

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 1671

BARRY J. FYFE

VERSUS

GENERAL INSURANCE COMPANY OF AMERICA,
PROGRESSIVE PALOVERDE INSURANCE COMPANY
AND RUSSELL LENARD

Judgment Rendered: December 21, 2011

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Appealed from the
Twenty-Third Judicial District Court
In and for the Parish of Ascension, Louisiana
Trial Court Number 89,167

Honorable Ralph Tureau, Judge

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Plaintiff -- Appellant
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Defendant – Appellee
General Ins. Co. of America

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BEFORE: WHIPPLE, PARRO, PETTIGREW, McCLENDON,
AND WELCH, JJ.

*Parro, J., dissents.
McClelland, J. dissents in part
and assigns reasons.*

*JW
with
G. 20*

WELCH, J.

Samara L. Abide,¹ trustee, appeals that portion of a judgment awarding Barry J. Fyfe the sum of \$1,500.00 in general damages in this personal injury litigation. Finding the general damage award abusively low under the facts of this case, we modify the award to increase it to \$50,000.00, and enter judgment against General Insurance Company of America (General Insurance) in the amount of \$38,921.73.²

BACKGROUND

This lawsuit arises from an automobile collision that occurred on June 25, 2007, on U.S. Highway 61 and Old Perkins Road in Ascension Parish. Mr. Fyfe, who was driving a Toyota Tundra, was stopped in traffic waiting for cars ahead of him to proceed when a Nissan Pathfinder, driven by Russell Lenard, rear-ended Mr. Fyfe's vehicle, knocking Mr. Fyfe's vehicle into the vehicle ahead of him. On May 8, 2008, Mr. Fyfe filed this lawsuit against Mr. Lenard and Progressive Paloverde Insurance Company (Progressive), the automobile liability insurer of the vehicle Mr. Lenard was driving, and General Insurance, Mr. Fyfe's uninsured/underinsured motorist coverage insurer. Mr. Fyfe alleged that he sustained serious injuries as a result of the collision, including but not limited to neck, shoulder, back, and jaw injuries, and sought to recover for past and future mental anguish and physical suffering, as well as past and future expenses for medical care.³

The parties stipulated that the accident was caused in part due to the

¹ Samara L. Abide, the trustee in **In Re: Barry John Fyfe**, a bankruptcy case pending in federal court, filed a motion in this court to be substituted as the proper party plaintiff. We grant the motion and order that Samara L. Abide is hereby substituted as the proper party plaintiff/appellant in this appeal.

² We grant the motion filed by James Kokemor to substitute as counsel of record for General Insurance.

³ Mr. Fyfe initially asserted a claim for lost wages and impairment of earning capacity, but abandoned these claims prior to trial.

negligence of Mr. Lenard. They further stipulated that Progressive tendered \$10,000.00 to Mr. Fyfe and that General Insurance tendered \$19,167.13 in underinsured motorist benefits and \$10,000.00 in medical payments to Mr. Fyfe. The parties contested the nature and extent of Mr. Fyfe's claimed injuries as a result of the accident.

During a two-day jury trial, Mr. Fyfe presented evidence of an MRI taken nearly four months after the accident showing that he had multiple neck and back disc herniations, evidence showing that he obtained medical treatment and physical therapy following the accident over a two-year period, and the testimony of three physicians relating at least some of the herniations in Mr. Fyfe's neck and back condition to the subject accident. He also presented medical evidence showing that he suffered from TMJ following the accident and relating such to the accident. General Insurance presented no medical testimony to contradict the testimony of Mr. Fyfe's treating physicians on causation. It offered into evidence one medical record containing a summary of a visit Mr. Fyfe made to one of his treating physicians on February 25, 2009, indicating that Mr. Fyfe was doing well, did not require any medication or injections, and was told to follow-up with the doctor on an as-needed basis.

The jury awarded Mr. Fyfe medical expenses in the amount of \$18,088.86, representing all expenses Mr. Fyfe sought to recover for medical treatment and physical therapy visits for his neck, back, and jaw injuries from the date of the accident through June of 2009. However, the jury entered a total general damage award of \$1,500.00, awarding the sums of \$500.00 for past, present, and future pain and suffering, \$500.00 for past, present, and future mental anguish and distress, and \$500.00 for loss of enjoyment of life and permanent impairments.

On November 24, 2009, the trial court entered judgment in accordance with the jury's verdict. Based on the jury verdict and the parties' stipulations regarding

insurance payments that had been tendered to Mr. Fyfe, the court determined that no damages were due to Mr. Fyfe. Thereafter, Mr. Fyfe filed a motion for a judgment notwithstanding the verdict (JNOV), challenging the amount of the jury's general damage award, which was denied by the trial court on January 7, 2010. Mr. Fyfe appealed, challenging the general damage award and the trial court's denial of his motion for a JNOV.

DISCUSSION

Plaintiff contends that the jury committed manifest error and abused its discretion in its award of general damages. Plaintiff submits that the jury erred in awarding only \$1,500.00 in general damages after awarding every dollar of Mr. Fyfe's claimed special damages for medical expenses incurred over a two-year period, as the special damage award reflected that the jury found the accident caused Mr. Fyfe's injuries. General Insurance contends that the jury did not abuse its discretion, but rather, simply determined that Mr. Fyfe's claims of pain and suffering were not credible and therefore entered an award commensurate with the evidence.

The assessment of "quantum" or the appropriate amount of damages by a trial judge or jury is a determination of fact, one entitled to great deference on review.

The role of an appellate court in reviewing a general damage award is not to decide what it considers to be an appropriate award, but rather to review the exercise of discretion by the trier of fact. **Youn v. Maritime Overseas Corp.**, 623 So.2d 1257, 1260 (La. 1993); cert. denied, 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994). Before this court can disturb a general damage award, the record must clearly reveal that the trier of fact abused its discretion in making the award. Only after making the finding that the record supports finding that the trier of fact abused its much discretion can this court disturb the award, and only to the

extent of lowering it or raising it to the highest or lowest point which is reasonably in the discretion afforded to the trier of fact. **Wainwright v. Fontenot**, 2000-0492 (La. 10/17/00), 774 So.2d 70, 74; **Coco v. Winston Industries, Inc.**, 341 So.2d 332, 335 (La. 1977).

We shall review the evidence in determining whether the jury's general damage award was abusively low. The evidence reflects that on June 25, 2007, Mr. Fyfe was involved in a "sandwich" type collision in which his vehicle was hit from the rear, propelling Mr. Fyfe's vehicle into the vehicle ahead of his. Mr. Fyfe was taken from the scene of the accident to St. Elizabeth Hospital, where he complained of back and neck pain. The medical records reflect that x-rays were taken of Mr. Fyfe's cervical and lumbar spine. The cervical spine x-ray showed mild arthritic changes, no evidence of an acute cervical fracture or significant subluxation, and no soft tissue swelling. The lumbar spine showed some slight arthritic changes and no acute lumbar or significant subluxation.

Mr. Fyfe testified that prior to the June 25, 2007 accident, he had been in good health and had no neck or back problems. General Insurance offered no evidence to show that Mr. Fyfe obtained any medical treatment for a neck or back problem before the instant accident.

Dr. Keith Mack, a general practitioner who treats patients with soft tissue injuries, first saw Mr. Fyfe on June 27, 2007, two days after the accident. His medical records reflected that plaintiff reported neck, back, jaw, and right knee pain, along with stinging, tingling, and burning sensations in his face, fingers, and toes.

Dr. Mack testified that he treated Mr. Fyfe conservatively from June 27, 2007 through November 1, 2007 for Mr. Fyfe's complaints of neck and back pain. He stated that Mr. Fyfe was treated at his clinic on 51 occasions over that time period, during which Mr. Fyfe received treatment from the doctor similar to

physical therapy. The record reflects that Mr. Fyfe received heat and cold treatments, massages, electrical stimulation to soothe and help heal his muscles, along with ultrasound and wax treatments. According to Dr. Mack, Mr. Fyfe did not respond well to therapy from a pain perspective and continued to have quite a lot of pain and discomfort the entire time Dr. Mack treated him, despite undergoing the prescribed treatments and taking the prescribed medications. When Mr. Fyfe did not respond to conservative care, Dr. Mack ordered MRI tests of Mr. Fyfe's cervical and lumbar spine.

On October 11, 2007, approximately three and a half months after the subject accident, MRI tests were performed on Mr. Fyfe's cervical and lumbar spine. The cervical MRI revealed herniated discs at the C5-C6 and C6-C7 levels and a protruding disc at C4-C5. According to Dr. Mack, the results of the scan were consistent with Mr. Fyfe's complaints of pain and throbbing in those areas. The lumbar MRI showed an annular tear, bulging, and herniation at the L5-S1 level and bulging and a partial tear at the L4-L5 level. Dr. Mack testified that the findings on both scans were consistent with the symptoms of neck and back pain Mr. Fyfe complained of and opined that the June 25, 2007 accident caused the herniated discs in Mr. Fyfe's neck and back. He further testified that all medical treatment that was provided by him to Mr. Fyfe was necessitated by the automobile accident. Dr. Mack testified that it was his belief that Mr. Fyfe's neck and back problems would cause Mr. Fyfe considerable problems in the future and may require that Mr. Fyfe seek surgery or specialty care in the future. On cross-examination, the doctor acknowledged that during Mr. Fyfe's last visit on November 1, 2007, four months post-accident, Mr. Fyfe no longer complained of knee pain.

Dr. Mack referred Mr. Fyfe to Dr. Glen Kidder for the complaints of jaw pain. Dr. Kidder first saw Mr. Fyfe on August 6, 2007, a month and a half after the

accident. Mr. Fyfe complained of neck and back pain, bilateral jaw, joint, ear, facial pain, and back teeth pain. He also reported that he had trouble sleeping. Dr. Kidder performed a clinical examination, diagnosed Mr. Fyfe as having sprained his temporomandibular joint ligaments, or "TMJ," and prescribed splint therapy. Dr. Kidder delivered a splint to Mr. Fyfe on November 25, 2007, and saw Mr. Fyfe one week later for a follow-up visit. Mr. Fyfe did not return for a scheduled appointment and Dr. Kidder did not see him after the initial follow-up visit. Dr. Kidder testified that on his first visit, Mr. Fyfe related a pain rate of 9, which improved by the first follow-up to a 7. Dr. Kidder described this as normal improvement. Dr. Kidder stated that he would have expected Mr. Fyfe, who did not have a particularly severe problem, to improve quickly with the splint therapy, and he anticipated that Mr. Fyfe should be back to a pre-accident state after a few months. The doctor opined that the symptoms for which he treated Mr. Fyfe were related to the June 25, 2007 automobile accident. Dr. Kidder admitted that his causation finding was based on the fact that Mr. Fyfe told him that he had not experienced any TMJ symptoms prior to the accident, and he assumed that Mr. Fyfe had provided an accurate history and accurate depiction of the pain he was feeling. Dr. Kidder further stated that a rear-end collision such as the one Mr. Fyfe was in could cause TMJ.

On December 3, 2007, Mr. Fyfe began treating with Dr. Joseph Turnipseed, a board certified pain management specialist. Dr. Turnipseed conducted a clinical examination, during which Mr. Fyfe exhibited tenderness in the cervical spine area between the shoulder blades, facet joint tenderness along the lower spine, and pain aggravated with extension and flexion at the L5-S1 level. The doctor reviewed Mr. Fyfe's cervical and lumbar MRIs taken on October 11, 2007. He testified that Mr. Fyfe did have degenerative disc disease, pointing out that two of the discs in his neck at C5-C6 and C6-C7 are degenerated discs and highly unlikely related to any

type of injury. However, he testified that the disc herniations at the other level and the tears in the lumbar spine at L5-S1 and L4-5 could be post-traumatic. Dr. Turnipseed stated that Mr. Fyfe's disc problem could be part degenerative and part post-traumatic. He also testified that normally, disc herniations are related to some trauma, although he has seen herniations without trauma. Dr. Turnipseed opined that based on the fact that Mr. Fyfe denied having any cervical or lumbar complaints prior to the accident, at least one herniated disc in Mr. Fyfe's neck and back were likely related to the accident. It was Dr. Turnipseed's opinion that Mr. Fyfe either sustained the herniations in the accident or aggravated a pre-existing disc condition as a result of the accident.

Dr. Turnipseed recommended that Mr. Fyfe undergo lumbar stabilization exercises, observing that Mr. Fyfe had been treated with neuromuscular therapy by Dr. Mack. As recommended, Mr. Fyfe underwent 13 sessions of physical therapy at Dutch Physical Therapy from January 2, 2008, through February 21, 2008. Dr. Turnipseed saw Mr. Fyfe again on March 12, 2008, observing that Mr. Fyfe had transitioned from the therapy program to home exercises and reported that his pain was improving. During Mr. Fyfe's next visit, on March 14, 2008, Mr. Fyfe reported numbness in his lower extremities along his lower back and that he believed working in the restaurant business and doing heavy lifting may have aggravated his symptoms. Dr. Turnipseed discussed the possibility of epidural injections because of the progression of Mr. Fyfe's pain; however, Mr. Fyfe expressed his apprehension over having spinal injections. Dr. Turnipseed ordered a back brace for Mr. Fyfe to wear at work. Mr. Fyfe saw Dr. Turnipseed again on June 17, 2008, at which time Mr. Fyfe reported that his pain was the same and he continued to have radiating pain in his left arm and both legs, and Dr. Turnipseed prescribed a muscle relaxer. On his last visit to Dr. Turnipseed, on September 22, 2008, Mr. Fyfe reported that his neck pain had progressed to the point where it was

as bad as his back pain, he still had radiating pain in his legs, and he had been taking his medications. At this point, Dr. Turnipseed stated, there was nothing more he could do for Mr. Fyfe, and he recommended that Mr. Fyfe be evaluated by a doctor specializing in physical medicine.

On December 31, 2008, Mr. Fyfe was involved in a second vehicular accident in which he crashed and totaled the vehicle he was driving. He acknowledged that he lost consciousness in the collision, had abrasions to his face and bit his upper lip, and was diagnosed at the emergency room as having a sprained back. Mr. Fyfe denied aggravating his neck or back condition in this accident and testified that he did not make a claim for this accident and did not seek medical treatment as a result of it.

Following the second accident, on April 23, 2009, Mr. Fyfe saw Dr. Francis Allen Johnston, an orthopedic specialist. Dr. Johnston testified that he was aware at that time of Mr. Fyfe's June 2007 rear-end collision, Mr. Fyfe's medical treatment thereafter, and the October 11, 2007 MRI reports. Dr. Johnston stated that Mr. Fyfe did not inform him of the December 31, 2008 crash. Dr. Johnston testified that his physical examination of Mr. Fyfe's neck and back revealed some tenderness, but good range of motion, and no evidence of nerve irritation. Dr. Johnston stated that the findings on the October 2007 MRIs are consistent with what he found in the physical examination regarding Mr. Fyfe's complaints of pain. He opined that given the three disc herniations in Mr. Fyfe's cervical spine and the absence of Mr. Fyfe's significant history of any neck pain prior to the 2007 rear-end automobile accident, at least one, if not two, of the disc herniations occurred as a result of the June 2007 accident. Moreover, he believed, the lack of preceding history in the lumbar area made it likely that the L5-S1 disc herniation and possibly the tear at the L3-4 annulus resulted from the June 2007 accident. Dr. Johnston testified that a person with multiple cervical disc herniations would have

a 12% whole person physical impairment, while the lower back annular tear and herniation would result in a 8-12% whole person impairment, for a combined whole person impairment of 18-20%.

Dr. Johnston saw Mr. Fyfe again on June 4 and July 9 of 2009, at which times Mr. Fyfe reported improved motion with therapy and an ability to manage his discomfort with over-the-counter pain medications. Dr. Johnston recommended that Mr. Fyfe modify his activities to avoid prolonged looking up or down, higher lifting, pulling or pushing, prolonged sitting or standing, repetitive bending or twisting at the waist, or lifting more than 15-20 pounds. He stated that he felt Mr. Fyfe would have some complaints of back and neck pain indefinitely, noting that long-lasting or chronic pain lasting longer than six or nine months is harder to get rid of.

Dr. Johnston testified that he related Mr. Fyfe's current symptoms to the June 2007 rear-end accident based on the history Mr. Fyfe had given him, and was asked whether the fact Mr. Fyfe had been in the December 31, 2008 crash would change his opinion. He stated that the fact that Mr. Fyfe lost consciousness and the fact his vehicle was totaled were significant in that those facts suggested a significant accident. However, Dr. Johnston indicated that his opinion relating the disc herniations to the 2007 rear-end collision would not be affected by the subsequent December 31, 2008 accident. He explained that those conditions had been conclusively demonstrated by objective tests on the MRI taken a year before the 2008 accident and that the 2008 accident would only have been relevant to his opinion if Mr. Fyfe had been asymptomatic prior to the 2008 accident and became symptomatic following it. He noted that it was certainly a possibility that the 2008 accident could have led to a worsening of Mr. Fyfe's symptoms, but that nothing he heard that day altered his assessment of Mr. Fyfe's permanent physical impairments.

In reviewing the general damage award, our initial inquiry is whether the award for Mr. Fyfe's injuries and their effects under the particular circumstances is a clear abuse of the much discretion afforded to the trier of fact. In this case, the jury awarded Mr. Fyfe all medical expenses incurred by him for treatment of his neck and back pain following the accident sued upon. The jury awarded Mr. Fyfe: (1) all expenses incurred during his treatment with Dr. Mack for neck and back pain from June 27, 2007, three days post-accident, through November 8, 2007, including the cost of 52 physical therapy visits; (2) all expenses incurred during his treatment with Dr. Turnipseed for back and neck pain from December 3, 2007, through February 25, 2009; (3) the cost of 13 physical therapy treatments at Dutch Physical Therapy from January 2, 2008, through February 21, 2008; (4) all of Dr. Kidder's treatment for the TMJ injury; (5) Mr. Fyfe's two visits to Dr. Johnston in June 2009 and the costs of x-rays taken during those visits; (6) the cost of the October 2007 MRIs; and (7) all prescription medication costs. The objective evidence demonstrated that Mr. Fyfe has multiple level disc herniations in his neck and back and annular tears in his lumbar spine.

In awarding Mr. Fyfe all costs of medical treatment Mr. Fyfe underwent as a result of his neck, back, and jaw pain from the date of the accident through April 2009, the jury had to find that the treatment was necessitated by and thus related to the June 2007 accident. Dr. Turnipseed and Dr. Johnston clearly testified that Mr. Fyfe sustained at least some of the herniations as a result of the accident and/or aggravated a pre-existing disc condition as a result of the accident. There was no evidence that Mr. Fyfe had any type of medical treatment for neck or back pain prior to the June 2007 accident. In fact, General Insurance offered no evidence to rebut Mr. Fyfe's medical causation evidence connecting the accident to his disc condition. Considering all of the evidence in light of the jury's award, we can only conclude that the jury accepted Mr. Fyfe's causation evidence and found that Mr.

Fyfe sustained disc herniations, or at the very least, aggravated a pre-existing condition as a result of the June 25, 2007 accident. Given the jury's clear causation determination in finding that Mr. Fyfe's extensive medical treatment was necessitated by the accident, we find the jury's award of \$500.00 for pain and suffering, \$500.00 for mental anguish, and \$500.00 for loss of enjoyment of life and physical impairments to be inherently inconsistent, woefully inadequate, and an abuse of the jury's discretion in setting the general damage award. Therefore, we must determine the lowest general damage award reasonably within the jury's discretion.

After reviewing similar cases, we find that the lowest amount the jury reasonably could have awarded Mr. Fyfe for pain and suffering, mental anguish, loss of enjoyment of life, and permanent physical impairment/disability is \$50,000.00.⁴ See **Guidry v. Millers Casualty Insurance Company**, 2001-0001 (La. App. 1st Cir. 6/21/02), 822 So.2d 675 (upholding a trial judge's increase of an accident victim's \$20,000.00 general damage award to \$50,000.00 where the accident aggravated the victim's pre-existing degenerative spinal disease and would require care for life); **White v. Progressive Security Ins. Co.**, 2008-926 (La. App. 3rd Cir. 2/4/09), 6 So.3d 860 (upholding a \$60,000.00 general damage award to a plaintiff who sustained multiple level disc protrusions as a result of an accident and whose chronic injury lasted more than two years); **Woolfolk v. Trism, Inc.**, 2007-0749 (La. App. 4th Cir. 1/16/08), 976 So.2d 216 (upholding a total general damage award of \$63,000.00 where the accident exacerbated the plaintiff's pre-existing back and neck conditions); **Pomier v. Moreland**, 2006-1117 (La. App. 3rd Cir. 2/7/07), 951 So.2d 486 (finding a jury's \$25,000.00 award for a herniated disc for which the plaintiff, who had been treated conservatively

⁴ Because the jury itemized each of the three elements of the general damage award equally, we find it unnecessary to determine the lowest reasonable amount the jury could have awarded in each individual category, and instead, we find it appropriate to enter an *in globo* award for general damages.

and declined surgery, constituted an abuse of discretion, and increasing the award to \$37,593.80, the amount of available damages in light of the parties' stipulation that damages did not exceed \$50,000.00); **Moraus v. Frederick**, 2005-429 (La. App. 3rd Cir. 11/2/05), 916 So.2d 474 (upholding a \$46,000.00 pain and suffering award where the plaintiff sustained soft tissue injuries to the neck, shoulder, and back and received conservative care); **Rabalais v. Mason**, 2001-925 (La. App. 5th Cir. 1/15/02), 807 So.2d 983, writ denied, 2002-0490 (La. 4/19/02), 813 So.2d 1093 (finding a \$50,000.00 general damage award was the lowest within the jury's discretion in a case involving aggravation of pre-existing arthritic or lumbar conditions, citing three cases where plaintiffs suffering from aggravation of pre-existing arthritic or lumbar conditions had been awarded \$55,000.00, \$52,000.00, and \$50,000.00).

CONCLUSION

For the foregoing reasons, the judgment is amended to award Samara L. Abide, trustee, the sum of \$50,000.00 in general damages and an award of \$68,088.86 is hereby entered, subject to a credit in the amount of \$29,167.13 (reflecting the \$10,000.00 tender by Progressive and the \$19,167.13 tender by General Insurance). Judgment is hereby entered in favor of Samara L. Abide and against General Insurance Company of America in the amount of \$38,921.73, together with legal interest thereon from the date of the judicial demand and all costs in the trial court. As amended, the judgment is affirmed. All costs of this appeal are assessed to appellee, General Insurance Company of America.

AMENDED AND AS AMENDED, AFFIRMED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CU 0319

BARRY J. FYFE

VERSUS

**GENERAL INSURANCE COMPANY OF AMERICA, PROGRESSIVE
PALOVERDE INSURANCE COMPANY AND RUSSELL LENARD**

McCLENDON, J., agrees in part and dissents in part.

I agree with the majority that the award of general damages by the jury was abusively low. However, the jury in this case was clearly required to make credibility determinations and weigh the testimony presented. As the trier-of-fact, the jury was charged with assessing the credibility of witnesses and, in so doing, was free to accept or reject, in whole or in part, the testimony of any witness. See **Pelican Point Operations, L.L.C. v. Carroll Childers Company**, 00-2770, pp. 7-8 (La.App. 1 Cir.2/15/02), 807 So.2d 1171, 1176, writ denied, 02-0782 (La. 5/10/02), 816 So.2d 293. Based on this, I believe that an award of \$50,000 in general damages is higher than the lowest amount the jury could have awarded, and I would have amended the judgment to award general damages of \$25,000. Accordingly, I respectfully agree in part and dissent in part.

PNC