NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2011 CA 0270

JESSI L. BOUDWIN, BRIAN J. BOUDWIN AND LEE A. THIBODAUX

VERSUS

GENERAL INSURANCE COMPANY OF AMERICA AND JACQUE G. LASSEIGNE, INDIVIDUALLY AND ON BEHALF OF HIS MINOR CHILD, EMILY D. LASSEIGNE

Judgment Rendered: September 14, 2011

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Appealed from
Nineteenth Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Docket Number 568,292

Honorable Timothy E. Kelley, Judge

* * * * * *

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Jessi L. Boudwin and
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General Insurance
Company of America
and Jacque G. Lasseigne,
individually and on
behalf of his minor child,
Emily D. Lasseigne

* * * * * *

BEFORE: WHIPPLE, KUHN, AND GUIDRY, JJ.

Whipple, J. concurs for reasons assigned.

GUIDRY, J.

The appellants in this matter seek review of the adequacy of the jury's award of damages. Finding no manifest error or abuse of the jury's discretion, we affirm.

FACTS AND PROCEDURAL HISTORY

On May 31, 2008, on Highland Road in Baton Rouge, Louisiana, sixteen-year-old Emily Lasseigne was driving from a friend's house in her father's 2003 Toyota RAV4. As Emily was traveling eastbound on Highland Road, she entered the left-turn only lane to cross the westbound lanes of traffic to the westbound Interstate 10 entrance ramp. The traffic signal at the intersection displayed green for both the east and west bound lanes of Highland Road.

Prior to making the left turn to cross the westbound lanes of Highland Road, Emily observed a 2002 Honda Civic traveling westbound on Highland Road in the left-hand lane with its left-turn indicator flashing. After observing the approaching Honda with the flashing left indicator, Emily proceeded to turn left towards the westbound entrance of Interstate 10; however, shortly after proceeding left, Emily realized that the Honda had not slowed to make a left turn, but continued to accelerate forward. In an attempt to avoid a collision, Emily accelerated the speed of her vehicle, while the Honda simultaneously swerved to the right. A collision of the two vehicles occurred when the front right bumper of the Honda struck the right rear bumper of the Toyota, causing the Toyota to flip over and land upside down, facing westbound, near the entrance ramp of westbound Interstate 10.

At the time of the accident, the 2002 Honda Civic was operated by Jessi L. Boudwin, and contained three passengers: Lee A. Thibodaux, Felicia M. Chiasson, and Shawn M. Bergeron. The vehicle was owned by Jessi's parents, Marie and Brian Boudwin. A month following the accident, Lee A. Thibodaux and Jessi and Brian Boudwin filed a petition for damages against Jacque G. Lasseigne, individually and on behalf of Emily, and General Insurance Company

of America, the Lassiegne's liability insurer. The plaintiffs later amended their petition to assert an additional claim for penalties and attorney fees against General Insurance Company of America for failure to tender or make full payment of the property damage claim for the Honda Civic.

On June 30, 2009, the plaintiffs filed a motion for partial summary judgment, seeking judgment in their favor as to the issues of fault and causation. The defendants did not oppose the motion, and after considering the pleadings, evidence, and affidavit filed in conjunction with the motion, the trial court rendered summary judgment in favor of the plaintiffs finding Emily Lasseigne to be the sole proximate and legal cause of the May 31, 2008 accident in a judgment signed October 15, 2009.

The case proceeded to trial solely on the issue of damages on September 8, 2010. Following a three-day trial, the jury awarded Lee Thibodaux $25,000 in general and special damages, and Jessi Boudwin $50,000. Believing the amounts awarded to be inadequate, Jessi and Lee filed a combined motion for judgment notwithstanding the verdict (JNOV), or in the alternative, for additur or a new trial, which was denied by the trial court.[1] This appeal followed.

ASSIGNMENTS OF ERROR

The plaintiffs, Jessi Boudwin and Lee Thibodeaux, have appealed the judgment, both contending the jury erred in failing to award them any damages for past and future mental pain and suffering, physical disability or loss of enjoyment of life, and future medical expenses. They additionally object to the sum the jury awarded each of them for general damages as being "an amount below that amount

[1] Although Jessi and Lee did not specifically assign as error the denial of their motion, we note that a JNOV can be granted only when the trial court finds that reasonable minds could not reach a contrary verdict. The trial court can make no credibility determinations nor draw inferences therefrom. When a JNOV is denied, the appellate court simply reviews the record to determine whether there is legal error or whether the trier of fact committed manifest error. McCrea v. Petroleum, Inc., 96-1962, p. 8 (La. App. 1st Cir. 12/29/97), 705 So. 2d 787, 791-92.

that was reasonably" within the jury's discretion.

DISCUSSION

Past and Future Mental Pain and Suffering

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 in assessing quantum of damages for pain and suffering are severity and duration. Jenkins v. State ex rel. Department of Transportation and Development, 06-1804, p. 26 (La. App. 1st Cir. 8/19/08), 993 So.2d 749, 767, writ denied, 08-2471 (La. 12/19/08), 996 So.2d 1133.

The record before us is practically devoid of any evidence of mental pain and suffering. At trial, Jessi stated that she cried at the time of the accident. And in response to the question "what's your greatest fear with this injury," Lee replied that it was that he would not be able to do anything, that he would be really limited as to activities and playing sports. Other than these isolated comments, which do not demonstrate any true or significant emotional distress, neither Jessi nor Lee offered any evidence of any mental pain or suffering. Therefore, we reject this assignment of error.

Loss of Enjoyment of Life & Physical Disability

For purposes of a general tort claim, disability damages are recognized as those general damages constituting any permanent disability or impairment that is secondary to the injuries sustained in the accident. Brossett v. Howard, 08-535, p. 19 (La. App. 3d Cir. 12/10/08), 998 So. 2d 916, 931, writ denied, 09-0077 (La. 3/6/09), 3 So. 3d 492; see also Matos v. Clarendon National Insurance Company, 00-2814, p. 11 (La. App. 1st Cir. 2/15/02), 808 So. 2d 841, 848-49. Disability is defined as "[t]he inability to perform some function," or alternately as "[a]n objectively measurable condition of impairment, physical or mental." Bryan A.

Garner, Black's Law Dictionary (9th ed. 2009). Impairment is simply defined as "[t]he fact or state of being damaged, weakened or diminished."

Similarly, 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 5, 933 So.2d at 775.

At trial, both Jessi and Lee were specifically asked about how their lives had changed following the accident, and both of them gave very similar responses. Jessi, who at the time of the accident had just graduated from high school, testified that before the accident, she studied all the time. Following the accident, she stated she still studied, but it was painful. She said the only thing she could not do following the accident was sit ups and study for long periods of time. At the time of trial, Jessi was a senior at Nicholls State University maintaining a 4.0 grade point average.

Jessi was also questioned regarding some of her routine physical activities, especially in regard to entries she made on her Facebook page. She acknowledged that she runs, or rather jogs, regularly to stay in shape, and even attempted to do an exercise program called P90X with a friend, which she described as being "really tough." Moreover, while Jessi's treating orthopedist, Dr. Chrisopher Cenac, testified that he could "easily" give her a 10 percent "whole body impairment for two-level disc pathology" in accordance with certain guidelines, he indicated that he usually only assigns anatomical impairment to individuals who "have lost something or had something removed."

Lee likewise testified that his lifestyle before and after the accident were pretty much the same. He still participated in all the same activities and

maintained his military commitment, including successfully completing physical aptitude tests required by the Army twice a year. Still, Lee testified that before the accident, he always stayed active and played a lot of sports, and following the accident, while he continued to stay active, it was "not as much, because I find that after activity that it's a lot more pain than usual."

On cross examination, however, Lee acknowledged several entries from his Facebook page where he reported frequently "working out" and also playing sports such as basketball, tennis, "ultimate Frisbee," and softball, sometimes engaging in multiple sessions of sporting activities in a single day. He further acknowledged that he wrote on his Facebook page that he had participated in a softball tournament in the month before trial, which happened to be two days before his final visit with Dr. Cenac. When asked if he had informed Dr. Cenac of any of injuries he had sustained while playing sports, he stated that he told Dr. Cenac that he stayed "active," but that he was "not inclined" to tell Dr. Cenac that he was playing on softball teams.

Considering the testimony and medical evidence presented, we cannot say that the jury was manifestly erroneous in refusing to award any damages for physical disability or loss of enjoyment of life. The record clearly shows that neither Jessi nor Lee have experienced any significant limitations or impairments as a result of the injuries they sustained in the May 31, 2008 accident. Jessi and Lee both received separate awards for the pain they each suffered and continue to suffer. See McGee, 05-1036 at 4-7, 933 So. 2d at 774-776. Accordingly, we reject this assignment of error.

Future Medical Expenses

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 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 Company, 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 Corporation, 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 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 14-15, 31 So. 3d at 1007.

With these precepts in mind, we will consider the evidence presented to the jury regarding the need for future medical care for Jessi and Lee.

Approximately one week after the accident, Jessi began treating with Dr. Gregory Pizzolato, a licensed chiropractor. MRI scans of Jessi's cervical spine revealed the following findings: two levels of disk bulging -- one to two millimeter at C5-6 and a one to two millimeter diffused bulge at C6-7 with impression on thecal sac; and straightening of normal cervical lordosis. Based on her persistent complaints of pain, Dr. Pizzolato's prognosis for Jessi's future medical care was treatment four to six times a year for flare ups.

Approximately seven months after the accident, Jessi began seeing Dr. Cenac, at the recommendation of Dr. Pizzolato. A second MRI scan that Dr. Cenac ordered of Jessi's cervical spine in July 2009, revealed that Jessi's condition had remained completely the same with no worsening. Consequently, following her last visit on October 29, 2009, Dr. Cenac gave the following final diagnosis:

> This patient's diagnosis is acute cervical injury causally related to the incident in question. The diagnosis is supported by reversal of the cervical lordosis, along with the cervical disc bulging at C5 and C6 which is quite unusual for a 19 year old female. I feel that she will have chronic symptoms in the future. I think that her symptoms will be aggravated by activities. These subjective complaints of discomfort may be permanent. She is not a surgical candidate. More probable than not, she should utilize over the counter medications on an as needed basis.

Considering the rather speculative nature of Dr. Pizzolato's prognosis of future medical needs in conjunction with Dr. Cenac's testimony indicating that such flare ups may be suitably addressed with over-the-counter medications on an as-needed basis, we cannot say that the jury manifestly erred in not awarding Jessi future medical expenses.

As for the future medical needs of Lee, the record reveals that roughly three weeks following the accident, on June 20, 2008, Lee began treating with Dr. Pizzolato. An MRI of Lee's lumbar spine revealed bilateral facet arthropathy at the L3-4 level with small effusion of the left facet joint, spinal canal, and neural foramen patent. Dr. Pizzolato explained that facet arthropathy means that the

borders of the facet joint are roughened instead of having a clean gliding surface to facilitate normal movement in the spinal joints. When asked for his prognosis regarding future care for Lee, Dr. Pizzolato replied, "it could be indefinitely ... without knowing the exact outcome of the other potential more invasive treatments, ... he could treat with me for an indefinite amount of time, as far as ... at a couple of times a year, ... five times a year... I'm kind of guessing, but it looks like it's down to once a month, which would be ten to twelve times a year."

Dr. Pizzolato also referred Lee to Dr. Cenac, who first examined Lee in February 2009. From that initial visit, Dr. Cenac found that Lee "has an aggravation of a pre-existing degenerative condition of the lumbosacral facets, most pronounced at L3/4." Dr. Cenac recommended that Lee continue conservative treatment with Dr. Pizzolato and take Naprosyn, an anti-inflammatory medication; however, Lee discontinued taking the medication against Dr. Cenac's advice.

Dr. Cenac was deposed about a month before trial. He testified that he could not give a definitive prognosis of Lee's condition because "the most important part his treatment program" was getting ready to start. During Lee's final visit on August 12, 2010, Dr. Cenac testified that he "felt" Lee was a candidate for a facet injection and gave him a prescription for the procedure. He further stated that a definitive prognosis of Lee's condition could be made based on whether Lee received the facet injection and whether the injection provided him any relief. Without the procedure, Dr. Cenac stated that Lee's prognosis is "somewhat undetermined." He testified that Lee is not a surgical candidate for any type of decompressive surgery, but he may be a candidate for further invasive surgery,

depending on his response to the facet injections.[2]

At trial, Lee claimed he was concerned about the costs as the reason he did not have the facet injection performed, but then revealed that he did not like the idea of having a foreign substance injected into his body and stated that he would rather "try... more than that" before putting a foreign substance in his body. No evidence regarding the costs of the procedure was offered at trial.

Based on this evidence, we cannot say that the jury erred in concluding that Lee failed to demonstrate that it would be necessary and inevitable for him to incur future medical expenses. While the option to seek the facet injections was clearly made available to Lee, by his own admission, it is equally evident that Lee prefers to seek more conservative treatment in the form of the chiropractic treatment provided to him. See Boxie v. Smith-Ruffin, 07-264, p. 14 (La. App. 5th Cir. 2/6/08), 979 So. 2d 539, 549. Moreover, even in regard to the chiropractic treatment received, Dr. Pizzolato testified that Lee only needed to seek treatment as needed, and Lee himself testified that he usually needed such treatment when he was more "active." The jury was also aware of the nature and extent of Lee's "activities," whereas the record seems to indicate that his medical care providers may not have been. Thus, considering the evidence presented and the deference owed to the findings of the jury, we decline to modify the judgment to award Lee future medical expenses.

General Damages

In their final assignment of error, Jessi and Lee contend that the jury abused its discretion by awarding them an inadequate sum in general damages.

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[2] Because Dr. Cenac had just prescribed the facet injection five days prior to his deposition, he expressed reluctance in being deposed regarding Lee's future prognosis. Yet, prior to the August 12, 2010 visit, the record reveals that Lee had missed or cancelled appointments with Dr. Cenac, and thus, had not been seen by Dr. Cenac since October 2009. Dr. Cenac was deposed in lieu of having to appear at the trial scheduled the following month.

When damages are insusceptible of precise measurement, much discretion shall be left to the court for the reasonable assessment of these damages. La. C.C. art. 1999; see also La. C.C. art. 2324.1. In reviewing a general damages award, the appellate court is not to decide what it considers to be the appropriate award, but is to review the exercise of discretion by the trier of fact. The discretion of the trier of fact is great, even vast, such that an appellate court should rarely disturb an award of general damages. Youn v. Maritime Overseas Corp., 623 So. 2d 1257, 1260-1261 (La. 1993), cert. denied, 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994).

The factors to be considered in assessing quantum of damages for pain and suffering are severity and duration. Jenkins, 06-1804 at 26, 993 So. 2d at 767. Appellate courts review the evidence in the light that most favorably supports the judgment to determine whether the trier of fact was clearly wrong in its conclusions. Before an appellate court can disturb the quantum of an award, the record must clearly reveal that the jury abused its discretion. In order to make this determination, the reviewing court looks first to the individual circumstances of the injured plaintiff. Theriot v. Allstate Insurance Company, 625 So. 2d 1337, 1340 (La. 1993). 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, 623 So. 2d at 1261.

The record reveals that Jessi's initial complaints following the accident were of headaches and pain in her neck and lower back. Her lower back pain quickly resolved, but her neck pain remained constant. According to Dr. Pizzolato's initial physical examination and x-ray scan, Jessi had fixation at C4-5, C5-6, C6-7 and diminished motion between C2-3 and C3-4. Jessi received chiropractic treatment roughly twice weekly for the first year, then roughly once a week for four months,

and then two times a month for the following four months until the end of January 2010. After that, Jessi did not receive any additional chiropractic treatment until one final treatment with Dr. Pizzolato on April 30, 2010, roughly four months prior to trial.

Following his initial examination, Dr. Cenac diagnosed Jessi with an acute soft tissue injury to the neck. He found that she had no neurological deficits, although he agreed that the MRI ordered by Dr. Pizzolato revealed that she had cervical disc bulging at C5-6 and C6-7, but without any cord compression or nerve root impingement. Jessi saw Dr. Cenac for a total of seven visits, and during that time, Dr. Cenac recommended a course of conservative, outpatient treatment consisting of a home exercise regimen and administration of an anti-inflammatory, analgesic, non-narcotic pain medication.

At trial, Jessi testified that her neck injury was still pretty bad. She said her neck hurts when she studies for long periods of time or if she tries to move her neck too far to the side or up and down. She also testified that she still jogs on a regular basis, but since the accident, she cannot do sit ups. At the time of trial, Jessi was a senior at Nicholls State University with a 4.0 grade point average. The jury awarded Jessi $33,654 for past and future pain and suffering.

Following the accident, Lee first sought medical treatment from Dr. Pizzolato three weeks after the accident, at which time he initially complained of pain in his neck and upper back. Tests performed by Dr. Pizzolato revealed normal reflexes with reduced or restricted ranges of motion in the neck; pain in the neck and upper back on head compression, leaning and rotation; fixation of the cervical spine at C2-3, C6-7, T2-3 and T5; and spasms in the suboccipital and upper trapezious. About two weeks later, on July 14, 2008, Lee's other complaints had abated, but he then reported experiencing lower back pain, which complaint continued unabated through the date of trial.

As related previously, Lee testified at trial that while he continues to stay active, he is less active than he was in the past because "it's a lot more pain than usual and my body was never like that before the accident." He said that before the accident, he could play sports like it was nothing and his body would feel "little to no pain." But after the accident, he stated "it's hard for me to go for extended periods of time, just because if I'm standing or doing anything else that my back will start to hurt a lot, and [it] just ... wasn't like that before the accident." However, he also testified about regularly participating in several different sports, sometimes engaging in multiple sporting activities in a day, and refusing to take the non-narcotic, anti-inflammatory pain medication prescribed for his pain.

On reviewing a November 2008 MRI scan of Lee's lumbar spine that Dr. Pizzolato had ordered, Dr. Cenac found that Lee has "posterior column facet arthropathy at L3/4 without carotid compression or nerve root impingement. This is somewhat unusual for a patient 23 years of age." Dr. Cenac further found that Lee had no negative motor sensory or reflex findings, there was no atrophy, and his motion was complete and normal. Lee presented to Dr. Cenac for a total of five visits on February 12, 2009, March 27, 2009, June 25, 2009, October 14, 2009, and August 12, 2010, just prior to trial. Lee was awarded $9,681.00 for past and future pain and suffering.

The general damage awards to both Jessi and Lee appear to be on the low side, especially considering the duration of their medical treatment; however, the jury may have had a different appreciation as to the severity of the injuries suffered. Whereas both Jessi and Lee acknowledged that for the most part, they were able to continue to engage in the same routine and activities as they did before the accident, it appears that the jury was mindful that Jessi, at least, testified to having to adjust and modify her habits to accommodate the pain she suffered as a result of the injury she sustained in the accident. She stated that she followed the

advice of medical care providers regarding doing home exercises, adjusting her posture and elevating her books when studying, and taking her prescribed medication.

On the other hand, Lee apparently was viewed as suffering much less, since he appeared to make no adjustments or modifications of his habits to address the pain he felt. He declined to take his prescribed medication and missed scheduled medical appointments. Moreover, the jury may have viewed Lee as unduly aggravating his injury and pain symptoms by the extensiveness and intensity of his involvement in various sporting activities.

With this reasonable view of the evidence in mind, we cannot say that the jury abused its much discretion in assessing general damages to Jessi and Lee.

CONCLUSION

Having considered the evidence presented, we find no error or abuse of the jury's discretion in the damage awards made by the jury. Accordingly, we affirm the judgment appealed. All costs of this are cast to the appellants, Jessi L. Boudwin and Lee A. Thibodaux.

AFFIRMED.

JESSI L. BOUDWIN, BRIAN J. BOUDWIN AND LEE A. THIBODAUX	**STATE OF LOUISIANA**
VERSUS	**COURT OF APPEAL**
GENERAL INSURANCE COMPANY OF AMERICA AND JACQUE G. LASSEIGN, INDIVIDUALLY AND ON BEHALF OF HIS MINOR CHILD, EMILY D. LASSEIGN	**FIRST CIRCUIT**
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WHIPPLE, J., concurring.

I write separately to note that had I been sitting as the trier of fact, I would have decided portions of this case differently, in particular, vis-à-vis the quantum owed for the claims asserted by Jessi L. Boudwin. However, given the credibility determinations that are reserved to the jury and the deference which we, as a reviewing court, are legally bound to give to such determinations, I am unable to say the jury's awards constitute an "abuse of discretion" on the limited medical information in the record before us.

Accordingly, I am constrained to concur in the legally correct result reached herein.