NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 CA 2291

LEMAR JAMES

VERSUS

BATON ROUGE COCA-COLA BOTTLING COMPANY, GULF COAST COCA-COLA BOTTLING COMPANY, INC., LENNARD HAWKINS, JR. & ROYAL INSURANCE COMPANY OF AMERICA

Judgment Rendered: SEP 21 2007

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Appealed from the
Nineteenth Judicial District Court,
in and for the Parish of East Baton Rouge,
State of Louisiana
Docket Number 527,567

Honorable William A. Morvant, Judge Presiding

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David W. Bernberg **New Orleans, LA**	**Counsel for Plaintiff/Appellant,** **Lemar James**
Wade A. Langlois, III **Gretna, LA**	**Counsel for Intervenor/Appellee,** **Louisiana United Businesses Association Self Insurers' Fund**
Matthew W. Bailey **Baton Rouge, LA**	**Counsel for Defendants/Appellees,** **Lennard Hawkins, Jr., Baton Rouge Coca-Cola Bottling Co., Gulf Coast Coca-Cola Bottling Co. & Royal Ins. Co.**

BEFORE: WHIPPLE, GUIDRY, AND HUGHES, JJ.

WHIPPLE, J.

This is an appeal by plaintiff from a judgment of the trial court rendered after a bench trial in which the court awarded special and general damages limited to $3,575.00 and $10,000.00 respectively, denied plaintiff's claim for past and future lost wages, and ordered reimbursement to intervenor for workers' compensation benefits paid to plaintiff. We affirm, as amended.

The relevant facts are that on January 2, 2004, plaintiff, Lemar James, an employee of F. Christiana & Company, and his "helper/trainee" were in the process of unloading the trailer of their employer's eighteen-wheeler tractor trailer parked at Ragusa's Supermarket in Baton Rouge when the left front corner of the tractor was struck by an International Cab truck registered to Coca-Cola Bottling Company and driven by Lennard Hawkins, Jr.

As a result of the impact, he was "thrown" about the interior of the trailer, causing him to strike the wall of the trailer with the left side of his body, and then fall onto a pallet of merchandise. As plaintiff fell, his head struck a brass bar inside the trailer causing him to "blackout" for a "couple of seconds" after the impact. Based on the injuries plaintiff sustained as a result of this accident, he sought general and special damages, including past and future lost wages and medical expenses. After the accident, he sought medical treatment for continuing headaches and spasm and pain in his neck, shoulder, and arm, for which he underwent a course of conservative treatment and physical therapy for approximately seven months. During this time, plaintiff consistently suffered from headaches. Because plaintiff continued to suffer from headaches, his treating physician, Dr. Leia Frickey, eventually referred him to an orthopedist, Dr. Kenneth Vogel, for further evaluation and treatment. Although the results of an MRI of his cervical spine were read as "normal", plaintiff nonetheless ultimately underwent a neurotomy, as recommended by Dr. Vogel, in an effort to alleviate

his complaints of continuing pain and headaches.[1] During the course of this treatment plaintiff was restricted from returning to work, as ordered by his treating physician, who considered him to be "disabled" from his job duties. Thus, he received weekly compensation benefits in the amount of $429.00. Louisiana United Businesses Association Self Insurers' Fund ("LUBA") intervened in the suit, seeking full and complete indemnity and payment **by preference** for the amounts it paid to plaintiff in indemnity benefits, which were stipulated as totaling $26,121.16.

Plaintiff appeals, assigning error to: (1) the admission of a surveillance videotape and corresponding report and related testimony; (2) the weight accorded by the trial court to certain expert medical witnesses; (3) the amount of general damages awarded by the court; (4) the failure of the court to render an award for past, present or future loss of wages; and (5) the trial court's award of reimbursement to LUBA when lost wages were not awarded.

With reference to plaintiff's first assignment of error, complaint regarding the introduction of the videotape recorded by Kyle Joe Ehrenreich, a private investigator hired to conduct video surveillance of plaintiff, we note that the videotape was admitted at trial without objection after plaintiff's counsel expressly stated, "I have no objection, Your Honor." Thus, plaintiff waived any right to challenge its admissibility on appeal. LSA-C.E. art. 103; Bienvenu v. Dudley, 1995-0547 (La. App. 1st Cir. 10/3/96), 682 So. 2d 281, 286, writs denied, 1996-2661, 1996-2673 (La. 12/13/96), 692 So. 2d 1069, 1070.

With regard to plaintiff's second assignment of error, wherein plaintiff complains that the trial court erred in allowing Ehrenreich's corresponding surveillance report and testimony into evidence, on the basis that this evidence

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[1]A neurotomy is an inpatient procedure designed to correct cervical segmental instability.

was not disclosed nor made available to plaintiff's counsel prior to trial, we likewise find no merit.[2] The record shows the surveillance report was never offered or introduced into evidence. Further, plaintiff did not object at trial on this (or any other) basis to Ehrenreich testifying; nor did he object to the witness referring to his written report while testifying.[3] However, even if we were to find these issues were properly before us for review, on the record before us, we find no abuse of discretion by the trial court in allowing Ehrenreich to testify and to refer to his written report. These arguments lack merit.

With regard to plaintiff's third assignment, i.e., that the trial court manifestly erred in failing to accord deferential weight to the stipulated deposition testimonies of his treating physicians, Drs. Leia Frickey and Vogel, as opposed to intervenor's expert, Dr. Gordon Nutik, we note that as the trier of fact, the trial court was entitled to accept or reject in whole or in part the opinion expressed by any expert, Wade v. Teachers' Retirement System of Louisiana, 2005-1590 (La. App. 1st Cir. 6/9/06), 938 So. 2d 103, 108, writ denied, 2006-2024 (La. 11/3/06), 940 So. 2d 673, and that the effect and weight to be given expert testimony are matters within the broad discretion of the trial judge. Wade, 938 So. 2d at 108.

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[2]Ehrenreich's testimony was offered in rebuttal to impeach plaintiff's testimony that he was unable to perform certain tasks and that on a daily basis, he was required to spend his day in bed or on the sofa trying to get comfortable due to his injuries.

[3]Instead, the record contains only the following exchange between counsel during Ehrenreich's testimony, when he referred to his surveillance report:

> [Counsel for James]: Do you have a copy?
>
> [Counsel for Defendants]: That's the only copy I have.
>
> The Court: Do we need to make a copy?
>
> [Counsel for Defendants]: I don't need one for me, if he wants it, just to speed this up and let him fast forward. He's going to testify off of the report.
>
> [Counsel for James]: Okay. So I've never seen the report, so I'd like to.
>
> [Counsel for Defendants]: Well, it's impeachment evidence. You never asked for it.
>
> [Counsel for James]: I understand.

Here, the trial court reviewed and discussed at length the testimony of Drs. Vogel and Nutik, and the reports and records of Dr. Frickey.[4] Relying, in part, upon the opinions of Dr. Nutik and Frickey, the trial court found that plaintiff had sustained a soft tissue injury, consistent with the findings noted by these doctors regarding plaintiff's condition. Accordingly to Dr. Frickey, although plaintiff's injuries initially prevented him from working. She eventually felt he had reached "maximum medical benefits" and did not provide further services. The trial court clearly chose to credit the opinions of Drs. Nutik and Frickey as to the nature of plaintiff's condition over the opinion of Dr. Vogel. The trial court also heard and discussed the nature of testimony of plaintiff regarding his physical condition and limitations and found his testimony to be lacking in credibility in some respects.

After a thorough review of the entire record in this matter, we find that a reasonable basis exists for the trial court's factual findings, including the trial court's specific finding that plaintiff had sustained a soft-tissue injury, but failed to establish that the neurotomy performed on January 31, 2006 was necessitated by or causally related to any condition sustained in the January 2, 2004 accident. Thus, we decline to disturb the trial court's findings. These arguments also lack merit.

With regard to plaintiff's fourth assignment, considering the record herein, we likewise find no error or abuse of discretion by the trial court in either its award of $10,000.00 for general damages or in its decision to limit the award for medical specials in accordance with its findings on causation.[5]

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[4]Contrary to plaintiff's claim, no deposition of Dr. Frickey appears of record. Instead, her certified medical records were introduced and considered by the court.

[5]The $3,575.00 figure awarded by the trial court essentially encompasses only the costs of treatment with Allied Adult and Child Clinic and Dr. Frickey, and of therapy plaintiff received in connection with that treatment.

The trier of fact is vested with vast discretion in fashioning an award of general damages, such that an appellate court should rarely disturb a general damage award on appeal. LaBorde v. St. James Place Apartments, 2005-0007 (La. App. 1st Cir. 2/15/06), 928 So. 2d 643, 648 (citing Youn v. Maritime Overseas Corporation, 92-3017 (La. 9/3/93), 623 So. 2d 1257, cert. denied, 510 U.S. 1114, 114 S.Ct. 1059, 127 L.Ed.2d 379 (1994)). Such deference is especially warranted where, as here, factual findings are based on determinations regarding the credibility of witnesses. Bergeron v. Williams, 2005-0847 (La. App. 1st Cir. 5/12/06), 933 So. 2d 803, 807. After reviewing the testimony of the various witnesses, including plaintiff, and the medical evidence herein, the trial court noted its concerns regarding the need for the neurotomy. Moreover, plaintiff testified that he was involved in four motor vehicle accidents prior to the instant accident, for which he also sought treatment. Given the record herein and the standards that govern our review, including the deference we must give to the trial court's credibility determinations and its resolution of conflicts in testimony, we are unable to say the trial court erred in the amounts awarded for general and special damages.

In his next assignment, plaintiff claims that the trial court erred in failing to award past and future lost wages. A trial court's award of lost wages is subject to the manifest error standard of review because such damages must be proven with reasonable certainty.[6] Boudreaux v. State, Department of Transportation, 2004-0985 (La. App. 1st Cir. 6/10/05), 906 So. 2d 695, 705, writs denied, 2005-2164

[6]At trial, we note that plaintiff's counsel attempted to introduce employment records obtained by defendants in discovery that defendants subsequently forwarded to plaintiff's counsel. However, counsel for defendants objected on the bases that the records were not authenticated or certified, they contained hearsay, and their relevance had not been established. The trial court sustained the objection and counsel for plaintiff then proffered the records. On appeal, plaintiff does not challenge the trial court's ruling denying the admissibility of these records. Thus, for purposes of these assignments, our review is limited to the evidence relied on by the trial court.

(La. 2/10/06), 924 So. 2d 174, and 2005-2242 (La. 2/17/06), 924 So. 2d 1018. Considering the evidence of record herein, we find the trial court erred in failing to award plaintiff lost wages for the period that plaintiff was receiving treatment for his soft tissue injury until it was determined that he was deemed able to return to work, considering the opinions of Drs. Frickey and Nutik, which the trial court clearly accepted as credible.

According to Dr. Frickey's records, plaintiff sustained a "cervical spine sprain with extension into the left trapezius muscle with radicular symptoms." Dr. Frickey recommended that plaintiff follow a course of conservative treatment, which consisted of attending phycial therapy three times a week and utilizing modalities of moist heat and transcutaneous electrical nerve stimulation (TENS) to the neck and left shoulder. Dr. Frickey also prescribed 800 mg of motrin for pain. Plaintiff continued with this course of treatment from January 6, 2004 through August 20, 2004 when Dr. Frickey determined that plaintiff had reached maximum medical benefit. Concluding that she had no further services to recommend to address plaintiff's complaints, she discharged plaintiff from her care and referred him to the care of an orthopedist for any residual symptoms. During the course of his treatment with Dr. Frickey, plaintiff was given medical excuses by Dr. Frickey in which she recommended that he remain off of work. Although he was discharged from her care on August 20, 2004, he was not specifically released to return to work.

On November 12, 2004, Dr. Nutik, an orthopaedic surgeon, evaluated plaintiff. After examining plaintiff and reviewing Dr. Frickey's records and plaintiff's x-rays, Dr. Nutik was unable to find anything wrong with plaintiff from an orthopedic standpoint, as his exam revealed normal findings and plaintiff was not on any medication. Dr. Nutik opined that plaintiff had sustained a soft-tissue injury that either resolved itself or should have resolved itself. Moreover, Dr.

Nutik testified that he did not feel that plaintiff was disabled from performing his truck-driving duties, based on his evaluation of November 12, 2004. As noted above, the trial court clearly relied on the testimony of Drs. Frickey and Nutik in rendering judgment.

On review, we find the evidence establishes from the date of the accident, January 2, 2004, until November 12, 2004, the date plaintiff was able to return to his job duties, plaintiff was excused from work. Thus, we agree with plaintiff that he is entitled to an award for past lost wages and that the trial court erred in failing to render an award. Accordingly, considering plaintiff's average weekly wage of $729.77 as established in the record by the workers' compensation carrier, and that plaintiff was medically excused and/or unable to work for forty-five weeks, plaintiff is entitled to an award for past lost wages in the amount of $32,839.65.[7]

Given the record herein, the credibility determinations made by the trial court, and its apparent reliance upon Dr. Nutik's testimony that plaintiff was not disabled from his truck-driving duties as a result of the accident, we are unable to say the trial court erred in finding that plaintiff failed to establish his entitlement to any award for further lost wages.

Finding merit, in part, to this assignment of error, we amend the trial court's judgment to award plaintiff the additional sum of $32,839.65, representing past lost wages for the time he commenced treatment with Dr. Frickey until Dr. Nutik determined that he was able to return to work, i.e., November 12, 2004.

Finally, we find no error in the court's award of reimbursement in favor of LUBA for the benefits previously paid to plaintiff. In doing so, we note that LSA-R.S. 23:1103 B, was amended by Acts 1989, No. 454, effective January 1, 1990, to provide, as follows:

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[7]Wade A. Langlois, III, a representative of intervenor LUBA, testified that the amount of weekly benefits paid to plaintiff by LUBA was based on his average weekly wage of $729.77.

> The claim of the employer shall be satisfied in the manner described above from the first dollar of the judgment without regard to how the damages have been itemized or classified by the judge or jury. Such first dollar satisfaction shall be paid from the entire judgment, regardless of whether the judgment includes compensation for losses other than medical expenses and lost wages.

In Roadrunner Motor Rebuilders, Inc. v. Ryan, 603 So. 2d 214 (La. App. 1st Cir. 1992), this court considered the amendment and concluded that it purports to give the employer the right to reimbursement from the employee's general damage award, regardless of whether the award is classified as an award for pain and suffering. Roadrunner, 603 So. 2d at 218. As recognized therein, the amendment gives the employer and the compensation carrier the right of reimbursement to funds to which they previously were not entitled, and takes from the employee the right to keep damages for pain and suffering free of the claims for reimbursement by the compensation carrier and the employer. Roadrunner, 603 So. 2d at 218. As further support, we note that in St. Paul Fire & Marine Insurance Company v. E.R. Smith, 609 So. 2d 809, 813-814 (La. 1992), the Louisiana Supreme Court observed that "[t]his provision eliminates the exclusion of the employee's general damage award from the employer's right of reimbursement by **prohibiting the employer's preference from being defeated by the nonmenclature used to describe the award and by expressly making the employee's entire award subject to "dollar for dollar" reimbursement by the employer**." (Emphasis added).

CONCLUSION

For these reasons, the trial court's judgment of August 29, 2006 is affirmed, as amended. Judgment is hereby rendered awarding plaintiff the additional amount of $32,839.65, representing plaintiff's past lost wages in

accordance with Uniform Rules – Courts of Appeal, Rule 2-16.1.B. Costs of this appeal are assessed against defendants/appellees.

AFFIRMED, AS AMENDED.