on your - - on Huda's medical problems?

\* \* \* \*

Q. I don't want any opinions. Just give me the facts.

A. What I know is it's a chronic condition that's mainly of the muscles in the neck which causes spasms, like continuous tension in them, and the Botox injection relaxes the muscles for a while and improve the pain.

Q. And since you've learned about this, looking back for the 14 years that you've known your wife, you are sure, as far as you've ever observed, she never had this problem before?

A. No, she never had this.

Defendants objected and the trial court ruled that Dr. Asbahi's testimony was from his perspective and understanding as a husband, not as an expert opinion on cervical dystonia. We find no abuse of discretion in that ruling. Based on the questions posed, Dr. Asbahi answered as a layman/husband.

Further, Dr. Asbahi offered the following testimony:

Q. Right. Today, how is she doing in life in terms of her attitude from what you know living with her and observe with her? Tell this jury how she is doing in life?

A. Well, life is much more difficult now. Huda is generally depressed most of the time.

\* \* \* \*

A. - - She doesn't feel good.

Defendants objected, contending that the testimony amounted to an expert medical opinion of Dr. Asbahi that his wife suffered from a psychological condition of clinical depression as a result of the accident. Dr. Asbahi was not offered as an expert in psychiatry or psychology. In fact, Dr. Asbahi testified that he is a pediatrician and was not offered as an expert in any field in this case. We find no abuse of discretion in the trial court's determination that this testimony was also given from his perspective as a husband.

Defendants next contend that a portion of the testimony of Dr. Eissa was outside the field of his expertise. Specifically, the defendants argue that he was not qualified to testify regarding the cost of the Botox injection procedures. The record reveals that during Dr. Eissa's testimony, plaintiffs

questioned Dr. Eissa as to his knowledge of the costs of the Botox injections. He stated that he had requested and received certified copies of Ms. Asbahi's bills for the injections from Josie Jacobs, the Financial Coordinator of Ochsner Medical Center, that reflected costs ranging "anywhere from \$4,000 plus to \$7,000 plus." However, we note that the costs of the procedures are not in dispute as they are reflected by the actual costs for injections previously received. The costs as testified to by Dr. Eissa coincide with the actual costs of Ms. Asbahi's prior procedures. The admission of cumulative evidence is largely within the discretion of the trial court. **Brumfield v. Guilmino**, 93-0366 (La. App. 1 Cir. 3/11/94), 633 So.2d 903, 912, writ denied, 94-0806 (La. 5/6/94), 637 So.2d 1056. Where said evidence is merely cumulative of other evidence in the record, and does not have a substantial effect on the outcome of the case, any error in its admission is harmless. **Alcorn v. City of Baton Rouge ex re. the Baton Rouge Police Dept.**, 02-0952 (La. App. 1 Cir. 6/27/03), 851 So.2d 1194, rehearing denied, (La. App. 1 Cir. 8/25/03), judgment vacated on other grounds, 863 So.2d 517 (La. 1/16/04), opinion reinstated, 898 So.2d 385 (La. App. 1 Cir. 12/30/04), writ denied, (La. 4/8/05).

Defendants also argue that a video of Dr. Eissa administering Botox injections to Ms. Asbahi was erroneously admitted into evidence by the trial court. While defendants do not dispute its relevance, they contend that its prejudicial impact exceeds its probative value as it depicts the insertion of needles into the skin on the back of Ms. Asbahi's neck. The trial court determined, after an analysis under LSA-C.E. art. 104, that the video was admissible as demonstrative evidence that would assist the jury in understanding the injection procedure and that the video would not be prejudicial or harmful to the jury in any way. The trial court did play the

video without sound. The video was explained by Dr. Eissa, the physician who performed the procedure. Thus, a proper foundation was laid for the video's introduction. Additionally, we find no abuse of discretion in the trial court's ruling that the exhibit was not highly prejudicial and that even if so, its probative value exceeded any prejudicial effect.

Finally, the defendants assign error to the trial court's failure to inform the jury that an exhibit, used by plaintiff's counsel in conjunction with the testimony of Dr. Eissa, was not "evidence."

In testimony, Dr. Eissa stated the following:

1. That the cost of the Botox injections ranged from \$4,000.00 to \$7,000.00;
2. That Ms. Asbahi would require Botox injections for the treatment of her cervical dystonia three to four times per year, for life; and
3. That the average life span of a woman in the United States is 75 years.

For demonstration purposes, plaintiffs' counsel wrote the following on a poster board:

$$\begin{array}{r} \$4,000 - \$7,000 \\ \underline{\quad \$5,500 \quad} \\ 3 \frac{1}{2} X \\ 26 \text{ Years} \end{array}$$

The \$5,500.00 figure is the average between \$4,000 and \$7,000, the cost range of the injections. 3 ½ is the figure depicting the average number of times the procedures will be required per year (3-4), and 26 years is the number of years the procedures will likely be required (subtracting Ms. Asbahi's age of 49 from the age of her life expectancy of 75.) While the poster board was originally offered and introduced as an exhibit, on the following morning, the court reversed its ruling. The court noted that while the poster could be used for demonstrative purposes during testimony, it was

not admissible as evidence, would not be given the weight of evidence, and could not be reviewed by the jury during its deliberations.

Essentially, defendants argue that the trial court failed to instruct the jury that the demonstrative exhibit was not in evidence. Louisiana Code of Civil Procedure article 1793(C) states, in relevant part, that:

A party may not assign as error the giving or the failure to give an instruction unless he objects thereto either before the jury retires to consider its verdict or immediately after the jury retires, stating specifically the matter to which he objects and the grounds of his objection.

The purpose of this rule is to afford the trial judge a fair opportunity to correct any error before the jury begins its deliberations. If no objection is made, the party is precluded from raising the issue on appeal. **Schoonmaker v. Capital Towing Co.**, 512 So.2d 480, 485 (La. App. 1 Cir. 6/23/87), writ denied, 514 So.2d 458 (La. 1987). Additionally, LSA-C.C.P. article 1635 also requires a contemporaneous objection to procedural matters before the court and the giving of grounds for the objection. **Jeansonne v. Bosworth**, 601 So.2d 739, 744 (La. App. 1 Cir. 5/22/92), writ not considered, 614 So.2d 75 (La. 1995).

It is noted from the record that the defendants made no objection to the trial court's failure to specifically instruct the jury that the demonstrative exhibit was not evidence and this objection has therefore been waived.

Moreover, we do not find that the trial court was required to specifically advise the jury that the poster board was not in evidence. It was not used or reviewable by the jury in its deliberations, but was merely a demonstration of the admissible evidence and testimony of Dr. Eissa. As stated earlier, where evidence is admitted that is merely cumulative of other evidence in the record, and does not have a substantial effect on the outcome of the case, any error in its admission is harmless. **Brumfield v. Guilmino**,

633 So. 2d at 912, **Alcorn v. City of Baton Rouge**, 851 So.2d at 1202-03. When considering the record as a whole, there has been no substantial effect on the outcome of this case by the judge's failure to specifically instruct the jury that the poster board was not evidence. **Wright v. Bennett**, 924 So.2d at 183.

After considering all of the defendants' objections to the evidence adduced at trial, we conclude, after considering the entire record, that there were no errors in the trial court's evidentiary rulings that had any substantial effect on the outcome of this trial. **Wright v. Bennett**, 924 So.2d at 182. Any error in the admission or exclusion of evidence herein was harmless as the ultimate result in this case is the same. See **Suprun v. Louisiana Farm Bureau Mutual Ins. Co.**, 08-0241 (La. App. 1 Cir. 9/12/08) (Downing, J., concurring) (unpublished opinion). As such, a *de novo* review is not warranted in this case and we will proceed with our review of the remaining assignments of error under the manifest error standard.

**B. AWARDS FOR PAST AND FUTURE MEDICAL EXPENSES**

In assignments of error four and five, the defendants allege that the trial court erred in awarding past and future medical expenses. Defendants contend that because plaintiffs failed to offer the actual medical bills to support the medical costs incurred, and also failed to offer any credible evidence or testimony to support an award of future medical costs, no damages for medical specials should have been awarded.

At the trial, in support of her claim for past medical expenses, Ms. Asbahi presented a summary of the past medical bills. We have previously determined that the admission of the medical summary had no substantial effect on the outcome of this case, and that defendants actually benefitted from its admission. Moreover, Ms. Asbahi, Dr. Asbahi, Dr. Eissa, and Dr.

Isaza all testified live at the trial regarding the various office visits, imaging, and treatments she required as a result of the cervical dystonia. Additionally, Dr. Landrineau testified by deposition as to his treatment.

We conclude that there was sufficient evidence of medical expenses totaling at least \$41,831.46 that are established to be for services provided to Ms. Asbahi and related to the injury she sustained in this accident. Accordingly, we find that the jury did not commit manifest error in awarding Ms. Asbahi \$41,831.46 in past medical damages.

Dr. Eissa treated Ms. Asbahi and was accepted as an expert in the fields of physical medicine and pain management. He explained that cervical dystonia is a condition that affects the muscles surrounding the neck, causing hypertrophy (extreme enlargement) and spasms. The specific muscles affected on Ms. Asbahi were the upper trapezius, the splenius capritas, the rhomboids, and the sternocleidomastoid. The Botox injections provide relief to Ms. Asbahi by essentially paralyzing the muscles, thereby stopping the spasms and resulting enlargement, and decreasing the pain caused thereby. Dr. Eissa diagnosed Ms. Asbahi with the condition and associated the condition with the motor vehicle accident, explaining at the trial that there is a correlation between cervical dystonia and trauma. He testified that because Ms. Asbahi never suffered from these symptoms prior to the accident, it is more likely than not that the accident caused the condition. Dr. Eissa testified that the effects of the Botox wear off, and it is more likely than not that Ms. Asbahi's condition will require the Botox injection treatment for her neck pain and headaches for the rest of her life. Therefore, Dr. Eissa stated that unless Ms. Asbahi continues to get the injections, her symptoms will return in full force.



The testimony of Dr. Eissa, Dr. Asbahi, and Ms. Asbahi evidences that between injections, Ms. Asbahi requires the use of a Lidoderm patch, a pain medication absorbed into the body from a patch placed directly on the skin. Even with treatment, however, she will still experience pain, particularly in the weeks just prior to and after the injections.

As of the time of the trial, Ms. Asbahi had already undergone Botox injections on November 25, 2008, March 24, 2009, August 6, 2009, December 9, 2009, April 28, 2010, and August 4, 2010. Thus, Ms. Asbahi requires the procedures every three and one-half months, or three to four times per year, as corroborated by the testimony of the witnesses and experts in this case.

The costs of the procedures, as testified to by Dr. Asbahi, Ms. Asbahi, and Dr. Eissa, and corroborated by Ms. Asbahi's past medical bills, indicate that the exact cost of the procedures varies, depending upon the amount of the Botox used and the number of injections given. The bills reflect the following costs associated with the prior procedures:

November 25, 2008	\$ 8,371.00
March 24, 2009	\$ 7,309.00
August 6, 2009	\$ 4,369.00
December 9, 2009	\$ 4,547.00
April 28, 2010	\$ 4,867.00
August 4, 2010	<u>\$ 4,763.00</u>
<b>Total</b>	<b>\$ 34,226.00</b>

Taking the total amount of the prior procedures, divided by the number of prior procedures, the average cost of a procedure is \$5,704.33. Multiplying that number by 3.5 (the number of times per year Ms. Asbahi will require the treatment, as testified to by the witnesses and reflected in the summary) yields the sum of \$19,965.16, which represents the average yearly costs of Ms. Asbahi's medical expenses. Dividing the jury's award of \$480,000.00 for future medical costs by the average yearly cost of medical

expenses, we can opine that the jury awarded Ms. Asbahi future medical expenses for approximately twenty-four and one-half years. Dr. Eissa testified that Ms. Asbahi would need the treatment for life, and that the average life expectancy of a woman in the United States is 75 years. While the defendants objected to Dr. Eissa's testimony regarding that issue, the trial court overruled that objection, finding that a medical doctor, admitted by the court as an expert in physical medicine, was qualified to testify as to a person's general life expectancy. We find no abuse of discretion in that ruling. Thus, we conclude that there is sufficient evidence in the record to support the jury's finding that the future medical expenses more likely than not to be incurred by Ms. Asbahi as a result of this injury are \$480,000.00, and we cannot say that this award is manifestly erroneous.

**C. AWARDS FOR GENERAL DAMAGES AND LOSS OF CONSORTIUM**

In their final assignment of error, defendants challenge the jury's general damage award amounts as to both Ms. and Dr. Asbahi. On appellate review, damage awards will be disturbed only when there has been a clear abuse of the trier of fact's discretion. The initial inquiry must always be directed at whether the trier of fact's award for the particular injuries and their effects upon the particular injured person is a clear abuse of the trier of fact's much discretion. **Cole v. State, Department of Public Safety and Corrections**, 2003-2269, p.5 (La. App. 1 Cir. 6/25/04), 886 So.2d 463, 465, writ denied, 2004-1836 (La. 10/29/04), 885 So.2d 589.

The discretion vested in the trier of fact is "great," and even vast, so that an appellate court should rarely disturb an award of general damages. Reasonable persons frequently disagree about the measure of general damages in a particular case. It is only when the award is, in either

direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances that the appellate court should increase or reduce the award. **Youn v. Maritime Overseas Corp.**, 623 So.2d 1257, 1261 (La. 1993), cert. denied, 510 U.S. 1114, 114 S. Ct. 1059, 127 L.Ed.2d 379 (1994). Only after making a finding that the record supports that the factfinder abused its much discretion can the appellate court disturb the award, and then only to the extent of lowering it (or raising it) to the lowest (or highest) point which is reasonably within the discretion afforded that factfinder. **Coco v. Winston Industries, Inc.**, 341 So.2d 332, 335 (La. 1976).

With regards to the general damage award of \$1,550,000.00, the jury awarded Ms. Asbahi \$100,000.00 for past physical and mental pain and suffering, \$1,300,000.00 for future physical and mental pain and suffering, and \$150,000.00 for loss of enjoyment of life. The evidence presented establishes the following:

Ms. Asbahi testified that the pain and suffering caused by the injury has significantly impacted her life and her relationships with her husband and son. She was a physical education teacher in Syria and was very active prior to the accident. Her son testified that while his mother used to play outside with him in the evenings after school, and particularly, she would help him with his sports, she does so much less frequently than before the accident. Dr. Asbahi testified that he has come home from work to find that although his wife had planned to cook a meal for the family, she had been unable to do so due to her pain. Other times, he would find her lying in bed for hours, or she would wake in the night and cry due to her pain. Dr. Asbahi testified that his wife would cancel plans, and that family vacations had to be cut short due to her pain. Ms. Asbahi testified, and her husband

corroborated, that while she used to spend most of every summer visiting her elderly mother and other family in Damascus, those trips have also been cut short and now come at a great discomfort. According to Dr. Asbahi, after the Damascus trips, Ms. Asbahi will stay in bed for two to three days.

Dr. Eissa testified that Ms. Asbahi's condition is permanent and that she will only get relief from the injections as long as she maintains them.

The evidence establishes that Ms. Asbahi's medical damages amount to over \$500,000.00 and she will suffer the effects of this injury for the rest of her life. We do not find that under these circumstances, the jury's award of past and future general damages in the amount of \$1,550,000.00 is beyond that which a reasonable trier of fact could assess for the effects of this particular injury. As noted previously, the jury is afforded vast discretion. We do not find any clear abuse of that discretion under the particular facts of this case and we will not disturb the jury's award.

Likewise, the testimony at the trial established that Dr. Asbahi's relationship with his wife has been dramatically affected by the injury she sustained as a result of the accident. He testified that he has watched his wife suffer greatly with the pain she experiences because of her injury. He stated that many times he has come home to find that she was unable to complete whatever task she may have started. He stated that she was not able to work in their home as she had in the past. Additionally, he testified that she was no longer able to help their son with his athletics and that he was worried both about the effect of the accident on his relationship with his wife, and also its effect on the relationship between his son and wife. He stated that he had awakened at night to find her crying in their bed, and that their family vacations must now sometimes be cut short.

Ms. Asbahi's injury is permanent, in that it will never be completely resolved but only relieved with continuous treatment. As such, it will continue to have an effect on Mr. Asbahi's relationship with his wife. Under these facts, we do not find that the loss of consortium award is so unreasonably high as to be outside of the jury's vast discretion. We find no merit in the defendant's assignments of error as to the general damages awarded in this case.

### **CONCLUSION**

For the reasons assigned herein, the judgment of the 21st Judicial District Court is affirmed. All costs of this appeal are assessed to defendants/appellants, Beverly Industries, L.L.C., Gray Insurance Company, and Austin Duskin.

**AFFIRMED.**