NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 CA 0973

CODY LEONARD AND KESSLIE LEONARD, INDIVIDUALLY AND OBO THEIR MINOR CHILDREN, ALEXIA LEONARD AND ASHLAND LEONARD

VERSUS

STEPHORN WALKER AND PROTECTIVE INSURANCE COMPANY

Judgment Rendered: MAR 2 6 2008

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Appealed from the
Twenty-Third Judicial District Court
In and for the Parish of Ascension
Docket Number 77,965

Honorable Guy Holdridge, Judge

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BEFORE: WHIPPLE, GUIDRY, AND HUGHES, JJ.

Guidry, J. dissents and assigns reasons.

HUGHES, J.

This appeal involves the question of whether the amount of damages awarded by a jury in this automobile accident case was correct and whether the trial court erred in granting a judgment notwithstanding the verdict. For the reasons that follow, we amend the trial court judgment, and affirm as amended.

FACTS AND PROCEDURAL HISTORY

On December 22, 2003, Cody Leonard drove his family to a local Winn-Dixie to do so some grocery shopping. While exiting the store's parking lot after shopping, Mr. Leonard was involved in an accident when an armored vehicle, owned by Brinks, Incorporated (Brinks), rear-ended the 1998 Honda Accord he was driving. Stephorn Walker, the driver of the Brinks vehicle, stated that the accident occurred because his brakes suddenly stopped working. The collision compressed the bumper of the Honda, but the indentation later popped out. According to a repair estimate, the total cost to repair the damage sustained by the Honda in the accident was $576.86.

On the day following the accident, Mr. Leonard began to experience pain and sought treatment from his family doctor, Dr. Glenn Schexnayder, for complaints of stiffness in his neck and lower back and headaches. Dr. Schexnayder diagnosed a neck and back sprain, and prescribed a muscle relaxant and non-steroidal anti-inflammatory medication to help relieve Mr. Leonard's complaints.

From February 9, 2004 until April 13, 2004, Mr. Leonard received chiropractic treatment.

On April 13, 2004, Mr. Leonard returned to Dr. Schexnayder and disclosed that his complaints had worsened since his last visit. At that visit, Mr. Leonard additionally complained of pain in his shoulders and numbness in his hands, with the symptoms being more pronounced on the left side. Mr. Leonard also informed Dr. Schexnayder that he could no longer work. Because of the complaints of increased and radiating pain, Dr. Schexnayder ordered an MRI of Mr. Leonard's cervical spine. On viewing the results of the MRI, Dr. Schexnayder recommended that Mr. Leonard see a neurologist.

On May 11, 2004, Mr. Leonard was seen by Dr. Stefan G. Pribil, a board-certified neurological surgeon. Based on Mr. Leonard's failure to respond to conservative treatment for a period of longer than six months post-accident and on his review of Mr. Leonard's MRI film from April 2004, Dr. Pribil recommended that Mr. Leonard undergo an anterior cervical discectomy to fuse the cervical discs at levels 5-6 and 6-7, which were the discs with the most significant problems of bulging and herniation according to the diagnostic tests. Mr. Leonard accepted the recommendation and Dr. Pribil performed the surgery in August 2004. Initially following the surgery, Mr. Leonard experienced some, but not total relief of his pain symptoms. However, ten months later, when Mr. Leonard's pain had not significantly abated, but rather seemed to be as severe as before the surgery, Dr. Pribil performed a second anterior cervical discectomy to fuse the cervical disc at level 4-5.

Meanwhile, on May 20, 2004, Mr. Leonard and his wife filed a petition for damages, individually and on behalf of their minor daughters, against Stephorn Walker, the driver of the Brinks armored vehicle involved in the accident, and Protective Insurance Company (Protective), as the

insurer of the Brinks vehicle, and later amended the petition to add Brinks as a defendant.

Following a September 19-20, 2006 trial, the jury rendered a verdict awarding Mr. Leonard $359,000.00 in damages against defendants Brinks and Protective, which included:[1]

Past Medical Expenses	$163,000.00
Past Lost Wages	$ 31,000.00
Future Lost Wages or Earning Capacity	$ 65,000.00
General Damages	$100,000.00

No damages were awarded for future medical expenses or loss of enjoyment of life.

Dissatisfied with the jury's verdict, Mr. Leonard filed a motion for Judgment Notwithstanding the Verdict (JNOV), which was granted by the trial court. Pursuant to the JNOV, the trial court increased Mr. Leonard's general damage award to $250,000.00. Mr. Leonard, Brinks, and Protective have appealed.

ASSIGNMENTS OF ERROR

In the defendants' suspensive appeal they assert that the trial court erred in increasing Mr. Leonard's general damage award by JNOV. Mr. Leonard asserts the trial court erred in the following respects: (1) in awarding only $31,000.00 in past lost wages; (2) in awarding only $65,000.00 in future lost wages or earning capacity; and (3) in the jury's award of an insufficient $100,000.00 general damage award and in the trial

[1] On motion of Kesslie Leonard, individually and on behalf of her minor children, the trial court signed an order on August 3, 2006, dismissing their claims. Further, prior to trial, defendants stipulated to the following facts: (1) Stephorn Walker's negligence was the cause in fact of the accident occurring on December 22, 2003; (2) Mr. Walker was in the course and scope of his employment with Brinks at the time of the accident; and (3) Protective issued a policy of insurance to Brinks that was in place at the time of the accident, which provided insurance to Mr. Walker. Defendants specifically reserved the right to contest the causal relationship of Mr. Leonard's alleged injuries to the accident, and the matter proceeded to trial solely on the claims of Mr. Leonard.

judge's subsequent insufficient JNOV award of $250,000.00 in general damages.

DISCUSSION

Special Damages – Past Lost Wages

Special damages are those which have a "ready market value," such that the amount of the damages theoretically may be determined with relative certainty, including medical expenses and lost wages. **Kaiser v. Hardin**, 2006-2092, p. 11 (La. 4/11/07), 953 So.2d 802, 810. To recover for actual wage loss, a plaintiff must prove that he would have been earning wages but for the accident in question. In other words, it is the plaintiff's burden to prove past lost earnings and the length of time missed from work due to the accident. **Boyette v. United Services Automobile Association**, 2000-1918, p. 3 (La. 4/3/01), 783 So.2d 1276, 1279. A trial court has broad discretion in assessing awards for lost wages, but there must be a factual basis in the record for the award. **Burrell v. Williams**, 2005-1625, p. 10 (La. App. 1 Cir. 6/9/06), 938 So.2d 694, 701.

Although Mr. Leonard was injured and experienced pain soon after the accident, he did not immediately stop working as a pipefitter. Mr. Leonard's work as a pipefitter entailed welding pipe of an average weight of 110 pounds per foot. According to the evidence presented at trial, Mr. Leonard was never permanently employed by one specific company, but would perform pipefitting duties for various companies. Following the accident, Mr. Leonard completed jobs for three different companies, in three different locations – California, Texas, and Taft, Louisiana – with each job lasting about two to three weeks. It was after completing the last job that Mr. Leonard informed Dr. Schexnayder that he could no longer work because his pain was too severe.

At trial, Mr. Leonard's treating neurologist, Dr. Pribil, testified that since coming under his care, Mr. Leonard was unable to work as a pipefitter, the occupation he held at the time he was injured. He further testified that while he encouraged Mr. Leonard to work, in accordance with Mr. Leonard's request, such was restricted to lifting of no than thirty pounds and excessively repetitive motion was prohibited.

Considering these restrictions, Dr. Cornelius Gorman, a vocational rehabilitation counselor testifying on behalf of Mr. Leonard, stated that Mr. Leonard would have to pursue lighter duty employment for which he had no experience. As such, Dr. Gorman opined that Mr. Leonard would have to start at an entry-level position, which typically paid an annual salary of between $17,000.00 and $19,000.00. Dr. Gorman testified that upon gaining some experience, Mr. Leonard's salary range might reach between $19,000.00 and $25,000.00, and then, based on Mr. Leonard's past history of holding supervisory positions, he opined that Mr. Leonard might obtain a higher paying supervisory position. However, Dr. Gorman premised his testimony regarding Mr. Leonard's employability in jobs paying greater than $19,000.00 per year on the assumption that Mr. Leonard would not experience increasing medical symptoms as a result of the increasing work commensurate with the work progression. Dr. Larry Stokes, a rehabilitation counselor offered by the defendants, opined that Mr. Leonard could secure a job paying between $245.60 per week to $807.20 per week within his medical restrictions.

In calculating Mr. Leonard's past lost wages, the economist for the defendants, Dr. Kenneth Boudreaux, calculated the sum to be $56,200.00, based on his estimation of Mr. Leonard's annual income for the three years preceding the accident. Because Dr. Boudreaux used the joint tax returns

filed by Mr. Leonard and his wife for the three years pre-accident, he had to estimate what portion of the income was attributable to Mr. Leonard and came up with the figure of $41,763.00. Dr. Boudreaux then reduced that sum by twenty-five percent based on an assumption given to him by counsel for the defendants, to account for the period of time from February 2005 up to the time of trial wherein Dr. Pribil released Mr. Leonard to work at light duty.

On the other hand, the economist offered by Mr. Leonard, Dr. Randolph Rice, also used Mr. Leonard's tax returns and W-2's to calculate his pre-accident wages and observed that the returns were filed jointly. Because Dr. Rice had W-2's to specifically identify what portion of the income listed on the tax returns was attributable solely to Mr. Leonard for only two of the three preceding years, he used those two years to come up with an average income for Mr. Leonard of $43,625.83. He then used an average income figure of $18,000.00 per year, based on the testimony of Dr. Gorman, to calculate the income Mr. Leonard could have earned from the date he was released by Dr. Pribil to work light duty up to the time of trial. Based on those calculations, Dr. Rice opined that Mr. Leonard's past lost wages were $69,113.00.

Considering this evidence, we conclude that the trial court erred in awarding Leonard only $31,000.00 in past lost wages. The expert testimony and medical evidence clearly support a higher award, and the surveillance evidence presented by the defendants was insufficient to contradict that evidence, as both Mr. Leonard and Dr. Pribil testified that the conduct displayed in the surveillance was within the work restrictions authorized by Dr. Pribil. Thus, we find that Mr. Leonard proved by a preponderance of the evidence that he is entitled to past lost wages in the amount of $69,113.00.

Special Damages – Future Lost Wages or Earning Capacity

Awards for loss of future income are intrinsically insusceptible of mathematical exactitude. **Oliver v. Cal Dive International, Inc.**, 2002-1122, p. 6 (La. App. 1 Cir. 4/2/03), 844 So.2d 942, 946, writs denied, 2003-1230, 2003-1796 (La. 9/19/03), 853 So.2d 638, 648. Although courts are not expected to calculate such awards with mathematical certainty, they cannot be based purely on speculation, conjecture, and probabilities. **Levy v. Bayou Industrial Maintenance Services, Inc.**, 2003-0037, p. 4 (La. App. 1 Cir. 9/26/03), 855 So.2d 968, 973, writs denied, 2003-3161, 2003-3200 (La. 2/6/04), 865 So.2d 724, 727. As such, the trier of fact must exhibit sound discretion in rendering awards that are consistent with the record. **American Central Insurance Company v. Terex Crane**, 2003-0279, p. 8 (La. App. 1 Cir. 11/7/03), 861 So.2d 228, 234, writ denied, 2004-0327 (La. 4/2/04), 869 So.2d 881.

An award of loss of future income is not based solely upon the difference between the plaintiff's earnings before and after a disabling injury. Rather, the award is predicated upon the difference between a plaintiff's earning capacity before and after a disabling injury. **Dennis v. The Finish Line, Inc.**, 99-1413, p. 36 (La. App. 1 Cir. 12/22/00), 781 So.2d 12, 40, writ denied, 2001-0214 (La. 3/16/01), 787 So.2d 319. It is only upon an abuse of the jury's discretion that a reviewing court should disturb an award for loss of future income. See **Lasyone v. Kansas City Southern Railroad**, 99-0735, pp. 9-10 (La. App. 1 Cir. 9/28/01), 809 So.2d 344, 350-351, writ denied, 2002-0093 (La. 3/15/02), 811 So.2d 891.

Based on our review of the evidence, we find no error in the jury's award for loss of future income. Both parties' expert economists testified about various sums Mr. Leonard might be entitled to for loss of future

income; however, those sums were expressly premised on certain assumptions, ranging from Mr. Leonard being unable to do any work to his being able to return fully to his past employment or something similar. As acknowledged by the expert economists and vocational rehabilitation counselors presented by both sides, a definitive determination of Mr. Leonard's future earning capacity, and consequently the loss of any future income, hinges on Mr. Leonard's medical prognosis. At the time of trial, Dr. Pribil, Mr. Leonard's treating physician, was unable to give a definitive future medical prognosis for Mr. Leonard. Since the evidence presented by the expert witnesses for both sides was expressly premised on the assumption of certain medical findings that were not established, the award of future lost wages based on such evidence would be purely speculative, and thus improper. Hence, we are unable to say the trial court erred in fixing the award for future lost wages.

JNOV on General Damage Award

Louisiana Code of Civil Procedure Article 1811(F) authorizes a trial court to grant a JNOV on either the issue of liability or damages or both. A JNOV should be granted only if the trial court, after considering the evidence in the light most favorable to the party opposed to the motion, finds it points so strongly and overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary verdict on that issue. **McLin v. Breaux**, 2005-1911, pp. 3-4 (La. App. 1 Cir. 11/3/06), 950 So.2d 711, 714, writ denied, 2006-2822 (La. 1/26/07), 948 So.2d 177. A JNOV should be granted only when the evidence points so strongly in favor of the moving party that reasonable persons could not reach different conclusions, not merely when there is a preponderance of evidence for the mover. The motion for JNOV should be denied if there is evidence opposed to the

motion that is of such quality and weight that reasonable and fair-minded persons in the exercise of impartial judgment might reach different conclusions. **Trunk v. Medical Center of Louisiana at New Orleans**, 2004-0181, p. 4 (La. 10/19/04), 885 So.2d 534, 537. In making this determination, the court should not weigh the evidence, pass on the credibility of witnesses, or substitute its judgment of the facts for that of the jury. **Hunter v. State ex rel. LSU Medical School**, 2005-0311, p. 6 (La. App. 1 Cir. 3/29/06), 934 So.2d 760, 764, writ denied, 2006-0937 (La. 11/3/06), 940 So.2d 653.

In reviewing a JNOV, an appellate court must first determine whether the district judge erred in granting the JNOV by using the above-mentioned criteria in the same way as the district judge in deciding whether to grant the motion. **Trunk**, 2004-0181 at p. 5, 885 So.2d at 537.

The standard to be applied by appellate courts in reviewing a JNOV is whether the trial court's findings in rendering the JNOV were manifestly erroneous. **Hunter**, 2005-0311 at p. 6, 934 So.2d at 764. If an appellate court determines that a JNOV was properly granted, the trial court's independent assessment of the damages is then reviewed for an abuse of discretion. **Hanchett v. State ex rel. Department of Transportation and Development**, 2006-1678, p. 12 (La. App. 1 Cir. 11/7/07), ___ So.2d ___, ___.

General damages involve mental or physical pain and suffering, inconvenience, loss of intellectual gratification or physical enjoyment, or other losses of life or lifestyle, which cannot be definitively measured in monetary terms. There is no mechanical rule for determining general damage; the facts and circumstances of each case control. **Koehn v. Rhodes**, 38,941, p. 6 (La. App. 2 Cir. 9/24/04), 882 So.2d 757, 762.

At trial, evidence was presented in the form of Mr. Leonard's own testimony and that of his treating doctors that he has suffered from continuous headaches and pain in his neck, shoulders, and arms since the date of the accident. It was established that Mr. Leonard had no previous complaints of neck or back pain or injury prior to the accident. Following the first invasive surgery, Mr. Leonard had some temporary relief of his symptoms, but his pain was not completely abated and eventually worsened to the level it was before the surgery, resulting in Mr. Leonard submitting to a second surgery.

Mr. Leonard testified that for two months following the surgeries, he was rendered completely helpless and required the assistance of his wife and mother to help bathe and dress him. As he explained, he just sat in bed with a brace on to hold up his head, while others cared for him. At the time of trial, Mr. Leonard still had not reached maximum medical improvement, nor was he released from Dr. Pribil's care.

It was also established, through the testimony of Mr. Leonard and his ex-wife, Kesslie Leonard, that his injury greatly impacted his relationship with his family. At the time of trial, Mr. Leonard's twin daughters were four years old, and Mr. Leonard testified about how upsetting it was to him that he could not play with or even pick up his daughters because of the burning, needle-like pain he felt in his neck and shoulders and the numbness he felt in his hands. Kesslie further testified that Mr. Leonard was constantly angry and depressed about his physical limitations caused by the injury and about his inability to work and help provide for his family. Kesslie admitted being angry with Mr. Leonard because she had to carry the financial burden of the family, and she attributed financial stress as contributing to the failure of their marriage.

Evidence was also presented establishing that Mr. Leonard was not entirely restricted by his injury. As shown at trial and admitted by Mr. Leonard, he can perform some work and activities. On February 17, 2005, prior to obtaining a work release from Dr. Pribil, Mr. Leonard performed a one-day, light welding job for which he received $600.00 in compensation. Mr. Leonard stated that he did not have any trouble performing the work, nor did he experience any increase in his discomfort as a result of having performed the work. As long as the work fit within his physical limitations, Dr. Pribil opined that Mr. Leonard could perform such work. And although Mr. Leonard testified that he cannot engage in all of his previous pursuits and pastimes, like playing golf, he could still engage in such recreational activities as hunting and fishing.[2] Further, despite the ongoing existence of Mr. Leonard's physical complaints, Kesslie testified that Mr. Leonard's relationship with her and the children had improved following the divorce.

In viewing the evidence presented in toto, we are unable to say that the trial court erred in granting a JNOV. Because of injuries sustained in this motor vehicle accident, Mr. Leonard underwent two surgical procedures, initially entailing two cervical disc fusions followed by a third cervical disc fusion, and endured continuous pain and suffering over the course of the three-year period between the accident and the trial in this matter. Under these circumstances, we can find no error in the trial court decision to raise Mr. Leonard's general damage award from $100,000.00 to $250,000.00.

[2] These activities are commonly recognized as stress reducing.

CONCLUSION

For the reasons stated herein, we amend the trial court judgment to increase Cory Leonard's award of past lost wages to $69,113.00, and we affirm the judgment as amended. All costs of these proceedings are to be borne by defendants herein, Brinks, Incorporated and Protective Insurance Company.

JUDGMENT AMENDED, AND AS AMENDED, AFFIRMED.

STATE OF LOUISIANA

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VERSUS

STEPHORN WALKER AND PROTECTIVE INSURANCE COMPANY

GUIDRY, J., dissents and assigns reasons.

GUIDRY, J., dissenting.

I disagree with the majority's determination that the trial judge properly granted the motion for judgment notwithstanding the verdict (JNOV) to increase the amount of general damages awarded to the plaintiff, Cody Leonard. In reviewing the trial judge's ruling granting a JNOV, this court is required to consider whether the trial judge properly considered the evidence presented in ruling on the motion, including ensuring that the trial judge did not impermissibly weigh the evidence, pass on the credibility of witnesses, or substitute its judgment of the facts for that of the jury. Hunter v. State ex rel. LSU Medical School, 05-0311, p. 6 (La. App. 1st Cir. 3/29/06), 934 So. 2d 760, 764, writ denied, 06-0937 (La. 11/3/06), 940 So. 2d 653. As the trial judge did not provide any reasons for granting the JNOV, this court is left to consider whether, after viewing the evidence in the light most favorable to the party opposed to the motion, the evidence points so strongly and overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary verdict on that issue. McLin v. Breaux, 05-1911, pp. 3-4 (La. App. 1st Cir. 11/3/06), 950 So. 2d 711, 714, writ denied, 06-2822 (La. 1/26/07), 948 So. 2d 177.

In reviewing the record on appeal, there were several facts in evidence that likely influenced the jury's finding that Mr. Leonard's injuries warranted the lesser amount of damages awarded. The record shows that Mr. Leonard's injuries, though not completely resolved, nevertheless were not completely disabling and allowed Mr. Leonard, if motivated, to continue in his former occupation and most of his leisure pursuits, albeit not to the degree that he was formerly able to engage in such activities. Most notably, one can readily appreciate that the jury could have well been persuaded by Mr. Leonard's testimony that he went hunting and fishing on an almost **daily** basis. Yet, rather than appreciating that such evidence likely influenced the jury's determination regarding the general damages award, the majority instead substitutes its judgment of the facts to note that such activities "are commonly recognized as stress reducing."

Accordingly, for the foregoing reasons, I respectfully dissent from the majority's opinion herein as I find the evidence of record supports the jury's award of general damages and does not strongly and overwhelmingly support granting a JNOV to increase the award.