

NOT DESIGNATED FOR PULICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2010 CA 2174

JASON PELLEGRIN

VERSUS

LOUISIANA HEART HOSPITAL, L.L.C., LISA DELGADO, FRANCISCO
BUTLER, BRAD STRINGER, KERRY TROSCLAIR, HERB COLLINS,
CHRISTOPHER SMITH, AND JOHN DOE

Judgment Rendered: May 6, 2011

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Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Suit number 2006-15194

Honorable Reginald T. Badeaux III, Presiding

* * * * *

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Louisiana Patient's Compensation Baton
Fund and Louisiana Patient's
Compensation Fund Oversight Board on
behalf of the nominal defendant,
Louisiana Heart Hospital, L.L.C.

* * * * *

BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

GUIDRY, J.

In this medical malpractice action, the Louisiana Patient's Compensation Fund and the Louisiana Patient's Compensation Fund Oversight Board (PCF) appeal from a judgment of the trial court casting the PCF with all court costs, including costs for depositions used at trial, and expert witness fees, in the underlying proceeding. Plaintiff, Jason Pellegrin, also appeals from the trial court's judgment, which failed to award any damages for future medical expenses, future pain and suffering, and loss of enjoyment of life. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

On October 6, 2004, Pellegrin underwent a lumbar discectomy at Louisiana Heart Hospital (LHH) in Lacombe, Louisiana. Prior to the surgery, a Foley catheter was inserted through Pellegrin's penis up to his bladder and was inflated. After completion of the surgery, and while being moved by LHH staff from the operating table to a gurney, the fully-inflated Foley catheter came out through Pellegrin's penis.

Thereafter, Pellegrin filed a request for review of his malpractice claim with the Division of Administration, which forwarded it to the PCF. A medical review panel was convened and rendered an opinion, finding that there was no evidence that LHH breached the applicable standard of care.

On October 16, 2006, Pellegrin filed suit against LHH in the twenty-second judicial district court, claiming that he suffered severe and permanent damages as a result of the negligence of LHH, and seeking damages for past, present, and future physical pain and suffering and mental anguish; past, continuing, and future medical expenses; future disability; and loss or impairment of life's pleasures.

After reaching an agreement with LHH to settle all claims against it, Pellegrin filed a petition for damages, for court approval of agreed-upon settlement, and for demand for payment from the PCF. In his petition, Pellegrin asserted that he and

LHH had agreed to settle all claims against LHH, reserving all rights to proceed against the PCF to recover damages in excess of the statutorily mandated credit, and subject to LHH remaining in the litigation as a nominal defendant. Pellegrin also stated that he was demanding an amount in excess of the agreed-upon settlement for a complete and final release of his claim, and pursuant to La. R.S. 40:1299.44(C) was making a demand upon the PCF for payment of an amount in excess of the PCF's statutorily mandated credit of \$100,000, due to the fault of LHH, a qualified health care provider. Pellegrin submitted that he and the PCF had been unable to agree on the amount to be paid by the PCF, and requested that the court determine the amount of Pellegrin's damages as to LHH in excess of \$100,000.

On April 27, 2009, the PCF filed a motion and order for intervention for the purpose of requesting a trial by jury. A jury trial was conducted on October 27 and 28, 2009, at the conclusion of which, the jury returned a verdict in favor of Pellegrin, finding that LHH had breached the standard of care and that the breach had caused damages to Pellegrin. The jury awarded \$31,628.95 in past medical expenses and \$52,500.00 in past and present pain and suffering. However, the jury awarded \$0 for future medical expenses, \$0 for future pain and suffering, and \$0 for loss of enjoyment of life. Accordingly, Pellegrin's total damage award was \$84,128.95.

On December 16, 2009, Pellegrin filed a motion for judgment notwithstanding the verdict and/or motion for new trial. The PCF also filed a motion to tax costs on an offer of judgment, asserting that it had made an offer of judgment pursuant to La. C.C.P. art. 970, which was received by Pellegrin on July 16, 2009, and that this offer was exclusive of any costs, interest, and attorney's fees that may be awarded.

The trial court held a hearing on these two motions on January 12, 2010. On that same date, the trial court signed a judgment in conformity with the jury's verdict. By handwritten notation dated January 19, 2010, the court added to the January 12

judgment that all costs of court, including all depositions used at trial, as well as expert witness fees, were to be paid by the PCF. On February 8, 2010, the trial court signed a judgment denying Pellegrin's motion for JNOV, denying the PCF's motion to tax costs, and ordering that the PCF be cast with all of Pellegrin's costs, including but not limited to, expert witness fees and depositions used at trial.

Pellegrin and the PCF now separately appeal from the January 2010 judgment.

DISCUSSION

Future Damages

Pellegrin asserts on appeal that the jury erred in failing to award damages for future medical expenses, future pain and suffering, and loss of enjoyment of life and that the trial court erred in denying the JNOV.

Future medical expenses, as special damages, must be established with some degree of certainty, and a plaintiff must demonstrate that such expenditures will, more probably than not, be incurred as a result of the injury. Menard v. Lafayette Insurance Company, 09-1869, pp. 12-13 (La. 3/16/10), 31 So. 3d 996, 1006. The proper standard for determining whether a plaintiff is entitled to future medical expenses is proof by a preponderance of the evidence that the future medical expenses will be medically necessary. Menard, 09-1869 at p. 13, 31 So. 3d at 1006. Awards will not be made in the absence of medical testimony that they are indicated and setting out their probable cost. Harvin v. ANPAC Louisiana Insurance Co., 06-204, p. 12 (La. App. 5th Cir. 10/17/06), 944 So. 2d 648, 655, writ denied, 06-2729 (La. 1/8/07), 948 So. 2d 134. Credibility determinations are for the trier of fact, even as to the evaluation of expert testimony. Green v. K-Mart Corp., 03-2495, p. 5 (La. 5/25/04), 874 So. 2d 838, 843. A trier of fact may accept or reject, in whole or in part, the uncontradicted opinions expressed by an expert. See Harris v. State ex rel.

Department of Transportation and Development, 07-1566, p. 25 (La. App. 1st Cir. 11/10/08), 997 So. 2d 849, 866, writ denied, 08-2886 (La. 2/6/09), 999 So. 2d 785.

In reviewing a jury's factual conclusions with regard to special damages, an appellate court must satisfy a two-step process based on the record as a whole in order to modify or reverse the judgment: there must be no reasonable factual basis for the jury's conclusion, and the finding must be clearly wrong. See Menard, 09-1869 at p. 14, 31 So. 3d at 1007. This test requires a reviewing court to do more than simply review the record for some evidence that supports or controverts the jury's findings. The court must review the entire record to determine whether the jury's finding was clearly wrong or manifestly erroneous. The issue to be resolved on review is not whether the jury was right or wrong, but whether the jury's fact-finding conclusion was a reasonable one. Menard, 09-1869 at pp. 14-15, 31 So. 3d at 1007.

From our review of the record, we find no manifest error in the jury's determination that Pellegrin failed to establish that he was entitled to future medical expenses. Pellegrin's treating urologist, Dr. Neil Baum, testified that when the catheter was removed from Pellegrin with the balloon inflated, Pellegrin's urethra was traumatized, leaving him with a subsequent stricture, or scarring. According to Dr. Baum, the problem of the stricture *may* be recurrent, and Pellegrin *may* have future symptoms that *may* require the urethra to be stretched or dilated in order to facilitate the flow of urine from his bladder to the outside of his body. Later in his testimony, Dr. Baum stated that Pellegrin will at least need to be seen by a urologist on an ongoing basis, probably once or twice a year, that he should have urinary flow rates and a bladder ultrasound examination, and if appropriate, he would require dilation of his urethra to improve his flow of urine. Dr. Baum opined that Pellegrin is likely to have a lifelong need of urologic care probably once or twice a year, and it will probably never go away. However, Dr. Baum acknowledged that as Pellegrin

approached age fifty, he will have the normal enlargement of his prostate that most middle aged men have, and related natural prostate problems, which would be unrelated to the stricture. Further, Dr. Baum stated that he did not treat Pellegrin for complaints of erectile dysfunction, because the cause of the dysfunction was not physiological, but rather, was psychological. However, Dr. Baum did provide Pellegrin with a prescription and some samples for Cialis. Dr. Baum stated that he last saw Pellegrin in June 2007, at which time Dr. Baum recommended that Pellegrin follow up with him in three months for a urine flow rate and bladder ultrasound. However, Pellegrin has not returned to see him since the June 2007 visit.

Dr. David Murdock, Pellegrin's treating psychiatrist, also testified at trial. Dr. Murdock stated he first saw Pellegrin in April 2006, at which time he diagnosed Pellegrin with post traumatic stress disorder (PTSD) and major depressive disorder. However, Dr. Murdock stated that he did not diagnose Pellegrin with, nor treat Pellegrin for, erectile dysfunction. Dr. Murdock noted that at the time of trial, Pellegrin's symptoms for PTSD had improved, and that he was currently not experiencing any symptoms. Dr. Murdock recommended antidepressants for treating Pellegrin's depression disorder, and had prescribed Lexapro. Dr. Murdock said the medication helps control the symptoms of depression, but does not cure depression. Dr. Murdock also recommended weekly psychotherapy sessions. According to Dr. Murdock, the symptoms of PTSD and depression tend to wax and wane, but *can* affect someone for the rest of their life. Particularly with PTSD, a person can be symptom free for a long period and then experience a triggering event that causes the PTSD to be symptomatic again.

In his testimony, Pellegrin confirmed that he has not seen Dr. Baum since June 2007, and indicated that he mainly did not return to Dr. Baum because of money. Likewise, Pellegrin admitted that he had declined weekly psychotherapy sessions for

his depression because of money and because of the effect that it had on his ability to work consistently. Pellegrin also admitted that although he was prescribed Cialis for erectile dysfunction and Lexapro for depression, he does not take either medication. According to Pellegrin, he has not taken Cialis since the summer of 2005, and he never really took the Lexapro, because he has a family history of substance abuse and he does not want to take medication. Further, Pellegrin acknowledged that prior to the back surgery and catheter removal, he contracted gonorrhea and reported complaints of burning. Additionally, the medical records indicate that Pellegrin informed Dr. Baum that he had been experiencing urinary voiding problems for a year, which predates the back surgery.

Dr. Suril Purohit, the urologist who treated Pellegrin immediately following the removal of the catheter, also testified by deposition. Dr. Purohit characterized the nature and extent of Pellegrin's injury as "minor." Dr. Purohit stated that he continued to treat Pellegrin from November 2004 to February 2005. In November 2004, Pellegrin's urethra appeared to have healed well, and Pellegrin did not have any complaints at that time. In February 2005, Pellegrin reported complaints of burning and split stream when he urinated and Dr. Purohit performed a cystoscopy to determine the cause of Pellegrin's then-reported complaints. The cystoscopy found no stricture, and the urethra otherwise appeared normal.

From our review of the evidence as a whole, the jury could have reasonably determined that Pellegrin did sustain an injury as a result of the catheter being removed, but that such injury was minor and any damage resulting therefrom had resolved by the time of trial. Given the uncertainty expressed by Dr. Baum as to Pellegrin's future prognosis and need for medical treatment and Pellegrin's refusal to seek further treatment or take prescribed medication, we find the jury permissibly weighed the evidence and evaluated the credibility of the witnesses. Accordingly,

though this court may have weighed the evidence differently, we find no manifest error in the jury's determination that Pellegrin failed to prove that he was entitled to future medical expenses.

Likewise, we find no error in the jury's determination that Pellegrin is not entitled to damages for future pain and suffering and loss of enjoyment of life. Pain and suffering, both physical and mental, refers to the pain, discomfort, inconvenience, anguish, and emotional trauma that accompanies an injury. McGee v. A C and S, Inc., 05-1036, p. 5 (La. 7/10/06), 933 So. 2d 770, 775. The factors to be considered by the trier of fact in assessing quantum of damages for pain and suffering are severity and duration. Thibodeaux v. USAA Casualty Insurance Co., 93-2238, p. 8 (La. App. 1st Cir. 11/10/94), 647 So. 2d 351, 357. As noted by the trial court at the hearing on Pellegrin's motion for JNOV, Pellegrin was shy and was not the best historian as to his past history and did not get across to the jury that he had a great psychic injury. Further, given that Pellegrin did not complain of continuing pain, nor did he seek treatment or take medication for at least two years prior to the date of trial, the jury reasonably could have determined that he was not entitled to future general damages for pain and suffering.

Further, damages for loss of enjoyment of life refer to detrimental alterations of the person's life or lifestyle or the person's inability to participate in activities or pleasures of life that were formerly enjoyed prior to the injury. Whether or not a plaintiff experiences a detrimental lifestyle change depends on both the nature and severity of the injury and the lifestyle of the plaintiff prior to the injury. McGee, 05-1036 at p. 5, 933 So. 2d at 775. In the instant case, Pellegrin did not offer any testimony that his lifestyle after the accident had been altered other than the fact that he has had problems with erectile dysfunction since his injury. According to Pellegrin, pain was an issue at first, but later the issue became his willingness and

desire to have sexual intercourse. Pellegrin stated that before the injury, sex in his life was for him and his partner, whereas now, it was not necessarily for him anymore because of his confidence and pride issues. Pellegrin stated that prior to the injury, he had sexual relations with his then-girlfriend once a week. After the injury, he had sex with his girlfriend about once every two weeks, and has sex with his current girlfriend about once every three weeks. Pellegrin acknowledged that he has not taken any prescription medication for erectile dysfunction, though Dr. Baum had given him a prescription for Cialis.

From our review of the record, the jury reasonably could have determined that Pellegrin failed to establish that he is unable to engage in activities or pleasures of life that were enjoyed prior to the injury, or that he otherwise experienced a detrimental lifestyle change. Accordingly, we find no error in the jury's failure to award damages for loss of enjoyment of life.¹

Court Costs

The PCF appeals the trial court's judgment to the extent that the judgment cast the PCF with all costs of court, including the costs for all depositions used at trial and expert witness fees.

It is well settled that the trial court has great discretion in awarding costs, including expert witness fees, deposition costs, exhibit costs, and related expenses. Samuel v. Baton Rouge General Medical Center, 99-1148, pp. 7-8 (La. App. 1st Cir. 10/2/00), 798 So. 2d 126, 131-132. The PCF, however, claims that the trial court abused its discretion in casting the PCF with all costs of court, because the PCF made an offer of judgment in accordance with La. C.C.P. art. 970.

¹ Though Pellegrin did not appeal from the February 8, 2010 judgment denying his motion for JNOV, he assigned as error the trial court's denial of that motion. We find, based on our determination of the issues related to future medical expenses, future pain and suffering, and loss of enjoyment of life, that the trial court likewise did not err in failing to grant the JNOV. See Belle Pass Terminal, Inc. v. Jolin, Inc., 92-1544, 92-1545, pp. 41-42 (La. App. 1st Cir. 3/11/94), 634 So. 2d 466, 491-492, writ denied, 94-0906 (La. 6/17/94), 638 So. 2d 1094.

Louisiana Code of Civil Procedure article 970 provides, in pertinent part:

A. At any time more than thirty days before the time specified for the trial of the matter, without any admission of liability, any party may serve upon an adverse party an offer of judgment for the purpose of settling all of the claims between them. The offer of judgment shall be in writing and state that it is made under this Article; specify the total amount of money of the settlement offer; and specify whether that amount is inclusive or exclusive of costs, interest, attorney fees, and any other amount which may be awarded pursuant to statute or rule. Unless accepted, an offer of judgment shall remain confidential between the offeror and offeree. If the adverse party, within ten days after service, serves written notice that the offer is accepted, either party may move for judgment on the offer. The court shall grant such judgment on the motion of either party.

* * *

C. If the final judgment obtained by the plaintiff-offeree is at least twenty-five percent less than the amount of the offer of judgment made by the defendant-offeror or if the final judgment obtained against the defendant-offeree is at least twenty-five percent greater than the amount of the offer of judgment made by the plaintiff-offeror, the offeree must pay the offeror's costs, exclusive of attorney fees, incurred after the offer was made, as fixed by the court.

* * *

E. For purposes of comparing the amount of money offered in the offer of judgment to the final judgment obtained, which judgment obtained shall take into account any additur or remittitur, the final judgment obtained shall not include any amounts attributable to costs, interest or attorney fees, or to any other amount which may be awarded pursuant to statute or rule, unless such amount was expressly included in the offer.

Article 970 is punitive in nature and its function is to compensate the rejected offeror who is forced to incur greater trial litigation costs that could have been avoided if the offeree had not acted unreasonably in rejecting the offer. Held v. Aubert, 02-1486, p. 14 (La. App. 1st Cir. 5/9/03), 845 So. 2d 625, 636.

On June 15, 2009, the PCF forwarded to Pellegrin an offer of judgment pursuant to Article 970. The offer, exclusive of any costs, interest, and attorney's fees that may be awardable, represented an amount equal to \$5,000 above the \$100,000 credit available to the PCF.

Under the facts of this case, Article 970 essentially provides that the plaintiff-offeree's post-offer costs must be paid by the defendant-offeror whose pre-trial offer

is rejected if the final judgment obtained by the plaintiff-offeree is not *at least* twenty-five percent less than the offer. See La. C.C.P. art. 970(C); see also Suprun v. Louisiana Farm Bureau Mutual Insurance Company, 09-1555, p. 6 (La. App. 1st Cir. 4/30/10), 40 So. 3d 261, 266. In the instant case, the jury awarded total damages in the amount of \$84,128.95. This amount represents roughly twenty percent less than the PCF's offer. Because the damage award is not *at least twenty-five percent* less than the PCF's offer of \$5,000 above the statutory credit of \$100,000 (or \$105,000), the PCF is not entitled to post-offer costs under La. C.C.P. art. 970(C). See Suprun, 09-1555 at p. 9, 40 So. 3d at 267.

Accordingly, having found that the PCF is not entitled to post-offer costs under Article 970(C), given the fact that Pellegrin was the prevailing party at trial, and considering that the trial court is afforded great discretion in awarding costs, we find no abuse of the trial court's discretion in casting the PCF with costs of court, including the cost for depositions used at trial and expert witness fees.

CONCLUSION

For the foregoing reasons, the judgment of the trial court is affirmed. All costs of this appeal are assessed equally to Jason Pellegrin and the Louisiana Patient's Compensation Fund and the Louisiana Patient's Compensation Fund Oversight Board.

AFFIRMED.